

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

Docket No. 50-209-GC-84

Date of Decision: September 30, 1987

Cite as: Chen v. GAO (9/30/87)

Before: Personnel Appeals Board, en banc; Brown, Cappello, Kaplan for the majority; James, Kaufman dissenting

Negative Acceptable Level of Competence

Within Grade Increase

Quality of Work Product

Standard of Proof

Reprisal

Hearing Procedures

Termination

DECISION ON REMAND

INTRODUCTION

This case is before the Board pursuant to an order of the United States Court of Appeals for the District of Columbia Circuit.¹ The Court of Appeals vacated and remanded for reconsideration our final decision of June 19, 1986. In this decision the Board reversed the Presiding Member. He held that Petitioner had proven a case of unlawful retaliation. In accordance with the mandate of the Court of Appeals, we have reconsidered the decision of the Presiding Member, applying the legal standards set forth below, and we hereby affirm the ruling of the Presiding Member.

I. BACKGROUND OF THE CASE

On July 24, 1983, Petitioner was appointed to a position as a GS-12 Training Evaluation Specialist in the Organizational Analysis and Planning Branch (OAPS) 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, as incorporated by the GAO Personnel Act of 1980.

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 re-evaluated 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 denial of the WIG. On December 23, 1985, following a hearing, the Presiding Member issued a decision which ordered Petitioner reinstated with all appropriate make-whole relief, including retroactive restoration of the WIG increase. On January 30, 1986, the Agency filed a petition for review of the Presiding Member's decision.

At hearing, 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 assignments² that were critical elements of his performance appraisal standards. The Agency presented examples of Petitioner's allegedly-deficient work product as part of its 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.

The Presiding Member reviewed all of the evidence and testimony and found that the Agency's articulated reasons for the personnel actions were pretextual.

The Board granted the Agency motion for reconsideration of the Presiding Member's decision, and after a review of the record, we decided that the record evidence was insufficient to support the Presiding Member's conclusions. In reversing the Presiding Member's decision, we sustained the Agency's adverse personnel actions. It was from that decision that the Petitioner appealed to the Court of Appeals.

II. THE COURT OF APPEALS DECISION

The Court of Appeals based its reversal of our decision on one primary point: That we had reviewed the Presiding Member's decision under the incorrect legal standard. The Court ruled that the PAB Regulations, specifically 4 C.F.R. Sec. 28.25(c) preclude us from exercising *de novo* review over the decisions of individual Board members. Instead, our reconsideration authority "is limited to reversing initial decisions only for lack of substantial evidence." *Slip. op.* at 12.

In remanding this matter to the Board, the Court of Appeals has explicitly instructed us to either adopt the Presiding Member's decision as our own final decision, or to reconsider his decision under the substantial evidence standard prescribed in our Regulations at 4 C.F.R. Sec. 28.25(c)(5), and enunciated by the Supreme Court in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The Court of Appeals has further instructed that, upon remand, we are to review Petitioner's case in the light of two separate inquiries: The nature of the Agency's adverse actions against Petitioner, and his contention that those actions were retaliatory. Although these issues involve different legal burdens, their resolution involves

essentially the same operative facts.

In White v. Department of the Army, 720 F.2d 209 (D.C. Cir. 1983), the Court of Appeals for the District of Columbia held that, on appeal of an adverse personnel action under 5 U.S.C. Sec. 7701, the Agency bears the burden of proving by a preponderance of the evidence that its actions are justified. White specifically overruled the PAB holding in Kienzle v. GAO, 1 PAB 28 (1981) that performance-based actions such as denial of within-grade salary increases must be supported by substantial evidence. In our prior decision in this matter, we disagreed with the Presiding Member as to which standard of proof controls the GAO's justification of its denial of Petitioner's WIG increase. We recognize that our adherence to the Kienzle standard in this Circuit was in error. In our analysis below, we apply the correct standard.

The order and burden of proof in retaliation cases under Title VII is articulated by Williams v. Boorstin, 663 F.2d 109 (D.C. Cir. 1980), cert. denied, 451 U.S. 985 (1981). Williams adopted the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) order of proof for Title VII retaliation cases.

III. ANALYSIS

As instructed by the Court of Appeals, we reconsider the decision of the Presiding Member applying the legal authority discussed above. The contentions of the parties and the evidence and case law in support of their arguments have been fully aired in the form of the legal memoranda before the PAB and the Court of Appeals.

We are required to give the Presiding Member's findings and decision only that weight which reason and judicial precedent warrant that such findings be given. Universal Camera Corp. v. NLRB, 340 U.S. at 496. Special deference, however, must be given to the Presiding Member's findings with respect to credibility. Id.; Jackson v. Veterans Administration, 768 F.2d 1325, 1331 (Fed. Cir. 1985). The Presiding Member, having heard the live testimony, and made his credibility determinations, has evaluated the Agency's evidence as insufficient to meet the preponderance of evidence standard necessary to uphold the Agency's denial of Petitioner's within-grade salary increase. The Presiding Member based his decision in this regard primarily on credibility determinations, noting the significant amount of conflicting testimony on the record.

Under 5 U.S.C. Sec. 2302(b)(9) and Title VII of the Civil Rights Act of 1964, as amended, it is unlawful to take an adverse personnel action against an employee in retaliation for that employee's filing of an EEO complaint. As stated earlier herein, the order and burden of proof in such cases is set forth in Williams v. Boorstin, supra. The employee (Petitioner here) must first make out a prima facie case. Once that is done, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for the adverse personnel action against the employee. If the employer carries that burden, the burden shifts back to the employee to show, by a preponderance of the evidence, that the employer's stated reason for the adverse action is pretextual. If that showing is made by the employee, the employer can only prevail by demonstrating by clear and convincing evidence, that the adverse action would have been taken anyway, even absent retaliation. Williams v. Boorstin, 663 F.2d at 116-17.

It is abundantly clear that Petitioner has made out a prima facie case of retaliation. Petitioner engaged in protected activity known to his employer; he was adversely affected by an action of the Agency subsequent to the protected activity (the denial of the WIG and termination); and there was a causal link or nexus between the Petitioner's protected activity and the adverse employment decision. Burrus v. United

Telephone Co. of Kansas, Inc., 683 F.2d 339, 343 (10th Cir. 1982); Gunther v. County of Washington, 623 F.2d 1303, 1314 (9th Cir. 1979), aff'd, 452 U.S. 161 (1981). The causal relationship may be shown by evidence that the employer knew of Petitioner's protected activity, Gunther, supra, at 1316; or that the adverse action occurred closely in time after the protected activity. Burris, supra. In order to rebut this showing by Petitioner, the Agency must come forward with a legitimate, non-retaliatory reason for denying Petitioner his WIG salary increase and subsequent termination, otherwise judgment must be entered for Petitioner. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The denial of Petitioner's within-grade salary increase and his subsequent removal from GAO were based upon three assignments. They were (1) The Literature Search, (2) The Learning Center Evaluation Plan, and (3) the Chapter on Special Issue Area Training Courses. These assignments will be discussed seriatim:

1. Literature Search

"The evidence supports Dr. Chen's statement that he completed this assignment in accordance with the requirements and on a timely basis." (Presiding Member Decision at 32-33.)

The Presiding Member based this finding on an evaluation of the conflicting testimony of the Petitioner and the Petitioner's first-line supervisor, and review of Petitioner's Exhibit 5 and Respondent's Exhibit 19. Petitioner's Exhibit 5 is a handwritten note on a scrap of paper from the supervisor to Petitioner that requested that Petitioner do a literature search on the evaluation of learning centers for Petitioner's group (the Learning Center Resource Group). There was no mention of dates, nor a definition of literature search, nor mention of Petitioner having to summarize the literature he found in his search. The Presiding Member believed Petitioner, and not the supervisor. The Presiding Member rejected the testimony of the first-line supervisor that Petitioner had been instructed to include summaries in his literature search (Presiding Member Dec. at 31), and found that summaries were not mentioned until after the task was completed and was being critiqued. (Respondent's Exhibit 18.) Failure to provide the summaries was the sole criticism of Petitioner's performance on this task. (Petitioner's Exhibit 20.)

2. Learning Center Evaluation Plan

This was the major project assigned to Petitioner. Failure to finalize the learning center evaluation plan appears to be the primary alleged reason in support of the Agency's adverse actions against Petitioner. There is no evidence of record that the components of the Learning Center were ever put in place during the period of Petitioner's responsibility for this task. The Presiding Member found that there was a lack of specificity and appropriateness in the guidelines, instructions, and performance standards given to Petitioner on this assignment. The Presiding Member concluded that the draft evaluation plan submitted by Petitioner at least reasonably satisfied the requirements of the Performance Standards, and the instructions of Petitioner's supervisor, especially given the lack of progress of the Learning Center at that time. For this assignment, there were one major and two editorial rewrites allowed, and the first draft was not originally due until February 1984, a date well beyond the time Petitioner was initially scheduled to be evaluated for his within-grade salary increase. However, the due date was accelerated to January 9, 1984 by Petitioner's supervisor. The acceleration of the due date put Petitioner in an unfair position in being evaluated. Moreover, the record evidence shows that Dr. Holley had responsibility for developing the learning center evaluation plan for over ten months before Petitioner was given the assignment. Dr. Holley made no progress on developing an evaluation plan and he was not faulted for his failure.

3. Draft Chapter on Special and Issue Area Training Courses

Petitioner's first-line supervisor listed performance on this task as justification for denying both the salary increase and the discharge, even though he did not give Petitioner the opportunity to complete all of the rewrites to which Petitioner was entitled under his performance standards. The Presiding Member found that Petitioner had complied with the requirements of his performance standards regarding this assignment -- i.e., that he had completed two major rewrites of the draft by the due dates. The Presiding Member ruled that Petitioner's performance was acceptable on this assignment because, at a time when Petitioner still was allowed two minor editorial rewrites on the draft, the first-line supervisor accepted the draft as "close enough that I decided not to send it back for rewrite." (Presiding Member Dec. at 35.) Petitioner's supervisor determined that the last draft on this project was "minimally acceptable." (Tr. 261.) Having made that decision, the supervisor cannot now argue that Petitioner's draft was unacceptable. Such rationale to support the denial of a WIG and subsequent removal are unconvincing and untenable. Petitioner's first-line supervisor also stated that Petitioner's performance on this task, standing alone, would not be enough to justify the adverse actions. (Tr. 260-261).

Thus, the Presiding Member concluded that the Petitioner had performed acceptably, under the circumstances, and that the Agency's proffered reasons for the denial of the within-grade increase and the subsequent termination of Petitioner were but a pretext for retaliation. The following pieces of evidence, taken together, also lend support to the Presiding Member's finding of pretext:

1. Petitioner's first-line supervisor made known to Petitioner his belief that the Board had made "an error" when it found that GAO had discriminated against him when it refused to hire him. (Tr. 154-155).
2. Petitioner's second-line supervisor falsely stated in his memorandum denying Petitioner's salary increase that he had "carefully reviewed Petitioner's work performance and found it to be unsatisfactory." (Petitioner's Exhibit 21). At the hearing, this supervisor admitted that he had never reviewed Petitioner's work.
3. This supervisor also denied Petitioner's request for a transfer on the ground that he could not do so, under the Board's explicit order to place him where he was. He denied the request without checking with GAO's legal office as to the correctness of the Board's order. If the second-line supervisor felt that the Board's order did not give him this leeway, he had an obligation to consult with GAO's legal staff. Other requests for transfers were routinely granted.
4. Petitioner's first-line supervisor refused repeated requests of Petitioner that he put his instructions in writing, even when it became apparent that there was some sort of communication problem between the two. Although it was established that the first-line supervisor did not normally give instructions in writing, there is no evidence that any other employee had ever requested him to do so.
5. Petitioner's first-line supervisor kept notes on his dealings with Petitioner, in violation of GAO's own rules that such notes be discussed with the employee and, for the sake of equity, be kept on all employees supervised.
6. Petitioner's first-line supervisor stated at one point that there were no problems communicating with Petitioner; however, the letter of termination stated clearly that one of Petitioner's major problems was an inability to communicate effectively.

7. The Petitioner was held to seemingly more stringent performance standards and reviews than those applied to other employees performing similar tasks. (Presiding Member Dec. at 63-65.)

It is recognized that retaliatory motivation can often only be shown by indirect and circumstantial, rather than direct evidence. See Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (2d Cir. 1980), and Schlei & Grossman, Employment Discrimination Law, (2d ed. 1983), pages 558-559. All of the above-discussed evidence is of an indirect and circumstantial nature. No one piece would be convincing. But, considered together, they constitute "substantial evidence" to support the conclusion of Presiding Member Brown that the explanations given were pretextual in nature.

Once pretext has been established, the employer has one last line of defense. GAO must prove, by clear and convincing evidence, that the Petitioner would have been fired from his position anyway, even absent retaliation. Williams v. Boorstin, *supra*, at 116-117. Slip op. at 14.³ The record indicates that GAO did not meet this burden. Petitioner was a new employee and, therefore, entitled to a reasonable breaking-in period. (Tr. 382.) Petitioner was, admittedly, a "very well" informed person (Tr. 300); a "very pleasant and cordial person to work with" (Tr. 304), who "tried to follow directions as best he c[ould]" (Tr. 315); who, initially, had "good working relationships with supervisors and colleagues" (Tr. 300); and who had a "reasonably good relationship with his clients." (Tr. 300.) As discussed above, there is substantial evidence that the performance of Petitioner was at best minimally satisfactory, based upon his performance standards. In any event, there is substantial evidence to support the finding that his performance was not of such a nature to warrant the adverse actions taken against him.

There is one remaining point which needs to be addressed under the Court of Appeals' remand, and that is the issue of whether or not the sustaining of the denial of Petitioner's salary increase denial is necessary to a finding that Petitioner's termination was justified. Under ordinary circumstances, we do not think that it would be necessary to sustain the denial of a within-grade increase in order to sustain a termination. However, the facts of this case dictate a different result. The Presiding Member found, as supported by substantial evidence, that the Petitioner was subjected to a pattern of disparate treatment and procedural irregularities that began almost at the commencement of his employment with GAO. Moreover, save for the literature search, none of the Petitioner's work assignments were discrete to the waiting period for his salary increase; all of the other assignments required almost his entire probationary period to complete. Here, the Agency's actions in regards to the Petitioner's within-grade increase denial and termination cannot be evaluated separately.

CONCLUSION

Our careful examination of the record as a whole, in light of the appropriately deferential standard of "appellate review," requires us to conclude that there is substantial evidence to support the decision of the Presiding Member. In so ruling, we are mindful of the fact that, as long as the Presiding Member's view of the evidence is plausible when the record is viewed as a whole, we may not reverse his decision even if we are convinced that we would have decided the case differently had we heard the case de novo. Anderson v. Bessemer City, 470 U.S. 564, 574 (1985).

Accordingly, the Board adopts the conclusion of Member Brown at page 65 of his decision of December 24, 1986, that a "reason of retaliation motivated the actions of the Agency in the denial of a within-grade increase to Dr. Chen and the eventual termination of his employment." It also adopts the relief fashioned by the Presiding Member at page 65 of his December 23, 1985 decision.

It is hereby ORDERED that GAO shall:

1. Rehire Petitioner;
2. Make him financially whole;
3. Work with Petitioner and his counsel in an effort to place Petitioner in a position that is appropriate to his experience; is outside OOH; and will meet the needs of the Agency.

DISSENTING OPINIONS OF MEMBERS JAMES AND KAUFMANN

It is not often that we feel the need to disagree with our fellow members of this Board. However, there are those rare occasions when a particular fact pattern leads members to draw different conclusions. This case presents one of those occasions.

We recognize that this case presents some very difficult factual and legal issues for the Board. A few of the issues raise matters of first impression for this Board. Also, we are mindful of the fact that this Board had struggled with this case during a Petition for Review and, presently, on remand from the Court of Appeals for the District of Columbia Circuit.

These facts, however, do not require this Board to abdicate its responsibility to review the correctness of decisions which are properly before us. As was pointed out by the Court of Appeals, under our regulations we have indicated that we will reconsider any decision when it is established that: (1) new and material evidence is available that, despite due diligence, was not available when the record was closed; (2) the decision of the Hearing Officer is based on an erroneous interpretation of statute or regulation; (3) the decision is arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (4) the decision is not made consistent with required procedures; or (5) the decision is unsupported by substantial evidence. 4 C.F.R. Section 28.25. We cannot avoid that responsibility by granting more weight to a decision by a Board Member than is required by law. See Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). To do otherwise may cause more harm than good under our present structure.

Likewise, we were not ordered by the Court of Appeals to rule in favor of either Petitioner or Respondent. We were instructed to consider the decision of the Presiding Member and adopt it as our final decision or reconsider the Presiding Member's decision under the substantial evidence standards specified in 4 C.F.R. Section 28.25(c)(5). Slip Op. at 12. Should the Board decide to reconsider a fellow Board Member's or Hearing Officer's decision, we must review the decision to determine whether it is supported by substantial evidence. Substantial evidence has been defined as more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Universal Camera Corp. v. NLRB, supra. The evidence must do more than create a suspicion of the existence of the fact to be established. It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. Id.

Should we conclude that the decision is not supported by substantial evidence, we are not at liberty to simply substitute our opinion for that of our fellow Board Member or Hearing Officer. We must provide reasoned explanations for our disagreement. Universal Camera Corp. v. NLRB, supra. Also, where issues of credibility may determine the adoption or rejection of a critical allegation made by both sides, we must give great deference to the Presiding Member's or Hearing Officer's findings. Credibility is not necessarily confined to the narrow peg of truthfulness. It has been termed as "the quality of power of

inspiring belief." Credibility involves more than demeanor. It apprehends the overall evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence. Indiana Metal Products v. NLRB, 28 Adl.2nd 702, 709 (7th Cir., 1971). Even more important, evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe. It is plausible. Id.

It is by the above standards that we in the dissent conclude that our fellow Board Member's decision in this case should be reversed. Our conclusion is based upon our review of the evidence and our finding that the initial decision is not supported by substantial evidence. Also, to the extent that we disagree with the credibility determinations of the Presiding Member, we find that his determinations were not reasonable, natural and probable in view of the facts of this case.

To properly analyze this case, it is important that the facts of the case be understood. It is the facts which determine the burdens of proof of each party. In that regard, we note that Petitioner began work at Respondent in July of 1983, after having filed and won a discrimination complaint against Respondent. In January of 1984, just six months after Respondent was ordered by this Board to hire him, Petitioner was denied a within-grade salary increase. On February 1, 1984, Petitioner filed a complaint of discrimination in which he alleged that he had been harassed and reprimed against because of his prior complaint of discrimination. In March of 1984, Respondent was again advised that his performance was unsatisfactory and his within-grade increase was again denied. On May 25, 1984, Petitioner filed a second complaint of discrimination in which he alleged discrimination in Respondent's decision to deny him a within-grade increase. Finally, on June 8, 1984 Petitioner was notified that he would be terminated. Petitioner was terminated on June 22, 1984. Prior to his termination, Petitioner amended his second complaint of discrimination to include the termination. Hence, what we must first determine is whether Respondent's denial of Petitioner's within-grade increase in January and March and his subsequent termination in June were in reprisal for Petitioner having filed and won a complaint of discrimination. Next, we must review the denial of within-grade increase and the termination to determine whether they were taken for cause. Closely related to the second review is the question of Petitioner's status; that is, whether Petitioner was a probationary employee.

To determine whether a reprisal was taken against Petitioner for having filed a prior complaint of discrimination, Petitioner must first establish a prima facie case of reprisal. Petitioner, as all others before him who have filed complaints of discrimination, has the initial burden of establishing a prima facie case and the ultimate burden of proving reprisal. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Womack v. Munson, 619 F.2d. 1292, 1297 (8th Cir., 1980). Petitioner's prima facie case creates a presumption of reprisal against Petitioner by Respondent. Petitioner's burden in establishing a prima facie case is not an inflexible or onerous burden. Id. The system of analysis set forth in McDonnell Douglas was never intended to be rigid, mechanized, or ritualistic. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). Petitioner need only produce objective facts from which an inference of discrimination can be made.

Unlike other prima facie cases of discrimination, Petitioner must show: first, that he engaged in protected activity under Title VII and it was known to Respondent; second, an employment action disadvantaging him occurred; and third, a causal connection between the first and second elements. Womack v. Munson, supra. After Petitioner has established his prima facie case, Respondent must then articulate a legitimate nondiscriminatory reason for the alleged acts of reprisal. The burden of going forward then shifts to

Petitioner to demonstrate that Respondent's stated reasons are mere pretext for reprisal, taken in retaliation for Petitioner's participation in protected activity. Id.

While we believe that Petitioner established a prima facie case of retaliation, we do not believe that he ever attempted to establish pretext after the Agency articulated its legitimate nondiscriminatory reason for the alleged acts of reprisal. It is unquestionable that Petitioner engaged in protected activity when he filed and won his complaint of discrimination. Likewise, there is no doubt that Respondent had knowledge of Petitioner's prior complaint of discrimination since Respondent was the object of Petitioner's complaint. Further, there is no question that the denial of the within-grade increase and the subsequent termination of Petitioner were disadvantaging to Petitioner. Finally, because Petitioner was hired in July of 1983 and the denial of the within-grade increase occurred in January of 1984 and March of 1984, and Petitioner was terminated on June 22, 1984, there is a rebuttable presumption or inference of a causal link between Petitioner's protected activity and Respondent's adverse action against Petitioner.

This, then, gives life to Petitioner's prima facie case of reprisal and shifts the burden of going forward to Respondent. Respondent met its burden when it alleged that Petitioner was denied a within-grade increase and was subsequently terminated because of unsatisfactory performance. As we demonstrate below, Petitioner advanced little, if any, evidence to show pretext and overcome Respondent's articulated nondiscriminatory reasons. However, the Presiding Member, through error, shifted the pretext requirement to Respondent and erroneously required Respondent to show by a preponderance of the evidence that Petitioner had performed unsatisfactorily when Petitioner failed to come forward with evidence of pretext.

The Presiding Member found that Petitioner's performance was satisfactory, given the nature of the assignments and supervision Petitioner received. We do not find substantial evidence in the record to support that conclusion. The Presiding Member, thereafter, found evidence of retaliatory conduct. Based upon these findings, the Presiding Member found [erroneously] that Petitioner was a victim of discrimination.

The majority affirmed the Presiding Member's decision relying principally upon the Presiding Member's determination regarding Petitioner's performance. They then reached a conclusion that retaliation had occurred based on evidence not considered significant or relied upon by the Presiding Member. The majority decision also did not consider the Presiding Member's independent findings of retaliation, nor the Presiding Member's error in failing to consider all of the relevant evidence before him.

In accordance with the direction of the Court, we considered the findings of the Presiding Member regarding Petitioner's performance and the findings of retaliation and we do not find substantial evidence to support a determination that Petitioner met his burden of proof. We also examined the denial of the within-grade increase and the subsequent termination for legal sufficiency.

I. PETITIONER'S PERFORMANCE

The Presiding Member based much of his findings on his analysis of Petitioner's performance appraisal. The key standards at issue were Petitioner's performance on the Literature Search, the Special and Issue Area Courses, and the Plan for Evaluating the Learning Center (LC). Because Petitioner must establish pretext he has the burden of showing his performance was satisfactory. Petitioner never made an effort to establish pretext and the analysis below supports that conclusion.

A. Literature Search

In his findings on the literature search assignment, the Presiding Member relied on the standards in the appraisal which stated "Literature related to the Learning Center searched and completed by Oct. 15, 1983." He also cited Petitioner's supervisor's note to an employee requesting Petitioner to do a "literature search" as the only other written direction Petitioner received. The Presiding Member pointed to the considerable testimony on the record regarding the meaning of the term "literature search" and the fact that Petitioner and his supervisor disagreed as to the assignment. Of further importance, in the Presiding Member's view, was the fact that Petitioner stated that he was first told to summarize articles on January 21, 1984 in the letter denying his within-grade increase. Petitioner specifically denies his supervisor's claim that they discussed the summaries on January 6, 1984 at their meeting. The Presiding Member concluded that because there was no written evidence of this assignment prior to January 21, 1985, and since the nature of the project is disputed, Petitioner completed the assignment in an appropriate manner. The Presiding Member, without further examination of the record before him, summarily concludes that Petitioner completed the assignment. However, an examination of the record reveals that there was, in fact, very little discussion about the nature of a "literature search." In direct examination, Petitioner resolutely refrained from answering questions about this assignment posed to him by both his attorney and the Presiding Member. (Tr. 117-119). During cross-examination, Petitioner explained that what he had done was a "computer literature search," a point never mentioned in the Presiding Member's decision. On its face, the computer literature search does not appear to be the same as what Petitioner's assignment required. In addition, Petitioner's supervisor testified that the computer search Petitioner turned in was nothing more than copies of documents that the librarian made for Petitioner, and that the abstracts would be of no help to the other members of the Learning Center Committee. This evidence was un rebutted and was apparently not considered by the Presiding Member. (Tr. 251-254). To prove pretext, Petitioner has the burden of establishing that his supervisor's determination was inappropriate. There is no evidence in the record which shows that Petitioner's supervisor did not make the assignment or that Petitioner completed the assignment as required. Petitioner's sole testimony on this issue was that he did not know about doing the summaries until later and he thought it was supposed to be a computer search. In our opinion this does not constitute evidence of pretext and, therefore, the Presiding Member erred in concluding otherwise. Further, if the Presiding Member's findings are based on credibility determinations, he failed to set forth the basis of those determinations. The Presiding Member certainly does not clarify how he concluded that the assignment was completed, when Petitioner claims he was unaware that he was assigned to complete the literature search until January, 1984.

B. Special and Issue Area Courses

The second item mentioned by Respondent as a basis for the denial of the Petitioner's within-grade increase and Petitioner's subsequent termination was Petitioner's unsatisfactory performance on the chapter he prepared concerning special and issue area courses. The Presiding Member noted that the standards allowed "Two minor editorial re-writes after 2nd major revision." The Presiding Member noted that the standard requiring the preparation of the chapter was not defined and, therefore, "the scope of each is subjective and cannot be determined or appraised." And, in finding that the assignment was performed satisfactorily, the Presiding Member found that the standards anticipated that there would be a lot of changes. However, the record does not support such a conclusion and the Presiding Member again cites no bases for his conclusion. The Presiding Member cited as significant, the fact that Petitioner's supervisor stated that "John's chapter was close enough that I decided not to send it back." Based on this statement the Presiding Member concluded that Petitioner had met the standard. In our review of the Presiding

Member's conclusions we find that the Presiding Member freely substituted his opinion of the quality of Petitioner's work for that of Petitioner's supervisor, in the absence of a compelling reason for such a substitution. We find error in the Presiding Member's initial premise, that the work cannot be reviewed for quality. Relevant case law has established that it is the role of supervisors to examine the quality of an employee's work and make determinations as to its adequacy. Sweeney v. Board of Trustees of Keene State College, 569 F. 2d 169 (1st Cir. 1978). In this case the Presiding Member chose to ignore the supervisor's findings as to quality and accept the work as satisfactory merely because Petitioner submitted three drafts as the standards allow. Carried to its logical conclusion this would mean that anything submitted by an employee would be treated as acceptable no matter how poor the work product submitted. The Presiding Member's substitution of his own judgment for that of the supervisor, without offering a reasoned explanation for such a substitution is, in our view, a serious error, especially where the employee provides no compelling reasons for the substitution.

We also find error in the Presiding Member's use of the above-cited quote from the supervisor as a basis for deciding that the supervisor thought the work Petitioner produced was satisfactory. The supervisor merely stated that, despite numerous meetings with Petitioner, he found Petitioner to be continuously resistant to any suggestions he might have as to changes. The supervisor further testified that it was easier for him to make significant "revisions" than to give it back to Petitioner. The standards only permitted two "major" rewrites. Thus, the Presiding Member's decision failed to address the supervisor's complete testimony as to the poor quality of Petitioner's work. The supervisor testified about numerous factual errors in portions of Petitioner's work product that simply did not make sense. On the other hand, Petitioner offered little, if anything, to refute the supervisor's testimony and the Presiding Member only commented that the supervisor failed to explain his testimony. In fact, the record shows that the supervisor discussed at length why Petitioner's work product did not make sense. (Tr. 257 - 259). The supervisor stated that the drafts themselves were replete with numerous changes and editorial comments, including the third draft, which had such substantive corrections such as to making it "median" rather than "average." (Resp. Exh. 12 at 6-8, 6-13, 6-14, 6-15, 6-16). This statement strongly supports the supervisor, but was not considered by the Presiding Member. Of even more importance is the testimony of one of Petitioner's fellow employees who reviewed Petitioner's work product. The employee confirmed the supervisor's judgment as to the quality of Petitioner's work. But the employee's testimony was not addressed by the Presiding Member and no reason was given for the silence. (Tr. 79). The Presiding Member made no determination as to the credibility of the testimony of the employee and no effort was made to resolve these apparent contradictions in the record.

Hence, the testimony of the employee and the supervisor and the actual work product all strongly support the contention that Petitioner's performance on the assignment was unacceptable. The Presiding Member largely ignores this evidence, choosing to rely on a comment by Petitioner that is taken out of context and the fact that Petitioner was allowed major rewrites. Again, Petitioner presented no evidence on his own behalf. This, in our opinion, does not amount to substantive evidence to make a finding that the work product of Petitioner was satisfactory.

C. Plan for Evaluating the Learning Center

As with the above-mentioned assignment, the Presiding Member began his evaluation of Petitioner's work on the Learning Center project by examining the performance standards. The relevant language, according to the Presiding Member, required Petitioner to submit a report that would be "technically sound, feasible and meet Learning Center input needs." The Presiding Member again refers to the subjective nature of

these standards. He noted that Petitioner's supervisor requested that Petitioner write out what should be looked at in a Learning Center and give it to him by January 9, 1984, which was sooner than the February deadline set forth in the standards. The Presiding Member acknowledges that Petitioner failed to meet this deadline but that Petitioner did submit something on January 24, 1984, which met the time requirements of the standards.

In determining that Petitioner's submission on this assignment was satisfactory, the Presiding Member relied on the supervisor's comments set forth on the January 24 draft, and a portion of the testimony of a second employee. The Presiding Member began his analysis of Petitioner's performance with the premise that the only evaluation plan Petitioner could have prepared was a very general one because the Learning Center was not in existence at the time. As support for his conclusion, the Presiding Member cites the testimony of the employee who previously had a similar assignment as Petitioner. The employee testified that in January of 1983 he stated "it was not feasible to consider an actual evaluation 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." (Tr. 352) The Presiding Member, however, failed to address the fact that Petitioner was assigned to plan an evaluation and the employee's statement refers to doing an "actual evaluation." In addition, the same employee's statement goes on to indicate that the evaluation could be done in about a year, which would have been in January of 1984, the time period in which Petitioner received the assignment to prepare an evaluation plan. Clearly, the Presiding Member was in error when he concluded that a more comprehensive evaluation plan was not possible.

Moreover, the Presiding Member did not address the considerable testimony on the record by the employee that the assignment could be performed as requested by the supervisor. The employee testified (1) that the purpose of having Petitioner participate on the Learning Center planning committee was to build an "evaluation linkage" as the program was being designed; (2) as of August 1983 there were no obstacles to completing the plan for evaluating the Learning Center; (3) the fact that the Learning Center did not actually exist would not effect Petitioner's ability to plan an evaluation; and (4) Petitioner's assignment was "do-able." (Tr. 352, 356, 360 and 361). The Presiding Member never addressed this obvious inconsistency in the record and provided no reasoning for his failure to consider this evidence.

In our view, the record simply does not support any conclusion but that the project was do-able. The record, as we view it, shows that after Petitioner received his supervisor's written comments he failed to submit a more specific and acceptable evaluation plan. Petitioner, in effect, elected on his own to simply ignore his supervisor's request for a more complete work product, a clear indication that he had not completed the assignment in a satisfactory fashion. In addition, Petitioner never asserted, during the hearing or in his post hearing brief, that the assignment was not do-able and he did not attempt to rebut the evidence in the record.

We also examined the Presiding Member's related conclusions that the supervisor was not qualified to review Petitioner's work and that the supervisor had given inadequate guidance to Petitioner on the Learning Center assignment by providing an example of an evaluation plan on another subject. With regard to the first conclusion, the supervisor acknowledged that he did not know a whole lot about learning centers but he also did not "need to know a whole lot." The supervisor went on to explain at length that: the "Evaluation techniques, procedures, analytic procedures, can be applied to any of millions of particular topics, and the Learning Center just happens to be the topic to which this is applied." The supervisor further stated that "If I know nothing about Learning Centers I should be able to apply this evaluation technique to the Learning Center concept." (Tr. 264). Although it is unclear as to how the

supervisor's lack of knowledge prevented the Petitioner from completing the assignment, the Petitioner offered no evidence to dispute this claim by the supervisor. Therefore, the supervisor's stated reasons went un rebutted. The Presiding Member again failed to consider this point and instead relied on his own judgment without any record to support it.

In a similar fashion, the supervisor stated that the model given to Petitioner was to "serve as another example which he could follow in designing an evaluation." (Tr. 312). The supervisor testified that he spent many hours discussing the nature of this assignment and other assignments with Petitioner. (Tr. 69, 277-278). The supervisor's testimony was supported by other witnesses, including the employee who previously had a similar assignment. (Tr. 363-364). Petitioner's rebuttal to the testimony of the supervisor and the employee consisted of his claim that he had difficulty meeting with the supervisor. Petitioner's claim, however, was disputed by the supervisor and two other employees. The Presiding Member's decision never addresses this dispute, but instead, concluded without substantial basis that the guidance was inadequate.

D. Conclusion Regarding Employee's Performance

The burden lies with Petitioner to establish that Respondent's determination that he was an unsatisfactory performer was pretextual. Petitioner submitted very little probative information and called no witnesses that would substantiate his claim. Petitioner's own testimony largely consisted of non-responsive answers to questions directed by his own counsel and the Presiding Member. The decision never considers this lack of evidence, but instead, through the use of inference and weak circumstantial evidence, concluded that Petitioner was a satisfactory performer. The Presiding Member, in effect, improperly shifted the burden of proof to the Agency to establish Petitioner's poor performance and failed to address the fact that Petitioner did not complete one of his assignments.

II. Harassment and Disparate Treatment

Having concluded that the record established that Petitioner was a satisfactory performer, the Presiding Member proceeded to examine Petitioner's allegations of disparate treatment. Once again it is Petitioner who has the burden of establishing by a preponderance of the evidence that the retaliation occurred. In accordance with the Court's direction, we have reviewed the decision to determine whether the Presiding Member's findings are supported by substantial evidence.

A. Comparison of Treatment of Petitioner and Holley

The Presiding Member found that Petitioner was treated differently from that of another employee Holley, for the following reasons: (1) Holley was assigned to the Learning Center project just prior to Petitioner being hired, (2) Holley testified that he spent four months solely working on a questionnaire for the Learning Center, (3) Holley was a GS-13, and (4) Holley's performance appraisal states that he completed evaluation plans for the "Learning Center and MP," and he received a "generally met" for this standard. The decision further notes that Petitioner was assigned the task of developing the Learning Center Plan and rewriting Holley's questionnaire. Finally, Petitioner's standards, unlike Holley's, the Presiding Member notes, contained deadlines.

From the above facts, the Presiding Member, in error, "infers" that the plan and questionnaire prepared by Holley "was unsatisfactory or incomplete in some respects or it would not have been necessary for Petitioner to be assigned the same project a few months later." However, the record contains no basis from

which to draw such a conclusion. The Presiding Member then states that holding Petitioner to deadlines and finding his redoing of Holley's work unsatisfactory constitutes disparate treatment. A review of the record reveals that Holley testified that he was working on several other projects at the same time as he had worked on the Learning Center assignment. (Tr. 368). This clearly contradicts the Presiding Member's interpretation of Holley's testimony that he was only working on the Learning Center plan. Further, the remainder of the Presiding Member's conclusions are also not supported in any substantial way by the record. In this regard, Holley's performance appraisal was submitted along with several others to show that the supervisor had prepared the appraisals in a similar fashion as Petitioner's. (Tr. 245-6). Petitioner raised no questions about Holley's appraisal and the precise nature of the assignments covered in it. Petitioner never suggests that Holley did not perform his assignments satisfactorily. It is merely unsupported speculation on the part of the Presiding Member to "infer" that Holley's work was somehow unsatisfactory and Petitioner was redoing the same assignment.

B. Comparison of Treatment of Petitioner and Klein

The Presiding Member's findings, in this instance, are based upon the testimony of Holley that Klein was responsible for developing Learning Center goals and objectives and that Petitioner's supervisor told Petitioner to "facilitate these objectives." From these two statements, the Presiding Member concluded that Petitioner's supervisor's comments "implied" that the objectives developed by Klein were unacceptable, but that there was no indication her performance rating was adversely affected. An examination of the record reveals that Klein never testified at the hearing, her appraisal was not entered in the record, Klein's supervisor did not testify that he was dissatisfied with her work, and Petitioner never asserted that Petitioner's supervisor was dissatisfied with Klein's work. Therefore, we find no basis in the record to support the Presiding Member's finding that Klein's performance was comparable to that of Petitioner.

C. Comparison of Treatment of Petitioner and Groves

In reaching a finding of disparate treatment, the Presiding Member cited that (1) Groves was given several months to prepare his draft chapter while Petitioner only had several weeks; (2) Groves draft was distributed two months after the final was due; and (3) Groves received no rating for this project. The record, however, reveals evidence that the assignments received by Groves and those received by Petitioner were not comparable. Groves was assigned to develop a model, while Petitioner had to follow the model once he received it from Groves. Minnick also testified that Petitioner's assignment was routine (Tr. 79-80), but this testimony is not addressed. As with the other instances cited above, the Presiding Member reaches conclusions that are not substantially based on facts in the record.

D. Petitioner's Treatment by Franklin

As further evidence of disparate treatment, the Presiding Member relies on the following: (1) Franklin believed that the PAB decision precluded him from transferring Petitioner (2) requests for transfers were honored, and (3) reasons for these transfer requests were not given. The Presiding Member concluded that Franklin's testimony is not persuasive reasoning, and that a person of the Division Director's grade and experience should have known that he had the latitude to grant Petitioner's transfer. In closing, the Presiding Member further cites the past practice of honoring transfer requests. Upon reviewing the record we find that Franklin testified that most, but not all, transfer requests were honored. (Tr. 221). But, contrary to the Presiding Member's decision, Franklin stated that most of these requests involved employees seeking promotional opportunities. (Tr. 221). This was clearly not Petitioner's situation, since Petitioner was a probationary employee with alleged performance problems. In addition, the Presiding

Member noted that the Agency is not obligated to transfer or demote an employee. The Presiding Member's inference is erroneously based upon inappropriate comparisons.

E. Petitioner's Supervisor's Use of the Diary

The Presiding Member cited Petitioner's supervisor's use of a diary as evidence of disparate treatment and retaliation. The Presiding Member specifically relies on the fact that the diary was not kept in accordance with Chapter 1 of the GAO Personnel Appraisal Manual, and that the supervisor kept the diary on only one other employee, who also was alleged to have had performance problems. An examination of the record discloses that Chapter 1 of the GAO Personnel Appraisal Manual was not submitted into evidence or raised by either party at the hearing.

Petitioner's supervisor testified that he only began keeping a diary upon the advice of the Personnel Office on January 20, 1984, after the decision to deny Petitioner's within-grade increase was made. (Tr. 281). It seems that most of the work that formed the basis of GAO's subsequent decision to terminate Petitioner occurred around or prior to this date. The supervisor's testimony was not challenged by Petitioner, and again, the Presiding Member does not indicate why the supervisor's non-retaliatory reason is not acceptable. In addition, the fact that the supervisor was keeping a diary on another employee with performance problems indicates that Petitioner was not being singled out for disparate treatment. (Tr. 282). We see no retaliatory motive here and there is not substantial evidence in the record to support the finding of the Presiding Member.

The majority should not overlook all these clear and reversible errors in the rush to support the Presiding Member's decision. We have no authority to pick and choose among evidence presented to us and to ignore credible evidence without providing reasons for our selections and refusals. We are tasked with great responsibility to decide the future of employees and future employment practices of an Agency. We must exercise our authority in fair and equitable means to both the Agency and employees. This is not what happened in this case. We in the dissent feel the same urge to circle our wagons and protect a fellow member but such protection should not be at the expense of fairness.

III. ADVERSE ACTION

A. The Denial of the Within-grade Increase

The Court has also directed us to consider whether substantial evidence exists to support the Presiding Member's determination that Respondent did not establish by a preponderance of the evidence that Petitioner's within-grade increase should have been withheld. It is our view that the record will not support such a finding, either. In the first portion of this decision we examined evidence concerning Petitioner's performance. For each of the issues that formed the basis of the denial of within-grade increase we found that the Agency had offered considerable evidence to support its conclusion. We find the denial of the within-grade increase proper where an employee fails to complete projects properly assigned to him. Further, Respondent offered more than enough testimony and documentary support to prove by a preponderance of the evidence that Petitioner was a poor performer. The majority, in its decision, has chosen to ignore the record, and instead, relies on the Presiding Member's unsupported inferences, which amounts to less than a scintilla of evidence. The Supreme Court's holding in Universal Camera Corp. v. NLRB, *supra*, requires a much greater finding of support than a few sentence fragments in a 400-page transcript and some unsubstantiated inferences.

B. The Termination Decision

Even assuming, arguendo, there is sufficient basis to determine that Respondent has not met its burden of proof for poor performance, Respondent still can establish that Petitioner would have been terminated anyway. According to the record before us, Petitioner was still a probationary employee at the time he was fired.¹ Since, in our view, there is no evidence of retaliation, Petitioner has no right to appeal the Agency decision not to continue his employment after his probationary period ended. As was noted earlier, there is ample evidence on the record to establish Respondent's concerns about Petitioner's performance. The purpose of a probationary period is to decline to retain such employees before they attain career status and have appeal rights. The record, therefore, supports the termination irrespective of whatever finding is made regarding the within-grade increase.

V. CONCLUSIONS

In accordance with the Court-ordered remand, we have examined the decision of the Presiding Member and do not find substantial evidence to support his determinations. Petitioner simply did not offer any significant support for any of his claims of retaliation. He certainly failed to rebut Respondent's evidence that he was a poor performer. The Majority Decision fails to properly address the burden of proof, relying instead on the Presiding Member's inferences that the Agency failed to prove by a preponderance of the evidence that Petitioner was an unsatisfactory employee. This is a critical error. Respondent is only required to prove its claim of poor performance in the context of examining the second part of the Court-ordered remand concerning adverse action. In our view, Respondent has proven its contentions by a preponderance of the evidence. We therefore believe that the decision of the Presiding Member should not be sustained and for the above reasons, we dissent from the findings of the majority.

Notes

1. The transcript reveals that because the PAB had ordered that Petitioner be hired in its earlier action, the Petitioner was given six months time-in-grade to qualify toward his within-grade increase. Statutory restrictions, however, preclude the waiving of the one-year probationary period.
2. These assignments were 1) the Learning Center Evaluation Plan, 2) the Literature Search, and 3) the Chapter on Special Issue Area training courses.
3. The Court of Appeals intimates (Slip op. at 14, n.8) that because retaliation is a prohibited personnel practice under 4 C.F.R. Sec. 2.5, once pretext is shown, this last defense may not be available to GAO. The facts of this case clearly indicate that this is a mixed motive, or dual causation case, and requires that we adhere to the standard set forth in Mt. Healthy City School District v. Doyle, 429 U.S. 274, 187 (1977). See, Frazier v. MSPB, 82 FMSR 7024 (D.C. Cir. 1982); Mortensen v. Department of the Army, 83 FMSR 7053 (MSPB 1983).