

Venkareddy Chennareddy v. U.S. General Accounting Office

Docket No. 70-701-17-85

Date of Decision: January 4, 1988

Cite as: Chennareddy v. GAO (1/4/88)

Before: James, Chairman; Cappello, Kaplan, Kaufman, and Weinstein, Members

Standard of Review - Hearing Procedures

Reopening and Reconsidering Initial Board Decision - Grounds for

Standard of Proof - Reopening and Reconsidering Initial Board Decision

Hearing Procedures - Conduct of Hearings

DECISION OF THE PAB

This matter is before the Board on a motion by Petitioner to reopen and reconsider the decision of the Presiding Member finding that Petitioner's nonselection for five promotions to GS-14 was not discriminatory.

In his original Petition for Review filed with the Board on December 24, 1985, Petitioner alleged that on three separate occasions in 1984, the Agency discriminated against him by failing to promote him to GS-14 because of his age, race, color and national origin. In two other separate instances, Petitioner charged that his nonselection was based upon his sex, race, color and national origin. After a full evidentiary hearing, the Presiding Member ruled on August 20, 1987, that none of the five selection decisions was discriminatory.

In his motion to reopen and reconsider, the Petitioner contends that the decision of the Presiding Member was arbitrary, capricious, an abuse of discretion and otherwise not consistent with law. Further, Petitioner claims that the decision is not supported by substantial evidence. The Agency has duly opposed the motion.

Petitioner argues that the Presiding Member committed prejudicial error when he denied Petitioner's prehearing request to require the Agency to file a formal response to his Petition for Review. Petitioner argues that the Presiding Member's denial of this request allowed the Agency to articulate a new reason for Petitioner's nonselections, and thus deprived Petitioner of a full and fair opportunity to show that the articulated explanations were pretextual. The Petitioner contends that for the Presiding Member to deny the motion for clarification and then to permit the Agency to present evidence during the evidentiary hearing of a different defense than that proffered in the Final Agency Decision was arbitrary, capricious, an abuse of discretion, and not consistent with the law governing employment discrimination cases.

We find no error and that Petitioner was given ample opportunity prior to the evidentiary hearing to ascertain the exact reasons the Agency asserted as the basis for its failure to select him for promotion to GS-14. In fact, our review of the record shows that Petitioner deposed each of the Agency's selecting officials, and that the testimony of each official during their deposition was substantially the same as that given during the evidentiary hearing. It seems clear and Petitioner does not argue otherwise, that it is the same evidence which the Presiding Member considered in rendering his decision. We see no error by the Presiding Member in this regard.

Petitioner also contends that the decision of the Presiding Member is not supported by substantial evidence. We find nothing in the Motion to Reopen and Reconsider which refutes the reasoning of the Presiding Member. The language in a Motion to Reopen and Reconsider must contain sufficient specificity to enable the Board to determine whether there is a serious evidentiary question which warrants a complete review of the record. See, Weaver v. Department of the Army, 2 MSPB 297, 299 (1980), aff'd., 669 F.2d 613 (9th Cir. 1982). Petitioner must make specific references to the record and the findings of the Presiding Member in order to meet the criteria for review of the entire record. Id. The Presiding Member found that the Agency articulated legitimate, nondiscriminatory reasons for Petitioner's nonselection to the five positions in question, and that Petitioner had failed to carry his burden of proving those reasons pretextual. The findings of the Presiding Member are supported by substantial evidence, and while Petitioner takes issue with these findings, and would have us interpret the evidence otherwise, we find nothing in the Petitioner's motion sufficient to persuade us that further review is warranted.

Accordingly, Petitioner's Motion to Reopen Fred Jimenez v. U.S. General Accounting Office, Docket No. 77-701-01-86, Date of Decision: February 27, 1987, Cite as: Jimenez v. GAO (2-27-87), and Reconsider is DENIED.

Before: Cappello, Presiding Member

Discrimination, National Origin - Performance Appraisal

Discrimination, Religion - Performance Appraisal

Discrimination, National Origin - Reduction in Grade

Discrimination, Religion - Reduction in Grade

Standard of Proof - Disparate Treatment

Negative Acceptable Level of Competence - Within-Grade Increase

Negative Acceptable Level of Competence - Reduction in Grade

Standard of Proof - Negative Acceptable Level of Competence

Reprisal - Exercise of Appeal Rights

Standard of Proof - Reprisal

DECISION

This is a proceeding brought under the provisions of the General Accounting Office Personnel Act of 1980, 94 Stat. 27, 31 U.S.C. §731, and the procedures promulgated thereunder and published at 4 CFR 27, as it pertains to the Personnel Appeals Board created by that Act.

On December 5, 1986, the General Counsel of the Personnel Appeals Board (Board), on behalf of the Petitioner, filed a Petition for Review challenging the reduction in grade, the denial of his within-grade salary increase, and the performance appraisals prepared by William Bedwell and Warren Faircloth of his work as a GS-12 evaluator.

Petitioner alleged that William Bedwell discriminated against him because of Petitioner's national origin (Hispanic) and/or his religion (Catholic) in rating his performance Unacceptable. Petitioner alleged that Warren Faircloth discriminated against him on the basis of national origin in rating his performance Unacceptable. By letter dated March 17, 1986, the General Counsel alleged that the rating provided by Mr. Faircloth was in retaliation for Petitioner's having filed EEO complaints and/or grievances.

Petitioner alleged that management's actions in denying his within-grade salary increase and in reducing him in grade were based upon these discriminatory appraisals and therefore those actions also were discriminatory. Petitioner also alleged that these actions were not supported by substantial evidence.

On December 17, 1986, the Petition for Review was amended to include a performance appraisal of Petitioner as a GS-12 Evaluator dated December 8, 1986, and prepared by Martha Vawter as the rater. It is alleged that this performance appraisal is part of a continuing pattern of discriminatory treatment intended to lend support to earlier discriminatory actions by GAO managers in the Atlanta Regional Office; that it is inaccurate; and that it is motivated by race discrimination (Hispanic) and by a desire to retaliate against him because he had filed EEO complaints.

On January 29, 1987, the Petition was further amended to include a performance appraisal dated October 20, 1986, and prepared by Martha Vawter and Jessie Flowers. It is alleged that it represents an on-going effort by management to discriminate against Petitioner due to his Hispanic origin, and to retaliate against him because he has filed, and continues to pursue, EEO complaints against the Agency.

On April 27, 1987, the Petition was further amended to include the denial of his most recent within-grade salary increase which is based upon the Vawter-Faircloth performance appraisals already a part of this action. The amendment alleges that the Agency cannot support the decision by requisite proof and that the decision constitutes discrimination based upon national origin and retaliation.

Hearings were held on 15 days between May 18 and July 20, 1987, in Atlanta, Georgia, and Washington, D.C. The parties were represented by counsel who stipulated to certain facts, introduced 144 exhibits, and examined and cross-examined 37 witnesses, three of whom were recalled for further examination.

Post-hearing briefs were originally due on September 11, 1987. See the transcript of July 20, page 19. The parties agreed to two extensions which were granted. The briefs were filed on September 25. Reply briefs were filed on October 9.

I. Findings of Fact¹

A. Background

1. Up until 1972, the Atlanta Regional Office "was almost entirely a white male organization" (Colbs, July 8, page 184). This was "no accident;" it was "by design of the Regional Manager" who headed the Atlanta Regional Office for 17 years (Colbs, July 8, page 191). There were no Hispanics.

2. This situation began to change in September 1972 when a new manager, Marvin Colbs, arrived with instructions from headquarters "to take a look at this, that it was of some concern to them, and that maybe one of [his] early thrusts down [in Atlanta] should be to correct that situation," (Colbs, July 8, page 185). On his first day on the job at Atlanta, Mr. Colbs made it clear to the staff that he was going "to aggressively recruit minorities and women." (Colbs, July 8, page 185). When Mr. Colbs retired in January 1985, "tremendous strides" had been made, although the office never "got to the point where [it] had what [he] consider[ed] to be a fair representation of Hispanics" (Colbs, July 8, page 186). Presently, around the office there is still some talk about "the good old days before Marv Colbs" (Oxford, May 20, page 584).

3. In January 1986, Mr. Colbs was replaced by James Martin who had been Regional Manager in the Dallas office. (See Martin, June 8, page 211). From January 1985 to January 1986, Archibald Patterson served as Acting Regional Manager. Mr. Patterson has been assigned to the Atlanta Regional Office since 1973. (See Patterson, June 11, page 815.)

4. The Regional Manager before Mr. Colbs was "pretty much an autocrat, [and] people in the office developed the attitude that you did what the Regional Manager said, and you didn't do anything that would cause you to come to his attention" (Colbs, July 8, page 191). Applying forward that attitude on how to deal with a Regional Manager, supervisors under Mr. Colbs "never wanted to do...anything that would cause them to rate [minorities] down because they felt--since [he] was pushing [the recruitment] program so hard, they felt that that would result in them being brought into [the manager's] office to discuss that rating with them" (Colbs, July 8, page 192). Therefore, their "attitude was: don't give a minority member or a woman a [sic] unsatisfactory rating, because the Regional Manager will call you in and you'll have to explain it" (Colbs, July 8, page 193).

5. Under Mr. Colbs, supervisors were, indeed, called in to explain an unsatisfactory rating. He explained that he: "wanted these people [minorities] to succeed [and] needed to know what it was and what was behind it so [he] could deal with it, and so [he] could prescribe necessary corrective action, give them further education or opportunities or development. [He] needed to know what was wrong if there was something wrong. So frequently [he] did talk to people about any adverse ratings, but it was not from the standpoint of being critical of their rating or asking them to change it; it was from the standpoint of [his] wanting to understand it so [he] could deal with it" (Colbs, July 8, page 194).

6. Nevertheless, a number of the older supervisors "never gave adverse ratings to minorities and women" (Colbs, July 8, page 194).

7. Under Mr. Colbs, the younger supervisors were "more inclined to describe things more accurately" (Colbs July 8, page 195). They "recognized that you didn't accomplish anything by sweeping a problem under the rug or hiding it; that the only way to deal with a problem of unsatisfactory performance was to call it the way it was and let whatever was going to happen happen in terms of either corrective action or whatever needed to happen" (Colbs, July 8, page 194). They also "realized that management could not

deal with unsatisfactory performance unless it has something in the record to indicate that there was something that had to be dealt with, so they were more inclined to give [management] that record" (Colbs, July 8, page 195).

8. Mr. Colbs includes within this group of younger supervisors Mr. Bedwell, Mr. Faircloth, and Ms. Vawter. Mr. Bedwell and Ms. Vawter were hired by Mr. Colbs and considered by him to be "very good supervisors" who would give "an honest assessment of the individuals they were rating regardless of their race" (Colbs, July 8, page 196). Mr. Bedwell was "very supportive" of Mr. Colbs' endeavors to hire minorities and women and was active in the office recruiting program (Colbs, July 8, page 188).

9. Mr. Colbs gave no such endorsement to Mr. Faircloth, who had served under Mr. Colbs' predecessor, left the office to go into service, and returned during the tenure of Mr. Colbs (Colbs, July 8, page 187). Mr. Colbs had no knowledge that Mr. Faircloth was "resentful" of his efforts to recruit minorities and felt that Mr. Faircloth did not have many opportunities to be "supportive" (Colbs, July 8, page 188).

B. Evaluators and the System for Rating Them

10. Evaluators are "generalists" and are shifted from one issue area to another (Posner, June 1, page 60). Their career ladder is from GS-9 to GS-12. They participate in two stages of audit work--survey (also called scoping), followed by implementation (also called review). The survey stage is a "kind of search for issues to develop and try to define the methodologies" (Posner, June 1, page 45). In the implementation stage, "typically," a number of regional offices get involved and the evaluators "actually go out and collect the data for the issue" (*ibid.*). The weight of the evidence points to the survey stage as the more difficult of the two. See Taylor, May 21, page 729; Cooper, May 20, page 663; Worth, June 11, page 773; and Colbs, July 8, page 213.

11. Erratic performance on jobs can result from "the nature of the job" (Colbs, July 8, page 213). As explained by Mr. Colbs:

"Some people can perform well on a very highly - structured job where you're essentially data gathering to develop a point or develop a finding, as opposed to a creative job where you're surveying to find out how a new and rather complex organization or a program works and try to determine what there is about that program that needs to be looked at. That's much more creative work and challenging work in terms of the depth of thought, as opposed to data gathering of specific information from records and files or discussions to support a point that had been previously identified" (Colbs, July 8, page 213).

12. Interviewing officials is an important task of evaluators, as are the write-ups of the interviews. It is "not unusual," indeed, "very common," to have to clarify and follow up on information, particularly on information obtained in early interviews (Pet. May 18, pages 157 and 176, and Searcy, May 21, page 684). One long-time GAO supervisor established that an evaluator may "go back to the same folks numerous times during the job" (Searcy, May 21, page 684). As further explained by Mr. Searcy:

"The way that we work our jobs, you begin, and sometimes you don't know very much about the subject, and you go and conduct an interview with the best knowledge that you have at the time. You don't always ask all the questions that you would have liked to ask on one trip." (*ibid.*).

13. A close-out conference follows a site visit to assure that the evaluators do not leave the site with a mistaken view of what was said by the agency officials (Toolan, June 10, page 707).

14. Sometimes GAO audit teams find themselves in "serious confrontational situations" with agency officials (JE4, page 3) and have to "move around [official's] constant objections to providing data" (JE2, page 2).

15. Since 1977 Respondent has rated the performance of its evaluators under a system known as "BARS," which stands for Behaviorally Anchored Rating System (RE6, page 2). This system has not eliminated "subjectiveness" from appraisals (RE6, page 3; Faircloth, June 9, page 475; Sullivan, June 10, page 677; and Oxford, May 20, page 594). The Evaluator/Auditor/Specialist Performance Appraisal Systems Manual (Manual) is used in appraising evaluators. See RE6.

16. "Setting expectations about what is to be done as well as qualitative standards is an important responsibility of each rating official," according to the Manual (RE6, page 3).

17. At the start of the appraisal period, the rater must clearly convey to the ratee: the specific tasks and responsibilities being assigned; the outputs expected; what the outputs are to contain or cover; the time frames for delivery of the outputs; and the standards against which the outputs and the individual's performance will be judged. See RE6, page 7. As new tasks and responsibilities occur during a rating period, the expectations must be re-established. Ibid.

18. Appendix I of the Manual summarizes "typical duties" at each grade level (RE6, page 16). It identifies a GS-12 evaluator as a "full performance level staff member" who, among other tasks, is expected to write planning documents; select and apply analytical methods appropriate to the situation from a number of alternatives; to develop conclusions and recommendations; and to participate in or lead meetings with GAO and agency officials to communicate results of work. See RE 6, page 18. Supervisors are to make "broad assignments" and the employee "through experience and knowledge frequently designs his/her own work steps, analyzes problems, and contributes to or develops plans and approaches to meet broadly-stated objectives" (RE6, page 19 (backside)).

19. Appendix II of the Manual lists job-related "tasks," which are grouped into eight "job dimensions": Planning; Data Gathering and Documentation; Data Analysis; Written Communication; Oral Communication; Administrative Duties, Working Relationships and Equal Opportunity; and Supervision. See RE6, page 22.

20. In addition to reviewing Appendices I and II of the Manual, the supervisor and the staff member are expected to agree to characteristics of the specific job or assignment such as "the number of job segments, reporting milestones, choice of reporting medium, etc" (RE6, pages 7 and 8 (backside)).

21. Appendix III of the Manual establishes generic standards for a five-level rating scale--Unacceptable; Borderline; Fully Successful; Superior; and Exceptional. See RE6, page 49 (backside).

22. There are no standards in the Manual, or elsewhere, as to how many errors an employee can make to qualify as performing at any specific level (Bedwell, May 22, pages 163-164). Nor are there any separate, more lenient standards for newly-appointed GS-12s. Elkins Cox, a GS-14 in the Atlanta Regional Office involved in making staffing assignments, established that an employee first promoted to a GS-12 might not be expected to function fully as a GS-12 for six or seven months. See Cox, June 10, page 715.

23. Appendix IV of the Manual provides some specific examples of applying the performance standards to some specific tasks. They can be used as a point of reference from which supervisors "can spell out expectations for quality, timeliness, thoroughness, extent of supervision, etc." (RE6, page 8). Appendices III and IV are to be used together to set qualitative expectations. Ibid.

24. Under BARS, "supervisors must continually monitor the performance of subordinates and provide feedback to them on how well they are doing" (RE6, back of page 8). The Manual makes "subordinates responsible for actively seeking and being receptive to feedback on job performance" (RE6, page 9).

25. A performance appraisal form is used by raters which has space for check marks to indicate the level of performance for each job dimension, and for a narrative explanation of how the rater arrives at the appraisal. See, e.g., JE1, 2 and 3. The Manual requires performance appraisals to include "both positive and negative aspects" of performance (RE6, page 9). The ratee's "predominant behavior" is to be used in checking which level of performance "best describes" his or her performance (RE6, back of page 10, emphasis in Manual).

26. The BARS Manual requires a review of performance appraisal "to provide additional assurance that the narrative adequately supports the rater's judgment and both the narrative and check marks [of level of performance] are consistent with the Performance Level Definitions and Statements. The reviewer's role is not to judge performance or change the rating" (RE6, page 11, emphasis in Manual).

C. The Key Witnesses and Their Credibility

Before findings of fact can be made as to some issues in this case, the credibility of the key witnesses must be resolved because of conflicts in their testimony. Findings 28 - 37 make these determinations as well as flesh out some relevant facts as to these witnesses as revealed on the witness stand.

27. First, it is recognized that in testifying to minutiae reaching back several years in time, the witnesses had memory problems. Some conflicts in their testimony may, therefore, be attributed solely to memory lapses.

28. Petitioner's first three supervisors in the Atlanta Regional Office were Naron Searcy and Eugene Taylor, who rated him as a GS-11, and Bobby Cooper, who gave him his first rating as a GS-12. All three are GS-13s presently employed by Respondent. Mr. Searcy has been so employed for 24 years; Mr. Taylor for 26; and Mr. Cooper for 25 (Searcy, May 21, page 677; Taylor, May 21, page 713; and Cooper, May 20, page 634). Each was supervised by Ron Worth who found no problems with their appraisals during the period each supervised Petitioner (Searcy, id. at 690; Taylor, id. at 721; and Cooper, id. at 643).

a. All three voluntarily appeared as witnesses for Petitioner and gave him their wholehearted support. Mr. Cooper, upon learning of the Unacceptable performance appraisal received by Petitioner from Mr. Bedwell, was "very much concerned about it, enough so that [he] went in and told Mr. Martin of [his] concerns, and basically just said to him that he hope[d] he would look at the situation very, very carefully because [he] felt like something was terribly wrong [and he] simply could not believe, you know, after the way he performed on [his] job, that the performance had deteriorated to that extent" (Cooper, May 20, page 647). Mr. Cooper testified that he had no reservations "whatsoever" to having Petitioner work for him again (Id. at 652-653).

b. Mr. Colbs "put Bobby [Cooper] in the category of people who would be inclined not to "rock the boat with respect to minorities," that is, would "not give them a rating that was less than Fully Successful" (Colbs, July 8, page 209), unless another supervisor had previously rated the employee in that way and "he would not be necessarily the one who was bringing the problem up" (Colbs, July 8, page 210). Mr. Colbs had retired by the time Mr. Cooper gave Petitioner his rating, however. And neither Mr. Cooper, nor Mr. Searcy, nor Mr. Taylor gave Petitioner a mere Fully Satisfactory rating which, at that time, did not have to be documented. Instead, all three rated him, in some job dimensions, as Superior and Exceptional--ratings which they did have to document. See JE 1, 2, and 3 and Worth, June 11, page 776.

c. It is recognized that all three had some interest in defending their ratings, even though they are not the ones being challenged in this proceeding. However, all three impressed me as gamely testifying against their employer in this case. I find all three to be trustworthy, knowledgeable witnesses, and I fully credit their testimony.

29. Roderick Worth is a GS-14 evaluator in the Atlanta Regional Office. He was called as a witness by Respondent's counsel. His entire 27-year career at GAO has been spent in the Atlanta office except for four years spent at GAO's European office between 1967 and 1971 (Worth, June 11, pages 760-761). Of all the witnesses he appears to have best known the quality of Petitioner's performance. Petitioner worked on three assignments (the Searcy, Taylor, and Cooper jobs) for which Mr. Worth was the second-line supervisor. He reviewed all the work papers on these jobs and he observed Petitioner giving oral presentations. See Worth, June 11, pages 782-783, and JE 1-4. From 1983 until late 1984 or early 1985, he served as Petitioner's "focal point." ² I fully credit his testimony as unbiased and based upon thorough knowledge of Petitioner's performance abilities and how GAO operates.

30. Petitioner is a 37-year-old Hispanic, proud of and sensitive about his heritage. He speaks English well, with a soft, Spanish accent. It is undisputed that he is difficult to understand over the telephone (Oxford, May 20, page 570).

a. As a devout Catholic, Petitioner adheres to church doctrine that moderation be practiced in drinking alcoholic beverages. Normally he does not drink at all; although, on field trips, he will join his colleagues in one or two cups of wine at dinner. See Pet. May 18, pages 44-45, and Pet. May 19, pages 391-392. His priest confirmed that the Catholic Church would regard as a "sin" the partaking of more than one or two drinks, if that amount exceeded moderation for that person. See Halaburda, page 674.

b. Petitioner began his employment with GAO in 1982 as a GS-9 evaluator in the Los Angeles Office (Stip. 1) and transferred to the Atlanta Regional Office as a GS-11 in mid-1983. Even his detractors admit that he is "very industrious" (JE6, page 1). When charged with the responsibility for ferreting out facts from officials of agencies being audited, he is persistent and disregards the hostility which GAO auditors sometimes encounter. This persistence has led to several complaints from agency officials to GAO management. Concededly, he always acts as a "gentleman" in his interviews of officials (Adams, June 10, page 665). He is well liked by his peers and had a "good reputation" for job performance prior to his assignment to the job supervised by William Bedwell (Oxford, May 20, page 530).

c. As a GS-12 evaluator, Petitioner was a relative novice during the period when he received the adverse ratings here at issue. He was promoted in December 1984, having received good ratings as a GS-11 on two prior jobs. However, at the time of his promotion, the promotion panel was advised by Ron Worth, his second-line supervisor/focal point, that he needed "more seasoning" in learning "to use GAO resources wisely [referring to too much time spent in using a personal computer, rather than writing by hand],

demonstrating some traits of leadership, learning to better demonstrate an ability to analyze information after you've gathered it" (Worth, June 11, page 764).³ Mr. Worth served as focal point for Petitioner from July 1983 until the "later part of 1985 or early 1986" (Worth, June 11, pages 779-780). The promotion panel consisted of Mr. Colbs, the Regional Manager; Archibald Patterson, David Gray and a Mr. Darnell, Assistant Regional Managers; and Bill Ball, the Professional Development Coordinator. The panel decided to promote Petitioner in spite of his need for seasoning. According to Mr. Colbs, the panel had sufficient evidence that he was performing well at his current grade and "had sufficient capacity to develop into a performer at the next level" (Colbs, July 8, page 182).

d. As a witness, Petitioner was on the stand for two full days and a part of two additional days. This extended period on the stand provided ample opportunity for observation of his demeanor and his recall of the facts of this case. He appeared to weigh his answers carefully and to recall events well. He was candid and admitted to committing some errors in his work.

e. Particular heed has been given to Respondent's points challenging Petitioner's credibility. See RRB 20-27. Considering the vast amount of information testified to by Petitioner, such flaws as Respondent found in his credibility do not present a persuasive argument that his credibility was "seriously discredit[ed]," as argued (RRB 23). While it is recognized that it is Petitioner "who has the greatest incentive to shade the facts" (RRB 24), Petitioner's demeanor impressed me as that of a trustworthy witness. However, after receiving the first adverse rating from Mr. Faircloth, his mental health, admittedly, did begin to deteriorate. See Pet. May 18, page 225. During this latter period Petitioner's ability to correctly recall facts and interpret what was said to him is questionable.

31. William Bedwell is the GS-13 evaluator in the Atlanta Regional Office who gave Petitioner his first Unacceptable rating, on the so-called EMS job. Mr. Bedwell joined GAO in May 1974, and left in October 1986 for a higher grade at another agency. See Bedwell, May 22, pages 14-15. As noted by Respondent at page 4 of its Reply Brief, various management officials, prior supervisors, peers, and several subordinates (none Hispanic) testified favorably about him in some favorable terms. For example, he was described as: "a very good supervisor" (Posner, June 1, page 58); "a nice enough fellow" (Taylor, May 21, page 723); "[v]ery sharp," "[v]ery smart," "[v]ery good," who did a "very good job" in recruiting, including the recruitment of minorities (Searcy, May 21, pages 691-692, 701-703); a "fair-haired boy" with a "good reputation" (Oxford, May 20, pages 632-633); a "fast tracker" in the promotion race (Cooper, May 20, page 667, and Colbs, July 8, page 178); "a very fine supervisor" who was "very good in developing junior staff" (Patterson, June 11, page 829); "excellent supervisor" (Toolan, June 8, page 698); a "good supervisor" (Curtis, June 10, page 612); and "a very good supervisor" who, as one of the younger ones, was more likely to give an accurate rating (Colbs, July 8, pages 194-196). A friend of Petitioner's, who was an Hispanic and active in recruiting Hispanics, testified that Mr. Bedwell had a "general reputation" as "very competent, hard working, a good supervisor," and he had no reason to suspect him of discrimination (Artesiano, May 21, pages 820 and 836).

a. One past supervisor of Mr. Bedwell expressed a negative opinion of his veracity. Mr. Cooper supervised Mr. Bedwell six or seven years ago. See Cooper, May 20, pages 648-653 and 666-668. Mr. Cooper acknowledged that Mr. Bedwell was "a very good technician" who did "good work," but "there was a good bit of the time when his mind was on other things" (Cooper, May 20, page 666). Mr. Cooper testified that Mr. Bedwell almost always went out "partying" in the evenings when they were "out on jobs" and he "wondered how he kept up the pace" (Cooper, May 20, page 652). This was undisputed and explained by Mr. Bedwell in terms of his being young and, at that time, single (Bedwell, May 22, pages 15-17). Mr.

Cooper also told Mr. Faircloth that Petitioner got "a raw deal" from Mr. Bedwell; that he "had had problems with Bill [Bedwell];" and that he "wouldn't believe anything Bill said" (Faircloth, June 9, page 482). Mr. Faircloth recounted this conversation with Mr. Cooper when called as a witness for Respondent. Respondent did not recall Mr. Cooper to the stand to rebut or explain this testimony even though Mr. Cooper is presently employed by GAO, and Respondent's case continued on for a number of days after this testimony was adduced. Therefore, I credit this account by Mr. Faircloth as being Mr. Cooper's opinion of Mr. Bedwell and rely upon the fact that Mr. Cooper seemed to know Mr. Bedwell as well as, perhaps better, than any of the others who testified to Mr. Bedwell's character. I note that none of the others testified, specifically, as to his reputation for veracity.

b. Other evidence also casts doubt upon the veracity of Mr. Bedwell. One such piece of evidence is a package of Petitioner's workpapers put together by Mr. Bedwell at the request of management officials, who needed to review Mr. Bedwell's December 1985 appraisal of Petitioner pursuant to Petitioner's grievance and charges of discrimination filed over the appraisal. Mr. Bedwell placed comments, initials, and dates on the workpapers. The procedure for a supervisor to record his review of workpapers is to place his signature or initials on the bottom right-hand part of the workpapers with a date (Pet. May 18, pages 102). The Bedwell comments, initials and dates were not on them when the workpapers were copied in May 1986 and seen by another supervisor. Mr. Bedwell did not tell management officials or counsel for respondent that he had backdated the workpapers, until he learned that copies existed as late as May 1986 which contained no such comments or initials (Pet. May 18, pages 110-114; Bedwell, May 22, pages 175-187, 200-210, and 226; PE 4, 8, and 9; and RE 20). Several of the backdated comments were addressed to "Fred [Jimenez]," one telling Mr. Jimenez "to move this to communication section [of the workpaper]" (Bedwell, May 22, page 184), even though Mr. Jimenez had himself moved to another job by January 8, 1986, and the comment was not placed on the workpaper until May or June 1986. These circumstances suggest that Mr. Bedwell engaged in a deceptive tactic in backdating the workpapers in order to justify his rating of Petitioner to his supervisors. The workpapers themselves were not "changed or altered" by Mr. Bedwell, however. (Pet. May 19, page 436).

c. There is other additional evidence casting doubt on the reliability of Mr. Bedwell as a witness. Using notes, Mr. Bedwell gave dates and contents of his counseling of Petitioner, who had denied that such counseling took place. When confronted on cross-examination with various official records showing him not to have been at work on the dates to which he testified, Mr. Bedwell admitted that he may have misinterpreted his notes (Bedwell, May 22, pages 116, 119-120 and 220-225).

d. Also raising a question as to his veracity, was the testimony of James Morrison, a GAO employee with no connection to the events involved in this case. Mr. Morrison gave credible testimony, disputing a denial by Mr. Bedwell, that Mr. Bedwell had told him, at a party, that on the EMS job he had gotten "stuck with someone that can't speak English clearly" (Morrison, June 11, pages 955, and see also pages 953-954 and Bedwell, May 22, page 241). This was an obvious reference to Petitioner, who was the only person on the EMS job who spoke with a foreign accent.

e. Nothing in Mr. Bedwell's demeanor as a witness gave me any reassurance of his reliability as a witness. Where his account of the facts differs from that of Petitioner, I find that Petitioner's was more reliable and credit Petitioner.

32. Douglas Oxford is a GS-12 evaluator who has been employed by GAO for about seven years and had previously served in the U.S. Marine Corps for 23 years. He was assigned to the Radar Warning Receiver (RWR) job under Warren Faircloth about one month after Petitioner's assignment to that job. At the time of this assignment, Mr. Oxford had been a GS-12 for GAO for about two years (Oxford, May 20, pages 529 and 595). Mr. Oxford had known Petitioner from working on adjacent jobs one time; and he once ran into an uncle of Petitioner's at a shooting match. See Oxford, July 20, pages 17-18. Mr. Oxford and Petitioner worked together closely on the RWR job and he became the day-by-day supervisor of Petitioner after Petitioner's first Unacceptable rating from Mr. Faircloth. See Oxford, May 20, pages 581-582.

a. Mr. Oxford liked and respected Mr. Faircloth and was "bothered" by his being put in the middle of the Petitioner/Faircloth problems. See Sullivan, June 10, page 672, and Oxford May 20, page 591. He was, initially at least, a reluctant witness for Petitioner because he feared for his career at GAO. However, he later became reassured that neither Mr. Faircloth nor GAO would take any retaliatory action against him. See Oxford, May 20, pages 591-593 and 628K. Although Mr. Oxford perceived that Mr. Faircloth knew he was cooperating with counsel for Petitioner on this case, Mr. Faircloth gave him a performance rating that was higher than Mr. Oxford felt he deserved. See Oxford, May 20, page 591.

b. Mr. Oxford testified as a witness for Petitioner and admitted that there were some discrepancies between his testimony at the hearings and statements he had given at a deposition and in affidavits (Oxford, May 20, pages 577, 607-609, 611-613, and 623-628A). One discrepancy was voluntarily corrected by Mr. Oxford. See *Id.* at 577. The others came up during cross-examination. As for his affidavits, he explained that they were not his "word-for-word testimony," but "another person's interpretation of what [he] said" (Oxford, May 20, page 608). They were sent to him and he was told "to make corrections but not make major changes" (*ibid.*). He testified at the hearing that he "had never been satisfied with the writing" of the affidavits (*ibid.*). He reaffirmed that their "substance was true" (*ibid.*).

c. In his deposition Mr. Oxford had stated that Mr. Faircloth was "probably better than average" at giving guidance (Oxford, May 20, page 612). At the hearing, Mr. Oxford testified that he was "average to below" (*Id.* at 611). This is not necessarily inconsistent, because during this period Mr. Oxford's assessment of Mr. Faircloth may have changed. However, Mr. Oxford explained the difference on the ground that its "hard to judge these kinds of things" (*Id.* at 612).

I find that, overall, Mr. Oxford was an unbiased, knowledgeable, trustworthy witness, somewhat put off and annoyed at counsel for being asked to draw lines on nebulous topics. See Oxford, May 20, pages 612-613. Such discrepancies as surfaced were minor. I fully credit his testimony at the hearing.

33. William Faircloth was a GS-13 evaluator-in-charge of RWR job at Warner-Robbins Air Force Base during the period when Petitioner and Mr. Oxford were assigned to that job. He had been permanently assigned to GAO's sublocation at Warner-Robbins for a number of years and had become an expert in the field of electronic warfare, including radar warning receivers. In 1987 he resigned to become self-employed. Management officials considered Mr. Faircloth to be "good," "fair," and to work "well with staff" (Martin, June 8, page 226).

a. Mr. Faircloth expected a GS-12 to act as a GS-12 and gave them no special help, even one in a 90-day opportunity period, such as Petitioner was when assigned to the RWR job and after receiving an Unacceptable performance rating from Mr. Bedwell. See Faircloth, June 9, page 511. Mr. Faircloth "often" sat in his office with his door closed; and staff "respected" his privacy (Oxford, May 20, pages 595-596). As a witness he appeared to be a somewhat testy individual with little patience for questioning by counsel.

b. Mr. Faircloth was unsympathetic to Petitioner's situation. Mr. Faircloth referred to Petitioner as "stupid" to Mr. Oxford (Oxford, May 20, pages 579 and 628G). On the day when Petitioner learned that his mother had unexpectedly died, Mr. Faircloth refused to grant a day's sick leave to Petitioner even though it is available for employees suffering from "emotional incapacity" (Patterson, June 11, page 929). Mr. Faircloth judged him to be able to work that day (Pet. May 18, page 225).

c. Mr. Faircloth's testimony conflicts in important respects from that of Mr. Oxford. For example, Mr. Faircloth denied making derogatory statements about minorities (Faircloth, June 9, page 474). Mr. Oxford testified that he did, namely:

"He made two statements--well, he made two derogatory statements, one specifically about minorities, on several occasions. And the statement that he made is generally about the same wording, as this, 'They come here and take these jobs, these \$35,000 a year jobs, and don't think they have to do anything.' The first time I recall that he said that was when we were talking about those kinds of programs that have been set up in the Federal Government, EEO programs. Fred at that time was the Hispanic Coordinator. We had several people in the office that were coordinators for programs to try to encourage blacks to come into the office or to try to encourage people to vent their frustrations, or if they believed they were being discriminated against -- those kinds of people that they could go to. I don't know that we were talking about those things specifically, but that was generally the conversation. And when he said that, it was the fact that, you know, 'They have all these programs to protect them, and they all get good pay and think that they don't have to do anything, and yet there's no way to get rid of them' -- I shouldn't say that, because he did not say that, but that was the gist of the conversation (Oxford, May 20, pages 576-577).

d. Mr. Oxford testified that the last time Mr. Faircloth made that statement was "after Fred left the job," namely:

At that time we were talking about other people that he had worked with, and he mentioned another individual that he had working for him, a black gentleman, Jesse Smith, who does not work with the office anymore. And he mentioned that he had given Jesse Smith a better rating than he had given Fred. But yet, Jesse Smith was worthless, that he wasn't any good at all, but he had given Fred a worse rating--Jesse Smith had received a better rating. And what he was talking about at that time was that he felt as though Jesse Smith had gotten a better rating than he deserved, and that there was pressure--he felt as though there was pressure brought on people at that time to give certain people better ratings than they deserved because they had these kinds of protection, and that there was nothing we could do about them, you know (Oxford, May 20, page 578).

e. Based upon my observation of Mr. Faircloth and Mr. Oxford during their stints on the witness stand, I believe Mr. Oxford to be the more credible witness. He was shown to have no biases for or against Mr. Faircloth or Petitioner. He was in a position to know what was happening on the RWR job. Although Mr. Faircloth no longer works for GAO, he had an interest in protecting the integrity of his rating. Mr. Oxford had no such interest. Indeed, it was contrary to his interest to take the stand and testify against the interest of his employer, a circumstance that did give him some concern. Accordingly, I credit the testimony of Mr. Oxford where it conflicts with that of Mr. Faircloth.

f. Up until receiving his first Unacceptable rating from Mr. Faircloth, after which Petitioner's mental health began to deteriorate, I also find that Petitioner was a more credible witness than Mr. Faircloth and credit Petitioner's testimony where there is a conflict with that of Mr. Faircloth, during that earlier period.

34. Jesse Flowers has been employed by GAO for 18 years, the last 4 1/2 as a field manager and the rest in evaluator positions. See Flowers, June 1, pages 84-85. Mr. Flowers' "issue area" is in the health delivery and quality-of-care field, for which he is responsible in the Atlanta region (id. at 85). He was Petitioner's second-line supervisor on the so-called VA job. As a witness, Mr. Flowers seemed candid and trustworthy, with some memory faults. There is no evidence that he ever made derogatory statements about or took any adverse actions against minorities prior to working with Petitioner on the VA job. He was anxious that Petitioner have a fair chance to succeed on the VA job, and so informed staff. See Tabb, June 3, pages 41-42 and 58. I credit his testimony.

35. Martha Vawter was a GS-13 when she joined the VA job. For the past two years she has served as an EEO counselor in the Atlanta Regional Office. See Vawter, June 2, page 2. She has been a GAO employee since 1974 and a supervisor since 1976. See id. at 1. She has rated 27 employees during that period. Id. at 2. She has given ratings of "Fully Successful or better to women and minorities, one being a Hispanic." Ibid. She has given a rating of less than Fully Satisfactory to six employees, one to a white male, one to a white female (Marie Bowman), two to black females (one being Magdalene Harris), and two to Petitioner. Ibid.

a. Marie Bowman and Magdalene Harris testified for Petitioner. Ms. Bowman is no longer employed by GAO. See Bowman, May 22, page 1. In early September 1985, she was employed by GAO and working for Ms. Vawter at the time. Id. at 2. While working for Ms. Vawter, she overheard a telephone conversation of Ms. Vawter while in Nashville at an audit site. Ibid. She heard Ms. Vawter say "something like, 'Well, there goes GAO'" (ibid.). Ms. Bowman did not know what she was talking about. Ibid. Later on, back in the Atlanta office, Ms. Bowman "heard that there was a class action suit that went on, and, as a result of that suit, mainly black people had been promoted in the Atlanta Regional Office [and she] just assumed that's what she [Ms. Vawter] was referring to" (Bowman, June 2, page 2 and see also page 3). Ms. Bowman testified that she got "one unsatisfactory rating" from Ms. Vawter (id. at 4). Ms. Bowman got "borderline ratings" from other GAO supervisors (id. at 6). Ms. Bowman resigned from GAO, and assumed she would have been removed if she did not resign. Ibid. At her present job at VA, Ms. Bowman has received a Fully Successful rating and has been "informed" that she will receive "a highly successful one" for her next job (id. at 7). In view of Ms. Bowman's poor rating from Ms. Vawter, her credibility as a witness is somewhat suspect. And the assumption she made from overhearing a telephone conversation is based on too tenuous a ground to accept without other supporting evidence, of which there is none.

b. Magdalene Harris is a black GS-12 evaluator who has been assigned to GAO's Atlanta Regional Office since the latter part of November 1983. See Harris, May 21, page 866. Both before and after working for Ms. Vawter, Ms. Harris received good performance ratings. See Harris, May 21, page 880 and PE 48, page 1. She testified "under subpoena" (Harris, May 21, page 872). Ms. Harris impressed me as a credible witness and her testimony was basically undisputed. It establishes that Ms. Vawter was a tough taskmaster to Ms. Harris and that in rating her performance she misrepresented the amount of time Ms. Harris had in which to accomplish her work and the amount of work she was assigned. See Harris, May 21, pages 867-879.

c. The General Counsel attacks the credibility of Ms. Vawter on the basis that she alleged Petitioner made "simple math errors" in compiling a schedule (RE 53); that there was "no pattern or apparent explanation for the difference in the sums she was counting and the sums Petitioner counted;" and there was no "judgment" involved (GCPHBr. pages 47-48). In fact, it was established that there was a judgment call in the count and also a pattern and an explanation --she was counting State and Federal deficiencies and he was counting only Federal ones. See Vawter, June 2, page 163-180. As to the discrepancy in the count, I find that Ms. Vawter was misled by the fact that Petitioner did not point out to her the explanation for the difference. The BARS Manual places a responsibility on subordinates to be receptive to feedback on job performance. See FF 21. Instead, as Petitioner testified, he deliberately held back the explanation from Ms. Vawter, on the ground that he "did not want to help her or management by pointing out the errors that they had made, which basically would have resulted in them trying to find other faults in [his] work to justify an unfair rating" (Pet. July 7, page 159). Under these circumstances, I cannot fault Ms. Vawter for not trying to resolve the matter on her own.

d. As a witness on the stand for almost a full day, Ms. Vawter impressed me as honestly trying to recall and respond to the questions asked. She appears to be a tough supervisor and is one of the breed of younger supervisors considered by management to "call it the way it [i]s" in rating subordinates. See FF 7. In the case of Ms. Harris, she seems to have called it unfairly.

36. George Tabb worked with Petitioner on the VA job supervised by Jesse Flowers and Martha Vawter. He was a GS-11 when he worked with Petitioner on the VA job and was promoted to a GS-12 in May 1987. See Tabb, June 3, page 36. He was knowledgeable about the VA job, the GAO staff working on it, and the conditions under which they worked. He was called as a witness for Respondent and gave testimony in support of that of Ms. Vawter and Mr. Flowers, who had been his supervisors. However, I do not find that this factor influenced his testimony. He was a newly-promoted GS-12 at the time he testified and so not dependent upon them for a promotion. He impressed me as candid, knowledgeable, and trustworthy as a witness, and I credit his testimony fully.

37. Marvin Colbs is the retired Regional Manager of the Atlanta Regional Office. See FE 2 and 3 above. He headed the promotion panel which decided to promote Petitioner in spite of his known need for seasoning. See FF 30c, above. He appeared to have no biases. He was knowledgeable about the Atlanta Regional Office and the promotion of Petitioner to a GS-12. He seemed candid and trustworthy as a witness, and I have credited his testimony on these points.

D. Petitioner's Performance

Appraisals and Consequences

Petitioner relies, in part, upon his "very good ratings" from prior supervisors to build his prima facie case of discrimination as to the Unacceptable ratings here at issue. See, e.g., GCPHBr. 62-63. Findings of fact 38-40 deal with the appraisals of his prior supervisors, and findings of fact 41, 45 and 47 deal with those here at issue.

Naron Searcy as supervisor

38. From July 12, 1983, to February 2, 1984, Petitioner was a GS-11 supervised by Naron Searcy on an assignment whose objective was to determine "whether increased funding to DOD during the period FY 1980-1983 eliminated problems that prevented accomplishments of overall goals and objectives" (JE 1,

page 1). The job involved "some complexities" and was, overall, "around the middle, or a little more, in complexity" (Searcy, May 21, pages 682-683, 696 and 708).

a. Mr. Searcy rated Petitioner Fully Successful or better in all job dimensions except Supervision, for which there was no basis for evaluation. In Written Communication, he rated petitioner as "Superior" and cited his workpaper summaries as "excellent" and demonstrating "skills in terms of organization, clarity, and logic of presentation in accordance with review objectives" (JE 1, pages 1 and 2). See also Searcy, TR May 21, pages 686-687. In Data Analysis, Mr. Searcy rated Petitioner as "Exceptional" and cited his "extraordinary job of analyzing tasks from different Army engineer battalions" on a "quick fly-through" and "without having to make a second visit" (JE 1, page 1).

b. At the beginning of the job, Mr. Searcy and Petitioner "worked together" under a written "job plan" which "very specifically said what each individual person would do in the time frame in which those kinds of things would be done" (Searcy, May 21, page 694). Job plans are still used at GAO, but not as a "hard requirement" (Searcy, May 21, pages 694-695).

c. About three-quarters way through the job, Petitioner conducted interviews "independently" and did "the work exclusively on one of the battalions," while Mr. Searcy was away (Searcy, May 21, page 680). Mr. Searcy considers Petitioner to be a "quick learner" (Searcy, May 21, page 681) who raised appropriate questions during interviews. Mr. Searcy found only "minor editing problems" in Petitioner's interview write-ups and thinks Petitioner "captured the essence of the discussions very well" (Searcy, May 21, page 681). He judged Petitioner's analytical ability as "exceptional" because of his ability to summarize information, work independently, present impressive amounts of data which was relevant, and organize it well. (Searcy, May 21, page 683-684). Mr. Searcy noticed no pattern of problems with Petitioner. See Searcy, May 21, page 682.

d. Mr. Searcy has been a GAO supervisor for 16 or 17 years and does not believe that Petitioner's receiving an Unacceptable rating can be explained on the basis of the complexity of the job or holding the higher grade level of GS-12. See Searcy, May 21, pages 677, 709-710.

Eugene Taylor as supervisor

39. From February 7, 1984, to February 1, 1985, Petitioner was a GS-11 supervised by Eugene Taylor on two jobs. See JE 2 and 3. From February 7 to June 30, 1984, the job was a survey of the Army's force modernization program.

a. Mr. Taylor rated Petitioner as Fully Successful in Oral Communication; Superior in Planning, Data Analysis, Written Communication, and Administrative Duties; and Exceptional in Maintaining Effective Work Relationships and Equal Opportunity Environment. See JE, page 1. There was no basis for evaluating Supervision. In support of these ratings, Mr. Taylor commented that Petitioner had "devised an effective alternative audit approach;" performed an "exceptional job of modifying our original audit guidelines so as to accomplish any objectives in a minimum of time;" demonstrated "tenacity" in obtaining data from "reluctant" agency officials; performed "a superior analysis of the facts so as to support our position;" prepared a "superior summary which included general background information and the data in support of his assigned issue area;" performed all administrative tasks in a "timely, accurate manner;" and developed an "exceptional working relationship with a FORSCOM office that has traditionally been difficult to deal with" (JE 2, back of page 1).

b. From July 2, 1984, to February 1, 1985, the job was "to determine whether the Army was distributing its force modernization equipment in accordance with its policies and if not, why not, and what [were] the adverse effects" (JE 3, page 1). It was "particularly tedious" for GAO staff because of a reluctant attitude of FORSCOM's force modernization staff who, historically, have been less than willing to share their documentation with auditors (JE 3, page 1). This was a more complex job than the preceding one (Worth, June 11, page 802-803).

c. On this job Mr. Taylor rated Petitioner Fully Successful in Job Planning, Written and Oral Communication, and Administrative Duties. He rated him Superior in all else but Supervision, for which there was no basis for evaluation. See JE 3, page 1.

d. In his testimony at the hearing, Mr. Taylor testified that Petitioner "handled himself well" at interviews of agency officials who "seemed to enjoy talking with him, and be receptive to his questions" (TR May 21, page 718). Mr. Taylor had no "significant problems" with Petitioner's write-ups (TR May 21, pages 718-719).

Bobby Cooper as supervisor

40. From January 27, 1985, to June 15, 1985, Petitioner was a GS-12 supervised by Bobby Cooper on a job to review the capability of the Army's 59 mobilization stations to move equipment from a station to a seaport of embarkation from which it could then be transported to the theater of operations. Mr. Cooper's team visited nine stations. The assignment was "generally of medium complexity," complicated by the short period of time allowed at each station (JE4, page 1). The assignment was in the implementation stage. Petitioner was primarily responsible for one of two major areas--"determining the status of blocking, bracing, packaging, crating, and tie-down materials (BBPCT) at each installation" (JE4, page 1). Petitioner did his part "without very much supervision" (Cooper, May 20, page 636).

a. Petitioner's performance was praised for its "depth and thoroughness;" and he was rated as Superior, in most job dimensions (JE4, page 2). Mr. Cooper noted in the appraisal, signed on June 11, 1985, that he "very much enjoyed working with Mr. Jimenez and [he] would welcome the opportunity to do so again" (JE4, page 3).

b. On the job dimension of Planning, Petitioner was found to have "planned his own work itinerary," in a "superior" way and accomplished his objectives ahead of schedule (JE4, page 2).

c. On Data Gathering and Documentation, Petitioner received a Superior rating and was praised for his "thoroughness" and effort in getting "specifics," some of which were "hard to come by," and all of which was "highly relevant." All his "working papers met policy standards in all respects" (JE4, page 2).

d. On Data Analysis he also was rated "Superior" and praised for being able "to cipher out the methodology used at each installation and then weigh that methodology against the few broad guidelines that existed" (JE4, page 3). At some installations, officials "blatantly lie[d]" to the team; and Petitioner showed a "special talent for identifying these misstatements through analysis of existing data, as limited as it might be" (JE4, page 3). He also showed "no reservations about bringing the situation to the attention of responsible officials" (JE4, page 3). "As a result, numerous on-the-spot corrections were made to inventories or procedural guidelines that will have significant future benefits" (JE4, page 3).

e. On Written Communication, Petitioner's "written products were of a quality that [Mr. Cooper had] seldom see[n]" (JE4, page 3). They were "very readable, in excellent form, and, most importantly, they contained detailed relevant facts" (JE4, page 3). His "summaries and working papers captioned the results of his data gathering and analysis comprehensively and effectively" (JE4, page 3). He received a rating of superior.

f. On Working Relationships and Equal Opportunity, Petitioner was praised for making "an extra effort to maintain a good working relationship with both his teammates and the agency personnel," and succeeded, which was "especially commendable in light of the number of service confrontational situations [the team] found [itself] in during the course of this review" (JE4, page 3). Mr. Cooper noted that "it is not easy to tell someone that he or she is totally wrong about an issue and then have them go away smiling," but that Petitioner "managed to do this on numerous occasions" (JE4, page 3). Petitioner received a rating of superior.

g. On the Cooper job, Petitioner and Mr. Cooper worked "closely together," at first (Pet. May 18, page 20). Mr. Cooper "reviewed [Petitioner's] work, critiqued, and provided some positive feedback and constructive criticisms" (Pet. May 18, page 20). Mr. Cooper reviewed Petitioner's work as it progressed. See Pet. May 18, page 21.

h. Mr. Cooper and Petitioner conducted some joint interviews of agency officials. Mr. Cooper found that Petitioner did "very well" and impressed him with his "thoroughness" and willingness to "challenge somebody" (Cooper, May 20, page 637). Petitioner's write-ups of the interviews demonstrated no problems "of any significance" (Cooper, May 20, page 638). He "might have made some additions," which he explained is "[n]ormally [done] when two people work together on an interview" (TR, May 20, page 638). One person picks up something another person misses. Petitioner missed no "major points" (Cooper, May 20, page 639). "Detail" was Petitioner's "greatest strength" (Cooper, May 20, page 640).

i. Mr. Cooper recommended Petitioner for an "outstanding performance award" which he did not receive because he was given, instead, on August 1, 1985, an award for his recruiting activity as Hispanic Employment Program Coordinator for the Atlanta Regional Office (Cooper, May 20, page 641 and Stip. 8).

William Bedwell as supervisor

41. From July 10, 1985, to December 3, 1985, Petitioner, as a GS-12, was assigned to a survey and review of emergency medical services systems (EMS) in the United States. See JE 6. Petitioner had never before worked on a health care issue. See Pet. May 18, page 68. It is "tough" on evaluators who have worked only on defense jobs to be assigned to a health field issue (Flowers, June 1, page 89).

a. The objective of the EMS assignment was "to design" a feasible approach for conducting a nationwide review of the status of EMS systems and to identify those significant Federal, State, and local factors that encourage or impede the development of such systems. The review was requested by Senators Cranston and Kennedy to identify any needed changes in the present Federal role. See JE 6, page 1.

b. William Bedwell was requested for the job by the two Senators "because of his extensive background and knowledge of the area" (Crowl, June 8, page 113). The EMS job was "very complex" and "important" (Posner, June 1, pages 48-49 and 54-55). It needed "very good people" and "additional staff," even if Petitioner had turned out to be a "world beater" (Posner, June 1, page 52 and 53 and Crowl, June 8, page

122). Mr. Bedwell had to play a "tremendous role," coordinating the work of six regions and constantly going "back and forth to Washington to deal with Washington folks as well as the staff of the requesting Senators" (Crowl, June 8, page 210). He "became a headquarters person working out of Atlanta" (Bedwell, May 22, page 25). Mr. Bedwell had to be in Washington "a great deal of the time" (*id.* at 39).

c. During Petitioner's initial week or so on the job, Mr. Bedwell did not spend "a whole lot of time" discussing with him the background of the EMS job (Bedwell, May 22, page 38). He provided him with a six-inch packet of background materials and "a Florida planning document" that was about "a foot thick" (Bedwell, May 22, pages 29-30). Mr. Bedwell clipped the parts of the documents to which he wanted Petitioner to pay "particular attention" (Bedwell, May 22, page 30-31). Mr. Bedwell did not discuss "specific assignments or expectations" or "anything related to the performance appraisal system" at the expectation-setting session (Pet. May 18, pages 27-28). He did not go through the BARS Manual with Petitioner (Bedwell, May 22, page 35). He told Petitioner the objective of the job as "[d]etermining the status of emergency medical services in the U.S." and that he was "not really sure how to approach it" because there were no standards in effect (Pet. May 19, pages 369-370).

d. During Petitioner's first two weeks on the job, he read the background material, helped with clerical duties, and assisted Mr. Bedwell in getting data collection instruments prepared for use in the forthcoming visits to State offices in Massachusetts and California. See Pet. May 18, page 28 and Bedwell, May 22, page 40.

e. Initially, Mr. Bedwell had no reservations about Petitioner's assuming the role of site senior. See Bedwell, May 22, pages 34-35. But, at some point in time, Mr. Bedwell told Petitioner that his assignment to be a site senior was "probably incorrect" because "essentially [he] was a new GS-12, had very little supervisory experience, and very little involvement with this particular issue area" (Pet. May 18, pages 29-30). Petitioner agreed. See May 18, page 35. When Mr. Bedwell heard that a newly-hired GS-7 was being assigned to his team, he "more or less suggested" to Petitioner that he speak to Elkins Cox, and explain that he (Petitioner), was "new," too "involved in the Hispanic Employment Programs, and had no prior experience; that this was not a time to assign [Petitioner] as a supervisor" (Pet. May 18, page 35). Petitioner did speak to Mr. Cox; and the newly-hired person was not assigned to the job. See *ibid.*

f. On Monday, July 22, Petitioner and Mr. Bedwell went to Boston. See Bedwell, May 22, page 41. The purpose of the trip was "to validate the data collection instrument" which Mr. Bedwell had prepared (Pet. May 18, page 36). Officials were to be interviewed and their opinions obtained. Petitioner was "to take very good notes and prepare write-ups after [their] interviews" (Pet. May 18, page 37). At the first meeting, on July 23, there were three State officials, Mr. Bedwell, and Mr. Bedwell's superior, Paul Posner. Mr. Posner was a GS-15, who was the Group Director from Washington.

g. After work on three of the four nights they were in Boston, Mr. Bedwell asked Petitioner to join him in the hotel lobby to discuss the day's events. See Pet. May 18, pages 39-40. On the evening of the first interview, Mr. Bedwell compared what they had been told about the Boston EMS to the way he envisioned the Florida EMS would be audited later on in the assignment. See Bedwell, May 22, page 46.

h. While discussing work in the hotel lobby, Mr. Bedwell had a number of drinks and "basically asked [Petitioner] to join him" (Pet. May 18, page 42). Both ordered scotch and water (Bedwell, May 22, page 48). These evenings were "cordial" (Pet. May 18, pages 45-46). Petitioner ordered his own drinks. See Pet. May 19, page 393. Petitioner told Mr. Bedwell that he was "basically a family man, Catholic man, that did not particularly like to drink" (Pet. May 18, page 44). They also discussed "where [Petitioner] was from

[and] how [he] came to the U.S." (Pet. May 18, page 45).

i. In spite of Petitioner's beliefs about drinking, he joined Mr. Bedwell, "out of deference," because he was "new on the job" and Mr. Bedwell was his "new supervisor" (Pet. May 18, pages 42-43). He did not realize, at first, that Mr. Bedwell drank so much and for so long into the evening. Mr. Bedwell would have three drinks while Petitioner was "still on [his] first drink" (Pet. May 18, page 43). Mr. Bedwell "would insist, 'Let's have another one'" (Pet. May 18, page 43). Petitioner "felt a little pressured" and did join Mr. Bedwell, but "reluctantly" (Pet. May 18, page 43 and see also pages 44 and 46).

j. Other witnesses who have worked and traveled with Mr. Bedwell testified that he never required them to socialize with him after hours and felt no pressure to drink. Maria Bauer, a GS-9 evaluator, testified that it was very clear when she traveled with the Bedwell team that there were no requirements to socialize after work hours. What one did after hours was of no concern to Mr. Bedwell, but anyone was welcome to join him. Ms. Bauer, who drinks no alcohol, because it is against her religious beliefs, felt no pressure to violate her beliefs when she traveled with Mr. Bedwell. See Curtis, June 10, pages 613-614 and Bauer, May 22, pages 7-11. Ms. Bauer testified about an evening in March 1986, with Mr. Bedwell, Nancy Toolan, a GS-12, and Linda Lootens, a GS-9, while on a trip to look at an EMS system. Ms. Bauer had a Perrier and the others had alcoholic drinks. Mr. Bedwell joked that her Perrier was "too strong" (Bauer, May 22, page 11). While she did not feel "pressure" to have any alcoholic beverage, she felt that there may have been "tension" because she was not drinking and the others "might have felt a bit uncomfortable" (id. at 10).

k. Mr. Bedwell told Petitioner to write up the Boston interviews "as soon as possible" and that he could write them up in Atlanta if he did not have time in Boston (Bedwell, May 22, page 76). Later, a staff member in Boston caught an error in Petitioner's write-up in that it stated that the EMS office established standards, whereas it was really another office. See page 4 of PE 34.

l. A field trip to California occurred a week after the return to Atlanta from the Boston trip (Pet. May 18, page 54). The purpose of this trip was to "continue trying to clarify and solidify what would be [their] approach to pursuing the review of emergency medical services in the implementation phase through the data collection instrument methodology" (Pet. May 18, page 56). Again, Mr. Bedwell emphasized that Petitioner "maintain good notes" of the interviews (id. at 57). Petitioner asked a few questions of one official, Mr. Moorehead. Ibid. Mr. Moorehead commented that the answer was in documents he had mailed "a few weeks earlier" (id. at 57-58). Mr. Bedwell had them, but Petitioner had not seen them. See id. at page 58. The official said to Petitioner "something like, 'What's the matter? Doesn't he share the information with you?'" Petitioner felt embarrassed and became reluctant to ask more questions (ibid.).

m. In regard to his participation in interviews, Mr. Bedwell told Petitioner that he was "doing fine as long as [he] kept good notes and prepared the write-ups," which was his "main role" (Pet. May 18, page 58). Mr. Bedwell told Petitioner to ask questions if he was not clear about anything.

n. Petitioner himself interviewed one of the San Diego officials. He did not have a prior chance to talk much about the interview because he had been going out with Mr. Bedwell in the evenings to "socialize" (id. at 59-60). Mr. Bedwell did give Petitioner some "general guidance" such as "this is who we're going to meet, and this is the office we're going to visit, and perhaps we'll want to cover the role of this office in the delivery of EMS" (Pet. May 20, pages 454-455 and see also pages 452-453). Contrary to the testimony of Mr. Bedwell, Petitioner testified that Mr. Bedwell did not give him an outline in preparation for the interview, and that the official did not appear "confused" (Pet. May 18, page 61 and see Bedwell, May 22,

pages 96-100). Petitioner recalls explaining the "purpose" of the visit to the agency official. (Pet. May 18, page 60). Petitioner recalled that Mr. Bedwell "injected himself saying things--trying to provide more specific information about what [they] had learned already from [their] visits to the State offices in California" (*ibid.*). No write-ups were prepared from the San Diego discussions. See Pet. May 20, pages 455-456. Mr. Bedwell used this interview as support for giving Petitioner an Unacceptable rating in Data Gathering. See JE 6, page 2. Mr. Bedwell admitted that "[m]aybe [he] didn't provide [Petitioner] the right cue or something" (Bedwell, May 22, page 100). The conflicting versions of this interview may be the result of unclear minds on the morning after an evening of "socializ[ing]" and drinking (Pet. May 18, pages 59-60). I find Petitioner to be the more reliable witness and credit his account.

o. The pattern of drinking in the evenings continued throughout the California trip. State officials accompanied them and Mr. Bedwell "kept insisting that [Petitioner] should go with him to take notes of whatever [they] discussed with officials" (Pet. May 18, page 63). Petitioner "didn't like to do this" but "felt that it was an extension of the work" (*Id.* at 63 and 64). Mr. Bedwell would say "something like 'Okay, I'm going to have a drink, and Fred is probably going to have another one, right? What will you have?'" (Pet. May 18, pages 63-64). "Under these circumstances," Petitioner felt he "was more or less compelled to have a drink" (Pet. May 18, page 64). Mr. Bedwell "would pick up the tab and say, 'I'll take care of it'" (Pet. May 18, page 82). Later, he would ask Petitioner "to chip in cash to more or less split it as much as [they] could" (Pet. May 18, page 62). Petitioner found this to be "unusual, but given the circumstances, [he] had to agree" (Pet. May 18, page 63). When they left California, Mr. Bedwell indicated to Petitioner that he "was doing pretty good because [he] was keeping good notes and, on occasion, would point out things in [their] conversations with officials" (Pet. May 18, page 68). By this time Petitioner had been on the job "about five weeks" (*ibid.* at 68).

p. Mr. Bedwell wanted the write-ups done on the word processing machine because "he's the type of person that likes to do a lot of changes, and it was easier to retype it that way" (*id.* at 73). As to the old copies, Mr. Bedwell would say: "'Okay, we don't need this anymore,' or something like that" (*id.* at 73-74). He knew that Petitioner was not keeping the old copies. Although Mr. Bedwell testified to how poorly prepared the unrevised write-ups were, he admitted that he made no copies of them. See e.g. Bedwell, May 22, pages 134-135, 189-190, and 200-201, 238-239.

q. Although Mr. Bedwell criticized Petitioner in his performance appraisal for taking "an inordinate amount of time preparing [write-ups] and making sure that they were neat" (JE6, page 3), Mr. Bedwell never made any comments to Petitioner "in reference to timeliness" (Pet. May 18, page 137). Petitioner prepared them on the week following the visits to officials. See Pet. May 18, page 136. As for "neatness," a glance at the performance appraisal prepared by Mr. Bedwell on Petitioner demonstrates that Mr. Bedwell has a low regard for neatness. See PE6.

r. Although encouraging Petitioner by telling him that he was doing good work, Mr. Bedwell was becoming concerned about Petitioner's ability to lead the project in Florida. See Bedwell, May 22, page 94. Mr. Bedwell expressed this concern to his supervisor, Robert Crowl, perhaps as early as the Boston trip but "definitely" after the California trip (Crowl, June 8, page 118 and see Bedwell, May 22, page 195). These concerns were Petitioner's "ability to participate in the various meetings that were being held with the EMS officials, his ability to summarize the data in work paper write-ups, and just be an active partner and understand what we were trying to do and accomplish" (Crowl, June 8, pages 118-119) and "to promptly prepare the write-ups" (Crowl, June 8, page 119).

s. Upon their return from California, Petitioner sought out his friend, Mario Artesiano, a GS-13 evaluator, and told him of "the differences in [his and Mr. Bedwell's] personalities and how it was influencing [him] in his ability to work with Bedwell" (Pet. May 18, page 95). Mr. Artesiano advised him "to try to do the best that [he] could" (ibid.).

t. After the California trip, Mr. Bedwell was "going to Washington a lot, every week" and did "not provide much coaching" to Petitioner, unlike Petitioner's experiences with his prior supervisors. (Pet. May 19, page 429-430). Initially, Petitioner and Mr. Bedwell "talked every day" (Pet. May 19, page 366). After the California trip, Mr. Bedwell was "not communicating with [Petitioner] as he had at the beginning" (Pet. May 19, page 430). After the California trip, Petitioner received some instructions through a third person and by telephone (Toolan, June 10, pages 686-687 and Bedwell, May 22, page 127).

u. In late August or early September, Mr. Crowl and Mr. Bedwell discussed getting additional staff with Elkins Cox and probably with Mr. Patterson, who was Acting Regional Manager. See Crowl, June 8, page 124.

v. Sometime before September (probably in July), Petitioner took a few hours off of his EMS job to write a letter nominating Mr. Artesiano for an award for his "outstanding achievements as Hispanic Employment Program Manager in the Atlanta Regional Office for the last seven years" (PE, May 18, page 25). He did so at Mr. Patterson's request. See ibid. He charged it to the Hispanic Employment Program Manager's code 990814 (Pet. May 18, page 75). He "probably" raised the subject with Mr. Bedwell "in early July" (Pet. May 18, page 76).

w. In early September, Petitioner attended the Hispanic Heritage Week activities in Washington. He informed Mr. Bedwell about the trip "probably the week before" he took it. (Pet. May 18, page 76). Mr. Bedwell did not "particularly like [his taking] a week off" (Pet. May 18, page 77). Mr. Bedwell denied knowledge of Petitioner's work on this collateral duty, prior to Petitioner informing him that he would be taking a week off the EMS job, and used this as an example for rating Petitioner as Unacceptable in Oral Communication. See JE 6, page 3.

x. The week of September 9, Mr. Bedwell and Petitioner travelled to Washington to meet with Paul Posner, Pat Elston, a health field expert, and David Bellis, a methodology expert of GAO, about the approach to follow in the implementation stage of the job, and to "plan the guidelines" (Pet. May 18, page 84 and Bedwell, May 22, page 197). Mr. Posner "did not particularly like the approach of the DCI's [data collection instrument] that Bedwell had envisioned initially" and wanted "a different approach" (Pet. May 18, page 78). At the end of the week, William Gatsby, Mr. Posner's superior, joined the group. See Pet. May 18, page 78. Petitioner did not say "much" at the meeting which included Mr. Gatsby (Pet. May 18, page 79). Mr. Posner conducted the meeting and Mr. Bellis and Mr. Bedwell made a "few" comments on "what was going to be the approach" (Pet. May 18, page 79). Petitioner "hesitated to participate a lot because [he] was kind of confused as to what had transpired. Initially, [he] thought that it was going to be simply following the DCI approach, and when Mr. Posner expressed concerns, serious concerns, and [they] had to really change emphasis, [he] was a little concerned about the methodology [they] were going to follow and was a little confused about what [they] were going to do" (Pet. May 18, page 79). Petitioner also "hesitat[ed] to make comments" because Mr. Bedwell had expressed a dislike for Ms. Elston, and did not like Mr. Posner "kind of interjecting himself that much" (Pet. May 18, page 80).

y. In mid-October, Mr. Bellis and Ms. Elston came to Atlanta and were joined by Gail Cooper, who was Director of an EMS in San Diego and had been hired by GAO as a consultant for a week. See Pet. May 18, page 84. Mr. Bedwell "again wanted to go out to socialize with them and asked [Petitioner] to go along" (Id. at 81). Petitioner declined and said: "Well, no, I really don't want to go drinking anymore" (Id. at 82). He explained to Mr. Bedwell that:

"[He] was a person of Catholic values and a family man; that [he was] not that type of person that likes to socialize the way he likes" (Pet. May 18, pages 42-43).

z. At the time of the Bellis-Elston-Cooper trip to Atlanta, Petitioner was "not really sure what approach [the team] was going to follow" (Pet. May 18, page 83). Ms. Cooper was there, "an expert in the field;" Mr. Bellis was there, "an expert in methodology;" and Mr. Bedwell was there, who "had been working in the area for a long time" (Id. at 83). Petitioner was instructed "to sit at a computer" and "input information being developed and shown on a blackboard and a lot of flip charts all over the room" (Pet. May 18, page 83). At the end of the meeting the information was printed out so that they "could review it overnight and discuss it in the morning again" (ibid.). This task "did not allow [Petitioner to] participate a lot" (ibid.). Ms. Cooper "did most of the talking" (Id. at 84).

aa. On October 15, 1985, Petitioner received a two-page memorandum from Nancy Toolan, in which she relayed to him instructions from Mr. Bedwell as to preparations for the kick-off conference, which was to start on Monday, October 28. See RE 15. Mr. Bedwell was in Washington for the two-week period preceding the kick-off conference. Nancy Toolan was the GS-12 who had just been assigned to the EMS job and was to be on leave up until the day of the conference. See Toolan, June 10, page 685. Considerable material had to be gathered, copied, and put in packages for the participants.

bb. One criticism of Petitioner's preparation for the conference was that page 40 of the material was behind page 42 and page 33 was found to be missing during the first morning of the conference. This embarrassed his superiors before all the conferees (Crowl, June 8, page 134).

cc. Another criticism of Petitioner's performance in preparing for the kick-off conference concerned his preparation of a map to be included in the package of material given to the participants. Mr. Bedwell was in Washington when the map had to be prepared, so Petitioner went to Mr. Crowl for guidance three times before it was prepared to Mr. Crowl's satisfaction. Mr. Crowl was annoyed that Petitioner needed this much help to accomplish a "simple, routine task" (Crowl, June 18, page 126, and see RE 13, page 4).

dd. The kick-off conference took place on October 28 and 29. It was set up to be "a very structured presentation where [Mr. Bedwell] would present [to about 20 evaluators representing all the regions participating in the EMS audit] the approach and answer any questions they might have" (Pet. May 28, page 85 and Bedwell, May 22, page 129). Petitioner "did not participate a lot" because he "didn't have a lot of questions, and [he] thought it was better to let other regions that had questions raise them and let them answer their questions" (Pet. May 18, page 85). Petitioner "knew more or less what [the audit team] was looking for," whereas the evaluators from the other regions had had no prior involvement in the audit (Pet. May 18, page 85). At the end of the kick-off conference Mr. Bedwell announced that if the participants had any questions they were to go to either him or Ms. Toolan. See e.g., Pet. May 19, pages 429 and May 18, pages 95-96. Petitioner felt "insulted" that Mr. Bedwell did not mention his name (ibid.).

ee. Mr. Posner noted Petitioner's lack of participation at the kick-off conference and at prior meetings. See Posner, June 1, pages 31, 33, 50 and 53. This raised questions in Mr. Posner's mind as to Petitioner's knowledge of the subject and usefulness to the assignment. In Mr. Posner's view, "the only way [he] can gauge whether someone looks like they're going to work out is whether or not they are participating in the meetings that [he is] involved with" (id. at 53).

ff. By the end of October, Mr. Bedwell had not told Petitioner that his performance was "not fully successful in any element" (Pet. May 18, page 88).

gg. Around the end of October, after the kick-off conference and before taking off on a scheduled trip to Florida to review the EMS there, Petitioner went to Mr. Patterson and asked for a transfer. See Pet. May 18, page 93. Petitioner told Mr. Patterson that he "had a difference in personality with Mr. Bedwell" and that, with Ms. Toolan already on the job, his transfer would not cause "much disruption" (Pet. May 18, page 93). Petitioner did not elaborate on the nature of the personality conflict. See Patterson, June 11, page 819. He did not mention that he preferred to work in the defense area. See Patterson, June 11, page 936. Mr. Patterson said he would "look into it" and would try to get him reassigned that week (Pet. May 18, page 94). Later, Mr. Patterson informed Petitioner that it would "probably take a few weeks" and that Petitioner would have to go to Florida (Pet. May 18, page 94-95).

hh. On November 1, 1985, Mr. Patterson told Mr. Bedwell that Petitioner had asked to be taken off the EMS assignment (Bedwell, May 22, page 138).

ii. The trip to Florida was made on November 5 and ended on November 15. See Toolan, June 10, page 707. Petitioner and Nancy Toolan both went to Florida. Neither was designated as site senior. Before they left, Mr. Bedwell sat down with them, went over the review guidelines, and assigned some areas to Ms. Toolan and some to Petitioner. See Pet. May 18, page 89 and Toolan, June 10, pages 685-686.

jj. Robert Crowl visited the Florida site while Ms. Toolan and Petitioner were there. He reviewed what they had collected and their write-ups. Petitioner's write-ups were in "a draft format" to be finalized when he got back to Atlanta (Pet. May 18, page 91). One comment of Mr. Crowl was that "some of the things did not correlate with those documents [they] had obtained" (ibid.). Petitioner was "following up on them when he came" (ibid.). Mr. Crowl found that Petitioner had recorded one piece of information "erroneous[ly]" (Crowl, June 8, pages 146-148 and see also page 180). Mr. Crowl knew it to be erroneous because it was "one of those things that was common knowledge," from "being familiar with the program" and being "up to date on background material" to which Petitioner should have had access. See Crowl, June 8, pages 134-138. The officials were reinterviewed by Petitioner and Mr. Crowl and gave the correct information. See id. at 136. Petitioner repeatedly questioned the officials about the matter and, each time, got the same reply, which was contrary to the way Petitioner had recorded it. See ibid.

kk. Another seeming inconsistency in Petitioner's Florida work shows up in a comparison of his final fact sheet with one of his write-ups. The write-up states that verification of trauma centers is "mainly a paperwork verification process" (RE 20, page 2), whereas his final point-sheet notes that "on-site visits" are required (PE 8, page 4).

ll. To an 11-page point sheet prepared by Petitioner on his areas of responsibility on the Florida trip, Ms. Toolan later added three pages--one page to complete information on the communications segment assigned to Petitioner, and two pages to add information on the training segment which was assigned to Petitioner and which was not discussed by him at all. See RE 13, pages 23-24, 27; Pet. 8, page 1; PE 39,

pages 7, 15-16; Pet. May 18, 125-127; Bedwell, May 22, page 136, and Toolan, June 10, pages 696-697.

mm. Although Mr. Bedwell claims that by the end of August he had decided that some of Petitioner's performance was "less than fully successful," [i]t never crossed his mind to, you know, document [his] comments, [his] discussions" to and with Petitioner (Bedwell, May 22, pages 195-201).

nn. Once the decision was made to reassign Petitioner, it was necessary to prepare a performance appraisal since he had been on the job for more than 30 staff days. See RE 1 (backside). On December 3, 1985, Mr. Bedwell rated Petitioner as Unacceptable in Data Gathering and Documentation, Data Analysis, Written Communication, Oral Communication, and Maintaining Effective Work Relationships and Equal Opportunity Environment. See JE 6, page 1. He rated him as Borderline in Administrative Duties. He found no basis for evaluating Petitioner on Job Planning and Supervision.

oo. The Bedwell performance appraisal of Petitioner criticized Petitioner for such things as: "unable to adequately obtain or record appropriate interview information;" failed "to participate in discussions;" "demonstrated little ability to understand the subject or the issues;" and his thoughts lacked depth or specificity" in analyzing data (JE 6, pages 2 and 3).

pp. Mr. Crowl testified that he concurred in Mr. Bedwell's rating, relying on a number of personal observations. See Crowl, June 8, page 126. One concerned the preparation of the map. See FF41cc, above. Another concerned Petitioner's failure to say more than a few words at the kick-off conference. See Crowl, June 8, pages 127-128. Another was the erroneous recording of information on one write-up done in Florida. See FF40jj, above. Another concerned the amount of time it took Petitioner to prepare write-ups. Another concerned his perception that headquarters staff became reluctant to relay information through Petitioner. (Crowl, June 8, pages 144-145). Another concerned the day that Mr. Crowl looked for Petitioner and found that he had gone and "forgot to tell anyone" (Crowl, June 8, pages 141-142). Another concerned Petitioner not always adequately justifying his travel advance which, one time, had to be reduced. See Crowl, June 8, page 142.

qq. Petitioner showed the Bedwell rating to Mr. Patterson who told Petitioner that he was "amazed" (Pet. May 18, page 97). When Petitioner told him he thought it was incorrect, Mr. Patterson "urged him to file a grievance if that was [his] thinking" (*ibid.*).

rr. Petitioner also talked to Mr. Worth about the rating "because he was [Petitioner's] focal point in the agency" and because he "was familiar with his previous ratings and [his] work" (Pet. May 18, page 98). Mr. Worth found it to be "the worst rating [he had] ever seen" (Worth, June 11, page 780). He had supervised Petitioner on the three jobs immediately preceding the one Bedwell supervised. He found Bedwell's rating of Petitioner to be "inconsistent with what [he] recalled what his performance was on [his] three jobs [the Searcy, Taylor and Cooper jobs]" (Worth, June 11, pages 780-781) and that he had "reviewed all of [Petitioner's] work papers on the jobs that he worked--that were under [his] tutelage" (Worth, June 11, page 782). In his opinion, the Bedwell appraisal was not adequately supported "because of lack of specificity" (Worth, June 11, page 788). He explained that the "further you get away from the norm, or the fully successful, the more that you would need a better explanation--narrative--to support where the check mark fell" (Worth, June 11, page 805). Mr. Worth observed that it is "normal" not to grasp matters "very easily" when they are unfamiliar to an employee (Worth, June 11, page 809).

ss. Elkins Cox, the GS-14 Assistant to the Assistant Regional Manager for Operations, reviewed the Bedwell rating and found the narrative examples adequately supported the rating. See Cox, June 10, pages 726-729. He admitted that he could not recall a rating dropping as drastically as the Bedwell rating of Petitioner (Cox, June 10, page 748) and that it was "unusual" *id.* at 745). He does not review most of the ratings, however. See *id.* at 746. He admitted that Mr. Bedwell found Petitioner deficient in basic skills, such as writing and speaking, which Petitioner would have demonstrated at lower grade levels. See *id.* at 749.

tt. David Gray, Atlanta's Assistant Regional Manager for Planning and Reporting, also reviewed the Bedwell rating and concluded that the narrative ratings adequately supported the appraisal (Gray, June 8, page 11). He was a member of the promotion panel which promoted Petitioner to GS-12, and he has been at GAO for 24 years. He admitted it was "unusual" for an employee to drop so drastically in a rating (Gray, June 8, pages 7 and 92).

uu. Mr. Colbs, the retired Regional Manager who was a GAO employee for 30 years, testified that such a drop in rating was "very, very rare under any circumstances" (Colbs, July 8, pages 198-199).

vv. Mr. Cooper did not believe, "after the way [Petitioner] had performed on [his] job that [Petitioner's] performance had deteriorated to that extent" (Cooper, May 20, page 647). The Bedwell rating of Petitioner was the "worst" Mr. Cooper had seen in his 25 years at GAO (Cooper, May 20, pages 653 and 654). Mr. Cooper did not think that "more complex jobs could be responsible for Fred Jimenez's poor performance" (Cooper, May 120, page 668).

ww. During the December/January time frame, no one from management looked at Petitioner's workpapers on the EMS job (Pet. May 18, page 99). Mr. Martin, the Regional Manager as of January 1986, in reviewing Petitioner's June 3, 1986, response to GAO's proposed reduction-in-grade action, did look at a "small sample" of Petitioner's workpapers supplied to him by Petitioner's supervisors on the EMS and subsequent assignments. See Martin, June 9, pages 257-259. He found that they "didn't help [him] very much" (Martin, June 9, page 258).

EEO Complaint Filed

yy. In response to the Bedwell rating, Petitioner contacted the EEO counselor in the Atlanta Regional Office, on December 13, 1985, and filed an EEO complaint on January 6, 1986. See Stip. 11 and JE 7, page 1.

Opportunity Period

42. On January 7, 1986, based upon his alleged Unacceptable performance on the EMS job, Petitioner was placed in a 90-day opportunity period to demonstrate satisfactory performance (Stip. 15 and JE 11). GAO owes "a very special obligation" to an employee during an opportunity period (Patterson, June 11, page 894). It is "quite critical" to an employee's career (*ibid.*).

Grievance Filed

43. On January 7, 1985, Petitioner formally grieved the Bedwell rating after receiving an extension of time to file. See JE 16, 8, and 10 and Stips. 12 and 14.

Denial of First Within-Grade Increase (WGI)

44. Once Petitioner received an Unacceptable rating, two actions were required. The first required denial of his WGI, due on or about December 22, 1985. See Stip. 13 and RE 3, page 3 (backside). The second required that he be placed in the opportunity period. See RE 2, page 6.

a. In view of the Bedwell rating, Mr. Patterson as Acting Regional Manager, decided that Petitioner was not entitled to his WGI. He notified GAO's Office of Personnel so that the paperwork could be prepared. See Yancy, June 1, pages 5-7 and Patterson, June 11, pages 823-826.

b. In order to give the Office of Personnel sufficient time to prepare the letter notifying Petitioner of this decision and to prepare the opportunity-period letter, Petitioner was notified that a decision on his WGI was being delayed. See Yancy, June 1, pages 5-8 and see also JE 9 and Stip. 13. A miscommunication between the Office of Personnel and the Atlanta Regional Office occurred which resulted in Petitioner receiving notice of the opportunity period prior to receiving notice of the denial of his WGI. See Yancy, June 1, pages 5-10.

c. Petitioner was notified by letter dated January 17, 1986, of the denial of his WGI. The basis for the denial was the Bedwell performance appraisal. See Stip. 17 and JE 12.

d. By letter dated January 31, 1986, Petitioner requested that the Comptroller General reconsider his WGI denial, arguing, in part, that the relevant GAO Order required the Regional Manager to postpone the WGI decision if the employee has received an opportunity letter. See Stip. 18 and JE 13.

e. By letter dated February 7, 1986, the Regional Manager rescinded his decision on the WGI and postponed the WGI decision pending completion of the opportunity period. See Stip. 19 and JE 14.

f. By letter dated February 25, 1986, Petitioner's request for reconsideration by the Comptroller General of the WGI denial was cancelled. The basis was that the WGI decision had been rescinded and postponed pending outcome of the opportunity period. See Stip. 21 and JE 21.

g. By letter dated May 14, 1986, the Regional Manager denied Petitioner's WGI. The basis for the action was the Petitioner's performance during the opportunity period under Mr. Faircloth. See Stip. 25 and JE 25.

h. By letter dated May 28, 1986, Petitioner requested that the Comptroller General reconsider the denial of his WGI. See Stip. 26 and JE 26.

i. By letter dated July 7, 1986, the Regional Manager rescinded the WGI denials dated January 17 and May 14 and denied Petitioner's WGI based solely upon the Bedwell performance appraisal. Stip. 29 and JE 28.

Warren Faircloth as supervisor

45. On Wednesday, January 8, 1986, Petitioner was assigned, as a GS-12, to a job at Warner-Robbins Air Force Base under the supervision of Warren Faircloth. See Stip. 16 and JE 22, page 1. At that time electronic warfare programs were being surveyed. On February 6, a Congressional request was received to conduct a review of Air Force and Navy radar warning receivers (RWRs) to determine (1) if the programs of the two services were "structured to enhance commonality, (2) if the services [were] following the

practice of concurrent testing and production in its RWR programs, and (3) if RWRs [were] combat effective" (JE 22, page 1).

a. The RWR job was a "major," "complicated," "very technical" one (Faircloth, June 9, pages 364, 369 and 483 and Oxford, May 20, pages 535 and 595). Team members were given a pile of documents, about 30 inches high, to study for background material. See Oxford, May 20, page 535. However, the engineer worked in Washington and the team "didn't really get a whole lot of help from him" (*ibid.*). Mr. Faircloth was himself an expert in the field and used a blackboard "to give demonstrations and talks about these various systems and things" (Faircloth, June 9, page 358). Mr. Faircloth was, however, "rarely available" to Petitioner for guidance in that, when Petitioner approached him, he would say he was "busy" or his door was closed, giving Petitioner the "impression" that he did "not really want [him] to go in" (Pet. May 18, pages 222-223 and Pet. May 20, page 484). Mr. Oxford could not recall "any specific guidance that [Mr. Faircloth] gave to anybody, really" unless it was behind his closed office door" (Oxford, May 20, page 569).

b. Mr. Faircloth was notified that Petitioner was in a 90-day opportunity period, but did not know anything specific about his prior rating. See Pet. May 19, pages 441-442; Faircloth, June 9, pages 368-69. Mr. Faircloth knew that the opportunity period meant Petitioner had had performance problems on his prior job and had "to bring [his] performance up" (Faircloth June 9, pages 356 and 510). No work plan, no written assignments, and no plan for the opportunity period were provided to Petitioner. See Pet. May 18, page 196.

c. The expectation-setting session took place on Friday, January 10. Mr. Faircloth identified three issue areas to be covered by the audit, explained the objectives of the job "[i]n general," referred Petitioner to the BARS Manual, and told him that "all the expectations that apply to a GS-12 apply to [him]" (Pet. May 19, page 460 and see also pages 439-441; May 20, 464-465, 458-459; and also Pet. May 18, page 143). There was no discussion of particular tasks or task statements or grade-level definitions. See Pet. May 18, page 144. Petitioner did not indicate to Mr. Faircloth that he did not understand what was being discussed. See Faircloth, June 9, page 369. The session given to Petitioner was consistent with the expectation sessions given to Mr. Sullivan and Mr. Oxford, who joined the job later. See Oxford, May 20, pages 532-534 and Sullivan, June 10, page 669-670 and 680-681. See also Faircloth, June 9, pages 501-502. It was deemed to be "adequate" by Mr. Oxford (Oxford, May 20, pages 611).

d. Petitioner was to complete all the review work necessary as to two systems of RWRs, the ALR 46 and ALR 56A. See JE 22, page 1. When Petitioner began his assignment, David Murley, a GS-12, was already working with Mr. Faircloth on completing a survey of electronic warfare. About a month after Petitioner started on the job, Mr. Murley left and was replaced by another GS-12, Douglas Oxford. While Mr. Murley was still there, he introduced Petitioner to some officials and spent an estimated 8 to 10 hours over a 2-week period in briefing Petitioner. See Pet. May 19, page 442-444.

e. It took Mr. Oxford "about six weeks" to obtain sufficient "working knowledge" of the systems assigned to him before he felt confident enough to interview a program manager about the systems (Oxford, May 20, pages 535-536). The only interviews done by Mr. Oxford during his first six weeks on the job concerned a fraud allegation "in the procurement of support equipment for two of the radar warning receivers" that the Faircloth team was looking at on the job (Faircloth, June 9, page 476). Mr. Oxford was never "criticized subsequently by Mr. Faircloth for not getting out sooner to interview people" (Oxford, May 20, page 536). Petitioner was so criticized, to Mr. Oxford, who wondered when Mr. Faircloth would

start criticizing him for the same thing. See Oxford, May 20, page 538 and JE 22, page 2. Mr. Faircloth expected Petitioner to be "getting into the meat of the work within a week" (Faircloth, June 9, pages 408, 498-499 and 505). He put no such pressure on Mr. Oxford. See Oxford, May 20, page 536. Nor did he set up interviews for Mr. Oxford during the first two weeks of the job (*ibid.*), as he did for Petitioner. See Pet. May 18, page 145.

f. On Friday, January 10, 1986, Mr. Faircloth advised Petitioner that he had "already set an appointment for [Petitioner] to meet an agency official on Monday" (Pet. May 18, page 145). Petitioner told Mr. Faircloth that he "didn't think that [he] was ready to start conducting interviews" (*ibid.*). Mr. Faircloth replied that "it didn't matter; that Murley would go with [him] and help [him] out" (*ibid.*). However, during the day on Friday, Petitioner was somehow notified that he was to meet with Clyde Janes, an EEO counselor in Atlanta, on Monday. ⁴

g. The interview originally set for Monday, January 13, was postponed and held on Tuesday, January 14. Mr. Murley conducted the interview, and Petitioner took notes and wrote it up on January 16. See Pet. May 18, page 148 and PE 44. Mr. Murley reviewed the write-up first, and then Mr. Faircloth. Mr. Faircloth criticized the write-up as "inadequate" for, among other things, failure to follow "proper standards," failure of Petitioner to be able to "explain" the information to him, and for "the depth of the information" (Faircloth, June 9, page 406).

h. One of the officials interviewed on January 14 was Will Frazier, Chief of the Receiver Section. Mr. Murley wrote a note on Petitioner's write-up of the interview and pointed out that some background information in the write-up came from documentation, not from Mr. Frazier as the write-up indicated. See PE 44 and RE 25 and Pet. May 18, pages 151-152. This error is mentioned in Mr. Faircloth's April 7 performance appraisal of Petitioner. See JE 22, page 3 and Pet. May 18, page 154.

i. Mr. Faircloth also questioned some of the figures in Petitioner's write-up of the January 14 interview. They were later checked and found to be "correct" (RE 25, page 4 and see also Pet. May 18, page 156).

j. Mr. Faircloth also asked for some clarification and follow-up work on the January 14 interview. Petitioner attributes some of Mr. Faircloth's criticisms as reflecting the fact that Petitioner "did not have a familiarity with the subject matter" (Pet. May 18, page 158) and that he relied on Mr. Murley who was familiar with the issue area and what the office had done. (Pet. May 19, page 445).

k. On January 16, after only eight calendar days on the assignment, Petitioner interviewed Vincent Connolly, Logistics Manager of the ALR 56 program. See PE 45 and Faircloth, June 9, page 454 and Pet. May 18, pages 165-169. Mr. Murley accompanied Petitioner and conducted the interview. Petitioner wrote it up on January 17. See Pet. May 18, page 166, Mr. Faircloth called this interview "quite a classic" and used it as an example of poor performance by Petitioner. See JE 22, page 3, first full paragraph and Faircloth, June 9, pages 450-460, 463-464. Among other things, Mr. Faircloth criticized Petitioner for "not recognizing the absence of necessary information (JE 22, page 3, first full paragraph and Faircloth, June 9, page 452) and for a lack of "intricate details" (Faircloth, June 9, 459 and 455). On the write-up Mr. Faircloth wrote in a comment on the failure to obtain the name and phone number of offices (PE 45, page 6). Petitioner explained that since Mr. Murley conducted the interview and did not ask for this information, Petitioner believed that "we surely have that in the office" (Pet. May 18, page 167).

l. On January 24, 1986, Petitioner and Mr. Murley did a follow-up interview of Vincent Connally, Logistics Manager, previously interviewed on January 16. See PE 47 and Pet. May 18, pages 176. Mr. Faircloth had only one comment, "name and number" (PE 47 page 4 and Pet. May 18, page 177). This information was already in the office.

m. In "late January of '86," Mr. Faircloth instructed Petitioner to prepare an "audit plan, a quick overview or plan of what you plan to do when you visit these units at Shaw Air Force Base," a tactical unit (Pet. May 18, page 196 and May 20, pages 469-471). He gave Petitioner no instructions "with regard to the degree of detail he wanted," or any time limit (Pet. May 18, pages 196-197). There were some "general guidelines for going to the tactical units," plus "vast amounts of information there in [GAO] files" (Faircloth, June 9, page 372). There were also some "draft guidelines" with "some ideas that [Mr. Faircloth] wanted to gather at the tactical units" (Faircloth, June 9, page 373). These may be the guidelines which were not available at the time Petitioner wrote up the audit plan. See Pet. May 19, pages 227-228.

n. On January 29, 1986, Petitioner produced a draft of an audit plan. See RE 27. Mr. Faircloth severely criticized this workpaper. See Faircloth, June 9, pages 371-391. For example, he criticized Petitioner for planning to ask about "irrelevant" data (id. at 384) such as when did the unit receive the aircraft and the number of aircraft in inventory. See RE 27, pages 4 and 5. Petitioner explained that he included the first item because he "was going to a unit that [he] didn't know much about and [he] wanted to know if they had had a lot of experience with this particular radar warning receiver and this particular aircraft" (Pet. May 18, page 200). He included the second (the number of aircraft in inventory) because he knew that Mr. Murley "was preparing an inventory of radar warning receivers installed in aircraft by location [and he] thought this was also relevant in trying to verify his information was correct" (ibid.). This was a matter that was being "continually updated" (Oxford, May 20, page 568). Mr. Faircloth criticized Petitioner for not being "thorough enough" (Faircloth, June 9, page 381); for not providing for the collection of relevant data (id. at 384); and for lack of "originality" (RE 22, page 12).

o. Mr. Oxford glanced over a part of 2 pages of the 10-page audit guidelines prepared by Petitioner for the visit to Shaw Air Force Base and thought they were "probably what [he] would have written as far as guidelines, at that time" (Oxford, May 20, page 565, 624). The glance took "about 10 seconds" (id. at 624).

p. On February 12, 1986, Petitioner filed a formal EEO complaint based upon the Bedwell performance appraisal. See JE 2, pages 2-4. During January and February, Petitioner continued to actively pursue his various grievance rights. See JE 15-20. Mr. Faircloth learned from Mr. Oxford that Petitioner had "some kind of a grievance that he was filing" (Faircloth, June 9, pages 480-481).

q. On February 12, 1986, Petitioner conducted the first interview on his own. See Tipton interview, PE 42, pages 8-25 and Pet. May 18, pages 178-179. It was written up on February 18. Mr. Faircloth reviewed all 18 pages of it and made only two comments, neither of a critical nature. See PE 42, pages 12 and 24.

r. On or about February 13, 1986, Mr. Faircloth asked Petitioner to prepare "a summary of work performed" (Pet. May 18, page 208 and Pet. May 20, page 465). Petitioner was not "clear" as to what Mr. Faircloth wanted (Pet. May 18, page 208 and Oxford, May 20, page 628A), so he talked to Mr. Faircloth who said: "I just want to have an idea of what you have been doing, like who have you been talking to, et cetera" (Pet. May 18, page 209 and see also page 211 and Pet. May 20, pages 467 and 524). (Ms. Vawter subsequently asked Petitioner to prepare something similar. See Vawter, June 2, pages 80-81.) Petitioner decided that what Mr. Faircloth wanted was "a scoping statement as defined by GAO" (Pet. May 18, page

209).

s. Actually, what Mr. Faircloth wanted was "a work paper summary" in order to "see what [Petitioner] had accomplished and see how he was analyzing and pulling that information together" (Faircloth, June 9, pages 424-425). Mr. Faircloth was "shocked" and "confused" by what he received from Petitioner on March 13 (Faircloth, June 9, page 431; RE 29; Pet. May 18, page 214; and Pet. May 20, page 468).

t. Usually, work paper summaries are prepared at the conclusion of a major segment of the work, although apparently they can be requested at any time. See Oxford, May 20, page 645; Cooper, May 20, page 660; and Searcy, May 21, pages 710-711. The GAO Project Manual refers only to preparing them as "various segments of the work are completed" (RE 5, page 7 (backside)). As of the date Mr. Faircloth gave his instruction to Petitioner on this matter, no work segment had been completed and Petitioner was "just starting in the job, had very little knowledge, and there was not a lot of information obtained at that point in time" (Pet. May 18, page 216 and see also Pet. May 20, page 524. Mr. Cooper testified that only eight weeks into a review, he would interpret a request for a summary of work performed to mean that the requestor wanted "to know precisely what has been done to date" (Cooper, May 20, page 645). Mr. Searcy "supposed" that a "summary of work performed" was "a loose term for a [workpaper] summary" that "summarized a segment of work," or "an overall summary of the job" (Searcy, May 21, pages 698-699).

u. During a one or two-hour discussion with Mr. Faircloth to discuss Petitioner's summary of work performed, Petitioner came to understand that Mr. Faircloth wanted a "work paper summary" (Pet. May 20, page 468). Petitioner felt that it was "premature" for such a summary, but that Mr. Faircloth wanted to see his writing and analytical skills (Pet. May 18, page 210). Petitioner convinced Mr. Faircloth to allow him to use the ALR-46 workpaper bundle for the purpose of providing an example of his writing and analytical ability. See Pet. May 18, pages 220. Petitioner submitted a work paper summary to Mr. Faircloth on March 15, 1986. See RE 30. Mr. Faircloth thought it was "a vast improvement" (Pet. May 18, page 222). In his testimony, Mr. Faircloth criticized it as "not acceptable based on the GAO standards" for failing, among other things, to "draw any conclusion or recommendations" (Faircloth, June 9, Page 439). Petitioner had prepared workpaper summaries for Mr. Searcy in a manner judged by Mr. Searcy to be "exceptional" (Searcy, May 21, pages 683 and 686-687).

v. No other staff member on the RWR project was asked to prepare a workpaper summary. See Oxford, May 20, page 573.

w. On February 24, 1986, Petitioner conducted a follow-up interview of Mr. Frazier, which he wrote up the same day. See RE 33 and PE 43; Pet. May 18, pages 180-181; and Faircloth, June 9, pages 419-423. This was the second interview which Petitioner conducted "independently" (Pet. May 18, page 180). Mr. Faircloth reviewed it on March 20 and made no written comments. Mr. Oxford later clarified one point which Mr. Faircloth thought was unclear. See RE 33 and Faircloth, June 9, page 421.

x. On April 1, 1986, Petitioner conducted an interview of two officials (Robert Boyle and Claire Camp) to collect follow-up information on the modification to ALR-46. See RE 35 and Faircloth, June 9, pages 411-418. Mr. Faircloth reviewed the interview on April 10 and asked for clarification on some points.

y. The above discussed workproducts of Petitioner basically formed the basis for Mr. Faircloth's April 7 performance appraisal of Petitioner. See JE 22 and Faircloth, June 9, page 466. Mr. Faircloth thought that "others might have been left out," but he felt that those were "probably" the "majority of them" (*id.* at 466).

z. On April 7, 1986, Mr. Faircloth rated Petitioner's performance as "generally unacceptable" (JE 22, page 2). Petitioner received an Unacceptable in the job dimensions of Planning, Data Analysis, and Written Communications. He received a Borderline in Data Gathering and Documentation. He received a Fully Successful in Oral Communication, Administrative Duties, and Working Relationships and Equal Opportunity. There was no basis found for evaluating the Supervision dimension.

aa. One of Mr. Faircloth's criticisms was that Petitioner "lacked the perseverance necessary to obtain the data and satisfy our audit objectives" on the ALR-56A (JE 22, page 3). When questioned about this on cross-examination, Mr. Faircloth, at first, testified that he "got the information that we needed on it," but then testified that he "just dropped that particular area" (Faircloth, June 9, page 540 and see also 544). Petitioner explained to Mr. Faircloth that the data "was not available at Warner-Robbins," but Mr. Faircloth "didn't believe" it (Pet. May 18, pages 191 and 194). Petitioner then questioned an official about the information, who repeated that it was not available at Warner-Robbins and complained to GAO about the repeated questioning. See Pet. 18, pages 223-224 and Pet. May 19, pages 495-497. Mr. Faircloth admitted that Mr. Oxford, subsequently and also unsuccessfully, looked for the same information; and that he did not "criticize" Mr. Oxford for his failure (Faircloth, June 9, pages 540-541, and see also Oxford, May 20, pages 551-554 and 628Q). Mr. Faircloth admitted further that locating the information was not "simple," but alleged that it could have been obtained if the right people had been asked (*id.* at 544). Mr. Faircloth excused Mr. Oxford's failure to locate the information on the ground that Petitioner should have gotten it. See *id.* at 545.

bb. Mr. Faircloth also criticized Petitioner for, among other things, failing "to master some of the basic GAO standards for preparing written products;" and a "lack of writing skills," which should have been developed at lower grade levels (JE 22, page 3).

cc. After the April 7, 1986, performance appraisal, Petitioner became distrustful of everyone, particularly Mr. Faircloth, and declined to discuss his work with him without a tape recorder or unless in the presence of a third person. See Faircloth, June 9, pages 476 and 538; and Oxford, May 20, page 580-581. After April 9, Mr. Faircloth placed Petitioner under the "direct supervision" of Mr. Oxford (JE 23, page 4).

dd. Around April 30, 1986, James Martin, Regional Manager, and his assistant David Gray, visited Petitioner at the Warner-Robbins site "to discuss whether [Petitioner] should stay on the job or be reassigned to another job" (Pet. May 20, page 492; Gray, June 8, page 43; Martin, June 8, page 235). The meeting lasted several hours. Petitioner's position was that he "was already on the job, had spent some time, and even though[he] didn't believe that the rating was accurate [he] thought that [he] could contribute to the job because [he] had been there for some months and had a better understanding of the subject area" (Pet. May 20, pages 492-493). Management decided to reassign him because of the deterioration in the relationship between Petitioner and Mr. Faircloth. See Martin, June 8, page 238.

ee. Petitioner asked for reassignment to Mr. Cooper or Mario Artesiano. Mr. Martin explained that GAO "did not have a need for anyone on either of these jobs that these people were involved in and that we needed to assign him somewhere where we needed staff [and that] to do otherwise would be disruptive to the ongoing efforts" (Martin, June 8, page 239). Petitioner was given two choices of assignments. He chose the "Flowers' job" (*ibid.*).⁵

ff. On May 8, Mr. Faircloth, in a final appraisal for the period of January 8 to May 1, 1986, again rated Petitioner as Unacceptable in his "overall performance" (JE 23, page 3; Faircloth, June 9, pages 470-471; and Stip. 23). He was rated Unacceptable on the same job dimensions as before, and was also rated Unacceptable in Data Gathering and Documentation, because, according to Mr. Faircloth, he did not follow up on sources or present data in "a logical, complete, and accurate manner;" did not prepare any written products in the last month of the rating period; and he took some he did prepare and did not return them (JE 23, page 4). Petitioner's rating on Working Relationships and Equal Opportunity also dropped to Borderline and, during the period since his last rating, his actions were deemed Unacceptable.

gg. The drop in Working Relationship was allegedly due, among other things, to his "suspicious and generally uncooperative" attitude towards Mr. Faircloth and Mr. Oxford (Faircloth, JE 23, page 4); his "counterproductive and disruptive" attitude and approach, creating "tension and disharmony" in the work environment; his refusal to discuss his April rating with Mr. Faircloth and "resent[ment] and antagonis[m]" in discussions of his work; and his copying of workpapers for his personal use without advising Mr. Faircloth (JE 23, page 4 and Faircloth, June 9, pages 469, 549, 554-556).

hh. Petitioner did prepare "fact sheets" after his April 7 rating (Pet. May 20, page 483), contrary to what Mr. Faircloth wrote in his appraisal as to his not preparing any written products during the last month of the rating period. (JE 23, page 4 and see FF45 ff, above).

ii. Although positive as well as negative comments are supposed to be made on performance appraisals, Mr. Faircloth made no positive ones on the appraisals of Petitioner as to his data-gathering efforts. See JE 22 and 23. For example, he omitted the fact that Petitioner had been able to convince reluctant officials to share with GAO "a briefing that had been prepared by the Air Force Inspector General" (Pet. May 18, pages 183-184). At a meeting, Mr. Faircloth acknowledged that the briefing paper was "very good" because it documented that work [of GAO] was relevant and the issues were valid" (*ibid.* and Pet. May 20, page 485). Mr. Martin, Mr. Patterson, and Mr. Gray were at this meeting. See Pet. May 18, page 184. Through good working relationships with engineers at the Air Base, Petitioner was also able to obtain reports on material deficiencies on RWRs which document the issue area of effectiveness. See Pet. May 18, page 185. He also obtained a copy of a briefing that showed that there were plans to improve the capability of the ALR-69 so that it would be compatible with another RWR, another issue area. See Pet. May 18, pages 185-186.

jj. Petitioner also takes credit for a phone call from a whistle-blower, Al Coody. It is not clear from the record, however, whether the whistle-blower called because he knew Petitioner, or because the GAO phone number was generally known on the Air Base. See Pet. May 18, pages 186-187 and compare Faircloth, June 9, pages 476-478, and 550-552.

kk. Jackie Brooks Guinn, a GS-14 field manager who worked at the Huntsville, Alabama, sub-location, was the Regional Manager's representative on the RWR assignment. He visited the Warner-Robbins site in February and March 1986 and possibly in January as well. While there, he reviewed some of the working papers of Petitioner, as "Fred's performance was an issue" (Guinn, June 10, page 626). He "reached the same conclusion that Warren did" (*ibid.*). He could not recall the date of the papers he reviewed. See *id.* at 628. One was a record of discussion from which he concluded: "Fred did not understand what he was going after. It, frankly, didn't make sense" (*id.* at 627). Mr. Guinn was not aware that Petitioner "was sent out to do interviews within his first week on this job" (*id.* at 635). Mr Guinn approved the appraisals of Petitioner, which Mr. Faircloth read to him over the telephone. See Guinn, June

10, pages 628-630.

ll. Mr. Patterson, as Assistant Regional Manager for Operations, reviewed the Faircloth ratings of Petitioner. He found that "the narrative support" was "consistent with the check marks on the face of the appraisal" and the BARS Manual (Patterson, June 11, page 831 and see also page 839). Mr. Patterson reviewed one workpaper of Petitioner--what "purported to be a work paper summary" but was "more a chronology of events or things that Mr. Jimenez had done, and included quite a bit of editorializing about how well he had done it" (Patterson, June 11, page 838). From this testimony, I find that what Mr. Patterson reviewed was RE 29, the summary of work performed, and not RE 30, the workpaper summary.

mm. Leo Benedict Sullivan, Jr., a GS-12 evaluator who joined the RWR assignment in June 1986, after Petitioner was reassigned apparently, went out on his first interview probably "within the first week or two weeks, just very quickly" (Sullivan, June 10, page 679). However, Mr. Faircloth did not tell Mr. Sullivan when he should go out and interview officials. See id. at 670. Mr. Sullivan was allowed to commence interviews when he felt ready to do so. Ibid. Mr. Sullivan had been a GS-12 for "[o]ver four years" when he joined this job (id. at 682).

nn. Mr. Oxford reported to work on the RWR job on February 10, 1986, just as it was entering on the review stage. See Oxford, May 20, pages 529 and 534. He was assigned the issue area of "effectiveness" (Oxford, May 20, page 531). During his first week on the job at Warner-Robbins, Mr. Oxford was told by Mr. Faircloth that Petitioner had had problems on his previous job and was having problems on the RWR job as well. See id. at 530.

oo. When Mr. Oxford had earlier worked adjacent to Petitioner at Fort McPherson, his first impression was that Petitioner "was a very quiet person, that he probably wouldn't make out very well in GAO" (Oxford, May 20, page 570). Mr. Oxford noted that Petitioner was "difficult to understand at times, his speech [and]... difficult to understand when you talk to him on the telephone, from the other side, unless you do something to make him raise his voice a little bit" (ibid.). Later, Mr. Oxford's opinion of Petitioner changed because, for one thing, his supervisors all "said good things about him," referring to Mr. Searcy, Mr. Cooper, and Mr. Taylor (id. at 571 and see also page 605). Mr. Oxford was also "impressed" by the fact that Petitioner took on management and tried "to get them to change their selection criteria on the overseas assignment" (id. at 572).

pp. On the RWR assignment, Mr. Oxford worked closely with Petitioner, read his workproducts, and his two ratings from Mr. Faircloth. Petitioner introduced him to the "majority" of the personnel at Warner-Robbins (Oxford, May 20, pages 536, 630-631), but "did not spend a lot of time out of the office during the time [Mr. Oxford] was there" because he had already talked to people (id. at 630-631). Petitioner often commented to Mr. Oxford that he "could not get proper guidance from Warren Faircloth" and "couldn't understand what he really wanted" (Oxford, May 20, page 569). qq. Mr. Oxford felt that Petitioner's ratings by Mr. Faircloth "dealt almost entirely on work that was done very early in the job" (Oxford, May 20, page 537). In his opinion, Petitioner "had quite a good command of the information" gathered on the job and "much of [Mr. Oxford's] understanding came from Fred Jimenez" (id. at 539). Mr. Oxford did not "really" think that this was explainable on the basis of the fact that Petitioner joined the job a month ahead of him (ibid.). In Mr. Oxford's opinion, Petitioner gathered too much data, but realized that this was because Petitioner "was repeatedly instructed by Warren Faircloth to go back and search harder for information on the 56A," and so he "felt pressed to do additional audit work" (id. at 540, 614-615).

rr. After Petitioner was reassigned, Mr. Oxford took over his responsibilities. Mr. Oxford recalls gathering no more data on the ALR 56A and 46 after Petitioner's reassignment. The information gathered by Petitioner was all that was used to write the final report. See Oxford, May 20, page 541-542.

ss. Mr. Oxford did do some follow-up work on Petitioner's work. He confirmed as "correct" some figures on modification kits which Mr. Faircloth had questioned (id. at 543-544). The follow-up work done by Mr. Oxford resulted in some "modifications or changes," but "[j]ust made them more understandable" (id. at 545). The changes "didn't affect the audit to a great extent" (id. at 619). For example, Mr. Oxford added "hardware" to "modifications" (PE 43, page 5 and compare RE 33, page 2, and see also RE 35, page 3). Mr. Oxford affirmed that it is "not unusual at all" to have to clarify data (id. at 628 N).

tt. Mr. Faircloth told Mr. Oxford that fact sheets prepared by Petitioner, after his first rating by Mr. Faircloth, were not "any good" and the "information wasn't reliable" (Oxford, May 20, page 557 and Pet. May 20, page 483). The information on Petitioner's fact sheets was used, later, without any criticism being expressed. See Oxford, May 20, pages 557-558.

uu. On his performance appraisal, Mr. Oxford received a Superior or Exceptional rating for Data Gathering from Mr. Faircloth. ⁶ As an example, Mr. Faircloth cited Mr. Oxford's "initiating a visit to the Office of History"--a visit actually initiated by Petitioner, who received only a Borderline rating. (Oxford, May 20, pages 594 and see also pages 628M and N and 542).

vv. In Mr. Oxford's opinion, Petitioner's workpapers were "better than [his];" and only Petitioner's papers had "purposes" and "explanatory" titles as required by GAO (Oxford, May 20, page 550). Mr. Oxford made this discovery when reviewing all the workpapers produced for the RWR job. Ibid.

ww. Mr. Oxford "couldn't see that Fred was as bad as Warren was saying he was" (Oxford, May 20, page 576). Thus, Mr. Oxford came to the conclusion that "Warren either was instructed or felt that he was expected to either rubber-stamp or agree with previous ratings Fred had gotten. In other words, help get rid of Fred Jimenez" (ibid.). Mr. Oxford feels less "emphatic about that today" [at the time of the hearing]" (Oxford, May 20, page 628J).

xx. Although Mr. Oxford supervised Petitioner for the period between Mr. Faircloth's preliminary and final rating of Petitioner, Mr. Oxford was "not asked for any input" into the final rating (id. at 580-582). Prior thereto, on at least one occasion, Mr. Faircloth asked Mr. Oxford: "Do you agree with what I'm saying about Fred" (Oxford, May 20, page 581). Mr. Oxford "kind of hedged" in answering because he "really didn't want to disagree with Warren" (ibid.). Mr. Oxford, instead, pointed out "those kind of things about Fred that [he] thought were positive" (id. at 582).

yy. During the period he worked for Mr. Faircloth, Petitioner's "mental health was probably beginning to deteriorate a little" (Pet. May 18, page 225). Petitioner attributes this to Mr. Faircloth's "discriminatory practice or retaliatory practice" (ibid.).

Reduction in grade action

46. On May 13, 1986, the Assistant Regional Manager proposed reducing Petitioner in grade to GS-11. The bases of the proposal were the Bedwell and Faircloth performance appraisals. Stip. 24 and JE 24. By letter dated June 3, Petitioner responded to the proposal to reduce him in grade to GS-11. Stip. 28 and JE 27. By letter dated July 9, the Regional Manager reduced Petitioner from grade level GS-12 to GS-11,

effective July 20, 1986. Stip. 30 and JE 29. By order dated July 17, the reduction-in-grade was stayed by the Board. Stip. 31. By order dated September 19, the Board denied the motion by the General Counsel to indefinitely stay the reduction-in-grade of Petitioner. Stip. 33. As of about September 21, Petitioner was reduced in grade to GS-11. Stip. 34. By order dated February 27, 1987, the Board granted the motion by the General Counsel, accompanied by new evidence, to indefinitely stay the reduction-in-grade pending outcome of the case before the Board. See Stip. 38 and Request by the General Counsel for an Indefinite Stay of Petitioner's Reduction In Grade dated December 5, 1986. By order dated May 12, 1987 the Board denied a motion by GAO to reconsider the stay. See Stip. 39. On May 13, 1987, GAO restored Petitioner to the GS-12 grade. Stip. 40.

Jesse Flowers and Martha Vawter as supervisors

47. From June 2 to December 20, 1986, Petitioner was assigned, as a GS-12, to survey the "VA's Programs for Monitoring the Quality of Care Provided to Veterans in Community and State Nursing Homes" (JE 31 and 32, page 1). A purpose of the GAO audit was to see what the VA standards were and how VA was enforcing them. See Pet. May 19, page 234. This was a "moderately complex" assignment (JE 31 and 32, page 1).

a. Jesse Flowers was assigned to this job in April 1986, before the Senate Committee on Veterans' Affairs had sent a formal request for this particular assignment. See Flowers, June 1, page 86. In late May, Martha Vawter and George Tabb joined the job. Ms. Vawter had had one prior experience in the health field; Mr. Tabb had had none. See Tabb, June 3, page 46 and Flowers, June 1, page 89. All three went to the VA and had "an opening conference to kick the job off" (id. at 87). Ms. Vawter then went on leave and, shortly after the conference, Mr. Tabb was pulled off the job temporarily. See id. at 87-88.

b. Mr. Flowers had an expectation-setting conference with Mr. Tabb and Ms. Vawter before Petitioner came on the job (Flowers, June 1, page 89). The formality and thoroughness of the session was "a little bit unique" to Mr. Tabb (Tabb, June 3, page 38). On June 2, when Petitioner joined the job, Mr. Flowers held another expectation-setting session. See Flowers, June 1, page 95. Mr. Tabb again participated. Ms. Vawter did not, as she was on leave. See id. at 89-90. The June 2 one lasted "probably an hour" (id. at 102). At that time the assignment was starting "on the ground floor" (id. at 90). The request letter had not been received, and little was known about the issues to be studied. See ibid. The expectations, "at that point," were to try to get "an understanding of how the program operate[d] and try to define the issues" (ibid.). The job was not ready for "segmentiz[ing]", that is assigning portions to each team member. See id. at 90-91. Mr. Flowers gave Petitioner "a fairly large volume of background material," about "five to eight" inches high, the same material he had earlier given to Mr. Tabb (Flowers, June 1, pages 92-93). Petitioner spent the "next couple of days" and "some of the following week" in a review of this material (id. at 93).

c. On June 9, Mr. Flowers held a "much more formal" and "lengthy" expectation-setting session with Mr. Tabb and Petitioner, after both had "about gone through background material" (Flowers, June 1, page 95 and Tabb, June 3, page 40). He followed an "outline" he always uses for such sessions (Flowers, June 1, page 100). The June 9 meeting lasted close to four hours (id. at 102-103). The formal request letter from Congress still had not been received. See id. at 96. They talked about "the overall objectives" of the job, which was in the scoping stage (id. at 96). These objectives were "to identify some issues that merit further development and review during implementation;" "what kind of data" was needed and "time frames," which were to complete the field work and draft the report by January or February, and get it to

the committee staff of Congress in May or June (id. at 96-97). They talked about working relationships--Mr. Flowers was the "EIC" (Evaluator-in-Charge) and Ms. Vawter "was the supervisor, the site supervisor" (id. at 97). Mr. Flowers promised "to make sure that Ms. Vawter gave [Petitioner] a segment of the work" as soon as the point was reached where this was possible (Flowers, June 1, page 98). Petitioner had told Mr. Flowers that he "needed an opportunity to demonstrate that he could do GS-12 work" (id. at 99). They talked also about time and attendance, work schedules, and other personnel matters. See id. at 98-99. Mr. Flowers also discussed the BARS Manual and, at Petitioner's request, went through it, until Petitioner said: "okay, that's enough. I understand what you're talking about" (id. at 101). It was still "impossible to assign specific tasks" to anyone (id. at 108).

d. At the June 9 session, Petitioner expressed "concern...on how he was going to be rated" (Flowers, June 1, page 103). Mr. Flowers told Petitioner that he "was aware that he had had some problems on two prior jobs," but did not know "the nature of them," and that he "got a new start on this one" (id. at 103-104). Mr. Flowers wanted "to first let Fred know that the rumor mill was working" (ibid.). Mr. Martin had told Mr. Flowers that Petitioner had had "some problems on the prior jobs" and instructed Mr. Flowers to assign work to Petitioner "as close as possible commensurate to what a GS-12 ought to be doing, and to give him a fair rating" (id. at 104). Mr. Flowers also told Petitioner that he felt "perfectly comfortable using the full range of the rating scale," if Petitioner gave him "justification" (Flowers, June 1, page 104). Mr. Flowers mentioned this because of the "perception" that raters "tend to just go down the middle on a rating form because to go either to the right or to the left on the form, you have to justify it" (id. at 103). Mr. Flowers also assured Mr. Tabb and Petitioner that, if he was going to "put together an adverse rating," the ratee would be told "in advance" of the "problems" (id. at 105).⁷

e. At some point in time, after the June 9 session, Petitioner told Mr. Flowers that he had filed a complaint. See Flowers, June 1, page 106. Mr. Tabb learned of Petitioner's troubles on the Bedwell job through "the rumor mill" (Tabb, June 3, page 45). Mr. Flowers told Ms. Vawter that Petitioner had had performance problems on his prior job. See Flowers, June 1, pages 111-112 and Vawter, June 2, page 38. She also had learned, by October 20, that Petitioner had filed a complaint. See Vawter, June 2, page 107. Mr. Flowers told Mr. Tabb that he "didn't want to hear anything about [Petitioner's difficulties on his previous job];" warned Mr. Tabb not to get "plugged into the rumor mill," if he could "help it;" and not to "get dragged into conversations about it" (Tabb, June 3, pages 41-42).

f. Mr. Tabb was "fairly well acquainted" with Petitioner before they were both assigned to the VA job, although they had not worked on the same job. See Tabb, June 3, page 42. Mr. Tabb "liked" Petitioner (ibid.). Petitioner "freely" discussed with Mr. Tabb the complaint he had filed and what had happened on the Bedwell and Faircloth jobs (id. at 53-54). Mr. Tabb had not been aware of the Faircloth job problems. Ibid. Petitioner told Mr. Tabb, as to the Faircloth job, that he felt "more or less the fix was in" and that Mr. Faircloth was "probably in a plot or a plan by the office to go ahead and support Bedwell's prior rating by having Faircloth continue that with another bad rating of his own" (Tabb, June 3, page 56). Mr. Tabb thinks that Petitioner's belief that there was a plot between Mr. Bedwell and Mr. Faircloth is "unlikely," first of all, because Mr. Faircloth "generally spends all of his time at his sublocation at Warner-Robbins and doesn't come into Atlanta at all" (Tabb, June 3, page 57). Petitioner expressed reservations to Mr. Tabb about Mr. Flowers treating him "any more fairly" because Mr. Flowers was part "of this clique" of "Carl Mays, Bob Cowl, Jesse Flowers, Elkins Cox, Bill Bedwell" (Tabb, June 3, page 57). Petitioner expressed all these concerns during June. Id. at 58. Mr. Tabb told Petitioner that he "doubted that Mr. Flowers "could possibly be involved in anything like this," that it was "just not his style" (Tabb, June 3, page 58). Mr. Flowers had "expressed to [Mr. Tabb] a great concern that he wanted Fred to succeed on

this job," to have " a fair chance, a clean slate, and to do well" (ibid.).

g. Petitioner told Mr. Tabb that "he liked to do analysis work, he liked to gather material and read it and synthesize it. He liked to do accounting oriented work, and that he wasn't particularly wild about doing a lot of people work, interaction on interviews, and things like that" (Tabb, June 3, page 61). Petitioner asked Mr. Tabb if he, Mr. Tabb, would lead the interviews they did jointly, and he, Petitioner would take notes and "just kind of jump in there whenever [he] felt the need to" (Tabb, June 3, page 62).

h. The GAO staff occupied "two little teeny office spaces side by side, and the door between them was always opened" (Tabb, June 3, page 62). Ms. Vawter and Petitioner sat in one office and Mr. Tabb in the other. Id. at 69. Everyone could overhear all conversations. Id. at 69 and 76-77. Mr. Tabb was "always reporting" to Ms. Vawter about what he had learned in talking to people; and she would tell him to "keep pursuing that some more" and "let's drop this for now" (Tabb, June 3, page 52). This was "the kind of guidance that [he] got" (ibid.). Katherine Chennault, a GS-12 who joined the job later, had the same type of interplay with Ms. Vawter. See Chennault, June 3, pages 24-25.

i. Ms. Vawter returned from leave during the second or third week in June. See Flowers, June 1, page 110. Based upon her first few weeks of observation Ms. Vawter reported to Mr. Flowers that Petitioner was "doing well;" was "applying himself;" and was "working hard" (Flowers, June 1, pages 114 and 119 and see also Vawter, June 2, page 39). At that point, they were all "working together" (Flowers, June 1, pages 114) and Ms. Vawter had not yet reviewed any written products of Petitioner. See Vawter, June 2, page 39.

j. Around the week of June 23, Mr. Flowers held a meeting with Petitioner and Ms. Vawter to again talk about expectations and "to make sure that Fred understood that [Ms. Vawter] was his site supervisor" and was "responsible for the work" (Flowers, June 1, page 110 and Vawter, June 2, page 7). Ms. Flowers "used [his] outline again" (Flowers, id. at 111). The "overriding purpose was to get [Petitioner and Ms. Vawter] together...and talk about their working relationships" (Flowers id. at 111). They did not go through the BARS Manual (ibid.). They were still not at the point "where you c[ould] segmentize the job" (Flowers, id. at 112).

k. On June 30, Petitioner and Ms. Vawter conducted an interview of Harmon Adams, a VA official. See Vawter, June 2, page 33 and RE 63. Petitioner prepared a write-up of the interview on June 30, and then two additional drafts. See id. at 33-38. None were deemed by Ms. Vawter to be "acceptable," as prepared (id. at 37). The third draft was only acceptable to Ms. Vawter after she added several comments. See Vawter, June 2, page 36. She had written down these comments on a piece of paper and given it to Petitioner when she returned the second draft to him. Ibid. She asked him to add the comments. Ibid. Petitioner did not explain to her his reason for not adding them. Id. at 36. On the third draft, she also noted that one paragraph was "not clear" and one sentence structure was "poor" (Vawter, June 2, pages 4 and 5). She also crossed out six lines of the third draft. Id. at 7. Ms. Vawter did not keep copies of the first two drafts. See Vawter, June 2, at 35. She had started to review the first draft and left it on her desk at the close of day. See Vawter, June 2, page 35. Ibid. When she returned, the next morning, Petitioner had already made the corrections. Ibid. She threw away the second draft because "at that point in time [she] had no reason to keep every draft that Mr. Jimenez prepared" (id. at 35). It is not "normal" to go through three drafts before producing an acceptable interview write-up "especially for a grade 12" (id. at 38 and see also Flowers, June 1, page 190).

l. The first assignment which Petitioner performed independently was made around the third week in June. See Vawter, June 2, page 7. The assignment was to review six files, each "[a]pproximately one-half an inch" thick (*id.* at 8), and to "document and obtain information on contract terminations" (RE 32, page 1). The files to be used were identified for Petitioner. *id.* at 9-10. Ms. Vawter gave to Petitioner a "format" for the review in the form of a "schedule" with specific "categories" to fill in (*id.* at 10). See Vawter, June 2, page 11. Ms. Vawter pointed out, in her testimony, that the work product contained "math errors;" "some misleading statements in the footnotes attached to the schedules;" and some "omitted deficiencies" (Vawter, June 2, page 12). There is an obvious math error on RE 52. Compare page 3, where Petitioner refers to "24" deficiencies on a March 3 report, to page 8 where he lists 28 of them. There are also omitted deficiencies. See page 8 of RE 52 and Vawter, June 2, pages 13-17 and 21.

m. Around the first of July, Ms. Vawter assigned another task to Petitioner, "to determine the frequency of VA's program reviews of their contract nursing homes" (Vawter, June 2, page 40). She went through the listing of contract nursing homes, "to just pull a judgmental sample" (*id.* at 40). She ended up "with 14 files, maybe every fifth file" (*ibid.*). She "designed the schedule for [Petitioner]," "told him to review the files and complete the schedule and to be conscious of looking for information in the files that would have some bearing on [them] meeting the objectives of [their] review" (Vawter, June 2, page 41).

Petitioner turned in the July 1 assignment on July 30. See RE 53. Ms. Vawter "signed off" on it on August 1 and 4 (Vawter, June 2, page 44 and RE 53, page 1). The first criticism of Ms. Vawter was that the schedule contained "math errors" (Vawter, June 2, page 45). On cross-examination, some of the "math errors" were shown not to be counting errors, but a misunderstanding as to what to count (Federal and State deficiencies or just Federal) and a disagreement as to the more accurate formula to use to compute averages. See Vawter, June 2, pages 159-185. Petitioner did not explain to Ms. Vawter the reasons for the difference in their figures. See FF 35 c. Another of Ms. Vawter's criticisms of RE 53 concerned the number of beds in the nursing homes. See Vawter, June 2, pages 46 and 52. Petitioner showed different numbers than those found by Ms. Vawter. Petitioner was not sure, but thinks he may have used a more recent source than Ms. Vawter. See Pet. July 7, pages 122-125.

Other criticisms of RE 53 related to an error on information being in which file (Vawter, June 2, pages 51-52); information not supported by a file (*ibid.*); omitted information (*id.* at 52; and numerous footnote deficiencies. *id.* at 59-66 and see Re 53, pages 9-19). Petitioner admitted to one "inadvert" error. See RE 53, page 3, item (7). Ms. Vawter considered RE 53 to be "unacceptable" and showed it to Mr. Flowers, on August 5, and to Mr. Martin (Vawter, June 2, page 56 and see also 67 and 69, and Martin, June 9, page 325).

n. In mid-July Mr. Flowers received word that Petitioner was being downgraded to a GS-11 level. See Flowers, June 1, page 117. GAO policy requires another expectation-setting session whenever a grade level changes. See *id.* at 117-118. Then Mr. Flowers learned that the down-grade action was stayed. Mr. Flowers called in Petitioner for two expectation-setting sessions--one for the downgrade to GS-11 and one for the GS-12 level when the downgrade was stayed. See *id.* at 118. The first occurred about July 11 and the second, about July 20 or 21. See *ibid.* At the time of the downgrade, Mr. Flowers could not recall whether Ms. Vawter gave him "any current reading" on how Petitioner was performing (*id.* at 119).

o. In the last week of July, Ms. Vawter assigned Petitioner responsibility for "the segment of work...dealing with 30-day monitoring visits" (Flowers, June 1, 115). The "objective here was to determine if VA [wa]s meeting its requirement to monitor patients in non-VA nursing homes on a 30 day

cycle as they are required to do" (*ibid.*). According to Mr. Flowers, Petitioner was to determine "first if [VA was] complying with the 30 day requirement;" then, "if not, why not" and "the cause of it;" and then "is there any adverse effect on the health of the patients because they're not doing it" (Flowers, June 1, page 116). In making the 30-day monitoring assignment, Ms. Vawter referred Petitioner to "some questions that George Tabb and [she] had brainstormed one day" and told him that they were "just to get him started" on the assignment (Vawter, June 2, pages 75 and 77; Tabb, June 3, pages 65-68; and RE 54). One of the questions Petitioner was to ask dealt with "the effect on veteran patients if [deficiencies] left uncorrected in the short run and long run" (RE 54, page 2). However, Ms. Vawter has never been "real confident that [GAO staff was] going to be able to document an effect [of VA not making monitoring visits every 30 days]" (Vawter, June 2, page 83 and see also page 150). She felt that "outside consultants" would probably be needed (*id.* at 198). Pursuant to a meeting in Atlanta, on August 12-14, it was "agreed" that Human Resources Development in Washington would "examine other possible means of determining the elusive effect" (Pet. H, page 3). While GAO staff was never "able to really nail down effect," Ms. Chennault, who had been a GS-12 for only seven months when she joined the VA job, used several approaches to determine "effect" when she later took over this assignment from Petitioner (Chennault, June 3, pages 21-23).

p. Although Ms. Vawter knew from an interview with Harmon Adams, supervisor of the social workers, that VA regarded itself as an informed purchaser of health care and that the social workers did not make quality-of-care determinations, she directed Petitioner to follow up on this issue with the social workers. See Vawter, June 2, page 223. She did so in order to obtain information "as to what they perceived their roles to be" (*ibid.*). Petitioner proceeded to interview three social workers--Stephen Hudson on August 5; Lillian Woods on August 7; and Jerry White on August 8. See RE 55, 56 and 57. He used the list of questions given to him by Ms. Vawter. Compare RE 55, 56 and 57 with RE 54. He wrote up the interviews on August 21, 22 and 27. See *ibid.* The write-ups of Mr. White's interview represented more than one "conversation" with him (Vawter, June 2, page 92). This is not "standard" (*id.* at 84). Each interview should be noted by date, or a new memorandum prepared on it. See *ibid.*

q. Ms. Vawter assigned to Petitioner the task of reviewing patient files to identify among other things, any quality-of-care problems found by the social workers (Vawter, June 2, page 152 and Petitioner May 19, page 247). Petitioner pointed out that he "didn't feel that [he] was qualified to make a determination as to whether care was appropriate or not," but he "agreed to review the files and see if the social worker had identified any problems" (Pet. May 19, page 254). Petitioner prepared a sampling methodology to select the patient files. See Pet. May 19, page 248 and Vawter, June 2, pages 152-153. Ms. Vawter wanted anecdotal samples instead. See Pet. May 19, page 248. Petitioner pointed out that anecdotal sampling would not be fair and random samples might be atypical. *Ibid.* Petitioner felt that a scientific sampling procedure was important for this particular assignment and the survey phase because he wanted to make sure that GAO could establish "that there was a valid issue, rather than an anecdotal sample that was uncharacteristic" (Pet. May 19, page 250). Ms. Vawter rejected his suggestion as "premature" (Vawter, June 2, 153). Ultimately, a sampling methodology was designed. See Vawter, June 2, page 204. Petitioner made a copy of each of the patient files that he reviewed. See Pet. May 19, page 255.

r. On August 5, Ms. Vawter gave a "progress report" to Mr. Flowers, the "essence" of which was that Petitioner was "having some problems" (Flowers, June 1, page 120 and Vawter, June 2, page 67). She pointed out "mathematical errors on the schedule;" not following "the standards... for putting together work papers" (Flowers, June 1, 120-121); and making statements that were "misleading" (*id.* at 122). Ms. Vawter expressed to Mr. Flowers her "judgment" that Petitioner "seemed not to understand what she was

asking him to do" (*id.* at 120-121). Mr. Flowers did not regard the "errors" as "unsurmountable kinds of problems, quite honestly" (Flowers, June 1, page 137). They "were things that...were correctable early on" (*ibid.*). Mr. Flowers instructed Ms. Vawter to "counsel" Petitioner "immediately" (Flowers, June 1, page 121). Ms. Vawter counseled Petitioner on August 6 in a session that lasted for perhaps one to two hours (Vawter, June 2, page 67). Petitioner was "very polite, very low-keyed," but "would not accept" Ms. Vawter's criticisms (Vawter, June 2, page 68). Petitioner indicated that the "inaccuracies" were "nothing more than supervisory preference" (*ibid.*) and that it was "normal" to make errors, which "would be picked up in the verification process" (*id.* at 69). See also Flowers, June 1, pages 121 and 126.

s. On August 9, Mr. Flowers and Ms. Vawter met with Mr. Martin and Mr. Patterson to bring them up to date on Petitioner's performance. See Flowers, June 1, pages 127 and 137 and Vawter, June 2, page 69. They told Mr. Martin and Mr. Patterson that "initially Fred seemed to be working hard and trying real hard," but that "more recently [his performance] seemed to be deteriorating" (Flowers, June 1, page 127). Ms. Vawter and Mr. Flowers expressed concern about "the amount of production they were getting out of Fred, about some of the data that he was or was not collecting, the speed at which things were happening, and his apparent lack of understanding of the objectives of the assignment" (Martin, June 9, page 268). It was agreed that Mr. Flowers and Ms. Vawter would meet with Petitioner at least every two weeks, to counsel him and "try to help him stay up" (Flowers, June 1, page 127).

t. On August 8, Petitioner submitted a schedule comparing the number of nursing homes and patients visited by the Decatur Medical Center social workers over a 12-month period. See RE 64 and also Vawter, June 2, page 101 and Pet. May 19, pages 245-246. This assignment required Petitioner "to pull data from 12 sheets of paper and just transfer that data to a summary schedule" (Vawter, June 2, page 102). He produced an "acceptable product" (RE 64) and, in Ms. Vawter's opinion, the only acceptable one he did produce (Vawter, June 2, pages 102-103). It was not a "particularly difficult assignment" (*id.* at 102).

u. In mid-August, Mr. Flowers attempted to set up a meeting with Petitioner and "the whole staff." (Flowers, June 1, page 129). The first was cancelled because Petitioner "took sick leave" (*ibid.*). The next was cancelled because Petitioner "took annual leave" (*ibid.*). The third, scheduled for August 25, did not take place because Petitioner "didn't return from leave" (*ibid.*). Ms. Vawter advised Petitioner and Mr. Tabb that "Jesse would be coming to the site...to review work papers" (Vawter, June 2, page 98), but she did not, "specifically", set up a meeting with Petitioner (*ibid.*). See also Tabb, June 3, pages 88-89.

v. On August 27, 1986, Petitioner wrote a memorandum to Mr. Martin, with a copy to this Board, in which he complained, among other things, that his supervisor was failing "to communicate clearly expectations" or "to maintain a good motivational environment for accomplishing the work;" that his supervisor was "setting [him] up for failure, denying [him] adequate guidance and excruciatingly nitpicking [his] work;" that her attitude toward him h[ad] become increasingly antagonistic and demeaning;" and that he had been excluded from planning discussions, on August 13 and 14, and from a trip to visit a VA Medical Center in South Carolina. See JE 30. Petitioner requested that he "work under a qualified Hispanic supervisor" in the Atlanta office (JE 30). Mr. Martin called Petitioner to a meeting on the day he received the memorandum, which was August 29. See JE 30; Flowers, June 1, page 130; and Martin, June 9, pages 269-270.

w. Mr. Flowers had already arranged to meet with Petitioner on August 29 (Flowers, June 1, page 130). However, by the time of the meeting Petitioner had been called into the meeting with Mr. Martin. See *ibid.* Mr. Flowers asked Petitioner to bring his workpapers to him while Petitioner met with Mr. Martin. In the bundles of workpapers given to Mr. Flowers, Petitioner "accepted part ownership" for two interview

write-ups (id. at 132). These interviews were conducted jointly with Mr. Tabb, who did the write-ups, with Petitioner reviewing them and making comments. See id. at 132-133. Mr. Flowers found no indication in the work bundle of "any work related to the segment that Ms. Vawter had given [to Petitioner]" (id. at 134). After Petitioner met with Mr. Martin, Petitioner and Mr. Flowers had a talk. See Flowers, June 1, page 134. After Mr. Flowers said that he could not find any of Petitioner's work in the work bundles, Petitioner advised him that "he wanted to be taken off the assignment;" that Ms. Vawter was "unfair;" was "harassing him;" was "not giving him guidance;" and was "excluding him from meetings" (id. at 135).

x. During the meeting on August 29 between Mr. Martin and Petitioner, Mr. Martin called in Mr. Flowers, briefly, to reinforce his understanding that expectations had been set and that Mr. Flowers had been trying to meet with Petitioner "to go over his performance" (RE 72, page 1). Mr. Martin also advised Petitioner that he would get back to him with a response to his transfer request. See RE 72, pages 1 and 2.

y. Mr. Tabb learned of Petitioner's allegations about Mr. Flowers and Ms. Vawter and testified that they were totally "false" (Tabb, June 3, pages 74-75 and see also 76-79. He was in a position to know this; and I credit his testimony. See FF36, and 47h. After these allegations were made, it "became a little bit more uncomfortable" for Mr. Tabb to continue the "fairly free and easy and comfortable" interaction between Petitioner and himself (Tabb, June 3, page 74). Mr. Tabb had been "defending" Petitioner to Ms. Vawter (Tabb, June 3, page 90). Finally, she became "a little perturbed with" Mr. Tabb and pointed out some "problems with Petitioner's work" (ibid.). She showed him "a math error" (id. at 91 and see also id. at 107). Mr. Tabb did not check the math, but took her word for it. See Tabb, June 3, page 117. When Mr. Tabb read Petitioner's write-ups, to which Ms. Vawter had referred him, and noted her comments that items were "unclear or confused," he verified that "in fact [the write-ups] were unclear or confused" (ibid.). Where Ms. Vawter noted "incorrect" on the write-ups, he agreed, based on his "experience in social work services" (id. at 118).

z. As a result of Petitioner's accusations, Mr. Flowers asked Mr. Tabb "to start making [him]self present at a lot of the meetings between Fred and Martha...to act as a hopefully impartial witness, that what occurred at those meetings, and to protect both Martha and Fred" (Tabb, June 3, page 93). Mr. Flowers' "mindset" seemed to Mr. Tabb to be that "[h]e wanted things to go well" (ibid.). Mr. Flowers told Mr. Tabb "if we're screwing up somehow, if Martha is being too tough or if Martha is doing something wrong, I want you to tell me about that stuff, as well as anything Fred might be doing, because we're going to have to make adjustments if this is going to work out" (ibid.). Mr. Tabb started taking "notes" (ibid.). He noted on September 10, that Petitioner was "acting rather paranoid about the whole thing," that is that Mr. Flowers and Ms. Vawter "were conspiring or wishing along with others to do him in" (RE 76, page 2). He noted, on September 12, that Petitioner had told him that he had an appointment with a "psych counselor...to help him deal with the stress on the job and the emotional strain of his situation" (RE 76, page 3).

aa. On September 2, Mr. Flowers went out to the "audit site", the VA Hospital in Atlanta (Flowers, June 1, page 135). He wanted to review all the workpapers of the team and to have further discussions with Petitioner. See id. at 136. Petitioner produced one write-up of an interview he and Ms. Vawter had done jointly. See id. at 136 and RE 52. Mr. Flowers had already seen two schedules which Ms. Vawter had shown him. See Flowers, June 1, pages 136-137. Mr. Flowers closeted himself with Ms. Vawter and Petitioner to discuss Petitioner's charges. See id. at 138. As to guidance, Petitioner conceded that Ms. Vawter "helped him format the schedule" (ibid.), and "helped him decide where the information was that he had to put on the schedules" (id. at 138-139). As to his assigned segment, Petitioner conceded that Ms. Vawter had given him "a listing of questions" to use "as a starting point" and that that was "guidance" (id.

at 139 and 144). Petitioner told Mr. Flowers that he "did not understand the objective" of the assigned segment (Flowers, June 1, pages 139, 144, 223-224). Petitioner also raised a question about travel, namely that Ms. Vawter and Mr. Tabb were going to, or had gone to Columbia, South Carolina, and had not asked him to go along. See *id.* at 142-143. As it happens, they were following Mr. Flowers' direction that they leave Petitioner behind, "to complete his work" on the assigned segment (*id.* at 143). Petitioner also mentioned being excluded from a meeting with the assignment manager from Washington, Mr. Garbark. See *id.* at 140-142. Mr. Flowers gave credible testimony that Petitioner "participated as much as any of us, or at least he was in the room," but he asked no questions and made no comments, in Mr. Flower's presence, even about his segment of the work, which was discussed (*id.* at 141-142). It was Mr. Tabb who answered all the questions about the segment involving the 30-day monitoring visits. See *id.* at 142.

bb. At the September 2 meeting, Ms. Vawter "set a specific target date" of September 8 for completion of the 30-day monitoring segment assigned to Petitioner (Flowers, June 1, page 144 and see also Vawter, June 2, page 80). This was "a major segment of the job" (*id.* at 145). Ms. Vawter also asked Petitioner to "summarize his work" on the assignment (Vawter, June 2, pages 80-81). She wanted "something loosely associated" with a work paper summary, but did not "expect a summary to the extent that you would prepare and put in working papers as a work paper summary" (*id.* at 81). "[A]ll [she] wanted was just to see some evidence that Fred had of what he had done since July the 29" (*ibid.*), and "what, if anything had yet to be done" (Pet. May 19, page 265).

cc. On September 5, Petitioner finished two schedules. See PE 18. One showed whether veterans were placed in nursing homes by the Decatur VA Medical Center within its primary service area. See Pet. July 7, page 12 and see also PE 18, pages 1-3). The other schedule showed nursing homes assigned to social workers and whether within the Metro-Atlanta area. See PE 18, pages 4-14. Ms. Vawter did not review these schedules until the latter part of November. See Vawter, June 2, page 123. She criticized the first schedule for not including "the complete universe," namely veterans placed by other medical centers (*id.* at 124). The second schedule was "not of any use," in Ms. Vawter's opinion, because it did not develop "whether the location of the nursing home impacted on how often the veteran was visited" (*ibid.*). Ms. Vawter also noted an apparent "math error" (*id.* at 127), among other points. These schedules were included as examples of poor performance in Petitioner's rating for the period of September 21 to December 20. See *id.* at 128.

dd. On September 9, 1986, a meeting was held between Mr. Martin, Petitioner, Mr. Flowers and Ms. Vawter, with an EEO counselor attending at Petitioner's request. See JE 37; Martin, June 9, pages 281-286 and 320-325; and Flowers, June 1, pages 149-152. The meeting lasted "[p]robably a couple of hours" (Martin, June 9, page 286). Mr. Martin showed to Ms. Vawter and Mr. Flowers the August 27 memorandum from Petitioner and attempted to get "specifics" from Petitioner about his complaints. See Martin, June 9, pages 282 and 286. The only "specific" Petitioner discussed, beyond what he had written, was about being excluded from the meeting in Atlanta with Mr. Garback from Washington. See *id.* at 282-285 and Flowers, June 1, pages 140-142. In the end, Mr. Martin told Petitioner that he "could find no reason to reassign him because Mr. Jimenez had been unable to provide him any specifics" (*ibid.*). By this time, Petitioner's "ability to concentrate" was being impacted by his emotional stress over his treatment at GAO (Pet. July 7, pages 86-87). His "mental health" [had] deteriorated" (*ibid.*).

ee. On September 24, 1986, Mr. Flowers met again with Petitioner and Ms. Vawter. See Flowers, June 1, page 152; Vawter, June 2, page 83; and Pet. May 19, page 261. Mr. Flowers wanted "to again reestablish expectations [for Petitioner] at the GS-11 grade level" because the stay of Petitioner's downgrade "had

been lifted" (Flowers, June 1, page 152). As a result of the meeting, Mr. Flowers prepared "a very detailed memorandum confirming what [Mr. Flowers] understood to be the expectations that Mr. Jimenez and [himself] and Ms. Vawter agreed to" (Flowers, June 1, page 156). Also discussed was the implementation stage of the assignment, the survey phase having concluded just eight days before the meeting. See Flowers, June 1, page 154. As to the segment already assigned to Petitioner, Petitioner continued to say that he "didn't understand the objectives" (*id.* at 155). Petitioner was instructed "to explore more the cause and effect" of nurses and social workers not visiting patients every 30 days (Pet. May 19, page 259 and see also Vawter, June 2, pages 151 and 186-194 and 200). Petitioner stated that it was his understanding that "cause and effect" was going to be developed by the Human Resources Development staff that were leading the job in Washington" (Pet. May 19, page 260). Ms. Vawter also asked Petitioner to prepare "a work paper summary" which was to be "a more formal document than what Ms. Vawter had requested...before" (Vawter, June 2, page 83). The meeting lasted for three hours. See Flowers, June 1, page 153. The work paper summary was never prepared. See Vawter, June 2, page 84.

ff. Following the September 24, 1986 expectation-setting meeting, Petitioner took "a long, unplanned, unscheduled period of leave" (Flowers, June 1, page 174). It lasted for a month or so. See *ibid.*

gg. On October 20, Petitioner was rated as a GS-12, concerning his work from June 2, 1986 to September 20, 1986. See JE 31 and Vawter, June 2, pages 103-107. Ms. Vawter found his overall performance to be "generally unacceptable" (JE 31, page 2). She rated "his written communication, oral communication, and administrative duties borderline" (JE 31, page 2). The other job dimensions were rated Unacceptable, except for Supervision for which there was no basis for evaluation. See JE 31, page 1.

hh. By the time Petitioner returned to work on November 3, 1986, Kathy Chennault had been added to the team. She received what, to her, was "adequate" guidance when she joined the job (Chennault, June 3, page 2 and see also Vawter, June 2, page 109). Petitioner met with Mr. Flowers and Kathy Chennault and was told that, in his absence, the job had evolved to a point that the expectations previously set might not be applicable anymore. See Flowers, June 1, page 176. Mr. Flowers and Ms. Vawter decided to have Petitioner assist Ms. Chennault in developing a segment assigned to her that had "a pretty high priority", by writing up the interviews which she conducted; and Ms. Chennault would assist Petitioner on the 30-day monitoring segment which was still not done (Flowers, June 1, page 177 and Chennault, June 3, pages 5-6). Petitioner was apparently "confus[ed]" about what he was to do (Pet. May 19, page 264).

ii. On November 13, 1986, Mr. Flowers accompanied Ms. Chennault and Petitioner to an interview of three officials from HCFA. See Flowers, June 1 page 183. Ms. Chennault was to conduct the interview and Petitioner was to write it up. See *ibid.* It lasted two hours. See *id.* at 184. Mr. Flowers testified to a number of criticisms of the write-up of the November 13 interview, the "first and most compelling reason" being that it did not meet GAO "standards" in that it failed to show, in the upper-right-hand corner, who prepared the document, the date of preparation, and a page number (*id.* at 193-194). He also found the statement of "Purpose" to be too general (*id.* at 196). There was also a failure to attribute statements to specific officials which is "standard policy" (*id.* at 195-196). Mr. Flowers questioned some of the terms used in the write-up. See Flowers, June 1, pages 201-202. In fact, the terms were proper. See Trent, May 21, pages 851-854. Mr. Flowers also criticized Petitioner's failure to write a more descriptive title, but admitted that this is not a GAO "standard" for workpapers (Flowers, June 1, pages 236 and 239).

jj. Counsel for Respondent produced the write-up which Ms. Chennault did of the same interview of HCFA officials on November 13, and the point sheet prepared by Mr. Flowers on it. See Chennault, June 3, pages 11, 12 and 17. Comparing the write-ups of Ms. Chennault and Petitioner and the Flowers' point sheets on each, it is apparent that the tone used by Mr. Flowers to Ms. Chennault was positive; whereas the tone used to Petitioner was negative. Compare JE 35 and RE 60.

kk. On November 14, Petitioner and Katherine Chennault interviewed Mildred Skipwith, a Medicaid program analyst. See RE 61. Ms. Chennault conducted the interview. See Pet. May 19, page 296. Mr. Flowers told Petitioner to write up the interview. See Vawter, June 2, page 113. Ms. Vawter, on November 25, told Petitioner to give it to Ms. Chennault for review. See RE 61, page 9 and Vawter, June 2, page 114. By December 1, Ms. Chennault had not received it. Petitioner explained to Ms. Vawter that he was still making revisions to it. See Vawter, June 2, page 114. Ms. Vawter told him to give "what he had" to Ms. Chennault, which he did. Ibid. However, Ms. Chennault could not review it because of all the portions crossed out, arrows drawn in, and inserts included. See RE 61, page 9. On December 3, 1986, Ms. Vawter told Ms. Chennault to prepare the write-up of the Skipwith interview "in the interest of time", and told Petitioner to rewrite it and submit it for Ms. Vawter's review, if he wished, "for developmental purposes" (RE 61, page 9). Petitioner did so on December 4 at 4:30 p.m. See RE 61, pages 2-8 and Vawter, June 2, page 115. Ms. Vawter reviewed it and found, after consultation with Ms. Chennault, that it contained "factual error, misleading and unclear statements, poor sentence structure, and grammatical error" (RE 61, pages 1-8). Ms. Chennault "ended up" doing the write-up (Chennault, June 3, pages 5, 10, 11 and 16).

ll. In late November, Petitioner provided Ms. Vawter with approximately a two-inch thick stack of "progress notes from social worker files" (Vawter, June 2, page 154), relating to the 30-day monitoring assignment. Earlier, Petitioner had told Ms. Vawter that "there were no indications of quality-of-care problems" in the files; and she told him: "Well, okay, let's not waste any more time and just put that aside" (Pet. May 19, page 252). Therefore, Petitioner stopped "annotating" the files (Pet. May 19, page 253). Ms. Vawter could not "recall" or "remember" telling Petitioner to stop work on the files (Vawter, June 2, page 155). She seemed genuinely unsure and so I credit Petitioner's testimony on this point. This would explain why the material was not "indexed" or "analyzed", which was one of Ms. Vawter's complaints. (Vawter, June 2, page 84).

mm. Also, in late November, Ms. Vawter first saw Petitioner's write-ups of the interviews with the three social workers and reviewed them. See Vawter, June 2, page 155 and RE 55, 56 and 57. She prepared a point sheet on them. Id. at 94. She was "not entirely satisfied with the content" of the write-ups (id. at 94), in that "he did not make an effort to go beyond those questions (RE 54, the list Ms. Vawter and Mr. Tabb drafted) to develop questions of his own." A comparison of RE 54 (the list) and RE 55, 56, and 57 (the write-ups) indicates that he did add one question--he asked the opinion of the social worker as to the quality of care reviews. Ibid. On December 2 Ms. Vawter gave her point sheet to Petitioner during a meeting between her, Mr. Flowers and Petitioner (Vawter, June 2, page 95). She told him "to review it and get back with [her] if he had any questions" (ibid.). He never did get back to her. Id. at 96.

nn. By December 10, Mr. Flowers knew that Petitioner was to be reassigned. See id. at 203. Mr. Flowers had told Mr. Cox that Petitioner was available because, by that time, the team was beginning to write its report and Petitioner had not done enough work to be in a position to contribute to that effort. See id. at 206.

oo. On December 10 at 8 a.m., Petitioner and Mr. Flowers interviewed two VA officials, Harmon Adams and Jerry White. See Flowers, June 1, pages 203 and 246 and Pet. N. Both asked questions of the officials. See Pet N. Mr. Flowers gave to Petitioner a 44-item, written critique of the Adams/White write-up. See pages 9-21 of RE 62. Some mistakes were noted (items 28, 31, 33, 35 and 39) and a major point was found to be missing. See item 16.

pp. Petitioner was not "receptive" to the help offered by Mr. Flowers; he "refused to accept ownership for any of the problems that [Mr. Flowers and Ms. Vawter] were pointing out to him; he told them it was "supervisory preference;" that "errors that [they] were referring to were not significant, and would be corrected through reviews" (Flowers, June 1, page 210). Petitioner did not attempt to explain to Ms. Vawter that differences in arithmetic which Ms. Vawter marked on one of his schedules were explainable on the basis of the fact that she was counting additional deficiencies (State), whereas he counted only Federal ones. Petitioner's explanation of this was that he had "lost [his] faith in her fairness and objectivity as it pertained to judging [his] performance, and also not only Martha's, but management" (Pet. July 7, page 159). He explained that he "did not want to help her or management by pointing out the errors that they had made, which basically would have resulted in them trying to find other faults in [his] work to justify an unfair rating" (*ibid.*).

qq. Petitioner interviewed VA social workers repeatedly, and did not write up the interviews, as should have been done. See Flowers, June 2, page 223. The VA social workers were "very, very upset" at Petitioner's "asking the same questions over and over again," in follow-up sessions, such as what was their "role as a social worker" (White, June 10, pages 562 and 579-580; Hudson, June 3, page 593; Adams, June 3, pages 656-657; Flowers, June 1, pages 222 and 258-261; and Tabb, June 3, pages 97-101). One of the social workers established that Petitioner omitted some "important points," but that the majority of the write-up was "accurate" (Hudson, June 10, pages 603 and 606). Petitioner should have, and did not, report to Mr. Flowers that he was having "problems" with VA officials (Flowers, June 1, pages 222 and 260).

rr. On January 12, 1987, Petitioner was given his final performance appraisal for the period from September 21 to December 20, 1986. See JE 32 and Vawter, June 2, pages 116-118. He was rated Unacceptable in all job dimensions except Oral Communication, for which he was rated Borderline, and Supervision, for which there was not basis for evaluation. See JE 32, page 1.

ss. Petitioner's failure to complete the 30-day monitoring segment had "a very severe impact on the job" (Flowers, June 1, page 171). An additional staff member had to be assigned, Kathy Chennault, a GS-12. See *ibid.* Ms. Vawter had to spend "too much time with Fred reviewing his work, providing guidance, coaching on what to do" (Vawter, June 2, page 110). Petitioner told Ms. Vawter that "he required more coaching than other members of his grade level" (*id.* at 111). Some target dates were missed because the 30-day monitoring segment was not done. See Flowers, June 1, page 172. GAO's team has never developed "why VA is not meeting the 30-day deadline" (*id.* at 225). The "effect" issue has never been developed (Flowers, June 1, page 227). The team "absolutely did not have the time to do it" (*ibid.*).

Denial of Second Within-Grade Increase

48. By letter dated April 20, 1987, the Regional Manager notified Petitioner that a within-grade increase, which was due on January 4, 1987, was denied, based upon the performance appraisals of William Faircloth and Martha Vawter on the RWR and VA jobs. See JE 40. "Greater weight" was placed on his "most recent performance" under Ms. Vawter (JE 40, page 2).

II. Controlling Law and Legal Principles

A. Allegations of employment discrimination

Subsection 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq. (1982), makes it unlawful for an employer to discriminate against an employee because, inter alia, of the employee's national origin or religion. Id. at §2000e-2(a). Title VII also makes it unlawful for an employer to discriminate against an employee because that employee opposed a practice prohibited by Title VII. Id. at §2000e-3(a).

These Title VII provisions are made applicable to GAO employees pursuant to §3(g)(3) of the General Accounting Office Personnel Act of 1980.

Allegations of employment discrimination must be proved by the plaintiff by preponderance of the evidence, which is defined as evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue. Parker v. Defense Logistics Agency, 1 MSPB 489, 509 (1980).

In two leading cases the Supreme Court sets forth and explains a presentation of proof in employment discrimination cases in order "to bring the litigants and the court expeditiously and fairly to the ultimate question" (Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981), citing and explaining McDonnell Douglas v. Green, 411 U.S. 792 (1973)). First, the employee must establish a prima facie case of discrimination by introducing evidence that "eliminates the most common nondiscriminatory reasons" for the challenged action. Burdine at 253-54. This burden is not intended to be an "onerous" one. Id. at 253. If the plaintiff establishes a prima facie case, a presumption of discrimination arises which the defendant can rebut by "articulat[ing] some legitimate, nondiscriminatory reason" for his challenged action. McDonnell Douglas at 802. "The defendant need not persuade the court that it was actually motivated by the proffered reasons.... It is sufficient if the defendant's evidence raises a genuine issue of facts as to whether it discriminated against the plaintiff" (Burdine at 254-55 (footnote and case citation omitted)).

If the defendant rebuts the presumption of discrimination, the plaintiff must prove that the employer's proffered reasons are really pretexts. McDonnell Douglas at 804. In so doing, evidence used to establish the prima facie case may be again used. Burdine, at 255, fn.10. In Burdine the Supreme Court emphasized that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the Plaintiff." Burdine at 253. And, in United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714-716 (1983), the Supreme Court admonished lower courts that, once a Title VII case has been "fully tried on the merits," the question of whether a plaintiff has established a prima facie case is no longer relevant" and that they should not make the inquiry into the ultimate question of fact "even more difficult by applying legal rules which were devised to govern 'the allocation of burdens and order of presentation of proof,'" quoting Burdine. See also Mitchell v. Baldrige, 759 F.2d 80, 83-84 (D.C. Cir. 1985) applying the Aikens advice.

When the agency relies upon inadequate job performance as its defense to a Title VII case, as here, determining whether a plaintiff adequately fulfilled his job requirements is a "task left to defendant, through its supervisors, and the court need only determine whether their decisions...[have] some basis in fact or [are] so groundless as to reveal a discriminatory motive." Eng v. National Academy of Sciences, 23 FEP Cases 862, 864 (D.D.C. 1980).

B. Agency actions reducing employees in grade

A reduction-in-grade is a "performance-based action" and the agency's burden of proof in a performance-based action is substantial evidence. 4 CFR 28.23(a).

Substantial evidence is 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, 340 U.S. 474 at 477 (1951) cited in Chen v. General Accounting Office, 821 F.2d. 732, 738 (D.C. Cir. 1987) at page 12. It means that the agency's actions must be upheld if in light of all the relevant and credible evidence, a reasonable person could agree with the agency, even though other reasonable persons might disagree. The presiding member may not substitute the member's judgment for that of the agency. Parker v. Defense Logistics Agency, 1 MSPB 509 (1979).

Under this test, the agency is "not required to present evidence which is more persuasive than that presented by the [employee]." Shuman v. Department of Treasury, 84 FMSR 5868, p.x-1165 (1984).

GAO Order 2432.1 provides for the reduction in grade of an employee whose work is unacceptable. The Order provides that a performance-based action (reduction in grade or removal) may be proposed at any time when the employee's performance becomes unacceptable in one or more critical elements of his position. GAO Order 2432.1, Chap. 2, par.2a (RE 2 page 6).

Prior to taking such action, the employee must be given written notice of the specific instances of unacceptable performance for any critical elements for which his performance has been determined to be unacceptable, and an opportunity period to demonstrate acceptable performance in those categories. See GAO Order 2432.1, Chap. 2, par. 2 (RE 2, page 6); and see also Wilson v. Interstate Commerce Commission, 28 MSPR 198 (1985). The opportunity period shall be not less than 30 days and not more than 90 days and the employee should be advised of its duration. See GAO Order No. 2432.1, Chap. 2, par. 2b. (RE2, page 6).

If the employee's performance continues to be unacceptable in one or more of the critical elements for which he received written notice, GAO management may propose a reduction in grade; a removal; or retain the employee at his or her current grade and pay level. The employee is given 30 days notice of the proposed action, an opportunity to respond, and, thereafter, written notice of the decision. Once the employee is given notice of his deficiencies and an opportunity to improve, the agency may remove the employee for unacceptable performance during the opportunity period. See GAO Order 2432.1, Chap. 2, par. 2c and 4b (RE2, pages 6 and 7). The agency need not prove unacceptable performance prior to the opportunity period. Wilson v. Department of Navy, 84 FMSR 6051 (1984).

GAO defines unacceptable performance as performance which fails to meet established performance standards in one or more critical elements of the employee's position. See GAO Order No. 2432.1, Chap. 1, par. 4g, (RE 6, page 4 (backside)).

A reasonable opportunity to improve performance is mandated by GAO Order 2432.1, Chap 2, par. 2b (RE2, page 6). which is the parallel to Chapter 43 of the Civil Service Reform Act. See 5 U.S.C. 4302(b)(6). In Sandland v. General Services Administration, 84 FMSR 5871, page x-1180-1181 (1984), the MSPB held that a reasonable opportunity to demonstrate acceptable performance is a "substantive right; indeed it is one of the most important rights, benefiting both the employee and the agency, in the entire Chapter 43 appraisal scenario." The MSPB stated that a prima facie case may be established by

documentary or testimonial evidence that petitioner was offered a reasonable opportunity to improve. However, "in the face of a nonfrivolous challenge, the burden rests with the agency to show full compliance with the requirements of §4302(b)(6) by substantial evidence." (*Id.* at x-1181). In Sandland, the agency failed to present sufficient evidence to successfully counter the employee's assertions and, as a result, the agency did not meet its burden of proving by substantial evidence that the employee was afforded a reasonable opportunity to improve. Therefore, the MSPB held that the agency's Chapter 43 action, lacking proof of a substantive element, could not be sustained.

C. Agency actions denying within-grade increases (WGI)

An agency also has the burden of proof when it takes an action denying a WG1 to an employee.

The General Counsel and the Respondent agree that the proper standard of proof is preponderance of the evidence, though there is some conflict among the circuits, some applying a substantial-evidence standard. See GCPHBr. page 33 and RPHBr. page 12 and the discussion in Chen v. General Accounting Office, 821 F.2d. at 740-741 (D.C.Cir., 1987) at page 18, where the D.C. Circuit notes its application of the preponderance of the evidence standard. In view of the agreement of the parties as to this issue, and the fact that this case is subject to appeal to the D.C. Circuit, the preponderance of the evidence standard will be applied in this case.

GAO Order No. 2531.3 provides for within-grade salary increases. See RE3. A within-grade salary increase is a periodic increase in an employee's basic rate of pay which is granted after the employee has fulfilled the waiting period and demonstrated that his or her work is of an acceptable level of competence. An acceptable level of competence means "a level of performance by employees of their assigned duties that is fully successful....An employee whose current performance with respect to any critical element is unacceptable is not performing at an acceptable level of competence." GAO Order No. 2531.3, Chap. 1, paragraph 5 (RE 3, pages 3(backside)-4)).

An employee who has been rated Unacceptable on a critical job element during the last appraisal period must be denied the WGI, unless the situation meets the conditions for postponement. See GAO Order 2531.3, Chap. 1, par. 5 (RE 3, pages 3 (backside-4)).

An employee rated "Borderline" or "Minimally Acceptable" on one or more critical or noncritical job elements may be denied the within-grade increase based upon management judgment. See GAO Order 2531.3, Chap. 1, par. 5 (2),(RE 3, page 3 (backside)). The decision to deny or grant a WGI must be supported by the employee's most recent performance appraisal or upon other written statements. GAO Order 2531.3, Chapter 4, par. 8 (RE 3, page 9).

D. Harmful procedural error

Mere failure of an agency to follow its procedures does not establish harmful error. The employee must show that without error the result would be different. Wilson v. Department of Agriculture, 28 MSPR 473 (1985).

III. Discussion and Conclusion

A. The allegations of discrimination

As set forth, supra, the employee alleging discrimination bears the burden of proving that it is more probably true than untrue that adverse employment actions were based upon these illegal practices. Respondent alleges that all the adverse actions here involved (two denials of within-grade increases and one reduction-in-grade action) were legitimately based upon poor performance as assessed by four supervisors on a succession of three jobs--the EMS job supervised by Mr. William Bedwell; the RWR job supervised by Warren Faircloth; and the VA job supervised by Martha Vawter and Jesse Flowers.

The EMS job

1. Petitioner did not establish that it was more probably true than untrue that national-origin discrimination was the motive for the performance appraisal given to him by Mr. Bedwell. Petitioner did show that he is an Hispanic from Puerto Rico; that he was denied a within-grade increase, based on his rating on the EMS job; that three prior supervisors had given very good ratings to him; and that in four of the six job dimensions for which Mr. Bedwell rated his performance as Unacceptable on the EMS job, he had been rated as Superior only six months earlier. See FF30, 44, 38-40, and 41nn. Respondent's own witness, Mr. Worth, who had been Petitioner's second-line supervisor on his three prior jobs and also served as his focal point in the agency, found the Bedwell rating to be inconsistent with Petitioner's prior performance. See FF41rr. There was also credible evidence that such a precipitous drop in performance was most unusual. See FF 41 ss, tt, and uu. A former Regional Manager in the Atlanta office could recall only one other, and it was under quite different circumstances, involving an elderly employee who had been carried for many years until one supervisor decided to carry him no longer. See Colbs, July 8, pages 199-203.

However, there is also persuasive evidence of poor performance by Petitioner on the EMS job. It is undisputed that Petitioner did not directly contribute to the development of the audit guidelines, the major product of the survey stage of the job, and did not assume the role of site senior during the implementation stage of the job. Both of these duties are of the type expected of a full-performing GS-12 evaluator. See FF 18. By the time Petitioner assumed his duties on the EMS job he had been a GS-12 for about seven months (December 1984 to July 10, 1985), which is about the time a newly-appointed GS-12 is normally expected to assume the full duties of this grade. See FF 22. Neither of these duties were assigned to Petitioner because he failed to demonstrate to his superiors that he had a good working knowledge of the subject or issues by becoming actively involved in planning discussions. See FF 41 x, z, dd, and ee. Petitioner agreed that he was not ready to assume the duties of a site senior. See FF 41 e. And he conceded that his participation in discussions with GAO officials on planning the guidelines was limited because of his confusion as to what was going on and also because of what he perceived to be Mr. Bedwell's resentment at the participation by a superior and dislike for another participant. See FF 41 x. Petitioner's lack of participation was noted, with concern, by not only Mr. Bedwell, but also Paul Posner, the GS-15 Group Director from Washington, and Robert Crowl, the second-line supervisor on the EMS job. See FF 41 r, ee and pp. Evaluators at the GS-12 level are expected to be active participants in meetings with GAO officials, thereby demonstrating their ability to understand the subject. See FF 18 and 41 ee.

While I mistrust Mr. Bedwell as a witness and, therefore, his unsupported assertions of poor performance by Petitioner (see FF 31), some of his assertions are backed by other credible evidence. For example, Mr. Bedwell criticized Petitioner's ability to analyze data. See FF 41 oo. Mr. Worth established that Petitioner needed more seasoning in this skill. See FF 30 c.

Other credible evidence explains the drop in rating from prior jobs. It was established that erratic performance can result from the fact that some evaluators perform well on highly-structured jobs, where they are essentially gathering data to develop a point, and not well on a more creative job where the audit team must survey to find out what points are to be developed and how. See FF 11. Petitioner's three jobs prior to the EMS job seem to have been of the first type and the EMS job seems to have been of the second type. Compare FF 38, 39 and 40 with FF 41.

While several of Petitioner's supervisors prior to the EMS job expressed doubt that complexity of the job could account for his drop in performance (see FF 38d and 41 vv), none of these supervisors was familiar with the EMS job, which was clearly a particularly tough assignment for Petitioner. In the first place, he was unfamiliar with the issue area. See FF 41. Adding to this difficulty, was the fact that the job in this issue area was very complex, was understaffed, and required frequent absences by the first-line supervisor who had the experience in the issue area. See FF 41 b. The ability of Petitioner to substitute for his leader was a trait in which Mr. Worth believed Petitioner to be deficient at the time of his promotion to a GS-12. See FF 30 c.

Mr. Worth predicted that management would be "asking for trouble" by assigning novice evaluators to complex jobs after it had "promoted them too fast" and without "sufficient experience" (fn. 3 on page 10). The prediction seems to have come true when management assigned Petitioner to the EMS job. But Mr. Bedwell had no leeway in taking this into account in rating Petitioner.

Respondent's performance appraisal manual (RE 6), requires supervisors to evaluate a GS-12 evaluator as a "full performance level member," with no allowance provided for an apprentice period. See FF 22. And Mr. Bedwell was one of the new breed of evaluators, inclined to "call it the way it was" in rating performance. See FF 7 and 8.

Credible evidence also established some examples of poor performance by Petitioner. On his last assigned task, a point sheet prepared on his segments of responsibility on the site visit to Florida, he omitted any information on one segment and did not complete another. See FF 41 ll. Petitioner's preparation for the kick-off conference was also deficient, in some respects. See FF 41 bb and cc.

Finally, no motive was shown for Mr. Bedwell to rate Petitioner except on the basis of his performance. Mr. Bedwell participated in the program to recruit minorities (FF 31) and an Hispanic friend of Petitioner's, active in GAO's recruitment program for Hispanics, knew Mr. Bedwell and averred that he had no reason to suspect him of discrimination. See FF 31.

The General Counsel cites only one possibly anti-Hispanic remark made by Mr. Bedwell--that on the EMS job he was stuck with someone who did not speak English clearly. See GCPHBr. page 64 and FF 31 d. The person to whom this remark was made, however, considered it to be a criticism of performance, and not racist in nature. See Morrison, June 11, page 957. Since it is undisputed that Petitioner was difficult to understand over the telephone (FF 45 oo), and that Mr. Bedwell's job required frequent absences from the office (FF 41 b), difficulty in communicating by telephone would be a legitimate performance-related criticism.

2. Also on the EMS job, Petitioner did not establish that it was more probably true than untrue that religious discrimination was the motive for the performance appraisal given to him by Mr. Bedwell.

Petitioner did establish that he was a devout Catholic; that Catholics are required to practice moderation in all their actions, including the drinking of alcoholic beverages; that moderation for him was an occasional glass or two of wine; that his supervisor knew of his feelings about drinking but continued to invite him to join in drinking after work hours to continue work-related discussions; that he felt pressured to join his supervisor; that he finally refused to join him; that within a few months he received a poor performance rating, contrary to his past performance history, and the worst ever seen by experienced GAO supervisors; and that, based on the poor performance appraisal, he was denied a within-grade increase. See FF 30a; 41 g, h, i, o, y, nn, rr, ss, tt, uu, vv; and FF 44.

However, as already discussed, Mr. Bedwell had a credible reason for the poor appraisal he gave to Petitioner, namely his poor performance on the job that was not up to the standards expected of a GS-12 evaluator. There was also credible evidence that at least one other staff member on Mr. Bedwell's team, a teetotaler by religious conviction, felt no compulsion to join him and the other staff members in imbibing alcoholic beverages and that Mr. Bedwell accepted her refusal in good spirit. See FF 41 g. Another staff member established that Mr. Bedwell did not pressure him to join in drinking with him after work. See Curtis, June 10, pages 613-614, 616-618. It is undisputed that the evenings Petitioner spent socializing with Mr. Bedwell were cordial ones; and Mr. Bedwell did not order drinks for Petitioner. See FF 41 h. Under these circumstances, no motive based on religious discrimination is convincingly proved.

The RWR job

3. Petitioner did establish that it was more probably true than untrue that national origin discrimination and retaliation were the motives for the performance appraisals given to him by Mr. Faircloth.

Petitioner showed that he was an Hispanic whose reduction-in-grade and denial of a within-grade increase were based upon Mr. Faircloth's poor appraisals of his performance. See FF 30, 46 and 48. He showed that, on jobs in the defense area, he had a good performance record prior to his assignment to the RWR job. See FF 38 and 38 a; 39 and 39 a; and 40 a-g. He showed that Mr. Faircloth made derogatory remarks about minorities and resented the programs designed to help them. See FF 33 c, d and e. He showed that Mr. Faircloth knew that he was processing some kind of grievance. See FF 45 p.

Respondent adduced evidence that poor performance was the basis for the Faircloth appraisal. See FF 45 e, g, h, k, n, s, v, aa, bb, gg, and kk. However, the proof adduced by Petitioner demonstrates that this reason was pretextual in nature.

For example, credible testimony from Douglas Oxford established that Petitioner performed at least as well as Mr. Oxford, who received a rating on each job dimension of Fully Successful or better from Mr. Faircloth. Mr. Oxford came to the RWR job one month after Petitioner, worked closely with him, read Petitioner's workpapers; and even acted as his day-to-day supervisor during the last month Petitioner worked on the RWR job. See FF 45 nn, pp-vv and xx. Thus, Mr. Oxford was in at least as good a position as Mr. Faircloth to be a fair judge of Petitioner's performance.

It was established by Mr. Oxford that Petitioner introduced him to the majority of personnel at Warner-Robbins (FF 45 pp); had a good command of the information gathered on the job (FF 45 qq); gathered all the information needed for the final report in his area of responsibility (FF 45 rr); produced work papers that were better than those of Mr. Oxford (FF 45 vv); and produced fact sheets that were used, later on in the audit, without any criticism being expressed, although Mr. Faircloth had told Mr. Oxford that they were not any good and the information was not reliable. See FF 45 tt.

A comparison of Mr. Faircloth's treatment of Petitioner and Mr. Oxford is also indicative of the pretextual motive of the performance appraisals he gave to Petitioner. For example, Mr. Faircloth forced Petitioner to produce write-ups on interviews conducted within his first few days on the job even though the job dealt with complicated and technical matters, and before Petitioner could absorb the background material needed to understand it. See FF 45 a, e, f, g. Mr. Faircloth then criticized the write-ups for the lack of depth and intricate details and not recognizing the absence of necessary information. See FF 45 g and k. By contrast, Mr. Oxford, a more experienced GS-12 than Petitioner, spent about six weeks primarily reviewing documentation before he felt prepared to start conducting interviews on his assigned portion of the audit; and Mr. Faircloth put no pressure on Mr. Oxford to start interviews on his portion of the audit. See FF 32 and 45 e.

Mr. Oxford was also rated highly by Mr. Faircloth for his data-gathering abilities. See FF 45 vv. Mr. Faircloth used, as the example to support the rating, Mr. Oxford's efforts in going to the Warner-Robbins library to gather historical data on the systems under review. See FF 45 uu. In fact, it was Petitioner who initiated the trip to the library. See FF 45 uu. Yet Petitioner received only a Borderline rating from Mr. Faircloth in Data Gathering, and no acknowledgment of his efforts at the library. See FF 45 z.

Although positive as well as negative aspects of performance are to be noted on appraisals (see FF 25), and some of Petitioner's work efforts at data gathering were acknowledged as being "very good" by Mr. Faircloth, no positive comments were made by Mr. Faircloth as to this aspect of Petitioner's performance. See JE 45 ii.

Petitioner, but not Mr. Oxford, was severely criticized for not finding certain data at Warner-Robbins. See FF 45 aa. Mr. Faircloth did not believe Petitioner when Petitioner explained that the data was not available at Warner-Robbins. See FF 45 aa. When Petitioner left the RWR job, Mr. Oxford assumed responsibility for the systems assigned to Petitioner. See FF 45 rr. Mr. Oxford was not criticized for his failure to gather this data and received a high rating on the Data Gathering job dimension. See FF 45 aa and uu.

Finally, Petitioner was criticized for failing to draw conclusions and make recommendations in a work paper summary, even though, at the time it was prepared, no segment of the work was completed. When instructed to prepare a workpaper summary, Petitioner was just starting on the job, with little knowledge thus far obtained. See FF 45 t and u. No one else was asked to prepare a workpaper summary, even after segments of the job were completed, which is the usual point at which such summaries are prepared. See FF 45 t and y.

Overall, the evidence is persuasive that, but for Mr. Faircloth's resentment towards minorities at GAO, in general, and Petitioner's efforts to avail himself of the system used to help them (see FF 33 c, d and e), Petitioner would probably have received as good a performance rating as Mr. Oxford, namely Fully Successful or better. See, e.g., FF 45 qq and vv and fn. 6.

The VA job

4. As for the VA job, Petitioner did not establish as more probably true than untrue that either national-origin discrimination or retaliation was the motive for the performance appraisals given to him by Ms. Vawter and approved by Mr. Flowers.

Petitioner did prove that he is an Hispanic from Puerto Rico; that he was denied a within-grade increase, based on his ratings on the VA job; that the first rating was given to him after about five months on the job; that Ms. Vawter had previously rated the performance of another minority employee as Unacceptable, based upon a somewhat misleading and inaccurate account of the amount of work she had to do and the time within which she had to perform it; and both his supervisors on the VA job knew he had filed an EEO complaint against Respondent. See FF 30; 35 b; and 47e and gg; and 48.

However, Respondent established by credible evidence that Petitioner's performance on the VA job did not match that expected of a GS-12. Petitioner had been a GS-12 for about a year and a half when he was assigned to the VA job. See FF 30 c and 47. He was familiar with work in one other health-care area. See FF 41. Thus, it could be reasonably expected by his supervisors on the VA job that he would be a full level, GS-12 by the time he was assigned to them, and thus be able to work under broad assignments, to devise his own work steps, and to develop plans and approaches to meet broadly-based objectives. See FF 8 and 22.

Certainly, expectations were carefully, and thoroughly delineated for Petitioner. See FF 47 b, c, j, ee, and hh. But credible evidence of record indicates that Petitioner measured up to none of these expectations. He admitted that he needed more guidance than other GS-12s. See FF 47 ss. Aside from one suggestion on the use of a sampling methodology (see FF 47 a), Petitioner apparently did nothing in the way of devising his own work steps. Ms. Vawter devised schedules he used to perform some work assignments. See FF 47 l and m. Ms. Vawter and Mr. Tabb, a GS-11, came up with a list of questions to ask officials interviewed by Petitioner, a list to which Petitioner contributed only one question. See FF 47 o, aa and mm. Petitioner was unable to understand the objectives of a major segment of work assigned to him and, in particular, seemed to be at a loss as to how to develop the effect of VA social workers not making monthly visits to nursing homes, as required by VA. See FF 47 aa and ee. The GS-12 who took over Petitioner's assignment was less experienced than he, but devised several methods to develop the issue. See FF 47 o.

Petitioner's supervisors could not rely upon Petitioner to come up with an error-free, timely or complete work product. See, for example, FF 47 k, l, m, y, cc, ff, kk, oo, qq and ss. And the failure of Petitioner to complete the 30-day monitoring segment of the VA job had a severe impact on the job. See FF 47 ss. Additional staff had to be assigned, and some target dates were missed.

By August 9, after about three months on the VA job, Petitioner's supervisors had grounds for concern about the amount and speed of Petitioner's work; what data he was and was not collecting; and his apparent lack of understanding of the objectives of his assignment to complete a major portion of the job. The validity of their concern is reinforced by Petitioner's admitted problems with deteriorating mental health during his time on the VA job. See FF 45 yy and 47 z and dd.

Another legitimate concern of Petitioner's supervisors was his seemingly cavalier attitude towards mistakes in his work which were being pointed out to him, namely that such mistakes were normal and would be caught during the verification process through which GAO processes all reports before publication. See FF 47 r and pp. Such an attitude is bound to disturb supervisors trying to produce an error-free report for Congress and be reflected in their appraisals of his performance.

Another legitimate concern of Petitioner's supervisors on the VA job was the fact that he made unjustified accusations against one of them to the Regional Manager, thereby straining working relationships on the job. See FF 47 v and y.

To show the pretextual nature of Respondent's proof of poor performance by Petitioner on the VA job, the General Counsel relies on a number of points, none persuasive.

First, the General Counsel argues that Respondent "should be prevented from relying on evidence of performance deficiencies that agency officials had a part in creating," namely the "mental strain" placed on Petitioner by his belief, that "he was the object of a management effort to discriminate against him and to discredit him" (GCPHBr. 78-79). A problem with this argument is that there is no credible evidence to support the allegation of a management plot to discredit and discriminate against Petitioner. Only Mr. Oxford gave any testimony to this effect and even he was not convinced that any such plot existed. See FF 45 ww. In particular, Mr. Flowers, the evaluator in charge of the VA job, was not the type to get involved in any such conspiracy and wanted Petitioner to have a "fair chance, a clean slate, and to do well" on the VA job (FF 47 f and y). Mr. Faircloth also cautioned staff not to get "plugged into the rumor mill" about Petitioner's performance problems and ordered that staff not "get dragged into conversations about it" (FF 47 e). He also told staff that he did not want to hear about the rumors. See FF 47 e.

As for Ms. Vawter, her first report to Mr. Flowers on the subject of Petitioner's performance was that he was "doing well," "applying himself" and "working hard" (FF 47 i). This is hardly the report one would expect of a supervisor engaged in a cabal against an employee. As already discussed, it was also established that many of the complaints which she had about Petitioner's performance were justified.

The General Counsel argues that Ms. Vawter deliberately attempted to mislead everyone as to the quality of Petitioner's performance by showing certain schedules prepared by him on which arithmetic errors seemed to appear. See GCPHBr. 81-82. As found above, there was an explanation for the seeming errors; but it was Petitioner who misled Ms. Vawter, not the reverse, by not explaining the difference in numbers to her. He deliberately withheld the explanation, apparently to build his case against her fairness and treatment of him. See FF 35 c and 47 pp.

Next, the General Counsel faults Ms. Vawter for the fact that, in August, she was pressing Petitioner to pursue with more vigor the questioning of the social workers, the result of which was that the social workers came to resent Petitioner's persistence and gave testimony adverse to Petitioner at the hearing. See GCPHBr. 83-84. This task was first assigned to Petitioner in the last week of July. See FF 47 o and p. Yet the write-ups of the interviews were not produced by Petitioner when Mr. Flowers visited the work site on September 2. See FF 47 aa. Ms. Vawter did not see the write-ups until November. See FF 45 jj. Thus, Ms. Vawter could have been pressing Petitioner to get this work finished and not, as the General Counsel argues, trying "to portray Petitioner as a totally incompetent evaluator" to the VA officials. (GCPHBr. 84). No purpose or motive has been shown for Ms. Vawter to put a GAO evaluator in a bad light with the officials of the agency being audited. This would only have made her own job more difficult.

Next, the General Counsel faults Ms. Vawter and Mr. Flowers for continuing "to press Petitioner to develop 'the effect' issue," that is the effect on the health of veterans from VA not meeting its standard of visiting nursing homes every 30 days (GCPHBr. 84-85). The "effect" issue was a difficult one; and time ran out before the team could develop it. See FF 47 o and ss. Nevertheless, there was nothing improper in Petitioner's supervisors giving a difficult task to Petitioner. They gave the same task to his replacement. See FF 47 o.

The General Counsel also argues that Mr. Flowers went to "great lengths to unfairly criticize Petitioner's work" (GCPHBr. 88) and points to his reviews of the write-ups of the Trent and Adams interviews (GCPHB. 85). These reviews do show some memory lapses by Mr. Flowers but, taken together with the rest of the record showing that Mr. Flowers wanted Petitioner to succeed, they do not prove "an obvious intent to make Petitioner's interview write-ups look seriously and substantively flawed," as the General Counsel argues. (GCPHBr. 85).

Finally, the General Counsel finds pretext in the comparison of the comments Mr. Flowers gave to Ms. Chennault and Petitioner on write-ups each did on the same interview. See GCPHBr. 86-88. The General Counsel is correct in his statement that Mr. Flowers' comments to Ms. Chennault were "positive" in tone and, to Petitioner, were "negative" in tone. See GCPHBr. 86 and FF 47 jj. There is a reasonable explanation for this difference, however, other than the one suggested by the General Counsel. Ms. Chennault was new to the job and giving her instructions in an encouraging manner would be natural for a supervisor. Petitioner, however, had been on the job for about seven months. Thus, Mr. Flowers had a right to expect that Petitioner would be producing write-ups more in conformance with what he expected.

B. The agency proof in support of its actions.

As set forth, supra, at pages 65-67, the employer bears the burden of proving that its adverse actions are justified. Respondent must prove that it is more probably true than untrue that its denials of within-grade increases are valid. But as to its decision to reduce Petitioner in grade, it need only prove that a reasonable person might accept relevant evidence as adequate to support its decision, even though a reasonable person might also disagree.

1. The reduction-in-grade action here involved is not supported by substantial evidence, in that a reasonable person could not agree that Petitioner was afforded a reasonable opportunity to improve his performance. As discussed, supra, at pages 65-66, agency action based upon poor performance cannot be sustained if the opportunity period is short circuited.

In the case of Petitioner, the initial fault with the opportunity period was the failure of his supervisor fully to comply with the requirements of GAO's appraisal system by not setting expectations in accordance with the BARS Manual and by which Petitioner could be guided. See FF 13-20.

The BARS Manual, in a clear and precise manner, sets forth "How to Use This Manual to Set Expectations," as follows:

[I]t is important that at the start of an appraisal period, both parties clearly understand:

What specific tasks or responsibilities are being assigned.

What the outputs are expected to produce.

What the outputs are expected to contain or cover.

The time frames in which the outputs are expected to be delivered.

The standards against which the outputs and the individual's performance will be judged. See RE 6, page 7, and FF 7.

The discussion goes on to explain how the Manual is to be used in the above process. As new tasks and responsibilities are assigned during a rating period, expectations must be reestablished. See FF 17.

The Manual also provides how the various appendices are to be used in setting expectations. Appendix I provides the Grade Level Definitions. The Manual requires a "joint review...by the supervisor and staff member" as the "starting point" (RE 6, page 7 (Backside)). Then the Manual sets forth steps that require cross-reference between portions of the Manual and the particular assignment. The supervisor is to identify "those tasks [from Appendix II] that should be done during the assignment" and indicate "which are most important to accomplishing the objectives of individual assignments." (RE 6, page 7 (backside)). Then the Manual deals very specifically with "Individual Assignment Expectations." The Manual states: "The characteristics of the specific jobs or individual assignments, while not a formal part of the manual, are used with the Grade Level Definitions and relevant tasks in setting expectations on what is to be done" (RE 6, page 7 (backside)). Thus, the supervisor is to (1) use Appendix I, (2) correlate specific tasks from Appendix II to the particular assignment, (3) identify the most important tasks, and (4) relate Appendix I and Appendix II to the particular requirements of the job. These four steps are involved in the first part of setting expectations, which essentially defines the employee's objectives on the job. The fifth step, which is in the second part of setting expectations, involves establishing the standards. The Manual indicates that supervisors should use Appendix III (the generic standards) "along with and as a cross-check to the Performance Statements" in Appendix IV (RE 6, page 8).

Petitioner's supervisor for the opportunity period here involved, Mr. Faircloth, did not use the Manual in setting expectations for Petitioner, just as he did not use it in setting expectations for two employees who later joined the job. See FF 45 c. If a rating is not challenged, of course, no problem of sustaining a rating presents itself. But when it is, as here, the rating cannot be sustained, because this would deny to an employee a substantive right, as discussed supra, at page 66. The denial of this right cannot be categorized as a mere procedural error. It is a right that is particularly crucial to an employee who has just received a career-damaging performance appraisal and is faced with improving his performance or suffering a reduction in grade or a dismissal, as was the Petitioner in this case. See FF 42. During such a period an employee needs to know exactly what is expected of him and the time frame in which he is expected to perform each task. In other words, compliance with the Manual must be precise, to be fair. GAO recognizes this, as shown by the testimony of Mr. Patterson that GAO owes a "very special obligation" to an employee during an opportunity period (FF 42).

The second fault with the opportunity period was the unreasonableness of what was expected of Petitioner. For example, Petitioner was forced to go on interviews before he could reasonably be expected to have absorbed the background material given to him on the highly technical matters involved (see FF 45 a and e); his supervisor was rarely available to Petitioner for guidance (FF 45 a and 33 a); his first write-ups of interviews were nevertheless criticized as inadequate for, among other criticisms, the depth of the information obtained and for a lack of intricate details (FF 45 g and k); and he was also faulted for failing to obtain information at Warner-Robbins Air Force Base which officials kept telling him was not at the Base (FF 45 aa).

2. The first denial of a within-grade increase, based upon the Unacceptable performance appraisal rating given to Petitioner by William Bedwell, (see FF 44 i), is invalid, in that the same substantive right was denied to Petitioner--the right to the setting of expectations in accordance with the requirements of GAO's performance appraisal system, as set forth in its BARS Manual and as discussed supra, at pages 77-78. Mr. Bedwell admitted that he did not use the Manual. See FF 41 c. He explained this failure by saying that "it's the responsibility of the staff to, you know, review and know what you're expected to do in terms of specific tasks" (Bedwell, May 22, page 36). But nothing in the Manual suggests that it is merely there for employees to review and interpret on their own. The supervisor has a responsibility to use the Manual in

explaining the assignment and in correlating the assignment to the various appendices in the Manual.

As already discussed, the denial of this right is not a harmless procedural error. Since Petitioner was still a novice GS-12 when he reported to the EMS job supervised by Mr. Bedwell, and had never before had an assignment in the health-care issue area, he was in particular need of knowing just what the BARS Manual requires of supervisors to make clear at the session when expectations are set. The effect of the failure to make expectations clear, at the outset, was exacerbated by the subsequent development of a personality conflict between Mr. Bedwell and Petitioner (FF 41 s and gg) and the fact that, after a few months on the job, Mr. Bedwell was going to Washington every week and was not communicating with Petitioner as he had in the beginning. See FF 41 t.

Thus, Petitioner was left to fend largely for himself without clear and precise guidance as to what was expected of him. When he turned to his second-line supervisor for assistance, his second-line supervisor became annoyed at him. See FF 41 cc. Further exacerbating the failure to set clear expectations was the fact that the job was both understaffed, and complex. See FF 41 b.

3. The second denial of a within-grade increase, insofar as it is based upon the Unacceptable performance appraisal ratings by Mr. Faircloth, is invalid for the same reasons invalidating the reduction-in-grade action and as discussed at pages 71-73, and for the failure of Mr. Faircloth to set expectations as required by the GAO Manual. See FF 45 c.

However, this denial is also based upon the ratings received by Petitioner from Ms. Vawter; indeed, "greater weight" was placed upon her ratings. See FF 48. As already discussed, at pages 73-76, no motive of discrimination and no failure to observe the processes of the appraisal system can be assessed against her ratings. For example, Mr. Flowers' meticulous care to set expectations for employees could be used as a model for supervisors. See FF 47 b, c, j, ee and hh.

Whether, under those circumstances, the denial should be allowed to stand is discussed in the next section of this Decision, dealing with the appropriate remedy to be fashioned in this case. ⁸

IV. Remedy

The evidence in this case paints a clear picture of managerial ineptness and unfairness in dealing with a "very industrious" employee (FF 30 b and 45 i), who has demonstrated that he can perform successfully at the GS-12 level, when assigned to a job commensurate with his experience and put under the guidance of a supervisor who has the time and inclination to work with him. Compare FF 40 with FF 41 b and t and FF 45 to see the different treatment accorded to Petitioner by his first supervisor at the GS-12 level and his next two.

By the time Petitioner was assigned to his fourth job as a GS-12 (the VA one under Ms. Vawter and Mr. Flowers) he had been subjected to discriminatory and neglectful treatment and had grown "paranoid" about GAO's willingness to treat him "fairly" (FF 46 f and z). Petitioner perceived that he was being discriminated against because of his national origin, his religion and his having availed himself of EEO processes. See FF 47 f and z. His perceptions of discrimination on the EMS job were not entirely groundless and, on the RWR job, were well grounded, as discussed at pages 68 and 71-73.

Rather than transfer away from the situation, as one co-worker advised (Oxford, May 20, pages 631-632), Petitioner fought to vindicate himself through this action. His efforts took their toll on him and contributed to emotional stress which finally resulted in his having to lose leave in order to be treated. The stress also took a toll on his mental health and undoubtedly contributed to his poor performance on the VA job. See FF 45 yy and 47 z and dd.

These, then, are the circumstances under which a remedy must be fashioned and "corrective action" ordered pursuant to 5 U.S.C. 753.

The corrective action as to the reduction in grade, based as it is upon a discriminatory appraisal during an opportunity period, and also upon failure to follow agency standards for appraising performance, is to rescind the reduction to GS-11 and leave Petitioner at the GS-12 level to which he was restored pursuant to the stay order of this Board. See FF 46.

The corrective action as to the first denial of a within-grade increase, which was due on or about December 22, 1985 is also rescission of the order and granting of the increase. The adverse action cannot stand because it was based upon the denial to Petitioner of the substantive right of knowing just what was expected of him in terms of performance on the EMS job.

Not so clear is the appropriate corrective action to be ordered as to the denial of the within-grade increase due on January 4, 1987. See FF 48. This denial was based only in part upon the discriminatory appraisal on the RWR job and primarily upon Petitioner's proven poor performance on the VA job. The problem is that Petitioner's performance on the VA job cannot be considered totally unrelated to the mental deterioration and emotion stress caused by the prior discriminatory practices to which he was subjected. This is a matter of significance to triers of employment discrimination cases, who must attempt to eradicate, insofar as possible, the effects of past discrimination and to make employees whole. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975); Franks v. Bowman Transportation Co., 424 U.S. 747, 771 (1976); and Segar v. Smith, 738 F. 2d 1249, 1289 (D.C.Cir. 1984). Thus, I am led to conclude that the second denial of a within-grade increase must also be rescinded and the increase due on January 4, 1987, granted.

In addition, two other remedies are deemed to be appropriate. One is the purging of the Unacceptable ratings from Petitioner's personnel file, so that they may not have any future effect upon his GAO career. Other GAO documents generated by these ratings should also be destroyed. The other remedy is the restoration of any leave which Petitioner can show was taken because of bringing this case and emotional stress suffered over the practices found herein to have been improper and discriminatory.

V. Ultimate Findings and Order

Based upon the record made in this case and credibility determinations, it is hereby found that:

- A. William Faircloth discriminated against Petitioner on the basis of national-origin in his performance appraisals of Petitioner on the RWR job.
- B. William Faircloth retaliated against Petitioner for using GAO's EEO process by giving him Unacceptable performance ratings on the RWR job.

C. William Bedwell, Jesse Flowers and Martha Vawter were not shown to have discriminated against Petitioner because of his national origin, religion or for having used the EEO process.

D. Respondent improperly denied two within-grade increases to Petitioner and reduced him in grade, in violation of 31 U.S.C. 732 (f)(1) and (d).

E. Because the within-grade increase denials and the reduction in grade were based upon managerial wrongs and resulted in loss of pay to Petitioner during the period he worked from December 22, 1985, back pay Petitioner would have otherwise earned should be restored to him.

Based upon the above premises, it is hereby ORDERED that Respondent shall:

1. Destroy the Faircloth, Bedwell and Vawter performance appraisals of Petitioner as well as all other documents related to those appraisals;

2. Restore any leave which has been used in bringing this case and because of emotional stress caused by managerial misconduct as found herein;

3. Grant the within-grade salary increases due to Petitioner on December 22, 1985, and January 4, 1987, retroactive to their original due dates; and

4. Cancel the reduction-in-grade to GS-11 and restore to Petitioner any monies lost because of the action.

It is further ORDERED that all counts in the Petitions for Review which allege discriminatory conduct by Mr. Bedwell, Ms. Vawter, and Mr. Flowers be dismissed.

Notes

1. Additional findings appear in the Discussion and Conclusions section of this Decision. In this Decision the following abbreviations are used. "RE" refers to the exhibits of Respondent. "PE" refers to those of Petitioner. "JE" refers to the Joint Exhibits. "Stip." refers to the Stipulations. The pages of some exhibits have two numbers. In this event, the number used is the handwritten one. The references to the transcript include the name of the witness and the date and page of the volume. "GCPHBr" refers to the post-hearing brief of the General Counsel. "RPHBr" refers to that of Respondent. "GCRBr" refers to the reply brief of the General Counsel. "RRBr" refers to that of Respondent. "Pet." refers to the testimony of Petitioner. "FF" refers to the Findings of Fact. An index to this Decision is attached hereto as Appendix A.

2. "focal point" for each employee was created by Marvin Colbs, when Regional Manager of the Atlanta Office, and was abandoned after he retired. An employee's "focal point" served as "a mentor, as a communicator of information from management to the employees; as a communicator of information from the employees to management; as a monitor on the employee's development in terms of his training needs; and to be aware of the employee's desires as to the kinds of jobs [he or she] wanted to work on; [and] whether [the employee] had personal problems that would affect [the employee's] ability to travel" (Worth, June 11, page 778).

3. In Mr. Worth's opinion, all "career-level people are promoted at too fast a pace" (Worth, June 11, pages 796-797) and that you are "asking for trouble if you promote people who don't have sufficient experience to complex jobs" (Worth, June 11, pages 797-798).

4. How he was notified is in dispute. Petitioner testified that Mr. Cox called him and that Mr. Faircloth knew about it. See Pet. May 18, page 147. Both Mr. Cox and Mr. Faircloth firmly deny having any knowledge about it. See Cox, June 10, page 731 and Faircloth, June 9, pages 486-492. Petitioner's testimony on this point is not credited since Mr. Cox corroborates the testimony of Mr. Faircloth.

5. Mr. Martin denied that he made any statement to the effect that he "didn't want to assign Mr. Jimenez to anyone that would help him" (Martin, June 8, pages 239-240, and RE 72). Mr. Gray also denied that such a statement was made. See Gray, June 8, page 45. Petitioner testified that Mr. Martin, by an apparent slip of the tongue made such a statement. See Pet. May 20, pages 494-495. Petitioner told Mr. Martin, at an August 29 meeting, that "maybe [he] had subconsciously told him that he did not want to help him" (RE 72, page 2). Mr. Martin and Mr. Gray seemed positive in their denials that such a statement was made; and each seemed to be trustworthy as a witness. This was a long meeting, lasting most of the morning, and was probably very stressful to Petitioner. One topic involved charges that Petitioner improperly copied documents. See Gray, June 8, page 99. Petitioner's mental health was deteriorating by this time. See Pet. May 18, page 225. In view of petitioner's state of mind at this time, I found that he was unreliable as a witness in testifying as to exactly what Mr. Martin said to him at this meeting.

6. Mr. Oxford's testimony is confusing on the subject of his ratings. At page 542 of the May 20 transcript, he referred to his rating on Data Gathering as "exceptional." And see page 628M confirming this. However, he also referred to having received two or three "fully successful" ratings and "the rest were 'superior.'" See Oxford, May 20, page 551.

7. / Petitioner testified that Mr. Flowers, at his expectation-setting session with Petitioner, made the comment that "he had staked his career and was planning to make the rest of his career in GAO and would not be hesitant to do what was necessary to keep his job" (Pet. May 19, page 230). Both Mr. Flowers and George Tabb, who was present, emphatically deny that such a statement was made. See Flowers, June 1, page 106 and Tabb June 3, Pages 42-43. On this point, I credit the testimony of Mr. Flowers and Mr. Tabb. By this time Petitioner's mental health was deteriorating (see FF 45yy) and he must have misinterpreted what was said.

8. The General Counsel raises several additional issues. See GCPHBr. 94-102. Resolution of them would serve only to lengthen, not alter the order entered in this Decision. Accordingly, the principle of judicial restraint is followed.