

Charles W. Malphurs v. U.S. General Accounting Office

Docket No. 91-04

Date of Decision: July 8, 1992

Cite as: Malphurs v. GAO (en banc) (7/8/92)

Before: Personnel Appeals Board, en banc (Roger P. Kaplan, Chair; Paul A. Weinstein, Vice Chair; Isabelle R. Cappello, Nancy A. McBride and Alan S. Rosenthal, Members)

Reconsideration and Reopening of PAB Decisions

Standard of Review

Substantial Evidence Standard

Reprisal/Retaliation

Performance Appraisal Systems

Hearing Procedures

Evidence

Merit System Violation

DECISION OF THE BOARD ON PETITIONER'S REQUEST FOR RECONSIDERATION

This matter is before the full Personnel Appeals Board on the Petitioner's Request for Reconsideration of the Initial Decision issued in this case by the administrative judge on December 10, 1991. The Petition, filed on April 3, 1991, alleged retaliation against Petitioner for a prior grievance filed by him. Specifically, Petitioner contended that his scores on a June 1990 performance appraisal and on a July 1990 panel ranking, a component of the Pay for Performance review process, were unjustifiably low, based on consideration of his prior grievance activity.

The administrative judge conducted an evidentiary hearing from July 24 through July 26, 1991 and, thereafter, received a transcript of a deposition of Patricia Slocum, a witness for Petitioner who was unable to testify at the hearing. The parties submitted post-hearing briefs and reply briefs. In the Initial Decision, the administrative judge denied the Petition for Review, based on his conclusion that the Petitioner had not met his burden of showing that the ratings given to him on his 1990 performance appraisal or on his 1990 panel ranking were in retaliation for his prior grievance. On January 9, 1992, Petitioner filed a Request for Reconsideration, in which he asked for reversal of the administrative judge's decision based on new evidence which was submitted with the Request for Reconsideration and on the ground that the Initial Decision was not based on substantial evidence.

A. New Evidence

The new evidence submitted with the Request for Reconsideration consists of four documents. Attachment A was a May 30, 1990 memorandum from Mr. John A. Rinko, Group Director, NSIAD/RDAP (National Security and Internal Affairs Division/Research, Development, Acquisition and Procurement Group) to the Director of the Agency's Office of Congressional Relations regarding a Congressional request for investigation of the Department of Defense's Procurement Technical Assistance (PTA) Program. Petitioner was listed by name as one of the recipients of a copy of this document. Attachment B was a June 15, 1990 letter from RDAP Director Paul Math to Defense Secretary Richard B. Cheney, advising him of the evaluation of the PTA Program. In the last paragraph of the letter, Secretary Cheney was advised to direct any questions about the evaluation to Mr. Rinko or to Petitioner, who was identified as Evaluator-in-Charge.

Attachment A and B purport to show that Petitioner began to work under the supervision of Mr. Rinko prior to July 13, 1990, the date on which Mr. Rinko participated on a panel that rated and ranked Petitioner's contribution to his unit, a panel convened as part of GAO's Pay for Performance System. Mr. Rinko, along with four of the other eight members of the rating panel, testified at the hearing before the administrative judge that he had no knowledge of Petitioner's prior grievance at the time that the panel met. He testified that he did not learn of this grievance until Petitioner told him about it at the time of his transfer to Mr. Rinko's supervision. Petitioner testified that the transfer occurred prior to the July 13, 1990, panel meeting; Mr. Rinko testified that the transfer occurred after the panel met. It was argued by Petitioner that Attachments A and B showed that Mr. Rinko, and, therefore, at least half the panel, had knowledge of Petitioner's prior grievance at the time the panel met, contrary to the testimony at the hearing, and that the attachments further showed that Mr. Rinko lied at the hearing.

Attachments A and B plainly do not meet the standard set forth in the Board's regulations for "new and material evidence" that, "despite due diligence, was not available when the record was closed."¹ Petitioner's assertion that these documents were "unavailable at the time of the hearing" is not persuasive. Petitioner is shown as a recipient of Attachment A and might logically be expected to have received a copy of Attachment B. Moreover, it was incumbent on Petitioner, through diligent search of his own records and through the prehearing discovery process, to obtain available documents. The proffered documents, dated May 30 and June 15, 1990, were just as available to Petitioner when the hearing was held in mid-1991 as they were when Petitioner came forward with them, six months later. No explanation was offered as to how these documents became available after the hearing and why they were not available prior to the hearing. Petitioner has not alleged any facts in support of his assertion that Attachments A and B were unavailable until after the hearing. Therefore, the Board denies reconsideration based on review of Attachment A or B.

The Board also declines to consider Attachments C and D. Attachment C consists of the results of 1989 and 1990 GAO employee attitude surveys which measured, among other things, attitudes related to Pay for Performance. Attachment D is captioned "Confidential TEF/EAG Survey on Compensation" and is described by Petitioner as a survey done in NSIAD. Putting aside obvious authentication issues attendant to Attachment D, the Board concludes that neither document constitutes material evidence. Petitioner contends that these documents should be considered because they show "employee discontent with the PFP system and a lack of trust between employees and middle and upper level management." This evidence is not material to the issue of retaliation raised by Petitioner and is, therefore, rejected.

B. Substantial evidence

Petitioner also contends that the Initial Decision of the administrative judge should be overturned because it is not supported by substantial evidence. A complete review of the record and the Initial Decision convinces the Board that the Initial Decision is supported by substantial evidence.

Petitioner bore the burden of showing that his 1990 performance appraisal and his 1990 Pay for Performance ranking were the products of retaliation based on his prior grievance. Petitioner's claim is most like a claim of reprisal under 5 U.S.C. §2302(b) (Civil Service Reform Act of 1978 (CSRA)), and it is, therefore properly analyzed in light of Merit System Protection Board (MSPB) precedent. Under the General Accounting Office Personnel Act of 1980 (GAOPA), the personnel management system of GAO shall "prohibit personnel practices prohibited under section 2302(b) of Title V." 31 U.S.C. §732(b)(2). The law in the Federal Circuit regarding MSPB reprisal cases is well-developed and the *prima facie* case has been clearly articulated by the Federal Circuit. A reprisal claimant bears the burden of showing: 1) protected activity occurred; 2) the accused official knew of the protected activity; 3) the adverse action under review could, under the circumstances, have been retaliation; and 4) there was a genuine nexus between the retaliatory motive and the adverse action. Webster v Department of the Army, 911 F.2d 679 (Fed. Cir. 1990); Warren v Department of the Army, 804 F.2d 654 (Fed. Cir. 1986); Oliver v Department of Health and Human Services, 34 M.S.P.B. 465 (1987).²

The administrative judge found insufficient evidence from which to infer a causal connection or nexus between the ratings and Petitioner's prior protected activity. The evidence showed that Petitioner had transferred in 1989, within the National Security and Internal Affairs Division (NSIAD), from the Manpower Group to the Research, Development, Acquisition and Procurement Group (RDAP). Prior to leaving Manpower, he had filed a grievance against his then supervisor regarding his 1988-89 performance appraisal. That grievance led to a Petition for Review before the Personnel Appeals Board, which petition was resolved in March, 1990, by a settlement with the Agency. Meanwhile, Petitioner worked in RDAP under the supervision of Assistant Director James F. Wiggins.

In June 1990, Mr. Wiggins completed an annual performance appraisal for Petitioner. On the surface, the appraisal was a favorable one, consisting of seven ratings in the "Superior" category (the fourth highest of five ratings) and one in the "Fully Successful" category (the middle of five ratings.) The evidence did establish, however, that such an appraisal was comparatively low. For example, in Petitioner's unit, only four of 18 employees had lower evaluations.

For purposes of Pay for Performance, this performance appraisal rating was expressed as a number on a 40-point scale. The value assigned to Petitioner's appraisal was 30.86. This score was then added to a rating based on Petitioner's contribution to GAO and his unit as determined by a ranking panel using a 20-point scale. The composite contributions score assigned to Petitioner by the ranking panel was 7.13. The ranking panel consisted of RDAP Director Paul Math, and Associate Director Michael E. Motley, along with RDAP Assistant Directors Clark G. Adams, David E. Cooper, Lester C. Farrington, Jr., John A. Rinko, Kevin M. Tansey and James Wiggins. Petitioner's total score of 37.99 placed him next to the lowest of the 19 employees among whom he was ranked.

The administrative judge made three ultimate findings upon which his decision was based. First, he found that there was insufficient evidence to allow an inference that Petitioner's prior grievance activity played some role in the performance appraisal given to him for the rating period 1989-90.

From the discussion in support of this finding, it is evident that the administrative judge was considering the fourth prong of the prima facie case, i.e., nexus, in making this finding. The administrative judge made findings that would support the first three elements of the prima facie case: Petitioner engaged in protected activity; his superiors involved in the performance appraisal and a review of the same knew of his protected activity; the evaluation occurred after the protected activity, and it was relatively low.

Substantial evidence supports the finding in the initial decision that there was no causal link between the protected activity and the appraisal. Petitioner was in a new unit, with a line of supervision that was not in any way involved in the grievance pending against his former supervisor in the Manpower Group. The ratings, although comparatively lower than they appear on their face, were not bad, and they were accompanied by complimentary narrative. Further, the ratings were not so obviously wrong as to suggest retaliation as the only explanation for them. Petitioner himself asked to remain under the supervision of Mr. Wiggins, rating him as one of the best managers for whom he had ever worked (Pet. Exhibit 11). The fact that petitioner's superiors had knowledge of his prior grievance does not compel a conclusion that there existed a causal connection between the appraisal and the prior grievance, nor does it undermine the substantial evidence in support of the administrative judge's finding.

The second finding rested on a review by the administrative judge of the narrative justifications accompanying each rating contained in the 1989-90 performance appraisal. Because the Petitioner was found not to have presented a prima facie case of retaliation with respect to the performance appraisal, the agency did not have to justify the appraisal on non-retaliatory grounds. Nevertheless, the administrative judge reviewed the justifications and found that they supplied a satisfactory non-retaliatory foundation for the assigned ratings. These written justifications provide additional evidence in support of the judge's decision that there was no causal link between the ratings and the grievance.

In this regard, the Board notes its view that the administrative judge perhaps overstated the limits of Board review of performance appraisals when he wrote that, in the absence of first-hand knowledge of the details of an employee's performance, it would be "impossible" for the Board to determine the precise level of that performance. (Initial Decision, p. 23). If the precise level of performance were, in fact, the issue before the Board, determination of this issue would depend, as in any other case, on competent and probative evidence of the matter alleged, not on first-hand knowledge of the Board or the administrative judge. In the instant case, however, the issue before the Board was not the absolute correctness of the ratings, but, rather, whether they were the result of retaliation against the Petitioner. The administrative judge determined that the evaluation was not retaliatory and, thus, there was no call to review the ratings, substituting his judgment for that of the rating supervisor. Finally, the administrative judge recited certain findings in support of the third ultimate finding, i.e., that Petitioner did not sustain his burden of putting forward a prima facie case of retaliation in the conduct of the Pay for Performance ranking panel.

This conclusion rests on the finding of the administrative judge that petitioner failed to establish a causal link, or a genuine nexus, between the protected activity and the panel ranking. The judge enumerated the factors considered by him in reaching this finding: five of the eight members of the ranking panel had no knowledge of the prior grievance; there was insufficient evidence from which to infer that the scores of these five members were improperly influenced by statements of the other three panel members, statements motivated by a desire on the part of these three panel members to retaliate against the Petitioner for his earlier grievance in a different group within NSIAD; and there was no basis upon which to infer that the scores supplied by the three members having knowledge of the prior grievance were in any way motivated by that knowledge.³

The Board concludes that the findings of the administrative judge are supported by substantial evidence. Although the administrative judge did not attach to certain evidence the weight or interpretation favored by the Petitioner, it is apparent that he received and considered almost all proffered evidence.⁴ Because substantial evidence supports the findings of the administrative judge, these findings will not be disturbed by the Board.

CONCLUSION

The Board declines to consider the evidence submitted by Petitioner with his Request for Reconsideration because it does not constitute new and material evidence that despite due diligence, was not available when the record was closed.

The Board declines to reject the Initial Decision on the ground that it is not supported by substantial evidence. It is the Board's conclusion that the Initial Decision of the administrative judge is supported by substantial evidence, which evidence is carefully reflected in the text of the Initial Decision.

Based upon the foregoing, the Petition for Review is denied. This is a final decision of the Board which is subject to judicial review pursuant to 4 C.F.R. §28.90.

Nancy A. McBride,
Board Member,
For the Board, en banc:
Roger P. Kaplan, Chair
Paul A. Weinstein, Vice Chair
Isabelle R. Cappello

Note: Concurring opinion of Member Alan S. Rosenthal follows.

Washington, D.C.
July 8, 1992

Administrative Judge Alan S. Rosenthal, concurring in the result:

By choice, I have not participated in the collegial deliberations of the full Board with respect to petitioner's request for reconsideration of my December 10, 1991 initial decision in this proceeding. Nonetheless, I have examined independently both prongs of that request. That examination has left me unpersuaded that there is substance to petitioner's insistence that the result reached in the initial decision should be overturned. More specifically, I remain of the view that, taken as a whole, the evidence adduced at the hearing last summer not merely supports but compels a finding that petitioner failed to sustain his burden of putting forward a prima facie case on his claims of retaliation for prior protected activity. Similarly, petitioner's endeavor (Reconsideration Request at 6) to encumber the existing record with assertedly "new and material evidence unavailable at the time of the hearing" is manifestly bootless. Hence, I concur in the denial of the request for reconsideration although not joining in the opinion prepared by the Board without my involvement.

There is no apparent need to add my own comments to those of my colleagues on each of the several contentions now advanced by the petitioner. I feel constrained, however, to single out one of his claims of newly discovered evidence for discussion. When taken in conjunction with the agency's response to it on

the merits, that claim gives rise to a substantial concern regarding the adequacy of the presentations by the two parties at the evidentiary hearing on a material, albeit not dispositive, factual question. In the interest of the efficiency of our adjudicatory process, that concern warrants ventilation.

A. A fundamental element of petitioner's case in this proceeding was the averment that the Management Review Group (ranking panel) that assessed his 1989-90 contributions for Pay for Performance purposes gave him low scores in retaliation for a grievance he had filed the prior year. In support of that averment, petitioner maintained, *inter alia*, that John A. Rinko (an Assistant Director in the Research, Development, Acquisition, and Procurement Group (RDAP) and a member of the ranking panel) had been made aware of that grievance prior to the meeting of the panel on July 13, 1990. According to petitioner's testimony at the hearing, in May 1990 he had been transferred to Mr. Rinko's supervision from that of RDAP Assistant Director James F. Wiggins, and at that time had commenced "some initial work" on an audit directed to the Department of Defense's Procurement Technical Assistance (PTA) Program (Tr. 93). It was then--some two months or so before the panel meeting--that he had advised Mr. Rinko of the earlier grievance (Tr. 91-92).

For his part, Mr. Rinko acknowledged that petitioner had told him about the grievance in a discussion incident to petitioner's transfer to his supervision. But his recollection was that the transfer (and therefore the discussion) did not occur until July. In this connection, he referred to a notation on his desk calendar indicating that the discussion had taken place on July 16, three days after the panel meeting (Tr. 402).

Although provided with no basis for determining with certainty which individual's memory was the more reliable, I resolved the conflict in favor of Mr. Rinko (initial decision at 15). I was influenced in that regard by the fact that Mr. Wiggins also recalled that petitioner's transfer from his supervision to that of Mr. Rinko took place in July (Tr. 355).

B. The short of the matter thus is that I was called upon to resolve a factual disagreement respecting the timing of a particular personnel action without the benefit of any official records bearing upon when that action took place. Given that neither the petitioner nor the agency undertook to supply documentation of that stripe, I assumed that it was simply unavailable and that, as a consequence, I must choose between the conflicting recollection of the witnesses on the basis of what appeared to be most reasonable in the totality of circumstances. As it has turned out, however, that assumption was in error.

By way of an attachment to his request for reconsideration of the initial decision, petitioner sought to put before the Board two documents that contained purportedly "new and material evidence unavailable at the time of the hearing" said to "undermine" my conclusion respecting the time of the supervision transfer (and therefore the time at which Mr. Rinko concededly knew of petitioner's prior grievance). The first document, referred to as Attachment A, was a May 30, 1990 memorandum from Mr. Rinko to the Director of the agency's Office of Congressional Relations with regard to a telephone conversation Mr. Rinko had with a staff member of the House Armed Services Committee pertaining to the legislative request for an investigation of the PTA Program. Petitioner was listed by name at the bottom of the memorandum as one of the recipients of a copy. Attachment B was a June 5, 1990 letter from RDAP Director Paul F. Math to the Secretary of Defense, informing the Secretary of the initiation of the PTA Program evaluation. In the final paragraph of the letter, the Secretary was invited to present any questions he might have to either Mr. Rinko or petitioner. The latter was identified as the Evaluator-in-Charge of the project.

On the face of it, these documents seemed to convey the message that petitioner was actively involved in the PTA Program inquiry by late May or early June 1990 (and thus was then under Mr. Rinko's supervision). In its response to the reconsideration request, however, the agency supplied other documents for the purpose of establishing that such was not the case. According to an attached affidavit of Mr. Rinko, he had sent a copy of his May 30, 1990 memorandum to petitioner simply "as a courtesy," prompted by Mr. Rinko's knowledge at the time that petitioner "would later" be working with him on the PTA Program assignment. The affidavit went on to refer to an appended copy of a Form J-1, which listed the starting date of the assignment as July 16, 1990.

Of still greater probative value were time and attendance sheets for petitioner that were appended to an affidavit of Mr. Math that also accompanied the agency's response. Those sheets covered each two-week pay period from that concluding on May 19, 1990 to that concluding on August 25, 1990. They reflect that, up to and including the pay period ending on July 14, Mr. Wiggins signed each sheet as petitioner's supervisor. In addition, the sheets bearing Mr. Wiggins' signature indicate that all work performed by petitioner during the particular period was in connection with assignments having a code number other than that given to the PTA Program project. Not until an examination of the sheet for the pay period commencing on July 15 and ending on July 29 does one find both Mr. Rinko's signature as petitioner's supervisor and work time attributed to Assignment Code 396929, the number belonging to the project in question.

C. On the basis of the time and attendance sheets now in hand, I am totally satisfied that my disposition in the initial decision of the supervision transfer issue was correct.¹ Accordingly, there is no occasion to seek leave from my colleagues to pursue further that issue. Nonetheless, it seems manifest that counsel for the respective parties treated this matter at the hearing in a manner both cavalier and unacceptable.

To begin with, petitioner's insistence in his request for reconsideration that the Rinko memorandum and Math letter were "unavailable at the time of the hearing" is simply frivolous. Beyond cavil, those documents--which came into existence on May 30 and June 5, 1990, respectively--were just as available to petitioner when the hearing was held in mid-1991 as they were when petitioner came forward with them some six months later.

It is possible that petitioner meant to assert merely that, in July 1991, the newly-tendered documents had not as yet come into his possession and, consequently, he was not then aware of their existence. But on even cursory analysis it is apparent that any such assertion would be similarly unavailing. In light of the fact that he was listed as a recipient, it is reasonable to suppose (in the absence of an explicit contrary representation) that petitioner had been supplied with at least a copy of the Rinko memorandum and that it was included in his files.² Be that as it may, however, no good reason has been offered (or appears) respecting why it would not have been possible for petitioner to obtain both that memorandum and the Math letter in the course of pre-hearing discovery. Indeed, inasmuch as petitioner intended to make an issue of the timing of his transfer to Mr. Rinko's supervision (as part of his claim that the latter knew of the prior grievance when the ranking panel met in July 1990 to determine contributions scores), one would think that he would have been most anxious to ferret out any official documents, not then in his possession, that might lend credence to the claim.

Equally puzzling, in the absence of illumination, is the apparent failure of either party to consult petitioner's time and attendance sheets for the May-August 1990 time period in connection with the question of the timing of the supervision transfer from Mr. Wiggins to Mr. Rinko. As seen, those sheets

clearly indicate that the transfer occurred in July rather than two months earlier.

Giving petitioner the benefit of the doubt, it might be assumed that his testimony on the supervision transfer matter was offered in total ignorance of the relevant content of the time and attendance sheets. On the same basis, it might further be assumed that, at the time of his preparation for the hearing, petitioner no longer had copies of the sheets in his possession. Although resort to those assumptions would negate any implication of a deliberate attempt on petitioner's part to mislead the Board, they would not also explain why he seemingly made no attempt to consult the official records of the agency bearing upon the supervision transfer.

Insofar as the agency is concerned, its counsel obviously had continuing ready access to copies of petitioner's time and attendance sheets--as well as to any other official records bearing upon the supervision transfer matter. Although it is not clear precisely when agency counsel first learned that the timing of the transfer would be placed in issue by petitioner, that discovery perforce came no later than the first day of the hearing (when petitioner testified). At that juncture, if not before, agency counsel might well have undertaken the scarcely formidable task of summoning from the official records custodian the time and attendance sheets that would resolve the matter once and for all.³ Instead, agency counsel--in common with petitioner's counsel--chose to leave the matter before me on the conflicting recollections of witnesses, buttressed only by the most unofficial notes of Mr. Rinko.

As it happened, without the assistance of official records I apparently made the right selection. Moreover, it cannot be said that the outcome of the proceeding necessarily hinged upon the correctness of that selection.⁴ In my judgment, however, those purely fortuitous considerations do not and cannot serve to justify what transpired here.

One of the most difficult tasks that can confront trial-level adjudicators is the resolution of conflicts in testimony on relevant factual issues. In many instances, there is no significant corroboration of the version of events offered by the witnesses for one side or the other. Where that is the case, the adjudicator often is compelled to resolve the conflict on the basis of a determination as to which witness or witnesses seem more "credible." That determination might, in turn, have to be founded on an entirely subjective appraisal that would be most difficult to explain in concrete terms.⁵

For these reasons, an adjudicator has every right to expect that the parties to the proceeding will not unnecessarily require findings to be made on the basis of credibility determinations alone. Here, any such expectation went unrealized. In a nutshell, there likely would have been no occasion to make such a finding on the supervision transfer matter had petitioner taken the trouble to examine in advance of the hearing the time and attendance sheets that clearly reflected a July 1990 transfer. And, to repeat, the agency similarly could have obviated the need for a credibility finding by furnishing the sheets itself upon its discovery that petitioner was making an issue of the timing of the transfer.

I add only that, even if the time and attendance sheets had not helped her cause, in the circumstances agency counsel would still have been duty-bound to see to it that the sheets found their way into the record. Governmental agencies--and their lawyers--have an overriding obligation to serve the ends of justice.⁶ That does not require agency counsel in adversarial proceedings to plead their opponents' cases. But, among other things, it does mean that, once a certain factual issue has arisen as to which a conclusive answer is to be found in readily accessible official agency records, those records should be supplied. By following such a course in this instance, the agency not only would have fulfilled a responsibility owing the adjudicatory process and this Board, but also would have saved its own time and effort in that the

supervision transfer issue would have been laid to rest at the hearing.

Notes

1. 4 C.F.R. §28.86 (d)(1).

2. Chen v. General Accounting Office, 821 F.2d 732 (D.C. Cir. 1987), a case involving a claim of reprisal for the exercise of title VII rights, is cited in the Initial Decision. This case presents a slightly different iteration of elements 2 and 3. However they are stated, 2 and 3 together require a showing that the action in question could have been retaliatory. Thus, if the official in question had no knowledge of the protected activity or if the adverse action occurred before the protected activity, then a prima facie case is not made and one does not get to the 4th element and the required finding of whether the suggested retaliation was in fact a cause of the adverse action.

3. Although the judge does not so state, it is evident that he did not reject the prima facie case based on a failure to show knowledge of the protected activity by deciding officials. We find that the second element of the prima facie case was satisfied, and think that he implicitly did so, too. The nature and extent of the knowledge of these matters by the members of the ranking panel was discussed insofar as it shed light on the question of whether a nexus existed. It was correct to weigh that as a factor in determining the question of nexus.

4. In fact, the only evidence, excluded by him was that offered by Respondent relating to the terms of the settlement of Petitioner's prior grievance. Petitioner's objection to the introduction of such matters was sustained.

Notes for Concurring Opinion by Rosenthal

1. I do not mean to imply a belief that time and attendance sheets invariably can be taken as totally authoritative on such questions as when an employee was working on a particular project or under whose supervision the work was being performed. In this specific case, however, it is difficult to perceive any possible interpretation of the relevant entries on the sheets other than that now offered by the agency. Moreover, the petitioner did not seek leave to respond to the Math affidavit for the purpose of attributing a different significance to those entries.

2. Whether petitioner was similarly favored with a copy of the Math letter at the time of issuance is less certain although, given the reference in it to him by name, good practice would have dictated that he at least be made aware of its existence.

3. There is little likelihood that agency counsel was unaware that the time and attendance sheets for evaluators contain not only the signature of the supervisor but, as well, an identification of the projects on which the employee worked during the particular time period.

4. It cannot be gainsaid, however, that the truthfulness or falsity of Mr. Rinko's representation that he did not know of petitioner's prior grievance at the time of the panel meeting was a matter of some significance on the question of whether petitioner established a prima facie case on his retaliation claims. Had that representation been false, there would have been at least room for doubt as to the validity of other Rinko representations (such as his claim that the prior grievance played no part in the formulation of the contributions score he gave petitioner). Beyond that, in such circumstances there might even have been

cause to probe yet more deeply the like insistence of the other panel members that the grievance was not discussed at their meeting and was not a factor in arriving at petitioner's contributions scores.

5. For me at least, reliance on so-called "demeanor" evidence is a course fraught with many perils. Whether a person makes a "good" or a "bad" witness (i.e., does or does not act and speak in a convincing manner) may well turn upon personality factors having little or nothing to do with the reliability of the testimony being offered. In the present case, the manner in which the witnesses conducted themselves during their testimony provided absolutely no insight into where the truth might lie on any of the factual matters in dispute.

6. On this score, agency counsel's attention is called to the recent decision of the Court of Appeals for the District of Columbia Circuit in Freeport-McMoRan Oil & Gas Co. v. Federal Energy Regulatory Commission (No. 90-1499, decided April 24, 1992), in which the court felt constrained to address what it characterized as "FERC counsel's remarkable assertion at oral argument that government attorneys ought not be held to higher standards than attorneys for private litigants" (slip op. at 3). Although that assertion was made in a context somewhat different from the situation to which my observations are directed, the court's emphatic rejection of the assertion (id. at 5-6) has plain instructive value here.