

Andrew Marshall Jr. v. U.S. General Accounting Office

Docket No. 92-04

Date of Decision: May 26, 1993

Cite as: Marshall v. GAO (5/26/93)

Before: Alan S. Rosenthal, Chair

Reprisal/Retaliation For Protected EEO Activity

Reprisal/Retaliation as Prohibited Personnel Practice

Motions Practice

Motions to Dismiss

Violations of Merit System Principles

Prima Facie Case

Pretext

Management Rights to Determine Qualifications

Performance Appraisal Systems - Evaluation of Employees

Janice E. Henderson, Deputy General Counsel, Personnel Appeals Board, for petitioner, Andrew Marshall, Jr.

Elizabeth S. Woodruff, Assistant General Counsel, and Barbara J. Simball, Senior Attorney, General Accounting Office, for respondent General Accounting Office.

INITIAL DECISION

The petitioner in this proceeding, Andrew Marshall, Jr., is currently employed as a Band I (Full Performance Level) evaluator in the General Government Division of the respondent General Accounting Office. The proceeding was instituted by the filing of a petition for review on May 26, 1992. The petition, submitted on his behalf by the Board's Deputy General Counsel, embraced three charges submitted to her office by Mr. Marshall.

As discussed in greater detail below, the essence of petitioner's claims is that, in prior assignments in other offices within the agency, he was the victim of numerous prohibited personnel practices said to have been in retaliation for protected activity in which he had previously engaged. By way of relief, he seeks, among other things, a retroactive promotion to the next level in the respondent's current classification system for evaluators (Band II); compensatory damages in the amount of \$50,000; six months paid administrative leave and restoration of all annual and sick leave taken since February 1990; reassignment to a regional office (Atlanta) in which he was formerly employed; and destruction of all performance appraisals

received during the July 1989-February 1991 period, as well as of any and all negative documents in respondent's files relating to his performance as an agency employee.

The proceeding was initially assigned to Administrative Judge Isabelle R. Cappello. Because of a serious illness in her immediate family, at her request it was transferred to the undersigned on the virtual eve of the evidentiary hearing held last November on the allegations of the petition. Following that hearing, the parties submitted posthearing briefs and reply briefs on a prescribed schedule. In addition, in February, oral argument was conducted on certain procedural issues raised by respondent.

This decision will commence with a development in Part I of petitioner's employment history in the agency, to the extent deemed relevant to the consideration of petitioner's assertions. In Part II, the respondent's insistence that most of those assertions must be summarily dismissed for failure to comply with the Board's Rules of Practice will be examined and, upon such examination, rejected. Then, in Part III, the decision will move on to an analysis of the assertions, which will lead to Part IV, ultimate findings that the record as a whole does not support petitioner's claims. For this reason, the petition for review is being denied.

I. PETITIONER'S GAO EMPLOYMENT HISTORY¹

A.

Petitioner's employment in Atlanta.

Petitioner's employment with respondent commenced in January 1986, when he joined the Philadelphia Regional Office as a GS-7 evaluator (J.S. 2).² In August of that year, he transferred at his own request to the Atlanta Regional Office (ATRO) (J.S. 3). In February 1987, he was promoted to a GS-9 evaluator (J.S. 4); three months later, was given a Special Commendation Award for his job performance (J.S. 5); and, on June 18, 1988, received an additional promotion to a GS-11 evaluator position, a position that had a promotion potential to GS-12 without further competition (J.S. 4; Tr. 37).³

In August 1988, petitioner filed a complaint with the agency's Civil Rights Office (CRO) alleging racial and gender discrimination while working in the Huntsville, Alabama sublocation of ATRO (Resp. Exh. 20).⁴ According to the complaint, that discrimination was reflected in, *inter alia*, a June 30, 1988 performance appraisal received from his immediate supervisor at Huntsville, John Puett (*id.*). The challenged appraisal had been reviewed and approved by David Grey, the Assistant ATRO Regional Manager for Operations (Tr. 1018-19). Mr. Grey, in turn, reported to James Martin, the ATRO Manager with overall responsibility for the operation of the Huntsville sublocation (*id.*).

At the time the August 1988 complaint was filed, petitioner was working on a National Security and International Affairs Division (NSIAD) assignment (J.S. 12). Approximately fifty percent of the jobs carried out at Huntsville are directed by NSIAD; Charles F. Rey, a NSIAD official at agency headquarters, made several trips to that location in connection with his management of the particular job to which petitioner was assigned (Tr. 23-24, 25-26).

Between August 1988 and May 1989, petitioner and the agency were engaged in negotiating a settlement of the discrimination complaint (Tr. 29). On January 27, 1989, while the negotiations were in progress, petitioner left his Huntsville assignment to return to Atlanta, where he worked between mid-February and May of that year on a Federal Aviation Administration (FAA) job for which he did not receive a

performance appraisal (Tr. 24, 26).

In May 1989, a settlement of the discrimination complaint was reached. The agreement memorializing the settlement was drafted by Nilda E. Aponte, the then CRO Acting Director (Tr. 29). On May 1 and 30, 1989, respectively, it was signed by petitioner and, for the agency, by Ira Goldstein, the then Assistant Comptroller General for Operations (J.S. 9, 11).⁵

One of the provisions of the settlement agreement called for the removal of two performance appraisals from petitioner's records.⁶ (Petitioner had unsuccessfully sought a change in those appraisals, but the agency had declined that request; the agency accepted, however, petitioner's fallback position that they be expunged (Tr. 485-86).) In addition, the agreement stipulated that petitioner would be transferred to agency headquarters without the mention of any office to which he would or would not be assigned (Joint Exh. 2). In that connection, petitioner testified that Ms. Aponte assured him that he would not be placed in NSIAD given the fact that he had been working on a NSIAD job at the time the discrimination complaint was filed (Tr. 32). Ms. Aponte denied having provided any such assurance but did acknowledge that she had informed certain headquarters officials that petitioner preferred assignment to the Human Resources Division (Tr. 484-85).

During the latter part of June 1989, petitioner was advised that he would be assigned to NSIAD but received assurances from the Civil Rights Office and Diana (Schultz) Eisenstat, the Assistant to the Deputy Assistant Comptroller General for Human Resources, that, in light of his concerns, they would monitor the situation (Tr. 1050-51). Within NSIAD, petitioner was to work in the Research, Development, Acquisition, and Procurement (RDAP) issues area (J.S. 14). RDAP had been involved in a few jobs with the Huntsville sublocation (Tr. 522). Petitioner had not worked, however, on those jobs. And, according to the testimony of RDAP management officials, they were unaware of the nature of the discrimination complaint filed by petitioner in ATRO (Tr. 283-84, 524, 721, 825). Arthur R. Goldbeck, NSIAD's Director of Operations, had been informed, however, that, as part of a settlement of some type of complaint, petitioner was being transferred to headquarters and that certain performance appraisals received in Atlanta would not accompany him (Tr. 612-13).

Although petitioner did not arrive at NSIAD until July 17, 1989, he last charged time to the FAA job in ATRO on May 19 (Resp. Exh. 32, p. 19). Between February and May, he charged a total of 38.8 staff days to the job (Tr. 1007). On or about May 20, petitioner went on extended leave, approved by the ATRO Regional Manager, Mr. Martin, incident to his transfer to headquarters (Tr. 1050).

The performance appraisals expunged as a result of the settlement agreement covered, respectively, the April 11, 1988 to June 15, 1988 and the June 19, 1988 to January 27, 1989 rating periods.⁷ As above noted, no appraisal was provided to petitioner for his work on the FAA job for the period between February 26 and May 20, 1989.

B. Institution of the Pay for Performance System.

On May 31, 1989, while petitioner was on leave preparatory to his transfer to NSIAD, Joan M. Dodaro (then McCabe), the Deputy Assistant Comptroller General for Human Resources, issued a memorandum to the heads of all agency divisions and offices explaining the conversion process from the then existing General Schedule classification and compensation system to a new system, denominated pay for performance (PFP) (Joint Exh. 3). That system was put into effect by GAO Order 2540.1 (June 2, 1989) (Pet. Exh. 6). Under it, the covered employees (including evaluators such as petitioner) were placed on

June 16, 1989 in "Bands," the Band for a particular employee hinging upon that employee's GS grade at the time. Thus, for example, evaluators then at the GS-7 through GS-11 levels were placed in Band I (developmental level) or "ID;" those at the GS-12 level in Band I (full performance level) or "IF." As a GS-11, petitioner's classification was converted to Band ID.

At its inception, the PFP system allowed a Band ID employee to earn a salary increase every six months until either reaching the ID salary ceiling or obtaining certification to Band IF. Further, evaluators who had served at least one year at the GS-11 level were to be reviewed between June 15 and September 30, 1989 to determine whether they should be certified to Band IF.

These determinations were made by progress review groups (PRGs). The PRG at ATRO was chaired by Mr. Martin, the regional manager (Tr. 994). In June 1989, it considered for certification to Band IF ten ATRO GS-11 employees, including petitioner, who were eligible for consideration for such certification based upon length of service in that grade (Tr. 995). Among the other nine, all but one had more time in grade than petitioner and only petitioner had previously filed a grievance (*id.*). None of the ten was certified at the time (*id.*). Mr. Martin did conclude that petitioner's performance reflected an acceptable level of competence entitling him to a within-grade salary increase based upon his GS-11 compensation (Pet. Exh. 50, pp. 14-15).

If a GS-11 employee was not certified to Band IF at the time of conversion to the PFP system, in addition to a within-grade increase he or she would be reevaluated approximately every 90 days thereafter until certified. The 90 day period was deemed by ATRO to be merely a guideline and Mr. Martin considered ATRO employees for promotion on a monthly basis (Tr. 1026, 1033). In July 1989, two of the ten employees who had been considered the prior month (and one additional employee) obtained certification on reevaluation (Tr. 1040-41). Petitioner, then on leave preparatory to transfer to headquarters, was not reevaluated (Tr. 1043).

C. Events subsequent to petitioner's transfer to NSIAD.

1. Shortly after his arrival at NSIAD on July 17, 1989, petitioner met with Michael E. Motley, the Associate Director of RDAP (which, as above noted, was the issues area within NSIAD to which petitioner was assigned) (Tr. 526). According to petitioner, he informed Mr. Motley of his eligibility for certification to the Band IF level and was advised in response that it was NSIAD's policy to assess employees in petitioner's situation after 90 days and, if the employee's performance was rated "fully successful" or better, to promote him or her (Tr. 41-42). Mr. Motley's version of the conversation was that he had told petitioner only that his performance would be evaluated over the course of the next three months (Tr. 527-28).

Its inability to obtain evaluations of petitioner's work on the GS-11 level in Atlanta was regarded as a problem by NSIAD/RDAP management (Tr. 623-26). In this connection, the one ATRO appraisal concerned with petitioner's performance on that level had been expunged and, in his capacity as NSIAD's Director of Operations, Mr. Goldbeck had been informed that the settlement agreement precluded Mr. Martin from discussing that performance with NSIAD officials (Tr. 717). Mr. Goldbeck testified that, sometime between August and November, he had indicated to petitioner that, if petitioner supplied the expunged appraisals, a progress review group would be reconvened to determine whether, on the basis of the additional information, it would be willing to certify him to Band IF (Tr. 626-27). Petitioner refused the offer, perhaps because (as he stated) Mr. Motley had declined to assure him that, if the appraisals reflected performance that was "fully successful" or better, he would be promoted (Tr. 157).⁸

2. Petitioner's first assignment upon arrival in NSIAD was to the so-called ALT (or administrative lead time) job, on which he worked under the immediate direction of Russell R. Reiter, a Band II senior evaluator who in turn reported to Assistant RDAP Director Kevin Tansey (Tr. 722). The objective of that undertaking was to ascertain the reasons for the increasing interval between the time a particular service or item was requested and the time a contract was awarded for its acquisition (*id.*). At the time petitioner was assigned to the job, and during his work under Mr. Reiter's supervision, the latter was not aware of the fact that petitioner had filed a discrimination complaint in Atlanta and, moreover, was not acquainted with any of the individuals, either in NSIAD or in ATRO, who were involved with the Huntsville project that generated that complaint (Tr. 720-21).

At the end of October 1989, at the request of either Mr. Tansey or Mr. Motley, Mr. Reiter prepared a performance appraisal for petitioner (Joint Exh. 9). On its face, the appraisal covered the portion of the ALT job that related to service-type contracts (referred to as ALT/Services)⁹ and was for the rating period July 13 to October 27. As of the conclusion of that period, in Mr. Reiter's words, the job was "just getting off the ground;" i.e., not all of the administrative paperwork to get a job started had as yet been completed (Tr. 724).

In all but one of the job dimensions listed on the appraisal, petitioner was rated "fully successful;" he was deemed "superior" in the dimension covering working relationships and teamwork. Although Mr. Reiter did not participate in a meeting of the progress review group on November 3 for the purpose of considering petitioner for promotion to the Band IF level, his input was received (Tr. 727). In essence, Mr. Reiter believed both that there had been insufficient time to evaluate adequately petitioner's performance and that he had not shown enough assertiveness or initiative to support a conclusion that he would be able to perform fully successfully at the Band IF level (*id.*).

These observations were reflected in a November 2 memorandum from Paul F. Math, the RDAP Director, to Mr. Goldbeck, in which Mr. Math recommended against petitioner's certification to the Band IF level (Joint Exh. 11). The memorandum, on which Mr. Goldbeck noted his concurrence, went on to recommend that petitioner be reconsidered for certification "after an additional few months." In this connection, Mr. Math pointed out that petitioner's assignment was entering a new phase that should provide him with additional opportunities to demonstrate his level of performance.

Consistent with this recommendation, the progress review group (which was chaired by Mr. Goldbeck) determined at its November 3 meeting that petitioner was not ready for certification to the Band IF level (Tr. 627-28, 660). Thereafter, on November 27, petitioner was provided expectations for the implementation phase of the ALT/Services job (Joint Exh. 10).

In mid-December, just prior to commencing a two week annual leave, petitioner provided his work papers to Mr. Reiter for review (Tr. 48). Petitioner testified that, while on leave, he had twice stopped by the office in quest of feedback and had been informed by Mr. Reiter that his work was "fine" (*id.*). Petitioner returned from leave on January 9. Two weeks later, on January 22 or 23, Mr. Reiter gave the papers back to petitioner with the request that they be indexed (Tr. 49, 738-39). On January 26, petitioner once again delivered the papers to Mr. Reiter who, upon review, found that they had been correctly indexed and organized. He also determined, however, that there were some shortcomings (Tr. 742-43). In this connection, Mr. Reiter referred to a duplication of documents; the inclusion of documents that did not pertain to the inquiry at hand; and errors appearing on petitioner's data collection instruments (DCIs) (Tr. 743). On January 29, the papers were once again returned to petitioner with the instruction to correct the

DCI deficiencies by the following day (id.).

Upon receiving that instruction, petitioner requested a meeting with Assistant RDAP Director Tansey to bring Mr. Tansey's attention to the fact that, because he was scheduled for training, he could not comply with the instruction (Tr. 50, 746, 808). The apparent result of the meeting was a brief extension of the time within which to correct the DCI deficiencies, as well as a corresponding delay in the issuance of a new appraisal in order that it could take into account the corrections.

That appraisal, prepared by Mr. Reiter and reviewed by Mr. Motley, was signed by both individuals on February 7, 1990 and covered petitioner's work on the ALT/Services job from October 28, 1989 to February 2, 1990 (Joint Exh. 12). It rated petitioner as "fully successful" with regard to four of six dimensions but only "borderline" in the remaining two. In providing that lower rating for the data gathering and documentation dimension, the appraisal discussed the perceived errors and inadequacies in petitioner's workpapers, including the DCIs. The "borderline" rating for the data analysis dimension was justified on the ground that the summaries petitioner had provided in connection with each of three completed DCIs were inadequate in certain specified respects.

Two days before this appraisal was signed by Messrs. Reiter and Motley, RDAP Director Math sent a memorandum to Mr. Goldbeck recommending against certification of petitioner to the Band IF level (Joint Exh. 13). The basis of the recommendation was that petitioner had "not demonstrated a level of performance that would reasonably assure he would be at least fully successful in all job dimensions at the full performance level." In support of this conclusion, Mr. Math pointed, inter alia, to petitioner's initial submission of unindexed workpapers (although acknowledging petitioner's statement that, because he had not been specifically told to index his work, he did not believe that it was necessary to do so). In addition, Mr. Math made reference to the perceived significant errors and omissions in petitioner's DCIs, as well as to the failure of his summaries to address the primary issues during that phase of the assignment. (Once again, the memorandum took note of petitioner's articulated belief that he had done what had been expected of him. More specifically, because the summaries were to be short, his impression was that he need not address those issues.)

Mr. Math concluded his memorandum with the further recommendation that petitioner be reconsidered for certification after an additional 90 days. Observing that his then current assignment would be completed within a few days, the memorandum stated that petitioner would be reassigned to a new supervisor and put on a job that had already reached the implementation stage. In Mr. Math's view, this would provide petitioner with opportunities to demonstrate his level of performance, with that performance assessed by a supervisor other than Mr. Reiter.

On February 6, 1990, a progress review group chaired by Mr. Goldbeck reevaluated petitioner and, once again, denied certification to the Band IF level (J.S. 58, Tr. 296). The following day, petitioner received the appraisal signed on that date by his superiors (Tr. 52). He testified that this was his first indication that his performance was deemed "borderline" in some respects and that, when he had expressed his surprise to Mr. Reiter, he was told that the ratings to that effect had been induced by Assistant RDAP Director Tansey, Mr. Reiter's immediate superior (Tr. 53). For his part, Mr. Reiter denied having been directed by "anyone in GAO" to give petitioner "borderline" ratings, although he acknowledged having discussed the appraisal with Mr. Tansey before it was issued to petitioner (Tr. 748).

On February 20, petitioner responded in writing to the February 7 appraisal in a five page single-spaced document (Pet. Exh. 18). The response indicated that it was a follow-up to a February 8 discussion of the appraisal with his supervisor (i.e., Mr. Reiter) and then went on to offer a rebuttal, point-by-point, to the justification set forth in the appraisal for the "borderline" ratings. Still further, petitioner expressed the belief that his contributions in another job dimension had not been appropriately recognized. Finally, the response reviewed the manner in which his superiors had dealt procedurally with his workpapers during the period in question (December-January) and stressed petitioner's conclusion that, although he had actively sought feedback on his work and progress, at no time had his supervisor given him reason to believe that there were the performance deficiencies later identified in the appraisal. To the contrary, petitioner maintained, the feedback he did receive left him "under the impression that everything was going fine."

On March 6, Mr. Motley sent a memorandum to petitioner to the effect that, upon consideration of each of the comments in the February 20 memorandum on the specific job dimensions, he had concluded that the appraisal ratings should not be altered (Pet. Exh. 74). Two days later, petitioner met with Messrs. Goldbeck, Motley, Tansey and Reiter to discuss the comments (Tr. 64, Pet. Exh. 40). During the meeting, according to petitioner, he was verbally abused and harassed (Tr. 67, 69, 168). This claim was disputed by the other meeting attendees (Tr. 558-60, 755-56, 814-15).

On April 3, 1990, petitioner filed a formal complaint charging discrimination on the basis of his race (black) and gender, and also claiming retaliation (Pet. Exh. 31).¹⁰ In an attachment, petitioner assigned as the official personnel actions he deemed discriminatory the ratings (including the two "borderlines") he had received on the February 7 appraisal. In his view, those ratings were "skewed" to justify the failure to give him a "much deserved" promotion.

3. In the meanwhile, in accordance with RDAP Director Math's statement of intent in his February 5 memorandum, petitioner was reassigned effective February 12, 1990 to the University Research Center job under the supervision of Thomas W. Reilly, the evaluator-in-charge of that job, and Lester C. Farrington, an RDAP Assistant Director (Joint Exh. 16, J.S. 72). As of that date, the job had entered the implementation stage (Tr. 824).

On rather short notice, petitioner was requested to accompany Mr. Reilly on a fact-finding trip to North Carolina commencing on February 12 (Tr. 826-28). There is some conflict in the evidence regarding the precise nature of petitioner's response to the request but, in any event, he acceded to it. According to the testimony of Messrs. Reilly and Farrington, petitioner was informed in advance respecting what was expected of him on the trip (Tr. 828, 917-18). Mr. Reilly testified that, in addition, he made the job's work papers available for petitioner's review (Tr. 826).

Petitioner's expectations were set on March 12, a month after he started on the University Research Center job (Joint Exh. 16). In the eyes of his superiors, he fulfilled those expectations satisfactorily. This is seen from two developments.

First, petitioner received a much more favorable interim performance appraisal for the rating period between February 12, 1990 (when he commenced work on the job) and April 25, 1990 (Joint Exh. 16). Provided by Mr. Reilly as rater, with Mr. Motley as reviewer, the appraisal rated petitioner as "superior" in two categories and "fully successful" in three others. One of the "superior" ratings was in the data gathering and documentation job dimension, which had previously received a "borderline" rating in the February 1990 appraisal concerned with the ALT/Services job.

Second, in an April 27, 1990 memorandum addressed to Mr. Goldbeck, Mr. Math recommended that petitioner now be certified to the Band IF level (Joint Exh. 17). This recommendation was based on the perceived marked improvement in petitioner's performance, as reflected in Mr. Reilly's appraisal. On this score, Mr. Math also noted with approval that, in meetings with him and Mr. Farrington during the course of the assignment, petitioner had manifested a desire to achieve that improvement.

Mr. Math's recommendation carried the day. Effective May 6, 1990, petitioner was certified to the Band IF level based on a May 2 decision of a progress review group (J.S. 74).

Notwithstanding this favorable action, however, petitioner was dissatisfied with the appraisal of his work on the University Research Center job. This dissatisfaction first surfaced in a May 8, 1990 response to the appraisal (Pet. Exh. 20). In it, petitioner complained of the failure to rate him at all in the planning job dimension and insisted that his ratings in four other dimensions were too low. After being advised by Mr. Motley that the challenged ratings would not be changed, on May 29 petitioner filed a formal complaint charging that the appraisal was in retaliation for the filing of his April 3 complaint (Pet. Exh. 70). The two complaints were then consolidated by the Civil Rights Office for processing and investigation (J.S. 33).¹¹

4. Following his certification to the Band IF level, petitioner continued to perform some work on the University Research Center job. But it was not his sole undertaking. To the contrary, between April 26 (the day after he received the interim appraisal that led to his certification) and June 15, 1990, he charged less than 28 staff days to that job. Subsequent to June 15, he devoted no time whatever to it (Resp. Exh. 32, pp. 50-53).

During the same period, petitioner charged 2.3 staff days to a new job, entitled Survey of DOD Contract Termination Procedures and Costs (DOD Contract job), to which he was assigned under Mr. Reilly's supervision (Resp. Exh. 32, pp. 51-53). In actuality, however, petitioner apparently spent a greater amount of time on that job. He was called upon to perform some preliminary work on the project as early as May 7, 1990 (Tr. 204-06, 849). Because a job code for the project was not established until May 31, that work (which required no more than three days to complete) was charged to the University Research Center job (Tr. 204-06, 854-57). Commencing on May 31, petitioner utilized the DOD Contract job code in recording time on that job (Tr. 204, Resp. Exh. 32, p. 52). Between that date and July 27, when formal expectations for it were set, petitioner had charged 12 staff days to the DOD Contract job (Tr. 204-06, 854-57).

The possible significance of the June 15 date stemmed from the fact that the agency's 1989-90 appraisal period ended on that date. Petitioner did not then receive an appraisal covering either the University Research Center or the DOD Contract job (Tr. 323-24). Nor was such an appraisal requested by him until October 31, 1990 (Tr. 244, 848).

Petitioner continued to work on the DOD Contract job during the summer and early fall of 1990. In an October 11, 1990 memorandum, he requested that he be removed from that job and assigned to a supervisor other than Mr. Reilly (Pet. Exh. 71). The request was founded on a belief that, because the May 1990 discrimination complaint implicated Mr. Reilly, petitioner could not obtain a fair appraisal of his work.

At an October 12, 1990 meeting with NSIAD and other agency officials to discuss the reassignment request, petitioner also raised for the first time the matter of his having been denied the opportunity to supervise a specific developmental level employee who was also under Mr. Reilly's supervision (Tr. 316). Petitioner had requested Mr. Reilly to provide this opportunity but the latter had not acceded to the request

(Tr. 316-17).

Petitioner's desire to be reassigned did not receive favorable action and he was not provided with the opportunity to supervise. At his request, however, his performance expectations were amended on October 17 and he was given an interim performance appraisal covering his work from June 17 to October 25, 1990 on the DOD Contract job (Tr. 859-61, Resp. Exh. 7). Prepared by Mr. Reilly and reviewed by Mr. Motley, the appraisal rated petitioner as "fully satisfactory" in six categories and unevaluated in a seventh (supervision, appraisal and counseling) (Joint Exh. 22).

Dissatisfied with this appraisal, petitioner met with Messrs. Reilly and Motley on October 31 to air his concerns (Pet. Exh. 24). Subsequently, on November 30, 1990, he filed a third discrimination complaint (Pet. Exh. 73). In attachments to the complaint, he indicated that the complaint rested principally on (1) the failure to reassign him to another supervisor; and (2) the then most recent performance appraisal, which he asserted did not accurately reflect his performance during the rating period. In addition, petitioner maintained that the agency had not provided him with timely expectations or a timely performance appraisal and thus was guilty of prohibited personnel practices. According to petitioner, the agency continued to retaliate against him for both his Atlanta discrimination complaint and the prior complaints filed as a NSIAD employee.

In late December 1990, Mr. Reilly left the agency and, on January 4, 1991, petitioner's supervisor of record on the DOD Contract job became Assistant RDAP Director Lester C. Farrington (Tr. 879-80, 941, 945). Shortly thereafter, petitioner received a performance appraisal covering his work on that job for the period between October 29, 1990 and January 4, 1991 (Joint Exh. 23). Mr. Farrington prepared the appraisal based upon his personal knowledge of petitioner's work and input received from Mr. Reilly (Tr. 879-82, 936-41). As in the instance of prior appraisals, it was reviewed by Mr. Motley. Petitioner was rated on the same six job dimensions that were the subject of ratings the prior October. On this occasion, he was upgraded to "superior" in two dimensions: oral communications and working relationships, teamwork and equal opportunity. In the other four dimensions, he was rated "fully successful."

In a January 16, 1991 memorandum addressed to Mr. Farrington, petitioner took issue with this appraisal on several grounds (Pet. Exh. 25). Among other things, he complained of a lack of feedback from Mr. Reilly, as well as of an absence of progress reviews during the rating period. Still further, he indicated a belief that the appraisal should have been prepared by Mr. Reilly rather than Mr. Farrington. Lastly, petitioner expressed the view that the information contained in the appraisal was incomplete.

Messrs. Farrington and Motley declined to modify the appraisal. This prompted petitioner to file on February 7, 1991 yet another discrimination complaint (Joint Exh. 24). According to this complaint, in large measure for the reasons assigned in petitioner's January 16 memorandum to Mr. Farrington, the appraisal was inaccurate, incomplete and in violation of agency rules and regulations. Upon receipt, the Civil Rights Office combined the complaint for processing with the November 1990 complaint.

5. Petitioner was transferred to the General Government Division in January 1991. As earlier noted, he remains employed in that Division.

II. THE PETITION FOR REVIEW AND RESPONDENT'S PROCEDURAL CLAIMS RESPECTING THE ASSERTIONS THEREIN.

Petitioner's several discrimination complaints while employed in NSIAD were found by respondent to be devoid of merit. Accordingly, petitioner brought them to the Board's General Counsel in the form of three separate charges. On August 15, 1990, petitioner filed two charges with the Board's General Counsel growing out of the April 3 and May 29, 1990 complaints, respectively. On July 26, 1991, a third charge was filed, embracing the November 29, 1990 and February 7, 1991 complaints.

Following investigation of the charges, the Deputy General Counsel filed on May 26, 1992 the petition for review now in hand. The list of alleged retaliatory actions contained in the petition is a long one indeed. In this regard, the petition points, *inter alia*, to innumerable failures both in Atlanta and in NSIAD to certify petitioner to the Band IF level and to provide him with a promotion-equivalent pay increase; assertedly biased, incomplete and inaccurate performance appraisals; the denial of the opportunity to supervise; the denial of a request for reassignment within NSIAD; the purportedly involuntary transfer to the General Government Division; and the failure to provide an annual performance appraisal in Atlanta. Similarly, according to the petition, there were prohibited personnel practices beyond the retaliatory acts. In this category were such matters as the failure (1) to set timely expectations; (2) to monitor performance; and (3) to supply feedback.

At the threshold, the Board is confronted with respondent's assertion in its post-hearing brief that many of the allegations in the petition must be summarily rejected either for the failure to exhaust administrative remedies or as untimely submitted. Oral argument was heard on this claim following the completion of the briefing process.

A. Preliminarily, at petitioner's insistence, it is necessary to address the failure of respondent to have sought the dismissal of the allegations in question in a prehearing motion. In this connection, petitioner points to the fact that Judge Cappello specifically invited the filing of dispositive motions in her July 9, 1992 prehearing order.¹²

Notwithstanding that order, respondent's counsel stated at oral argument that it was the impression of her office that the Board believed that the agency was filing too many dispositive motions and therefore had requested that such motions not be filed other than in exceptional circumstances. According to counsel, this impression, coupled with the conclusion that the procedural issues "were extremely fact intensive and that dismissal without a factual record was highly unlikely," prompted respondent's decision not to file a dispositive motion in this instance.¹³

Obviously, this Board expects all litigants before it--and not merely the agency--to avoid the filing of motions that lack a sound footing for the relief being sought therein. Insubstantial filings serve no purpose other than to increase the burden upon the tribunal and the other parties. By the same token, however, the efficient and economical operation of any adjudicatory process is scarcely furthered by the withholding of well-founded motions that, if successful, would obviate the need to explore certain factual issues at some length in an evidentiary hearing.

To the knowledge of this writer, the Board has never sent a message to respondent (or any other litigant) discouraging the submission of a substantial motion seeking the pretrial disposition of some or all of the issues that have been raised in the petition for review.¹⁴ In this instance, respondent must be presumed to have regarded its procedural claims to have substance from the very filing of the petition for review. On that score, there is a total absence of foundation to counsel's present insistence that, prior to the development of an evidentiary record at a hearing, it could not have pressed the claims with any hope of prevailing. To the contrary, then, as now, the claims were readily susceptible of resolution on the basis of,

at most, a few documents that could have been appended to a dispositive motion.

In short, the procedural claims now before the Board both could and should have been presented in a prehearing dispositive motion filed within the time period prescribed in Judge Cappello's July 9, 1992 order (*i.e.*, by September 8, 1992). Contrary to petitioner's belief, however, this circumstance does not preclude the consideration of the claims at this time. The July 9 order does not seem to have foreclosed the course that respondent has pursued, a course apparently dictated by respondent's genuine, if misguided, belief as to the Board's attitude with regard to dispositive motions.

B. Turning to the merits of the procedural claims, respondent first maintains that, of the nineteen separate allegations contained in the petition for review, thirteen were never filed with the agency's Civil Rights Office. For this reason, respondent insists, those thirteen are subject to dismissal for failure to exhaust administrative remedies.¹⁵

In support of its position that petitioner was required to present to the Civil Rights Office each allegation found in the petition for review, respondent points to 4 C.F.R. §28.98(a). That section is contained within subpart D of the procedural rules of the Board, 4 C.F.R. §28.95 *et seq.*, which is entitled "Special Procedures--Equal Employment Opportunity (EEO) Cases."

According to section 28.95, the procedures in subpart D relate to, *inter alia*, complaints filed against agency actions said to be in violation of the provisions of section 717 of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16, prohibiting discrimination based on race, color, religion, sex or national origin. For its part, section 28.98(a) provides that, "[p]rior to invoking the Board's procedures in a case alleging prohibited discrimination, a complaint must first be filed with GAO in accordance with GAO Order 2713.2," the agency regulation dealing with "discrimination complaint processing in the United States General Accounting Office." Chapter 3 of Order 2713.2 addresses the requirement that individual discrimination complaints be filed in writing with one of several designated agency officials (to be promptly transferred to the Civil Rights Office if not initially transmitted to its Director or Deputy Director). Among other things, the complaint must set forth with specificity "the reasons for believing prohibited discrimination has occurred, and when."

As is readily apparent, the initial question requiring exploration here is whether, as respondent implicitly assumes, petitioner's allegations of retaliation come within the section 28.98(a) exhaustion requirement. This, in turn, would appear to hinge upon the significance, if any, attaching to the fact that the petition for review does not invoke simply Title VII of the Civil Rights Act of 1964, as amended, and the provisions of Chapter 23 of Title 5 of the United States Code making it a prohibited personnel practice to discriminate against an employee on a basis, such as race, proscribed by section 717 of the Civil Rights Act.¹⁶ The petition does cite (at 11) section 704(a) of that Act, 42 U.S.C. §2000e-3(a), to the effect that it is an unlawful employment practice to discriminate against an employee because of prior involvement in the EEO process (such as the making of a charge). But it then goes on to maintain (at 12, *et seq.*) that each of the claimed procedural violations said to be retaliatory in nature also offended the merit system principles embodied in, *inter alia*, portions of Chapter 23 of Title 5 of the United States Code having nothing directly to do with discrimination proscribed by the Civil Rights Act.¹⁷

On that score, the thrust of the petition is that, "when one violates a 'law, rule, or regulation' that 'implements or directly concerns' a merit system principle, a prohibited personnel practice occurs."¹⁸ Following the statement of that proposition, the petition particularizes the various provisions of statute and agency directives that are deemed to have been violated in the treatment of petitioner.¹⁹

Thus, although petitioner might have cast his petition solely in Title VII discrimination terms, he chose not to do so. Was that choice a permissible one notwithstanding the broad assertion that he had been retaliated against in response to the earlier filing of an EEO complaint? And, if a permissible choice, did it relieve petitioner of any obligation to present all of his allegations to the Civil Rights Office before coming to the Board?

The answer to both questions must be in the affirmative. There is nothing in the regulations of this agency to require the casting of a claim in Title VII terms simply because it relates to a prior grievance that had alleged discrimination on the basis of, *e.g.*, race or gender. Nor is there any regulatory requirement that a claim rooted in prohibited personnel practice provisions not involving Title VII discrimination first be brought to the Civil Rights Office. To the contrary, it long has been accepted that such a claim--in contrast to the Title VII discrimination complaints based on, *e.g.*, race (including complaints of retaliation for having previously asserted such discrimination)--may be brought directly to the Board's General Counsel without the agency's prior review of such complaints.²⁰

Accordingly, there is an insufficient foundation in our regulations for respondent's assertion that the allegations of the petition for review in question here must be dismissed out-of-hand if they were not first presented to the agency's Civil Rights Office. Had any such allegations invoked solely Title VII of the Civil Rights Act of 1964, as amended--*i.e.*, focused entirely on the source of the purported retaliation having been a grievance founded in racial and gender discrimination--resort to the Civil Rights Office might well have been required by 4 C.F.R. §28.98(a).²¹ Because, however, petitioner has also invoked the prohibited personnel practices provisions of Title 5 of the United States Code that are not rooted in discrimination, there was no obligation to present each allegation to that office before filing charges with the Board's General Counsel.²²

The question remains, of course, whether any allegation not presented to the Civil Rights Office can appropriately be considered as a discrimination complaint within the scope of Title VII of the Civil Rights Act. In the context of this case, that question lacks present practical significance. To be sure, an employee invoking Title VII in a case alleging retaliation for having previously engaged in a protected activity need not be concerned with one of the usual elements of a *prima facie* case: namely, a showing that the employer had actual knowledge of that prior activity. Rather, for purposes of Title VII, there is a rebuttable presumption of such knowledge.²³ Petitioner does not need, however, the benefit of that presumption. The respondent does not, as it cannot, dispute that the fact that petitioner had filed a discrimination complaint in Atlanta, as well as other complaints once he was transferred to agency headquarters, was well known to NSIAD management. And in no other respect does it appear to make a difference whether petitioner's allegations of retaliatory conduct are considered on the basis of Title VII or, instead, are examined solely within the framework of the prohibited personnel practice provisions of Title 5 of the United States Code not tied to the Civil Rights Act.

C. Respondent's additional claim of a failure to exhaust administrative remedies relates to certain allegations in the petition for review that, according to respondent, were not included in the charges filed with the Board's General Counsel. In support of the proposition that "[c]harges related to personnel actions must be filed with [that official] before filing with the [Board]," respondent refers (without discussion of their provisions) to 4 C.F.R. §§28.11 and 28.18.²⁴

Section 28.11 sets forth the procedures for the filing of a charge with the General Counsel, including such matters as who may file, as well as when, how and what to file. Nothing in that section explicitly restricts a petition for review filed by the General Counsel (as the one at bar) to allegations contained in the charge(s) put before him by the employee.

For its part, section 28.18 is concerned with the procedures for the filing of a petition for review and a request for hearing with the Board. Here, too, there is a conspicuous absence of anything limiting in terms (or by necessary implication) the content of a petition filed by the Board's General Counsel to the precise allegations contained in the charges submitted to the General Counsel. Indeed, the section is devoid of any mention of "charges."

In these circumstances, there is little cause to pursue this exhaustion claim at any length. At the very least, respondent had an obligation to explain in its brief just why the sections of our rules upon which it relies should be taken as implicitly, even if not explicitly, supporting its position.²⁵ No such explanation comes readily to mind, and this Board is simply unprepared to seek out a possible justification for a thesis that respondent has not seen fit to develop itself.

D. Respondent also maintains that several of the allegations in the petition for review must be dismissed as untimely.²⁶ One such claim has now been withdrawn on the strength of a post-hearing supplementation of the record by petitioner.²⁷ Another claim rested upon an assumption on respondent's part that a particular charge brought by petitioner to the Board's General Counsel had been included in the report and recommendations that accompanied the February 22, 1991 right to appeal letter sent by the General Counsel to petitioner. Although withheld from respondent's counsel, the report and recommendations were submitted to the Board for in camera inspection. That inspection disclosed that, contrary to respondent's assumption, the right to appeal letter did not extend to the charge in question.²⁸ As a consequence, this second claim likewise fails for want of a factual foundation.

A third claim relates to petitioner's allegations respecting the failure to provide him with a performance appraisal for the period between April 25 and June 15, 1990,²⁹ and with a timely performance appraisal within 20 days of the end of the assignment on the University Research Center job.³⁰ According to respondent, petitioner was aware on or shortly after June 15, 1990, that he had not received a rating for the April 25 to June 15 period and had last charged time to the University Research Center job on June 15, 1990--a job that officially ended in August 1990. Nonetheless, these allegations did not surface until the filing of his November 30, 1990 complaint with the Civil Rights Office--well in excess of the thirty-day period provided in 4 C.F.R. §28.98(a) for the filing of discrimination complaints.

Had there been an obligation to bring these allegations to the Civil Rights Office, there might well be merit to respondent's insistence that the untimely filing with that office requires their dismissal at this juncture. Given, however, the conclusion that petitioner need not have pursued that administrative remedy at all, his failure to have done so in a timely fashion cannot serve to prejudice him. Put another way, an assertion cannot be dismissed for the untimely taking of an action that was not a condition precedent to the putting of that assertion before this Board.

Precisely the same result necessarily obtains with regard to respondent's remaining untimeliness claim, which is addressed to the inclusion in the November 30, 1990, complaint of allegations that expectations for petitioner were not set in a timely manner. Although it does appear that there is substance to the insistence that those allegations should have been presented to the Civil Rights Office at an earlier time (if to be presented at all), that factor does not preclude their consideration as assertions of prohibited

personnel practices not founded upon racial or gender discrimination.

E. There is no need to decide here whether the various allegations not brought in a timely fashion (if at all) to the Civil Rights Office were nonetheless timely presented to the Board's General Counsel.³¹ The time limits contained in our procedural rules are not jurisdictional in the sense that they cannot be waived in appropriate circumstances.³² In the absence of a claim of untimely filing with the General Counsel, and here there has been none forthcoming from respondent, it is difficult to perceive any good reason why the Board should delve into the timeliness matter sua sponte. This is especially so inasmuch as a resolution of the matter might well require confronting not merely difficult questions as to what constitute "adverse and performance-based actions" or "other personnel actions" triggering the running of the period prescribed in 4 C.F.R. §28.11(b) for filing charges but, as well, the widely divergent views of the parties on the meaning and application of the "continuing violation" doctrine. Such issues are appropriate for exploration only in circumstances where, unlike here, one of the parties has squarely presented them for decision.

III. ANALYSIS OF THE MERITS OF THE CONTROVERSY

As in Malphurs v. GAO, 2 PAB 81 (December 10, 1991), affirmed by the full Board on motion for reconsideration 2 PAB 147 (July 8, 1992), the criteria governing the adjudication of retaliation claims are not in dispute here. In the first instance, the burden was on petitioner to make out a prima facie case of retaliation by demonstrating that (1) he had engaged in protected activity; (2) thereafter, he was subjected to some adverse personnel action(s); (3) the official or officials taking the action(s) had knowledge of the protected activity; and (4) a causal relationship existed between the protected activity and the adverse action(s). If the petitioner fulfilled that obligation, the burden of going forward shifted to the agency which had to establish the existence of a genuine non-retaliation reason for the adverse action(s).³³

It is, of course, conceded that petitioner engaged in protected activity both in Atlanta and in NSIAD and that, in the wake of the complaints filed at each location, he was subjected to numerous personnel actions that were (at least in his view) of an adverse nature. Nor is there room for doubt that some (albeit not all) of the officials having a hand in those personnel actions were aware at the time of prior protected activity on petitioner's part, whether or not they also knew of the precise character of that activity (i.e., had been informed of the subject and exact content of the ATRO and NSIAD discrimination complaints filed with the Civil Rights Office). What is much less clear, however, is the existence of a causal relationship between the various complaints and what ensued in petitioner's employment.

Indeed, as to some of the claims of retaliatory conduct, the failure of petitioner to sustain his burden on that fourth prong is so apparent as to raise a question as to whether the claim was advanced in good faith. One particularly striking example will suffice by way of illustration.

Petitioner attributes to retaliation the failure of ATRO to have certified him to the Band IF level while still its employee in June 1989. Even a superficial investigation of that claim would have disclosed to petitioner that (1) as above mentioned (p. ___ supra), ten employees were considered for certification at that time; (2) of the nine others, all but one had more time in grade (as a GS-11) than had petitioner and none had previously filed a grievance; and (3) all ten were denied certification.

On the face of it, those readily ascertainable facts made petitioner's endeavor to cast the mantle of retaliation around ATRO's failure to certify him in June 1989 a patent absurdity. And if there were some other considerations that might nonetheless have supported an inference that the action taken in petitioner's case (unlike that taken in the case of the nine other employees) had a retaliatory foundation,

petitioner did not bring them forward.³⁴

In short, from all appearances, petitioner advanced a claim which he and his counsel knew (or could have ascertained with little effort) was totally without substance, leaving it to the respondent to provide the detail that made evident that insubstantiality. Quite apart from whether that course breached some obligation of candor owed by petitioner's counsel as an officer of the Board, this much is beyond cavil: the presentation of essentially frivolous claims as part of a scatter gun attack upon the respondent's conduct scarcely is wise litigation strategy.

That specific example is not all that raised doubt as to whether petitioner has provided the requisite link between his protected activity and the various management actions and decisions of which he complains. Nonetheless, there is no necessity to explore at this juncture the adequacy of the evidence adduced by petitioner as his prima facie case on the purported retaliatory underpinning of those actions and decisions. This is because, as appears to be its established practice in proceedings charging retaliation for protected activity, respondent did not rest its case simply on the proposition that petitioner had failed to sustain his initial burden. Instead, through a parade of witnesses including every person who played a particularly significant role in the challenged actions and decisions, respondent undertook to explain the foundation for each action and decision.

In this circumstance, the Board is in a position to proceed directly to the facial sufficiency of the reasons assigned by the respondent for petitioner's treatment at its hands and, then, to move on to whether petitioner fulfilled his ultimate burden of demonstrating that any reasons having surface plausibility nevertheless must be dismissed as pretextual.³⁵ On the latter score, petitioner did not supply the Board with all the assistance that he might have provided. Although exercising his option to file a reply posthearing brief, he chose to confine that brief strictly to an answer to the portions of respondent's posthearing brief that concerned the procedural issues discussed in Part II, supra. Perhaps this choice was prompted by a belief that nothing respondent had said on the merits of the controversy warranted a reply. But any such belief would be difficult to justify.

To cite but one example, in its posthearing brief respondent took head-on petitioner's reliance on the asserted "longstanding relationship" between ATRO, the Huntsville sublocation and NSIAD as providing the motive for RDAP's alleged retaliation against him for the filing of the discrimination complaint in Atlanta.³⁶ According to respondent, the evidence did not establish that that relationship extended to RDAP, which had no regular, ongoing job-related work performed for it by the Huntsville sublocation. There may be an adequate rejoinder to this observation; if so, however, petitioner has not put it forward. Yet, obviously, one might reasonably be curious respecting why RDAP officials would even consider taking unlawful retaliatory action against petitioner based upon a previous grievance that did not involve their unit or, seemingly for that matter, any agency officials with whom they were shown to have had a close working or personal relationship.

With these prefatory observations out of the way, the Board moves on to an analysis of petitioner's specific claims of impropriety on respondent's part.³⁷

A. With respect to his employment in ATRO, petitioner complains of the failure both (1) to certify him to the Band IF level before his transfer to NSIAD, in July 1989; and (2) to provide him with either an end of year performance assessment on June 15, 1989 or a performance appraisal of his work on the FAA job.³⁸

1. For reasons already developed, there is no possible foundation on this record for petitioner's insistence that retaliation was at the root of the failure to certify him (or any other ATRO employee) in June 1989. And there is a like lack of a record basis for an inference that the decision not to reevaluate him for certification the following month was tied to his prior grievance. Petitioner has pointed to no rule or regulation requiring such reevaluation and there was a substantial practical reason for not doing so in his case. In apparent contrast to the employees who were reevaluated in July after having been denied certification in June (two of whom then were certified along with a third employee who had been first considered for certification at an earlier time), petitioner had been on leave continuously since late May. As a consequence, subsequent to the June evaluation petitioner had performed no work in ATRO that might have justified a fresh look at the certification matter.

2. According to the testimony of Joan M. Dodaro, the Deputy Assistant Comptroller General for Human Resources, for the assessment year ending on June 15, 1989, a performance appraisal closing out the year was required only in three circumstances: (a) the job was complete and the employee had charged at least 30 staff-days to it; (b) the job was incomplete and the employee had charged at least 45 staff-days to it; or (c) the employee had timely requested an appraisal (Tr. 450-51). Petitioner did not establish that this understanding on the part of a senior agency official in the area of personnel matters was in error, let alone was offered to shield retaliatory action by ATRO.³⁹ And none of the three conditions was present in his situation. The FAA job was not complete; petitioner had charged less than 45 days to it; and he had not requested a performance appraisal.

Nor does it affirmatively appear that ATRO had an obligation, imposed by regulation or manual provision, to provide petitioner with a performance appraisal regarding his work on the FAA job once he had embarked upon extended leave preparatory to his transfer.⁴⁰ No doubt, as he testified, ATRO Manager Martin had the discretion to furnish petitioner with such an appraisal. Not having requested that this be done, however, petitioner is scarcely on solid ground in his insistence that the absence of an appraisal is convincing evidence of a retaliatory intent. As Mr. Martin aptly observed, if petitioner believed it important to have an appraisal as he was departing for NSIAD (and well he might have entertained that belief given the expunging of his prior appraisal for work on the GS-11 level), he should have asked for one (Tr. 1010).⁴¹

B. Proceeding to an exploration of petitioner's dissatisfaction with his treatment in NSIAD (or more precisely RDAP), the centerpiece of that dissatisfaction is the denial of certification to the Band IF level upon his arrival in July 1989 and then again in November 1989 and February 1990. As petitioner would have it, those denials and associated events were in retaliation for the discrimination complaint filed in ATRO. They will be considered seriatim.

1. That petitioner came to NSIAD with no record of the quality of his performance in ATRO on the GS-11 level was a circumstance entirely of his own making. He elected, as was his right, to have included in the agreement in settlement of his Atlanta complaint a proviso that expunged the one performance appraisal received for work on that level. Further, the ATRO officials reasonably interpreted the agreement as precluding them from discussing with NSIAD/RDAP officials any aspect of petitioner's performance as a GS-11.

In these circumstances, it is fully understandable that there was a disinclination to certify petitioner to the Band IF level immediately upon his arrival at NSIAD. Manifestly, how one has discharged his or her responsibilities at a particular grade level has a considerable bearing upon the determination as to how that

individual is likely to fulfill the presumably weightier responsibilities given to those on the next higher level. Accordingly, it cannot be found that the explanation for the denial of certification in August 1989 was pretextual.

2. Next to be examined is the decision of the progress review group not to certify petitioner for promotion to the Band IF level in November 1989 following several months work on the ALT/Services job and a performance appraisal by his immediate supervisor, Mr. Reiter, which rated him "superior" in one job dimension and "fully successful" in the others. If one were to take petitioner's version of his conversation with Mr. Motley the prior July as both being accurate and containing a guarantee of promotion upon 90 days of "fully successful" or better performance, there might be room for drawing the inference of retaliation that petitioner suggests. The Board finds more plausible, however, Mr. Motley's recollection that the commitment was merely to evaluate petitioner's performance in three months--which, indeed, was done.

This is especially so given the absence in this record of anything to support the existence of an established policy within NSIAD that would have provided a promotion to one in petitioner's situation upon receiving a performance appraisal such as that obtained by him. Indeed, more broadly, a significant difficulty with many aspects of petitioner's case is the lack of concrete evidence that he was the victim of disparate treatment; *i.e.*, that other NSIAD employees who had not engaged in protected activity within or without that Division were better treated by management in some material respect.⁴²

As has been seen, Mr. Reiter's recommendation played a significant role in the progress review group's denial of certification. On its face, the underpinning of that recommendation seems reasonable enough--that the ALT/Services job had not as yet reached a stage that enabled petitioner to demonstrate sufficiently his capabilities and that, additionally, there was cause for concern respecting his assertiveness and initiative. Petitioner has offered nothing to persuade the Board that, nonetheless, the recommendation was pretextual.

3. Possibly more controversial is the third denial of certification to the Band IF level that occurred in February 1990. At the foundation of that action was the performance appraisal covering petitioner's work on the ALT/Services job between October 28, 1989 and February 2, 1990. Although also prepared by Mr. Reiter, as seen this appraisal was markedly less favorable than the prior one (containing, as it did, two "borderline" ratings and none above "fully successful").

Manifestly, if this appraisal represented a fair assessment of petitioner's performance, it would be difficult to quarrel with the determination against certification. And, petitioner's protestations to the contrary notwithstanding, the record evidence provides adequate support for the assessment. Specifically, petitioner has not satisfactorily refuted the insistence of Mr. Reiter and others in RDAP management that his work papers were inadequate and contained errors. In this regard, it might well be that petitioner appropriately might have been provided greater feedback at an earlier point with regard to the quality of his submissions. On the other hand, it was not unreasonable for management to hold him accountable for errors in his product, as well as (given his years of experience as an evaluator) to a familiarity with such seemingly basic requirements as those pertaining to indexing and the content of summaries.

Be that as it may, this Board finds no support for a conclusion that either the February 1990 appraisal or the denial of certification that rested upon it was in retaliation for the grievance filed in Atlanta. Indeed, quite apart from all other considerations, there is the matter of the affirmative steps that RDAP Director Math took to enhance petitioner's chances of obtaining certification when next evaluated. It seems

scarcely likely that, had he and his RDAP colleagues been bent on retribution for protected activity on petitioner's part that did not implicate their office, Mr. Math would have undertaken to reassign petitioner to another supervisor (Mr. Reilly) on a different job (University Research Center) that had entered the implementation stage. As Mr. Math indicated in his February 5, 1990 memorandum, this action was taken for the express purpose of providing petitioner with an opportunity to demonstrate his capabilities, with his performance assessed by someone other than the supervisor who had had difficulties with his performance on the ALT/Services job. And that objective was realized. At the end of an additional three month period, petitioner received both a considerably more favorable performance appraisal and his promotion to the Band IF level.

All this being so, the Board expressly finds that the denial of certification to the Band IF level between petitioner's arrival in NSIAD in July 1989 and May 1990 (when certification was ultimately achieved) was not in retaliation for prior protected activity. Rather, the denial was the consequence of bona fide management decisions to the effect that petitioner had not as yet demonstrated his capability to perform satisfactorily on the Band IF level.

No doubt, as petitioner would have it, those managerial decisions might have been flawed; i.e., in reality, petitioner's work on the ALT/Services job might have been of sufficient merit to warrant certification at an earlier date. It also might have been that the supervision of petitioner's performance by Mr. Reiter would not have qualified as a textbook model. But those possibilities are quite beside the point here. It is not the function of this Board to substitute its judgment for that of responsible agency officials on either the quality of a particular employee's work or the precise prerequisites for promotion. Nor can this Board engage in the micro-management of agency offices. Here, to repeat, as explained by agency officials the certification decisions were reasonable on their face and petitioner wholly failed to counter the explanations with a demonstration that they nonetheless were pretextual. In a nutshell, the Board has been (1) given insufficient reason to infer an intent to retaliate against petitioner; (2) provided with no probative evidence that petitioner was treated, from the standpoint of certification, materially different from other similarly situated NSIAD/RDAP evaluators;⁴³ and (3) pointed to no pattern of questionable conduct on the part of respondent during the August 1989-May 1990 period that might give rise to a presumption that petitioner was being targeted for retaliatory action.

C. What next requires exploration is whether there is sufficient record evidence to support petitioner's claim that, in the wake of the complaints he filed while employed in that Division, NSIAD/RDAP officials engaged in retaliatory action.

1. The first of those complaints was filed on April 3, 1990. Barely a month later, petitioner received his certification to the Band IF level on action of a progress review group within NSIAD that was at least influenced by the recommendation of the RDAP Director. If, then, NSIAD/RDAP officials were as upset about the April 3 complaint as petitioner suggests, they manifested their distress in a most unusual fashion.

Quite apart from the seeming inconsistency between (1) petitioner's insistence that he was a victim of retaliation prompted by his NSIAD complaints and (2) his promotion on the heels of one of those complaints, the record is of no assistance to petitioner. To begin with, petitioner is in disagreement with the interim performance appraisal he received for his work on the University Research Center job in the February-April 1990 period (despite the fact that that appraisal led to his promotion). Petitioner offered nothing, however, to allow, let alone compel, a conclusion that that appraisal was so plainly at odds with reality that a retaliatory objective presumably was at its foundation. All that appears is that the subjective

judgment of petitioner's superiors as to the quality of his performance in four job dimensions (and whether there was a basis for rating him in a fifth dimension) does not coincide with petitioner's equally subjective judgment on these matters. As this Board member endeavored to make clear in the Malphurs initial decision, supra, standing alone such disagreements--no doubt far from uncommon in this and every other federal agency--are not fit grist for the adjudicatory mill.⁴⁴

2. Turning to petitioner's assignment to the DOD Contract job, whether or not issue might be taken with one or another of the management decisions of which he complains, none appears to have had a retaliatory purpose or to have constituted a prohibited personnel practice warranting anything remotely approaching the extensive relief sought by petitioner. For example, petitioner challenges the denial of two requests made by him in the fall of 1990: (1) to be reassigned to a supervisor other than Mr. Reilly; and (2) to be allowed to supervise a developmental level evaluator. As to the first request, there is no need to consider whether it was in fact denied or, rather, as the respondent maintains (Tr. 315-18, 652-63), simply held in abeyance pending completion of the assigned task (in conformity with NSIAD practice in cases of requested reassignment). In either event, decisions on such requests are peculiarly within the realm of management prerogatives and are not subject to Board review in the absence of some clear indication, wholly absent here, of discriminatory or retaliatory action.

Much the same answer is required with regard to the failure to provide petitioner with the opportunity to supervise a lower-level employee. Respondent's evidence was to the effect that it was not feasible to provide petitioner with a supervisory opportunity on the DOD Contract job given the nature of the job and the relatively few employees assigned to it (Tr. 316-17, 321, 876). In addition, according to respondent, it is not common in NSIAD for a full performance level Band I employee with less than one year on that level to supervise a developmental level employee (Tr. 322, 656, 877).⁴⁵ Petitioner did not establish that those explanations were pretextual. In this connection, given the wide latitude that necessarily is enjoyed by respondent in determining who should be assigned supervisory responsibilities on particular projects, it was incumbent upon petitioner to provide, at minimum, concrete evidence establishing that he was treated differently than other similarly situated employees. As is true with regard to so many other facets of his overall claim of retaliation, there was an absence of any convincing evidence of disparate treatment.

Petitioner's dissatisfaction with the performance appraisals he received on the DOD Contract job--one in October 1990 and the other in January 1991--rests in large measure on the same subjective footing that is at the bottom of his challenge to earlier appraisals. Once again, there is insufficient evidence that retaliation for the prior filing of grievances was a factor. As in the case of those received by petitioner on the previous jobs, the two appraisals associated with the DOD Contract job contained narrative justifications for each job dimension rating. On their face, the supplied narratives supported the ratings to which they related and petitioner fell well short of a persuasive demonstration that the narratives were so far off the mark as to give rise to an inference of animus.

D. Remaining is a miscellany of additional alleged prohibited personnel practices on the part of respondent. According to respondent, with one exception, none of the laws, rules, or regulations upon which petitioner relies for his claims in this regard imposes a mandatory requirement. It is unnecessary to pass upon the validity of that assertion. For, upon analysis, it appears that respondent has not been shown to have been guilty of any impermissible practice that might conceivably justify even a portion of the relief sought by petitioner in this proceeding.

The consideration of but a few of petitioner's claims in this regard will suffice. First, insofar as petitioner's certification to the Band IF level is concerned, neither Ms. Dodaro's May 30, 1989 memorandum nor GAO Order 2540.1 required such certification at any particular time. Instead, as a GS-11 employee with at least one year in grade at the time of the conversion to the pay for performance system, petitioner was entitled to no more than that which he received: evaluation for promotion at periodic intervals.

Second, although petitioner complains that on several jobs he did not have proper expectations set in a timely manner, the record does not establish that he was prejudiced thereby to an extent requiring the grant of relief. For example, petitioner insists that the expectations set in November 1989 for the implementation phase of the ALT/Services job were incomplete because they did not explicitly state that work papers must be indexed and summaries prepared for the data collection instruments. These were standard developmental level tasks, however, and, as a relatively experienced evaluator, petitioner should have been well aware of the agency guidance in that respect. Similarly, assuming that formal expectations were not timely set on other jobs, petitioner failed to explain satisfactorily how that shortcoming left him in the dark respecting the precise nature of his duties to such an extent that his performance appraisal was adversely affected.

Third, it need not be definitively decided whether (as well might not have been the case) petitioner enjoyed an enforceable right to greater feedback and/or formal progress reviews on the ALT/Services and DOD Contract jobs than was obtained by him. For, on this score as well, there has been a lack of a sufficient showing of prejudice warranting the grant of relief of the stripe sought by petitioner. In this regard, the Board is unpersuaded that the two "borderline" ratings that petitioner received in the February 1990 appraisal can appropriately be attributed to inadequate feedback on the ALT/Services job. Assuming, without deciding, that Mr. Reiter might have advised petitioner of the work paper deficiencies at an earlier point, the fact remains that those deficiencies should have been quite apparent to petitioner based upon his several years of prior experience as an evaluator.

Fourth, petitioner is wide of the mark in his assertion that he was entitled to performance appraisals (1) for work on the University Research Center job between April 25 and June 15, 1990; and (2) within 20 days after the end of that job. For this proposition, petitioner relies on the Performance Appraisal System Manual (Joint Exh. 4). But, absent (as here) a timely request for one, that Manual did not require a written appraisal in circumstances where less than 30 staff days are charged to a job (as was the case with the University Research Center job in the April-June 1990 interval). Nor, given his limited work on the job, did the Manual require an end-of-assignment appraisal in the absence of a timely request on petitioner's part. Moreover, these considerations to one side, once again there is no discernable link between the conduct of which petitioner complains and the relief that is requested.

Finally, petitioner's objection to the January 1991 performance appraisal on the DOD Contract job on the ground that it was prepared by Mr. Farrington, rather than by Mr. Reilly, is totally without substance. Because Mr. Reilly had left the agency in late December, Mr. Farrington took his place as petitioner's supervisor of record on the job and, in that capacity, quite properly prepared the appraisal. Further, it is significant that, as earlier noted, Mr. Farrington had personal knowledge of petitioner's performance during the period in question (as his second line supervisor) and additionally obtained the input of Mr. Reilly (the departed first line supervisor) for use in preparing the appraisal.⁴⁶

IV. CONCLUSION

On the basis of the foregoing, the Board makes these ultimate findings of fact:

1. No action taken or failed to be taken by respondent in connection with petitioner's employment in ATRO and NSIAD following the settlement of the ATRO discrimination complaint was the consequence of retaliation against petitioner for having engaged in protected activity.
2. The retaliation question to one side, petitioner failed to sustain his burden of demonstrating the existence of any prohibited personnel practice on respondent's part that might justify the grant of any of the relief sought by him.⁴⁷ For these reasons, the petition for review must be, and hereby is, denied.

Notes

1. Unless otherwise indicated, the recitations in this part of the opinion are based upon uncontroverted evidence, to a significant extent derived from documentary exhibits. They should be deemed findings of fact. Any event occurring during petitioner's employment that is revealed in the record but not referred to in the ensuing discussion should be taken as being, in the Board's judgment, of no relevance to the disposition of the petition for review.

If found necessary, the identified conflicts in the evidence will be resolved in the analysis portion (Part III) of the decision. Absent further discussion of a particular conflict, the reader may assume that it was found to lack pivotal significance.

2. "J.S." refers to the Joint Stipulations of Fact.
3. "Tr." refers to the transcript of the evidentiary hearing held in November 1992.
4. All exhibits referred to in this opinion were admitted into evidence.
5. Mr. Martin also signed the agreement (J.S. 10), as did Ms. Aponte (Joint Exh. 2).
6. One of those appraisals was the June 30, 1988 appraisal specifically mentioned in the August 1988 discrimination complaint; the other was a subsequent appraisal dated February 8, 1989 (Joint Exh. 2).
7. To repeat, January 27, 1989 was the end of petitioner's Huntsville assignment.
8. There is a seeming variance in the testimony regarding whether Mr. Goldbeck or Mr. Motley made the offer to petitioner (compare Tr. 157 with Tr. 626-27). For present purposes, it is not necessary to resolve the disparity.
9. Mr. Reiter testified that the appraisal also encompassed some work on the other (commercial products) portion of the ALT job, which was not referenced because it did not progress very far (Tr. 725). In addition, the appraisal embraced the limited work that petitioner had performed on a Competition in Contracting Act (CICA) job (Tr. 726).
10. It should be noted that this Board is not confronted with any claim of racial or gender discrimination with regard to the agency conduct complained of in the petition for review. As will be seen, Title VII of the Civil Rights Act of 1964, as amended, comes into play only because the alleged retaliatory actions

were said to be in response to the racial and gender discrimination complaint filed in ATRO.

11. It is worthy of passing note that petitioner's ATRO complaint was similarly addressed to a performance appraisal that accompanied a promotion. See pp. 3-4, supra.

12. As earlier noted, this proceeding was initially assigned to Judge Cappello and was not reassigned until just prior to the evidentiary hearing in November.

13. See Transcript of February 10, 1993 oral argument at 5.

14. The Board's Solicitor recalls that, in 1990, agency counsel were informally told of the view of the then Board members that too many frivolous dispositive motions were being filed. That is, of course, an entirely different matter.

15. Respondent's post-hearing brief at 35-38.

16. See 5 U.S.C. §2302(b)(1)(A). For present purposes, it will be assumed, without deciding, that 4 C.F.R. §28.98(a) would come into play with respect to a discrimination complaint founded upon the provisions of section 2302(b)(1)(A).

17. One of those merit system principles precludes (i.e., includes within the ambit of prohibited personnel practices) reprisals against employees for "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation." 5 U.S.C. §2302(b)(9)(A). In short, action in retaliation for the filing of a prior grievance is a prohibited personnel practice within the meaning of Title 5 of the United States Code whether or not likewise a violation of Title VII of the Civil Rights Act (because that prior grievance involved, e.g., asserted racial or gender discrimination).

18. Petition at 12.

19. Id. at 13-14.

20. See, Saul v. United States, 928 F.2d 829, 833 (9th Cir. 1991); Ryon v. O'Neill, 894 F.2d 199 (6th Cir. 1990); Frazier v. MSPB, 672 F.2d 150 (D.C. Cir. 1982).

21. To avoid possible misunderstanding as to the reach of this decision, it must be stressed anew (see n. 16 supra) that there is no need to decide here whether an assertion of, e.g., racial or gender discrimination would come within the ambit of section 28.98(a) if cast in prohibited personnel practice terms. That question can be left for a future day when, unlike here, it is squarely presented.

22. See cases cited n. 20, supra.

23. McKenna v. Weinberger, 729 F.2d 783, 790 (D.C. Cir. 1984).

24. Respondent's post-hearing brief at 38-40.

25. Suffice it to note that there are at least policy considerations that point in the direction of clothing the Board's General Counsel with the authority to present to the Board allegations of prohibited personnel practices that surfaced during his or her investigation, whether or not contained in the employee's charge(s).

26. Respondent's post-hearing brief at 40-44.

27. See January 27, 1993 letter to the Board from Elizabeth S. Woodruff, respondent's counsel.

28. See Board's February 19, 1993 Memorandum.

29. Petition, para. 3(e)(3).

30. Id., para. 3(e)6.

31. See 4 C.F.R. §28.11(b).

32. See Quarry v. General Accounting Office, 2 PAB 23 (1981). In that proceeding, on motion of the agency a three-member panel of this Board dismissed a petition for review on the ground that the petitioner had not timely filed his discrimination complaint with the agency. The basis of the dismissal was that the petitioner had not demonstrated "good cause" for his failure to have observed the applicable time limit. (In this connection, the Board pointed to a holding of the Merit Systems Protection Board that an untimely filing of a complaint or appeal may be waived for good cause shown.) On petitioner's motion for reconsideration, the Board en banc affirmed the Panel decision on December 21, 1981.

33. See also, Chen v. General Accounting Office, 821 F.2d 732 (D.C. Cir. 1987). This Board's discussion [at pp. in its very recent decision en banc in Rojas v. GAO, 2 PAB 193 (May 20, 1993)], is likewise worthy of reference.

34. Petitioner maintains in his posthearing brief (at 63-64) that Mr. Martin had used his expunged personnel appraisals in deciding against certification in June 1989 and that constituted evidence of retaliation. The evidence establishes only that the progress review group members took into account their recollection that petitioner's ratings had not been below "fully successful," as well as the impression of his then current supervisors as to the quality of his performance (Tr. 1024). What other basis would there have been for making the certification decision? Petitioner leaves this question unanswered.

35. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983).

36. Respondent's posthearing brief at 51-52.

37. In carrying out this undertaking, the Board does not consider itself obliged to dwell upon any asserted procedural irregularity that has not been shown to bear directly upon the entitlement of petitioner to the relief that he is seeking. For example, one of petitioner's claims is that there was a failure to set expectations within the prescribed time period on the DOD Contract job once he was assigned to it. Even if that claim is meritorious, it does not advance petitioner's cause unless the record discloses that he suffered some consequential injury for which he is now entitled to redress. Stated otherwise, not all departures from established procedures call for a remedy but, rather, only those that have had a discernible adverse effect upon some facet of the petitioner's employment. To be sure, a pattern of procedural irregularities might suggest a retaliatory course of conduct in the instance of an employee who had previously engaged in protected activity. No such pattern has been shown in this case and no particular irregularity has been linked to an improper motive as opposed to, at the very most, simply a lapse in managerial attention to small detail of the stripe that almost inevitably occurs from time to time with respect to all employees.

38. Petitioner also maintains that he had been improperly denied a promotion-equivalent increase. As respondent noted without contradiction, however, the promotion-equivalent increase for an employee at the GS-11 level (e.g., petitioner in June 1989) was certification to the Band IF level. Thus, this additional claim has no independent standing.

39. Petitioner's reliance on provisions contained in a manual entitled "Performance Appraisal System for Band I and II Employees" (Joint Exh. 4) is entirely misplaced. That Manual was issued in June 1989 and, as Ms. Dodaro testified (Tr. 450), had no application to the assessment year ending that month.

40. On this score, as well, petitioner relies on manual provisions not applicable at the time here in question. See n. 39, supra.

41. As previously seen, the second of the two expunged appraisals was the only one that evaluated his work in ATRO on the GS-11 level (to which level petitioner was promoted in June 1988). There is no need to dwell at length upon the fact that, although not expunged, ratings that petitioner had earlier received as a GS-7 and GS-9 similarly did not accompany him to NSIAD. Assuming, without deciding, that ATRO was obligated, by regulation or otherwise, to forward those records to petitioner's new office, its failure to have done so neither was shown to have a likely retaliatory purpose nor was demonstrated to have a prejudicial effect upon petitioner's career in NSIAD. On the latter score, as has been seen and will be discussed further shortly, NSIAD was not interested in petitioner's performance below the GS-11 level in determining whether to certify him to the Band IF level.

42. As will later appear (n. 43, infra), the single evaluator witness offered by petitioner in support of his claim of disparate treatment turned out not to be similarly situated. Needless to say, petitioner's failure to demonstrate that he was treated less favorably than other similarly situated employees cuts against his insistence that management's explanations for the decisions made and actions taken in his case were pretextual.

43. In addition to his own testimony, petitioner offered the testimony of only one other evaluator, Paul Brubaker, who transferred from ATRO to NSIAD in April 1989 (Tr. 356). Mr. Brubaker received a performance appraisal for the period between April 10 and June 15, 1989 and, upon the inauguration of the pay for performance system, was converted from GS-11 to Band I at the developmental level (Tr. 357-59). In July 1989, he was promoted to Band IF (Tr. 360). As respondent elicited on cross-examination, however, Mr. Brubaker's GS-11 performance appraisals obtained in ATRO accompanied him at the time of transfer (Tr. 364). Thus, his promotion was based on the evaluation of his work on that grade level, both in ATRO and NSIAD, over a protracted period. In the circumstances, it cannot be said that he and petitioner were similarly situated, and that significance attaches to the fact that, unlike petitioner, Mr. Brubaker had not previously engaged in protected activity.

44. Ultimately, it is not the employee's opinion of the value and quality of his or her work that matters; it is the perception of the supervisors that is relevant. See Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980).

45. Respondent's witnesses also insisted that supervisory experience is not a condition precedent to promotion from Band IF to Band II (although one witness acknowledged it might be helpful) (Tr. 322, 656, 877).

46. The Board finds no record support for the claim in the petition for review that petitioner's transfer to the General Government Division was a retaliatory act or otherwise improper.

47. On this score, the Board expressly finds, with respect to any asserted prohibited personnel practice not addressed in terms in Part III, that petitioner failed to supply the requisite connection between the claimed practice and some facet of the relief sought by him. As previously noted (n. 37, supra), this Board sees no necessity to consider whether any challenged agency action or decision constituted a prohibited personnel practice in the absence of such a demonstrated link.