

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

Docket No. 92-04

Date of Decision: September 30, 1993

Cite as: Marshall v. GAO (en banc) (9/30/93)

Scope of Review - De Novo Review

Standard of Review, Initial Decision

Prohibited Personnel Practice

Violation of Merit System Principles as Prohibited Personnel Practice

Standard of Proof for Prohibited Personnel Practice

Rules and Regulations

Performance Appraisal Systems

Evaluation of Employees

Performance Appraisal Systems Procedures

Reprisal/Retaliation

Credibility

Reconsideration/Reopening of PAB Decisions

Remedies

DECISION

This matter is before the Board pursuant to the provisions of the General Accounting Office Personnel Act (GAOPA), as amended, 31 U.S.C. §732 et seq. (1988) and the Board's rules at 4 CFR §28.87.

I. Procedural history

By a Petition for Review filed on May 26, 1992, Petitioner alleged that Respondent, also referred to herein as GAO, engaged in a continuing course of retaliatory actions against him which began in August 1988, when he filed a discrimination complaint involving the Atlanta Regional Office (ATRO), and continued after he was transferred to a division in headquarters following settlement of his complaint on May 30, 1989. He also alleged the occurrence of a number of "procedural violations in all phases of the GAO performance management cycle which include (1) expectation setting, (2) monitoring performance, feedback and coaching and (3) performance appraisal." see page 12 of the Petition for Review. Failure to comply with GAO rules and regulations in specific instances was alleged as to named GAO officials. see

pages 2-4 of the Petition. Specific allegations as to 11 prohibited personnel practices were made. see page 9 of the Petition. The alleged deviations from written policies and procedures were alleged to be part of a pattern of retaliatory actions. see page 10 of the Petition. GAO orders, memoranda and a manual were named as the GAO rules and regulations not followed. see pages 13 and 14 of the Petition. At page 10 of the Petition, it is charged that "deviation from written policies and procedures" constituted a retaliatory "pattern that had begun in the Atlanta Regional Office." Petitioner sought specific relief and "such other relief as may be appropriate." see page 15 of the Petition for Review.

In Respondent's Answer to the Petition for Review, Respondent denied the occurrence of any retaliation, procedural irregularities or prohibited personnel practices. In defense, Respondent alleged that the manual and internal memoranda did not have the force and effect of law. It also alleged that certain claims should be dismissed for failure to exhaust administrative remedies and as being time-barred.

A pretrial order was entered on July 9, 1992, following a pretrial conference. As to the allegations in the Answer that certain claims in the Petition should be dismissed, it was "ORDERED" that "Dispositive motions are to be filed by September 8." No such motion was filed by either party by the prescribed date. However, in a prehearing brief filed on October 19, Respondent made it clear that it was continuing its challenge of the Petition for Review on procedural grounds.

Just prior to the hearing date, there was a substitution of administrative judges due to an illness in the family of Member Isabelle R. Cappello, who was originally assigned to the case. At her suggestion, the case was assigned to another rather than delay it. Member Alan S. Rosenthal volunteered to take over the case, with her concurrence.

The hearing was held over the course of six days in November 1992. An Initial Decision [ID] was rendered on May 26, 1993, ruling against Respondent on the procedural issues and against Petitioner on the merits.

On June 25, 1993, Petitioner, pro se, filed a Request for Reconsideration [RfR].¹ His objections to the ID are that the Administrative Judge [AJ]: "(1) abused his discretion by failing to make his decision in light of the determining principles upon which personnel management in the Federal Government is based; (2) abused his discretion by tailoring his decision to the letter of Title VII law, while violating the spirit of that law; (3) failed to recognize Petitioner's prima facie case of retaliation in the denial for certification in Atlanta and thus erroneously, concluded that Petitioner's case was frivolous; (4) ignored significant portions of Petitioner's evidence which established pretext in the failure to certify Petitioner in the Atlanta Regional Office; (5) disregarded crucial facts which established the connection between the retaliation which started in Atlanta and continued in GAO Headquarters; (6) dismissed without examination the prohibited personnel practices which were evidence of pretext and, therefore, retaliation against Petitioner; and (7) gave an exaggerated and unreasonable weight to the testimony of agency witnesses who provided testimony regarding agency policy and regulations, instead of examining the plain language of the regulations and reviewing the existing case law interpreting the regulations." see page 2 of the RfR. He urges the Board "to thoroughly examine the documentary evidence" and incorporates by reference his post-hearing brief. see page 3 of the RfR.

No request to reconsider the rulings in the ID on the procedural issues has been filed and the Board has not reconsidered them. We neither affirm nor reverse these rulings of the AJ and will not consider them as precedent in future cases, but allow them to stand as controlling in this case.²

On July 26, 1993, Respondent's Opposition to Petitioner's Request for Reconsideration (Opposition) was filed. Respondent supports entirely the AJ's rulings on the merits of the issues as to retaliation and prohibited personnel practices.

In reviewing a request for reconsideration of an initial decision of a Board member, this Board has the option of a de novo³ or an appellate type review. see 4 CFR §§28.87 (c) and (d). The authority as to de novo review was written into our rules following the decision in Chen v. General Accounting Office, 821 F.2d 732, 736 (D.C.Cir. 1987), wherein the court of appeals instructed us that our regulations "could have included authority for de novo review, but [the ones at that time] did not." see 54 F.R. 24134 (June 6, 1989) which explains that: "The final language [of the June 6, 1989 amendments to the rules] allows the Board, like the MSPB, to conduct a de novo review of the law and facts for each initial decision that the Board is called upon to reconsider" and contrasts this to "review ... used by the federal courts of appeals in their review of Board decisions." In either case, the complete record and the initial decision must be studied, so that one choice is as time-consuming as the other.

After studying the record and ID, in this case, we have opted for de novo review and, under it, to affirm the ID in part and reverse it in part. see 4 CFR §28.87 (c).⁴ We affirm its holdings that the allegations of retaliation in the National Security and International Affairs Division (NSIAD) and a pattern of retaliation from one unit to another were not proved by a preponderance of the evidence. We reverse its holding that the allegation of retaliation in the ATRO was not proved by a preponderance of the evidence. We also reverse the holding that the allegations of prohibited personnel practices need not be considered fully; and we consider each.

To summarize our decision, we find that Petitioner proved, by a preponderance of the evidence, that ten prohibited personnel practices occurred in connection with Petitioner; that seven of them had a harmful impact upon Petitioner's career; that retaliation did occur against Petitioner at the ATRO; and that two types of relief are appropriate. Petitioner failed to prove by a preponderance of the evidence that the prohibited personnel practices were part of a pattern of retaliatory acts on the part of GAO managers that extended from one unit to another, or that retaliation occurred at the NSIAD.

II. Findings of fact (FOF)⁵

1. Petitioner's employment with Respondent commenced in January, 1986, when he joined the Philadelphia Regional Office as a GS-7 evaluator. (Stip 2).⁶

2. In August, 1986, he transferred at his own request to the ATRO. In February, 1987, he was promoted to a GS-9 evaluator (Stip 4); three months later, he was given a Special Commendation Award for his job performance (Stip 5); and on June 19, 1988, he received a promotion to a GS-11 evaluator position that had a promotion potential to GS-12 without further competition. (Stip 4 and TR 37).

3. In August 1988, Petitioner filed a complaint with GAO's Civil Rights Office (CRO) in which he alleged discrimination on the basis of race and sex while working in the Huntsville, Alabama, sublocation of the ATRO. (RE 20). According to the complaint, that discrimination was reflected in, inter alia, a June 30, 1988, performance appraisal prepared by his immediate supervisor at Huntsville, John Puett. (RE 20). The challenged appraisal had been reviewed and approved by David Gray, the Assistant ATRO Regional Manager for Operations (TR 1018-19), who reported to James Martin, the ATRO Manager with overall responsibility for the operation of the Huntsville sublocation. (TR 1018-19).

4. At the time the August 1988 complaint was filed, Petitioner was working on a NSIAD assignment. (Stip 12). About one-third of the work done in the ATRO is programmed or managed out of the NSIAD. (TR 1046). About fifty percent of the jobs carried out at Huntsville are managed by the NSIAD. (TR 23). Mr. Martin travels to GAO headquarters on an average of 12 to 18 times every year. (TR 1045-46). Charles Rey, a NSIAD official at GAO's headquarters, made several trips to the Huntsville site in connection with the particular job to which Petitioner was assigned. (TR 23-24 and 25-26).

5. 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 was reassigned to Atlanta, where he worked between mid-February and May on a Federal Aviation Administration (FAA) job for which he did not receive a performance appraisal. (TR 24, 26 and 989-90).

6. In May 1989, the discrimination complaint was settled with Mr. Martin representing GAO in the mediation process that preceded the settlement agreement. (TR 482, 988-89, 1018-19 and 1023-24). The ratings received by Petitioner at the Huntsville subunit were a focus of the discussion during the mediation process. (TR 1024). The agreement memorializing the settlement was drafted by Nilda Aponte, the then Acting Director of GAO's CRO, who held separate sessions with Petitioner and Mr. Martin (TR 29, 485 and 988) and acted as a neutral. (TR 488). On May 1, it was signed by Petitioner, his attorney, Earline Smith-Montgomery, Nilda Aponte, and Mr. Martin who signed as a party to the agreement. (JE 2, TR 1023 and 482 and Stip 10). On May 30, it was signed by Ira Goldstein, Assistant Comptroller General for Operations. (JE 2).

7. Pursuant to the agreement, GAO agreed, *inter alia*, "to remove the ratings dated June 30, 1988 and February 8, 1989, from Mr. Marshall's official personnel file"⁷ and "to transfer Mr. Marshall to a unit within GAO in the District of Columbia within sixty days of the effective date of this agreement." (JE 2, page 2). The parties also stipulated that "the terms of this agreement are confidential and that neither party shall disclose any of these terms except for the limited purpose of implementation of this agreement." (JE 2, page 3).

8. Petitioner had unsuccessfully sought a change in the ratings in question, but the agency did accept his fallback position that the ratings be expunged. (TR 485-86). In a separate session with Petitioner, Ms. Aponte advised Petitioner that "there were some disadvantages" to expunging the appraisals in that "with the appraisals gone, the assumption would be that no appraisals meant that they were bad appraisals, that anybody who encountered his record would assume that they were gone because they were bad appraisals." (TR 485-86). In fact, the ratings were Fully Successful⁸ or better. (Stip 6). Petitioner, however, was "adamant that they were bad as far as he was concerned, so he wanted them out." (TR 486).

9. In connection with the transfer, and after the agreement was signed, Petitioner expressed to Ms. Aponte his preference for an assignment to the Human Resources Division (HRD). (TR 32 and 484). Petitioner feared being assigned to the NSIAD because he had been working on a NSIAD job at the time the discrimination complaint was filed. (TR 32 and 484).

10. During the latter part of June 1989, Petitioner was advised that he would be assigned to the NSIAD, but received assurances from the CRO and Diana (Schultz) Eisenstat, the Assistant to the Deputy Assistant Comptroller General for Human Resources (Joan (McCabe) Dodaro) that, in light of his concerns, they would monitor the situation. (TR 1050-51) Ms. Dodaro explained that the reason for the assignment to the NSIAD was that the HRD was over strength in personnel and that the NSIAD needed staff. (TR 439).

11. Within the NSIAD, Petitioner was to work in the Research, Development, Acquisition and Procurement (RDAP) issues area. (Stip 14). RDAP had been involved in a few jobs with the Huntsville location; but Petitioner had not worked on those jobs. (TR 522-23). According to the testimony of RDAP management officials, they were unaware of the exact nature of the discrimination complaint filed by Petitioner in the ATRO. (TR 283-284, 524, 721 and 825). Arthur Goldbeck, the 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 the ATRO would not accompany him. (TR 612-13).

12. Although Petitioner did not arrive at the NSIAD until July 17, 1989, he last charged time to the FAA job on May 19. (RE 32, page 19). Between February and May, he charged to the FAA job a total of 38.8 staff days (eight hours charged to same job code). (TR 1007 and 394).

13. On May 17, 1989, Mr. Martin approved for Petitioner more than 220 hours of leave, which would have taken Petitioner to July 1, the time within which he was to be transferred to headquarters under the settlement agreement. (JE 2, page 2 and TR 1050). Petitioner requested an additional two weeks of leave when he encountered problems with the transfer to the NSIAD (TR 1050). and his transfer from the ATRO was not effected until July 16, 1989. (TR 1050).

14. On May 31, 1989, while Petitioner was on leave preparatory to his transfer to the NSIAD, Ms. Dodaro issued a memorandum to the heads of all agency divisions and offices setting forth the conversion process from the then existing General Schedule classification to a new system, denominated pay for performance (PFP). (JE 3). It emphasized that copies of the memorandum be distributed to affected GS-7 through GS-11 staff "as soon as possible." (JE 3, page 2). Petitioner did not receive a copy from the ATRO. (TR 38-40).

15. The new PFP system was put into effect by GAO Order 2540.1 dated June 2, 1989. (PE 6). On June 16, 1989, the covered employees were placed in "Bands," the Band for a particular employee hinging upon that employee's GS grade at the time. For example, evaluators then at the GS-7 through GS-11 were placed in Band ID (developmental level); those at the GS-12 level were placed in Band IF (full performance level).

16. Evaluators, such as Petitioner, who had served one year at the GS-11 grade, were reviewed between June 15 and September 30, 1989, to determine whether they should be certified to Band IF. (JE 3, pages 2-3). Such evaluators remained in the GS system, with entitlement to step increases, until they were certified to Band IF. (JE 3 and TR 429-30) If a GS-11 staff member was not certified at the time of conversion, the staff member received a within-grade increase (WIG) and had to be reevaluated every 90 days thereafter until certified. (JE 3, page 3).

17. In making the determination whether a GS-11 evaluator should be certified to the full performance level (FPL), unit management Progress Review Groups (PRGs) are to apply the same standards applicable to the determination whether a GS-11 should be promoted to GS-12, *i.e.*, an evaluator's performance is reviewed to determine whether he/she showed the potential to perform fully successful work at the GS-12 level. (TR 288 and 433-34). For certification to the IF level of Band I, the PRG: (a) reviews the tasks and standards prescribed for the position in the "Appraisal Manual for Bands I and II" (JE 4); (b) considers input from the Petitioner's current and past supervisors and managers; (c) assesses whether the staff member has demonstrated the potential to perform the tasks and duties specified for FPL staff at the fully successful level; considers whether the staff member has shown a limited need for close supervision,

leadership skills and initiative/assertiveness; and reviews any performance appraisals received by the staff member during the evaluation period, particularly those at the GS-11 level. (JE 3, page 7, JE 8, pages 3-4 and TR 434 and 992-93.) Performance appraisals at the GS-7 and 9 level are not considered to be relevant to the certification process because different standards are applied to work at those levels. (TR 434, 286-87, 379-80 and 993-94).

18. Petitioner had been promoted to the GS-11 level effective June 19, 1988, and was eligible to be considered for certification to IF on June 19, 1989. (PE 50, page 9). He was reviewed for certification to IF in the ATRO in June 1989. (TR 994-95). Mr. Martin was chair of the PRG and made the final decision (TR 994). denying the certification because, he testified, Petitioner: "In my opinion ... had not demonstrated to us that he had the type of experience and capability to perform the various tasks that I would expect a full performance evaluator to perform." (TR 994).

19. Mr. Martin did conclude that Petitioner's performance reflected an acceptable level of performance, in June 1989, entitling him to a within-grade increase. (PE 50, pages 14-15).

20. A total of ten people were eligible for certification in the ATRO in June 1989; none was certified. (TR 995 and 1032). All but one of the ten had more time in grade than Petitioner. (TR 995). The next month, July, two of the ten were certified to the full performance level, based upon 23 additional staff days of work. (TR 1033-43). Mr. Martin had no recollection of Petitioner being considered for certification at the July meeting or of the date of the July meeting. (TR 1043).

21. Petitioner arrived at the NSIAD on July 17, 1989. (Stip 14). According to Respondent's records, Petitioner was considered and rejected for certification on August 3, 1989 as "not [being] ready for certification." (TR 620-21).

22. Shortly after Petitioner's arrival at the NSIAD, and primarily at his own behest, Petitioner met with Michael Motley, the Associate Director of RDAP, the subunit in NSIAD to which he had been assigned. (TR 526). Petitioner asked Mr. Motley when he was going to be considered for certification to FPL (TR 526). and was informed that it had been decided to assess him over a three-month period. (TR 527).

23. When the time period for assessing Petitioner neared, Mr. Motley contacted the ATRO "to see what Andrew's performance was like when he was in Atlanta." (TR 527). Mr. Motley knew Mr. Martin from "previous work experience". (TR 603). Mr. Martin refused to give him any information, including information on Petitioner's most recent performance on the FAA job. (TR 546-47). When Mr. Motley went to Mr. Goldbeck about the matter, Mr. Goldbeck informed him that Mr. Martin had also refused to talk to Mr. Goldbeck about Petitioner's performance at the ATRO, even though Mr. Goldbeck knew Mr. Martin "pretty well." (TR 662).

24. During the 90-day period before consideration for certification in November 1989, Petitioner charged time to the CICA compliance job, code 396018, from July 29 to September 23, 1989; the ALT/Commercial (Administrative Lead Time) job, code 396022, September 9 to September 23; and the ALT/Services job, code 396023, October 7. see RE 31, showing the two-week periods ending on these dates.

25. An interim performance appraisal for the period of July 13 to October 27, 1989, was signed by the first-line supervisor, Russell Reiter, and the second-line supervisor, Mr. Motley, on November 14, 1989. (JE 9). The rating included the time charged to all three jobs. (TR 725-26). Petitioner received ratings of

five Fully Successful and one Superior, in the job dimension of Working Relationship, Teamwork and Equal Opportunity. (JE 9). The rating noted that he was "self-confident in appearance" at meetings. The rating also noted that he "voluntarily assisted another RDAP staff member needing assistance in proofreading a 14 page report" (JE 9, page 3). During this rating period, the job "was just getting off the ground"; i.e., not all of the administrative paperwork to get a job started had been completed. (TR 724).

26. When the PRG met on November 3, 1989, it had no written performance appraisals to consider. The one for the 90-day period at the NSIAD was not yet signed. (JE 9). The ATRO had forwarded none to the NSIAD upon Petitioner's transfer. (TR 1013-17). However, Mr. Goldbeck, the chair of the PRG, did have a memorandum dated November 2, 1989, from Paul Math, Director of RDAP issues. (JE 11). The memorandum advised Mr. Goldbeck that Petitioner was not recommended for certification because his three-month assignment with RDAP "did not provide us with sufficient information or a sufficient basis to conclude that he has demonstrated the ability to perform at least fully successfully at the full performance level." (JE 11). The memorandum did note that Petitioner had performed at a fully successful level at the developmental level. (JE 11). The memorandum also noted that Petitioner had not demonstrated that he was "a self-starter, who takes the initiative to go beyond specific assigned tasks." (JE 11). Mr. Math also noted that Petitioner's assignment was entering the data collection phase, and that this should provide him with additional opportunities to demonstrate his level of performance. (JE 11).

27. On November 3, 1989, Petitioner was again considered and rejected for certification. (TR 621).

28. Petitioner was reevaluated for certification on February 6, 1990; it was again denied. (Stip 58 and TR 295-96). The denial was based upon the written recommendation of Mr. Math. (TR 281 and 296 and JE 13).

29. The February 5, 1990 recommendation of Mr. Math to Mr. Goldbeck stated 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." (JE 13, page 1). It further stated that: "Mr. Marshall completed assigned tasks, but he has not demonstrated that he is familiar with GAO workpaper standards or is a self-starter who takes the initiative or goes beyond specific assigned tasks." (JE 13). The memorandum pointed out that Petitioner had "submitted the results of his work to his supervisor for review without either organizing the documents into workpapers, indexing the workpapers, or cross-indexing the DCIs [data collection instruments] to the workpapers to permit appropriate supervisory review." (JE 13, page 1). The memorandum noted that: "Unfortunately, because of the supervisor's other duties, these incomplete workpapers did not receive the timely supervisory review originally anticipated." (JE 13, page 1). The memorandum acknowledged Petitioner's statement that he had not been told to index and cross-index his work. (JE 13, page 1).

The memorandum also pointed to "other significant deficiencies" in Petitioner's work, taking note of errors and omissions in the DCIs. (JE 13, pages 1- 2). Deficiencies in the summaries he was expected to prepare were noted (JE 13, page 2), as well as Petitioner's statement that he was expected to submit only short summaries and that he did not believe that they were to address the issues. (JE 13, page 2).

The memorandum concluded with the further recommendation that Petitioner be reconsidered for certification after an additional 90 days. Observing that Petitioner's then current assignment would be completed within a few days, Mr. Math stated that Petitioner would be reassigned to a new supervisor, thus allowing Petitioner's performance to be assessed by another supervisor, and that he intended to assign

Petitioner to a job which had entered the implementation stage, thus providing opportunities for Petitioner to demonstrate his level of performance. (JE 13, page 2).

30. Petitioner's performance appraisal for the period of October 28, 1989, to February 2, 1990 (the period of performance between the November 1989 and February 1990 considerations for certification) contained two ratings of Borderline, one in the job dimension of Data Gathering and Documentation, and the other in Data Analysis. (JE 12). The other ratings were Fully Successful and one No Basis for Evaluation. (JE 12). The performance appraisal discussed the perceived errors and inadequacies in Petitioner's workpapers, including failure to index, omissions and errors in the DCIs and inadequate summaries. (JE 12, Pages 2 and 3). This performance appraisal was signed by Mr. Reiter and Mr. Motley on February 7, 1990. (JE 12, page 2). The second-line supervisor, Kevin Tansey, initialed the appraisal. (JE 12, page 2).

31. On February 8, 1990, Petitioner discussed his rating of February 7 with his supervisor and, on February 20, wrote a memorandum to the NSIAD management concerning its validity and offering a rebuttal, point-by-point, to the justification set forth in the appraisal for the Borderline ratings. (PE 18). Petitioner also stated his belief that his contributions in another job dimension were not appropriately recognized. (PE 18, page 3). Finally, the memorandum reviewed the manner in which his supervisors had dealt procedurally with his workpapers during the December to January timeframe 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 any reason to believe that there were performance deficiencies later identified in the appraisal. (PE 18, pages 4-5). To the contrary, Petitioner maintained, the feedback he did receive left him "under the impression that everything was going fine." (PE 18, page 5).

Mr. Reiter explained that there "wasn't anything on which to provide feedback, not until after December 22nd when his work was turned in to me ... [and before December 22] he was out at NAVSEA collecting the information to do those data collection instruments." (TR 738).

32. On February 26, 1990, Petitioner contacted the CRO. (TR 62). A counselor from the CRO contacted Mr. Goldbeck on March 6 and had a conversation with him during which Mr. Goldbeck stated that he would look into the matter and get back to the CRO. (TR 63).

33. On March 6, 1990, Mr. Motley sent a memorandum to Petitioner to the effect that, upon consideration of each of the comments in the February 20 memorandum, he had concluded that the appraisal ratings should not be altered. (PE 74).

34. Two days later, Petitioner met with Messrs. Goldbeck, Motley, Tansey and Reiter to discuss the Petitioner's concerns about his February appraisal. (PE 40 and TR 64-65). The ratings were found by management to be substantiated. (TR 64).

35. On April 3, 1990, Petitioner filed a complaint of discrimination in which he alleged racial and gender discrimination and retaliation, and that the most recent date on which the discrimination occurred was February 7, 1990. (PE 31). Petitioner alleged continuous and unceasing discrimination since July 17, 1989, in violation of the agreement settling his August 22, 1988, complaint of discrimination and retaliation. (PE 31, page 3 and JE 2). Petitioner assigned as the official personnel actions he deemed discriminatory the ratings (including the two Borderlines) he had received on the February 7 appraisal, and the denial of a "much deserved promotion." (PE 31, page 3). He expressed the view that his performance warranted higher ratings and that his ratings were skewed to justify the agency's failure to promote him. (PE 31, page 3).

36. Also on April 3, 1990, Petitioner wrote to Ms. Aponte and requested a reinstatement of his August 22, 1988, complaint filed in the ATRO because the agency had violated the terms of the settlement agreement by assigning him to the NSIAD. (PE 32, Attachment A). The request was denied. (TR 102).

37. In the meanwhile, in accordance with RDAP Director Math's statement of intent in his February 5, 1990, memorandum (JE 13, page 2), Petitioner was reassigned effective February 12, 1990, to the University Research Center job, code 396230, under the supervision of Thomas Reilly, the evaluator-in-charge, and Lester Farrington, a RDAP Assistant Director. (TR 909-10).

38. Mr. Farrington knew John Puett and Charles Rey, but never discussed Petitioner with them. (TR 911-12). Mr. Farrington understood that Petitioner was coming directly from the field to him and was not told that Petitioner had received an appraisal with which he was unhappy. (TR 912-13). Later, Mr. Farrington learned that Petitioner had worked for Mr. Tansey and had received an appraisal with which he was unhappy. (TR 924).

39. Mr. Reilly knew Charles Rey, but could not recall discussing Petitioner with him. (TR 823). Mr. Reilly met Petitioner in the fall of 1989. (TR 823). Mr. Reilly did not know that Petitioner had transferred from the ATRO pursuant to a settlement agreement until he read the PfR. (TR 824). In February 1990, he learned that Petitioner was working on a grievance or complaint involving the NSIAD and so informed Mr. Farrington. (TR 895-97). At some point in time, Mr. Motley and Mr. Farrington told Mr. Reilly that Petitioner had received some ratings of Borderline, but not in which job dimensions. (TR 905).

40. When Petitioner began work on the University Research Center job, on February 12, 1990, it had entered the implementation stage. (TR 824). On February 9, Petitioner was requested to go on a fact-finding trip to North Carolina commencing at 7:00 a.m. on Monday, February 12. (TR 95 and 826-28).

41. Petitioner's expectations were set for the University Research Center job on March 12, 1990, a month after he started work on the job. (JE 16).

42. For the interim rating period between February 12, 1990 (when Petitioner commenced work on the University Research Center job) and April 25, Petitioner received a more favorable rating than his last one from Mr. Reiter -- raising his rating in Data Gathering and Documentation from Borderline to Superior, and his rating in Data Analysis from Borderline to Fully Successful. Compare JE 16 with JE 12.

43. In an April 27, 1990, memorandum addressed to Mr. Goldbeck, Mr. Math recommended that Petitioner now be certified to the Band IF level. (JE 17). Both this recommendation and the performance appraisal for the period ending April 25, 1990, came within a few weeks after Petitioner had filed his April 3 formal complaint of discrimination and retaliation against the NSIAD. (PE 31, page 2).

44. The PRG met in May 1990 and, after an hour's debate, agreed that Petitioner was ready for certification. (TR 648-49). Petitioner's certification was made effective on May 6, 1990 -- 52 months after he began his career at GAO and about 11 months after he became eligible. (Stips 2, 4 and 74 and JE 3, page 3).

45. Petitioner was dissatisfied with his appraisal on the University Research Center job, signed on May 1, 1990 by his supervisors. This dissatisfaction first surfaced in his May 8 response to the appraisal. (PE 20). In his response, Petitioner complained of the failure to rate him in the Planning job dimension and opined

that his ratings in four other dimensions were too low. (PE 20).

On May 10, Mr. Motley provided Petitioner with a memorandum advising him that he had reviewed his comments. (TR 565). Petitioner was unable to provide specific examples to satisfy Mr. Motley that the ratings should be changed. (TR 565-66).

46. On May 29, 1990, Petitioner filed his second complaint against the NSIAD management, alleging that he had received lower ratings than he expected and that these ratings were in retaliation for his complaint filed on April 3. (PE 70 and 33). The CRO combined the two complaints for processing and investigation. (Stip 33 and PE 33).

47. Following his certification to the Band IF level, Petitioner continued to perform some work on the University Research job. Between April 26 (the day after the period on which his interim appraisal ended, JE 16) and June 15, 1990, he charged fewer than 28 staff days to that job and, subsequent to June 15, he devoted no time to it. (RE 32, pages 50-53). This job was officially terminated in August 1990. (TR 846).

48. During the same period (April 26 to June 15, 1990) Petitioner also charged 2.3 staff days to the DOD Contracts job, code 396237, also under the supervision of Mr. Reilly. (RE 32, pages 52). Petitioner was called upon to perform some preliminary work on this project as early as May 7, 1990. (TR 204-06 and 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 and 854-47).

Commencing on May 31, Petitioner utilized the DOD Contracts job code in recording time on that job. (TR 204 and RE 32, page 52). Between May 31 and July 27, 1990, when formal expectations were set, Petitioner had charged only 15 staff days to the DOD contracts job. (RE 32, pages 52-57 and JE 22, page 1). Formal expectations were set as soon as it was determined what work the job required. (TR 859).

49. Petitioner was not given a performance appraisal for the work he performed between April 26 and June 15, 1990, on either the University Research Center job or the DOD Contracts job (TR 323-24). even though he requested one for this period on October 30 and 31. (Stip. 43 and RE 9).

50. Petitioner continued to work on the DOD Contracts job during the summer and early fall of 1990. In an October 11 memorandum, he requested that Mr. Goldstein remove him from that job and assign him to a supervisor other than Mr. Reilly. (PE 71). The reason he gave was that he had filed a complaint alleging that his current supervisor, Mr. Reilly, had committed prohibited personnel practices and that he felt it was a conflict of interest to continue to be supervised by him and created a strain between them. (PE 71).

51. In a meeting on October 12, 1990, Petitioner advised Mr. Math, Mr. Motley, Mr. Farrington and Mr. Reilly that his request for reassignment was based upon the fact that he had filed a complaint against Mr. Reilly. (TR 315, 567 and RE 5, 6). Mr. Math and Mr. Motley knew that a charge had been filed against the unit, but no one at the meeting knew that Mr. Reilly had been named in the charge. (RE 6, page 3 and TR 315).

Also at this meeting, Petitioner referred to the fact that Mr. Reilly had refused him the opportunity to supervise. (TR 316). Mr. Reilly explained that Petitioner had talked to him about it; but the job did not allow it as there were tight time restraints and each person had to be responsible for a segment. (TR 317).

The meeting concluded with Petitioner saying that he planned to talk to Mr. Goldstein about the reassignment and Mr. Motley telling him that, until notified otherwise, he would continue to work on his current assignment. (RE 5, page 2 and RE 6, page 4).

52. Petitioner's expectations were amended on October 17, 1990, and, at his request, he was given an interim performance appraisal covering his work from June 17 to October 25. (JE 22 and TR 859-61 and 870). The appraisal rated him Fully Successful in six categories and No Basis for Evaluation in Supervision. (JE 22).

Dissatisfied with this appraisal, Petitioner met with Messrs. Reilly and Motley on October 31 to air his concerns. (PE 24).

Subsequently, on November 30, 1990, Petitioner filed another discrimination complaint. (PE 73). In an attachment to the complaint, Petitioner indicated that the complaint rested principally on the failure to reassign him to another supervisor and the fact that his performance was not accurately reflected in the performance appraisal for the period of June 17 to October 25. (PE 73, pages 3-4). In addition, Petitioner maintained that the agency had not provided him with timely expectations or a timely performance appraisal, and thus committed prohibited personnel practices. (PE 73, page 5). According to Petitioner, the agency continued to retaliate against him for complaints filed against the ATRO and the NSIAD. (PE 73, page 5).

53. In late December 1990, Mr. Reilly left the agency and, on January 4, 1991, Petitioner's supervisor of record on the DOD Contracts job became Mr. Farrington. (TR 879-80, 941 and 945).

54. Shortly thereafter, Petitioner received an end-of-the-assignment performance appraisal covering his work on the DOD Contracts job for the period between October 29, 1990, and January 4, 1991. (JE 23). Mr. Farrington prepared the appraisal based upon his personal knowledge of Petitioner's work and a draft appraisal prepared by Mr. Reilly before he left. (RE 13 and TR 879-82 and 936-41). As in the instance of prior appraisals, it was reviewed by Mr. Motley. (JE 23). Petitioner was rated on the same six job dimensions that were the subject of the ratings the prior October. (JE 22 and 23). On this occasion, Petitioner was upgraded to Superior in two dimensions. In the other four, he was rated Fully Successful. (JE 23).

55. In a January 16, 1991, memorandum addressed to Mr. Farrington, Petitioner took issue with the appraisal covering the period between October 29, 1990, and January 4, 1991, on several grounds. (PE 25). Among other things, Petitioner complained of a lack of feedback from Mr. Reilly, as well as of an absence of progress reviews during the rating period. (PE 25, pages 1-2). Further, he indicated a belief that the appraisal should have been prepared by Mr. Reilly. (PE 25, page 2). Lastly, Petitioner expressed the view that the information contained in the appraisal was incomplete. (PE 25, page 2).

56. Messrs. Farrington and Motley declined to modify the appraisal (TR 586-87), prompting Petitioner to file another complaint covering the period from October 29, 1990, to January 4, 1991. (TR 138-39). According to this complaint, the appraisal was inaccurate, incomplete, and in violation of agency rules and regulations. (PE 25).

57. Effective January 13, 1991, Petitioner was transferred to Respondent's General Government Division, Human Resources Management Issues office, the office to which he had requested a transfer following the settlement of his discrimination complaint in May 1989. (PE 50, page 29 and TR 32 and 484).

III. Discussion of the merits⁹

A. The alleged prohibited personnel practices

Petitioner's claim of retaliation rests, in part, upon the numerous prohibited personnel practices allegedly committed by management officials in rating his performance and eligibility for promotion. In examining this claim, the Board begins with the applicable law and then proceeds to each alleged instance of a prohibited personnel practice (PPP).¹⁰

The law, as applied to this case

Both parties correctly articulate the applicable law. As Respondent states at pages 69-70 of its Post-Hearing Brief: "In order to establish a claim of a prohibited personnel practice, petitioner must establish the occurrence of a prohibited personnel practice by a preponderance of the evidence. In Re Frazier, 1 M.S.P.B. 159, 177 (1979). Thus, petitioner must prove that the GAO committed a particular act and that the complained of action violates a particular law, rule, or regulation that implements or directly concerns one of the enumerated merit principles. Finally, petitioner must establish the particular action violated a mandatory law, rule, or regulation."

As Petitioner states at page 57 of its Post-Hearing Brief, "'not every piece of paper emanating from a Department or Independent Agency is a regulation' and, in order 'to determine the effect of a provision ... , a court must determine [the issuing agency's] intent in authoring it, as ascertained by an examination of the provision's language, its context, and any available extrinsic evidence'." The quotations are from Doe v. Hampton, 566 F.2d 265, 280-81 (D.C. Cir. 1977) and other cases so holding are also cited in the Doe case.

Some of the "paper[s]" involved in this case include: GAO Order 2430.1, entitled Performance Appraisal Program (PE 2); GAO's Performance Appraisal System for Band I and II Employees promulgated by the Assistant Comptroller General for Operations (JE 4 and hereinafter referred to as the Manual), dated June 1989 and which supersedes an earlier manual known as the Bars Manual (JE 4, page 1); the GAO Memorandum, dated May 31, 1989 to the heads of divisions and offices from the Deputy Assistant Comptroller General for Human Resources, entitled Procedures for Assessing Developmental Level Staff (JE 3 and hereinafter referred to as Procedures); and NSIAD HRM Memo #4, dated January 12, 1990, entitled National Security and International Affairs Division Ratings Required By Change Of Supervisor (PE 10 and hereinafter referred to as Memo # 4). see pages 43-44 of the RfR.

All of the above "papers" were obviously promulgated with the intent to comply with GAO's statutory duty to establish and implement a performance appraisal system under which employees would be fairly and objectively measured by their performance and rewarded or terminated accordingly. This statutory duty is found in 5 U.S.C. as follows.

Chapter 23 of 5 U.S.C. mandates that: "Federal personnel management should be implemented consistent with the following merit system principles ... (6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards." see 5 U.S.C. §2301(b). Violation of one of the merit system principles constitutes a PPP. see 5 U.S.C. §2302 which includes in the types of personnel actions which can be a PPP: a "promotion"; a "transfer"; a "performance evaluation under chapter 43 of this title"; and a "decision concerning pay, benefits, or awards " see 5

U.S.C. §§2302(a)(2)(A)(ii),(iv),(viii) and (ix).

Chapter 43 of 5 U.S.C. concerns "Performance Appraisal." It mandates that: "Each agency shall develop one or more performance appraisal systems which - (1) provide for periodic appraisals of job performance of employees ... and (3) use the results of performance appraisals as a basis for ... promoting ... employees." (5 U.S.C. §4302(a)).

Under the GAOPA, GAO is required to establish, by regulation, a personnel management system that provides, inter alia, for a system to appraise the performance of employees consistent with the requirements of 5 U.S.C. §4302. (31 U.S.C. §§732(a) and (d)(1)).

In order to conform to the requirements of 5 U.S.C. §4302, the regulations promulgated by GAO must prescribe a performance appraisal system which establishes "performance appraisals which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria ... related to the job in question for each employee or position under the system" and "at the beginning of each ... appraisal period, communicate ... to each employee the performance standards and the critical elements of the employee's position" (5 U.S.C. §§4302(b)(1) and (2)).

In this case, Petitioner relies on the orders, manuals, and procedures by which performance appraisal systems have been established and are to be implemented at GAO. GAO Order 2430.1 is the regulation adopted by GAO establishing the Chapter 43 performance appraisal system. see GAO 2430.1, Ch.1, Sec.1 and 3. GAO Order 2430.1 is the second chapter of the GAO Performance Appraisal Systems and is known as the Policy and Procedures section of that manual. The first chapter is the Performance Appraisal Concepts and Issues section, and the third chapter is the Appendices, which contain the performance standards and instructions for appraising employees in 17 categories of positions at GAO. see PE 2, page 18.

The so-called BARS Manual was that appendix to the GAO Performance Appraisal Systems which established the performance standards and methodology for appraising GAO evaluators and other related positions. see GAO Order 2430.1, Appendix I. (PE 2, page 18). The BARS Manual was superseded by the current Manual, which is Joint Exhibit 4. The successor Manual was made necessary by the fact that GAO implemented its new PFP system under which employees were placed in bands rather than in grade levels. (JE 3, page 1).

Judge Paul A. Weinstein, in a decision which became a final Board decision, held in Hendley v. GAO, Docket No. 120-211-02-89, dated November 19, 1990, that certain provisions in GAO Order 2430.1 and the BARS Manual were mandatory. These are the provisions in GAO Order 2430.1 that require performance appraisals within 20 days of the date a staff member is released from an assignment (Hendley, finding of fact 16 at page 7) and the BARS Manual requirement for communicating expectations to a staff member. (Hendley, findings of fact 39-44, at pages 11-12). The BARS Manual provisions for communicating expectations are essentially identical to those in the current Manual.¹¹

At page 23 of the Hendley decision, Judge Weinstein points out that "[t]he plain language of 5 U.S.C. §4302, as incorporated by the [GAOPA] requires the Comptroller General to adopt regulations implementing a performance appraisal program for GAO employees. GAO Order 2430.1 is the regulation adopted by the Comptroller General to comply with that statutory obligation. GAO Order 2430.1, Ch.1, Sec.1. The BARS Manual is that appendix to the GAO performance appraisal procedure which specifies the performance appraisal procedures for evaluators and evaluator-related positions. GAO Order 2430.1,

Appendix I, CH.3-I." He concludes "[t]hus, either the BARS Manual and GAO Order 2430.1 are regulations implementing the statute, or the Agency may be in violation of the statute by not having such regulations." He continues that "all of the procedures outlined in the BARS Manual are not mandatory, [but he found] that the Order and the BARS Manual are regulations, and are mandatory with respect to those procedures which fulfill the requirements of 5 U.S.C. §4302."

The Board agrees with the Hendley analysis as set forth above.¹² We further conclude that a miserly interpretation of 5 U.S.C. §4302 is not justified (see footnote 32 to page 70 of Respondent's Post-Hearing Brief arguing that the statute sets forth no dates within which expectations must be communicated to employees and, therefore, dates set forth in regulations are not binding.) The statute requires the agencies to establish performance appraisal "systems" and mandates that "regulations ... shall prescribe each performance appraisal system" and, "at the beginning of each...appraisal period" provide for "communicating to each employee the performance standards and the critical elements of the employee's position ... [and] evaluating each employee during the appraisal period on such standards" (§§ 4302(b) (2) and (3), emphasis added). We view this statutory mandate to include such vital elements of the "system" as dates when expectations must be set; the designation of the person who will prepare and sign the performance appraisal; the forwarding of performance appraisals to a transferred employee's new unit; and monitoring, coaching, and the issuance of formal progress reviews during the appraisal period. These are the necessary elements which make the "system" functional.

This leaves for consideration the Procedures memorandum and the NSIAD HRM Memo #4. (JE 3 and PE 10).

In implementing the new PFP system, a memorandum on Procedures for Assessing Developmental Level Staff went out to all heads of divisions and offices, to be distributed "as soon as possible" to GS-7 through GS-11 evaluator staff, from the Deputy Assistant Comptroller General for Human Resources - Joan M. McCabe [now Dodaro]. (JE 3, page 2). It was promulgated after a comment period and its provisions are also covered in GAO Orders 2540.1, 2500.1 and 2430.2. (JE 3, page 2). Its stated purpose was to set forth "the process for assessing DL [developmental level] evaluator and evaluator-related specialists." (JE 3, page 1). Under the new system, DL evaluators at the GS-11 level were to be assessed for certification to the FPL before entering the new system, and thus receive a "promotion-equivalent" increase, if their performance would have warranted promotion to GS-12 under the old system. (JE 3, page 1). Overall, this Procedures memorandum has a "mandatory tone," in that it is filled with such mandatory expressions as; "will use," "will evaluate," "must be," "must set," "will be," "will become," "will provide," "will include," "will have," "must receive," "must approve," "will require," "must review," "will tell," and "will also give." (JE 3, pages 2-8, emphasis in memorandum).¹³ The Procedures memorandum obviously is a part of the new pay-for-performance "system" installed at GAO in June, 1989. In her testimony, Ms. Dodaro explained the import on the divisions of GAO's "general guidance" on implementing the performance appraisal system: "The divisions cannot do anything more lenient than the guidance. If they want to do something less, if they wanted to say waive expectations entirely, they couldn't do it, but we've never gotten in an individual manager's way who wanted to make things stricter than our guidance." (TR 446). In other words, GAO sets the minimal parameters; and subunits are free to be stricter, as situations in their units may require.

Ms. Dodaro's explanation was given in response to questioning about the NSIAD's HRM Memo #4 dated January 12, 1990, which established a "Rating Requirement" whenever a supervisor is replaced. (PE 10).

The NSIAD Memo # 4 obviously is also a part of the performance appraisal system, applicable to that division. Its tone is clearly mandatory. It "requires" a rating of staff members when a supervisor moves or is replaced and within "20 calendar days." (PE 10).

All of the above-discussed documents of Respondent relate to its statutory duty to establish performance appraisal systems which provide for "periodic appraisals" and which use the results for, *inter alia* "promoting ... and removing employees." (5 U.S.C. §4302(a)(1) and (3)). They implement the merit system principle that "[e]mployees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards." (5 U.S.C. §2301(b)(6)).

The statute (5 U.S.C. §2302(b)(11)) makes it a prohibited personnel practice to "take or fail to take any other personnel action if the taking or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title." The Board views the GAO orders, manuals and memoranda discussed above as being the type of "rules and regulations" which allow employees, such as Petitioner, to charge that prohibited personnel practices have occurred. *see* pages 16-23 of our decision in Dowd v. GAO, Docket No. 91-03, dated February 24, 1992, on the parties' cross motions for summary judgment, wherein we held that agencies can be bound by internal regulations, even those issued gratuitously and not pursuant to a statutory obligation, particularly when the regulations are procedural rules related to employees' personnel rights.¹⁴

We next turn to an examination of each allegation of a PPP, first at the ATRO and then at the NSIAD; the allegedly mandatory language of each GAO document relied upon to support the PPP; and the harm, if any, suffered by Petitioner as a result of the PPP.¹⁵

Alleged PPPs at the ATRO

1. Petitioner alleges that the ATRO's failure to provide him with a performance appraisal for the period of February 26 through May 19, 1989, (his period of work on the FAA job, code 341023) and an annual assessment rating on June 15, violated GAO Order 2430.1 dated May 24, 1985. (PE 2). *see* pages 66-68 of Petitioner's Post-Hearing Brief and pages 2-3 of the Petition for Review.

Chapter 3 of GAO Order 2430.1 concerns Performance Appraisal Procedures and section 2 is entitled When Appraisals are Due. (PE 2, page 2). Subsections a(1) through (3) state: "(1) For those staff rated on BARS at end-of-assignment, ratings are due within 20 calendar days of the staff member's release date. Under certain conditions such as tight time deadlines, additional time can be given to the rater with management approval. (2) All staff rated at end-of-assignment who have more that 45 staff days on an incomplete assignment by June 15, should have an interim appraisal prepared in preparation for the annual assessment. (3) All appraisals, whether interim or final, should be complete (due) by June 15, so that they can be used for the annual assessment." (PE 2, page 3). Subsection b. defines "due" as meaning "the point in time at which the performance appraisal should have been written, reviewed, and discussed with the ratee. The "should" language is permissive in tone, as Petitioner acknowledges at page 57 of his Post-Hearing Brief and at page 41 of his Pre-Hearing Brief.

Section 3 of Chapter 3 of GAO Order 2430.1 is entitled Appraisal Period. (PE 2, page 3). Subpart c is the section particularly relied upon by Petitioner. *see* page 67 of his Post-Hearing Brief. It provides: "For a staff member rated on a job-by- job basis, a formal written appraisal need not be prepared if the individual's total time on the job is less than 30 staff days, unless specifically requested by either the

individual staff member or the home unit management." (PE 2, page 3). By necessary implication, if 30 or more staff days are worked, there is a "need" to prepare a formal written appraisal. This language is mandatory in tone.

Ms. Dodaro testified that there was "a lot of confusion" about the two standards in effect before the new system of PFP began on June 16, 1989. (TR 450). According to her, the two standards were: "you must rate somebody if they stayed on the job for 30 days if the job was completed. If the job is incomplete and you're bumping up against the annual assessment, the June 15th time where everybody has to get some sort of appraisal ... you must give them an appraisal if they're on the job for 45 days." (TR 450, emphasis added). Thus, Ms. Dodaro, who in her position as Deputy Assistant Comptroller General, oversees personnel (TR 421), obviously regards these provisions in issue as requirements, not suggestions. This is the type of "extrinsic evidence" of agency "intent" which courts consider in determining the binding effect of agency rules and regulations. see Doe v. Hampton, 566 F.2d at 281. We, therefore, defer to this interpretation of agency management and treat all the provisions here in issue as mandatory.

The FAA job was not completed until after Petitioner transferred to the NSIAD. (TR 1006-07). Petitioner had been on the FAA job 38.8 staff days before transferring to NSIAD. (TR 1007).

After reading the provisions of GAO Order 2430.1 (PE 2) relating to appraisal periods and when ratings are due, we understand why they generated "a lot of confusion." (TR 450). There are conflicting implications. In such an instance, the Board resolves any ambiguity in favor of the employee and holds management to its duty to write clear and unambiguous rules.¹⁶

Petitioner relied on the rule as stated in Section 3 of Chapter 3 of GAO Order 2430.1 (PE 2, page 3) and did not specifically request a rating on the FAA job, as he could have done -- he expected to receive one, under the rule, without a need to request it. (TR 1059 and 155-56) Thus, we find that a PPP occurred when Petitioner was not given an appraisal for his work on the FAA job.¹⁷ Petitioner was harmed by the failure to rate him on the FAA job, his most recent activity as a GS 11 before transferring to the NSIAD. His most recent activity at the ATRO was what most interested the NSIAD about his work performance before transferring there, and was one reason for the ten-month delay in granting him a promotion-equivalent increase to Band IF.

2. Petitioner alleges that the ATRO failed to forward to the NSIAD his performance appraisals for the past three years, upon his transfer, and that this failure violated GAO Order 2430.1. (PE 2). see pages 46-47 of the RfR and page 12 of the Petition for Review.

Part 6 of GAO Order 2430.1 is entitled Records Maintenance. It provides: "Official performance appraisal records are to be maintained by the home units in separate employee performance files... . The performance folder will contain all interim and final appraisals done on an individual within the past 3 years... . For a staff member who is transferring to a new GAO unit, it is the responsibility of the previous home unit to ensure that the performance files are transferred to and received by the staff member's new unit on his/her entered-on-duty date. ... " (PE 2, page 17, ¶ 6a and e) These particular provisions are mandatory in tone, although other provisions of Part 6 are not. see Part 6d stating that: "Supervisors may wish to maintain private notes during the course of the year to assist them in preparing an employee's performance appraisal." (PE 2, page 17, emphasis added). The clearly permissive nature of Part 6 is persuasive evidence that the sections here involved are not permissive, but mandatory in nature.

Three years of past appraisals would have included Petitioner's appraisal, as a GS-9, in which he received ratings of five "Exceptional," two "Superior," and one "No Basis for Evaluation" out of the eight job dimensions rated. (PE 14, page 1). This appraisal was for the period ending on April 8, 1988, and was signed by Mr. Martin on May 12, 1988. (PE 14, pages 1 and 2).

Three years of past appraisals would have also included the appraisal on the FAA job, which should have been given to Petitioner, as we have found.

Mr. Martin admitted that ATRO forwarded nothing from Petitioner's performance appraisal file to Washington when he transferred to the NSIAD on July 17, 1989. (TR 1013-16 and Stip 14) This constituted a PPP.

As we have already found, the failure to transmit an appraisal on the FAA job harmed Petitioner greatly. However, the Board fails to see how the failure to transmit this GS-9 appraisal affected Petitioner in any adverse way. He was promoted to GS-11 on June 19, 1988 (Stip 4); and it is clear that any PRG considering him for certification was only interested in his performance appraisals as a GS-11. (TR 434, 286-87, 291, 377, 380 and 525-26)

The GS-9 appraisal might have been useful to Petitioner when the decision was made about his placement upon transfer. Petitioner's first preference was the Human Resources Division (HRD). (TR 484). The GS-9 performance appraisal showed that he had worked on a review of the Equal Employment Opportunity Commission's enforcement activities, an assignment which seemingly would interest the HRD. (PE 14, page 1). However, Ms. Dodaro was responsible for his placement and she gave unrebutted testimony that the HRD was "way over strength," whereas the NSIAD was "under their staff so they were in a position to accept people into the division." (TR 439). Thus, it is unlikely that the GS-9 appraisal would have changed this managerial decision to place Petitioner in the NSIAD.

3. Petitioner alleges that he never received any notice or feedback on the certification process in the ATRO which denied him certification in June 1989. see pages 13-14 of the RfR and page 12 of the Petition for Review.

The Procedures memorandum provides as follows: "The unit head will designate a PRG member¹⁸ to give individuals feedback from the group's deliberations. The PRG member will ... inform them whether or not they were recommended for FPL... ." (JE 3, page 8).

This language is mandatory in tone.

Mr. Martin headed the PRG at the ATRO. (TR 1029-30). Based upon his admissions, he did tell Petitioner that he would not make him a full-performance evaluator when Petitioner came into his office and asked him to do so before Petitioner transferred to the NSIAD. (TR 1028). Mr. Martin could not remember whether this was before or after the PRG met. (TR 1029). As to what he told Petitioner about how he could be certified, Mr. Martin testified that he told him to "work hard, and demonstrate that he could in fact perform at that level. ..." (TR 1031-32). Petitioner denied that he received any notice or feedback from the ATRO on the certification process. (TR 1054-55 and 1062).

Accepting as true the admissions of Mr. Martin, the Board finds that he did not give the type of notice and feedback required by the Procedures memorandum. Petitioner was not told of the "group's deliberations" and was apparently not even told that the group had met and not recommended him. (JE 3, page 8). This

constituted a PPP.

Petitioner was harmed by this lack of communication from Mr. Martin in that he was unprepared as fully as he could have been for his consideration at the next certification meeting of a PRG, which took place in the NSIAD.

Alleged prohibited personnel practices at the NSIAD

4. A PPP alleged by Petitioner as to the NSIAD concerns the failure of management to give him any feedback after being considered for, and rejected for certification in August 1989, about two weeks after he transferred to NSIAD from the ATRO. see pages 75-76 of Petitioner's Post-Hearing brief and page 12 of the Petition for Review.

The same regulation as in paragraph 3, supra, is involved in this allegation.

Petitioner received no feedback from the PRG which rejected him for certification. (TR 624 and 1056). Therefore, a PPP occurred.

Had Petitioner received such feedback, he could have been told that the PRG "just did not have enough information to have any level of confidence as to what level of performance [Petitioner] was capable of or had demonstrated because [the PRG] did not have the history that [the PRGs] normally have to use to make that kind of decision" -- the reasons given for the denial. see TR 623-24. This was an obvious reference to the lack of any history from the ATRO as to Petitioner's performance capabilities as a GS-11. Such feedback would have alerted Petitioner of the need to produce such a history before the next PRG met.

However, little harm to Petitioner is discernible from the record because he was given an opportunity to produce such a history before the next PRG met in November 1989 and he declined. (TR 626-27). The Director of Operations of the NSIAD, Arthur R. Goldbeck (TR 610), even volunteered to reconvene the PRG which denied certification to Petitioner in November 1989, if Petitioner would produce copies of his ratings from the ATRO for consideration by the PRG. (TR 627). Petitioner considered this but then declined on the morning after Mr. Goldbeck made his offer. (TR 627).

5. Petitioner alleges that his performance appraisal on the Alt/Services job, code 396023, for the period covering July 17 to October 27, 1989, and signed by his first-line supervisor on November 14 (JE 9 and TR43), and his November 3 consideration for certification were untimely. see RfR, pages 17-18 and 20, relying upon the Procedures memorandum (JE 3), and pages 4 and 12 of the Petition for Review.

The Procedures memorandum provides that after it has been determined that a promotion-equivalent increase was not merited by a developmental level employee (such as Petitioner on November 3, 1989): "The unit head must set a reevaluation date within the next 90 days and repeat the process until the promotion equivalent is awarded." (JE 3, page 3). This language is mandatory.

Petitioner was first considered and rejected in NSIAD on August 2 or 3, 1989. (Stip 52 and TR 620). Petitioner was reevaluated on November 3, 1989, which was several days late. (TR 660). Counting from the August 2 or August 3 date, the 90-day period ran out on either Tuesday, October 31, or Wednesday, November 1. Thus a PPP occurred.

However, the record does not show how Petitioner was harmed by this delay.

As to the performance appraisal, the Procedures memorandum states that unit heads are responsible for certifying staff members to FPL "when they believe staff are ready to perform successfully at that level" and "should consider input from supervisors and managers familiar with the staff member's work, the difficulty of the tasks assigned, the results of previous PRG sessions, and DL performance appraisals." (JE 3, page 7). This is permissive in tone and a PPP cannot be based on such language.

We note that, although the performance appraisal for the period at issue was filled out after the reevaluation by the PRG, the Director of Operations, NSIAD (Mr. Goldbeck) was informed by the Director, RDAP Issues (Mr. Math), before the reevaluation of the quality of Petitioner's performance during the period. see JE 11. Thus, no harm was shown, even had the language been mandatory.

6. Petitioner alleges that the PRG which considered him for certification in November 1989 did not use the information required by the Procedures memorandum. see pages 20-21 of the RfR and page 12 of the Petition for Review.

Petitioner relies upon the provision in the Procedures memorandum that provides: "Management should consider input from supervisors and managers familiar with the staff member's work, the difficulty of the tasks assigned, the results of previous PRG sessions, and DL [development level] performance appraisals." (JE 3, page 7).

This language is not mandatory in tone as we have already held; and even if it were, the facts in this record indicate that no PPP occurred.

Petitioner focuses his allegation upon the failure of Arthur Goldbeck, Director of Operations, NSIAD, and Chair of the PRG, to do more to obtain information, namely: failure to seek advice from upper management on the propriety of denying certification to Petitioner, who had performed fully satisfactory work in the three months he had been at the NSIAD yet had no performance history which the NSIAD could obtain; and failure to consider Petitioner's official personnel folder which documented the fact that Petitioner had gotten a within-grade increase in the ATRO, based upon an acceptable level of performance, just before transferring to NSIAD, and had received an award for commendable performance while at the ATRO. (RfR page 21).

Mr. Goldbeck testified as to the deliberations of the PRG in November 1989. (TR 627-32). He admitted that it was "unusual" for the PRG in the NSIAD, in the late fall or early winter of 1989/1990, to determine that an eligible employee was not ready for certification. (TR 635). In NSIAD, the average time it takes an eligible person to reach the full-performance level ranges from "quite early to perhaps 15 or 16 months." (TR 635) In November 1989, Petitioner had been a GS-II for 16 months (Stip 4) and a GAO employee for over three years. (Stip 2). Mr. Goldbeck admitted that when employees move into NSIAD, they "want to make sure that people are not hurt by a move from one organization to another." (TR 637) He admitted knowing that some awards are in the OPFs. (TR 666).¹⁹

In order to obtain information on Petitioner, Mr. Goldbeck had his Human Resources Manager call an assistant to the Deputy Assistant for Human Resources, Diana Schultz Eisenstat, about the lack of performance appraisals from the ATRO. (TR 638 and 515-18 and PE 35). Upon learning that the appraisals from the ATRO would not be available, Mr. Goldbeck himself called Ms. Eisenstat (TR 638). and, upon being advised by her that he could not get them, he called the Regional Manager in the ATRO

and tried to obtain "oral input about [Petitioner's] performance." (TR 638). Another NSIAD official (Michael Motley, Associate Director NSIAD/RDAP) also called the ATRO in a futile attempt to obtain information. (TR 527 and 520). Mr. Goldbeck had looked at Petitioner's personnel file in determining where to place him in NSIAD, although primarily to learn his educational background. (TR 615).

Based upon the above-described attempts to obtain information about Petitioner, the Board would not conclude that a PPP had occurred even if the language of the provision of the Procedures memorandum relied upon by Petitioner was deemed to be mandatory in nature. While Mr. Goldbeck may not have done all that he could, he did enough to show a good faith attempt to assist Petitioner.

7. Petitioner alleges that he was never provided with feedback on his lack of assertiveness and initiative, the reasons given for denying him certification in November 1989, in accordance with the Manual. see page 52 of the RfR and page 12 of the Petition for Review.

The Manual provides instructions on feedback under the heading "Monitoring Performance, Feedback and Coaching." (JE 4, page 6). It states: "Once expectations are established, supervisors must monitor performance and periodically provide feedback to subordinates on how well they are doing. Monitoring not only keeps staff members apprised of their performance, but also assists them in developing, maintaining, or improving their skills. Moreover, such activity can also positively impact assignments by indicating when employees are ready for increased responsibility or by identifying and correcting problems." This is mandatory language.

Two management officials, the Associate Director of NSIAD, Michael Motley (TR 520), and Petitioner's first-line supervisor, Russell Reiter, testified on this point. see TR 544-45 and 728-29. Mr. Motley was a member of the PRG. (TR 532). Mr. Motley "believe[d]" that he told Petitioner, after the denial of certification, that a reason for the denial was that he had not demonstrated that he was a "self-starter." (TR 544-55). Mr. Reiter testified that he showed Petitioner a memorandum (JE 8), after the denial of certification, which indicated that one "guideline to be used for discussing the readiness of developmental-level Band I staff members for certification to the full performance level" is "Initiative/Assertiveness." (JE 9, pages 1 and 4). This memorandum is dated August 16, 1989, and is addressed to all NSIAD evaluators from Mr. Goldbeck. (JE 9, page 1).

Petitioner's performance appraisal for the period ending just before the November 1989 PRG met is JE 9. The only mention of initiative/assertiveness qualities in that appraisal is in the Oral Communication narrative that described Petitioner as "self-confident in appearance." (JE 9, page 3).

From these facts, the Board draws the conclusion that Petitioner's supervisors failed to provide him with adequate feedback on the need to show initiative and assertiveness. Thus, a PPP occurred. Obviously, the failure harmed Petitioner because his lapse in these qualities was a reason for denying certification to him in November, 1989.

8. Petitioner alleges failure to provide complete and accurate expectations and to monitor his performance and provide feedback on the ALT/Services job, code 396023, for the period from October 28, 1989, to February 2, 1990. see page 78 of Petitioner's Post-Hearing Brief, ¶ (1) and (2) and pages 3 and 12 of the Petition for Review.

Chapter 1 of the Manual is entitled "The Performance Management Cycle" and contains subparts including "Setting Expectations", "Monitoring Performance, Feedback and Coaching", and "Performance Appraisal (Preparation and Counseling)." (JE 4, pages 4-7). The Manual states: "This chapter [1] discusses the main objective of each phase of the performance management cycle and methodology for attaining them." (JE 4, page 4). The Manual continues, inter alia: "Expectation setting is a key element in performance management. Performance expectations include what an employee will do, by when and how well. The components of what and by when are usually determined by the work assigned to the employee. The how well component is in reference to the written performance standards in this manual." (JE 4, page 4).

The Manual continues: "[E]xpectation setting and performance coaching are an ongoing process. If expectations are set at a point in the job when product, product time frames, scope of assignments, etc., are not yet known, supervisors should try to define expectations to the extent possible." (JE 4, page 4).

The Manual continues: "Once expectations are established, supervisors must monitor performance and periodically provide feedback to subordinates on how well they are doing." (JE 4, page 6).

In a section entitled "Using This Manual to Set Expectations", the Manual refers to appendices providing performance standards for each job dimension and states: "These standards must be used to set expectations" (JE 4, page 5).

In the section on "Performance Appraisal," the Manual states: "The supervisor must complete the appraisal form, either at the end of the assignment or annually (, or in the case of developmental staff, once during each six months) . . . The normal expectation is that the ratee will not be surprised by the appraisal since ongoing discussions should have been taking place during the course of the assignment or the appraisal period." (JE 4, page 7).

The overall tone of the above-described provisions is mandatory in nature, with the exception that supervisors "should" try to define expectations "as soon as possible" when product, time frames and scope of assignments are not yet known.

The allegations as to the ALT/Services job grow out of the fact that Petitioner received two "Borderline" ratings, to his "surprise," for the rating period of October 28, 1989, to February 2, 1990. (TR 53). One criticism was his failure to index some workpapers. (JE 12, page 2). It is undisputed that Petitioner had not been told to index them. (JE 10 and TR 740-41). Indexing is a "normal standard procedure," and Mr. Reiter "assumed it would automatically be done." (TR 741).

The Board notes that one example given in the Manual for supervisors to follow in preparing summaries of expectations for Band I employees does not "assume" that indexing of workpapers will be done by an employee. see page 9 of the Manual where "ensure that all workpapers were properly prepared and indexed" is set forth as an express expectation. (JE 4, emphasis added). The Board also notes that another supervisor of Petitioner did specifically mention the task of "index[ing]" in written expectations given to Petitioner. (RE 7, an addendum to Petitioner's expectations, dated October 17, 1990, and prepared by Mr. Reilly). Petitioner was not specifically so advised by Mr. Reiter; and, at the time the expectations were set (November 27, 1989), Petitioner was still a developmental-level evaluator. (Stip 74 and JE 12).

Nevertheless, Petitioner was aware that workpapers were to be indexed. In his written comments on the Borderline ratings, Petitioner stated that, when he first submitted the workpapers for supervisory review, he asked Mr. Reiter "if there was anything he would like to add before [he, Petitioner] indexed the work papers." (PE 18, page 1). Mr. Reiter admitted that Petitioner "might have asked [him] how [he] wanted the workpapers indexed." (TR 740). Mr. Reiter could not recall helping Petitioner and "might have just told him to do a scheme that [Petitioner] wanted." (TR 740). In his written comments, Petitioner stated that it had been his experience in the GAO regional offices "that each supervisor had his own preference as to how he wanted the work papers organized in their final form." (PE 18, page 1).

Petitioner first submitted the workpapers to Mr. Reiter on December 22, 1989, just before taking two weeks of annual leave. (TR 48 and 733). Mr. Reiter did not give Petitioner any feedback on these work products until January 22, 1990. (TR 49 and 738). Mr. Reiter acknowledged that it was "[u]nfortunate" that he did not review Petitioner's work papers for five weeks after he submitted them and that he knew that the rating period was being employed for the purpose of assessing Petitioner's entitlement to certification. (TR 782). Kevin Tansey, the second-line supervisor on the ALT/Services job, admitted that Mr. Reiter should have looked "earlier" at the work papers given to him by Petitioner. (TR 803-804).

On his performance appraisal that followed this lack of supervisory attention by Mr. Reiter, Petitioner was given two Borderline ratings, one in Data Gathering and Documentation. (JE 12, dated February 7, 1990). In the comments portion of the performance appraisal supporting the Borderline rating, Mr. Reiter specifically mentioned that Petitioner submitted the documentation for supervisory review "without ... indexing them." (JE 12, page 2).

Although Mr. Reiter knew that Petitioner was denied certification in November 1989 and would come up for certification again in 90 days (Stip 56 and TR 782), he admits that he "[p]robably [did] not" check with Petitioner on what he was doing. (TR 762).

When Petitioner next came up for certification, in February 1990, certification was denied. (Stip 58) The Director of RDAP, Paul Math, recommended against certification and mentioned the failure to index the workpapers, among other failings. (JE 13).

The Board finds that a PPP occurred when Mr. Reiter failed to clearly set expectations and provide monitoring and feedback to Petitioner, under the circumstances described above. The Manual requires more of supervisors. This lack of attention by Petitioner's supervisor contributed to Petitioner's poor rating in Data Gathering and Documentation and hampered his attempt to become a full-performance evaluator, i.e., to become certified.

9. Petitioner alleges that his performance appraisal for the period of February 12 to April 25, 1990, on the University Research Center job, code 396230, did not "accurately depict [his] true performance," in violation of "the purpose for which performance appraisals are provided." (Petitioner's Post-Hearing Brief, pages 81-82). see pages 4 and 12 of the Petition for Review. Petitioner cites the Manual, JE 4 and PE 2 (superseded in June 1989 by JE 4).

The Manual states: "The appraisal system's primary purpose is to provide a systematic and uniform method to evaluate job performance of GAO Evaluators and Evaluator-related specialists in Bands I and II on the basis of job-related criteria." (JE 4, page 1). The Board views this express purpose -- that performance appraisals be based on job-related criteria -- to be a binding declaration based on statute. In 5 U.S.C. §2301(b)(6) (1991) it is mandated as a merit system principle that: "Employees should be retained

on the basis of the adequacy of their performance." 5 U.S.C. §§4302a(b)(2) and (3)(1991). Failure to evaluate the true performance of an employee would be a PPP.

For the rating period at issue, Petitioner's ratings in the seven job dimensions were three Fully Successful, two Superior, and two No Basis for Evaluation. (JE 16). Petitioner's allegation as to this performance appraisal not being a "true" one focuses on the fact that his supervisor, Thomas Reilly, complimented him on "work paper summaries" which he did not prepare. see page 82 of Petitioner's Post-Hearing Brief. Mr. Reilly testified that the compliment referred to Petitioner's "input into the draft report." (TR 840). The term "workpaper summaries" refers to a particular work product at GAO. see JE 4, page 72. No mention of "workpaper summaries" appears in the performance appraisal. (JE 16).

Petitioner also alleges that the rating did not give him credit for work which he did perform. He wanted his work evaluated in the "Planning" dimension, based upon his flexibility in going on an unexpected field trip, at the beginning of his assignment to a job, and still being able to plan his segment of the assignment. (PE 20, page 1 and TR 175-88). Management's explanation was that they "really didn't have any job planning at that point" and that the job planning had already been done at an earlier stage of the job, during the survey phase. (TR 842). When Petitioner joined the team, the job was in the implementation phase. (TR 842). The Manual confirms management's explanation of just what is meant by the "Planning Dimension" in rating performance. (JE 4, pages 38-40).

Based upon the above-discussed evidence, the Board finds no PPP insofar as this allegation is concerned.

10. Petitioner argues that the NSIAD failed to set new expectations for him after he was given a promotion-equivalent increase to Band I full-performance level, in violation of page 16 of the Manual. (JE 4). see page 84 of Petitioner's Post-Hearing Brief and page 9 of the Petition for Review.

The Manual provides that: "All employees are to be rated at least annually, except that developmental staff will be appraised at least once every six months Appraisals periods will be as follows: ... The period ending with promotion of an employee with a new period beginning on the employee's promotion date. (In this instance, the employee is appraised at the end of one period against the standards for the lower band, and new expectations are set after promotion using the standards for the higher band.)" (JE 4, page 16). This is mandatory language.

However, GAO classifies a promotion-equivalent increase to Band IF from Band ID as a "REASSIGNMENT," not a "PROMOTION." see page 6 of PE 6, which is GAO Order 2540.1.²⁰ Thus, no PPP can be based upon the failure to reset expectations after the promotion-equivalent increase which Petitioner received from Band ID to Band IF.

11. For the rating period of June 17 to October 25, 1990, on the DOD Contracts job, code 396237, Petitioner alleges that Mr. Reilly was also obliged to set expectations for him before July 21²¹ by "GAO policy" which states "that expectations are to be set within 30 calendar days of an assignment to a new job." see page 84 of Petitioner's Post-Hearing Brief, citing the Manual, JE 4, page 16, and TR 30 and 104) and page 9 of the Petition for Review.²² Petitioner started work on the DOD contracts job on May 7, 1990. (TR 103)

Two NSIAD management officials (Mr. Math, Director of RDAP and Mr. Motley, Associate Director of NSIAD) admitted that there is a "written policy that expectations should be set within 30 calendar days" of the start of a job. (TR 326 and 581). As Petitioner himself admits, the word "should" is permissive, not

mandatory in tone. see page 41 of Petitioner's Pre-Hearing Brief and page 57 of his Post-Hearing Brief. The "written policy" uses the word "should." Therefore the policy was not binding and no PPP occurred.

In addition, the "written policy" of NSIAD was apparently not made an exhibit in this case. Without the opportunity to study it, the Board would be unwilling to find that it had the effect of a binding regulation.

12. Petitioner also alleges that a PPP occurred when he was not given a final performance appraisal upon his release from the University Research Center job, code 396230. see pages 85-86 of Petitioner's Post-Hearing Brief and page 9 of the Petition for Review.

The Manual has a section heading entitled "When Appraisals Are Due." (JE 4, page 15). It states, inter alia: "For an employee rated when an assignment ends, the appraisal is due within 20 calendar days of the staff member's release date." (JE 4, page 16). This is mandatory language.

The following section heading is entitled "Appraisal Periods." (JE 4, page 16). It provides that they "will be as follows" and then lists five of them. (JE 4, page 16). One period is "[t]he period ending with promotion of an employee with a new period beginning on the employee's promotion date." (JE 4, page 16). This is mandatory language. (As we have already concluded, a "promotion" does not include the reassignment from Band ID to Band IF. see paragraph, 10, supra.)

Then the Manual states: "For a staff member rated on a job-by-job basis, a formal written appraisal need not be prepared if the individual is on the job less than 30 staff days, unless specifically requested by either the individual or the home unit management." (JE 4, pages 16-17). The Board interprets this language to mean that if the individual is on the job 30 staff days or more, there is a "need" for a formal written appraisal. This is mandatory in tone, so we have already held.

The University Research Center job was officially terminated in August 1990. (TR 846). Petitioner did not charge any time to the University Research Center job after June 15, 1990. (RE 32, page 53). Whether his release date was June 15 or in August, 1990, it is clear that he was not given a final rating on the job and was not rated at all for the period he spent on the job between April 25, 1990 and June 17, 1990. (TR 98-99 and 847) He did receive an interim rating for work on the job up until April 25, 1990. (JE 16). It is unclear from the record just how many days Petitioner worked on job code 396230 between April 26 and June 15, 1990. Cf. RE 32, pages 50-53 with TR 204-06 and 840-57.

Mr. Reilly explained that no rating was given at the end of the assignment because Petitioner had performed fewer than 30 staff days on it for the period after he was "promoted" until the end of the job (TR 847-48). His "promotion" was on May 6, 1990. (Stip 74).

Ms. Dodaro confirmed the explanation of Mr. Reilly as being correct. (TR 454-55). She explained that an evaluator could request a rating, however. (TR 455) When reminded that Petitioner requested one, on October 30 and 31, 1990 (Stip 43 and RE 9), Ms. Dodaro explained that "his right to ask for the rating has to be contemporaneous with everybody's knowledge of the events and, since Petitioner could have asked for one in June, and did not, she "would not think that it would be required to give one then." (TR 455).

In her memorandum to Petitioner dated November 5, 1990, Ms. Dodaro explained to Petitioner why she was denying his requests of October 30 and 31, 1990 to be evaluated, as follows:

As you are aware, your rating covering the period February 12, 1990 through April 25, 1990 was prepared so that you could be evaluated for consideration to the Band I-full performance level. Subsequent to that evaluation you were converted to the full performance level of Band I effective May 6, 1990. As a result, the number of staff days assigned to the job between May 6 and June 15 were [sic] less than 30 and rating you for this period would not meet the intent of the criteria contained within GAO's performance appraisal manual dated June 1989. Furthermore, a rating covering part of a previous rating year would have no effect on your previous year's standing and will not be considered in the current assessment year which began June 1, 1990 and goes through June 15, 1991. Therefore, a rating covering the subject period would not be in accordance with the intent of our appraisal procedures.

see RE 9 and TR 323-25.

The Board notes that Ms. Dodaro did not mention the need for a request for an appraisal to be "contemporaneous with everybody's knowledge of the events". While the Board agrees that the "utility of performance appraisal information depends upon its timeliness", as is stated in the Manual (JE 4, page 15), we do not agree that requesting one on October 30 was untimely. If Petitioner's release date from the job was in June 1990, the request was only five months later. If the release date were in August, 1990, it was only three months later. In either event, knowledge of Petitioner's job performance should not have grown so dim that it would have been impossible to rate him on it.

Therefore, the Board finds that a PPP occurred when Petitioner was denied the final rating he requested for his performance on the University Research Center job.

Respondent argues that this failure to rate had "no adverse impact on petitioner's promotion potential or pay-for-performance results since he was ineligible for both during the 1990 cycle." (Respondent's Post-Hearing Brief, page 24, ¶129).

Petitioner's next rating period began on June 17, 1990. (TR 324). According to Ms. Dodaro, for the period since his promotion on May 6, 1990, and until June 15 or 16, Petitioner was not eligible for any bonus or permanent pay determination.²³ (TR 324) According to Mr. Motley, Petitioner was ineligible for promotion in GAO, or elsewhere in the government, because he had not been in grade a year at the time he requested this rating. (TR 455). Also according to Ms. Dodaro, Petitioner would not have been eligible for a bonus because an employee must have been a Band IF by April. (TR 456).

Respondent takes too narrow a view of what constitutes "adverse impact" upon an employee. For example, had Petitioner wished to leave GAO for another job (a not unlikely possibility given Petitioner's unhappiness with his treatment at GAO), a performance rating on a job would be a valuable asset. The Board is unwilling to accept Respondent's no-adverse-impact argument. Petitioner obviously wanted a rating for some purpose and it was denied. The Board cannot conclude that the failure to grant his request was without harmful consequences.

13. Petitioner alleges a failure to monitor performance and to provide coaching and feedback during the rating period of October 29, 1990, to January 4, 1991, on the DOD Contracts job, code 396237. see pages 56-57 of his Post-Hearing Brief and page 9 of the Petition for Review.

The Manual provisions upon which Petitioner relies, at page 41 of his Post-Hearing Brief, are: "Once expectations are established, supervisors must monitor performance and periodically provide feedback to subordinates on how well they are doing. Monitoring not only keeps staff members apprised of their performance, but also assists them in developing, maintaining, or improving their skills. Moreover, such activity can also positively impact assignments by indicating when employees are ready for increased responsibility or by identifying and correcting problems." (JE 4, page 6). The language of these provisions is mandatory in tone.

Petitioner's complaint in this regard is based upon the fact that his first-line supervisor, Thomas Reilly, left notes for him on his work products. (PE 25, page 1). Mr. Reilly explained that he commonly used notes as a means of communicating feedback to staff who were away from their worksites. (TR 884).

The Board finds no PPP resulted, per se, from a supervisor giving Petitioner feedback, monitoring and coaching in written form, as long as there is also some interactive communication between the employee and the supervisor. This is a lesson of Hendley v. United States General Accounting Office, Docket No. 120-211-02-89, pages 21-22, in regard to expectation-setting. There was some such communication between Mr. Reilly and Petitioner. see RE 14, page 1.

14. Petitioner also alleges that a PPP resulted from the failure to give progress reviews to him on the DOD Contracts job, code 396237. see page 57 of his Post-Hearing Brief and page 9 of the Petition for Review.

As to progress reviews, the Manual states: "At least one formal review of expectations and the progress displayed in meeting them before the assignment is completed is anticipated unless circumstances, e.g. duration of the job, etc., dictates otherwise. Scheduling this session at the mid-point of the assignment is suggested. Such a review ensures a clear understanding of expectations and the progress toward meeting them." (JE 4, page 6). There is a space on the End-of-Assignment Performance Appraisal form for "Dates of Prg. Rev." (JE 23). While the words in these provisions are permissive in tone, the fact that the performance appraisal form has a space for progress review dates, and that they are routinely filled in by managers (see RE 13, JE 23, JE 12, JE 9, JE 22 and JE 16) indicates that progress reviews are regarded as mandatory, not permissive. This is the type of "extrinsic evidence" of intent to which the courts look. see Doe v. Hampton, 566 F.2d at 281.

On the appraisal of Petitioner for the rating periods of June 17 to October 25, 1990 (JE 22), and October 29, 1990, to January 4, 1991 (JE 23), the space on the ratings for "Dates of Prg. Rev" both show the notation "Bi-weekly." Petitioner denies that he was given any "progress reviews" during the latter rating period. (PE 25, pages 1-2, which is Petitioner's written comment on the latter rating and TR 138) In his written rebuttal to Petitioner, Mr. Reilly states that he "continually provided informal feedback" to Petitioner and refers to one meeting, in addition, when he and the second-line supervisor, Lester Farrington, sat down with Petitioner "in a more formal setting" to discuss why Petitioner was unable to join another staff member on a trip. (RE 14, page 2). During the meeting, held on November 27, 1990, Mr. Farrington attempted "to motivate and encourage" Petitioner, who had received a performance appraisal with which he did not agree. (RE 14, page 2). There is no evidence that expectations and Petitioner's progress toward meeting them we've discussed. Testifying in rebuttal, Petitioner did not deny that the November 27, 1990, meeting occurred.

The November 27 meeting, while "formal," did not appear to be a "review of expectations and the progress displayed in meeting them." see the Manual, JE 4, page 6. It was clearly not set for the purpose of reviewing expectations and progress toward meeting them.

Respondent asserts that the interim performance appraisal given to Petitioner midway through the DOD Contracts job qualified as a "formal" progress review. see pages 80-81 of its Post-Hearing Brief and JE 22.

The Board disagrees. Performance appraisals, whether interim or final, and progress reviews are distinct duties imposed upon supervisors under the performance appraisal system, as evidenced by the fact that the duties are set forth in separate portions of the Manual. (JE 4). The duty to conduct "[a]t least one formal review of expectations and the progress displayed in meeting them before the assignment is completed" appears in the section of the Manual on "Monitoring Performance, Feedback and Coaching." (JE 4, page 6). The performance appraisal duty appears in the section on "Performance Appraisal (Preparation and Counseling)." (JE 4, page 7). The "Counseling" refers to a "face-to-face counseling session to communicate the basis for the appraisal." (JE 4, page 7). Further evidence is seen in the fact that the performance appraisal form includes a block in which the supervisor indicates "Date[s] of Progress Review." See, e.g., JE 9, page 1.

Allowing an interim performance appraisal to substitute for a progress review would defeat the purpose of the progress review which "ensures... a clear understanding of expectations and the progress toward meeting them." (JE 4, page 6). Petitioner was not certified as a full performance Band I employee on the basis of an interim performance appraisal, a fact which illustrates how important such appraisals can be to the career of an employee and also the importance of having a formal progress review before being appraised so that improvement can be made. see TR 723 and JE 9.

The failure to provide Petitioner with a formal progress review constitutes a PPP which harmed him. As the Manual makes clear, GAO expects employees to perform better if they have the benefit of monitoring of performance, feedback, coaching, and a "formal" progress review by supervisors. (JE 4, page 6). It cannot be concluded, therefore, that Petitioner would not have been able to improve his performance had he had the benefit of the "formal" progress review.

15. Petitioner alleges that another PPP occurred when the wrong supervisor signed his rating for the rating period from October 29, 1990, to January 4, 1991, on the DOD Contracts job, code 396237. see pages 88-89 of Petitioner's Post-Hearing Brief and JE 23.

NSIAD's Human Resources Memo #4, dated January 12, 1990, "establishes the NSIAD policy on requirements for ratings when supervisors are changed during the appraisal period." (PE 10). It states that "[d]uring the appraisal year, supervisors may be relocated due to transfer between subdivisions within NSIAD, transfer to other units within GAO, or separation from GAO." (PE 10, emphasis added). It states that "[t]o ensure that we have appraisals for the entire assessment year, and by each supervisor of a staff member, NSIAD now requires a rating to be written when a supervisor moves or is replaced."

The "rating requirement" states: "Within 20 calendar days, after a change in supervisors, the former supervisor is required to provide ratings to the staff members he/she directly supervised. This requirement applies only when the staff member was under the direct supervision of the supervisor for 30 staff days or more." (PE 10 and TR 599). This is mandatory language.

In this case, Petitioner performed work under the direct supervision of Mr. Reilly on the DOD Contracts job from May 7, 1990, until Mr. Reilly left GAO on December 27 or 28. (TR 848 and 880 and RE 31, pages 4-5). Mr. Reilly prepared a draft end-of-assignment rating for Petitioner before he left. (TR 879-80 and RE 13). At the time Mr. Reilly left, Petitioner had worked for considerably more than 30 staff days under Mr. Reilly's supervision. see RE 31 and 32.

Mr. Reilly gave his draft rating to Mr. Farrington, who had been Petitioner's second-line supervisor on the DOD job and knew something of his work. (TR 936-938 and 941). Mr. Farrington was Petitioner's first-line supervisor for about three weeks, and it was he, not Mr. Reilly, who gave Petitioner his end-of-assignment rating on the DOD job. (JE 23 and TR 940-41). The ratings on the Reilly draft and the Farrington draft are the same. (Cf. JE 23 with RE 13). The comments are also the same with the exception of one sentence on the Reilly draft, under Part III. Mr. Reilly stated that "Since his last appraisal on October 26, 1990, Mr. Marshall has demonstrated marked improvements in the areas of oral communication and working relationships and his rating has been adjusted accordingly." (RE 13, page 3) Mr. Farrington substituted for this Reilly statement: "Since his last appraisal on October 26, 1990, Mr. Marshall has demonstrated improvement in the areas of oral communication and working relationships." (JE 23, page 2). The ratings for oral communication and working relationships were higher than they had been on Petitioner's last rating on the DOD job. (Cf. JE 22 with JE 23).

Having Mr. Farrington, rather than Mr. Reilly, give Petitioner his end-of-assignment rating is clearly contrary to the NSIAD requirements set forth in PE 10 and constituted a PPP. However, little discernible harm occurred since the ratings were the same. Only one comment of Mr. Reilly was slightly more favorable -- Mr. Reilly found "marked" improvement in oral communications; Mr. Farrington left out the "marked."

B. The alleged retaliation issue.

The law as to retaliation

It is a prohibited personnel practice "to take or fail to take any personnel action against any employee ... as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation. 5 U.S.C. §2302 (b)(9).²⁴ A "personnel action" includes a "promotion," a "transfer,"²⁵ a "performance evaluation" and a "decision concerning pay." see 5 U.S.C. §§2302(a)(2)(A) (ii),(iv),(viii) and (ix). When Petitioner filed his complaints of discrimination and retaliation, and engaged in negotiations to settle them, he was exercising a right granted by GAO Order 2713.2, dated August 12, 1981, entitled Discrimination Complaint Processing in the United States General Accounting Office. (PE 32, Appendix II). At Chapter 3, paragraph 14a, page 16, this order provides (emphasis added):

Complainants, their representatives, witnesses, counselors, investigators, and other GAO employees who are in any way involved in the presentation and processing of a complaint shall be free from restraint, interference, coercion, discrimination or reprisal.

The United States Court of Appeals for the Federal Circuit has clearly enunciated the four elements of the legal test for retaliation for engaging in such protected activity. In Webster v. Department of the Army, 911 F.2d 679, 689 (Fed. Cir. 1990), hearing en banc denied, 926 F.2d 1149 (1991), the Court stated: "The four elements of this test are: (1) the employee engaged in a protected activity; (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 retaliation and the adverse action" (citing

Warren v. Department of the Army, 804 F.2d 654, 656-58 (Fed. Cir. 1986)).

Once these tests have been met by the plaintiff, the burden of going forward with the evidence shifts to the employer to explain clearly the nondiscriminatory reasons for its action. United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983).

If the employer successfully rebuts, the plaintiff may prevail only if he can show that the defendant's articulated reason is mere pretext or unworthy of belief and that retaliation is the real cause for the action. Wrenn v. Gould, 808 F.2d 493, 501 (6th Cir. 1987). The ultimate burden of persuasion always rests with the plaintiff. Aikens, 460 U.S. at 716.

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

Respondent does not dispute that Petitioner engaged in protected activity by filing complaints against his supervisor at the Huntsville sublocation of the ATRO and against NSIAD management nor does Respondent dispute that management knew of the protected activity. see page 50 of Respondent's Post-Hearing Brief. Respondent disputes all else.

The PPPs as evidence of retaliation

Based upon our consideration of the above PPPs, we find them to have been the result of managerial inattention, neglect or incompetence, and not part of a grand scheme to retaliate against Petitioner which continued from the ATRO to the NSIAD, as alleged.

Petitioner argues that "based upon their friendship over the years, Mr. Martin and Mr. Goldbeck conspired to retaliate against [him] for his participation in the EEO process in Atlanta." see page 72 of Petitioner's Post-Hearing brief and also page 73 where Petitioner further alleges: "Because of the friendship between Martin and Goldbeck, Goldbeck agreed, through benign neglect in some instances and overt actions in other instances, to continue the retaliation against Petitioner." Some of these allegations relate to Mr. Goldbeck's position as the Director of Operations for the NSIAD and the alleged PPPs discussed above. see pages 3-4, 48-49, 72-82, 86 and 90-91 of Petitioner's Post-Hearing Brief.

Respondent, in its Reply to Petitioner's Post-Hearing Brief, denies that any PPPs at all occurred. see pages 20-24. We have found to the contrary.

We have considered the position of Mr. Goldbeck and the fact that he could have influenced his underlings in the way alleged by Petitioner. (TR 610). We have also considered not only the working relationship between Mr. Martin and Mr. Goldbeck (TR 662), but also that between Mr. Martin and Mr. Motley. (TR 603). From these facts, however, we cannot conclude that Petitioner showed, by the preponderance of the evidence, that retaliation was the motive behind the PPPs. Knowing co-workers "pretty well" and having "previous work experience" with them (FOF 23) are not, alone, strong enough threads to hold together the fabric Petitioner must weave to construct a case of retaliation continuing from one unit to another.

We next turn to a consideration of the other evidence on the issue of retaliation.

Alleged retaliation against Petitioner in the ATRO²⁶

During his employment at the ATRO, Petitioner was a good employee, always performing at a fully successful level or better and once receiving a Special Commendation Award. (Stip 5 and 6).

The genesis of all Petitioner's problems began, in his view, when he filed a discrimination complaint against a supervisor in the Huntsville suboffice of the ATRO. The complaint was filed in August, 1988. (RE 20).

The Regional Manager of the ATRO, James Martin, actively participated in the negotiation of the settlement of this complaint. (TR 988 and 1017-18). He represented Respondent in the negotiation process which led to the terms of the settlement agreement. (TR 482). The resolution process took place over a period of nine months (TR 1018 and 29) and Mr. Martin signed the agreement on May 1, 1989, as the representative of Respondent. (Stip 10). see also FOF 6, supra.²⁷

Mr. Martin's active involvement in the settlement negotiations is a critical piece of evidence and one ignored in the ID.²⁸ Taken together with the fact that the charge of discrimination involved the office for which he is responsible, it shows motive on his part to retaliate against Petitioner. It gives a plausibly damaging explanation for Mr. Martin's subsequent acts and failures to act in dealing with Petitioner, which the Board next considers.

First, Mr. Martin acknowledges that expungement of ratings could affect Petitioner's career. (TR 1020). As it turned out, the expungement did affect his career because the supervisors in the headquarters unit to which he transferred (NSIAD) had no access to Petitioner's past performance history, and delayed certifying him as a full performance employee, entitling him to a pay raise, partly on this basis. see, e.g., TR 632, where the NSIAD's Director of Operations denominated the absence of these ratings as "[v]ery, very significant." This fact did not "bother" Mr. Martin and he did not bring it to anyone's attention. (TR 1020).

Secondly, the Board notes Mr. Martin's refusal to share with the NSIAD officials any information about Petitioner's performance, even that performance which was not covered by the confidentiality provision of the settlement agreement. Only two ratings were expunged under the agreement, specifically covering his work at the Huntsville subunit of the ATRO, during the periods ending on June 30, 1988, and February 8, 1989. (JE 2, page 2). Not covered by the confidentiality provision was the most recent period of work performed by Petitioner after his reassignment from Huntsville to Atlanta, which began about mid-February of 1989 and ended on approximately May 23, 1989. (TR 26-27).

However, when the Associate Director of NSIAD, Michael Motley, called the ATRO and asked the Director of Operations there "if [he] could talk to him a little bit about [Petitioner's] performance when he was in Atlanta," the Atlanta official asked if he could call back in "about 15 minutes." (TR 546) About 10 minutes later, Mr. Martin himself returned the call of the NSIAD manager and stated: " I understand that you've been asking some questions about [Petitioner's] performance here in Atlanta" and, upon affirmance, stated that: "[W]ell, sorry, but we can't give you anything." (TR 546, emphasis added) Mr. Martin further said that: "I'm sorry, I just can't discuss it" when the NSIAD official asked why he could not receive any information. (TR 546).²⁹

Because Petitioner's performance on the FAA job would have been the "most recent activity" that the ATRO had to submit to the NSIAD, it would have been particularly valuable to the NSIAD in making the decision as to whether to certify a GS-11 evaluator to the full performance level.³⁰ (see the testimony of the Deputy Assistant Comptroller General for Human Resources at page 465 of the transcript where she explained that: "Always on full performance certifications, the most recent activity is the most important" see also TR 434, 286, 379, 546 and 993.)³¹

Mr. Martin's excuse for not giving the NSIAD official any information on Petitioner's job performance was that he interpreted the settlement agreement to mean that he was "precluded from discussing [Petitioner's] performance in general." (TR 1000 and 1003). This excuse is disingenuous because Mr. Martin himself was a party to the negotiations on the terms of the agreement and the agreement clearly does not encompass a prohibition on discussing any but the two ratings specifically expunged. see JE 2.³² In concluding that Mr. Martin's testimony on this point was not credible, we have assumed, arguendo, that his demeanor when so testifying was convincing, in that a presiding official would credit his testimony based upon demeanor evidence alone. We note Member Rosenthal's skepticism about reliance demeanor evidence. As he put it, in his concurring opinion in Malphurs v. United States General Accounting Office, Docket No. 91-04, dated July 10, 1992:

For me, at least, reliance on so-called "demeanor" evidence is a course fraught with 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.

In Malphurs, Member Rosenthal was forced to resolve a conflict in the testimony without official records. Here, of course, there is an official record -- the settlement agreement, the terms of which are set forth simply and clearly. see JE 2. ³³ By Mr. Martin's own admissions, he was an active participant in negotiating the agreement as to expunging the ratings. see FOF 6, supra. Should Mr. Martin be deemed credible when he testified, contrary to the unambiguous language of the settlement agreement, that he believed he could not discuss anything about Petitioner's performance at the ATRO? The confidentiality provisions of the agreement clearly covered only the two ratings expunged, and not his subsequent work at the ATRO.

At pages 1-2 and 29-30 of his dissent, Member Rosenthal appears to be of the view that his finding as to the demeanor of Mr. Martin and the content of his responses to questions, should end the matter.³⁴ We, of course, have the transcript record of the responses and are as aware of them as Member Rosenthal. More importantly, however, demeanor evidence is only one of seven factors to weigh in determining credibility issues. see Brzozowski v. United States Postal Service, 51 M.S.P.R. 196 (1991) (citing the seminal MSPB case of Hillen v. Department of the Army, 35 M.S.P.R. 453 (1987)).³⁵ Of these seven, three are particularly applicable to this case.

One is the bias, or lack thereof, of Mr. Martin. Mr. Martin was deeply involved in this litigation as one of the key management witnesses called by Respondent to defend itself against the charges in the Petition for Review. He is named in the Petition for Review as one of the management officials charged with retaliation and prohibited personnel practices. His bias is obvious and his testimony cannot be credited, as does Member Rosenthal, without regard for this factor.

Another factor bearing on credibility is the contradiction of the witness's version of events by other evidence. Here, we have the settlement agreement itself which contradicts Mr. Martin's testimony that he thought he could give out no information on Petitioner's performance. See JE 2.

The third factor is the inherent improbability of Mr. Martin's testimony as to his understanding of an agreement which he helped to negotiate. Mr. Martin is a high-ranking management official who cannot creditably be charged with a failure to comprehend what he negotiated.³⁶

The Board has considered all the above factors in arriving at our conclusion that Mr. Martin's testimony as to his understanding of the settlement agreement is not worthy of belief. We are confident that our weighing of the evidence is more complete than that of Member Rosenthal and that we have articulated a sound reason, based on the record, for our contrary evaluation of Mr. Martin's testimony on this point. Under similar circumstances, the Court of Appeals for the Federal Circuit has upheld a decision of the MSPB overruling one of its presiding officials on a credibility issue. see Jackson v. Veterans Administration, 768 F.2d 1325, 1330 and 1332 (1985). In this decision, the court of appeals acknowledged the deference due to demeanor determinations by a presiding official, but also ruled that the MSPB can overturn a credibility determination if it "articulated a sound reason, based on the record, for its contrary evaluation of the testimonial evidence." Id. at 1331.

Another example of Mr. Martin's retaliatory actions against Petitioner is grounded upon his admission that he had discretion to order a rating for Petitioner on the FAA job, but chose not to do so, in the belief that he was not obligated to do so.³⁷ In another context, Mr. Martin admitted that, if it is a "good person" who wants to transfer to Washington, DC, he is usually supportive and makes efforts on his behalf. (TR 1002). The Board believes that Mr. Martin would have made an effort on Petitioner's behalf and ordered a rating on the FAA job if he had seen the Petitioner as a "good person," but that he failed to exercise his discretion on behalf of an employee solely because the Petitioner had filed a charge, which is the essence of retaliation.³⁸

The Board must now answer the hard question--why would Mr. Martin be so reluctant to assist the Petitioner, knowing his situation vis-a-vis getting a promotion equivalent to a GS-12 in another unit which had absolutely no knowledge of his past job performance as a GS-11, and knowing that Petitioner had always given the ATRO at least fully satisfactory performance (Stip 6) and, during one rating period, as a GS-9, a stellar performance, including five ratings of "Exceptional"? (PE 14).

Mr. Martin admitted that "if it is a good person" who wants to transfer to Washington, he is usually supportive and calls Washington to recommend that "good person[s]" performance. (TR 1002).³⁹ In Mr. Martin's view, why didn't Petitioner qualify as a "good" person, and one entitled to Mr. Martin's assistance in giving the NSIAD the job performance information that was not expunged under the settlement agreement, and one entitled to a performance appraisal on his most recent work experience? The answer seems clear -- Petitioner had filed a complaint about Mr. Martin's regional office and Mr. Martin was not about to help him in any way. All the above-described actions and inactions by Mr. Martin had an adverse impact upon Petitioner's ability to obtain certification and to receive the pay increase and career-enhancing opportunities which certification entails.

Taken together, Mr. Martin's demonstrated attitude and refusals to assist a good employee can be defined by one word--"retaliation." Retaliation can be both overt and subtle. See, e.g., Collins v. State of Illinois, 830 F.2d 692, 702-03 (7th Cir. 1987), and the numerous cases cited therein. "[R]arely, is it direct; and, 'in almost all situations [the causal connection] must be inferred from circumstantial evidence'." (Webster v.

Department of Army, supra, 911 F.2d at 689). Mr. Martin had had experience with at least one other discrimination case involving his office. (TR 1022). Thus, Mr. Martin would not be expected to engage in any overt acts of discrimination after this experience. He did acknowledge that he is "always disappointed when somebody is unhappy with what is going on in the region or feels that they have been done harm in some way." (TR 1022). In this case, his "disappointment" led him to let Petitioner twist slowly in the wind, as the expression goes.⁴⁰

Petitioner engaged in protected activity over a period of nine months--from the filing of his complaint in August 1988 until its settlement in May 1989.⁴¹ Mr. Martin played an active role in the settlement negotiations. He subsequently took personnel actions relating to Petitioner's transfer to the NSIAD and his performance appraisals, or lack thereof--actions that had an adverse impact upon Petitioner's career. While it was a staff member, and not he who was charged with discriminatory conduct, the fact that it took place in an office managed by Mr. Martin reflected poorly upon him and could have been retaliation. (Webster, 911 F.2d at 691).

The repeated failures to act to protect Petitioner's career occurred within a span of about six months after the discrimination complaint of Petitioner was settled. As the United States Court of Appeals for the District of Columbia has held: "The causal relationship may be inferred from adverse action that closely follows protected activity." See Chen v. General Accounting Office, 821 F.2d 732 at 739 (1987).⁴² The fact that Mr. Martin would have treated a "good" employee differently than Petitioner leads this Board to conclude that it was retaliation, and not legitimate managerial prerogatives which motivated Mr. Martin.⁴³ In other words, Mr. Martin's explanations for his treatment of Petitioner were pretextual in nature.⁴⁴ We are persuaded that Petitioner proved retaliation at the ATRO by a preponderance of the evidence.

Before concluding this portion of the discussion on the merits, we address Member Rosenthal's concern that we have not accorded due process to Respondent and Mr. Martin because we have followed a trail of facts, other than that followed by counsel for Petitioner, in finding retaliation at the office which Mr. Martin managed. See pages 18-21 of his dissent. First, we point to the Petition for Review which charges retaliation, in both specific and general terms, at the regional office managed by Mr. Martin. See Petition, pages 2-3, 5 and 8-10. The Petition names Mr. Martin as a person responsible for actions involved in the Petition (page 2). It alleges as a specific act of retaliation "the failure to provide annual assessment performance appraisal in Atlanta" (page 8), one of the undisputed facts upon which the Board relies. It charges that: "Subsequent to the settlement of his Atlanta discrimination complaint, a series of related acts occurred commencing with his failure to be assessed during the 1989 Annual Assessment process and [the ATRO] management's failure to consider him for a promotion equivalent increase and certification to the full performance level" (pages 9-10). It charges that following these retaliatory acts, "many other retaliatory acts were committed" against Petitioner (page 10). It charges that Petitioner finally became convinced that he was "being subjected to retaliation for his use of the EEO process" and "recognized a pattern that had begun in the Atlanta Regional Office" (page 10).

All of the above-listed charges clearly gave notice to Mr. Martin and Respondent that a wide variety of actions by Mr. Martin was being put in issue.

In reaching the ultimate finding that Mr. Martin did retaliate against Petitioner, we have relied only upon the admissions of Respondent's witnesses, Mr. Martin and Mrs. Aponte, and upon a joint exhibit, the settlement agreement. For purposes of the decision, we have assumed that Mr. Martin looked convincing when he gave his testimony.

With the plethora of undisputed facts in this record, counsel for Petitioner argued her case upon the certification issue in the ATRO, obviously in the belief that it was the strongest point. The Board relies on another set of undisputed facts, well within the allegations made in the Petition for Review. Respondent is well aware of our regulations and its de novo review provisions, which do not require prior notice to the parties when we invoke it. Respondent has available to it an appeal to the United States Court of Appeals for the Federal Circuit. See 31 U.S.C. 755 (a), as amended September 9, 1988 (U.S.C.A., (Supp. 1991)) and 4 CFR §28.90 specifying such an appeal right and the right of this Board to designate its Solicitor, the General Counsel, or any other qualified individual to represent it in a judicial proceeding involving a Board decision. Under all these circumstances, we fail to see how due process has been violated.

Alleged retaliation against Petitioner at the NSIAD

In considering this allegation, two periods must be distinguished--the period when the only motive for retaliation was the fact that the NSIAD managers, who had had a long working relationship with Mr. Martin in the ATRO, knew that a discrimination complaint of Petitioner had been settled at the ATRO; and the period when Petitioner entered the EEO process at the NSIAD, involving NSIAD management, on February 26, 1990. (Stips 25, 26 and 27).

Prior to his transfer to the NSIAD, on July 17, 1989, Petitioner had had no contact with any of the individuals in the NSIAD who later served as one of his supervisors. (TR 258). Although at least some of his NSIAD supervisors were aware that some of Petitioner's appraisals had been expunged pursuant to a settlement agreement of a complaint, none knew that the complaint involved a charge of race and sex discrimination. (TR 282-84 (Math), 521-22 (Motley), 614-15 (Goldbeck), 720-22 (Reiter), 787-88 (Tansey), 823-26 (Reilly) and 910-12 (Farrington)).

Before February 26, 1990

As already discussed supra, there was a friendly working relationship between Mr. Martin, at the ATRO, and Mr. Goldbeck. (TR 662). Mr. Goldbeck did know, before Petitioner arrived in the NSIAD, that the NSIAD would not be receiving ratings of Petitioner from the ATRO because of the settlement of a complaint. (TR 613). Mr. Goldbeck did control the PRGs which denied certification to Petitioner three times before February 26, 1990. (TR 660 and 693-95 and Stips 52, 56 and 58). Mr. Goldbeck did review the February 1990 performance appraisal on which Petitioner received two Borderline ratings, before it was given to Petitioner. (TR 638-40). This appraisal resulted in the third denial of certification at the NSIAD. (TR 297-98). The first two denials were based, in part, upon the lack of performance history from the ATRO, as has already been discussed.

The most the Board can make of these facts is that retaliation could have been the reason behind these denials of certification. However, other evidence is suggestive that it was not. At the time Petitioner was assigned to his first job at the NSIAD under the supervision of Mr. Reiter, who gave Petitioner the two ratings of Borderline on his February 1990 performance appraisal (JE 12), Mr. Reiter did not know that Petitioner had filed a discrimination complaint in the ATRO and, moreover, was not acquainted with any of the individuals, either in the NSIAD or in the ATRO, who were involved with the Huntsville project that generated that complaint. (TR 720-21).

As already discussed, Mr. Goldbeck did try to obtain Petitioner's performance history from the ATRO and from Petitioner himself, even offering to reconvene the PRG if Petitioner would provide copies of his ratings at the ATRO. When Petitioner received two Borderline ratings from one supervisor, Mr. Goldbeck saw to it that Petitioner was reassigned to another supervisor who would give him an accurate rating and to a job that would enable him to raise the two Borderline ratings. (TR 646). The Board contrasts these affirmative actions to help Petitioner with the lack of any such affirmative action by Mr. Martin; and we conclude that Petitioner did not establish a case of retaliation at the NSIAD during this period.

After February 1990

The efforts of Mr. Goldbeck to secure another supervisor and suitable job for Petitioner paid off, in that Petitioner did raise his ratings and, on May 6, 1990, did secure certification.⁴⁵ See JE 16 and Stip 74. Thus, it is difficult to find that the NSIAD retaliated against Petitioner by taking adverse action against him after he entered the EEO process in the NSIAD in February 1990.

Petitioner relies upon the fact that none of his performance appraisals was as high as his performance warranted. He supports this allegation with no credible evidence that this was, in fact, so. At most, the Board gleans from the voluminous evidence on this issue, which we do not attempt to cite, that there was a difference of opinion on the subject. Respondent adduced evidence to support each appraisal; and Petitioner did not show the appraisals to be "so groundless as to reveal a discriminatory motive." Eng, 23 FEP Cases at 864.

Petitioner complains about the failure to allow him to supervise an employee. See pages 36-37 of his Post-Hearing Brief. There was un rebutted evidence, on this point, which established that supervisory experience was not available on the job on which he requested it--the job was too short-handed, the workload was too demanding, and there were very tight time-frames in which to accomplish the work, so that each team member had to be responsible for a segment. (RE 5, page 2 and TR 316-17, 321 and 876). Unrebutted is the testimony that it is "just very rare" in the NSIAD for a recently-promoted, full-performance-level, Band I evaluator to supervise a developmental evaluator. (TR 322 and see also TR 656 and 877). Nor is supervisory experience necessary for promotion to Band II, although it would be helpful. (TR 877, 655 and 322).

Petitioner also complains that he was forced to work under a supervisor, Mr. Reilly, against whom he had filed one of his discrimination complaints and after he had specifically requested a transfer. See page 36 of his Post-Hearing Brief. There is un rebutted testimony that Petitioner "couldn't just leave a job in the middle of the job." (TR 652). Petitioner wrote his request to Mr. Goldstein, on October 11, 1990, after his unit denied his request. (PE 71 and TR 116-18). Mr. Reilly left GAO's employment in December 1990, but not before drafting another performance appraisal for Petitioner, which was accepted almost as written, as already discussed. The last appraisal of Petitioner by Mr. Reilly was higher than his former appraisal of Petitioner. Compare JE 23 with JE 22. Petitioner was transferred to the headquarters unit he had originally requested, effective January 13, 1991, following the settlement agreement of his discrimination complaint. See FOF 57, supra.

From these facts, the Board cannot draw the conclusion sought by Petitioner--that a retaliatory motive was behind the refusal to transfer him, immediately upon request. It was reasonable for management to give some consideration to the fact that a job had to be completed before a transfer was ordered.

Petitioner felt that Mr. Reilly's demeanor towards him changed after learning, in October, that Petitioner had filed a complaint against him and that, thereafter, Mr. Reilly stopped attending meetings with him, but not other staff members; required Petitioner to submit his records of discussions within 24 to 48 hours from the date they took place; left notes on his written work products which he considered demeaning; and excluded him from meetings. (PE 24 and 25, page 1 and TR 200-01 and 233-41). Mr. Reilly gave un rebutted testimony that he generally required records of discussions to be submitted within 24 to 48 hours and that he had had some problems getting them back from Petitioner within that time frame. (TR 860-61). Another staff member testified that she generally did her writeups (records of discussions) within one day and that it was expected that they be done within a day "so as to not forget the content of the interviews." (TR 966-67).

Mr. Reilly denied that his demeanor towards Petitioner changed after learning that he was the subject of one of Petitioner's complaints. (TR 866). Mr. Reilly further explained that he was unable to attend a couple of meetings with Petitioner because he was busy trying to prepare a briefing on an assignment and that he regarded Petitioner as experienced enough so that there would be no problem. (TR 866-67). Another staff member gave un rebutted testimony that Mr. Reilly did not attend some of her meetings and left notes on her work products, which she described as a common practice and not demeaning. (TR 967-69). Mr. Reilly denied that he scrutinized Petitioner's work any closer after learning of his complaint. (TR 867). Mr. Reilly could recall no job-related meeting from which Petitioner was excluded, as Petitioner had testified. (TR 867-69). Another staff member gave un rebutted testimony that she and Petitioner were working on different segments of the job and so did not always attend the same meetings. (TR 969). She could recall no specific exclusion of Petitioner from any meeting. (TR 970).

From this array of additional facts, the Board still cannot make a finding that it was retaliatory intent that motivated Mr. Reilly's actions.

IV. Remedies

As to remedies, generally, the Board resolves against the agency any ambiguity as to the exact relief fairly recoverable on account of illegal actions and inactions. Managers should know that there are consequences to their failure to follow agency regulations, and to retaliatory acts against employees seeking to benefit from rights given to them by statute and by the agency. Such knowledge helps to assure that managers will treat employees fairly and in accordance with the law in the future.

As to the specific remedies in this case, the Board has considered all the remedies sought in the Petition for Review, at pages 14-15. We consider the following to be appropriate. Because actions and inactions in the ATRO were retaliatory and PPPs occurred, as stated in PPPs 1, 3 and 4, supra, which prevented Petitioner from receiving a fair consideration for certification to Band IF upon his transfer to the NSIAD, Respondent shall backdate Petitioner's certification to Band IF to August 1989, when he was first denied certification by the NSIAD, and make the appropriate back pay adjustments to date.

As a remedy for PPPs 7 and 8, supra, Respondent shall change the ratings of Borderline on Petitioner's performance appraisal for the period of October 27, 1990, to February 2, 1991 (JE 12) to Fully Satisfactory and make other necessary adjustments to the narrative statements in the appraisal. In so ordering, the Board is not substituting its judgment for that of Petitioner's supervisors. Instead, we are fashioning an appropriate remedy for the harm he has suffered. We have considered the fact that Petitioner has never received less than Fully Successful ratings, with this lone exception, since his employment in January 1986. We have also considered the fact that, for the rating period immediately following his

receipt of the two Borderlines, he received Fully Successful and Superior ratings in the job dimensions for which he received the Borderline ratings.

As for attorney fees and costs, Petitioner shall follow our regulations as set forth in 4 CFR §28.89, provided the parties cannot agree between themselves on the issue.

V. Ultimate findings and order

Based upon the record made in this case, we find that Respondent has committed prohibited personnel practices and has retaliated against Petitioner for engaging in protected activity, as detailed in the body of this decision.

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

1. Backdate Petitioner's certification to FPL to August 1989 and make all appropriate back pay adjustments to date.
2. Upgrade the two Borderline ratings on JE 12 to Fully Satisfactory and adjust the narrative statements to reflect fully satisfactory performance.

Having considered Petitioner's request for reconsideration, and having affirmed in part and reversed in part the ID, this decision constitutes a final decision of the Board from which the parties may seek judicial review pursuant to 4 CFR §28.87(e).

Members McBride and Rosenthal dissent from portions of this decision and state their reasons for so doing in separate opinions attached hereto.

DISSENTING OPINION **(Alan S. Rosenthal)**

Introduction

1. Last November, under an eleventh hour transfer of the responsibility from Judge Cappello at her request, I undertook to conduct the evidentiary hearing on the myriad claims advanced by petitioner, Andrew Marshall, Jr., in his petition for review in this proceeding. Over the course of five hearing days, I heard a total of sixteen witnesses. Among them was virtually every agency official who had any significant involvement in one or more of the events occurring in either the Atlanta Regional Office (ATRO) or the National Security and International Affairs Division (NSIAD) that form the basis of petitioner's insistence that he was a victim of retaliation in both of those locations because of a discrimination complaint he had earlier filed in ATRO.

The opportunity to observe these witnesses as they responded to questions was necessarily of paramount importance in my adjudication of the case. To be sure, there was little dispute in the evidence regarding the specific management actions and decisions concerning petitioner's employment that were taken or made during the period in question. Thus, there were few credibility issues presented on that score. But the same cannot be said with respect to the examination of petitioner's claim that the essentially undisputed management actions and decisions of which he complains were not merely unwarranted, but were taken with an invidious underlying purpose--that of retaliation for having previously engaged in protected activity.¹

Stated otherwise, as the assigned trier of fact, given that retaliation claim it became my manifest duty to pass careful judgment on the credibility of each alleged retaliator as he offered on the witness stand legitimate (i.e., non-retaliatory) reasons for the challenged decision or action on his part. For, with respect to each tendered reason, I was required to determine not merely whether his decisions and actions (not in dispute) were justified, but also whether, if arguably wrong, they were nonetheless made or taken in good faith. In a very few instances, the attendant circumstances might have been such as to provide of themselves a definitive answer to the latter inquiry. In most instances, however, the answer was at least heavily influenced by the manner in which the alleged retaliator responded to the questions asked of him, particularly on cross-examination, with regard to the foundation for his actions. For that manner both could and did provide an insight into the genuineness of his asserted reason or motive, an insight that could not be drawn from simply a perusal of a cold stenographic transcript.²

Following the conclusion of the hearing, the receipt of the parties' posthearing briefs, and an oral argument on some procedural issues not of current moment, I rendered a 55-page initial decision on May 26, 1993. In Part I of that decision, I detailed petitioner's GAO employment history with a footnote notation to the effect that the recitations were essentially based upon uncontroverted evidence. After disposing in Part II of the procedural issues (largely in petitioner's favor), I turned in Part III to an analysis of the merits of the controversy. My conclusion, based upon my view of the record as a whole (including my judgment as to the credibility of the explanations of the various management officials as to what prompted their challenged decisions and actions), was that petitioner had not fulfilled his ultimate burden of persuasion on his claims. As stated in Part IV,

I found as a fact that:

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.

2. Before me, petitioner was represented throughout by the Office of the Board's General Counsel. Apparently, the General Counsel decided that my decision and the result reached in it were not materially in error. At least that is a reasonable inference from the fact that the General Counsel chose not to file a request for reconsideration of the decision on petitioner's behalf. In this connection, it is worthy of passing note that the General Counsel commendably seems not at all reticent to seek such reconsideration of an initial decision if he believes it to be in error.³

As was his right, however, petitioner chose to request reconsideration pro se. In a June 25, 1993 filing, he invited the full Board to review the initial decision on the ground that it was "the result of errors which cause the decision to be arbitrary and capricious and otherwise not consistent with law." He then went on to particularize those errors.

Adhering to the course I followed in the Malphurs proceeding,⁴ I elected not to participate in the collegial consideration of the request by the other Board members. Rather, as in that case, I examined the request, and the agency's response to it, independently. That examination satisfying me that none of petitioner's averments called for a change in the result reached in the initial decision, I awaited the action of my colleagues.

In the circumstances, I assumed (as likely did both parties) that that action would be in the context of what petitioner sought--namely, a review of the initial decision to ascertain whether any of his particularized objections to it had substance. As the majority opinion reflects, however, that assumption proved wide of the mark. Three of my colleagues have chosen instead simply, in effect, to discard the initial decision and to proceed to render what is tantamount to an initial decision of their own--an initial decision partially inconsistent with mine yet rendered without the benefit of the observation of a single witness.⁵

The majority's naked authority to undertake such action is beyond cavil--our Rules of Practice expressly provide that, "[i]n reviewing the initial decision, the Board may review the record as though it were making the initial decision." 4 C.F.R. §28.87(c). But what may be authorized is not necessarily an appropriate course in the particular case. In this instance, the majority not only has failed to provide a cogent explanation for what is facially a curious choice but, with due respect, I submit that no rational justification is possible. Moreover, as will be seen, in carrying out this mission the Board has committed such patent and consequential error, both procedural and substantive, that reversal on any further judicial review is close to a certainty. The prospect of additional litigation is all the more regrettable in light of the fact that the petitioner's case is utterly devoid of substantial merit.

I.

Although asserting that it was not required to assign any reasons for embarking upon a de novo review, the majority nonetheless has chosen to provide those reasons in an extended footnote. Without any attempt at elaboration, the majority catalogues the numerous sins of commission and omission that, in its view, required it to scrap the initial decision in favor of an ab initio decision of its own.⁶

In short, the majority would have it that the initial decision was seriously defective both in content and in result. Even assuming that there were merit to that conclusion,⁷ it does not come close to providing an adequate underpinning for the majority's election to follow the course that it has pursued. Nor does the tendered explanation come to grips at all with the elements of fundamental lack of fairness that perforce attends upon the chosen course.

A. To begin with, it was scarcely necessary for the majority to conduct a de novo review and to render a voluminous "from scratch" opinion in order to develop its proposition regarding the deficiencies that it insists inhere in the initial decision. That could have been accomplished within the bounds of an appellate review of the stripe plainly contemplated by our Rules.⁸ If, for example, the majority thought that my findings, as the trier of fact, were incomplete, it would have been easy enough to have identified specifically those additional findings that purportedly were required--and with equal specificity explained why (contrary to my view) they were obligatory. Similarly, it would have taken considerably less effort in the final analysis had the majority pointed to those facts not considered in the initial decision that, to its mind, mandated conclusions different than those reached in that decision. The same can be said with respect to the conclusions on the existence of prohibited personnel practices that assertedly were unjustifiably omitted from the initial decision. And, finally, there is a total disconnect between the majority's claim that counsel for the petitioner received unjust and intemperate criticism in the initial decision and its conclusion that the criticism necessitated a de novo review.⁹

B. But the major vice associated with the majority's course is not that my colleagues could have accomplished their objective in much shorter order within the confines of the familiar appellate review that normally prevails in circumstances where, as here, individuals who did not conduct the trial are called upon to examine on a cold record challenges to the findings of the individual who did hear the witnesses.

Rather, that overarching vice lies elsewhere.

As previously noted, because of the majority's action this proceeding appears to be a fit candidate for judicial review--at the very least, that option is available to the agency. How might the appellate court intelligently evaluate the majority's decision without having before it a reasonably particularized and thus informative discussion as to why the findings on which the initial decision rested were either in error or incomplete? By simply reversing in part the initial decision with little particularization of its perceived deficiencies, the majority would deprive the court of any opportunity to determine whether those deficiencies in fact existed; *i.e.*, whether the replacement of the initial decision with the majority's decision was itself an abuse of discretion.¹⁰

Moreover, is not the agency entitled to some more illuminating exposition as to why an initial decision in its favor is being relegated to the waste bin than simply the broad brush claims of infirmity offered without elaboration by the majority? On that score, the majority also appears to attach no significance to the fact that the agency was not put on any advance notice that the Board intended to conduct a de novo, rather than an appellate, review of the initial decision.¹¹ Yet the failure to provide such notice had obvious important consequences. Nothing in petitioner's request for reconsideration of the initial decision served to alert the agency to the possibility that, instead of accepting his invitation to review the initial decision and to overturn it for certain specified reasons, the Board would discard the decision and proceed back to square one. Thus, unsurprisingly, the agency's response to the request did not take into account that possibility; to the contrary, with full justification, it implicitly assumed that the Board would consider the reconsideration request in the terms presented. With all due respect, I submit that, whatever else might be said for the Board's reservation to itself of the authority to conduct de novo reviews, it is not empowered to exercise that authority, as it did in this instance, in a manner that runs roughshod over the legitimate interests and procedural rights of the parties before it.¹²

C. As thus seen, the majority's resort to a de novo review was unnecessary to the rectification of any errors that it perceived to exist in the initial decision and was accomplished only at the price of fundamental unfairness. What, then, really was at the foundation of that choice? Although I would not presume to answer that question for the majority, I can say this with confidence: The effect of that review was the assumption of free license to engage in the most rank speculation and conjecture, a course that would not have been so readily available to the majority had it confined itself to the appellate review customary in these situations.¹³

I will have more to say on this subject when, in Part II, *infra*, the basis for the majority's pivotal finding on the issue of retaliation at ATRO is examined in some depth. Suffice it here to provide an example that stems from the justification offered for the majority's choice to conduct a de novo review (although, as it turned out, this particular matter did not influence the result my colleagues have reached).

One of the claims made by petitioner before me was that the denial of certification to the Band I full performance level at ATRO in June 1989 (before his transfer to NSIAD) was a retaliatory act. I found this claim frivolous and did not hesitate to say so. Moreover, being of the view that lawyers--and I might add government lawyers in particular--owe a manifest obligation to the tribunals before whom they practice to refrain from pressing baseless claims, I raised a question whether petitioner's counsel breached that obligation in this case.¹⁴

Characterizing my observations in this regard as "the use of intemperate and unjustified language as to counsel for petitioner,"¹⁵ the majority insists that it provided one of the reasons why *de novo* review was warranted. Although, as previously noted, the majority could have made its point (meritorious or not) just as easily in the context of the customary appellate review that petitioner had requested, it is instructive to examine the underpinnings of both my observation and the majority's response to it.

My conclusion that petitioner's claim pertaining to the lack of certification at ATRO was totally baseless rested on these uncontroverted facts:

1. In June 1989, ten ATRO employees were considered for certification to the Band I full performance level.
2. Of the nine other employees, all but one had more time in grade than had petitioner.
3. None of the ten received certification.
4. Petitioner did not even attempt to demonstrate that his situation (e.g., qualifications) were so different from those of the other nine that there was not a rational foundation for denying him certification along with the others.
5. Indeed, petitioner offered nothing at all in support of his claim that the denial of certification in June was retaliatory other than the fact of the denial itself.

I respectfully submit that, given the foregoing considerations not in dispute, no individual engaged in disciplined decision-making would or could have reached any conclusion other than that the claim in question was so insubstantial that its rejection out-of-hand was mandated. Whether such an individual would have gone on to criticize counsel is another matter--some adjudicators (including this one) feel more strongly about the duty of lawyers to refrain from wasting the tribunal's time than do others. If, however, my assessment of insubstantiality was on sound ground, my prerogative to put forth the comment I did is beyond serious doubt.

What, then, is the foundation for the majority's rejection of that comment as "intemperate" and "unjustified"? The majority professes to find "not implausible" and to "raise suspicions" the following scenario now offered by petitioner in explanation of his thesis that the failure to certify him in June 1989 was retaliatory:

Mr. Martin [the ATRO manager] delayed the certification process until after petitioner left, in order to avoid taking what would amount to an adverse action against petitioner (denial of certification) and thus evade another discrimination complaint against the ATRO, that is, if no one were certified, petitioner could not claim that he was treated differently. Mr. Martin, of course, knew that under the settlement agreement Petitioner would be leaving the ATRO around July; GAO procedures only required Mr. Martin to reevaluate for certification "within the next 90 days" after a denial.¹⁶

Although my colleagues in the majority found it unnecessary to accept or reject this scenario (because they were finding retaliatory action in ATRO on other grounds), it is illuminating that they would attach the label of plausibility to a theory (not, as I recall it, advanced at trial) that rests entirely on the most rank speculation and conjecture having not the slightest foundation in the record. As I think most disinterested observers would agree, the scenario is not only implausible but absurd. Surely, it is reckless even to

suggest--without any record basis whatever-- that Mr. Martin might have sacrificed the interests of nine other ATRO employees in order to do injury to petitioner.

I would have preferred not to explore this subject again. It is not my purpose to embarrass anew counsel who represented petitioner before me. She is an honorable lawyer, who in this one instance made what I deemed to be a mistake worthy of critical comment. The majority has, however, left me with little choice. This is because both its attack upon my comment, and the justification offered for it, lay entirely bare the majority's willingness--indeed seeming eagerness--to substitute fanciful speculation for an effort to come to terms with hard fact. While this had no real consequences insofar as concerned the ATRO certification issue, as will be seen in Part II the same departure from disciplined decision-making undergirds the finding of retaliation that the majority does make.¹⁷

With these considerations in mind, I now turn to the merits of the partial reversal of the initial decision.

II.

As earlier noted, the ultimate conclusion reached in the initial decision was that petitioner had failed to fulfill his burden of demonstrating that he was the victim of (1) retaliatory action on the part of agency officials; and/or (2) any prohibited personnel practice "that might justify the grant of any of the relief sought by him." The qualification on the second prong of the conclusion rested on my belief, explicitly stated in the initial decision, that there is no occasion to consider whether a particular action or decision of an agency official¹⁸ constituted a prohibited personnel practice unless it appeared from the record that the employee suffered possible prejudice as a result. My rationale for this belief was summarized in footnote 37.

In carrying out [the analysis of petitioner's claims], 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.

My colleagues see it differently. As the majority decision reflects, they think it appropriate to consider at the outset whether a particular challenged agency action or decision was a prohibited personnel practice. If that question is answered in the affirmative, the matter of prejudicial effect is then considered. Invoking that process, the majority has found a number of what it deems to be prohibited personnel practices. Its ensuing examination of their effect has led it to the conclusion that some but not others caused injury to petitioner and thus called for remedial measures.

Although adhering to the opinion that my approach is preferable,¹⁹ I find no legal or other fatal infirmity in the majority's approach (which has the additional endorsement of Judge McBride). At the same time, however, I see little reason for unnecessarily expanding this opinion by concerning myself with majority conclusions that the majority itself has found not to provide a basis for relief. Accordingly, I will address solely (and then only to the extent absolutely required) the purported prohibited personnel practices to which the majority attaches operative significance.

But before going into the specifics of the retaliation and prohibited personnel practices issues, there are yet other procedural matters requiring recognition. In her separate dissent, Judge McBride questions whether all of the claimed prohibited personnel practices were properly presented. Although I share her concern in that regard, I will not pursue it independently here. For there is a much more fundamental difficulty with respect to the manner in which the majority approached the discharge of its responsibilities--one which, in my view, removes any possible doubt that its result is infected with reversible legal error.

In the version of its decision currently in hand, after setting forth the reasons for its conclusion that James Martin, the ATRO manager, had retaliated against petitioner, the majority expressly concedes in an accompanying footnote that "[p]etitioner cast his argument as to retaliation at the ATRO based upon other facts of record (emphasis supplied)."²⁰ In short, by its own admission, the majority has convicted an agency official of retaliation on a theory that was not suggested by petitioner (or the Board's Deputy General Counsel who represented him before me) and, as to which, the official consequently was provided with no opportunity to respond directly (i.e., to defend himself).

Even if retaliation were not the serious matter that it is, I would have regarded this treatment to be remarkable to say the least. Given, however, that a finding of retaliation brands the alleged offending official as guilty of egregious misconduct, the treatment is not merely novel but alarming. Surely, before taking action that has the effect of destroying the reputation of a federal career employee who has served for many years in a responsible managerial position (honorably insofar as the record at hand reflects), one should be extremely careful to ensure that the employee has been judged solely on the basis of the specific charges brought against him (here the precise claim of retaliatory conduct and the precise foundation assigned for it).²¹ That, I respectfully submit, is what due process is all about.

What, then, is the justification offered by the majority for pinning the label of retaliator on Mr. Martin, the ATRO manager, on grounds that concededly have not been offered by petitioner and, thus, have not called for a specific defense at any point? In essence it is that, when embarking upon a de novo review, anything goes. According to the majority, in such an undertaking it is free to consider and to rely upon whatever it wishes. As the majority apparently would have it, by invoking the magic words "de novo review," it may push to one side the long-settled right of one charged with a violation of law to be given sufficient notice of the underpinnings of the charge to enable the presentation of a competent defense.²²

Contrary to the majority's belief,²³ nothing in our February 24, 1992 decision in Dowd v. GAO (Docket No. 91-03) lends the slightest support to this enterprise. Dowd is plainly and decisively distinguishable. There, we were confronted with the agency's motion to dismiss a petition for review on the ground that, as a matter of law, the petitioner could not prevail on his claim even if he established all of the facts alleged in his complaint. It was in this context that we said that, in passing upon the agency's motion to dismiss, we could not confine ourselves to the particular legal theory advanced by petitioner in support of his case but had to determine whether there was some other legal theory sufficient to defeat the motion and to allow the case to go forward to trial. For this proposition, we cited, inter alia, Bramlet v. Wilson, 495 F.2d

714, 716 (8th Cir. 1974).

Extended discussion should not be required with respect to the pivotal distinction between the two situations. In Dowd, we undertook to ascertain whether, "on the facts [p]etitioner alleges, there is any possible legal basis for granting the relief sought."²⁴ We determined that such a legal basis existed and, therefore, the agency's motion to dismiss was insubstantial and the petitioner was entitled to go forward on his factual allegations. In this case, following a trial (in which its members did not participate), the Board majority has decided factual issues against the agency (and its official) on a theory not advanced by petitioner and, therefore, not presented for defense. Bramlet most assuredly does not countenance such action and I would be most surprised if the majority were able to find any support for it in either judicial decisions or prior decisions of this Board.

In sum on this point, if nothing else in the majority's decision cries out for judicial intercession, such intercession is necessary to dispatch once and for all the notion that the authority to conduct a de novo review carries with it the authority to disregard conventional principles of fundamental fairness. On that score, I entertain little doubt that the District of Columbia Circuit would be not merely surprised, but chagrined, to learn of the use that the majority has now made of the green light given the Board in Chen v. General Accounting Office, 821 F.2d 732, 736 (D.C. Cir. 1987) to provide for de novo review by regulation.²⁵ My equal conviction is that the Congress that created this tribunal would be no less distressed by the majority's insensitivity to the entitlement of all parties coming before the Board--not merely employees-- (1) to know what the adversary is claiming on factual issues, (2) to have an adequate opportunity to respond to those precise claims, and (3) to be judged on the basis of the claims and the response thereto.

A. With these decisive due process infirmities out of the way, I proceed to the substance of the majority's determination that, in his capacity as ATRO manager, Mr. Martin unlawfully retaliated against petitioner for having filed a discrimination complaint while employed in ATRO's Huntsville sublocation.²⁶ According to the majority, that retaliation took the form of the failure to have furnished NSIAD, the headquarters division to which petitioner was transferred as a consequence of the settlement of that complaint, with sufficient information as to his ATRO performance.

As shall now be seen, the majority's determination rests upon nothing more than the same kind of speculation and conjecture--based in turn upon some dark and totally unfounded suspicion regarding Mr. Martin's good faith--that surrounded the majority's conclusion that petitioner's ATRO certification scenario was "not implausible." In this instance, however, the stakes are much higher. With regard to the certification scenario, the majority contented itself with simply endorsing the possibility that, with guile that would have been admired by Machiavelli, Mr. Martin undertook to deny petitioner certification in a manner that caused other ATRO employees to suffer. Here, the majority finds as an absolute fact--without the slightest doubt as to its accuracy--that Mr. Martin violated his oath of office and committed one of the most serious sins--short of criminal misconduct--that can be laid at the doorstep of a federal manager. That, once again, is very serious business indeed.

Let us start with the facts and then look at the inferences built upon other inferences that the majority invokes to reach its conclusion. Those facts may be summarized as follows:

1. The settlement agreement expressly provided for the expungement of the only written appraisals of petitioner's ATRO work on the GS-11 level. This proviso was inserted in the agreement at petitioner's behest, who was then being advised by private counsel. The agreement was entirely silent on the subject of whether, although clearly unwilling to have NSIAD made aware of ATRO's written evaluation of his performance on the jobs covered by the two appraisals, for some undisclosed reason petitioner was nonetheless prepared to have an ATRO oral appraisal of his work on the FAA job disclosed to his new employing office. Had petitioner desired the non-disclosure to apply only to the jobs covered by the expunged appraisals--i.e., wished some but not all of the appraisals of his GS-11 work at ATRO made available to NSIAD--, he could have insisted upon the inclusion of a specific provision to that effect.

2. The precise extent of Mr. Martin's personal involvement in the negotiating process does not clearly appear in the record. We do know, however, that he did not deal directly with petitioner but, rather, participated in the negotiations through Nilda I. Aponte, the then Acting Director of the agency's Civil Rights Office (Tr. 988). Thus, petitioner's discussions as to why he desired to have two appraisals expunged were not with Mr. Martin, but rather were with Ms. Aponte.

Still further, in response to a question from petitioner's counsel regarding his involvement in attempting to resolve the Huntsville complaint, Mr. Martin noted that he was involved only in the sense that he talked with the civil rights counselor in ATRO to whom petitioner initially presented his discrimination complaint (Tr. 1018-19). For her part, Ms. Aponte made reference to Mr. Martin's participation in the settlement negotiations without the slightest indication that it was extensive. Moreover, not only was Mr. Martin but one of several signers of the settlement agreement on the agency's behalf, but the agreement was actually drafted by Ms. Aponte (Tr. 29).²⁷

3. There is no evidence in the record that any official of the agency, either in ATRO or headquarters, interpreted the agreement as permitting the disclosure to NSIAD of any appraisal of petitioner's ATRO work on the GS-11 level. Most significantly, Ms. Aponte, the draftsman of the agreement and the principal negotiator for the agency, did not express the view in her testimony that, because the agreement specifically referred only to the written appraisals of certain GS-11 work at ATRO, it was the intent of the parties to allow ATRO management to provide oral appraisals of other work on that level.

Given these facts, I am at a total loss to understand how the majority can conclude that Mr. Martin was obliged to read the agreement in the manner that, several years after the event and acting in a calm and deliberative atmosphere far removed from the scene, It (joined by Judge McBride) now would read it. If I understand the majority, it places sole reliance in support of its reading on the fact that the agreement did not literally--i.e., in so many words--cover petitioner's performance on the FAA assignment. But anyone who has had extensive managerial experience can readily appreciate--indeed, may have learned through bitter personal experience--that it is often prudent not to provide a crabbed interpretation to an agreement such as that here involved but, instead, to focus upon the apparent underlying purpose of the provision in question.

On this score, the Monday morning quarterbacking in which my colleagues indulge does not, as it cannot, adequately explain why petitioner possibly might have wished evaluations of some, but not all, of his work at ATRO on the GS-11 level made available to NSIAD. It is quite true that, inasmuch as he was given a within-grade salary increase in June 1989, petitioner's service on the FAA job was regarded as satisfactory by ATRO management. But the two appraisals that petitioner had asked be expunged likewise reflected satisfactory service. In these circumstances, the inference was permissible, if not mandatory, that

petitioner thought his work at ATRO to be of higher quality than reflected in management assessments and, consequently, did not wish any such assessment to accompany him, in writing or otherwise, to NSIAD.²⁸

That most assuredly is the inference that I would have drawn had a like situation arose during my many years in managerial positions in two federal agencies. And I cannot help but speculate as to what the majority's reaction would have been had Mr. Martin disclosed to NSIAD information respecting petitioner's FAA job performance not to petitioner's liking, followed by a complaint on petitioner's part that that action offended the obvious purpose of the agreement to keep ATRO appraisals (written or oral) out of NSIAD's hands. Would its current hindsight view that the agreement required the strictest possible literal interpretation still have carried the day?

But the issue here is not whether petitioner should have given the majority's reading to the agreement--a reading which, to repeat, I believe it unlikely that most managers in Mr. Martin's situation would have provided. It is whether there is any evidence, let alone substantial evidence, to buttress the majority's further conclusion that Mr. Martin's failure to read the agreement as it does was a retaliatory act. The answer to that question is plainly in the negative. Indeed, it is on this score that the majority's appetite for speculation as a substitute for concrete evidence surfaces in its starkest form.

Reduced to its essentials, the majority's case comes down to the fact that, in response to a general question from me, Mr. Martin observed that, in the case of a "good person" on his staff, he would endorse a transfer request with a telephone call to headquarters.²⁹ But far from being an unguarded admission against interest, as the majority would have it, this was an unremarkable answer to the question I posed. And it is precisely the answer that I would have given had the same question been posed to me in my days as a manager. If an employee has done good work for you--and that in context is what Mr. Martin's reference to a "good person" obviously meant--the decent thing to do is to assist him or her in obtaining a desired transfer in any way legally possible.

The insuperable difficulty confronting the majority is that its reliance on the "good person" statement as somehow establishing that Mr. Martin thought petitioner was not such a person (and thus retaliated against him) entails a classic form of circular reasoning, that, I am confident, neither of the academicians in the majority would tolerate for one minute in a classroom setting. Manifestly, that statement has no conceivable relevance for that or any other purpose if Mr. Martin genuinely believed that he could not legally supply information regarding petitioner's FAA job performance to NSIAD. (Stated otherwise, Mr. Martin both could have believed petitioner to be a "good person" and not supplied the information if he thought himself precluded from taking that step.) Yet, the majority attempts to use the "good person" statement as proof that Mr. Martin could not have held that genuine belief, but rather necessarily had a retaliatory intent.³⁰

There are no other considerations that might furnish at least a colorable basis for the majority's endeavor to cloak Mr. Martin with the retaliator mantle on grounds not suggested by petitioner himself. It well may be that he was aware that petitioner's career in NSIAD might be affected by the lack of ATRO performance information. It scarcely follows, however, that his interpretation of the settlement agreement had a retaliatory foundation. A better conclusion would be that petitioner's problem on that score was of his own making. His decision not to allow the written appraisals of his GS-11 work to go forward to NSIAD--despite their "fully satisfactory" ratings--created, as we have seen, at least an ambiguity with regard to what could be furnished.

Nor is it of present moment that Mr. Martin possibly (we do not know for certain on this record) chose not to seek the advice of others regarding his interpretation of the agreement. There being no evidence that any agency official read the agreement differently than did he, it is total speculation that such consultation might have led to a different result. In any event, to be confident in the correctness of one's own interpretation of an agreement does not allow a finding of retaliatory intent simply because someone else might interpret it differently.³¹

This leads me to a final point. The majority, as I understand it, tries to overcome the fact that its members did not hear the witnesses by first conceding for present purposes that Mr. Martin sounded convincing on the witness stand and then maintaining that he was simply an artful liar. This simply will not do. For one thing, as we have seen, there is not a particle of concrete evidence that would allow a conclusion that Mr. Martin was not telling the truth in one or another statement he made on the witness stand--all that the majority can rely upon is the impermissible inference that it would draw from the "good person" statement. Beyond that, demeanor evidence might not be everything but it necessarily carries especially heavy weight where, as here, there is no other reasonable basis for charging the witness with deception (if not perjury).

I observed Mr. Martin closely during his testimony, and most particularly with regard to responses on cross-examination and to my questions. I found him to be a forthcoming witness who showed no signs of hesitation or evasion. I was left with no doubt that Mr. Martin was not merely convincing but truthful.³² In that circumstance, I find even more disturbing the majority's eagerness to discredit him from its distant vantage point. Be that as it may, for the benefit of any reviewing court, I now make explicit what was implicit in the initial decision: a finding, based in part upon my observation of the witness, that Mr. Martin was entirely truthful in his explanation as to why he had not furnished information to NSIAD regarding petitioner's performance on the FAA job.

In sum, the majority's retaliation thesis not only was not pressed by petitioner, but is entirely insupportable. No exposition of or resort to the powers that the Board enjoys when it turns to its de novo review authority can conceivably justify the manifest injustice its decision has worked. Indeed, the Salem "witches" were hanged many centuries ago on no less persuasive "evidence" than the majority can muster here.

B. Moving on to the matter of prohibited personnel practices, although the majority finds that the agency was guilty of a number of such practices and that several of them prejudiced petitioner's GAO career, the relief awarded was most modest. All that petitioner is given exclusively on that score is the upgrading of two ratings on one NSIAD performance appraisal and a corresponding adjustment in the accompanying narrative statement.³³

For the reasons contained in my initial decision, I remain persuaded that the majority is just as much in error in its conclusion in this area as it is with regard to its conclusions respecting the ATRO retaliation claim.³⁴ Because, however, so little is at stake,³⁵ I see no necessity to repeat those reasons here. Rather, I confine myself here to commenting upon the majority's resort to a familiar contract doctrine that, to my knowledge, has never previously been employed in the context of the application of personnel directives.

In my initial decision, I concluded that petitioner had not been entitled to a performance appraisal in connection with his work between mid-February and May 1989 on the FAA job. This was because petitioner had worked fewer than 45 staff-days on that project (38.8 staff-days to be specific); the job was not complete at the time he left it; and no appraisal was requested by him. As the initial decision noted,

and the majority does not appear to challenge, under the system in effect when he performed his last work on the job, in such circumstances no appraisal need have been given.

Despite that recognition, the majority holds that it was a prohibited personnel practice to withhold a performance appraisal on the FAA job.³⁶ This surprising conclusion necessarily is rooted in the fact that, as part of the new pay-for-performance compensation system instituted in June 1989--after petitioner had left the FAA job--the agency decreed that henceforth (i.e., for appraisal years beginning on June 16, 1989) formal written appraisals were to be given as a matter of course to any employee spending 30 or more staff-days on a job.

It may well be that the conversion from one requirement to another produced confusion in some employees' minds as to what standard applied in their own specific case. Indeed, undoubtedly such uncertainty often arises when personnel requirements are significantly altered. But that hardly means that an agency is obliged to give an employee the benefit of a new provision that, on its face, has only prospective application and, thus, manifestly did not govern at the time relevant to the employee's particular situation.³⁷

In these circumstances, even if ever applicable outside of the contract arena, the rule of contra proferentum referred to by the majority³⁸ is quite beside the point here. There is simply no ambiguity whatever in the actual terms of the regulation in effect when petitioner completed his assignment on the FAA job--a regulation that did not require giving him an appraisal on the FAA job in the absence of a request on his part. I would note, however, my doubt as to whether that rule comes into play in other than contract interpretation disputes. In this connection, the majority does not offer any authority for its belief that the rule can be applied in the interpretation of personnel directives.

For all of the foregoing reasons, I am compelled to take strong exception to what I am persuaded is a seriously flawed exercise, from several procedural and substantive standpoints, on the part of a majority of this Board. I therefore dissent from so much of the majority's decision as determines that petitioner has established an entitlement to relief.

DISSENTING OPINION (Nancy McBride)

I dissent, in part, from the decision of the majority and wish to state the basis of this view. The majority has determined to reverse, in part, the initial decision of the Administrative Judge and issue its own decision based on a de novo review of the record. With respect to the retaliation claim, the majority simply reaches a different conclusion than does the Administrative Judge, although it is not suggested that his conclusion was not supported by the evidence. Having reviewed the record, I concur in the judgment of the Administrative Judge on the question of retaliation and, therefore, dissent from the majority. Additional points of disagreement with the majority are noted herein.

I will not attempt to state the facts, accepting unless otherwise noted the findings as stated by the Administrative Judge and as restated and supplemented by the majority. I would also observe as a preliminary matter the difficulty in trying to organize the shifting and divergent threads of Petitioner's case. Petitioner's complaint is understood generally to be that he was subject to: (1) a continuing pattern of retaliation for using the Civil Rights Office process to raise discrimination issues, beginning in Atlanta with the failure to certify him to the full performance level and continuing with NSIAD's failure to certify

him to full performance level on four occasions prior to May 6, 1990 and inaccurate and procedurally irregular appraisal ratings of his performance while at NSIAD; and (2) numerous prohibited personnel practices over the course of his employment with NSIAD, which practices constituted both the basis for charges of prohibited personnel practices and evidence in support of the retaliation claims. The facts, legal theories and legal arguments have continuously tumbled out in different patterns. This is seen most clearly in attempting to analyze Petitioner's claim with respect to prohibited personnel practices.

Prohibited Personnel Practices

The majority has considered as charges all prohibited personnel practices addressed by Petitioner, whether raised in the Petition for Review or injected later in the proceedings. I do not believe that it is proper to consider, as the basis for relief, claims of prohibited personnel practices not articulated in the Petition for Review or an amendment thereto. It puts too great a burden on this Board, as well as the Respondent agency, to permit the wholesale casual amending of the Petition for Review as the case develops. Petitioner presented evidence of a variety of alleged prohibited personnel practices with two objects in mind.

In some cases, the practice was advanced as evidence of retaliation; in other cases, it was advanced as a charge, a finding of which could entitle him to relief. To the extent that a practice is advanced as evidence of retaliation, then it may be considered as such without the specific practice having been pleaded in the Petition for Review. But if such a practice is to be considered as the basis of a claim upon which relief may be granted, then fundamental fairness demands that such a practice be clearly identified in a charging or notice document, or proper amendment thereto, before considering it as such.

The majority has considered, in numbered paragraphs, 15 prohibited personnel practices, some of which actually embrace two or more such practices. Petitioner raised 11 prohibited personnel practices in the Petition for Review. The same 11 were enumerated twice in the Petitioner's Pre-hearing brief. Contrary to the assertions of Petitioner, the Administrative Judge examined each of the alleged prohibited personnel practices. Contrary to the assertions of the Respondent, the Administrative Judge did not determine that there was "no evidence of any impermissible personnel practices." (Respondent's Opposition to Petitioner's Request for Reconsideration, at page 3). The Administrative Judge found that Respondent was not "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." (ID at pages 51-52).

I agree with the premise of the majority that entitlement to relief is not an element necessary to prove before a finding of a prohibited personnel practice. The correct analysis should proceed, with respect to each allegation, to determine whether a prohibited personnel practice had occurred, whether Petitioner had been harmed thereby, and, if so, whether he was, therefore, entitled to any relief.

In view of the Administrative Judge's familiarity with the record, the preferable course would have been a remand to him for findings consistent with the above analysis. The majority having taken the course of ruling on each alleged prohibited personnel practice, I will note my agreement or disagreement as to each in the order in which they are considered in the Decision.

1. ATRO's failure to provide Petitioner with a performance appraisal for the period February 26 through May 19, 1989 and an annual assessment rating on June 15, 1989.

Petitioner asserted a failure to provide a performance appraisal for the FAA job in Atlanta as an instance of retaliation. Petitioner's retaliation claims against ATRO are being considered as allegations of prohibited personnel practices. This agrees with the ruling of the Administrative Judge that the claims were not barred for failure to exhaust administrative remedies (filing a complaint with the CRO), because no such requirement exists with respect to charges of prohibited personnel practices. It was not resolved whether a claim of retaliation for filing a discrimination complaint constitutes a "discrimination" charge subject to the administrative prerequisite of filing a complaint with the Civil Rights Office. The Administrative Judge concluded that the answer to this question was not of any practical significance. In one respect, at least, this is incorrect. The question of remedies, more particularly the availability of compensatory damages, is affected by whether the claim is considered as a Title VII claim or whether it is considered as a prohibited personnel practice.

The majority considers this as a prohibited personnel practice charge and finds a prohibited personnel practice based on confusion in the applicable provisions of GAO Order 2430.1 relating to when ratings must be given. The rule, which has since been changed, required ratings on incomplete assignments when an employee had more than 45 staff days by June 15. Another provision stated that a written appraisal need not be prepared if an individual's total time on a completed job was less than 30 days. While this was not a model of clarity with respect to employees with 30-45 days on an incomplete assignment, it plainly did not establish a rule for the rating of such employees. The majority has termed this an ambiguity, turned it into a mandatory provision, and labeled the failure to follow the nonexistent provision a prohibited personnel practice. I do not agree.

2. ATRO failed to forward to NSIAD Petitioner's performance appraisals for the three years prior to his transfer.

3. Petitioner never received notice or feedback on the certification process at ATRO.

4. NSIAD management failed to give Petitioner feedback after he was considered for certification in August 1989.

5. The performance appraisal on the ALT/Services job, code 396023, and the consideration of Petitioner on November 3, 1989, for certification to the full-performance level were untimely.

6. The November Progress Review Group did not use required information.

The allegations addressed in numbered sections 2 through 6 do not appear in the Petition for Review as instances of retaliation or of prohibited personnel practices. Petitioner presented evidence on these matters in support of his retaliation claims, and I agree that these matters are properly considered in that context. They should not, however, be elevated to charges upon which Petitioner may be entitled to relief. The majority appears to adopt a dangerously expansive concept of notice pleading, allowing descriptive information in the list of names and titles of persons responsible for the actions being complained about to become charges of prohibited personnel practices. Likewise, the mere general assertion of procedural irregularities in the performance appraisal process should not be used to give a petitioner carte blanche to add prohibited personnel practices at the post-hearing brief stage of its case.

7. NSIAD management failed to give Petitioner feedback regarding information considered in recommending against certification at the November Progress Review Group meeting.

8. NSIAD management failed to provide complete and accurate expectations and to monitor Petitioner's performance and provide feedback on the ALT/Services job, code 396023.

Paragraph number 7 alleges a result of the failure to monitor Petitioner's performance and provide feedback on the ALT/Services job. Paragraph number 8 addresses two prohibited personnel practices set forth as numbers 1 and 2 in the Petition for Review.

The evidence established that indexing work papers was a standard developmental task, one which Petitioner, in fact, understood was expected on this particular job. (Tr. 741; PE 18, page 1). I, therefore, cannot agree that the failure to include "index work papers" in the written job expectations constituted a prohibited personnel practice.

I agree with the finding that Petitioner was not given the informal monitoring and periodic feedback designed to prevent "surprises" in the formal appraisal at the end of an assignment or work period. Under the circumstances, I concur with the majority that a prohibited personnel practice occurred. It is true that Petitioner was, in fact, given an opportunity to correct the deficiencies prior to issuance of his performance appraisal. And, it is difficult to assess the harm, if any, caused by the prohibited personnel practice. Nevertheless, considering that the supervisor had Petitioner's work product for almost five weeks before giving him any feedback, that negative feedback was not provided until just before the appraisal and that, for the first time in his GAO career, Petitioner received two Borderline ratings, it should be presumed that Petitioner was harmed.

9. The performance appraisal for February 13 through April 25, 1990 on the University Research job, code 396230 did not accurately depict Petitioner's true performance.

This allegation does not appear in the Petition for Review either as an instance of retaliation or as an alleged prohibited personnel practice, and therefore, it should not be considered by the Board as a claim for relief based on a prohibited personnel practice. The Petition for Review does mention lowered performance appraisal ratings as a retaliation claim. However, the alleged practice addressed by the majority does not relate to a lowered rating, but, rather, Petitioner's claim that the rating was not based on his performance. Although the majority concluded on the merits that the Petitioner did not establish a prohibited personnel practice, I take issue with its willingness to consider this.

10. NSIAD failed to set new expectations for Petitioner after he was given a promotion equivalent increase, i.e., promoted to full performance level.

I agree with the majority that Petitioner did not establish a prohibited personnel practice.

11. NSIAD failed to set expectations within 30 calendar days of Petitioner's assignment to DOD Contracts job. I agree with the majority that the actions complained of did not constitute a prohibited personnel practice.

12. Petitioner was not given a final performance appraisal upon his release from the University Research Center job, 396230.

Management was not required to give Petitioner a performance appraisal for this period unless so requested by Petitioner.¹ Nothing in the rule limits the time within which an employee may ask for an appraisal. Petitioner asked for an appraisal three to five months after his release from the job. At some

point, an employee who has failed to request an appraisal would be deemed to have waived his right to ask for a rating, even though the rules do not prescribe a time within which he must do so. Nonetheless, I cannot say that three or five months constitutes a waiver. Therefore, the failure to provide the appraisal after one was requested constituted a prohibited personnel practice.

However, there is no evidence of any harm to Petitioner as a result of the failure to evaluate him when requested or as a result of the continued absence of such an appraisal. Because the appraisal would have been for a short period of time, one for which an appraisal was not required, no negative inference should be drawn from its absence. Petitioner's performance during the period in question was not shown to have been a factor in any subsequent personnel decision. Therefore, Petitioner is not entitled to any relief based on this violation.

13. Failure to monitor performance and to provide coaching and feedback during the rating period of October 29, 1990, to January 4, 1991, on the DOD Contracts job, code 396237.

I agree that no prohibited personnel practice resulted from the supervisor providing feedback, monitoring and coaching in written form.

14. Failure to give progress reviews to Petitioner on the DOD Contracts job, code 396237.

The language in the Manual is not mandatory and I do not agree that the failure to conduct a formal progress review constituted a prohibited personnel practice. It is clear that such reviews are viewed as desirable, but they are just one way in which the mandatory feedback, monitoring and coaching can occur.

15. Signing of rating for period October 29, 1990, to January 4, 1991, on the DOD Contracts job, 396237, by the wrong supervisor.

Petitioner complains that a document called NSIAD Human Resources Memo #4 established the NSIAD policy on requirements for rating when supervisors change during the appraisal period. In such a case, it is NSIAD policy to require that a rating be written when a supervisor moves or is replaced. In my view, NSIAD Human Resources Memo #4 is a permissive policy guiding one GAO division in its effectuation of GAO's rules implementing the merit systems principles. Deviation from such a policy does not constitute a prohibited personnel practice.

Retaliation

1. Retaliation at ATRO

Petitioner alleges a continuing pattern of retaliation spring from two sources. The first involves the conduct of Mr. Martin, the director of the ATRO during all time relevant to Petitioner's complaints about the office. Petitioner bore the burden of establishing, by a preponderance of the evidence, that the ATRO conduct constituted retaliation against him for the exercise of protected activity. The alleged retaliation is:

1. failure to certify Petitioner to full performance level in June 1989;
2. failure to evaluate Petitioner's performance on FAA job;

3. failure to forward all appraisals, other than the two expunged, from three-year period predating Petitioner's transfer to NSIAD, as required by GAO Order 2430.1; and

4. failure to discuss Petitioner's prior performance with NSIAD.

It is asserted that allegations 2, 3, and 4 prevented him from being certified to the full performance level at NSIAD in July 1989, August 1989 and November 1989.

The ATRO retaliation claims should fail for two reasons: first, they are untimely before this Board and, second, Petitioner has not met his burden of proof.

Although all procedural issues were resolved in favor of Petitioner and Respondent has not sought reconsideration, I think that it sets a very bad precedent to consider these retaliation claims, raised for the very first time in the Petition for Review, filed almost three years after their occurrence. Petitioner asserts that in February 1990, when NSIAD turned him down again for certification to full performance, he realized that he was the victim of a continuing pattern of retaliation commencing at ATRO. Yet, in all the complaints that he filed between February 1990 and May 1992, he never made any allegations against ATRO.² I can think of no reason to entertain these complaints at this late date.

Although I adhere to the notion that the General Counsel is not precluded from raising a charge or charges not raised by the Petitioner, there must be some fairness and restraint in the application of this latitude. That fairness is missing here, where the three-year old charges are against an office and an individual not charged with anything in the timely complaints. Nor does the continuing violation theory save these charges. The majority agrees that there is no link between the ATRO acts, some of which are found to be retaliatory, and Petitioner's experience at NSIAD, which are found not to have constituted retaliation for his earlier ATRO discrimination complaint. Thus, the continuing violation theory clearly does not apply here.

Assuming, however, that the charges were properly before this Board, I cannot agree that Petitioner has met his burden of proving retaliation in any of the ways alleged, even though I do not share the view of the Administrative Judge that Petitioner failed to make a prima facie case or that his claims, if timely, were frivolous.

With respect to the failure to certify, Petitioner did state a prima facie case of reprisal as a prohibited personnel practice, but the Respondent's asserted nonretaliatory reasons for not certifying him were not shown to be pretextual, a finding with which the majority does not disagree.

An evaluation on the FAA job was not required or requested and, therefore, the absence of such an evaluation does not constitute the taking or failure to take a personnel action as that term is defined at 5 U.S.C. §2302(a)(2)(A), and a prima facie case is not established on this claim.

The failure to forward appraisals is likewise not a personnel action. Even if it were, it was shown to have been an administrative error, unmotivated by retaliation and not at all harmful to Petitioner because this missing evaluations were for this performance at the GS-7 and GS-9 levels, which would not have been considered in evaluating him for certification to full performance.

The final contention was that Mr. Martin's refusal to discuss any aspect of Petitioner's prior performance with NSIAD constituted reprisal. The terms of the settlement agreement did not mandate Mr. Martin's refusal to discuss any aspect of Petitioner's performance. I am persuaded, however that Mr. Martin thought that it did and that his error was simply that, and not motivated by a desire to retaliate against Petitioner.

Mr. Martin's interpretation of the agreement is not, as the majority would have it, inherently improbable. To the plausibility of his interpretation is supported by the fact that Petitioner never asked for an evaluation on the FAA job and he refused Mr. Goldbeck's entreaties in November 1989 to let ATRO give NSIAD information on his performance there. Petitioner was fully aware, at least by November 1989, that his lack of performance history was an impediment to his certification; yet, he did not then suggest an interpretation of the settlement agreement that differed from Mr. Martin's.

Despite the recitation of the Hillen factors by the majority, it is clear to me that demeanor should be the most significant determinant of the credibility issue here presented. The only factor established in support of the majority's resolution of the credibility issue is the possibility of bias on the part of Mr. Martin. I am of the opinion that all the other factors cut in favor of the credibility determination made by the Administrative Judge: Because of his role in the settlement negotiations, Mr. Martin was in a position to understand the parties' interpretation of it; there was no evidence of any character issues weighing against him; there was no prior inconsistent statement; his version is supported by other evidence, especially Petitioner's conduct, as described above; his version is not inherently improbable. See, Hillen v. Department of the Army, 35 M.S.P.R. 453 (1987). The majority states that it assumes that Mr. Martin's demeanor was good. With that assumption, I fail to see a reasonable basis for rejecting the credibility determination made by the Administrative Judge.

I also note that Mr. Martin's thoughts on Petitioner's performance were such that he declined to certify him to the full performance level, because he did not believe that Petitioner was ready to perform at that level. It seems likely that any comments that he might have offered To NSIAD would not have been in support of certification.

The majority makes much of Mr. Martin's failure to take a proactive role in looking out for Petitioner's career development. Its view that Mr. Martin would have ordered a performance appraisal on the FAA job, i.e., in a situation where an appraisal was not otherwise required, for a "good" employee, is utterly without support in the record. The most that can be said is that Mr. Martin would phone ahead for a "good" employee considering a transfer. The settlement agreement itself obviated the need for what Mr. martin said he would normally do for a "good" employee. The transfer was already approved and called for no intervention on his part. In any event, Mr. Martin's failure to take voluntary action to advance Petitioner's career is not adverse action and it does not deserve the label "letting Petitioner twist slowly in the wind."

II. Retaliation at NSIAD

The second pattern of retaliation alleged by Petitioner relates to a series of events that occurred during his assignment at NSIAD. I agree with the Administrative Judge and the majority that Petitioner did not establish retaliation at NSIAD. There is virtually no evidence to support even an inference of retaliation.

Notes [to McBride Dissent]

1. I am assuming that Petitioner worked fewer than 30 days in this job code during the period April 26, 1990 through June 15, 1990. Respondent framed its argument in terms of the period May 6 to June 15, 1990, the period following Petitioner's "reassignment" to full performance level. If this date was not significant for purposes of triggering a duty to set new expectations, then it is likewise insignificant as the start of a performance appraisal period. Therefore, if Petitioner worked more than 30 days on this job during the work period following his April 25, 1990 appraisal through his release date on June 15, 1990, the failure to evaluate him at that time, without any request, would have constituted a prohibited personnel practice.

2. In the CRO complaint against NSIAD filed in April 1990, there is a suggestion of a complaint that ATRO had breached the 1989 settlement agreement. This is a wholly different matter than retaliation. Moreover, it does not appear that Petitioner followed up on or pursued this claim during the course of the CRO complaint against NSIAD.

Notes [to Rosenthal Dissent]

1. There is, of course, no room for question that the issue of retaliatory intent is an issue of fact. Sumner v. United States Postal Service, 899 F.2d 203 (2nd Cir. 1990); Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346, 1354 (9th Cir. 1984).

2. The majority endeavors to deprecate my reliance upon demeanor evidence by pointing (at 322) to comments contained in footnote 5 in my separate July 10, 1992 concurring opinion on the full Board consideration of the initial decision rendered by me in Malphurs v. GAO, 2 PAB 147 (July 8, 1992). What the majority fails to disclose, however, is the context in which those comments were made. The concurrence was directed to the failure of the parties to have supplied available official records during the hearing on a matter of pure objective fact: on what date did the petitioner transfer from the supervision of one official to that of another? Because of that failure, I was required to decide between the conflicting recollections of petitioner and an agency official as to the actual date of transfer on the basis of a judgement respecting whose recollections of petitioner and an agency official as to the actual date of transfer on the basis of a judgement respecting whose recollection was likely better.

The point I made in criticizing the parties for not supplying the available records was that, to have attempted to rely on the witness demeanor in resolving the dispute to which the concurrence was addressed would have a course "fraught with many perils." And, as the quote supplied by the majority reflects, I said that "in [that] case" --i.e., not in all cases--witness demeanor provided no useful insight.

In the case now at hand, the retaliation issue is not likewise one of objective fact. It is, rather, what was the motive underlying actions taken by agency officials. Not only did I not imply in Malphurs, let alone state explicitly, that the manner in which agency officials explain their actions on the witness stand is irrelevant, but any such claim would have been patently bootless. Of course, as I noted, there are "good" and "bad" witnesses. This does not detract, however, from the fact that, particularly where intent is concerned, triers of fact are often called upon to determine whether a specific witness sounds convincing because his or her testimony is genuine or, rather, because he or she possesses exceptional acting ability. In this case, I did precisely that--aided by over twenty years of adjudicatory experience. Yet, with barely a wave of the hand, the majority was held for naught my observations of the witnesses as they testified.

3. See, e.g., his July 26, 1993 request for reconsideration of the July 8, 1993 initial decision in Rosenbaum v. GAO, Docket No. 93-01.

4. See concurring opinion in Malphurs v. GAO, Docket No. 91-04 (July 10, 1992 full-Board decision).

5. The fact that the majority has cast its outcome in terms of a partial affirmance and a partial reversal of my initial decision does not alter the fact that its voluminous decision is, in every real sense, the equivalent of an initial decision.

6. Majority decision at, n. 4.

7. It is rather surprising that defects so readily apparent to the majority seemingly escaped the attention of the Board's General Counsel, an experienced litigator who served for many years as a member of this Board (and between 1987 and 1990 as its Chairman).

8. By virtue of 4 C.F.R. §28.87(d), the Board is required to "reject an initial decision, in whole or in part, *** when [it] finds" that

- (1) New and material evidence is available that, despite due diligence, was not available when the record was closed;
- (2) The initial decision is based on an erroneous interpretation of statute or regulation;
- (3) The initial decision is arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;
- (4) The initial decision is not made consistent with required procedures and results in harmful error;
- or
- (5) The initial decision is unsupported by evidence required by the requisite burden of proof as set forth at §28.61.

Those are familiar ingredients of an appellate-type review.

9. That claim is considered more extensively, infra.

10. I would think that not even my colleagues in the majority would dispute that, in some circumstances, the wholesale substitution of the findings of reviewing judges for those of the trial judge might constitute such an abuse.

11. Presumably, the majority relies on the fact that our regulations do not specifically require the providing of such advance notice. There is, however, an at least implicit obligation to observe fundamental fairness in the application of those regulations.

12. As will be seen in Part II of this dissent, infra, in an even more crucial respect the majority has demonstrated an insensitivity to the dictates of procedural due process. I would add that the majority can derive no comfort from the fact that, in Rojas v. GAO, Docket No. 92-03, the full Board replaced the April 2, 1993 initial decision of Judge Weinstein with one of its own (issued on May 20, 1993). The important difference between the two cases is that, in Rojas, the full Board neither reached a result different from that of the member who heard the evidence nor substituted its judgment for that of that member on matters necessarily involving an appraisal of witness credibility. I certainly would have not cast my vote in favor of the action taken in Rojas had the situation been otherwise.

13. To repeat, this was the type of review that was requested by petitioner.

14. Initial decision

15. Majority decision at n. 4.

16. Majority decision at n. 40.

17. My comments to which the majority has taken unwarranted exception did not extend to the claim regarding the July 1989 denial of certification. For reasons stated in the initial decision, however, that claim likewise is not substantiated in the record.

Nor did I suggest that any other claim advanced by petitioner before me warranted criticism of counsel. To the contrary, while finding all of petitioner's claims lacking in proof, my criticism was in terms restricted to the ATRO June 1989 certification issue.

18. I include inaction on the official's part within the scope of this phrase.

19. Our role as adjudicators is to determine whether, as claimed, an employee has been injured by agency actions or decisions said to have been improper. It does not appear to me to be a useful expenditure of our time--or the taxpayers' money--to explore at some length, as does the majority, asserted management derelictions that, in any event, were of no moment. I would leave a judgment on such asserted derelictions to a case, should one arise, in which the claimed impropriety had some real significance in terms of the petitioner's employment.

20. Majority decision at, n. 43. In a prior version of the majority's decision supplied to me, the same concession was expressed in terms of petitioner having cast his argument "on other grounds."

21. It is, of course, not my place to determine the fate of an agency employee properly found to have engaged in retaliatory action against an employee who had previously filed a discrimination complaint. I can say with confidence, however, that a subordinate of mine in such a situation would have had reason to be concerned about not merely reputation, but continued employment as well. To my way of thinking, short of outright criminal conduct, there are very few more venal sins that might be committed by an agency official. In this connection, it is one thing to be found to have committed a prohibited personnel practice. Most such practices are the result of either unawareness of particular personnel requirements or inattention to those requirements. In neither instance is a question of personal character presented. The same is not so where, as here, the official is charged with a deliberate endeavor to punish an employee for having exercised a statutory right--and, thus, with a knowing violation of a legislative enactment of the significance of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.

22. See majority decision at, n. 43.

23. Ibid.

24. Dowd v. GAO, supra.

25. Of course, judicial review of this decision will lie in the Federal Circuit. 31 U.S.C. §755(a). There is no reason to believe, however, that that court is any less concerned with the essential ingredients of fair play and, thus, would receive any more favorably the majority's thesis as to the virtually limitless bounds of its powers once it incants the words "de novo review."

26. Majority decision at et seq.

27. Although seemingly given no effect in the analysis portion of its decision, at least some of these facts (e.g., Ms. Aponte's role as draftsperson of the settlement agreement) were alluded to in the majority's statement of facts.

28. While it might have been preferable to have made such a desire explicit rather than implicit, experience teaches that what is preferable is not always accomplished.

29. Majority decision at.

30. Although there is no necessity to press the point here, there is the additional factor, noted by Judge McBride in her dissent, that petitioner did not need Mr. Martin's assistance in accomplishing the transfer to agency headquarters. As a literal matter, Mr. Martin's response to my question was framed in terms exclusively of assisting an employee to obtain a transfer. See majority decision at, n. 39. It is thus open to some question whether the response had any application to the matter of providing information to NSIAD respecting petitioner's performance on the FAA job. I do not need or wish to place primary emphasis on this factor inasmuch as, for the even stronger reasons stated in the text, the majority's reliance upon the "good person" statement is patently without substance.

31. Insofar as concerns Mr. Martin's acknowledgement that, although not required to do so, he had the discretion to provide petitioner with a performance appraisal on the FAA job, that acknowledgement is of no benefit to petitioner for a variety of reasons. Apart from the fact that there is nothing in the record to permit an inference that Mr. Martin's non-exercise of that discretion had a retaliatory foundation, petitioner is confronted with his failure to have requested such an appraisal. Whether or not petitioner had been entitled to the appraisal as a matter of right (and thus a prohibited personnel practice resulted from the non-receipt of one), without the rejection of a specific request any claim of a retaliatory foundation has a hollow ring.

32. At the risk of undue immodesty, my experience over 20 years of adjudication has left me equipped to discern when a witness sounds persuasive but is likely untruthful or dissembling.

33. Majority decision at. The retroactive promotion awarded petitioner was based on the majority's findings of both retaliatory action and prohibited personnel practices. As I read its decision, that relief would have been provided even if no prohibited personnel practices had been found.

34. In substantial measure, Judge McBride agrees with my assessment. To the limited extent that we might be in disagreement, I adhere to the views expressed in the initial decision.

35. Apart from the lack of significant awarded relief, a finding of a prohibited personnel practice does not carry the same stigma as does a finding of discriminatory or retaliatory action. See n. 21, supra.

36. Majority decision at et seq.

37. I appreciate that the majority does not explicitly invoke the new provision that came into effect with the institution of the pay-for-performance system, but rather points to what it deems to be an ambiguity in GAO Order 2430.1. In my view, however, an evaluator could have been uncertain as to the effect of that Order only if aware of the prospective alteration of the 45-day rule. (As I see it, a professional employee

such as petitioner would have found no inconsistency in the provisions of the Order cited by the majority.) I would add that, if petitioner were in reasonable doubt as to what standard applied to his situation with regard to the FAA job, a simple inquiry of the personnel office likely would have removed that doubt.

38. Majority decision at, n. 16.

[End Rosenthal Dissent]

Majority Notes

¹ Our regulations provide that "any party" may file a RfR. See 4 CFR § 28.87(b). At pages 4 and 7 (footnote 7 of his dissent) Member Rosenthal draws an inference from the fact that the Board's General Counsel, who represented Petitioner at the hearing, did not request consideration of the ID for him. The board is not privy to the decision-making processes of the General Counsel. His decisions to litigate or represent employees are entirely his own. The fact that he decided to represent one employee and not another may be a reflection of the relative importance of a case and his limited resources.

² We are considering all claims as charges of prohibited personnel practices, as did the AJ, and, therefore, there are no jurisdictional issues as would be the case if considered as EEO charges which require an exhaustion of remedies under our regulations at 4 CFR 28.98.

³ We use term "de novo" as a shorthand phrase for the language in Board regulations that: "In reviewing the initial decision, the Board may review the record as though it were making the initial decision." 4 CFR §28.87(c).

⁴ At pages 5-10 of his dissent, Member Rosenthal expresses his objections to our choice of de novo review and charges the Board with an abuse of discretion.

Since 1989, the Board's rules have provided for de novo review and Member Rosenthal, at pages 5-6 of his dissent, recognizes the right of the board to undertake it. See 4 CFR §28.87(c). To our knowledge, Respondent has never objected to its being in our regulations and has certainly been aware of it. The Board's regulations do not require us to give prior notice to parties when we elect to use it. Nor do our regulations require us to state reasons for our choice, although we do so below, in order to address the abuse-of-discretion issue raised by the dissent.

While any exercise of discretion can be abused, we do not believe that we have done so here. The Board majority found itself in major disagreement with the ID. Whether we chose appellate type or de novo review, we realized that we faced a major writing effort. We had to address many issues as to prohibited personnel practices which the AJ declined to address fully because he did not perceive that there was any appropriate relief which could be ordered. The decision on the issue of retaliation at the ATRO was rewritten because we disagreed with the AJ on the issues. We had to counter the use of intemperate and unjustified language as to counsel for the Petitioner, who had no appeal right to protect her reputation. (Summaries of decisions of this Board are bound and distributed throughout GAO.) For future cases, we had to correct the limited basis upon which the AJ decided the credibility of key witness, Mr. Martin. (the AJ relied solely on the demeanor of Mr. Martin and the content of his testimony and gave no written indication that he had also considered Mr. Martin's bias, or lack thereof, as a witness or other evidence of record which refuted his testimony, as discussed *infra* at pages 82-85).

Even where we agreed with the resolution of the issue in the ID as to retaliation in the NSIAD, we saw the need to amplify the decision by discussing points upon which Petitioner relied but the AJ ignored. These were our sole reasons for choosing de novo review.

Despite the protestations of Member Rosenthal to the contrary, at page 9 of his dissent, the Board does elaborate on each of the above-listed subjects in our decision. What we do not do is give a point-by-point reference to the ID and explain how it differs, as Member Rosenthal would have us do. This would serve only to lengthen an already long decision. Member Rosenthal does not subject that any of our findings of fact are erroneous or that they are incomplete. We are at issue only over one ultimate finding of fact, the credibility of Mr. Martin, and our finding on that issue is based upon undisputed facts and an assumption that his demeanor as a witness was convincing.

At page 9 of his dissent, Member Rosenthal remarks that the Board has relegated his ID to the "waste bin." While colorful, this remark is untrue. The ID constitutes a part of the record of this case, is filed in the records of this office, and is available for any necessary judicial review.

While we believe that remarks made by Member Rosenthal in his ID about counsel were intemperate and unjustified, we do not believe that they flowed from any bias on his part, as alleged at pages 34-35 of the RfR. He conducted an evenhanded hearing and his decision, while unfavorable to Petitioner on the merits, reflected his honest perception of the facts, the obligations of this Board, and the law.

⁵ Additional findings of fact are made in the discussion of each issue on the merits.

All of the findings of fact made in this decision are based upon undisputed facts, most of them being admissions of witnesses called by Respondent, and upon documentary evidence. We take this to be the meaning expressed on page 59 of the RfR, that, by "simply using Respondent's admissions and documentary evidence, Petitioner established his case of retaliation by a preponderance of the evidence." The only credibility finding (that related to Mr. Martin) is based upon the admissions of witnesses called by Respondent (Mr. Martin and Ms. Aponte) and documentary evidence (JE 2).

⁶ The following abbreviations will be used in this decision. "Stip" refers to the stipulations of the parties. "TR" refers to the transcript. "JE" refers to the joint exhibits of the parties. "PE" refers to exhibits of Petitioner. "RE" refers to exhibits of Respondent.

⁷ Performance appraisals are kept in a file separate from an employee's Official Personnel File (OPF). PE 2, page 17. Therefore, the reference in the settlement agreement to the rating being expunged from a specific personnel action was based." (PE 2, page 17, ¶ c). Management at the NSIAD had Petitioner's OPF; it did not have the expunged ratings. (TR 615 and 627).

⁸ The possible rating on performance appraisals are "Exceptional," "Superior," "Fully Successful," "Borderline," and "unacceptable." See, e.g., JE 23. "No Basis for Evaluation" is also to be marked in the appraisal form, if applicable.

⁹ The positions of the parties on the numerous issues will be set forth in the discussions of each issue, as appropriate. The legal principles applicable to each issue will be set forth as a preface to the discussion of each issue.

¹⁰ In her dissent, Member Nancy A. McBride objects to our consideration of some of the PPPs on the ground that they are not spelled out with specificity in the Petition for Review.

The Petition does specifically spell out some PPPs. It details 11, at page 9, includes others at pages 2-4. In addition, Petitioner relies on notice pleading, perhaps to an extreme, in alleging that there were "procedural violations in all phases of the GAO performance management cycle." See pages 4, 9 and 12 of the Petition. However, Respondent had the opportunity, through our discovery process (4 CFR §28.40-45) to nail Petitioner down on just what, specifically, he was alleging was a violation. The response does not reflect exactly what discovery was made. The record does show that Respondent did not come to this Board for an order compelling discovery related to the issue of Prohibited Personnel Practices, pursuant to 4 CFR §28.43, so we assume that whatever discovery Respondent attempted on this issue was obtained to its satisfaction. To the extent that Respondent failed to help itself, through discovery, this Board sees no need to ignore prohibited personnel practices of which there was evidence admitted into the record, even though they were only the subject of notice pleading.

Indeed, as Member McBride recognizes, the Board is obliged to consider all the evidence of prohibited personnel practices to determine whether the alleged pattern of discrimination was established. Having done this, we deem it improvident to stop there and not rule on another important issue in this case, namely whether the evidence established prohibited personnel practices. This trial was extensive; it represented a huge investment of time and money. The parties deserve to emerge from it with rulings that will help them meet their future responsibilities. We owe them no less.

Furthermore, as to the 15 PPPs discussed *infra*, only PPPs 2,3,4,6 and 7 rely solely on the notice pleading in the petition. As to PPP 2 we found no harm resulted from the violation and so no remedy was ordered. As to PPPs 3 and 4, the same remedy was applied as to the retaliation found at the ATRO. As to PPP 7, we have ordered no additional relief beyond that ordered for PPP 8. As to PPP 6, we found no violation. Member McBride is mistaken that PPP 5 does not appear in the petition as a prohibited personnel practice. See page 4, first paragraph (h) of the petition alleging that "Mr. Reiter violated GAO rules and regulations in preparing Mr. Marshall's performance appraisal on Job Code 396023 [the ALT/Services job]." Member McBride is also mistaken that PPP 9 does not appear in the petition as a prohibited personnel practice. See page 4, second paragraph (h) of the petition that "Mr. Reilly violated GAO rules and regulations in preparing Mr. Marshall's performance appraisal on Job Code 396230 [the University Research job] and Job Code 396237 [DOD contracts job]."

While it would have been easier on this Board had we limited our review to the 11 specifically-named prohibited personnel practices on page 9 of the petition, and ignored all other pleadings therein, as Member McBride would have us do, it would not have served the parties as well.

At pages 15-16 of his dissent, Member Rosenthal repeats the position taken in the ID that: "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 the relief he is seeking." In fact, the Board considers its obligation to be quite different. In order to ascertain the appropriate relief, the Board must consider what harm was done. In order to determine that issue, the Board must consider the nature of the alleged PPP.

¹¹ Indeed, in many respects the BARS Manual is stricter. The BARS Manual required that the date of expectation-setting sessions be recorded on Form 563 (the Performance Appraisal form), and there was no requirement that expectations be in writing. See, e.g., JE 22, Part 6. Under the successor Manual, there is an added requirement that expectations be summarized, in writing, on the Form 563. See, e.g., JE 9 Part

1(B).

The remaining provisions of the two manuals are essentially parallel. In the instructions for using the manuals, The BARS Grade Level Definitions are changed to Band Role Definitions to fit the new system; the BARS Task Inventory is now a Task List; and there were eight Job Dimensions in BARS, one of which (Administrative Duties) has been dropped in the new manual.

¹² In its Post-Hearing Brief, GAO does not acknowledge the Hendley decision, but chooses, instead to rely upon another decision, Roberts v. GAO, Docket No. 112-211-17-89, dated June 26, 1990, which never became a final decision of the Board because, while pending before the Board on a petition for reconsideration, GAO settled the case and it was dismissed. See page 71, footnote 33 of its Post-Hearing Brief. In its Reply Brief, at page 22, footnote 13, Respondent attempts to distinguish Hendley on the basis that it has changed the 20-day rule.

In its Post-Hearing Brief, GAO does distinguish another case which did become a final Board decision, Jimenez v. GAO, 1 PAB 563, dated February 26, 1988. In that case it was held that "compliance with the [BARS] Manual must be precise; to be fair" to an employee who had just received a career damaging performance appraisal. Id. In Jimenez, GAO did not plead that the BARS Manual was not a binding regulation.

¹³ Some options are expressly left to managers -- for example, "[m]anagement has the option of requiring a separate appraisal especially for PRG use." (JE 3, page 5) Such options, however, are rare and specific in nature.

As stated in a case cited by Respondent at page 71 of its Post-Hearing Brief, Guardian Federal Saving & Loan Association v. FSLIC, 589 F.2d 658, 667 (D.C. Cir. 1978), involving the issue of whether regulations issued by the FSLIC were subject to the prior notice and comment procedures of section 553 of the Administrative Procedure Act (APA), "stringent substantive commands are not removed from section 553 because they have some provisions of discretionary waiver." In Guardian, the court speaks of the "mandatory tone" of provisions of the regulations at issue as "encouraging compliance." (Ibid) The "mandatory tone" of the Procedures memorandum certainly encourages compliance. Indeed, the Board cannot conceive of GAO prefacing its Procedures memorandum with the caveat: "Managers are not bound to follow procedures in this memorandum." Yet, in this case, counsel for GAO would have us assume that such a caveat applies.

¹⁴ At pages 70-71 of its Post-Hearing-Brief, Respondent relied upon several cases which we find distinguishable on their facts. Schweiker v. Hansen, 450 U.S. 785, 789-90 (1981) was a per curiam decision with two Justices dissenting. It involved the issue of estoppel on the Government when an agent of the Social Security Administration failed to advise an applicant of advantages of filing a written application for benefits and to file a written application if uncertain of her rights, as the agent should have done under the agency's handbook. The Court held that the "13-volume handbook for internal use by thousands of SSA employees, including the hundreds of employees who receive untold numbers of oral inquiries like respondent's each year" had "no legal force, and it d[id] not bind the SSA." Id. at 789.

Guardian Federal Savings & Loan Association v. FSLIC, 589 F.2d 658, 667 (D.C. Cir. 1978) involved the application of section 533 of the APA to regulations and a bulletin of FSLIC as to criteria for auditors under a statute which required annual audits of FSLIC-insured institutions. It was held that the APA's requirement for prior notice and comment did not apply to the regulations because they were subject to the

exception for "general statements of policy."

Horner v. Jeffrey, 823 F.2d 1521 (Fed. Cir. 1987) involved a statutory interpretation in the Federal Personnel Manual, which a majority of the court (three judges dissenting and one concurring in a separate opinion) held was incorrect and not binding. Id. at 1529-32. The court distinguished the situation where Congress authorizes an agency to administer a statute and to promulgate implementing regulations, the situation here. Id. at 1531.

Doe v. Hampton, 566 F.2d 265 (D.C. Cir. 1977), one judge dissenting, vacated a summary judgement against an employee and remanded the case for a determination of whether a provision of the Federal Personnel Manual was mandatory rather than precatory. The provision concerned making "every reasonable effort" to reassign a disabled employee, and grant liberal leave without pay, before dismissal. Id. at 280-82.

None of the above cases concerned the issue at stake in this case -- what constitutes a rule or regulation required by statute to be adopted to implement performance appraisal systems governing promotions and dismissal for Federal employees.

¹⁵ Appropriate relief as to PPPs found will be considered under the Remedies portion of this decision.

¹⁶ The rule of contra proferentum requires that a contract be construed against the party who drafted the document. See United States v. Turner Construction Co., 819 F.2d 283, 286 (Fed. Cir. 1987), stating that this rule "correctly requires the drafter to use care and completeness in creation of a contract." We adopt this rule in holding GAO to the same standard. Employees, no less than parties to contracts, are entitled to be guided by clear and unambiguous rules, particularly when they affect their careers.

¹⁷ At pages 31-32 of his dissent, Member Rosenthal misconstrues our holding as to PPP 1. He seems to believe that we based it upon a new system instituted after Petitioner left the FAA job. We most assuredly did not base our conclusion on such a basis. We based it upon GAO Order 2430.1, Chapter 3, Section 3c, which was in effect when Petitioner finished his work on the FAA job. See PE 2, page 3 of 18. (It is page 10 of the document).

¹⁸ The "PRG" stands for Progress Review Group, which is the group which recommends whether an evaluator should be certified as a full-performance evaluator from a developmental-level one. (JE 3, pages 3-4).

¹⁹ Excerpts from Petitioner's Official Personnel File were admitted into evidence as PE 50. The within-grade promotion of June 18, 1989, is there. The award is not.

²⁰ We note that it appears to be common, nevertheless, for GAO to refer to this "reassignment" as a "promotion." See Stip 74 and TR 847-48.

²¹ A GAO document shows that expectations were actually set on July 27, 1990. See JE 22.

²² The citation to the Manual and TR 30 are not on point. Neither deals with setting expectations with 30 calendar days.

²³ Under the PFP system, evaluators are eligible for salary increases six months after they receive a promotion-equivalent increase. (JE 3, page 4). Petitioner received this increase in May 6, 1990. He received a "PFP Merit Increase" on October 7, 1990. (PE 50, page 2).

²⁴ We are treating the retaliation issue as a prohibited personnel practice not subject to administrative exhaustion under our rules, as it would be if treated as an EEO matter. See 4 CFR §§28.2(a)(2) and 28.98. Relief for prohibited personnel practices does not include compensatory damages.

²⁵ At page 12 of her dissent, Member McBride refers to the failure to forward appraisals as not being a "personnel action." We believe that it is because the requirement to forward appraisals from one unit to another is part of the "transfer" functions at GAO. See GAO Order 2430.1 (PE 2, page 17, ¶ 6a and e).

²⁶ At page 11 of her dissent, Member McBride objects to the Board's consideration of this issue because of untimeliness. Her dissent acknowledges, and seemingly accepts, Petitioner's assertion that he did not become aware that he was a victim of a continuing pattern of retaliation commencing at the ATRO until February 1990.

In the Board's view, Petitioner acted promptly thereafter in asserting retaliation at the ATRO. On February 26, 1990, after receiving ratings of less than Fully Successful for the first time in his four-year career at GAO, Petitioner complained at the CRO, alleging retaliation, inter alia. (PE 32, page 1). Under GAO procedures for handling informal discrimination complaints (PE 32, App. II, Chapter 1.4), mediation lasted until March 23, 1990. (PE 32, page 3). In a formal complaint, dated April 3 and filed on April 9, 1990, Petitioner alleged retaliation, inter alia, and asked, inter alia, that his complaint against the ATRO of August 22, 1988, be reinstated. (PE 31, page 4, ¶ 6).

The Petition for Review is based, in part, on the April 9 complaint and alleges, at page 5, that there was "retaliation for filing the 1988 discrimination complaint in the Atlantic Regional Office."

²⁷ The ID contains no findings on the active involvement of Mr. Martin in the mediation process that led to the settlement agreement, beyond a footnote indicating that Mr. Martin "also signed the agreement." See footnote 5, on page 5, of the ID.

²⁸ At page 23 of his dissent, Member Rosenthal states that the precise nature of Mr. Martin's personal involvement in the negotiating process does not clearly appear in the record. See FOF 6 which clearly shows, based upon admissions of Mr. Martin and Ms. Aponte, both witnesses of Respondent, that Mr. Martin represented management of the mediation process that led to the settlement agreement. Mediation only succeeds if management is actively involved in the process. Here, it did succeed -- there was a settlement agreement. Mr. Martin admitted that the expunging of the two ratings was a focus of the discussion during the mediation process. See FOF 6 and TR 1024.

²⁹ Nothing in the record indicates that Mr. Martin could not have told the NSIAD official something to the effect of "let me check this out" and then sought advice on whether he could inform the NSIAD official of Petitioner's latest performance on the FAA job. In our view, a manager concerned about the career of a good employee would have done just this. We note that Mr. Martin, in dealing with a "good" employee, admitted that he would consult with the employee to "make sure that is what they to do" before forwarding ratings to an office to which the employee wished to transfer. See TR 1002. Mr. Martin's failure to accord to Petitioner this same process is another indicator of a retaliatory motive on his part.

At page 25 of his dissent, Member Rosenthal professes an inability to understand why Petitioner would want an evaluation of some of his work as a GS-11 made available to the NSIAD and not that which was expunged. An answer readily comes to mind. Petitioner felt that the two expunged ratings were the result of race and sex discrimination. See FOF 3, Supra. Petitioner may have hoped for better from his subsequent supervisor on the FAA job.

³⁰ Because Mr. Martin granted a within-grade increase to Petitioner on June 18, 1989, based upon "an acceptable level of performance" (PE 50, pages 14-15), it is reasonable to assume that Petitioner's performance of the FAA job (the last work he performed at the ATRO) would have been at least Fully Successful or above.

For employees performing at an acceptable level, GAO required the within-grade increase as part of its implementation of its new pay-for-performance system. See JE 3, page 3.

³¹ At page 23 of his dissent, Member Rosenthal asserts that it was the responsibility Petitioner to have inserted in the settlement agreement that he wished non-disclosure to apply only to the jobs covered by the expunged appraisals. In the first place, a member of the GAO's Civil Rights Office drafted the complaint. See FOF 6. Secondly, the settlement agreement only applied to the two expunged ratings, not to subsequent work Petitioner might perform at the ATRO. See JE 2. How was Petitioner to know that Mr. Martin would apply the confidentiality provisions of the settlement agreement to work on the job that is not mentioned in the agreement?

³² At page 13 of her dissent, Member McBride agrees that Mr. Martin erroneously concluded that the settlement agreement precluded him from discussing any aspect of Petitioner's prior performance with the NSIAD. However, she is persuaded that this was mere error on his part and not evidence of a retaliatory motive.

Member Rosenthal, at pages 24-25 of his dissent, disagrees with Member McBride, and the Board majority, on the interpretation of the settlement agreement, but he seems to acknowledge that the agreement did not, in so many words, apply to Petitioner's performance on the FAA job.

We fail to see what, in the record, persuaded both dissenting members that Mr. Martin was incapable of correctly interpreting the settlement agreement. Mr. Martin actively participated in the settlement negotiations. He is a long-time, high-ranking official of GAO (TR 1004 and 987), one not likely to be unable to comprehend what he had negotiated.

Member McBride notes that any comment of Mr. Martin to the NSIAD on Petitioner's performance would not likely have been in support of certification, in view of the fact that he had declined to certify Petitioner to full performance. However, the NSIAD officials who called Mr. Martin were concerned with the fact that they had no performance history on Petitioner. Had Mr. Martin told them of Petitioner's most recent performance on the FAA job (obviously acceptable since he received a within-grade increase with that as his most recent performance), he would not have violated the settlement agreement and such information would have likely satisfied the NSIAD officials that they had inherited a good worker, not a dud. In any event, this is all speculation and not dispositive of the issue of whether Mr. Martin withheld information because of retaliatory motive or because of an erroneous interpretation of the agreement he negotiated.

³³ In what appears to be a post hoc rationalization, Member Rosenthal now professes great confidence in demeanor evidence. See pages 2 and 29-30 of his dissent. For purposes of this decision, it makes no difference, since we assumed, arguendo, that the demeanor of Mr. Martin was convincing. We rely upon documentary evidence and admissions of Respondent's witnesses which refute his convincing demeanor in testifying that he thought the settlement agreement precluded him from giving NSIAD officials information on Petitioner's performance on the FAA job. We also have assessed his bias as a witness, as discussed infra.

³⁴ At page 30 of his dissent, Member Rosenthal relies on his experience of over 20 years of adjudication as leaving him equipped to discern when a witness sounds persuasive but it is likely untruthful or dissembling. Member Rosenthal does not seem able to accept the fact that the Board has assumed the convincing demeanor of Mr. Martin.

The combined experience of the majority members has taught them to consider not only demeanor evidence but the full array of factors that must be considered to determine the credibility of the witnesses. These factors are discussed in detail, infra.

We should add that the combined experience of the majority includes one with 24 years of adjudicatory experience; another who serves on a panel of the United States hearing fair employment practice cases; and another who has had many years of experience hearing arbitration cases.

³⁵ The seven factors cited in the Brzozowski case are: "(1) The witness's opportunity and capacity to observe the event or act in question I; (2) the witness's character, (3) any prior inconsistent statements by the witness; (4) a witness's bias or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its inconsistency with other evidence; (6) the inherent improbability of a witness's version of events; and (7) the witness's demeanor."

³⁶ At page 13 of her dissent Member McBride expresses her belief that the testimony of Mr. Martin was plausible, based upon two facts. One is the fact that "Petitioner never asked for an evaluation on the FAA job." The answer to this is that one was required or not, Petitioner expected to receive one based upon his understanding of GAO regulations. See TR 1059 and 155-56.

The second fact relied upon by Member McBride is that Petitioner refused Mr. Goldbeck's entreaties in November 1989 to let ATRO give NSIAD information on his performance there. What Mr. Goldbeck testified to was as follows, in response to questioning about a lack of work history from the ATRO and when he discussed this with Petitioner:

Somewhere between August and November, I'm not sure when it was.

But I did have a conversation with Andrew in which I asked him if he would be willing to allow the panel to see the ratings-- I assumed he had copies of them-- that he had received down there. I told him that I would reconvene the panel and present those ratings to them and see if they would be willing, based on the additional information, to certify him. Andrew told me that he would get back to me on it. The next morning he came in and said that he had decided that he didn't want to do that.

See TR 626-27. This conversation has to be considered in the light of the testimony of Ms. Aponte that Petitioner came to her office "right away" after he was denied certification in November 1989 and expressed his view that "there was something of bad faith on the part of management involved with it."

(TR 486-87). Ms. Aponte advised Petitioner to await for another 90 days and his "allegation [of retaliation] would be stronger." See TR 493. We can make nothing more significant out of Petitioner's declining to say anything further to Mr. Goldbeck than that he was following the advice of Ms. Aponte, namely to wait.

At page 14 of her dissent, Member McBride also asserts that: "Because of his role in the settlement negotiations, Mr. Martin was in a better position to understand the parties' interpretation of it (opportunity to observe)." Petitioner was in as good a position; and he testified that he expected a rating on the FAA job, after the settlement agreement was negotiated and only two ratings were expunged, as already discussed.

At pages 13-14 of her dissent, Member McBride acknowledges "the possibility of bias" on the part of Mr. Martin in giving his testimony, a possibility that the ID does not deal with at all.

³⁷ At page 12 of her dissent, Member McBride states that a rating on the FAA job was not required or requested. The majority disagrees that one was not required. Supra. Petitioner's failure to request one is explained on the basis of undisputed facts in the record -- he expected to receive one under GAO Order 2430.1, Chapter 3, Section 3c (PE 2, page 3). See TR 1059 and 155-56. We think it is unfair to charge Petitioner with failure to request a rating under these circumstances.

We also note that, whether a performance appraisal is given or not given, it constitutes a "personnel action" as that term is defined in 5 U.S.C. ¶ 2302(a)(2)(A)(viii).

³⁸ At pages 14-15 of her dissent, Member McBride asserts that the "settlement agreement obviated the need for what Mr. Martin said he would normally do for 'good' employees considering a transfer." We disagree. The significance of Mr. Martin's testimony about how he would treat a "good" employee that he would actively assist one. All Mr. Martin's actions and inactions, after the settlement agreement, reflected no effort whatsoever to assist Petitioner.

39. The context in which this statement was made is as follows:

Judge Rosenthal: Normally, people who inherit an employee--either from within the agency or perhaps from without the agency--are interested in how that employee has performed in his or her prior assignment. I don't think there is anything unusual about that at all.

The Witness [Mr. Martin]: I would agree that it is not unusual at all. And usually those things have already taken place. In other words, if somebody came to me and said, "I want to transfer to Washington," I would ask them where they wanted to go and they would tell me. I would ask if they had thought through this whole process and why they wanted to go and their motivation, and if they are sure that is what they want to do.

If the answer is yes, and if it is somebody that I am willing to support for that kind of transfer--because I don't think we ought to move people around just willy nilly at their whim. In other words, if it is a good person and I am willing to support their transfer to Washington, I usually call Washington or whichever division it is and say probably to the Deputy for Operations, "I have X who would like to transfer to your division. I think it's [sic] a good person. I think you ought to consider them. I would like to have a chat with you."

Usually what will happen in that case is that they will say, "Can you send me a copy of the last rating or two."

I usually say, "Yes. Let me talk to the person and make sure that is what they want to do." Then we

send it.

So that conversation has taken place.

See TR 1001-02.

The above testimony was elicited by an "off hand observation" by Member Rosenthal. In a moment of candor, Mr. Martin showed his hand and, inadvertently, established a basis upon which the Board bases its conclusion that a retaliatory motive was behind his actions in regard to Petitioner.

40. Petitioner argues that Mr. Martin's refusal to certify him to the full performance level before he transferred to the NSIAD was evidence of retaliation. See pages 35-40 of the RfR.

In June 1989, Petitioner was considered for certification along with nine other evaluators, all but one of whom had more time in grade than Petitioner. None was certified. The next month, July, two of the group rejected in June were certified, based upon 23 additional work days. See FOF 20, supra.

Petitioner was on authorized leave from May 20 until his transfer to the NSIAD. (TR 1050). He transferred to the NSIAD on July 17, pursuant to the settlement agreement negotiated by Mr. Martin as the representative of management. (Stip 14 and TR 482).

Petitioner posits that the June 1989 Atlanta certification process was a "sham." (RfR 35). Under Petitioner's scenario, Mr. Martin delayed the certification process until after Petitioner left, in order to avoid taking what would amount to an adverse action against Petitioner (denial of certification), and thus evade another discrimination complaint against the ATRO, that is, if no one were certified, Petitioner could not claim that he was treated differently. Mr. Martin, of course, knew that under the settlement agreement Petitioner would be leaving the ATRO around July. GAO procedures only required Mr. Martin to reevaluate for certification "within the next 90 days" after a denial. See the Procedures memorandum distributed to heads of offices on May 31, 1989. (JE 3, page 3).

This scenario written by Petitioner is not implausible. The circumstances do raise suspicions. However, the Board concludes that it need not adopt or reject it because it has found sufficient evidence of retaliation without factoring in this thesis.

The AJ did not consider the possibility that the certification process in the ATRO was a sham; rather the AJ accepted at face value its validity. See ID 36-37. At pages 12-14 of his dissent, Member Rosenthal lists the facts upon which he relied and denominates the charge of retaliation at the ATRO as "totally baseless" and "without any record basis whatever." The record basis is there, however. He just did not consider it.

The following are the undisputed facts indicating the possibility that the June 1989 certification process in the ATRO might be a sham. Mr. Martin knew that Petitioner was transferring out of the office in July. He was not required to reconsider, in July, those denied certification in June. The requirement was for reconsideration within 90 days. Yet, Mr. Martin reran the certification process after only a month and certified two of those rejected in June on the basis of only 23 additional staff days of work. See FOF 16, 18 and 20, supra.

41. We disagree with GAO that "[p]rior to February 1990, petitioner's only protected activity was the filing of a discrimination complaint against his immediate supervisor in the Huntsville sublocation." See page 51 of Respondent's Post-Hearing Brief (emphasis added), and also page 25 of its Reply Brief. Under GAO Order 2731.2, Chap. 3, ¶14, at page 16, quoted supra, an employee's freedom from reprisal covers not only the "presentation [of a complaint], but also the "processing" of that complaint. The processing includes "Investigation" and any "Effort to Resolve Complaint." See GAO Order 2713.2, Chap. 3, ¶¶5 and 6, at pages 8-11. (PE 32, Appendix II).

42. The "adverse action" and "protected activity" relied upon in Chen were as follows. On April 10, 1981, Dr. Chen filed his initial EEO complaint alleging that GAO failed to hire him on a discriminatory basis. On February 26, 1983, a member of this Board found that the refusal to hire was discriminatory and ordered that he be hired. On May 2, 1983, GAO was ordered by this Board to hire Dr. Chen. Dr. Chen began work on July 27, 1983. On January 20, 1984, GAO denied a within-grade salary increase to Dr. Chen and notified him, in June, that he was being fired. see Chen v. General Accounting Office, 821 F.2d 732, 733 (D.C. Cir., 1987) and Chen v. GAO, 1 PAB 260, 260-62 (decision of the presiding member) (1985).

The Court of Appeals, in its Chen decision, noted that Dr. Chen relied upon, as his "protected activity" "his earlier successful EEO complaint." 821 F.2d at 733 and 739.

Between the filing of the original EEO complaint and the first adverse action, the denial of the salary increase, was a 33-month span of time. Counting from the time Dr. Chen was hired, until the salary-increase denial, there was a span of six months. The denial of the salary increase marked the first opportunity which GAO had to take an adverse action against Dr. Chen after being forced to hire him. See footnote 2 at 821 F.2d 733, noting that Dr. Chen was eligible for a within-grade increase in January 1984 because the Board ordered that he be hired with retroactive time in grade.

43. Petitioner cast his argument as to retaliation at the ATRO based upon other facts of record. Nevertheless, in a de novo review, the Board looks at the entire record and not just that portion upon which counsel fashions an argument. For a somewhat similar example of the refusal of this Board to limit itself to what counsel may argue, see the decision in Dowd v. GAO, 2 PAB, (February 24, 1992), wherein the Board stated that "we cannot confine ourselves to an examination of the particular legal theory advanced by Petitioner" (page), and then found a reason to deny GAO's motion for summary judgment which Petitioner had not argued. Id. at. Here we are not dealing with a different legal theory, but with the same legal theory--what constitutes retaliation. We simply rely upon a different set of facts in the record.

44. Member Rosenthal, at page 18 of his dissent, expresses concern that the Board's decision "has the effect of destroying the reputation of a federal career employee." The answer to this concern is that the Board has simply followed where the facts of record led.

We wish that Member Rosenthal had an equal concern for the career of the federal attorney who presented Petitioner's case. He has no qualms in questioning her good faith in bringing a charge of retaliation as to the ATRO and charges her with bringing a "frivolous case." As evident from this decision, the Board majority has found that she brought a convincing case. The Board majority and Member McBride have concluded that she certainly brought a prima facie case.

45. We note the fact that the NSIAD management certified him only shortly after he had filed his first EEO complaint against the NSIAD. See FOF 35 and 44. This coincidence of events is suspicious, but not entirely persuasive.