

# **Robert P. Rosenbaum v. U.S. General Accounting Office**

**Docket No. 93-01**

**Date of Decision: July 8, 1993**

**Cite as: Rosenbaum v. GAO (7/8/93)**

**Before: Leroy D. Clark, Member**

**Summary Judgment Standard**

**Merit System Principles Violation**

**Unacceptable Performance**

**Performance Appraisal**

**Management Right to Discipline**

**Performance - Based Removal**

**Opportunity to Improve Performance**

**Unacceptable Performance**

**Prohibited Personnel Practice**

**Discipline - Management Rights**

**Discipline - Personnel Action**

## **DECISION ON PETITIONER'S AND RESPONDENT'S MOTIONS FOR SUMMARY JUDGMENT**

### **INTRODUCTION**

The General Counsel of the Personnel Appeals Board (PAB) filed a Petition for Review dated January 6, 1993 on behalf of the Petitioner, Robert P. Rosenbaum, challenging his discharge from the San Francisco Regional Office of the Respondent agency, the General Accounting Office (GAO). Petitioner charged that his termination was in violation of 5 U.S.C. §§4302 and 4303 and GAO Order 2432.1 (July 14, 1987) and as such constituted a prohibited personnel practice.

The Respondent filed various discovery requests on February 8, 1993. The PAB General Counsel filed a "motion to strike" the discovery requests on the ground that they were untimely.<sup>1</sup> On March 3, 1993, the Respondent replied to the Petitioner's motion to strike and moved for an enlargement of time to serve the discovery requests.<sup>2</sup>

On March 1, 1993, the Petitioner filed a motion for summary judgment. After being granted an enlargement of time, the Respondent filed, on April 2, 1993, an opposition to the Petitioner's motion for summary judgment and its own motion for summary judgment.

## **FACTUAL BACKGROUND**

Petitioner began employment with the GAO in August 1974 as an auditor. By 1987, he had progressed to the position of a GS-12 evaluator in the San Francisco Regional Office (SFRO).<sup>3</sup> Petitioner received an unacceptable rating in the job dimension of "Written Communication" in performance appraisals conducted at the end of two different periods -- from October 1986 to January 1987, and from April 13, 1987 to May 31, 1988. The latter unacceptable rating became the basis for establishing a performance improvement period (PIP) for the Petitioner, in which an assessment was to be made as to whether the Petitioner could adequately correct his deficiencies in functioning. The opportunity period entailed assignment to a project entitled "Evaluation of Medicare Part B Carrier Utilization Review Activities" (the "Medicare Job"). The period was to begin on August 15, 1988 and end within 90 days. Extensions to January 9, 1989, however, were granted to allow Petitioner time to care for his hospitalized parents and to submit further written products to have a full evaluation of his performance. Petitioner was again rated unacceptable in "Written Communication" at the conclusion of this PIP and was notified on March 23, 1989, by Karen Harnish, Assistant Regional Manager for Operations for SFRO, that on the basis of the previous and continuing lack of success she was proposing that the agency remove him from federal service.<sup>4</sup>

Petitioner grieved the unacceptable rating given him in the PIP on March 17, 1989 to the Regional Manager of the SFRO, Thomas P. McCormick, and requested that the agency forgo issuing the final notice of discharge until his grievance was resolved. Mr. McCormick appointed a subordinate, John Zugar (who had been suggested by the Petitioner), to review the rating. Mr. McCormick denied the Petitioner's grievance on June 9, 1989, after receiving Mr. Zugar's report finding no basis for objection to the adverse performance rating given to the Petitioner.

Petitioner filed a second grievance on July 3, 1989, objecting to Mr. McCormick acting on the proposed notice of discharge until his grievance filed in March 1989 had been finally resolved by the head of GAO. GAO's Office of Civil Rights declined, on July 24, 1989, to investigate a grievance that the Petitioner had filed with that office.

Respondent has appended an affidavit to its motion for summary judgment in which Mr. McCormick claims to have consulted with the General Counsel and the Office of Personnel of GAO. Mr. McCormick claims that, in those consultations, he was informed that he could issue the notice of discharge before the Petitioner's grievance was fully resolved. He claims that he was further informed that he should act promptly for "difficulties can arise" if the notice of termination was issued more than a year after the proposed notice of discharge.<sup>5</sup> On August 11, 1989, Mr. McCormick issued the notice of final discharge to the Petitioner based on his unacceptable performance on the job element of "Written Communication." The discharge became effective on September 22, 1989.

After the Petitioner received notice of his proposed removal from federal service in March 1989, he was assigned to a new project from April through August 1989, under the supervision of Richard J. Griffone. The project entailed an audit of the Bureau of Land Management (the "BLM Job"). Petitioner asserts in a statement of facts appended to his motion for summary judgment that Mr. Griffone had promised him a final rating on his work on the project, but that Ms. Harnish, the Assistant Regional Manager, had

informed Mr. Griffone that Petitioner was being dismissed and that he was not required to give Petitioner a rating. Mr. Griffone was not aware that the Petitioner was in the process of being discharged when the Petitioner was initially assigned to him. Mr. Griffone later prepared an affidavit, as part of an investigation of a claim of discrimination by the Petitioner, which stated, in part, "If I had rated Bob at that time he would have received at least 'fully successful' in all job elements except supervision, which he was not assigned to do." Ms. Harnish also prepared an affidavit during the investigation in which she described the Petitioner's work on his last project as "OK." The Petitioner appended these affidavits to his motion for summary judgment.

The Respondent appended an affidavit to its counter motion for summary judgment in which Mr. Griffone stated, in part, in characterizing the work of the Petitioner: "In my opinion, the written work Mr. Rosenbaum performed was minor and not substantial enough to reflect his ability as a Band I Full Performance Evaluator in the job dimension of 'Written Communications.'" Mr. Griffone also stated that "[h]ad he not been released because of his removal, I probably would not have rated him because an end of assignment rating would not have been due at that time." In the affidavit of Mr. Griffone cited above, which Petitioner appended to his motion for summary judgment, Mr. Griffone states: "With respect to writing assignments, Bob [the Petitioner] was going to work with me on a chapter of the final report dealing with land inventories.... It was not the kind of assignment I would have given Bob to fully test his writing capabilities."

## **SUMMARY OF THE CONTENTIONS OF THE PARTIES**

Petitioner has filed a motion for summary judgment contending that the relevant facts are not in dispute and that his discharge was, as a matter of law, a prohibited personnel practice. Petitioner does not, in this proceeding, contest the following: (1) that the Respondent properly structured a period to assess his ability to improve his performance on the job element of "Written Communication;" (2) that he failed to improve his performance on that element during the opportunity period; and (3) that the initial March 23, 1989 notice of a proposed termination was sustained in the face of all of Petitioner's subsequent grievances and appeals.

Petitioner does assert, however, that Respondent allowed the Petitioner to remain on the job for approximately five months after the unsuccessful opportunity period and that Respondent's final notice of discharge was invalid because the Petitioner achieved a "fully successful" rating on the job element of "Written Communication" from his last supervisor, or he would have received such a rating if the supervisor had not been improperly prevented from giving his work a formal evaluation. Petitioner contends that no employee can be discharged, even after an unsuccessful opportunity period, if he has corrected the deficiency which was found during that period before the final notice of discharge is issued.

The Respondent argues that the Petitioner's motion for summary judgment cannot be granted on two grounds: (1) there is no legal authority to support the Petitioner's claim that, despite an undisputed failure to improve his performance during an opportunity period, he cannot be dismissed if there is evidence of an improvement thereafter; and (2) even assuming, arguendo, that there was such a cognizable legal claim, there is an unresolved factual dispute between the parties as to whether there was an improvement in Petitioner's performance or an adequate opportunity to gauge same. Respondent also moves for summary judgment in its favor.

## ANALYSIS

The Petitioner's motion for summary judgment will be dealt with initially. The standards for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. Summary judgment should be granted when all of the documents in a case "show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). Since summary judgment deprives the non-moving party of the opportunity to present evidence at a trial, the party seeking judgment has the burden of proving the absence of any dispute as to the material facts. Addickes v. S. H. Kress and Co., 398 U.S. 144, 157 (1970). Moreover, "[s]ummary judgment is not to be granted because the moving party appears likely, or even very likely, to prevail at trial; the procedure is reserved for cases where the material facts are so clear that a trial would be an empty exercise in formalism." Popham, Haik, Schnobrich v. Newcomb Securities, 751 F.2d 1262, 1266 (D.C. Cir. 1985). Therefore, if on uncontradicted facts, the moving party has a legitimate claim as a matter of law, then summary judgment is appropriate.

When all of the pleadings and affidavits filed in this matter to date are considered, the Petitioner has not satisfied the burden of proving that, even on his legal theory of the case, there are no facts in dispute. The Petitioner's claim is that if he achieves a full correction of his deficiency in performance after an initial proposed termination based on that deficiency, but before the final notice has issued, he cannot be validly discharged. This would appear to entail at least two factual propositions: (1) that the Petitioner worked on a project after the proposed termination which was appropriate for the measurement of a correction in the deficiency; and, (2) that the Petitioner actually performed on the project at a successful level in the dimension in which he was previously lacking.

The Respondent's initial proposed termination of the Petitioner occurred after he failed an opportunity period designed to evaluate his performance in "Written Communication." The Petitioner would therefore have to establish that he performed writing tasks successfully on a project which adequately measured his abilities in this area. In attempting to establish these factual propositions the Petitioner relies on affidavits secured after his discharge and during an EEO investigation from Ms. Karen Harnish, Assistant Regional Manager for Operations, SFRO, and Petitioner's last project supervisor, Mr. Richard J. Griffone. Ms. Harnish's affidavit includes the statement, "[m]y sense is that Bob's performance was OK under Griffone." Mr. Griffone states in his affidavit that he would have given the Petitioner "a 'fully successful' in all job elements, except supervision which he was not assigned to do."

However, in another part of that affidavit, Mr. Griffone states that the project was not an appropriate one for measuring a deficiency in writing. The Respondent also countered with another affidavit from Mr. Griffone in which he makes two pertinent statements: (1) "[i]n my opinion, the written work Mr. Rosenbaum performed was minor and not substantial enough to reflect his ability as a Band I Full Performance Evaluator in the job dimension of "Written Communication;" and (2) "I never rated Mr. Rosenbaum's performance on the BLM job."

The Respondent also counters with an affidavit from Ms. Karen Harnish, in which she qualifies her statement upon which the Petitioner relies that his work under Griffone was "OK." In the affidavit she relates: "As I stated further, 'this was not a good indication of (Mr. Rosenbaum's) overall abilities to perform because the job had a limited scope.' I did not intend to indicate that Mr. Rosenbaum's performance in Written Communications under Mr. Griffone had improved in any way."

The Petitioner has not presented clear undisputed evidentiary material to support a claim that the project under the supervision of Mr. Griffone was adequate for the evaluation of writing skills. Furthermore, there is a direct conflict in factual assertions from the Petitioner and the Respondent as to whether there was a fully acceptable performance on the dimension of written communication. Therefore, the Petitioner has not borne the burden of showing that there are no genuine issues of material fact such that a motion for summary judgment, even on his theory of the claim, can be entertained.

The above disposition is sufficient to deny the Petitioner's motion for summary judgment. The Respondent has also filed a motion for summary judgment that must be disposed of because it challenges the Petitioner's claim, not only on the above factual grounds, but in terms of its legal sufficiency.

Petitioner asserts that his removal from federal service was in violation of 5 U.S.C. §2302(b)(11), which makes it a prohibited personnel practice to:

take or fail to take any other personnel action if the taking of 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.

Merit System Principle number 6 of 5 U.S.C §2301(b)(6) requires that employees be retained on the basis of the adequacy of their performance, that inadequate performance should be corrected, and that employees should only be separated who cannot or will not improve their performance to correct any prior deficiencies. Petitioner asserts that the Respondent violated 5 U.S.C. §§4302 and 4303 and GAO Order 2432.1 (July 14, 1987), which implement Merit System Principle 6. These laws and regulations provide the grounds and procedures for removing an employee based on unacceptable performance. While GAO is expressly excluded as an "agency" under section (1) (iii) of 5 U.S.C. §4301, our statute requires GAO to be governed by the merit system principles of 5 U.S.C. §2301, and to have provisions for discharge which are consistent with 5 U.S.C. §4303. See 31 U.S.C. §732 (b) (1), (2) and (d) (2).

5 U.S.C. §4302 requires an agency to establish a performance appraisal system and implement it through periodic appraisals in order to accurately and objectively evaluate how employees carry out their duties. See Wilson v. Department of Health and Human Services, 770 F. 2d 1048 (Fed. Cir. 1985). 5 U.S.C §4303 defines five levels of successful and unsuccessful performance. It further requires that an agency give an employee a performance improvement plan and a reasonable period of time to attain the fully successful level when performance has fallen below that level. GAO Order 2432.1 implements these statutory directions by requiring written notice to an employee of his or her unacceptable performance on critical job elements and directs the supervisor to choose a "reasonable period," but not less than 30 days, to measure and evaluate the employee's improvement.<sup>6</sup>

The Respondent found the Petitioner's performance deficient on the critical job element of "Written Communication" on two projects between 1986 and 1988. A PIP was established for the Petitioner which lasted well beyond the minimum 30 days required under Order 2432.1. Petitioner failed to achieve the minimum acceptable rating during this opportunity period and was given a notice of proposed termination. Although Petitioner grieved the negative evaluation, the grievances were not sustained. Thus, for purposes of this proceeding, the agency had issued a valid notice of proposed termination. Indeed, the Petitioner fully concedes this conclusion in his "Memorandum in Opposition to Respondent's Motion for Summary Disposition:" "Petitioner seeks reversal of his removal because the agency failed to consider the improvements he made in his performance, including the dimension of written communication, during his post-PIP assignment. Petition for Review at sec. 4. Indeed, whether Petitioner's performance prior to or

during the PIP period was unacceptable is not at issue here."

The agency has satisfied one of the most important requirements of a valid discharge, for the opportunity to demonstrate acceptable performance is "not a procedural matter subject to the harmful error rule, but is a substantive condition precedent to the taking of an action under Chapter 43." Sullivan v. Department of Navy, 44 M.S.P.R. 646, 651 (1990) (citing Sandland v. General Services Admin., 23 M.S.P.R. 583, 589 (1984)). Respondent does acknowledge a technical failure of compliance with regulations 9.c.(3) and 11.a. under GAO Order 2432.1 (July 14, 1987).<sup>7</sup> Under those provisions the deciding official (here Thomas P. McCormick) should have issued the final notice of discharge, at a maximum, within 90 days of the initial issuance of the proposed notice of discharge. Extensions beyond that period could only be granted, for good cause, by the Director of Personnel. In this case, the final notice of discharge was issued by Mr. McCormick well after the 90 days allotted him under the regulations. Mr. McCormick had phone consultations with the Director of Personnel during this period, but there does not appear to have been the formal approval of an extension of time by the Director of Personnel.

The Respondent assumed that the Petitioner was alleging as a part of his legal claim that his discharge must be voided because the deciding official breached these GAO regulations. The Petitioner, however, in the memorandum opposing the Respondent's motion for summary disposition, clearly denies that this procedural error was in any way intended to support his legal claim: "Nowhere in Petitioner's pleadings does he claim that, because Respondent did not remove him in ninety (90) days, it is now precluded from removing him." If Petitioner had sought to rely on the procedural delay as a support for a claim that the discharge was unlawful, he would have had to show harmful error. See Faust v. Smithsonian Institution, 29 M.S.P.R. 496, 499 (1985) and Benton v. Department of Labor, 25 M.S.P.R. 430, 435, n.4 (1984). Petitioner rightly acknowledges that he could hardly claim harmful error in a delay that was largely in response to his pleas and demands that the final notice of discharge not be issued forthwith.

Petitioner's claim is most clearly stated in his memorandum in response to the Respondent's motion for summary disposition. He rests his claim exclusively, as he states it, on the proposition that the Respondent's argument is improper when it is claimed "that under prevailing legal precedent, the agency is not required (emphasis added) to consider post-PIP improvements in removal actions." It is here that the Petitioner and the Respondent join issue, but the Respondent's position is supported by the prevailing legal precedent.

The full implication of the Petitioner's argument is that even if an agency has clear evidence of substandard performance by an employee leading up to and during his PIP period, such that a notice of proposed termination properly issues, the agency must treat the intervening period prior to the issuance of the final notice of discharge as, in effect, a second PIP. The case law directly refutes the Petitioner's claim that an agency has an obligation to continue evaluating an employee after it has issued a notice of proposed termination and the deciding official has made a judgment that the past record does not justify further review. See Gordon v. Department of Agriculture, 25 M.S.P.R. 438, 441 (1984).

Petitioner relies on language in Sullivan to support his claim that an agency has a continuing obligation to evaluate an employee up to the date of final discharge:

we find no support for the view that allowing a single PIP will, under all circumstances and for all time, satisfy the agency's obligation, particularly where the agency has not demonstrated a history of poor performance ...and provided warnings and assistance to the employee in the past.

Sullivan, 44 M.S.P.R. at 658.

Congress thus foresaw a situation in which an employee might perform unacceptably during a PIP, but improve his performance thereafter during the advance notice period, and made specific provision for allowing that employee to retain his job.

Id. at 657.

The Merit Systems Protection Board, in the first statement above, is merely noting that it is possible that a single PIP will be found insufficient to support an adverse action against an employee where the agency has failed to meet its burden of proof that an employee had a history of poor performance, and where the agency had failed to provide warnings and counselling to the employee. None of that pertains to this case, for the Petitioner here has expressly conceded that his history of substandard performance prior to and during the PIP did support the issuance of the notice of proposed termination. His only claim is that he was entitled, in effect, to a second PIP.

The second quote above from Sullivan likewise does not support the Petitioner's claim here. The Board was merely referencing two provisions under 5 U.S.C. §4303, which indicate that Congress intended that an agency have the option of considering an employee's performance after a PIP, if there were reasons for doing so. One provision allows the agency to extend the notice period of a proposed Chapter 43 action from 30 to 60 days. 5 U.S.C. §4303(b)(2). The other provision bars an agency that has made a decision not to act on a proposed notice of termination from relying on it in a subsequent adverse action where the agency has evaluated and found an employee's performance acceptable for more than a year. 5 U.S.C. §4303(d).

The option under the statute to extend the notice period could accommodate the situation where a review of the proposed notice of termination by the deciding official raised doubts about whether the adverse rating was correct or sound. The deciding official, therefore, has the authority to extend the notice period 30 days to get additional information.<sup>8</sup> If the agency thereafter affirmatively decides not to go forward with the final notice of termination and evaluates the employee's performance as acceptable for over a year, then it cannot rely on the stale proposed notice of termination should the employee's performance again become substandard. Under the latter scenario, the employee would have a right to a fresh PIP after successful performance for a year.<sup>9</sup> This sequence of events did not occur here. The Petitioner was not employed for more than a year after the proposed notice of termination. Moreover, the Respondent's affidavits from the deciding official, Mr. McCormick, show that he concluded after review that the only appropriate decision was to finally discharge the Petitioner, and that he did not believe that further evaluation was warranted.<sup>10</sup> Petitioner makes no claim that the deciding official was equivocal or uncertain that the record called for a final discharge. Indeed, the Petitioner offers no challenge to this factual assertion by the Respondent precisely because his claim is that the agency refused to re-evaluate him and that they were "required" to do so as a matter of law.

Sullivan does not support the claim the Petitioner makes here. Indeed, the case was more focussed on allowing an agency to dismiss an employee, even after a successful PIP, without a second PIP, where negative performance was repeated, as long as the agency relied on negative performances occurring within one year of the proposed notice of termination. As Sullivan itself recognizes, "the primary purpose of Chapter 43 was to simplify and expedite procedures for dismissals of Federal employees whose performance is below the acceptable level."<sup>11</sup> The Petitioner's claim would violate the spirit of that Act, because, as was also said in Sullivan, "we are persuaded that Congress intended neither to reward the

'roller coaster' employee nor to make agencies repeatedly provide time consuming PIPs." <sup>12</sup> The Petitioner's claim would place an agency in the untenable position of being required to assign an employee under a proposed notice of termination to a project where his deficiencies in skills could continue to damage a work product, even where there is strong evidence that this would occur. The Civil Service Reform Act does not require such an inefficient and dysfunctional use of employees during the process of discharge.

## CONCLUSION

For the above reasons, Petitioner's motion for summary judgment is denied and Respondent's motion for summary judgment is hereby granted. The Petition for review is hereby Dismissed.

## Notes

1. It is assumed that the General Counsel meant to style the motion as one for a protective order. Motions to strike should be directed only to pleadings and portions thereof as a device for narrowing the issues. See Sidney Vinstein v. A. H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983).
2. In view of the ultimate ruling in this case, there will be no need to rule on the discovery dispute.
3. The terms auditor and evaluator are used interchangeably at GAO, the name change from auditor to evaluator having occurred in 1980.
4. Petitioner was also given borderline (or less than fully successful) ratings in "Oral Communication" on three projects during the 1987-89 period, and an unacceptable rating in "Administrative Duties" for his work during the PIP. However, these ratings were not relied upon by Respondent in the issuance of both the proposed and final notices of discharge. This opinion will therefore focus solely on the deficiency in written communication upon which the discharge was based.
5. Respondent's exhibit #8, p. 4, appended to the Motion for Summary Judgment.
6. The specific language is found in paragraph 9, section (a) and (b)(1) and (2) of GAO Order 2432.1 (July 14, 1987):

### 9. PROCEDURES FOR PROPOSING PERFORMANCE-BASED ACTIONS.

a. Timing of Action. The process begins with supervisory determination that an employee is performing below the minimum standard defined under the applicable GAO performance appraisal system (i.e., unacceptably) in one or more of the critical job elements of his or her position. (See paragraph 5(f) for the applicable definition of minimum standard.) This determination is made at any time during the rating period that unacceptable performance is found to exist; the supervisor need not wait until the issuance of an end-of-job or annual performance appraisal to deem performance unacceptable.

b. Opportunity Period in Which to Improve. Once unacceptable performance is deemed to exist, the supervisor gives the employee an opportunity period in which to demonstrate performance at no less than the minimum standard in every critical job element in which performance is, at that point, unacceptable.

(1) Written Notice of Opportunity Period. The employee is advised in writing of the specific instances of unacceptable performance for each critical job element where unacceptable performance exists.

The opportunity period notice also appraises the employee of the minimum standard for each such element, together with the period of time that the employee is being given to demonstrate performance at (or above) the minimum standard.

(2)Duration of Opportunity Period. Except as provided in paragraph b(3), below, an opportunity period is no less than 30 days nor more than 90 days. Within this range, the supervisor determines the span of time that would afford the employee a reasonable period in which to demonstrate adequate improvement. The duration of the opportunity period and the work assignments made during that period will be commensurate with the duties and responsibilities of the employee's position, and, to the extent feasible, will provide the employee with work where he/she actually has the opportunity to improve in his/her performance deficiency areas.

7. Those sections read as follows:

9. PROCEDURES FOR PROPOSING PERFORMANCE-BASED ACTIONS.

c. Proposal to Take Performance-Based Action. Where an employee completes the opportunity period without having improved his/her performance to at least the minimum standard in every critical job element for which performance was deemed to have been unacceptable at the outset of the opportunity period, the supervisor MUST initiate the appropriate performance-based action at that time. The employee cannot remain in his/her position at his/her grade following the unsuccessful completion of the opportunity period. In proposing a performance-based action, all of the following procedural steps are followed:

(3) Proposal Time Period. The written proposal notice provides the employee with 30 days advance notice of the proposed action. (This 30-day period is referred to as the "notice period.") The deciding official may extend the notice period for up to 30 additional days. Any extension thereafter requires the approval of the Director of Personnel.

11. DECISION ON PROPOSED PERFORMANCE-BASED ACTIONS.

a. Timing. Decisions on proposed performance-based actions are made within 30 days of the expiration of the notice period. The Director of Personnel may extend this period for up to 30 additional days for good cause shown.

8. The option for extension of the notice period could also have nothing to do with doubt about the merits of the rating, but may simply provide the deciding official with more time to give a thorough review of the employee's grievances about the rating. Under GAO Order 2432.1 (July 14, 1987), section 9(c)(4)(b), the employee need not reply to the proposed notice of termination until 20 days after it issues. Thus, the deciding official may have only 10 days in which to review a grievance lodged against the proposed notice.

9. It may have been this provision that the Director of Personnel was concerned with in his counselling of the Regional Manager, Mr. McCormick, against further delay in issuing the final notice of discharge because that delay might erroneously be interpreted as a reconsideration of the decision to discharge.

10. "I believe that Mr. Rosenbaum asked for a new opportunity period. I did not grant it because he was already given a 90 day opportunity period that was extended several times. I had no reason to believe he would do better during another 90 day period." Respondent's affidavit of Thomas P. McCormick, exhibit #8, pages 4-5, appended to its motion for summary judgment.

11. 44 M.S.P.R. at 658 (citing Lisiecki v. Federal Home Loan Bank Board, 23 M.S.P.R. 633, 638-39 (1984), aff'd sub nom., Lisiecki v. Merit Systems Protection Board, 769 F.2d 1558 (Fed.Cir. 1985), cert. denied, 475 U.S. 1108 (1986)).

12. 44 M.S.P.R. at 658.