

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

**Docket No. 93-01**

**Date of Decision: March 7, 1994**

**Cite as: Rosenbaum v. GAO (en banc) (3/7/94)**

**Before: Personnel Appeals Board, en banc (Alan S. Rosenthal, Chair; Nancy A. McBride, Vice Chair; Leroy D. Clark, Harriet Davidson and Paul A. Weinstein, Members)**

**Unacceptable Performance**

**Performance Evaluation**

**Performance Appraisal**

**Performance Based - Removal**

**Removal**

**Management Right to Discipline**

**Opportunity to Improve Performance**

## **DECISION ON MOTION FOR RECONSIDERATION**

This matter is before the full Board on petitioner's request for reconsideration of an initial decision of the Administrative Judge granting summary judgment for the agency. The issue presented is whether, in making its final determination to remove petitioner, the agency was obligated to consider petitioner's performance in the period after he received his notice of proposed removal. Because the Board concludes that the agency did not have such an obligation, it affirms the initial decision of the Administrative Judge.

### **Background**

On January 4, 1993, petitioner, represented by the PAB General Counsel, filed a petition for review challenging his removal from his position as an evaluator in GAO's San Francisco Regional Office. Petitioner alleged that his termination constituted a prohibited personnel practice because it was in violation of federal statutes and GAO regulations. Respondent GAO denied that any applicable laws, rules or regulations had been violated in removing petitioner. On March 1, 1993, petitioner filed a motion for summary judgment. Respondent opposed this motion and filed its own motion for summary judgment. On July 8, 1993, the Administrative Judge issued his decision denying the petitioner's motion for summary judgment, granting respondent's motion for summary judgment, and dismissing the petition for review.

The following facts are not in dispute. On July 13, 1988, petitioner received a performance appraisal for the rating period of April 13, 1987 to May 31, 1988. In that appraisal, petitioner received an "unacceptable" rating in the critical job dimension of "written communication."<sup>1</sup> As a result of this rating, petitioner was given a 90-day opportunity period in which to improve his performance in written communication.

Petitioner's 90-day opportunity period (also known as a performance improvement plan or "PIP") began on August 15, 1988, and was scheduled to end on November 15, 1988. The opportunity period was twice extended and ultimately ended on January 9, 1989. At the conclusion of that period, petitioner again received a rating of "unacceptable" in written communication.

On March 23, 1989, petitioner received a notice proposing to remove him from his position based on unacceptable performance in the critical job dimension of written communication. The proposal was issued by the Assistant Regional Manager for Operations in the San Francisco Regional Office. The notice informed petitioner that the final decision would be made by the Regional Manager no sooner than 30 days following petitioner's receipt of the notice. It also informed him of his rights, including his right to make a written and oral reply and his right to representation by an attorney or other person of his choice.

Prior to the issuance of the notice of proposed removal, petitioner filed a grievance objecting to the unacceptable rating that he received at the conclusion of his PIP. The Regional Manager for San Francisco delayed action on the proposed removal while he was considering petitioner's grievance. As part of the grievance proceeding, the Regional Manager asked the petitioner to select a GS-14 evaluator to review the petitioner's rating. The reviewer selected by petitioner completed his review on May 26, 1989, concluding that there was no basis to change the rating. On June 9, 1989, the Regional Manager denied petitioner's grievance concerning his rating.

On July 3, 1989, petitioner filed another grievance objecting to the agency going forward with his removal until further, higher level, proceedings on his grievance were completed. After consulting with various officials in headquarters, the Regional Manager concluded that further delays were not warranted. On August 11, 1989, the Regional Manager issued a decision on the proposed removal in which he sustained the finding that petitioner had performed at an unacceptable level in written communication despite having received a reasonable opportunity to improve. The effective date of petitioner's removal was set as September 22, 1989.

### **Contentions of the Parties**

Petitioner does not challenge the initial rating of unacceptable in written communication which he received on July 13, 1988. Similarly, he does not contest that he received a reasonable opportunity to improve his performance or that the agency had a substantial basis for its determination that he failed to improve his performance during the opportunity period. Although a period of approximately four and a half months elapsed between the proposal to remove petitioner and the agency's final determination, petitioner does not allege that this delay was improper or constituted a prohibited personnel practice.<sup>2</sup> On the contrary, petitioner "concedes that he asked for the postponement himself and, therefore, does not now complain because [his removal] was postponed." Petitioner's Memorandum in Opposition to Respondent's Motion for Summary Disposition, at p. 5.

Petitioner's entire argument is that it was unlawful for the agency to remove him because, after the issuance of the notice of proposed removal, he was assigned to a new project and his work on that project was satisfactory. Petitioner asserts that it is a prohibited personnel practice for an agency to remove an employee who improves his performance to the "fully successful" level at any time before the final decision to remove him is issued. Petitioner asserts that this is the case even where the employee had already received a reasonable opportunity to improve and had failed to demonstrate satisfactory performance during the opportunity period. Petitioner contends that the uncontested facts in this case prove that his performance reached the "fully successful" level in the time between the issuance of the

notice of proposed removal and the final agency decision terminating his employment.

The agency disputed that petitioner had ever demonstrated "fully successful" performance in the critical dimension of written communication. However, the agency's primary argument was that it was not under any obligation to consider petitioner's performance during the period after the notice of proposed removal was issued. The agency argued that it was entitled to judgment as a matter of law because the undisputed facts showed that it had properly rated petitioner's performance as unsatisfactory, it had given him a reasonable opportunity to improve and he had failed to do so. The agency contends that it therefore met all the statutory and regulatory requirements for removal of an employee for unacceptable performance.

### **Decision of the Administrative Judge**

The Administrative Judge denied petitioner's motion for summary judgment, finding that the facts concerning petitioner's performance in the period following the notice of proposed removal were contested. The Administrative Judge concluded that petitioner had not presented uncontested evidence that he had: (1) worked on a project after the proposed removal that was adequate to assess his performance in written communication, or (2) actually performed at the "fully successful" level in written communication prior to the effective date of his removal.<sup>3</sup> The Administrative Judge thus concluded that, even if petitioner's legal theory was valid, petitioner was not entitled to summary judgment.

The Administrative Judge next considered the agency's motion for summary judgment. He ruled that there was no legal basis for petitioner's claim that the agency was required to consider his performance in the post-notice period before deciding to remove him. As a result, the Administrative Judge granted summary judgment for the agency and dismissed the petition for review.

### **Request for Reconsideration**

Petitioner filed the present request for reconsideration seeking reversal of the grant of summary judgment in favor of the agency. His primary contention is that the Administrative Judge incorrectly held that the agency has no obligation to consider petitioner's performance after the issuance of the notice of proposed removal. Petitioner asserts that the ruling of the Administrative Judge is inconsistent with the decision of the Merit Systems Protection Board in Sullivan v. Department of Navy, 44 M.S.P.R. 646 (1990).<sup>4</sup>

### **ANALYSIS**

The issue before the Board is whether the agency is required to consider an employee's performance that occurs after the agency has issued a notice of proposed removal and to retain an employee who demonstrates satisfactory performance in that post-notice period. For the reasons discussed below, we agree with the Administrative Judge that the agency was not obligated to consider petitioner's post-notice performance in this case.

Under the General Accounting Office Personnel Act (GAOPA), GAO is required to have personnel rules for the removal of employees for unacceptable performance that are consistent with 5 U.S.C. § 4303. 31 U.S.C. § 732(d)(3). GAO is also required to have a performance appraisal system that meets the requirements of 5 U.S.C. § 4302. *Id.* at § 732(d)(1). GAO's rules implementing these provisions of the GAOPA are contained in GAO Order 2432.1.<sup>5</sup>

Neither the GAO Order nor the federal personnel appraisal statute upon which it is based contains any express requirement that the agency retain an employee whose performance improves to the "fully successful" level after a notice of proposed removal has been issued. Both the order and the statute require that employees be given an opportunity to improve their performance, but in both cases this opportunity is to be provided before a notice of proposed removal is issued. See, 5 U.S.C. § 4302(b)(6); GAO Order 2432.1, pp. 5-6. Once an employee fails to improve during an opportunity period, the statute specifies that he may be removed so long as he is accorded four procedural rights. The employee is entitled to:

1. 30 days advance notice of the proposed removal;
2. representation by an attorney or other individual;
3. a reasonable time to answer orally and in writing; and
4. a written decision.

5 U.S.C. § 4303; see also GAO Order 2432.1, pp. 6-8. There is no mention in the statute of any right of the employee to have his or her performance appraised after the notice of removal has issued.<sup>6</sup>

A review of the legislative history of the Civil Service Reform Act indicates that Congress did not intend to require agencies to consider post-notice performance or to retain employees whose performance reaches the satisfactory level only after removal has been proposed. An early version of the bill did require that agencies afford employees an opportunity to improve during the period following the notice of proposed removal. S. 2640, 95th Cong., 2d Sess. at 31 (introduced on March 3, 1978). However, the final version of the bill moved this requirement for an opportunity to improve to before the issuance of a notice of proposed removal. The Senate report accompanying the final version of the bill commented:

Section 4302(b)(4) specifies that an adverse action should be taken against an employee with an unacceptable performance rating only after the employee has had an adequate opportunity to improve his job performance. The bill does not require, however, that the agency's decision whether to take action against an employee must, in each instance, be governed by the performance of an employee during the specific 30- or 60-day notice period afforded him under section 4303.

S. Rep. No. 95-969, 95th Cong., 2d Sess., at 42, as reprinted in 1978 U.S. Code Cong. and Admin. News at 2764.

Thus, it appears that the intent of Congress, in fashioning the final version of the statute, was to limit the function of the post-notice period. The report describes the function of the post-notice proceedings as follows:

"The purpose of this procedure [in 4303(b)] is to provide the employee with notice that his performance is not acceptable, to permit the employee to reply to the proposed action and the reasons for the action, and to give a decision, whether favorable or unfavorable, to the employee."

Id. at 2765. The concern of Congress in designing the post-notice proceedings was to ensure that employees were accorded due process. There is no indication that Congress intended to give employees a right to have an additional opportunity to improve their performance after the notice of proposed action had issued, or to require agencies to reevaluate an employee's overall level of performance based on work during the post-notice period.<sup>7</sup>

Strong policy considerations undergird the scheme adopted by Congress. First, efficient functioning of the government requires closure of the performance evaluation process at some point. Once an employee has been evaluated as unsatisfactory under a properly constructed performance appraisal system, has failed to improve during a properly designed PIP and has been issued a notice of proposed removal, it would be extremely inefficient to require the agency to continue to evaluate the employee's subsequent performance. A primary objective of the Civil Service Reform Act was to simplify the procedures for removing employees who were not performing at acceptable levels. Lovshin v. Department of the Navy, 767 F.2d 826, 831-832 (Fed. Cir. 1985)(en banc). This was seen as critical to protecting the public's right to an effective government. Id. It would be inconsistent with this objective to require an agency to retain an employee who had a history of substandard performance both before and during the PIP, merely because of an improvement in performance while he is awaiting a decision on a proposed removal. The Board shares the concern of the Administrative Judge that such a holding could require an agency to retain a "roller coaster" employee who improves his performance only at the eleventh hour before removal and then returns to his previous unsatisfactory level once the threat of removal is withdrawn. See, Initial Decision at \_\_\_\_\_. Such a holding might also ultimately hurt employees as it would discourage agencies from granting short postponements of the removal to alleviate personal hardship. An agency would be less receptive to such requests if, as a result, it would be obligated to treat the intervening period as a second PIP.

The only support cited by petitioner for his contention that an agency is required to retain an employee whose performance improves to the "fully successful" level during the post-notice period is the decision of the Merit Systems Protection Board in Sullivan v. Department of the Navy, 44 M.S.P.R. 646 (1990). That case, however, does not support petitioner's position.

The issue addressed in Sullivan is "whether an agency may rely on instances of alleged unacceptable performance occurring after the close of the PIP." Id. at 655. The case involves an employee who successfully completes a PIP and then, once again, performs at an unacceptable level in the post-PIP period. The MSPB held that, in such a situation, the agency could rely on post-PIP performance in deciding to propose the removal of an employee. Id. at 659. The holding of Sullivan thus does not speak to the situation of petitioner who did not perform satisfactorily during his opportunity period and only claims to have demonstrated improvement after the removal was proposed.

Because the holding of the case is not germane to his situation, the petitioner relies instead on some general discussion in Sullivan of whether it is permissible for agencies to consider post-PIP performance. The MSPB states that there are situations where it may be appropriate for the agency to consider both improvements and deteriorations in performance following a PIP:

In light of these provisions of the law and its legislative history, the Board concludes that consideration of post-PIP performance was not foreclosed by Congress and that in order to effectuate the purpose of the law, its consideration may be appropriate.

Id. at 658 (emphasis added). As an example of appropriate consideration of post-PIP improvement in performance, the MSPB cites only 5 U.S.C. § 4303(d) which recognizes that an agency may voluntarily decide to retain an employee based on successful performance after the issuance of a notice of proposed removal. (See footnote 6 above.) While an agency is certainly not foreclosed from considering performance after the PIP, there is nothing in Sullivan which suggests that an employee has a right to have post-notice performance considered or that an agency must retain an employee who brings his

performance up to the "fully successful" level only after the proposed notice of removal is issued.<sup>8</sup>

Thus, the undisputed evidence in this case revealed that the agency had met all of the statutory requirements for removal of the petitioner. Petitioner only sought to prove that, after the agency proposed his removal and during a "notice-period" that was extended at his request, petitioner's performance finally came up to the satisfactory level. Because we conclude that such a showing would not have entitled petitioner to any relief, we rule that the Administrative Judge properly granted summary judgment for the agency and properly denied summary judgment for the petitioner.

## **CONCLUSION**

The decision of the Administrative Judge in this matter is hereby **AFFIRMED**.

## **Notes**

1. Petitioner had received one prior rating of unacceptable in written communication on March 5, 1987.
2. Under GAO Order 2432.1 (July 14, 1987), final action on a removal is to take place within 90 days of the issuance of the proposal to remove, unless this period is extended by the Director of Personnel. See pars. 9(c)(3), 11(a). No extension was sought from the Director of Personnel in this case. Because petitioner does not challenge this failure to abide by the GAO order, the Board has not considered it in deciding this matter.
3. In support of his claim that he had performed at the "fully successful" level, petitioner relied on two affidavits taken during the investigation of a complaint of age discrimination filed by petitioner. The first was a statement by the supervisor of the project to which petitioner was assigned in the period after the issuance of the notice of proposed removal. He stated: "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." However, in the same affidavit, the supervisor qualified this statement by commenting that the project did not involve the kind of assignments that would "fully test [petitioner's] writing capabilities." In a recent affidavit taken by the agency to support its opposition to petitioner's motion for summary judgment, the supervisor further qualified his statement by saying that petitioner's writing on the assignment was minor and not substantial. The other affidavit relied upon by petitioner was from the Assistant Regional Manager and stated that petitioner's performance during the post-notice period was "OK." But she also qualified this statement by saying that the project to which petitioner was assigned was of "limited scope" and thus was not a good indication of the petitioner's overall abilities. In a recent affidavit taken by the agency to support its opposition to petitioner's motion to dismiss, the Assistant Regional Manager stated that she had not intended to imply that petitioner's work had improved in any way.
4. Petitioner also claims that the Administrative Judge erred in finding that there was a genuine issue of fact as to whether petitioner's performance improved in the period after the issuance of the notice of proposed removal. Petitioner once again asserts that the undisputed facts demonstrate that he had performed at the fully successful level during this period and that summary judgment should have been entered in his favor. The Board agrees with the Administrative Judge that the facts surrounding petitioner's performance following the notice of proposed removal are very much in dispute. (See summary of facts in footnote 3). There would thus have been no basis for granting summary judgment for the petitioner even if his legal theory had been sustained.

5. The version of GAO Order 2432.1 that was in effect at the time of the petitioner's removal was the one dated July 14, 1987.

6. The statute does state:

If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

5 U.S.C. § 4303(d). This provision demonstrates that an agency has discretion to retain an employee whose performance improves during the post-notice period. But, read in context of the entire section, it does not give the employee a right to insist that his post-notice performance be considered or that he be retained based on satisfactory performance in the post-notice period. The only right it confers is the right of the employee to have the record of his unsatisfactory performance expunged after he has maintained satisfactory performance for one year.

7. We note that the Congressional report states that agencies are not required to consider performance after the notice of proposed removal "in each instance." This latter phrase may simply recognize that under the statute agencies do have discretion to retain employees whose performance improves during the notice period. See, 5 U.S.C. § 4303(d). It may also suggest that while agencies generally have no obligation to consider post-notice performance, there may be unusual circumstances which would necessitate such consideration. We have no occasion on the present appeal to decide whether an agency might ever be obligated to consider performance after the notice of proposed removal. It is clear that Congress did not want such an obligation imposed as a general matter. In the present case, petitioner has offered to prove only that he performed at a satisfactory level on assignments given to him during a brief extension of the notice period made at his request. Requiring consideration of his post-notice performance in these circumstances would amount to recognizing a general requirement for such consideration, contrary to the intent of Congress.

8. Petitioner's reading of Sullivan is further undermined by the fact that the MSPB has repeatedly held that an agency is not required to consider improvements in performance that occur after it has issued a notice of proposed removal. Heller v. Department of Air Force, 28 M.S.P.R. 35 (1985), aff'd w/o opinion, 795 F.2d 1019 (Fed. Cir. 1986); Gilbert v. Department of Health and Human Services, 27 M.S.P.R. 152 (1985); Gordon v. Department of Agriculture, 25 M.S.P.R. 438 (1984). In Sandland v. General Services Administration, 23 M.S.P.R. 583 (1984), the MSPB stated, in dicta, that:

"Thus, an employee has a substantive right to an improvement period prior to the institution of a performance based action. In contrast, an employee's performance during the requisite notice period need not be considered in reaching the ultimate conclusion of whether an action is appropriate."

23 M.S.P.R. at 588. Although Sandland is cited and discussed several times in Sullivan, the MSPB never indicates that it is rejecting or retreating from the above statement contained in that case. Thus, contrary to petitioner's assertion, it does not appear that the MSPB reads Sullivan as requiring consideration of post-notice performance.