

Gwendolyn Burton Poole v. U.S. General Accounting Office

Docket No. 98-01

Date of Decision: June 30, 1999

Cite as: Poole v. GAO (6/30/99)

Before: Michael Wolf, Chair

Performance appraisal

Removal

Opportunity period

DECISION

This case arises out of a Petition for Review filed by Gwendolyn Burton Poole (Petitioner). Petitioner contests the decision of the U. S. General Accounting Office (GAO or the Agency) to remove her from employment as a Band II evaluator for unacceptable performance.¹ As explained below, I affirm the Agency's decision.

I. Procedural Background

In May 1997, Petitioner received a performance appraisal with unsatisfactory ratings in all but one of the critical job dimensions for her position. As a result, Petitioner was placed in a 90-day performance improvement opportunity period, effective June 10, 1997.² In September 1997, Petitioner received a performance evaluation for the opportunity period, which rated her unsatisfactory in four critical job dimensions. This rating led to a notice of proposed removal dated September 26, 1997.

On October 16, 1997, Petitioner appealed the proposed removal to the Personnel Appeals Board Office of General Counsel (PAB/OGC). The General Counsel requested and was granted a 30-day *ex parte* stay of the removal to allow time for that Office to investigate the circumstances surrounding Petitioner's charge. Ultimately, the stay was extended to January 10, 1998.

On January 15, 1998, Petitioner received a letter notifying her of the Agency's final decision to remove her from employment. She was permitted, however, to resign from GAO on January 16,

¹See 31 U.S.C. §753(a); GAO Order 2432.1 ¶15.

²See GAO Order 2432.1 ¶8.

1998, under a "discontinued service retirement."³ On February 13, 1998, Petitioner attempted to appeal the removal directly to this Board, bypassing the PAB/OGC.⁴ She was notified that this "appeal" would be held in abeyance until the PAB/OGC had completed its investigation and issued the requisite Right to Appeal Letter. After receiving a Right to Appeal Letter, Petitioner re-filed her Petition for Review on March 23, 1998. The Petition incorporated by reference the letter of February 13, 1998.

On appeal, Petitioner challenged three separate performance appraisals in which she received unsatisfactory ratings: October 1996, May 1997, and September 1997. The Agency filed a motion for partial dismissal, arguing that this Board only had jurisdiction to review the performance appraisal that led to Petitioner's removal (*i.e.*, September 1997). The Agency alternatively requested that Petitioner be precluded from presenting evidence relating to the October 1996 and May 1997 ratings.

By Order of August 24, 1998, I concluded that this Board did not have jurisdiction over Petitioner's appeal of the October 1996 and May 1997 performance appraisals.⁵ Because the performance appraisal in September 1997 formed the basis of the Notice of Proposed Removal, the ratings in that appraisal were held to be reviewable by the Board.

The August 24, 1998 Order denied the Agency's alternative motion *in limine*. Under the governing GAO Order, the Agency could support its case with proof arising within the one-year period preceding the Notice of Proposed Removal.⁶ The May 1997 and October 1996 ratings were therefore arguably relevant to the removal. I concluded that both the Agency and Petitioner could offer facts relating to these ratings as evidence to support their positions.

³A discontinued service retirement is available to eligible employees subject to removal for poor performance who might otherwise not yet be qualified for early retirement benefits. See 5 U.S.C §8336(d).

⁴See 4 C.F.R. §§28.11, 28.18.

⁵The Order stated in pertinent part:

Challenges to performance appraisals in and of themselves . . . do not constitute separate claims cognizable under the Board's jurisdiction. See 31 U.S.C. §753. The appropriate channel through which to challenge the accuracy or fairness of a performance appraisal is the Agency's grievance mechanism . . . as provided for in GAO Order 2771.1.

A particular performance appraisal may come within the Board's jurisdiction if an employee alleges that the appraisal involves a prohibited personnel practice under 31 U.S.C. §732(b)(2). . . . Petitioner challenges her ratings in the October 1996 and May 1997 appraisals as being grossly inaccurate or unfair, but does not allege that the ratings violated any law, regulation or GAO order, as is required for a claim of prohibited personnel practice. [Order at 4.]

⁶GAO Order 2432.1 ¶9c(2).

The hearing in this case was conducted on September 14-16, and December 7-10, 1998. The Agency presented the testimony of three witnesses and submitted numerous documentary exhibits. The Petitioner represented herself in the proceeding and elected not to testify. She did, however, present numerous documents to support her position. Petitioner also called ten Agency employees as witnesses, in addition to the three called by GAO. Both parties submitted post-hearing and reply briefs.⁷

II. Factual Background

A. Pre-Opportunity Period

Petitioner began her employment with GAO in the Chicago Regional Office in January 1980 as a Management Analyst. She was later reclassified as an Evaluator and eventually promoted to Senior Evaluator. At the close of 1988, Petitioner resigned to pursue employment in the private sector. In August 1991, she returned to the Chicago office of GAO as a Band II Senior Evaluator. In 1993, she was assigned to the Housing Group of the Resources, Community and Economic Development (RCED) Division.

In the three performance appraisals between April 1993 and April 1995, Petitioner was rated at least “exceeds fully successful” in all job dimensions under review. P.Ex. I/15.⁸ In her rating for the period April 8, 1995 to September 30, 1995, Petitioner was rated “exceeds fully successful” or “outstanding” in all job dimensions except teamwork. In the latter dimension, Petitioner was rated “fully successful.” P.Ex. I/15 at 8. Petitioner grieved the teamwork rating, but her supervisor’s rating was upheld. Tr. 341. Effective September 1995, the Agency transferred Petitioner to the Financial Institutions and Markets Issue Area (FIMI) of the Agency’s General Government Division (GGD). Tr. 333-34, 341.

In FIMI, Petitioner began working on a project known as the “sales practices” job. Tr. 25-26. This project resulted in the production of a report to Congress on sales practices associated with three types of financial products: over-the-counter (OTC) derivatives, mortgage-backed securities (MBS), and structured notes (SNs).⁹ The sales practices study was a follow-up to a 1994 FIMI

⁷Petitioner attached documents to her two post-hearing briefs that were not admitted into evidence at the hearing. Those documents have been treated as argument, rather than evidence.

⁸Petitioner’s Exhibits are contained in two binders, each beginning with the number “1.” Roman numerals are used to designate each of the two volumes.

⁹OTC derivatives “are privately negotiated outside of an organized exchange and have a market value determined by the value of an underlying asset, reference rate or index,” known as the “underlying.” R.Ex. 14 at 26. The underlying could be, for example, a stock or commodity. *Id.* Options, forwards, and swaps are examples of derivatives. *Id.* at 27.

Mortgage-backed securities are debt securities created from residential mortgages. R.Ex. 14 at 30.

report that had analyzed risks associated with OTC derivatives, but had not focused on the sales activities of dealers or the relationships between customers (“end-users”) and dealers. R.Ex. 14 at 2. The new study focused on the possibility that derivative losses were caused by questionable dealer activities. Twenty-seven non-administrative GAO staff located throughout the United States worked on the job. Tr. 22, 24.

Petitioner's project manager on the FIMI job was Cecile Trop, a Band III assistant director for the FIMI issue area. Petitioner's immediate supervisor was David Diersen, a Band II evaluator. Tr. 19, 24. Both Ms. Trop and Mr. Diersen were based in Chicago.

Mr. Diersen, as rater, and Ms. Trop, as reviewer, signed Petitioner's first appraisal in FIMI. Dated October 1, 1996, this appraisal rated Petitioner as "needs improvement" in two critical job dimensions--data analysis and teamwork. P.Ex. I/16 at 9; Tr. 26. In three other job dimensions--planning, data gathering and documentation, and oral communication--she was rated as “fully successful.” Finally, in written communication, Petitioner was rated as “exceeds fully successful.” P.Ex. I/16 at 9.

After receiving the October 1996 appraisal, Petitioner informally complained to supervisors that the evaluation was inaccurate. See GAO Order 2430.1 ¶9. This discussion led to a revision of the written narrative on her evaluation; no changes were made to the actual ratings. P.Ex. I/16 at 15. Petitioner declined to sign the revised evaluation, claiming that it remained "grossly inadequate." Id. at 12-15. She again complained informally to her supervisors about this rating, but did not pursue her objections through the formal grievance procedures.

In fiscal year 1997, Petitioner continued to work on the sales practice job. Her assignment was to complete a comprehensive "loss list" that had been begun by GAO employee Melvin Thomas and to prepare a summary of losses that focused on questionable sales activities. R.Ex. 7; Tr. 27-29, 482. To aid in making these determinations, Mr. Thomas prepared a comprehensive list of criteria for deciding whether improper sales practices were involved in a loss. R.Ex. 49. Petitioner received a copy of this list and made several revisions to it. R.Ex. 8. Petitioner was also instructed to review 10 years of newspaper and journal articles, regulatory reports, and professional publications in order to decide whether particular losses were within the scope of the study, the amounts of such losses, and whether improper sales practices caused the losses. Tr. 28-29.

In April 1997, Petitioner submitted her initial spreadsheet. As the coordinator of the loss list project, Mr. Thomas reviewed her submission and concluded that Petitioner had made serious errors in 24 of those cases. He summarized the errors into five separate categories:

1. A loss amount was computed although sources do not indicate that there was a loss.
2. Loss was assumed to be entirely from derivatives, although derivatives either not mentioned or other products or factors mentioned by sources.

Structured notes are debt securities that combine elements of traditional debt instruments and OTC derivatives. R.Ex. 14 at 31.

3. Loss was categorized as sales practice related, although sales practices not mentioned by sources.
4. Loss amount appears to be overstated by several hundred million dollars.
5. Loss amount was computed by taking the average from several sources. [P.Ex. II/19.]

Mr. Thomas supported these comments with a brief summary of the individual cases that he considered to be in error. This summary was provided to Petitioner in April 1997. Id.

Petitioner also met with Mr. Thomas and Mr. Diersen on April 23, 1997 to discuss the problems with her spreadsheet. Tr. 903-04. At this stage, two other members of the sales practice team (Chris Marik and Richard Tshara) were asked to review all of Petitioner's documentation and to prepare their own version of a loss list based on those materials. Tr. 41, 503-09; R.Ex. 9 (entitled "list617").¹⁰ Ms. Marik and Mr. Tshara deleted 53 entries from Petitioner's list, specifying a variety of reasons for the deletions. R.Ex. 6 at 4-5.

At the end of May 1997, Petitioner submitted a revised loss list (the "sales4" spreadsheet). P.Exs. II/25, 26. She also submitted a written response to Mr. Thomas' critique of her April loss list. P.Ex. II/21. Petitioner disagreed with virtually all of Thomas' comments. Both Mr. Diersen and Mr. Thomas found the "sales4" list to be unacceptable, claiming that it contained many of the same errors that had previously been identified. P.Ex. II/27; see Tr. 40-41.

On May 30, 1997, Petitioner received a performance evaluation for the period October 1996 through April 1997. R.Ex. 2. Ms. Trop testified that she initiated an interim appraisal because Petitioner had been "unresponsive" to concerns raised by Messrs. Thomas and Diersen in their meeting of April 23, 1997. Tr. 953-54. In this evaluation, Petitioner was rated as unsatisfactory in five critical job dimensions: planning, data gathering and documentation, data analysis, oral communication, and teamwork/working relationships. She was rated fully successful in written communication. David Diersen signed the appraisal as the rater, and Cecile Trop signed as the reviewer. Petitioner refused to sign the rating form.

B. The Performance Improvement Opportunity Period

Under GAO Order 2432.1 ¶¶a and b, the Agency must place an employee in an opportunity period when unacceptable performance is found in even one critical element of the employee's position. Following her May 30, 1997 performance appraisal, Petitioner received notice, signed by Chicago Regional Manager Leslie Aronovitz, that she was being placed in a 90-day performance

¹⁰In addition to the documents previously collected by Petitioner and Mr. Thomas, Ms. Marik and Mr. Tshara also had the benefit of some additional documents provided by a librarian. Tr. 507. In the course of their work, they also made several revisions to the "sales practice" criteria that Petitioner used. Tr. 483-84.

improvement opportunity period beginning June 10, 1997. R.Ex. 3.¹¹ The notice stated that failure to improve all five critical job dimensions to at least the “needs improvement” level would result in either a reduction of Petitioner's band level or her removal from GAO employment.

Attached to Ms. Aronovitz's notice letter was a ten-page memorandum with a detailed discussion of Petitioner's performance problems and the Agency's expectations in the dimensions of planning, data gathering, data analysis, oral communication, and teamwork. The memorandum identified the following “Overall Performance Problems and Expectations:”

During the prior rating period, the following overall problems were identified with your performance: selecting inappropriate and unacceptable methodologies for organizing and reporting on your work; not submitting your work for timely review; providing consistently unrealistic estimates for meeting job milestones; making incorrect and inadequately supported spreadsheet entries and dropping other valid entries; ignoring recommendations for managing your computer files; not providing your supervisor with appropriate access to your computer files; and rejecting assistance from your supervisor and core group members. [R.Ex. 3 at 3.]

Petitioner was instructed to discuss these expectations with her supervisor. She was also advised that her supervisor would meet with her weekly to discuss her performance during the opportunity period.

Petitioner was given one specific assignment for the opportunity period. She was to reconcile her loss list with the loss list prepared by Ms. Marik and Mr. Tsuchara. She was instructed to prepare a written reconciliation plan by June 19, 1997, containing an estimate of the time needed to complete the work. R.Ex. 3 at 5. Petitioner also received a 29-page methodology prepared by Ms. Marik and Mr. Tsuchara. R.Ex. 12. The opportunity letter described the reconciliation project in detail and advised Petitioner of the need to document and explain her conclusions.¹²

¹¹In accordance with GAO Order 2432.1, the notice had been reviewed by the Employee Relations Branch of the Personnel Office. Tr. 368-69.

¹²The letter stated, in part:

During the opportunity period, you will be expected to provide a spreadsheet that reconciles the differences between the spreadsheet that you submitted on April 16, 1997, and the one provided you with the opportunity period letter and its attachment. The expectation is that you will provide convincing evidence supplemented by sufficient explanation to support your reconciliation. Your May 28, 1997, responses to questions raised on 25 of the 33 largest dollar losses in your spreadsheet do not constitute an acceptable reconciliation. For all but one loss, you stated "I disagree" without providing convincing evidence or a logical explanation to support your spreadsheet entries. In addition, your responses often did not fully address the questions raised or explain your analysis of the information contained in the

On June 13, 1997, Mr. Diersen and Ms. Trop met with Petitioner to review the opportunity letter and determine a strategy for meeting its requirements. R.Ex. 16 at 1. Petitioner requested a postponement of further meetings until she could prepare a written response to the opportunity letter. She was advised that the governing GAO Order does not provide time for filing a written response to the opportunity letter, and that, while she was free to write such a response, it would not delay the schedule set for meeting performance deadlines. See R.Ex. 16.

All of the feedback sessions were held between June 13, 1997 and September 4, 1997.¹³ During that period, Petitioner met with her supervisors a total of 12 times. R.Exs. 16-27. Prior to each meeting, a Purpose, Agenda and Limit (PAL) was circulated; a detailed summary of each meeting was written afterwards. Petitioner's expectations for the opportunity period included summarizing any agreements reached after each meeting. R.Ex. 3 at 10. Throughout the opportunity period, however, Petitioner declined to add to, amend, or initial the meeting summaries. See R.Exs. 16-27.

As of the August 7, 1997 feedback session, Petitioner still had not produced any case reconciliations. Mr. Diersen and Ms. Trop recorded in their report of this meeting that they had "stressed to Ms. Poole that reconciliation of the differences between the two spreadsheets was the crucial part of the project and that we needed reconciled cases, or at least tentatively reconciled cases, before we could provide her meaningful feedback on her reconciliation work." R.Ex. 24 at 1.

On August 13, 1997, Mr. Diersen, Mr. Thomas, Ms. Trop and Petitioner met for feedback on the first group of 30 reconciled cases provided by Petitioner. The report of that meeting stated that Petitioner

had often misapplied the criteria that we had provided her for (a) classifying products and (b) determining if sales practice disputes were involved. We also told Ms. Poole that our review showed that, when differing loss amounts were reported, she had not selected the one best loss amount or consulted with Mr. Diersen or [Mr.] Thomas to obtain guidance in doing so. Ms. Poole rejected the validity of much of the feedback that we provided her. As the session proceeded, her interruptions became so frequent and her responses so antagonistic that it was difficult to provide the feedback we had prepared for her. [R.Ex. 25 at 1.]

Petitioner also was advised that the support she had provided for her reconciliation "would not pass referencing." *Id.*

supporting document. . . . Before beginning work on this reconciliation project, your supervisor and the loss list project coordinator (Mel Thomas) will meet with you to review these expectations and answer any questions that you may have. [R.Ex. 3 at 3.]

¹³Ms. Trop and Mr. Diersen participated in all of the meetings; Mr. Thomas participated in the meetings that focused on the loss list reconciliation. R.Exs. 17-27.

On August 21, 1997, Ms. Trop, Mr. Diersen, and Mr. Thomas reviewed Petitioner's second group of reconciled cases. Petitioner was again told that she had "misapplied the criteria" provided to her for:

- (a) properly classifying the products as over-the-counter (OTC) derivatives, mortgage-backed securities (MBS), structured notes (SN), or exchange-traded derivatives; (b) determining if sales practice disputes were involved; (c) determining whether the entity reporting the loss was a dealer or end-user; or (d) determining whether a reported loss from operations involved the products listed in (a) above. [R.Ex. 26 at 1.]

The Agency's reports of the meetings on August 13 and 21 indicated that many of the specific errors were discussed with Petitioner; all of the alleged mistakes were catalogued at the end of each report. R.Exs. 25, 26.¹⁴ In her comments during the meetings and in written responses, Petitioner disagreed with virtually all of the criticisms of her loss list reconciliation, usually contesting the methodology and instructions provided to her. See R.Exs. 25-28.

Petitioner met with Mr. Diersen, Mr. Thomas and Ms. Trop on September 4, 1997, to discuss the third group of reconciled cases she had submitted. See R.Ex. 27. She was again told that she had misapplied the criteria for determining whether a loss should be included in the report. The summary of the September 4 meeting, prepared by the Agency, indicates the nature of the colloquy between Petitioner and the three other Agency officials:

Ms. Poole did not explain the basis for her disagreement with our analysis of the Continental Illinois Bank case. However, she said that if we did not understand her analysis of the case, we should show her more evidence. We reminded her that it was her responsibility to provide us the evidence to support her analysis. She accused Mr. Thomas of not reading all the support that she had cited and not quoting all the relevant information from those sources. We asked her to point out what she was referring to,

¹⁴For example, the report of the August 13, 1997 meeting had numerous entries such as the following:

ABN AMRO Bank

An entity cannot be both an end-user and a dealer on the same loss. Separate reported losses by the same entity should not be combined. Losses were improperly combined, resulting in conflicting entries under "country." Evidence shows that foreign exchange (FX) options in this case should be entered as over-the-counter (OTC) derivatives. Evidence does not support sales practice determination.

AWA Ltd.

Evidence shows that FX transactions in this case are OTC derivatives. Evidence does not support sales practice determination. [R.Ex. 25 at 7.]

but she declined and said "next one." [*Id.* at 2.]

* * *

When Mr. Thomas attempted to explain to Ms. Poole why her definition of a dealer was causing her to miscategorize end-users as dealers, she cut him off repeatedly. Then, in a condescending and abrasive manner, she accused him of failing to look at her entire definition of a dealer and selecting parts of the definition to make his point. We told Ms. Poole that, in fact, this is exactly what she had done. We told Ms. Poole that, for several of the cases we reviewed, she incorrectly identified the dealer and end-user to the reported loss. For most of these cases, she mistakenly identified the same party as both the dealer and end-user. We told Ms. Poole that this showed her lack of understanding of the overall objectives of her analysis and how it would be used. [*Id.* at 4.]

At the end of the review of the loss list reconciliation, Mr. Thomas left the meeting. Ms. Trop and Mr. Diersen then provided Petitioner with "performance feedback:"

Overall Performance: Ms. Poole's performance during the opportunity period has not changed and perhaps has declined.

Planning: Ms. Poole has not met any of her deadlines for submitting reconciled cases.

Data Gathering and Documentation and Data Analysis: Because Ms. Poole has not been responsive to feedback, as discussed above, she continues to have problems classifying products and determining if any entity is an end-user or a dealer and if sales practice issues were involved. As a result, her spreadsheet continues to contain many erroneous entries.

Oral Communication: Ms. Poole continues not to listen constructively and continues to refuse to summarize her understanding of what she is told.

Working Relationships, Teamwork, and Equal Opportunity: Ms. Poole continues to show an unwillingness to work as a team member. She does not share her work or seek input from others to assure that she is meeting objectives. [*Id.* at 7.]

At the close of the opportunity period, Petitioner received a performance appraisal dated September 15, 1997. R.Ex. 1. In that appraisal, compiled by Mr. Diersen and Ms. Tropic, Petitioner's performance remained "unacceptable" in the job dimensions of planning, data analysis, oral communication, and teamwork/working relationships. Her performance in data gathering and documentation had improved to the "needs improvement" level, and her rating for written communication remained at "fully successful." R.Ex. 1 at 1. The narrative assessment of Petitioner's performance stated, in part:

Ms. Poole was under a 90-day opportunity period. She was consistently uncooperative and rejected the detailed feedback provided to her. She resubmitted basically the same work that had triggered the opportunity period without additional support or explanation as to how our concerns had been addressed. As a result, her overall performance remained unacceptable and she continued to overstate derivatives losses by hundreds of billions of dollars. [*Id.* at 2 (emphasis in original).]

C. The Removal Action

Following the appraisal for the opportunity period, Petitioner received a written notice of proposed removal, dated September 26, 1997. R.Ex. 4. The letter stated that the proposed removal was based on "unacceptable performance in the critical job dimensions of Planning; Data Analysis; Oral Communication; and Teamwork, Working Relationships, and Equal Opportunity." *Id.* at 1; *see* Tr. 21. The letter informed Petitioner of her right to reply either orally or in writing within 20 calendar days and explained her right to representation. It also provided an analysis of Petitioner's performance during the opportunity period in the four critical job dimensions:

1. Planning

The notice of proposed removal stated that Petitioner had fallen behind schedule from the outset of the opportunity period, first by failing to submit a reconciliation plan until June 30, 1997 (rather than June 19), and then by not meeting any of the dates set in the schedule for submitting reconciliations. By the end of the opportunity period, Petitioner had "submitted less than half of the required reconciliations for review. Further, much of this work was incomplete, and it was not summarized as required." R.Ex. 4 at 2.

2. Data Analysis

The proposed removal described Petitioner's performance in data analysis as follows:

[Y]ou resubmitted basically the same work that had triggered the opportunity period without additional support or explanation as to how your supervisors' concerns had been addressed. As a result, you overstated derivatives losses by hundreds of billions of dollars and

your work could not be used in the final report. In numerous cases, support did not exist for your determination that a loss involved the products covered by the review or a sales practice dispute. Also, although the product definitions were discussed with you in great detail, you continued to include products that were outside these as well as accepted industry definitions in your spreadsheet. You also did not apply the team's criteria for determining whether a loss involved sales practices, and you classified numerous cases as both "involving" and "not involving" sales practices, which are contradictory conclusions. Finally, you frequently classified an entity as both an end-user and a dealer, even though you had been repeatedly reminded that these were mutually exclusive categories. [R.Ex. 4 at 2.]

3. Oral Communication

The removal letter stated that Petitioner "did not listen constructively" and that she "frequently denied that agreements had been reached" with supervisors. Petitioner was also faulted for failing to summarize the agreements reached after each feedback session, as she had been asked to do in the expectation-setting memorandum. Finally, Petitioner "frequently interrupted and talked over others, speaking in a raised and hostile voice." R.Ex. 4 at 2.

4. Teamwork/Working Relationships

The removal notice stated that Petitioner was "consistently uncooperative and rejected the detailed feedback provided." R.Ex. 4 at 3. She was "condescending and abrasive" and abruptly terminated one feedback session when she received comments critical of her work. Petitioner refused to submit her work in progress and "consistently refused to respond to supervisory instructions." *Id.*

III. Contentions of the Parties

A. Petitioner's Position

Petitioner makes five main arguments in support of her position:

1. Petitioner's performance appraisal for the period October 1, 1996 to April 25, 1997 was inaccurate.
2. The Agency's decision to place Petitioner in a 90-day opportunity period was arbitrary and based on unsubstantiated evidence.
3. Petitioner's performance appraisal for the period April 28, 1997 to September 9, 1997 was inaccurate.
4. The Agency willfully obstructed Petitioner's right to compete for employment and injured her employment life and reputation.

5. The Agency's removal of Petitioner under discontinued service retirement was improper and injured her prospects for future employment.

For a remedy, Petitioner does not seek reinstatement. Instead, she asks that the Agency be directed to: (1) provide her with a performance appraisal for the period October 1, 1995 to September 9, 1997 with a rating of at least "exceeds fully successful" in all job dimensions; (2) destroy all personnel records relating to "unacceptable" performance and removal; (3) revise all records relating to Petitioner's retirement to show an "early out retirement" on September 30, 1997, a rehire on October 1, 1997, and a resignation effective January 16, 1998;¹⁵ (4) provide Petitioner with a new retirement plaque dated September 30, 1997; (5) pay Petitioner's reasonable attorney's fees and legal expenses; and (6) provide "such other and further relief as the Board deems necessary and proper." P.Br. at 32-33.¹⁶

B. The Agency's Position

The Agency contends that each of the four unacceptable ratings at the end of the opportunity period was supported by substantial evidence and that this evidence was largely un rebutted by Petitioner. The Agency additionally argues that it complied with its obligations during the opportunity period, such as providing notice to Petitioner of her deficiencies and providing her the assistance necessary to improve her performance. Finally, the Agency contends that Petitioner "put forth virtually no evidence to substantiate her claims" (R.Br. at 37) and that many of her objections to procedures during the opportunity period were improperly raised for the first time in Petitioner's post-hearing brief. R.Rep. Br. at 1.

IV. ANALYSIS

There are three essential pre-conditions to the commencement of a performance-based removal action. First, the employee must have been rated below the acceptable level in at least one critical job element. The performance appraisal leading to the unacceptable rating may be made at any time; it need not occur at the end of the appraisal year or the end of a job assignment. Regardless of its timing, the unacceptable rating must be documented. GAO Order 2432.1 ¶8a. Second, after the rating has been issued, the employee must be given a meaningful and reasonable opportunity period in which to demonstrate acceptable performance. GAO Order 2432.1 ¶8b. See also *Martin v. FAA*, 795 F.2d 995 (Fed. Cir. 1986); *Sandland v. GSA*, 23 MSPR 583 (1984).¹⁷ Third, the employee must

¹⁵Petitioner's Brief, at 32, states the dates of September 30, 1998 and October 1, 1998. In the context of this case, I have assumed that Petitioner meant to identify the year "1997."

¹⁶Although both parties submitted pre-hearing briefs, all references in this decision are to post-hearing briefs (cited as "P.Br." or "R.Br.") or post-hearing reply briefs (cited as "P.Rep. Br." or "R.Rep. Br.").

¹⁷Factors bearing on the reasonableness of the opportunity period include: the nature of the duties assigned, the performance deficiencies involved, the duration of the opportunity period, and whether assistance and training were offered to the employee. See, e.g., *Macijauskas v. Army*, 34 MSPR 564

have received an unacceptable rating for the opportunity period in at least one critical job dimension. GAO Order 2432.1 ¶9a.

When placing an employee in an opportunity period, GAO must provide the employee written notice "of the specific instances of unacceptable performance for each critical job element where unacceptable performance exists." Order 2432.1 ¶8b. The opportunity period notice must inform the employee:

- (a) of the standard for acceptable performance for each such [critical] element,
- (b) the period of time that the employee is being given to demonstrate acceptable performance,
- (c) of the assistance management will offer the employee during the opportunity period to improve his/her performance, and
- (d) that unless the employee's performance improves to and is sustained at the acceptable level appropriate, action will be taken (e.g., reassignment, issuance of a proposal to reduce in grade/band, issuance of a proposal to remove from GAO employment). [*Id.* ¶8b(1).]

An opportunity period at GAO may last between 30 and 90 days; Management selects "a reasonable period in which to demonstrate adequate improvement."¹⁸ Order 2432.1 ¶8b(2). If an employee completes the opportunity period without demonstrating an acceptable level of performance for every critical job element at issue, the Agency must either take the proposed action (e.g., removal) or reassign the employee. *Id.* ¶9a.¹⁹

Assuming compliance with the foregoing procedural requirements, GAO's decision to remove an employee on the basis of poor performance must be sustained by the PAB if it is supported by substantial evidence. 4 C.F.R. §28.61(a)(1). Substantial evidence "means that degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence." 4 C.F.R. §28.61(d).²⁰ The Agency therefore

(1987), *aff'd mem.*, 847 F.2d 841 (1988); *Stubblefield v. Commerce*, 28 MSPR 572 (1985); *Pine v. Air Force*, 28 MSPR 453 (1985). See also *Lovshin v. Navy*, 767 F.2d 826, 834 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1111 (1986).

¹⁸A brief extension may be granted under "compelling or extenuating circumstances." Order 2432.1 ¶8b(4).

¹⁹To initiate a performance-based action after the opportunity period, the Agency must provide written notice of the proposed action, stating the specific reasons for the action and giving 30 days advance notice. The notice must also explain the employee's procedural rights. GAO Order 2432.1 ¶9c. There is no claim in this case that the Agency failed to provide the requisite notice of removal.

²⁰The United States Court of Appeals for the Federal Circuit relied on the legislative history of the Civil Service Reform Act in defining the substantial evidence standard, as applied to performance-based actions before the Merit Systems Protection Board:

bears the burden of presenting substantial evidence that an employee failed to demonstrate acceptable performance during the opportunity period, measured against existing performance standards. See GAO Order 2432.1 ¶9; *Lovshin v. Navy*, 767 F.2d 826, 834 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1111 (1986); *Martin v. FAA*, 795 F.2d at 997.

An employee may present an affirmative defense that there was harmful error in the application of the Agency's procedures in arriving at its decision, that the decision was based on a prohibited personnel practice, or that the decision was not in accordance with applicable law. The employee bears the burden of proving any affirmative defense by a preponderance of the evidence.²¹ See 4 C.F.R. §28.61(c); 5 C.F.R. §1201.56(a).

Applying these legal principles to this case involves a determination whether the Agency presented "substantial evidence" to support the ratings of unacceptable performance for the period April 28, 1997 to September 9, 1997. If there is substantial evidence to support any one of the four unacceptable ratings, then the removal must be upheld—unless Petitioner proves that the ratings or removal decision were tainted by harmful error.

Petitioner presented numerous exhibits and witnesses in support of her contention that the performance appraisals in May 1997 and September 1997 were flawed and inaccurate. All of that evidence has been carefully considered in reaching the following findings and conclusions.²²

Under this standard the Board must find that there is reasonable basis for the agency's decision whenever it concludes that a reasonable man could—on the basis of the record—have acted as the agency did, even if it is also possible to conclude that another course of action would also have been reasonable. In reviewing agency action taken under this section, both the Board and the courts should give deference to the judgment by each agency of the employee's performance in light of the agency's assessment of its own personnel needs and standards.

Lisiecki v. MSPB, 769 F.2d 1558, 1562 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986) (quoting S.Rep. No. 969, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2767).

²¹Preponderance of the evidence, as defined in the Board's regulations, means "that degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true." 4 C.F.R. §28.61(d).

²²Petitioner declined to testify, although she was repeatedly advised that any factual statements she wished to make should be made under oath as a witness. See Tr. 125-26, 206-07, 272, 306, 339, 350, 365, 426, 433, 443-45, 596, 602, 635, 742, 746, 939, 984. In her post-hearing rebuttal brief, Petitioner states that she "had wanted to testify at the hearing but was unable to do so." P.Reb. Br. at 4. She provided no explanation for this statement.

Petitioner additionally attached "exhibits" to her post-hearing briefs that challenged the accuracy of the Agency's criticisms of her work; none of those documents had been entered into evidence at the hearing. For this reason, those "exhibits" have been considered as supporting argument, but not as record evidence.

Finally, Petitioner raised several procedural objections to her opportunity period. The Agency is correct that Petitioner did not testify or offer evidence to support several of these contentions. However, in a number of instances the Agency presented evidence that arguably supports these assertions (*e.g.*, feedback session reports). To this extent, Petitioner's affirmative defenses are addressed below.

A. Complaints About the May 30, 1997 Performance Appraisal

The August 24, 1998 Order in this case dismissed that part of the Petition for Review seeking rescission of Petitioner's May 30, 1997 performance appraisal. Petitioner nevertheless argued in her post-hearing briefs that this performance rating inaccurately rated her unsatisfactory in five job dimensions.

I re-affirm my prior conclusion that, absent allegations of a prohibited personnel practice, this Board does not have jurisdiction to adjudicate the claim that Petitioner's May 30, 1997 performance appraisal was "inaccurate." Petitioner did not pursue the sole remedy for such a claim--the filing of a grievance under GAO Order 2771.1. Nor did her Petition for Review allege that the May 30, 1997 appraisal violated any law, regulation or GAO Order.

Consistent with the August 24, 1998 Order, Petitioner was permitted to make as complete a record as she wished with regard to her work on the loss list prior to the opportunity period. In fact, many of her witnesses testified to her work prior to May 30, 1997. This evidence was clearly relevant to the ultimate issue to be decided, since the assignment given to Petitioner during the opportunity period was to review and reconcile work that had been performed prior to the opportunity period. A determination whether the Agency had substantial evidence to support its removal decision necessarily required consideration of Petitioner's work product both before and during the opportunity period.

For this reason, the jurisdictional bar to this Board's direct review of Petitioner's May 30, 1997 appraisal did not prevent Petitioner from presenting evidence to support her argument that this performance appraisal was based on a flawed analysis of her work product. In making the findings and conclusions in this decision, I have considered all of Petitioner's work product during the year prior to the Notice of Proposed Removal.

B. Placement in the Opportunity Period

Petitioner argued that she was placed in an opportunity period "based on unsubstantiated evidence."

In making my findings and conclusions, I have not drawn any adverse inferences from Petitioner's failure to testify.

P.Br. at 21. As previously explained, the Agency is required to place an employee in an opportunity period whenever the employee receives an unsatisfactory rating in any critical job dimension. Therefore, the Agency was merely following its own Order when it initiated the opportunity period in June 1997. It did not deviate from its regulations or procedures.

Petitioner's protest that the opportunity period was not based on substantiated evidence is nothing more than an attack on the unsatisfactory ratings she received on May 30, 1997. For the reasons already stated, challenges to performance appraisals in and of themselves do not constitute separate claims cognizable under the Board's jurisdiction. See 31 U.S.C. §753. Petitioner's removal cannot be reversed solely because she disagreed with the conclusions in the May 30, 1997 ratings.

C. Due Process Before and During the Opportunity Period

Petitioner contested the fairness of a number of the procedures that the Agency followed before and during the opportunity period. To the extent that she has raised claims pre-dating the opportunity period, she has not filed timely charges with respect to those claims. They therefore are beyond the PAB's jurisdiction.²³ The remaining procedural objections lack merit.

Petitioner argued that, "[d]uring this entire 90-day [opportunity] period, . . . [I] was treated unfairly and denied any form of representation or mediation, continually threatened with removal from the Financial Institutions and Markets issue area, subjected to constant ridicule, and placed in a more lowly subordinate position." P.Br. at 21.

The procedural requirements for opportunity periods are set forth at GAO Order 2432.1 ¶8b. That Order does not require that employees be permitted to bring a representative to opportunity period feedback sessions. See R.Ex. 18 at 1; P.Ex. I/39 at 4-5. There is no evidence that Petitioner was otherwise prevented or dissuaded from obtaining legal or other advice. Accordingly, I conclude that Petitioner's rights were not violated when she was not permitted to bring a representative to her feedback sessions.²⁴

Petitioner's assertion that she was continually threatened with removal during the opportunity period is similarly rejected. The documents in evidence show that Petitioner was given notice of her potential removal. I find that these notices did not constitute "threats." Nor did any of the witnesses testify that Petitioner was threatened during the opportunity period. It is quite clear that Petitioner was unhappy to be in an opportunity period and that her resistance to the process resulted in tense and unpleasant meetings. However, none of those interactions support a finding that Petitioner was

²³For example, Petitioner contended that Mr. Diersen unfairly increased her workload in Fall 1996. P.Br. at 13. Based on this record, I find that Petitioner did not timely allege that Mr. Diersen committed a prohibited personnel practice, unlawful discrimination, or some other action within the Board's jurisdiction. See generally 4 C.F.R. §§28.2(b), 28.11(b).

²⁴Petitioner also claimed that her rights were violated when she was not allowed to tape record the feedback sessions. P.Reb. Br. at 19. GAO Order 2432.1 does not provide such a right to employees.

"threatened" with removal. Similarly, the record does not support a conclusion that she was "ridiculed" during the opportunity period. While the feedback she received from Ms. Trop, Mr. Diersen and Mr. Thomas may have been critical of her work, it did not amount to ridicule. I also conclude that the advice and counseling that Petitioner received during the opportunity period satisfied the Agency's obligations under GAO Order 2432.1 ¶8.²⁵

Petitioner also failed to support her assertion that she was placed in a "more lowly subordinate position" during the opportunity period. P.Br. at 21. Her assignment for the opportunity period--the reconciliation of her "sales4" loss list with the "list617" prepared by Ms. Marik and Mr. Tsuhara--was appropriate to Petitioner's level of responsibility and her past work. Paragraph 8b(2) of GAO Order 2432.1 states that the work assignment in an opportunity period must be "commensurate with the duties and responsibilities of the employee's position and will provide the employee with work where he/she has the opportunity to improve in his/her performance deficiency areas." The Agency complied with this requirement.

Finally, Petitioner complained that her opportunity period was "beset with unnecessary tasks" and that she was "prevented from completing the requested reconciliation because of, among other things, increased expectations, over and above the performance expectation notice." P.Reb. Br. at 17. These assertions in the post-hearing brief cannot be considered evidence. Nor is there evidence in the record to support these claims. None of Petitioner's witnesses testified to this effect. The reports of the feedback sessions do not document "unnecessary tasks" or any material changes in the basic tasks assigned at the outset of the opportunity period. Petitioner's own comments in the feedback sessions do not replicate the complaints she now makes in the post-hearing brief. I conclude that the reconciliation project given to Petitioner in the opportunity period provided her a fair opportunity to improve her performance in each of the unsatisfactory job dimensions. Both the quality and quantity of the work assignments complied with the requirements of GAO Order 2432.1.

D. Substantial Evidence Supports the Unacceptable Performance Ratings Cited in the Removal Notice

Petitioner was rated unsatisfactory in four job dimensions for the period April 28, 1997 to September 9, 1997: planning, data analysis, oral communication and teamwork/working relationships. Substantial evidence in the record supports each of the four ratings.

1. Planning

The proposed removal letter identified the following deficits in Petitioner's "planning" dimension:

In planning, you were expected to submit a plan by June 19, 1997,

²⁵Petitioner argued that she was denied mediation during the opportunity period. P.Br. at 21. She did not explain what she meant by this term; neither her witnesses nor exhibits provided an explanation. There is no provision in GAO Order 2432.1 for "mediation." Absent any explanation or evidence from Petitioner as to the type of mediation denied to her, this argument is rejected.

that included a targeted number of reconciled cases that you would submit for review each week. Although this expectation was reiterated to you on June 17 and 20, your plan did not contain a reconciliation schedule until June 30. Also, you did not meet any of the dates shown on this schedule for submitting reconciliations. According to your plan, you would begin submitting cases on July 10; however, no cases were submitted until August 8. You did not adjust your plans to address the need to submit additional cases for review each week in order to complete the reconciliation work within the opportunity period. However, you repeatedly assured your supervisors that your work would be completed on schedule, with sufficient time for supervisory review. Ultimately, you submitted less than half of the required reconciliations for review. Further, much of this work was incomplete, and it was not summarized as required. [R.Ex. 4 at 2.]

Those comments are consistent with the rating given on September 15, 1997.

Petitioner has asserted that the Agency's rating for planning was based on "unfounded problems." P.Br. at 22. For example, Petitioner states that she had asked for a revised opportunity notice and had withheld preparing a plan while she "was waiting for a reply." *Id.* When she was not given a revised notice, she submitted a plan on June 24, 1997, five days after it was due. R.Ex. 19; see R.Ex. 16 at 2. However, that plan did not include a comprehensive schedule of work to be submitted throughout the opportunity period; a revised plan was due on June 30, but was submitted on July 3, 1997. R.Ex. 19 at 12-14. Petitioner concedes that the planning document was not submitted by the prescribed deadline. P.Br. at 22, 23.

Petitioner also complained that she was required to "lower all her previously recorded million dollar amounts to thousand dollar amounts, where applicable." *Id.* at 23. Petitioner stated that Mr. Thomas and others were not required to undertake this work. *Id.* The implication of this assertion is that she was not given sufficient time to complete her opportunity period assignments. Petitioner has made this point by citing flaws in Mr. Thomas' original loss list and the extensive work she performed to make the revised loss list usable by her colleagues. P.Reb. Br. at 8-10.

If Petitioner had concerns about her ability to submit the final reconciliation on time, she did not raise them in the early stages of the opportunity period, when her work was being planned. For example, the July 7, 1997 feedback session report states that Petitioner "would reconcile all the cases by August 29." R.Ex. 20 at 4. Petitioner did not amend this feedback report or otherwise indicate that it was inaccurate.

In the July 15, 1997 feedback session, Petitioner again indicated that her reconciliation would be completed on time. In addition,

Ms. Poole also said that the attachment to the opportunity letter did not require her to submit cases according to any schedule and the only

requirements she had to meet were in that attachment. She said that, as a result, she could submit all the cases on the last day of the opportunity period if she so chose, but she did not plan to do so. Ms. Poole also repeated what she had told Mr. Diersen the previous morning--that she had never agreed to submit cases according to any schedule, that she had provided the planning document schedule only because we asked for it, and that the planning document schedule was meant only to give us an idea of how many cases she might submit and when. [P.Ex. 21 at 2.]

Throughout the opportunity period, Mr. Diersen and Ms. Trop continued to advise Petitioner that she was not meeting her deadlines. See, e.g., R.Ex. 22 at 1-2 (July 24, 1997); R.Ex. 26 at 8 (Aug. 21, 1997). If Petitioner believed that these reports incorrectly stated her deadlines or inaccurately characterized her tardiness, she certainly could have submitted corrections. She did not do so.

These problems with Petitioner's lack of timeliness in her submissions were also the subject of testimony by Ms. Trop. She credibly stated that Petitioner did not submit her first reconciliation until two-thirds of the opportunity period had passed and that she submitted less than half of the case reconciliations by the end of the opportunity period. Tr. 58-59.

Petitioner offered no testimony to rebut the evidence contained in the feedback reports or Ms. Trop's descriptions of the feedback sessions. I find that the Agency presented credible, substantial evidence that Petitioner performed unsatisfactorily in the job dimension of planning and that her removal based on this rating was proper.

2. Data Analysis

The notice of proposed removal stated that Petitioner's performance in data analysis was unsatisfactory because of her large overstatement of derivatives losses, inclusion of losses where support did not implicate sales practices, inclusion of products outside the accepted definitions, and misclassifications and contradictory determinations. R.Ex. 4 at 2 (quoted *supra*). The complaints about Petitioner's data analysis were described in greater detail in the comments accompanying the September 15, 1997 performance appraisal. See R.Ex. 1.

In support of this unsatisfactory rating, the Agency put into evidence the feedback session reports, the loss lists prepared by Petitioner before and during the opportunity period, the Marik/Tshuara loss list, and the source materials relating to the disputed entries in Petitioner's spreadsheets. The Agency also offered the testimony of several witnesses--most importantly that of Ms. Trop and Mr. Thomas. In opposition to the Agency's position, Petitioner offered her own versions of the spreadsheets and reconciliation, various supporting documents (memoranda, e-mail, etc.), and the testimony of several of her colleagues who worked on the loss list project.

A review of that evidence makes it clear that the Agency was dissatisfied with both Petitioner's overall methodology in preparing her loss lists and the specific conclusions she reached. Both factors entered into the decision to rate her as unsatisfactory in this dimension and both factors need

to be addressed.

a. Petitioner's Methodology

Petitioner made the point that, prior to April 1997, the criteria for the loss list were not definitive. The testimony by Mr. Thomas and Ms. Trop tended to support that observation. For example, the criteria for determining a "sales practice" issue were not documented at the outset of the project; they were reduced to writing only later and were modified slightly by Petitioner. Tr. 686, 698, 700 (Thomas). The testimony suggested that various other criteria were the subject of on-going discussion and modification (*e.g.*, when and how to record losses incurred by dealers trading for their own account).

Accepting this fluidity in the development of the loss list, however, does not detract from the fact that, by April 1997, the Agency had conveyed to Petitioner the criteria that it expected her to utilize in preparing her loss list; Messrs. Thomas and Diersen had notified her of the types of errors that she had made in her spreadsheets. Tr. 738; see R.Ex. 17; P.Ex. II/19. The record clearly establishes that Petitioner had been instructed by the beginning of the opportunity period to utilize the following criteria in preparing a loss list and a summary of the loss list:

1. There must be documentation clearly showing that losses resulted from investments in OTC derivatives, mortgage-backed securities or structured notes. [R.Ex. 3 at 4-9; R.Ex. 2 at 2; Tr. 997; see R.Ex. 7.]
2. The identical entity should not be entered as both dealer and end-user (customer) in the same transaction. [R.Ex. 3 at 7.]
3. A loss should not be categorized as a "sales practice issue" unless the documentation clearly supports this conclusion. [R.Ex. 3 at 7-8.]
4. The "best" loss amount that can be derived from the documentation should be used, rather than an average amount. [R.Ex. 3 at 8; R.Ex. 2 at 3.]

A review of Petitioner's own documents, as well as evidence presented by the Agency, leaves no doubt that one of Petitioner's greatest difficulties was accepting the instructions given to her. She continually challenged Management's decisions and instructions in these areas. Petitioner was not merely disagreeing with how data should be interpreted or applied, but was actually challenging the definitions and criteria to be used in the spreadsheet. See, e.g., P.Ex. II/21 (BancOne Corp.; Barings Bank, Inc.; Metallgesellschaft AG; Steinhardt Partners). While there might have been a valid basis for debating these definitions and criteria earlier in the loss list project, by May 1997²⁶ Management had made its decisions and wished to proceed under the instructions given to Petitioner. It was Petitioner's duty to abide by those instructions.

²⁶ Petitioner's Exhibit II/21 was a May 28, 1997 spreadsheet that responded to criticisms she had received from Messrs. Thomas and Diersen.

An example of Petitioner's resistance to the Agency's instructions can be found in her responses to criticism that she incorrectly identified some losses as the product of sales practices. In the Metallgesellschaft matter, Petitioner stated:

If a derivative transaction simply occurs, it automatically becomes a sales practice issue, but what you are asking for, however, is whether or not the sales practice is allegedly improper (*i.e.*, an irregular or criminal act). [P.Ex. II/21.]

Petitioner made similar comments with regard to the Steinhardt losses:

The term "derivative" connotes a sales practice by the very nature of the buyer and seller entering into a contract or other binding instrument to buy or sell a security. [*Id.*]

Clearly, Petitioner had an expansive view of when a "sales practice" was involved in a transaction. In her eyes, virtually every derivative loss implicated a sales practice. But that view was decidedly at odds with the instructions used by everyone else working on the loss list project. Petitioner was instructed that not every derivative transaction should be recorded as a sales practice issue. See, *e.g.*, R.Ex. 8 ¶II. For example, she was informed that a loss resulting from aggressive speculation by a firm's own employee was not to be identified as a sales loss. *Id.* at ¶IIB.

Petitioner similarly misconstrued the nature of an "improper sales practice." She was not told that such practices were limited to irregular or criminal transactions, as she stated with respect to the Metallgesellschaft matter. Rather, she was told to record a loss as a sales practice issue if there was any regulatory investigation, "regardless of outcome of investigation." *Id.* at ¶IE.

In effect, Petitioner operated under her own definitions when analyzing the loss list data. She recorded entries based on her definitions and then argued repeatedly with Management when she was told that she was in error. Petitioner evidenced a belief that her way of analyzing data was the best way and that she would not conform her analyses to the instructions given by Messrs. Thomas and Diersen.

This intransigence and refusal to conform to the group's common definitions and criteria continued to manifest itself during the opportunity period. For example, following a detailed explanation about Petitioner's misinterpretation of the term "securities dealer," the report of the September 4, 1997 feedback session includes the following entry:

She responded angrily saying that we had been doing work on derivatives since 1990, and therefore, we should tell her the right answer concerning the definition of a dealer. When we did so, she said that she was standing by her work and that she would not revise it. [R.Ex. 27 at 5.]

The feedback session for August 13, 1997 showed a similar resistance by Petitioner to the instructions she had received in Expectation 10 of the opportunity letter. That Expectation stated that, if the reports identified several different loss amounts for a particular transaction, she was to select the most credible loss amount. She was specifically instructed not to use an average of the reported losses. R.Ex. 3 at 6. The feedback report for August 13 states: "When Mr. Diersen asked Ms. Poole why she had not made the required selections, she initially said that she was not going to make them, citing her belief that her use of averaging [losses] was a better approach." R.Ex. 25 at 4.²⁷

The issue in this litigation, however, is not whether Petitioner's averaging approach to losses was the better one. The issue is whether her data analysis was satisfactory. That analysis required her to operate under the same criteria and methodologies as her co-workers on the loss list project.

The performance standards for data analysis require a Band II evaluator to apply GAO standards and appropriate methodologies. Those standards indicate that "unacceptable" is the appropriate rating if a Band II evaluator frequently

Chooses or applies an analysis strategy inappropriate to the objectives of the evaluation; includes irrelevant analysis; overlooks job constraints.

Conducts inappropriate analyses (using an improper, overly complex, or simplistic technique) for the job.

* * *

Chooses an inappropriate research methodology. . . .

Fails to appropriately consider findings of fact, weight of evidence, laws, regulations, or GAO standards when drawing conclusions. . . . [R.Ex. 30 at 32-33.]

Under this standard, an evaluator performs unsatisfactorily when he or she refuses to apply job standards and methodologies that are clearly and repeatedly explained by supervisors.

Based on a review of all of the record evidence, I find that there was credible, substantial evidence to support the conclusion that Petitioner's methodologies for analyzing data during the opportunity period were unsatisfactory under the above criteria.

b. Individual Errors in Petitioner's Data Analysis

During the feedback sessions and in its post-hearing brief, the Agency identified numerous errors in

²⁷ Petitioner's disagreement over the Agency's instructions carried over into this litigation. In her post-hearing briefs, she continued to defend her actions by citing the correctness of her own analytical methodologies. For example, Petitioner argued in her brief that her use of an average loss in one case was a "statistically valid method." P.Br. at 17.

Petitioner's loss list and final reconciliation. These errors included the following categories: improper inclusion of losses that were not OTC derivatives, mortgage-backed securities or structured notes; erroneous identification of improper sales practices; and erroneous identification of entities as both dealer and end-user in the same transaction. The Agency's evidence of this faulty data analysis was largely derived from Mr. Thomas' testimony, the reports of feedback sessions, and the source documents that were used in the preparation of the various loss lists. Petitioner also put numerous documents into evidence in an effort to explain or contradict the Agency's contentions.

Having reviewed all of the feedback reports, source documents and loss lists, I agree with Petitioner that a few of the "errors" cited by the Agency are merely disagreements over matters requiring the exercise of judgment. On the other hand, most of the examples cited by the Agency result from faulty analyses by Petitioner and/or a refusal on her part to apply the Agency's defined criteria.²⁸ The following are only a few examples of the many losses that were incorrectly characterized by Petitioner.

(1) Barings Bank

In her May 1997 loss list, Petitioner identified Barings Bank, Inc. as an end-user reporting a loss of \$1.15 billion. P.Ex. II/25; R.Ex. 10, line 41. Petitioner identified the "dealer, investment manager or counterparts" as "Barings PLC, a single Barings trader not named." For the "sales practice issue," Petitioner reported "alleged Fraud; Bank of England prevented Barings insolvency." Petitioner identified this loss as having involved a "sales practice issue."

Mr. Thomas credibly testified that these entries contained the following errors:

1. The supporting documents showed that one employee of Barings Bank had engaged in unauthorized derivatives trades. There was no evidence that sales practice concerns contributed to the losses.
2. The supporting documents did not indicate that the derivatives losses resulted from OTC trades (as opposed to trades on an exchange).

Tr. 816-21.

The listing of Barings Bank in Petitioner's May 1997 loss list was discussed at the August 21, 1997

²⁸In some instances, Petitioner reached a correct conclusion, but presented the conclusion in a confusing manner. For example, Petitioner correctly identified the AM South losses as not involving a sales practice issue. See P.Ex. II/25 at 55, line 19. In another column of the same spreadsheet, however, Petitioner identified the "sales practice issue" as "fast rising interest rates." Id. Mr. Thomas testified that "fast rising interest rates" was not one of the designated criteria for sales practice issues. Tr. 874-75; see R.Ex. 8. In the job dimension of data analysis, an employee must not only reach the correct conclusions, but must produce analyses that are logical and usable by colleagues. See R.Ex. 30 at 32-33.

feedback meeting. The report of the meeting describes the discussion of Barings as follows:

In her analysis of Barings Bank, Ms. Poole indicated that the losses involved OTC and exchange-traded derivatives. This classification differs from that in List617, which indicates that the Barings losses involved only exchange-traded derivatives. Mr. Thomas read aloud Ms. Poole's analysis which states "The column 'OTC and XCHNG' is a better choice since options cuts across both exchange and non-exchange markets." He also read aloud from supporting workpaper (wp) 814 pp. 50-51, which states that "the British investment bank's demise didn't result from the largely unregulated 'over the counter' derivatives market but from poorly managed bets on plain vanilla futures and options listed on closely supervised exchanges." We then asked Ms. Poole, [sic] to explain her conclusion that Barings involved OTC derivatives. She responded that the sentence at issue contains the word "largely," which means that the losses did not largely result from OTC derivatives--leaving open the likelihood that the losses were partly from OTC derivatives. We explained that the word "largely" is used to describe the OTC derivatives market as being "largely unregulated" and not to describe the losses as "largely not involving OTC derivatives." Mr. Thomas also reread aloud the second part of the sentence, which states "but from poorly managed bets on plain vanilla futures and options listed on closely supervised exchanges." We told Ms. Poole that when both parts of the sentence are taken together, the sentence clearly states that the losses involved exchange-traded derivatives. Ms. Poole angrily rejected our interpretation, stating that an objective reviewer would accept her interpretation of the sentence and that our alternative explanation was illogical and unfounded.

* * *

We asked Ms. Poole to discuss with us the basis for her conclusion that the Barings losses involved sales practices when the workpaper support states that a foreign regulator reported that losses involved a single trader. She did not wish to do so. [R.Ex. 26 at 2, 3.]

In addition to Mr. Thomas' testimony and the feedback session reports, the Agency also put into evidence the source documents relied on by Petitioner for her spreadsheets, including the documents relating to Barings. See Jt. Ex. 1 at 13, 61, 62, 132, 149; Jt. Ex. 4 at 54-56; Jt. Ex. 5 at 600-01, 620-23. These documents support Mr. Thomas' testimony.

I find that Mr. Thomas' testimony, the August 21, 1997 feedback report, and the source documents

provide substantial evidence that Petitioner's data analysis of the Barings losses was unsatisfactory both before and during the opportunity period.

(2) Continental Illinois Bank

Petitioner's May 1997 loss list showed Continental Illinois Bank as having a \$7 billion loss from derivatives. The Marik/Tsuhara loss list did not identify this as a loss covered by the project.

In her May 1997 loss list, Petitioner characterized the transaction giving rise to Continental Illinois' losses as "short-term liquidity to banks involved in international financial markets; Federal Reserve bailed out Continental to prevent its total insolvency." P.Ex. II/25 at 48, line 83. In the September 4, 1997 feedback session, the Agency raised this issue:

To address Ms. Poole's inclusion of events that were not losses and did not involve products covered in our review, we discussed the Continental Illinois Bank case. We read aloud Ms. Poole's entire narrative of the Continental Illinois Bank case in which she stated that the bank "did in fact suffer derivatives losses," and that "all or nearly all of the \$7 billion loan it got from the Federal Reserve was to pay off the international institutions." In her narrative, she quoted from source 823, page 3, which stated that "the run on its deposits by Eurodollar market institutions initiated the bank's collapse." We told Ms. Poole that source 823 provides no basis for her conclusion that Continental Illinois Bank incurred losses of \$7 billion from using products covered in our review. We explained that the "run on the bank" by Eurodollar depositors was European customers taking their money out of the bank and is not a basis for calculating financial losses that Continental Illinois Bank would report in its financial statements. We told Ms. Poole that the \$7 billion was not financial losses but a loan by the Federal Reserve to the bank because of the liquidity problems that resulted from Continental Illinois Bank's European customers removing their deposits. We pointed out that the source contains no discussion about the magnitude of financial losses Continental Illinois Bank may have incurred due to the departure of European customers and the resulting liquidity problems.

Ms. Poole did not agree with our statement that the loss Of deposits by Continental Illinois Bank did not equate to measurable financial losses. . . . Ms. Poole did not explain the basis for her disagreement with our analysis of the Continental Illinois Bank case. However, she said that if we did not understand

her analysis of the case, we should show her more evidence. We reminded her that it was her responsibility to provide us the evidence to support her analysis. [R.Ex. 27 at 2.]

Petitioner returned to the Continental Illinois losses in her post-hearing rebuttal brief:

Melvin Thomas' List and Richard Tsuhara's List⁶¹⁷ and Listing² cited "no" for both a loss and a sales practice. A Eurodollar is a derivative. It is actually a Eurodollar deposit, i.e., a Eurocurrency, that takes the form of Eurodollar certificates of deposits. Corporations and national governments offer these Eurodollar or Eurocurrency certificates to banks outside their own countries to lock in lending and borrowing rates or to speculate on the future level of rates. The May 1994 GAO report cited several examples of currency derivatives, and the November 1996 GAO report specifically discussed a Euro-currency Standing Committee's concern about such derivatives. Such derivatives do exist in the foreign markets. [P.Reb. Ex. 4 at 7 (footnotes omitted).]

The thrust of Petitioner's defense is that "a Eurodollar is a derivative." Even if that were true, Petitioner failed to address the lack of support for her conclusion that the bailout amount of \$7 billion equals the amount of losses suffered in derivatives trades or that all of the losses resulted from investments within the scope of the sales practice job. See Tr. 853-56; Jt. Ex. 5 at 590-606.

Given the absence of evidence to support Petitioner's identification of a \$7 billion derivative loss by Continental Illinois Bank and given her failure to address all of the Agency's criticisms, I find that the Agency proved by substantial evidence that Petitioner's data analysis of Continental Illinois Bank was unsatisfactory.

(3) Bank Julius Baer

In her May 1997 loss list, Petitioner identified Bank Julius Baer as an end-user (customer) that had traded in the following derivative products: "strips, currency, forwards, [and] futures." R.Ex. 10 at 39, line 29. The only source document for this designation was a study of derivatives losses submitted to the House of Representatives Banking Committee. Jt. Ex. 1 at 196 *et seq.* The sole reference to this Bank states that it "[a]nnounced its global fund sank 9% in the first quarter of 1994, the worst quarter the bank ever had." Id. at 199. See also Tr. 810-11.

During the August 13, 1997 feedback session, Messrs. Thomas and Diersen addressed the Bank Julius Baer entry on Petitioner's loss list:

We discussed two other cases, Balsam and Bank Julius Baer, to further illustrate that Ms. Poole had misapplied the criteria that we had provided her to classify products.

The Bank Julius Baer case was supported by a list of derivatives losses prepared by Beau Deitl & Associates for the House Banking Committee. . . . We asked Ms. Poole how she determined that strips, currency, forwards, and futures were involved in these losses when the source had named no products. She correctly stated that the subject of the entire list prepared by Beau Deitl & Associates is derivatives losses. However, she elaborated by saying that it is, therefore, reasonable to make judgments about the specific products that may have been involved. We told her that such judgments in general, and for this case in particular, could not be made based on the evidence presented and that such judgments would not clear referencing. [R.Ex. 25 at 3. See also Tr. 812-13.]

Petitioner was asked to provide additional references to support her conclusion. Tr. 813-14. Petitioner prepared a written response to this criticism on August 19, 1997:

Here the definition of "global" to include OTC and foreign exchange was questioned. In other words, whether the broad term "global" was sufficient to classify products generally as strips, currency, forwards, and futures, as I had done, and put them under your combined OTC and foreign exchange column. I still say yes because global implies world-wide, both foreign and domestic, as do these common broad product types (contracts) that I used to categorize the derivative losses. But if we remain consistent with previous GAO reports, it might be better to use the basic common terms of swaps, forwards, options, futures. Even with these broader designations, your OTC and foreign exchange column fits. But if you want to say products "not named," that's just as well, too. My task was merely to explain why and how I made certain designations on my spreadsheets as compared to others. [R.Ex. 28 at 3.]

Petitioner's final reconciliation continued to list Bank Julius Baer as a derivatives loss involving "futures, options, currency." R.Ex. 12, line 28. The sole documentary support cited for this entry was the above report to the Banking Committee, which did not use those terms.

Based on the documentary evidence presented, I find that the Agency presented substantial evidence to support its conclusion that Petitioner had made improper assumptions about the cause of the Bank's losses. Her analysis of the data relating to Bank Julius Baer was unsatisfactory both before and during the opportunity period.

* * * *

The types of errors described above are merely representative of the many mistakes or flawed analyses described in the Agency's extensive exhibits and testimony. That evidence is "substantial" for purposes of establishing that Petitioner's data analysis for the loss lists was unsatisfactory.

3. Oral Communication

The Agency's letter proposing removal identified the following deficits in Petitioner's oral communication skills:

In oral communications, you did not listen constructively or assure that you understood what others said. You frequently denied that agreements had been reached with your supervisors or that you had been provided specific information, even when evidence existed to the contrary. To partially address these concerns, you were reminded that one of your expectations was to summarize the agreements reached at the close of each feedback session; however, you refused to do so. You also frequently interrupted and talked over others, speaking in a raised and hostile voice. You typically rejected what others said before they were able to finish presenting their ideas. When you spoke, your presentations were frequently confusing, convoluted, and contradictory. When asked to clarify, you typically refused to do so. Because you did not listen effectively, your supervisors typically had to repeat and document instructions and agreements. Also, because you frequently rejected others' recollections, virtually all discussions occurred with more than one person present. [R.Ex. 4 at 2.]

This summary is consistent with the entries in many of the feedback reports during the opportunity period:

Concerning oral communications, we advised Ms. Poole that her performance during the period had not improved and continued to be unacceptable because she did not listen constructively to what others tried to communicate, as evidenced by, among other things, her continuously interrupting and talking over others. We cited several instances of this behavior in the meeting as it occurred. In addition, we told her that because she did not appear to listen, we spent a significant amount of time documenting what was said to her and revisiting discussions. [R.Ex. 18 at 3.]

* * *

Concerning oral communications, we reminded Ms. Poole that she was expected to summarize agreements reached during meetings to better assure that we have reached a meeting of the minds. She reiterated her unwillingness to meet this expectation. We said that we could accept her unwillingness to do so if the objective for doing so had been met by other means. However, we had seen no evidence that her listening had improved. That is, she continues to misunderstand the content of discussions. She also continues to interrupt and talk over Ms. Trop and Mr. Diersen during discussions, including this one, and to speak disrespectfully. [R.Ex. 20 at 6-7.]

* * *

Ms. Poole rejected the validity of much of the feedback that we provided her. As the session proceeded, her interruptions became so frequent and her responses so antagonistic that it was difficult to provide the feedback we had prepared for her. [R.Ex. 25 at 1. See also R.Ex. 27 at 7.]

Ms. Trop reiterated these observations in her testimony. She testified credibly that Petitioner frequently interrupted other participants in meetings, refused to discuss criticisms of her work, and acted with a lack of respect. Tr. 82, 88, 958.

Petitioner relied on several documents to rebut these allegations. See, e.g., P.Exs. I/39, 40. In one such e-mail, Petitioner stated:

The recent records of discussion . . . are consistently inaccurate and become more so as this opportunity process continues. I choose [sic] not to respond before because of their inaccuracies. Any prudent, rational person comparing these records of discussion with the opportunity letter and considering the implications of such a letter on an individual would know that these records of discussion simply do not make any good sense. And, furthermore, my professional character does not lend itself to such nonsense and the "ridiculous" mannerisms that I am suppose to have as portrayed in these records of discussion.

But at today's supposedly feedback meeting I really found out several underlying reasons for this rather bizarre process in the first place. I was openly laughed at during today's feedback session, purposely and without any remorse. And added to that, I was simply told "When this

is over, you're not going to be working with us, no skin off our teeth." I could say much more but it's really not worth it at this point in time. The insults are many and unnecessary, but I hear and understand perfectly well because I have extraordinary high skills and abilities in this area.

I ended today's 2:00 p.m. session, not abruptly as the two attendees would like to think but professionally because I had work to do as I no longer felt the need to be humiliated so forcefully.

And I am still not permitted to have representation or a tape recorder at weekly sessions. I wonder why! [P.Ex. I/39 at 8 (7/15/97).]

To some extent, Petitioner's comments reflect either a lack of understanding of the feedback process or an unwillingness to engage in a dialogue that necessarily involved criticism of her work. In either event, her unwillingness to testify and to subject her position to cross-examination undermines her effort to attack the veracity of the Agency's evidence.

Viewing all of this evidence, I find that the Agency persuasively established that the Petitioner frequently refused to engage in a dialogue during feedback sessions and often resorted to rude and unproductive comments. Petitioner's limited evidence failed to establish that she was provoked into either rudeness or silence. In sum, the Agency presented substantial evidence that Petitioner's oral communication skills were unsatisfactory during the opportunity period.

4. Teamwork and Working Relationships

The Agency's letter proposing removal identified the following defects in Petitioner's teamwork and working relationships job dimension:

In teamwork, working relationship, and equal opportunity, you were consistently uncooperative and rejected the detailed feedback provided to you. You treated co-workers that attempted to assist you with disdain and distrust. For example, when the loss list coordinator attempted to explain why your definition of a dealer was causing you to miscategorize end-users as dealers, you cut him off repeatedly. Then, in a condescending and abrasive manner, you accused him of failing to look at your entire definition of a dealer and selecting parts of the definition to make his point. However, this is what you had done. When your supervisors tried to explain that you continued to include nonderivatives losses in your spreadsheet, you accused them of withholding information from you and changing their definitions--even though the definitions were included in the draft report you received when assigned to the job and these definitions had not changed. You also abruptly terminated the August 21 feedback

session when the feedback indicated that your work continued to reflect the same errors that had been discussed with you before the start of the opportunity period. In addition, you consistently refused to respond to supervisory instructions. For example, when your supervisors became concerned about your lack of progress in meeting the expectations for the opportunity period, as evidenced by your failure to submit any cases for review after over one-third of the opportunity period had passed, they asked you to submit your work, including work-in-progress. When you repeatedly ignored these requests, they gave you a supervisory directive, warning you that failure to provide the work requested could lead to a personnel action.

You responded that you had not completed reconciling any cases, that they had no right to your work-in-progress, and that you would provide your work when you were ready to do so. [R.Ex. 4 at 3.]

Ms. Trop testified that Petitioner had been unwilling to share her work with colleagues or supervisors; this attitude was evident both before and during the opportunity period. Tr. 85-86, 959. When Petitioner was offered training to improve her interpersonal skills and her ability to work in a team, she declined the training. Tr. 86.

The reports of the feedback sessions gave examples of the problems that Management had with Petitioner's conduct in this job dimension:

Concerning teamwork, working relationships, and equal opportunity, we told Ms. Poole that her performance had not improved primarily because her behavior was aggressive, hostile, and disrespectful. We said that Ms. Poole frequently made snide and caustic remarks that were offensive. Ms. Poole responded by criticizing Ms. Trop for not seeking feedback from her concerning Mr. Diersen's and Ms. Trop's performance. She advised Ms. Trop that if she were allowed to rate Mr. Diersen's performance, she would rate him unacceptable. Ms. Poole insisted that GAO policy called for such feedback from staff to supervisors. [R.Ex. 18 at 3.]

* * *

We are concerned that Ms. Poole's behavior towards her supervisor continues to undermine effective working relationships. For example, on July 17, Mr. Diersen went to Ms. Poole's office to provide her a copy of the most recent memo from a feedback discussion (memos that Ms. Poole had previously indicated that she would like to continue receiving). Ms. Poole's door was closed and Mr. Diersen knocked. Ms. Poole saw that Mr. Diersen was at the door and turned away, returning to what she had been doing. Mr. Diersen waited several seconds and knocked again. Ms. Poole then abruptly motioned and told Mr. Diersen to slip the document under the door--

which he did. [R.Ex. 22 at 2.]

* * *

Ms. Poole continues to show an unwillingness to work as a team member. She does not share her work or seek input from others to assure that she is meeting objectives. As an example of her unwillingness to work with others, Mr. Diersen pointed out how she had refused to talk to him earlier in the day concerning the scheduling of this session. [R.Ex. 27 at 7-8.]

Petitioner offered no witness testimony to rebut the Agency's evidence. Petitioner's post-hearing brief suggests that the Agency had excluded her from team meetings, but she cited no testimony or exhibit to support this accusation.²⁹

Given the weight of the Agency's evidence and Petitioner's failure to offer countervailing proof, I find that the Agency presented substantial evidence that Petitioner's performance in teamwork/working relationships was unsatisfactory during the opportunity period.

V. CONCLUSION

As detailed in the preceding pages, I conclude that substantial evidence supports the Agency action to remove Petitioner. Petitioner was accorded the requisite opportunity to demonstrate improved performance and failed to do so. Accordingly, the Agency's removal of Petitioner from employment with the United States General Accounting Office is hereby sustained.

SO ORDERED.

²⁹Petitioner cited only "9/16/98 Transcript pages 48 [sic]." P.Br. at 27. There is no such transcript page for the September 16, 1998 hearing.