

# **Brad Hathaway v. U.S. General Accounting Office**

**Docket No. 97-02**

**Date of Decision: July 3, 1997**

**Cite as: Hathaway v. GAO (7/3/97)**

**Before: Leroy Clark, Chair**

**Senior Executive Service**

**Informal hearing**

**Performance**

## **REPORT OF INFORMAL HEARING**

### **I. Case Background**

Petitioner Brad Hathaway was presented with a performance appraisal on December 4, 1996, which rated his performance as "Unsatisfactory" and formed the basis for the recommendation that he be removed from the Senior Executive Service (SES) of the U.S. General Accounting Office (GAO). Pursuant to GAO Order 2920.1, Mr. Hathaway then petitioned the Executive Resources Board (ERB) to review the recommendation that he be removed from the SES, and supplied written arguments challenging the proposed removal and his evaluation of "Unsatisfactory." The ERB recommended that the assessment of petitioner be sustained and that, accordingly, petitioner be removed from the SES.

Joan M. Dodaro, Assistant Comptroller General for Operations, notified petitioner by letter of February 26, 1997, that the Acting Comptroller General had decided to remove him from the SES for the reason of poor performance, effective March 28, 1997. Petitioner was informed that he would be removed to a Band III Assistant Director position, with the benefit of the saved pay provisions outlined in the statute. See 5 U.S.C. §3594.

Pursuant to 4 C.F.R. §28.141 of the regulations of the Personnel Appeals Board (PAB) and GAO Order 2920.1, petitioner thereafter requested an informal hearing before a member of the Personnel Appeals Board. The hearing was held on March 14, 1997. The Agency was represented by counsel, and two Agency officials presented statements for the record. Mr. Hathaway was represented by the Personnel Appeals Board Office of General Counsel. Petitioner also presented his own statement for the record. Subsequently both parties submitted, through counsel, post-hearing briefs and attachments.

### **II. Factual Background**

Petitioner Brad Hathaway became a member of the SES in 1989, serving as an Associate Director in

various groups in the National Security and International Affairs Division (NSIAD) at GAO until his removal in March 1997. From 1993 until January 1996, petitioner was an Associate Director in the Systems Development and Production issues group (SDP). In January 1996, as part of a reorganization within NSIAD, petitioner transferred to the Defense Management issues group (DM). During the rating periods from fiscal years 1989 through 1995, Mr. Hathaway's overall performance had been rated at the "Fully Successful" level. In fact, petitioner's ratings in individual performance dimensions improved somewhat during this period.<sup>1</sup> At the beginning of the 1995-96 appraisal year, petitioner was still assigned to SDP, under the supervision of Mr. Lou Rodrigues. Petitioner was reassigned in January 1996 to the DM issues group under the supervision of Mr. David Warren, although the project assignments on which Mr. Hathaway had been working in SDP continued. Performance issues have been raised concerning projects in both issues groups in connection with the appraisal year here at issue. For purposes of discussion, they will be addressed separately by issues group.

In November 1996, after the 1995-96 appraisal year ended, Henry Hinton, Assistant Comptroller General for NSIAD, notified petitioner orally in a meeting that his performance for that period would be rated as "Unsatisfactory." Pet. Br. at 3. This conclusion was based on his rating at the "Did Not Meet" level in two performance elements--work results and job/unit management. Mr. Hinton informed petitioner that, because of the rating, he would recommend to the Acting Comptroller General that petitioner be removed from the SES. On December 4, 1996, Mr. Hathaway was presented with a written performance assessment as had been described at the earlier meeting. Petitioner appended his comments to that assessment and signed the document on December 11, 1996.

### III. Discussion

#### A. Scope of Review

In providing for appointment of career employees to the Senior Executive Service, Congress established a system which permitted removal of such individuals from the SES to civil service positions outside the SES, "at any time for less than fully successful performance." 5 U.S.C. §3592(a)(2). This removal provision is permissive, not mandatory, for cases like the one here at issue.<sup>2</sup> The statute specifies that career appointees removed from the SES to a civil service position under this provision do so without loss of pay. See 5 U.S.C. §§3592 and 3594 ("saved pay"). GAO Order 2920.1, ch. 8, ¶3.e, governs this type of removal, providing for placement at the GAO

---

<sup>1</sup>For 1989-91, petitioner achieved a rating of "Did Meet" in all four dimensions; for 1991-93, he achieved a "Did Meet" rating in three dimensions and "Exceeds" in one dimension; and for 1993-95, he was rated at "Did Meet" in two dimensions and "Exceeds" in two dimensions. Pet. Ex. 3; TR 28.

<sup>2</sup>Under GAO Order 2920.1, "[a]n employee who receives **an** unsatisfactory rating **may be** reassigned or transferred within the SES, or placed in a position outside the SES." Ch. 8, ¶3.b (emphasis added). For an employee "who receives **two** unsatisfactory ratings in any period of 5 consecutive years," or "who, **twice** in a period of 3 consecutive years, receives less than fully successful ratings," removal from the SES is mandatory. Ch. 8, ¶3.c (emphasis added).

management level or GS-15 or the equivalent. The Agency also provides for "saved pay" in this situation. Order 2920.1, ch. 4, ¶4.c.

By legislative design, the appeal rights of a career employee subject to removal from the SES for reasons of poor performance are confined to the informal process invoked in this case. *Berger v. Dept. of Energy*, 36 MSPR 48, 51 (1987); see 5 U.S.C. §3592(a); 31 U.S.C. §733(a)(6). The underlying statute provides that in the case of removal for less than fully successful executive performance by a career appointee, the individual is entitled, upon request, to an informal hearing at which the individual "may appear and present arguments, but such hearing shall not give the career appointee the right to initiate an action with the [Merit Systems Protection] Board under section 7701 of this title, nor need the removal action be delayed as a result of the granting of such hearing." 5 U.S.C. §3592(a)(3) (incorporated by reference in 31 U.S.C. §733(a)(6)).

The Personnel Appeals Board implementing regulations provide for an informal hearing, but are silent as to any follow-up from such a hearing, except to specify that the informal hearing "shall not give the career appointee the right to initiate an action with the Board under another provision of these rules." 4 C.F.R. §28.141(c). GAO Order 2920.1 provides more content to the regulatory framework. Under its provisions, the administrative judge may "comment on the executive's arguments and recommend appropriate action if a serious defect in the personnel action is manifest," but is not authorized to order specific relief. GAO Order 2920.1, ch. 8 ¶3.f(3).<sup>3</sup>

## **B. Petitioner's Arguments: Summary**

In asking the administrative judge to recommend that his removal from the SES be rescinded, petitioner makes a two-pronged argument. First, petitioner contends that the Agency reached an erroneous conclusion that his performance was unsatisfactory, which formed the basis for his removal; he claims that the Agency failed to fairly and accurately assess his performance. In petitioner's view, the Agency "failed to accurately reflect his contributions and credit him for the accomplishments of his team." Pet. Brief at 3. Secondly, petitioner argues that the Agency departed from important procedural rights during the appraisal year and in the steps leading up to the informal hearing. He contends that his supervisor, Mr. Hinton, "failed to afford him an opportunity to participate actively in the formulation of the performance appraisal, consider his comments and, most importantly, that he was not informed of any deficiencies in his performance until after the rating period was over." *Ibid.* Specifically, he claims that the Agency failed to give him adequate, timely feedback, coaching and counseling, in violation of GAO Order 2920.1, ch. 6, ¶4.d(2); that the Agency denied him a meaningful opportunity to participate in his own performance appraisal, in violation of Order 2920.1, ch. 6, ¶4.c(5); and that the Agency failed to provide him with a written final performance rating, in violation of ch. 6, ¶3.g.

---

<sup>3</sup>By comparison, the applicable regulatory provision in the executive branch arguably provides somewhat broader leeway for recommendation following an informal hearing. The relevant provision states that the Merit Systems Protection Board (MSPB) "will refer a copy of the record to the Special Counsel, the Office of Personnel Management, and the employing agency for whatever action may be appropriate." 5 C.F.R. §1201.142.

For purposes of analysis, the first prong of the argument, concerning the accuracy and fairness of his substantive evaluation, and the feedback issue of the second prong, will be discussed in tandem in section C below, because, for the most part, the same testimony speaks to both issues. This discussion will be divided into the two time periods/issue areas relevant to this case. The remaining procedural arguments will be discussed in section D.

### **C. Performance and Feedback Issues**

#### **1) The SDP Period**

The Agency maintains that Mr. Rodrigues, as petitioner's supervisor during the early part of the appraisal year, actively criticized the quality of Mr. Hathaway's work at the time it was ongoing. Resp. Br. at 4; TR 16, 17, 20. A review of the transcript of the informal hearing as well as petitioner's written submissions reveals conflict as to the Agency's statements that Mr. Rodrigues did in fact provide timely negative feedback to petitioner. Specifically, Mr. Hinton, testifying for the Agency, stated that on the Weapons Systems Warranty job, Mr. Hathaway had redirected the work and focus of the job, ultimately causing Mr. Rodrigues as his supervisor to become heavily involved. TR 16. He further stated that Mr. Rodrigues informed Mr. Hathaway of the problems with the job and what needed to be done to fix it.<sup>4</sup> On the other hand, petitioner states that he was not told during his tenure on the project or during the rating period that his performance on this project was less than satisfactory. TR 36; Pet. Br. at 8. He does note some disagreement during the job as to its message. TR 35. Petitioner goes on to point out that Mr. Rodrigues "rated the Message Agreement Conference that Petitioner set up and organized on this project to be one of the best and complimented the team for being well-prepared." Pet. Br. at 8. Neither petitioner's brief nor his testimony indicate that he was individually commended in this regard. The record indicates that the Agency did perceive performance difficulties on this job. The feedback may have been inferential rather than direct.

Also during the early period of the year and under Mr. Rodrigues' supervision, Mr. Hathaway's performance on the Inter-Cooled Recuperating (ICR) Engine Testing job was deemed inadequate. In the Agency's view, petitioner submitted to Mr. Rodrigues a draft report lacking in focus, objectives, and understanding of the intended message; petitioner did not realize he had sufficient data to support the report's message and suggested that the team gather additional information. TR 17. This occurred as Mr. Hathaway was transitioning into a new area. Mr. Rodrigues assigned another Associate Director who understood the intended message and underlying data of the report, who then "rolled up his shirt sleeves, got into this job, recognized that the team had indeed collected sufficient information to make the message of the report." TR 17. Mr. Hinton was told that enough information had been gathered to support the message and that petitioner did not understand the significance of the data. TR 17. Respondent's brief and the testimony on this subject reveal that Mr. Hathaway's supervisor, Mr. Hinton, was notified of the job's deficiencies. Nothing in the record, however, indicates that Mr. Hathaway was directly informed of the deficiencies of this work while it

---

<sup>4</sup>Mr. Hinton testified as follows: "Mr. Rodrigues told Mr. Hathaway what they planned to do on that job. They pulled that job back from Mr. Hathaway, and Mr. Rodrigues took charge of that job and saw it through to a successful conclusion and completion." TR 17.

was ongoing. Further, petitioner states that at no time during his tenure on this project was he informed by Mr. Rodrigues, Mr. Hinton, or any other NSIAD management official that his work on the project was less than acceptable. Pet. Br. at 7. Accordingly, the feedback on this job could have been more clear and direct, while the Agency has provided support for its conclusion on petitioner's performance on this project. As in the instance of the Weapons Systems Warranty job, however, at the SES level, circumstances in losing control over a job at some point should suggest negative feedback to the individual involved.

## 2) The DM Period

The individual projects involving questions about petitioner's performance during the second phase of the appraisal year include the following: Environmental Protection: Clean Up and Compliance; Rocky Mountain Arsenal Clean Up Costs; and the Earth Observing Systems/NASA (EOS) job.<sup>5</sup> On the EOS job, the Agency states that petitioner "did not adequately address agency comments." Resp. Br. at 7; see TR 19. In that instance, because the comments were not well addressed and this was a critical step, the issue area director, Mr. Warren, "had to engage himself and take over that job and work to get that job successfully completed and out of the office." TR 19. On the other hand, petitioner contends that the analytical problems at issue resulted from matters which took place before he joined that team, and that his difficulty in addressing agency comments stemmed from the short period (6 months) in which he had worked with Mr. Warren. Resp. Br. at 8; Joint Ex. 2 at 6 (Hathaway comments on rating). Petitioner stated that after the report was issued, Mr. Warren told him that his involvement was more detailed than he would have liked. Pet. Br. at 9. Mr. Hinton maintained that petitioner was given feedback. TR 20.

On the Environmental Protection: Clean Up and Compliance job, the Agency viewed the report produced by Mr. Hathaway as "not supported by properly analyzed data." Resp. Br. at 7. Mr. Hinton testified that he and Mr. Warren spoke to Mr. Hathaway, explained that the product was unacceptable and why they reached that conclusion, and further, that they advised him that he was responsible and suggested how the product could be improved: "I stayed involved until that report was issued." TR 12. Petitioner acknowledged timely feedback on this job: "Mr. Hinton was quite clear in his concerns about this draft during final processing. I took his criticism seriously, worked to address all points and the report was issued." Joint Ex. 2 at 7 (Hathaway comments on rating).

On the Rocky Mountain Arsenal job, the Agency contends that petitioner failed to resolve legal issues with the Office of General Counsel, blaming the problems on the legal advisors' lack of familiarity with defense environmental programs. Resp. Br. at 8. Mr. Hinton testified that "[i]t was evident from the discussion that Mr. Hathaway did not have a good understanding of the issues at hand, the message that was needed for the report, and what the underlying evidence was." TR 13. He further explained that after the meeting, "Mr. Warren told Mr. Hathaway, and I also share the

---

<sup>5</sup>In testimony the Agency challenged Mr. Hathaway's performance on the Defense Environmental Construction project, but in the post-hearing brief, withdrew the objections based on the conclusion that its earlier position had been premised on the preliminary draft which had not yet been reviewed by Mr. Hathaway. TR 18-19; Resp. Br. at 10.

statement that I'm about to share with you, that that was one of the worst meetings that Mr. Warren had been in involving the senior leadership of GAO. I too share that view. Because we did not come across, Mr. Hathaway in particular, as having a good understanding of the criteria to be applied in that job." TR 14. On that job, petitioner acknowledged that he had participated in "a bad meeting." TR 38. But he also stated that he "didn't even know until after the end of the rating year that there were people who thought I hadn't handled that well."<sup>6</sup> *Ibid.* Following the meeting, Mr. Warren, as petitioner's issue area director, became "immediately involved in that job," rewriting the report in its entirety. TR 14.

The five jobs on which the Agency relies--two from the first part and three from the second part of the year--to support the conclusion that petitioner's performance was unsatisfactory are amply detailed in the record. While petitioner admits direct negative feedback on only one such job, the indicia of repeated supervisory intervention and comments which an executive could reasonably be expected to view as negative feedback give some support to the Agency on this question. At the SES level, repeated supervisory intervention should suggest negative feedback to the manager whose work is being revised or taken over.

At the beginning of the rating year, Mr. Hinton had advised petitioner along with other SES members from the NSIAD Systems Development and Production team of the expectations associated with their level. TR 34. In petitioner's view, "the kinds of things that were stressed are the kinds of things that I've just said my statistics are showing very well." *Ibid.* Mr. Hinton's testimony, on the other hand, indicates that at that meeting, he

emphasized the need for strong leadership, it was a period when GAO was going through downsizing, a period that we were also introducing new business processes for the office. At the same time, though, I felt it was very important to emphasize the need for top quality, objective products from the SES team.

TR 11.

Mr. Hinton also spoke about a midyear feedback session in May 1996, in which he "emphasized the need for him [petitioner] to assume responsibility for a body of work, that I wanted to see his analytic capabilities and I wanted him to be focusing on economy and efficiency issues." TR 11. In contrast, petitioner's testimony indicated that nothing at the midyear conference was directed at him individually: "Again, we got challenging goals, but it was in terms of, this is what I want from the group. There wasn't anything said in either one of those meetings that said, Brad, we're dissatisfied with what you're doing." TR 34. It is not unreasonable for petitioner to contend that the feedback given him during the year could have been more direct, particularly in view of his previous performance history. However, it is also difficult to characterize the import of intervention by his supervisors at this level--and the implication that carried with such action. In sum, petitioner could have been given more direct, clearer signals, while he also could have been more alert to unspoken

---

<sup>6</sup>The meeting took place on September 7, 1996. The rating year ended on September 30, 1996.

feedback associated with the projects he supervised.

### 3) Performance Based on Team Contributions

Petitioner raises a further contention concerning the substance of his performance rating--that he should have been evaluated based on the overall contributions of the teams which he supervised during the relevant year. He contends that his performance should have been evaluated by viewing the end products of 20 assignments with which he was associated during the year. This would include such factors as productivity, timeliness, cost savings and the overall results of the team projects. Pet. Br. at 13-14. Petitioner cites the GAO order provision stating that the Agency's executives should be "accountable for the effectiveness and productivity of the employees they supervise." Pet. Br. at 2\_n.1, 27; Request for Informal Hearing at 4; see Order 2920.1, ch. 1, ¶6.e.

Respondent argues, based on Order 2920.1, ch. 6, ¶2.c, as follows:

Chapter 6 ¶2(c) states that appraisals will be based on both individual and organizational performance, taking into account factors such as quality of work. In assessing Mr. Hathaway, Mr. Hinton took all the relevant information into account regarding both individual and team performance. Mr. Hathaway's individual performance weighed more heavily than what his team had produced, because his work was accomplished only through significant intervention by others.

Resp. Br. at 10-11. Specifically, Respondent argues that "Mr. Hathaway had little or no contribution" to the work input on 13 of the 20 assignments for which his teams produced end products. TR 21. Indeed, the Agency contends that of "the seven major jobs on which Mr. Hathaway worked during the rating year, Mr. Hathaway had problems on most." Resp. Br. at 5.

The record goes into some detail concerning performance problems on several assignments. Thus, of the 7 projects placed in issue by the Agency, the record reveals serious quality concerns on 5.<sup>7</sup> Even if the 7 projects had resulted in superior end products, petitioner does not respond to the argument that his superiors had to intervene to a degree that was unusual and unsatisfactory for them. For an executive, this concern carries some weight in view of the performance standards applicable at that level. Thus, petitioner's Performance Contract for 1995-96 listed his Individualized Performance Objectives as follows:

In partnership with the Director, SDP, then the Director, DM, and the other Associate Directors, **provide leadership, guidance and direction to the groups** with particular attention to the issues of Budget Analysis, Sea Systems and Ballistic Missile Defense (SDP) and Defense Environmental Programs, Management of High Visibility Programs and Financial Management (DM).

---

<sup>7</sup>See discussion, *supra*.

Joint Ex. 2 at 1, Pt. 1 (emphasis added). The importance of leadership and independence in the SES is reiterated in the Agency's brief:

The role of an Associate Director in GAO is an extremely significant one. . . . He is a high level management official who guides and shapes the analysis of GAO products, and effectively leads his staff in producing quality GAO products. He needs to display a high degree of independence and objectivity. He is held accountable for accuracy, efficiency, effectiveness, and the timely completion of GAO products.

Resp. Br. at 7. While SES members thus must be accountable for group work products, this accountability for team work does not insulate a manager from the standards and expectations attached to his or her own position.

The Agency therefore could lawfully evaluate petitioner's performance with a view toward the need for managerial independence. Because of the pattern of intervention by petitioner's supervisors, the Agency could reasonably conclude that petitioner's individual performance weighed more heavily than the overall contributions of the teams he supervised. Petitioner has shown nothing unlawful in the Agency's substantive evaluation of his performance.

#### **D. Other Procedural Issues**

Petitioner's contentions concerning the procedures involved in his removal begin with the requirement in GAO Order 2920.1, ch. 6, ¶4.d(2) that his supervisor provide "continued feedback, coaching, and counseling on progress toward contract accomplishment." See Pet. Br. at 27-28. Petitioner also points to two other, related provisions in the SES Order which amplify the process:

Performance appraisal is a continuous process, with frequent communication between supervisor and executive regarding the quality and effectiveness of the performance. When appraisal is done in an environment of fairness, mutual respect and meaningful communication, it can enhance the rater-ratee relationship and lead to improved performance and improved personnel decisions. The formal rating at the end of the appraisal period is just one aspect of the process.

Order 2920.1, ch. 6, ¶3. Petitioner also cites the following explanation of progress reviews: "Systematic communication and feedback between supervisors and SES members on performance effectiveness and progress toward meeting established goals is an important element of a successful SES performance appraisal system." Ch. 6, ¶3.d; see Pet. Br. at 28. In his brief, however, petitioner relies on cases involving employees at a lower level than the SES who therefore would not have had

the same expectations of independence in their work product and of leadership in their job performance. Pet. Br. at 28; *see DePauw v. ITC*, 782 F.2d 1564 (Fed. Cir.), *cert. denied*, 479 U.S. 815 (1986); *Murphy v. GAO*, 2 PAB 132 (1992); *Glover v. HHS*, 24 MSPR 636 (1984); *Shuman v. Dept. of Treasury*, 23 MSPR 620 (1984).

As the Agency brief points out, the Executive Review Board noted that petitioner's products were re-written by others; such events "should constitute very meaningful feedback to a member of the SES." Resp. Br. at 13. Petitioner was provided with feedback during the review year which should have alerted him to deficiencies in his performance. That the feedback could have been more direct does not negate that feedback took place.

Petitioner also challenges the Agency for failing to provide a meaningful opportunity to participate in his appraisal, in violation of Order 2920.1, ch. 6, ¶¶4.c(4) and (5). Those provisions state that the SES member is responsible for "providing key achievements at the end of the assessment period supporting how well his/her performance addressed the contract general expectations and individualized performance objectives" and for "[p]articipating actively in his/her own performance appraisal." Petitioner also relies on the Order for the proposition that an appraisal must be completed "in an environment of fairness, mutual respect and meaningful communication." Pet. Br. at 30-31; Order 2920.1, ch. 6, ¶3. The record in this matter reveals that petitioner met with Mr. Hinton shortly after the conclusion of the appraisal year. TR 33, 46-49.

Petitioner testified that, by that time, he had "started noticing that I wasn't getting called with questions about jobs that were my jobs. Dave Warren was getting the call from the front office." TR 46. At the November meeting with Mr. Hinton, petitioner was informed of the proposed conclusion that his performance was less than satisfactory and that Mr. Hinton would recommend petitioner's removal from the SES. Petitioner was invited to respond at that time, but elected to wait until he received the completed, written version of his appraisal and then submitted his own written response. TR 47-49. Petitioner objects to his supervisor's recommendation being completed before he had prepared his narrative of accomplishments for the year. He was denied an extension of time to submit his narrative, and filed it on the required date. Subsequently he received the formal written appraisal. Petitioner thereafter followed the procedures specified for seeking higher level review of his supervisor's recommendation. Nothing in this process indicates any deviation from the required procedures outlined in chapter 6 of Order 2920.1. That petitioner disagreed with the conclusion of his supervisor and the affirming conclusion of the Executive Review Board does not negate the validity of the process followed to reach that conclusion.

Finally, petitioner contends that he has not received a final written rating of record. Pet. Br. at 31; *see* Order 2920.1, ch.6, ¶3.g. The Agency states that the 1996 rating, signed by Mr. Hinton and by petitioner, became final when it was sustained by the ERB and the Acting Comptroller General, in accordance with Order 2920.1, ch. 6, ¶3.g. Resp. Br. at 15. Petitioner was informed that the rating had been upheld in the communication from Joan M. Dodaro, Assistant Comptroller General for Operations, dated February 26, 1997. Joint Ex. 3. Ms. Dodaro's follow-up response to petitioner's inquiry of February 28, 1997, made clear that the Acting Comptroller General had concurred in the

decision that the rating and removal based thereon be sustained. Joint Ex. 4. This should have left no doubt that the rating signed by petitioner and his supervisor in December 1996 had become the final rating of record.

Petitioner received a performance evaluation, which indicated that he "did not meet" the required standard in two elements--work results and job/unit management. For that reason, he received an overall rating of unsatisfactory, and thus the Agency could and did lawfully remove Mr. Hathaway from the SES to a Band III position. Following that evaluation, petitioner met with the Executive Resources Board to discuss his performance and rating. The ERB informed petitioner of the decision to remove him from the SES and of his right to request an informal hearing before the Personnel Appeals Board. Contrary to petitioner's contention, he was provided with a minimally adequate level of feedback during the relevant review year which should have alerted him to deficiencies in his performance.<sup>8</sup> Further, the Agency afforded petitioner his requisite procedural rights during the review process and follow-up. Petitioner was offered placement in a managerial position in the civil service with full pay retention. There is no basis for an ultimate conclusion that Mr. Hathaway was treated unlawfully in the process leading to his removal. Based upon the submissions of the parties and the record developed at the hearing, I find that no recommended action with respect to petitioner's removal is warranted in this case.

## **CONCLUSION**

For the reasons set forth above, I conclude that the Agency acted lawfully in the evaluation of petitioner for the 1996 appraisal year and in the steps taken subsequent to its determination to remove him from the SES because of unsatisfactory performance.

---

<sup>8</sup>Rendering criticism of a professional is an unpleasant business, and thus there may be a tendency to postpone or avoid it as long as possible. Moreover, the culture of the SES may be such that unsatisfactory evaluation is a rare event, and thus members are expected to be sensitive to muted negative signals of disapproval. Nevertheless, it bears repeating that in view of petitioner's prior satisfactory performance history, and the optional character of removal for a single unsatisfactory rating, feedback in this instance could have been more than "minimally adequate," had it been more overt and direct.