

Lenora J. Pernell v. U.S. General Accounting Office

Docket No. 01-03

Date of Decision: August 15, 2002

Cite as: Pernell v. GAO (8/15/02)

Before: Jeffrey S. Gulin, Chair

Retaliation

Discrimination

Prohibited personnel practice

Unacceptable performance

Denial of within-grade increase

Removal

INITIAL DECISION

I. Introduction

This matter is before the Personnel Appeals Board (PAB or the Board) on a Petition for Review filed by the Personnel Appeals Board's Office of General Counsel (PAB/OGC) on behalf of Lenora J. Pernell, a former GS-7 Issue Area Support Technician in the Accounting and Information Management Division (AIMD) in the Washington office of the U.S. General Accounting Office (GAO or the Agency). Petitioner challenged, *inter alia*, the Agency's decision to remove her from its employment rolls because of unacceptable performance.

Petitioner alleges that the following personnel actions were taken in retaliation for the assertion of protected appeal rights in violation of 5 U.S.C. §2302(b)(9)(A) and because of her race (African-American) in violation of 42 U.S.C. §2000e-16 and 5 U.S.C. §2302(b)(1)(A):

- 1) the May 5, 1999 denial of a within-grade increase;
- 2) the "unacceptable" ratings she received in two dimensions of her May 20, 1999 performance appraisal;
- 3) the "unacceptable" rating she received in one dimension of her September 14, 1999 performance appraisal;

- 4) the “unacceptable” ratings she received in three dimensions of her June 1, 2000 performance appraisal;
- 5) the June 2000 denial of a within-grade increase;
- 6) the “unacceptable” rating she received in one dimension of her October 5, 2000 performance appraisal; and
- 7) the October 25, 2000 proposal and the December 21, 2000 decision to remove her based on the “unacceptable” ratings contained in the June 1, 2000 and October 5, 2000 performance appraisals.

Petition for Review (PFR) ¶¶3, 5.

Petitioner seeks the reversal of the personnel actions that she alleges constitute prohibited personnel practices and the award of appropriate make-whole relief.

II. Procedural History

The Petition for Review was filed on February 8, 2001.¹ Petitioner claimed that the above outlined personnel actions constituted violations of GAO Orders 2531.3 (Within-Grade Salary Increases) (May 18, 1998); 2430.1 SUP (Performance Appraisals) (Dec. 4, 1992); and 2432.1 (Dealing with Unacceptable Performance) (Jan. 16, 1998); as well as GAO’s Performance Appraisal System for Administrative Professional and Support Staff (October 1997 and December 1999) (APSS Manual). Petitioner argued that the actions constituted prohibited personnel practices under 5 U.S.C. §2302(b)(12), as a result of GAO violating its own regulations. PFR ¶4.

Petitioner specifically alleged that the Agency failed to provide adequate notice of perceived deficiencies in her performance; failed to provide adequate coaching, training and feedback on performance; denied her 1999 within-grade salary increase without prior notification that her predominant performance was not acceptable and while her documented performance was fully successful; failed to provide a reasonable opportunity to improve; and failed to adequately and accurately document the reasons for the removal. PFR ¶4.

The Agency filed its Answer to the Petition for Review on March 16, 2001, denying any wrongdoing in its actions concerning Petitioner and specifically asserting that “[a]t all times pertinent hereto, respondent acted in good faith and without any intent to engage in unlawful

¹ The removal was to be effective on December 30, 2000. On December 27, 2000, Petitioner, through counsel, requested that the PAB issue an *ex parte* stay of the removal action. PAB Docket No. 00-12; *see* 4 C.F.R. §28.133(a). The Board granted a 30-day stay. Pursuant to Petitioner's request, a further temporary stay through February 10, 2001, was granted on January 29, 2001. *See* 4 C.F.R. §28.133(b). On February 8, 2001, Petitioner filed a request for a permanent stay. The Agency was granted several extensions of time to prepare its reply. On May 21, 2001, Petitioner's request for a permanent stay was denied; her removal was effective on May 23, 2001. Tr. 1787.

retaliation against Petitioner. All of respondent's actions were done for legitimate non-discriminatory and non-retaliatory reasons." Answer at 14.

On May 30, 2001, Respondent filed a Motion to Dismiss or, in the Alternative, Motion for Summary Judgment. The Agency argued that Petitioner's claims regarding her within-grade denials of May 1999 and June 2000 as well as the performance appraisals of May 1999, September 1999 and June 2000 should be dismissed for failure to state a claim and failure to exhaust administrative remedies. In the alternative, the Respondent sought summary judgment on the grounds that it was entitled to judgment as a matter of law.

On June 5, 2001, Petitioner's Response to the Respondent's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment was filed. As to the latter, Petitioner argued that summary judgment was not supportable because there were many genuine issues of material fact to be resolved. Petitioner further argued that the appropriate claims had been stated and there was no showing of failure to exhaust administrative remedies.

A nine-day hearing of this case was held on June 11-15 and June 18-21, 2001. At the beginning of the hearing, the Administrative Judge announced that the dispositive motions would be ruled upon in the post-hearing decision.² Both Petitioner and Respondent filed Post-hearing Briefs on August 31, 2001. Respondent filed its Reply Brief on September 28, 2001; Petitioner's Reply Brief was timely filed on October 5, 2001.

III. Factual Background

Petitioner began her employment with GAO in March 1984 as a GS-4 program aide in the Resources, Community, and Economic Development Division (RCED) and remained in the Administrative, Professional and Support Staff (APSS) series throughout her tenure at GAO. Transcript (Tr.) 1787.

A. Petitioner's Work in the Government-wide Accounting and Financial Management Issue Area

In the Spring of 1998, Petitioner worked in the Government-wide Accounting and Financial Management (GAFM) issue area of the Accounting and Information Management Division (AIMD) as a GS-7 Issue Area Support Technician. Tr. 52-53, 107-08. Petitioner's duties included travel administration, handling and processing mail, ordering supplies, and maintaining appointment calendars for the directors. Tr. 1789-90. During that time, Petitioner's issue area directors, Greg Kutz and Gary Engel, contacted Sarah Jaggar, the Director of Operations for AIMD, to inform her that they were concerned about Petitioner's performance and attendance. Tr. 47, 53-54. They subsequently requested that Ms. Jaggar reassign Petitioner to another office. Tr. 64. Ms. Jaggar attempted unsuccessfully to arrange a six-month detail for Petitioner outside her division. Tr. 64-65.

² Upon review of the pleadings and the relevant case law, Respondent's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment is denied.

In December 1998, Anthony Salvemini, a manager in AIMD's Planning and Reporting office, agreed to add Petitioner to his staff. Tr. 65. Ms. Jaggar spoke to Petitioner about the option and told her that the position involved processing time and attendance reports (T&A's) and other paperwork. Tr. 66. Petitioner told Ms. Jaggar that that she did not want that assignment and "would not go there." Tr. 66, 334, 1791.

Subsequent to that conversation, Petitioner contacted John Luke, Deputy Assistant Comptroller General for Human Resources, who oversaw all personnel-related matters at GAO. During a meeting with Mr. Luke, Petitioner told him that she was being reassigned to perform the T&A function, that two other employees who were white females had declined the job, and that she would prefer another assignment. Tr. 405, 1792-95. Mr. Luke, who is African-American, did not believe that Petitioner was expressing concern about being discriminated against on the basis of race in this assignment. Tr. 407, 419, 427-28.

After their meeting, Mr. Luke contacted Ms. Jaggar and asked her to consider other options with respect to Petitioner. Tr. 66-67, 408-09. He also told Ms. Jaggar that Petitioner believed that she was being "set up to fail." Petitioner's Exhibit (P.Ex.) 2; Tr. 336. Neither Petitioner nor Mr. Luke made any reference to race discrimination in their conversations with Ms. Jaggar about the Planning and Reporting assignment. Tr. 66, 77; Respondent's Exhibit (R.Ex.) 104 at 6.

Ms. Jaggar told Mr. Luke that she appreciated his input and agreed to seek another position for Petitioner even though she had previously looked within the Division and had contacted Directors of four other Divisions seeking a suitable placement for Petitioner. Tr. 64-65, 78, 336, 372-73, 409.

Initially the Director of Operations for the General Government Division (GGD) had responded favorably to Ms. Jaggar's inquiries on behalf of Petitioner, indicating that GGD needed an administrative staff person. On December 10, 1998, however, he notified Ms. Jaggar that he could not find a position for Petitioner. Tr. 64-65, 78; R.Ex. 104 at 7.

B. Petitioner's Detail to the Computer Support Group

Shortly thereafter, Ms. Jaggar decided to detail Petitioner to the AIMD Computer Support Group (CSG), which reported directly to her. Tr. 78-81. She determined that a detail to the new position was more appropriate than reassignment for Petitioner, who retained her title of Issue Area Support Technician but would not be working in an issue area. Tr. 110-11. Petitioner told Ms. Jaggar that she was willing to accept the detail to CSG. Tr. 112. Her detail was effective on January 27, 1999; she began working in CSG on February 1, 1999. Tr. 81; R.Ex. 12.

As the manager of CSG, James Bouck was Petitioner's immediate supervisor; Ms. Jaggar, a member of the Senior Executive Service, was her second-line supervisor. Tr. 47, 82, 112, 1014. Mr. Bouck and Petitioner constituted the CSG. Tr. 112. During the preceding year—1998—two Band II evaluators had also served in the CSG. Tr. 1394-96.

Prior to detailing Petitioner to CSG, Ms. Jaggar had reviewed Petitioner's Issue Area Support Technician position description and determined that there was an "exact match" with what

needed to be done in CSG. Tr. 85. Ms. Jaggar and Mr. Bouck developed a list of tasks that Petitioner would be expected to perform in CSG.³ Tr. 86, 1018; *see* R.Ex. 13. Petitioner was expected to maintain computer inventory records; notify OIMC about delivering and setting up computers for new employees and removing them after employees departed; monitor printer and toner usage; facilitate Mr. Bouck's meetings; file records relating to computer maintenance and supplies; and inventory the software closet. Tr. 87-107; R.Ex. 13.⁴ The duties did not require knowledge of computers beyond what every GAO employee was expected to have. Tr. 108-09, 1023, 1029.

Before Petitioner's detail to CSG began, Mr. Bouck met with her to review generally the work that she would be doing. Tr. 1022, 1799. She did not express reservations or concerns about the tasks and indicated that she was happy to be back in the computer field. Tr. 1032, 1435, 1799. On February 1, 1999, Mr. Bouck sent Petitioner an e-mail, titled "Lenora's duties," outlining assignments that she was expected to take on in the CSG. Tr. 1018, 1801; R.Ex.13. On February 3, 1999, Ms. Jaggar and Mr. Bouck met with Petitioner to communicate some of the expectations to her. Tr. 113, 116, 1443.

Once Petitioner started work in CSG, Mr. Bouck and Ms. Jaggar had continuous and frequent contact with her. Early on, Mr. Bouck met daily with her; later he cut back to two or three times per week. The meetings with Ms. Jaggar were weekly. Tr. 125-27, 1038-39. Additionally, Mr. Bouck provided Petitioner with information and work samples and set up programs for her to use to accomplish her tasks. Tr. 253, 1051-56; R.Ex. 105 at 4, 6. Petitioner took extensive notes during Mr. Bouck's explanations and instructions. Tr. 1103-04.

By early March 1999, a month or so after the CSG detail began, Ms. Jaggar and Mr. Bouck began to observe problems with Petitioner's work. Assignments were not being completed and there were errors in her data collection. Tr. 127-28; *see* R.Exs. 15, 103 at 1. She also was behind in completing the GAO-mandated Computer Based Training (CBT) modules. Tr. 1044-46, 1448-49. Ms. Jaggar took steps to ensure that Petitioner's feedback concerning problems with her assignments was very precise, and further required Mr. Bouck to work even more closely with her than he had been. Tr. 130. Beginning in April, Mr. Bouck asked Petitioner to meet with him daily to review her assignments, identify any problems she had with them, and allow her to raise concerns. Tr. 134-35, 1101, 1845, 2085-86. Mr. Bouck also sent Petitioner a lengthy e-mail on April 15, 1999, clarifying her tasks and duties and encouraging her to work with him to solve problems. R.Ex. 21. In particular, the e-mail gave specific instructions regarding monitoring printer and toner cartridge usage, updating physical inventory and equipment folders; updating software inventory; arranging to get scratched disks degaused; taking charge of Reachout distribution and summarizing her accomplishments to date. R.Ex. 21. Petitioner was satisfied with the supervision she received during her first three months in CSG. Tr. 2088.

³ Mr. Bouck clarified the instructions in expanded detail in an e-mail to Petitioner sent on April 15, 1999. *See* R.Ex. 21.

⁴ There were two tasks on the lists that Petitioner was never asked to perform: assisting staff in diagnosing and solving computer problems and providing T&A assistance to the budget issue group. Tr. 95-96, 98.

Throughout April and into early May, Petitioner continued to have problems with the timeliness of her assignments, as well as with the accuracy and completeness of the information she was collecting. Tr. 1062-63, 1102, 1108, 1116, 1130-31, 1133; *see* R.Exs. 21, 24. Mr. Bouck was “beginning to have serious concerns about her ability to complete the tasks that he had given her to complete ... in a timely manner.” Tr. 1102.

1. May 1999 Denial of Petitioner’s Within-Grade Increase

As the Director of Operations, Ms. Jaggar was routinely advised of within-grade determinations and reviewed these decisions. Tr. 51, 135-36. Late in April 1999, the AIMD Personnel Specialist informed Ms. Jaggar that a determination needed to be made about whether to grant Petitioner a within-grade increase. Tr. 135. At that time, Ms. Jaggar and Mr. Bouck met to discuss Petitioner's performance during her first three months in CSG and to make an assessment about whether her performance was at the "acceptable" level, a requirement before a within-grade increase can be granted. Tr. 136-37. Deciding that her performance in CSG was not at an “acceptable” level to warrant a within-grade, they signed a form denying the increase on May 5, 1999. Tr. 138-39; R.Ex. 25. On May 21, 1999, Ms. Jaggar presented Petitioner with a letter advising her that her within-grade had been denied because of unacceptable performance. R.Ex. 31.⁵ The letter also referenced Petitioner's most recent annual performance appraisal in GAFM in which she garnered two ratings of "needs improvement."⁶ Tr. 139, 142; *see* R.Ex. 133.

2. Petitioner’s May 1999 Performance Appraisal

After the denial of the within-grade, Ms. Jaggar and Mr. Bouck prepared a performance appraisal for Petitioner covering her time in CSG (February 1, 1999 through May 20, 1999). Tr. 142; R.Ex. 6. Three performance dimensions were standard and required for Issue Area Technicians: Teamwork and Interpersonal Behavior; Service Orientation; and Individual Work Productivity. Petitioner's supervisors did not select three additional dimensions for Petitioner's CSG role until May 1999: Checking, Examining and Recording; Filing and Organizing; and Typing/Word Processing. Tr. 1439-40. At that time, Petitioner received ratings of "fully successful" in two required dimensions—Teamwork and Interpersonal Behavior; and Service Orientation; “needs improvement” in two of the added dimensions—Filing and Organizing; and Typing/Word Processing; and "unacceptable" in two dimensions—Individual Work Productivity (required dimension) and Checking, Examining and Recording (added dimension).

⁵ In April 1998 and April 2001, Ms. Jaggar favorably reviewed a within-grade increase for an Issue Area Support Technician in AIMD who was an African-American. During the relevant period, one white Issue Area Support Technician received her within-grade. In March 2000, Ms. Jaggar denied a within-grade increase for a white male AIMD employee. Tr. 143-45.

⁶ Petitioner signed her performance appraisal for the last period in GAFM, leading up to the CSG period and covering from October 1, 1998 to January 27, 1999, on May 13, 1999. She was rated "fully successful" in all dimensions. P.Ex. 1. The GAO Order governing within-grades, however, specifies that performance must be at an acceptable level of competence based on "the most recently completed GAO annual appraisal period." Order 2531.3 ch.2 ¶1.a (emphasis added) (May 18, 1998) (R.Ex. 31).

Tr. 145; R.Ex. 6. Petitioner was given the performance appraisal on May 21, 1999. Tr. 1188.

3. Petitioner's June 1, 1999 Charge Filed with PAB/OGC

On June 1, 1999, Petitioner filed a charge with the Personnel Appeals Board's Office of General Counsel claiming that the May 1999 appraisal and the denial of the within-grade were actions taken in violation of law, rule or regulation and constituted reprisal for the exercise of appeal rights. Tr. 1889-90; P.Ex. 16.⁷

Ms. Jaggar became aware that Petitioner had filed a charge with the PAB/OGC on June 8, 1999. Tr. 322. Mr. Bouck was also aware of the charge, since he subsequently saw a letter about the charge from the PAB/OGC dated June 4, 1999; he could not remember when he saw the letter. Tr. 1400-01, 1535-36.

4. June 1999 Opportunity Period

As a result of the May 20, 1999 performance appraisal, on June 4, 1999, Petitioner was placed in an opportunity period for 45 days.⁸ Tr. 147, 150; R.Ex. 38. Mr. Bouck prepared the letter to Petitioner, placing her in the opportunity period, outlining her duties, and prioritizing her assignments during the time. Tr. 1190-92; R.Ex. 38. Ms. Jaggar and Mr. Bouck met with Petitioner on June 7, 1999, to review all of the assignments that she would have during the opportunity period and to set specific deadlines for them. Tr. 150-51, 1193-95, 1892; R.Ex. 40. Ms. Jaggar and Mr. Bouck also suggested training that might assist her with her tasks and encouraged her to seek assistance and clarification from them or others. Tr. 152, 1196, 1205, 1207. None of the assignments or tasks was new to Petitioner; rather, they were a continuation of previously-assigned work. Tr. 154. She appeared to understand the assignments. Tr. 1032, 1063, 1076-77, 1078.

During the opportunity period, Mr. Bouck reviewed her work products on a daily basis. In addition, Petitioner met daily with Mr. Bouck, and weekly with Ms. Jaggar. Tr. 156-57, 1304. During these meetings, the supervisors reviewed her progress, noted improvements, identified problems with assignments, and counseled her. Tr. 159-61, 1259-61; R.Ex. 103. Petitioner also sought assistance from Mr. Bouck if she did not understand something. Tr. 1914.

On July 2, 1999, Petitioner sent an e-mail to Jeffrey Steinhoff, then Acting Assistant Comptroller General for AIMD, requesting that she be returned to her previous assignment and informing him that she believed she had been the victim of retaliation and harassment. Tr. 1658-

⁷ While not apparent on the face of the charge, Petitioner's contacting Mr. Luke was the underlying exercise of rights that she alleged as the basis of her reprisal charge. Tr. 1927-28; *see* P.Brief at 54.

⁸ John Luke, then Deputy Assistant Comptroller General for Human Resources, testified that he thought Petitioner was technically "inappropriately placed in an opportunity period" because she was on detail. Tr. 433. He clarified his view, however, stating that a technical violation of GAO Orders was permissible if it were done "in the interest of the employee" as in the instant case. Because Petitioner could have been reassigned, downgraded or removed at the end of the opportunity period, and none of those options was pursued, the opportunity period inured to her benefit. Tr. 433-34.

59, 1926-28; R.Ex. 48 at 1. Upon receipt of the e-mail, Mr. Steinhoff contacted Ms. Jaggar, who informed him that Petitioner was in an opportunity period. Tr. 1659-60. On July 8, 1999, Mr. Steinhoff sent an e-mail to Petitioner telling her that he was denying her request because he decided that she should complete the opportunity period and that he expected her to do so successfully. Tr. 1660, 1743-45; R.Ex. 48 at 2. He told her that her supervisors “were hopeful she would complete the opportunity period.” Tr. 1744. In a follow-up e-mail on July 9, 1999, Petitioner reiterated her request to return to her previous assignment and also told Mr. Steinhoff about the denial of her within-grade. She further informed Mr. Steinhoff that she had filed a charge with the Personnel Appeals Board. Tr. 1661-64; R.Ex. 48 at 3. After consulting with Agency counsel, Mr. Steinhoff advised Petitioner that his original decision stood. Tr. 1662. He also spoke to Ms. Jaggar about the harassment and retaliation claims and found no basis for them, determining that everyone was acting in good faith. Tr. 1662-63, 1738, 1743.

Although Mr. Bouck monitored the progress of each of Petitioner's assignments and discussed them with her regularly, there were still serious problems with her timeliness and accuracy during the opportunity period. *See, e.g.*, Tr. 1228, 1260-62, 1268, 1279-81, 1295; *see* R.Ex. 101.

Because of the leave schedules of the two supervisors and in order to allow Petitioner to complete some of her opportunity period assignments in which she was behind, Ms. Jaggar asked Mr. Steinhoff to extend Petitioner's opportunity period from July 19 to August 11, 1999. Tr. 178-79, 1666; R.Ex. 53. The request was granted. Tr. 179-80, 1666.

On August 12, 1999, after the opportunity period had ended, Petitioner met with Ms. Jaggar and Mr. Bouck for an assessment of her progress. Tr. 180. Although the supervisors concluded that her performance had improved in some areas, her checking, examining and recording of documents remained at the “unacceptable” level. Tr. 184.

5. Petitioner’s September 1999 Performance Appraisal

On September 15, 1999, Petitioner was given a performance appraisal covering the opportunity period. It was prepared by Mr. Bouck, and reviewed and signed by Ms. Jaggar. Tr. 184-85, 1376, 1940; R.Ex. 7. Petitioner received a rating of "unacceptable" in the dimension of Checking, Examining and Recording; “needs improvement” in two dimensions—Individual Work Productivity; and Filing and Organizing; and “fully successful” in three—Teamwork and Interpersonal Behavior; Service Orientation; and Typing/Word Processing. Tr. 1376, 1941; R.Ex. 7. According to Ms. Jaggar, the “unacceptable” rating was based upon Petitioner's incomplete and inaccurate information on one task and untimeliness on another which caused the Division to make errors in the purchasing of equipment. Tr. 188-89.

6. Petitioner’s October 1999 Amendment to her June 1999 Charge

On October 8, 1999, Petitioner amended her June 1, 1999 charge filed with the PAB/OGC to include her September 1999 performance appraisal that she claimed was an impermissible retaliatory action for the exercise of her appeal rights. Tr. 2075-76; PFR ¶49. She also alleged abusive and harassing conduct on the part of her supervisors. Tr. 1946. Ms. Jaggar knew that Petitioner had amended her charge to include the September appraisal. Tr. 328-29.

C. Petitioner's Reassignment to Audit, Oversight, and Liaison Issue Area

Because of her poor performance in the opportunity period, Ms. Jaggar decided to return Petitioner to an Issue Area Support Technician role and she contacted Mr. Steinhoff about the need to reassign Petitioner. Tr. 189-90, 1748. Mr. Steinhoff set up a meeting with Mr. Luke, Ms. Jaggar, and Agency counsel to discuss Petitioner's reassignment. Tr. 190, 1748-49. At that meeting, Mr. Steinhoff told Mr. Luke that he wanted to assign Petitioner to another group to give her a "fresh start" rather than leave her in the CSG as Ms. Jaggar had suggested. Tr. 1748-49, 1755. Mr. Luke concurred in Mr. Steinhoff's decision to move Petitioner out of CSG and Ms. Jaggar was given the task of locating an assignment for Petitioner. Tr. 1755.

Some weeks after the meeting with Mr. Luke, Mr. Steinhoff became aware that Ms. Jaggar was having difficulty finding a position for Petitioner. Tr. 1763-64. During a bi-weekly meeting with David Clark, Issue Area Director of Audit, Oversight, and Liaison (AOL), Mr. Steinhoff learned that Mr. Clark's office needed an administrative support person. Tr. 1764-65. On November 15, 1999, Petitioner was assigned to AOL as an Issue Area Support Technician with Cynthia Cortese, a GS-10 Issue Area Assistant, as her immediate supervisor and Mr. Clark as her second-line supervisor. Tr. 190-92.

On November 17, 1999, Petitioner met with Ms. Cortese to set her expectations and to review the job dimensions and description. Tr. 571-72; R.Ex. 60. At that meeting, Ms. Cortese told Petitioner to take the expectations and review them and, if she had changes, Ms. Cortese would consider them. Tr. 573, 827-28. Both Ms. Cortese and Petitioner signed the expectations, as drafted, on November 18, 1999. Tr. 582; R.Ex. 60.

Petitioner was familiar with most of the duties of Issue Area Support Technician in AOL, as they were common to the position throughout GAO. Tr. 190-91, 588, 1963-65. The expectations set in November 1999 included the required dimensions of Teamwork and Interpersonal Relations; Service Orientation; and Work Orientation and Productivity. Moreover, they included the added dimensions of Filing and Retrieving; Handling and Processing Materials and Mail; and Purchasing and Maintaining Supplies. *See* R.Ex. 60 at 4.

Ms. Cortese's desk was in close proximity to Petitioner's and there was "just about daily" communication between the two of them concerning work and assignments. Tr. 586-87. Ms. Cortese testified that "if anything wasn't done right, we had to talk about it. Nothing was given to her unless she was told how to do it. We talked about it. Again, it was, if you have questions." Tr. 587.

Shortly after Petitioner joined AOL, Ms. Cortese, who keeps a log on the work activity of those she supervises, noted problems with several of Petitioner's routine assignments, including failure to distribute office mail on more than one occasion, despite daily reminders; failure to send workpapers to the Federal Records Center in a timely manner; and failure to create time card files. Tr. 574-75, 583-84, 589-94, 606; *see* R.Ex. 119. Each time that Ms. Cortese discovered that a task had not been done, she would talk to Petitioner to ascertain whether she understood the assignment; Petitioner never indicated that she did not. Tr. 584, 586, 594, 606-07, 614.

Petitioner's problems with timeliness and accuracy, and her failures to complete assignments, continued throughout the Winter and Spring of 2000. Tr. 612-16, 619-20, 633-34.

As a result of the issuance of new, Agency-wide performance standards, expectations were reset for all APSS staff in February 2000. Tr. 454, 621-22. On February 24, 2000, Petitioner met with Mr. Clark, who gave her the expectations. Tr. 624. She then met with Ms. Cortese to discuss these new standards, which had been selected by Ms. Cortese and reviewed by Mr. Clark. Tr. 626-27, 630-31. Petitioner's performance dimensions remained essentially the same, *i.e.*, Teamwork and Interpersonal Behavior; Service Orientation; Individual Work Productivity; Handling and Processing Materials and Mail; Filing and Organizing; and Typing/Word Processing. R.Ex. 63. The performance dimension of Checking, Examining and Recording was also added. After meeting with Mr. Clark and Ms. Cortese, Petitioner and Ms. Cortese initialed the expectation form; Petitioner had no questions about the revised expectations. Tr. 629, 897-98, 1982, 2095; *see* R.Ex. 63.

1. June 2000 Denial of Petitioner's Within-Grade Increase

In May 2000, Ms. Jaggar again was notified that Petitioner was eligible for a within-grade increase. Tr. 192. Both Mr. Clark and Ms. Cortese were contacted; they informed Ms. Jaggar that Petitioner's work was not at an "acceptable" level for a within-grade. Tr. 193. Ms. Jaggar denied the within-grade increase, notifying Petitioner of the decision by letter dated June 2, 2000. Tr. 193; *see* R.Ex. 71.

2. Petitioner's June 2000 Performance Appraisal

Because of continuing serious concerns about Petitioner's performance, Mr. Clark and Ms. Cortese prepared an interim performance appraisal for her covering the period from November 15, 1999 through May 31, 2000, which they signed on June 1, 2000. Tr. 483-84, 864; *see* R.Ex. 8. Mr. Clark intended to give Petitioner formal notice about her performance and to give her an opportunity to improve prior to her end of the fiscal year appraisal. Tr. 483.

Because of the concerns with the performance, because the concerns were serious [*sic*] as they were, we felt that it was important and useful, if not necessary to provide a formal notice to Lenora about her performance, and to thereby, give her an opportunity period with whatever training that would be available and the like, and to improve that performance before the end...

Tr. 483.

In the interim appraisal, Petitioner was given "unacceptable" ratings in three dimensions: Individual Work Productivity; Handling and Processing Materials and Mail; and Checking, Examining and Recording.⁹ R.Ex. 8 at 3. Petitioner prepared an e-mail response to the appraisal

⁹ Petitioner had been rated unacceptable in this dimension on the prior annual appraisal as well. See discussion, *supra*.

(R.Ex. 73) on June 21, 2000 and a contributions statement on June 26, 2000 (R.Ex. 8 at 4). She claimed in part that the performance appraisal did not follow the requirements of the new system and that the appraisal constituted reprisal. *See* R.Ex. 73. Mr. Clark and Ms. Cortese reviewed and considered both of these submissions, but did not alter the ratings. Tr. 488-501, 870-71, 2011; *see* R.Exs. 73, 74.

3. Petitioner's June 2000 Opportunity Period

Subsequent to the performance appraisal, Petitioner again was placed in a 45-day opportunity period, beginning on June 28, 2000.¹⁰ Tr. 196-97, 501; *see* R.Ex. 78. On June 28, 2000, Mr. Clark and Ms. Jaggar met with Petitioner to discuss her specific tasks and assignments for the opportunity period and to inform her about a schedule of training for her. Tr. 199, 503-06, 2011-12; *see* R.Exs. 78, 79. Her opportunity period tasks were administrative in nature and a continuation of work she had been performing in AOL and in previous positions at GAO. Tr. 504-05, 828, 1789, 2036. The letter placing her in an opportunity period outlined specific tasks including answering phones, preparing time and attendance sheets and travel orders and vouchers, distributing mail, and packing and assembling workpaper documentation. R.Ex. 78 at 3.

During the opportunity period in AOL, Ms. Cortese met frequently with Petitioner and closely monitored her work which, despite oversight and regularly-scheduled feedback sessions, continued to be untimely and replete with errors. Tr. 734-61; *see* R.Ex. 121. In accordance with the terms of the opportunity period letter, Petitioner also was scheduled to receive training in the preparation of T&A and travel forms. Tr. 550, 963, 2040-43. She missed all of the appointments that had been scheduled for the travel administration training and never received it. Tr. 559, 2042-43.

Despite the training in the preparation of T&A cards and feedback from Ms. Cortese, who went over mistakes with Petitioner, the T&A's prepared during the opportunity period contained numerous discrepancies in leave balances, wrong codes for assignments and transactions, and repeated transaction codes. Tr. 781-815; *see* R.Ex. 122C. In addition, Petitioner's travel forms and orders routinely contained incorrect itineraries and incomplete information. Tr. 777-80; *see* R.Ex. 122B. Ms. Cortese continued to point out the errors to Petitioner and give her feedback in all of the areas in which her work was error-laden. Tr. 780, 916-18; *see* R.Ex. 121.

4. Petitioner's June 2000 Amendment to her June 1999 Charge and EEO Complaint

On June 30, 2000, Petitioner again amended the June 1, 1999 charge she had filed with the PAB/OGC, alleging that her June 2000 appraisal and the denial of her within-grade increase were the result of reprisal for having filed the earlier charge with the PAB. P.Ex. 49. Petitioner also initiated contact with an EEO counselor in the Office of Civil Rights, now the Office of Inclusiveness and Opportunity, in March 2000 and filed a formal complaint in July 2000. *See* R.Ex. 66.

¹⁰ Due to leave schedules, the opportunity period was extended from August 14 to September 15, 2000. Tr. 2052.

Ms. Jaggar was aware of Petitioner's contacts and filings with GAO's Civil Rights Office and was aware of her filings with the PAB. Tr. 211-12. In her view, these activities were not factors in any decision made or action taken with respect to Petitioner. Tr. 212.

5. Petitioner's October 2000 Performance Appraisal

After the opportunity period ended on September 15, 2000, Petitioner received another performance appraisal in October. She was rated as "fully successful" in four dimensions and "unacceptable" in the remaining one dimension of Checking, Examining and Recording, based—to a large extent—on the frequent, recurring mistakes she made when processing T&A forms and travel orders. Tr. 204, 516, 928-29; *see* R.Ex. 9.

Under the governing regulation, the “unacceptable” rating necessitated some action on Management’s part. GAO Order 2432.1 states that:

If during the opportunity period, an employee does not demonstrate acceptable performance in those dimensions rated unacceptable, (that is, performance at the Needs Improvement level or higher), the proposing official . . . must initiate a performance-based action under the procedures in this order or reassign the employee. Management may not leave the employee in his or her position following the unsuccessful completion of an opportunity period.

GAO Order 2432.1 ¶8a (emphasis added). “Performance-based action” is defined as “the reduction in grade or band or the removal of an employee based solely on unacceptable performance.” Order 2432.1 ¶4e.

D. October 25, 2000 Proposal to Remove Petitioner

The responsibility to propose an employee's removal fell on Ms. Jaggar as Director of Operations for AIMD. Tr. 205. Ms. Jaggar could identify eight people in her Division, seven white and one African-American, who had been removed or resigned after being told that they would be terminated during their probationary periods in the preceding two years. Tr. 209.

Based on the "unacceptable" rating in the dimension of Checking, Examining and Recording on the October performance appraisal, *i.e.*, Petitioner's failure to successfully complete her opportunity period, Ms. Jaggar determined that removal rather than a lesser consequence was in order:

Because of the kinds of problems that she had in the checking, examining, and recording area and because of the conversation that I had had with her supervisor, I proposed that she be removed rather than downgraded or reassigned because I did not feel that, in spite of the training, the on the job training and the attention that had been given her over time, she was showing

improvement in this area, and I did not feel that she was going to be able to successfully perform those kinds of tasks.

Tr. 207.

In reaching this decision, Ms. Jaggar considered input from Petitioner's supervisor, a review of samples of Petitioner's work products, and Petitioner's failure to demonstrate any improvement in the area despite supervisory intervention, feedback and training. Tr. 206-07; *see* R.Ex. 87. In a letter dated October 25, 2000, Ms. Jaggar formally proposed Petitioner's removal from the employment rolls at GAO based on her unacceptable performance in the critical element of Checking, Examining, and Recording. Tr. 205; *see* R.Ex. 87.

As the Director of AIMD, Mr. Steinhoff was responsible for deciding whether to accept or reject Ms. Jaggar's proposal to remove Petitioner. Tr. 1683. On November 14, 2000, Petitioner delivered a letter to Mr. Steinhoff responding to the October 25 proposal to remove her. She claimed that the proposal, among other things, was based on predetermined results, that she had been subjected to disparate treatment and retaliation, and that she had not been afforded a fair opportunity to improve. Tr. 1686, 2065-66; *see* R.Ex. 88.

After carefully reviewing Petitioner's claims, Mr. Steinhoff determined that he needed to meet with the parties involved, gather additional information and review Petitioner's appraisals. Tr. 1691-92, 1694. Mr. Steinhoff then proceeded to meet individually with Ms. Cortese, Mr. Clark, Ms. Jaggar, Mr. Bouck, and Petitioner. Tr. 1695. He took detailed notes on these meetings. *See* R.Exs. 89-93.

During his interview with Ms. Cortese, Mr. Steinhoff was told that she never felt pressured by anyone to evaluate Petitioner improperly and that she wanted her to succeed but that Petitioner simply could not perform the work assigned to her, regardless of the assistance provided. Tr. 1700-04; *see* R.Ex. 89.

Mr. Clark told Mr. Steinhoff that both he and Ms. Cortese had really tried to make the situation work but, in his opinion, Petitioner was simply incapable of performing the tasks assigned her. Tr. 1707-08; R.Ex. 90. He described daily feedback, constant dialogs and regular meetings with Petitioner, none of which resulted in Petitioner's performance rising above the "unacceptable" rating in one dimension. Tr. 1706-07. Mr. Clark also told Mr. Steinhoff that Ms. Jaggar had not acted improperly with respect to her dealings with Petitioner. Tr. 1706.

In meeting with Ms. Jaggar, Mr. Steinhoff concluded that her involvement in so many of Petitioner's personnel issues was not improper but rather occurred in the normal course of her duties as Director of Operations for a Division at GAO, *i.e.*, review of ratings for compliance with applicable guidance, discussing performance periods and standards. Tr. 1709, 1712; R Ex. 91.

Because the proposal to remove Petitioner was based solely on her work in AOL, Mr. Steinhoff limited his questions for Mr. Bouck to whether Petitioner's work in CSG was administrative or required computer skills and whether Ms. Jaggar pressured him to ensure that Petitioner failed.

Mr. Bouck reiterated that Petitioner's tasks in CSG were basic and fundamental (changing toner cartridges, recording number of copies, inventory maintenance, etc.), and he denied pressure from Ms. Jaggar, assuring Mr. Steinhoff that the decisions and evaluations of Petitioner were his alone. Tr. 1713-15; *see* R.Ex. 92.

Finally, Mr. Steinhoff met with Petitioner and encouraged her to feel free to provide any additional documentation and information that she thought would be useful to him. Tr. 1716-17, 2069; *see* R.Ex. 93. He reviewed notes and other materials that she provided. Tr. 2071-73.

E. December 13, 2000 Decision to Remove Petitioner

On December 13, 2000, Mr. Steinhoff sent a letter to Petitioner notifying her that she would be removed from GAO's employment rolls on December 30, 2000. Tr. 1720; *see* R.Ex. 97.

On December 14, 2000, Petitioner requested that Mr. Steinhoff review documents she had provided showing that she had received incorrect instructions and guidance. Tr. 1721-22; *see* R.Ex. 98. Mr. Steinhoff reviewed the documents and then met with Mr. Clark, who provided documents inconsistent with those supplied by Petitioner. Tr. 1724-26. Mr. Steinhoff met with Petitioner again to allow her to discuss the conflicting sets of documents and the instructions and guidance she had been given. Tr. 1728. After completing his review and the related discussions, Mr. Steinhoff notified Petitioner by letter dated December 21, 2000 that his decision to remove her remained unchanged. *See* R.Ex. 99.

Petitioner was removed from employment at GAO on May 23, 2000, after the Personnel Appeals Board lifted the temporary stay that had been ordered in this case.¹¹

IV. Discussion

A. Applicable Legal Standards

In a challenge to a removal for unacceptable performance, the Agency bears the burden of proof. Such a removal will be sustained by the Board where it is supported by substantial evidence. 4 C.F.R. §28.61(a)(1). That standard of evidence requires only that a reasonable person, considering the record as a whole, might accept the decision as adequate even though other reasonable persons might disagree. *See Wells v. Harris*, 1 MSPR 208 (1979); 4 C.F.R. §28.61(d). The substantial evidence standard precludes the presiding official from substituting his or her own judgment for that of the Agency. *See Rocheleau v. Securities & Exchange Comm'n*, 29 MSPR 193, 197 (1985); *Parker v. Defense Logistics Agency*, 1 MSPR 505, 530-31 (1980).

Under this Board's decision in *Poole v. GAO*, three conditions must be met prior to initiating a performance-based removal action.¹² *Poole v. GAO*, PAB Docket No. 98-01, slip op. at 19 (June

¹¹ The Administrative Judge lifted the stay of Petitioner's removal on May 21, 2000. On Petitioner's appeal of the denial of a permanent stay, the full Board affirmed the decision. Docket No. 00-12 (Aug. 10, 2001).

30, 1999). First, the employee must have been rated below the “acceptable” level in at least one critical job element.¹³ Second, after the rating has been issued, the employee must have been given a meaningful and reasonable opportunity period in which to demonstrate “acceptable” performance. GAO Order 2432.1 ¶7.¹⁴ Third, the employee must have received an “unacceptable” rating for the opportunity period in at least one critical dimension covered in the opportunity period. GAO Order 2432.1 ¶8.

The Federal Circuit has held that an agency must establish that it had an approved performance appraisal system, that it communicated to the employee the written performance standards and critical elements at the beginning of the appraisal period and that it warned the employee of any reported inadequacies in her performance in the applicable critical elements during the appraisal period. *Lovshin v. Department of the Navy*, 767 F.2d 826, 834 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1111 (1986).

Pursuant to 4 C.F.R. §28.61(b), however, the Board will not sustain the removal action if an employee shows that:

- 1) [there was] ... harmful error in the application of the agency’s procedures in arriving at such decision;
- 2) ... the decision was based on any prohibited personnel practice described in 4 CFR 2.5; or
- 3) ... that the decision was not in accordance with law.

The employee bears the burden of proving any affirmative defense by a preponderance of the evidence.¹⁵ See 4 C.F.R. §28.61(c); 5 C.F.R. §1201.56(a).

B. Petitioner’s Claims

¹² The MSPB has held that in order to prevail on a performance-based removal action an agency must show by substantial evidence that before it removed the employee, it gave written notification that advised the employee of unsatisfactory performance, that the employee had been counseled on numerous occasions by the agency of the need to improve performance and that the employee was told how to obtain assistance. See *Pine v. Department of the Air Force*, 28 MSPR 453, 455 (1985).

¹³ 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 ¶7a.

¹⁴ “[A]n employee’s right to a reasonable opportunity to improve is a substantive right; indeed it is one of the most important rights, benefitting both the employee and the Agency, in the entire Chapter 43 appraisal scenario.” *Sandland v. General Services Administration*, 23 MSPR 583, 590 (1984).

¹⁵ Preponderance of the evidence as defined by the Board’s regulations, means “that degree of relevant evidence which a reasonable person, considering the record as a whole, would 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).

Petitioner challenges her removal on the grounds that the performance standards were invalid, that the Agency failed to provide proper notice before and during the opportunity period, and that Petitioner's performance was not unacceptable. PFR ¶¶4, 45; GAO Order 2430.1 SUP ch. 1 ¶1-4b; Order 2432.1 ¶7b.

Petitioner claims that the actions taken and/or not taken by GAO violate its own regulations, thereby constituting prohibited personnel practices under 5 U.S.C. §2302(b)(12). That section provides that:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—
(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning the merit system principles....

Petitioner also alleges that actions were taken against her by Management officials in the GAO unit then known as the Accounting and Information Management Division (AIMD) during the period prior to and including her removal because of reprisal in violation of 5 U.S.C. §2302(b)(9)(A) and because of discrimination in violation of section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e-16) and 5 U.S.C. §2302(b)(1). PFR ¶¶48-58, 59-61.

The actions challenged by Petitioner included the May 5, 1999 denial of her within-grade step increase; the two "unacceptable" ratings she received in her May 1999 performance appraisal; the one "unacceptable" rating she received in her September 1999 performance appraisal; the three "unacceptable" ratings she received in her June 1, 2000 performance appraisal; the June 2000 denial of a within-grade increase; the one "unacceptable" rating she received in her October 5, 2000 performance appraisal; and the October 25, 2000 proposal and December 21 decision to remove her. PFR ¶3.

C. Relevant Requirements of GAO's Performance Appraisal System

1. Consistency with 5 U.S.C. §4302

Under the GAO Personnel Act, 31 U.S.C. §732(d)(1), GAO must establish a system consistent with the requirements of 5 U.S.C. §4302. GAO is required to establish standards within that system that permit accurate appraisal of performance based on objective criteria, which are reasonable, realistic, attainable and clearly stated in writing. *See Chaggaris v. General Services Administration*, 49 MSPR 249, 253 (1991). The performance standards must be sufficiently precise and specific in order to invoke a general consensus as to their meaning and content. *See Vines v. Department of Defense*, 67 MSPR 667, 674 (1995). Performance standards are not required to contain specific indicators of quantity, quality and timeliness that are used to evaluate work. *Id.* Absolute standards are considered to be the exception rather than the rule. *See*

Callaway v. Department of the Army, 23 MSPR 592, 597-600 (1984).¹⁶ Examples of exceptions would be those “situations where death, injury, breach of security or great monetary loss could result from a single failure to meet the performance standard.” *Id.* at 599.

2. Mandatory Regulations Implementing 5 U.S.C. §4302

In *Hendley v. GAO*, the Board held that:

The plain language of 5 U.S.C. Sec. 4302, as incorporated by the GAO Personnel Act of 1980, 31 U.S.C. Sec. 732(d)(1), requires the Comptroller General to adopt regulations implementing a performance appraisal program for GAO employees. GAO Order 2430.1 is the regulation adopted by the Comptroller General to comply with that statutory obligation. GAO Order 2430.1, Ch.1 Sec. 1.

* * *

[5 U.S.C. §4302] mandates that performance appraisal programs must be adopted by regulation, and such programs must ensure that employees’ performance standards and critical elements of their positions are communicated to them at the beginning of their appraisal periods.

2 PAB 33, 49 (1990). Specifically in *Hendley*, the Board found that those procedures which fulfilled the requirements of 5 U.S.C. §4302 in the Agency’s performance appraisal system at that time—in the BARS Manual and in the governing GAO Order—were mandatory regulations.¹⁷

Section 4302 of 5 U.S.C. is captioned “Establishment of performance appraisal systems.” In subsection (a), it outlines what is required of a performance appraisal system, including: providing for “periodic appraisals of job performance of employees;” encouraging “employee participation in establishing performance standards;” and using “the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.” In subsection (b), it specifies requirements for each performance appraisal system:

¹⁶ In *Callaway*, the MSPB referred to absolute standards in terms of “a single failure to meet the performance standard measuring performance of a critical element.” *Callaway v. Department of the Army*, 23 MSPR at 598 (1984),

¹⁷ The Agency attempts to differentiate the *Hendley* case by stating that the mandatory language there at issue in the BARS Manual (consistent use of the word “shall” rather than “should”) made the procedure mandatory. However, the presiding official in *Hendley* did not rely on the wording of the Manual but rather the Manual’s relationship to the statute. 2 PAB at 49-50. *See also Marshall v. GAO*, 2 PAB 270, 290-94 (1993).

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria . . . related to the job in question . . .

(2) . . . at the beginning of each . . . appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance.

The Agency's APSS Manual is titled "Performance Appraisal System for Administrative Professional and Support Staff." *See* R.Ex. 4 (Oct. 1997), R.Ex. 5 (Dec. 1999). In the Introduction to the Manual, GAO provides an overview of its system. Under the heading of "Purpose of the Performance Appraisal System," the 1999 Manual states:

The primary purpose of the . . . [APSS] appraisal system is to provide a systematic and uniform method to evaluate job performance of . . . staff on the basis of job-related criteria. The appraisal is an integral part of the performance management cycle and should be used to

- help employees understand their responsibilities and how their work supports GAO's core values and contributes to GAO's strategic objectives and goals;
- prepare honest performance assessments based on accurate and consistent application of the performance standards;
- provide candid and specific feedback to employees on how well they are meeting expectations and on ways to improve performance;
- help supervisors and managers recognize and deal with performance problems; and
- provide a basis for performance-based actions.

R.Ex. 5 at 4.

The title of the APSS Manual is a mirror image of 5 U.S.C. §4302's title. It clearly tracks the requirements of the statute in creating a performance appraisal system for GAO.

The lengthy Manual is replete with myriad instructions as to what "should" be done in the appraisal system. *Compare* n.17, *supra*. GAO argues that the word "should," which is consistently used throughout the Manual, implies mere guidance and does not convey mandatory requirements. R.Br. at 40-41; Tr. 5-7. The case law reveals a lack of uniformity on exactly what language is mandatory and what constitutes general policy statements that permit broad discretion. Nevertheless, because the APSS Manual so obviously tracks the statute and the Agency has failed to explain what constitutes GAO's required appraisal system if not the APSS, I find that the APSS Manual imposes mandatory requirements. Indeed, a contrary conclusion would place GAO out of compliance with statutory requirements. As this Board held in

Hendley, the Manual is “mandatory with respect to those procedures which fulfill the requirements of” 5 U.S.C. §4302. 2 PAB at 49.

3. Specific Regulatory Requirements

a. Communication of Performance Standards

As required by §4302 of 5 U.S.C., GAO is obligated to communicate performance standards to employees at the beginning of the appraisal period. 31 U.S.C. §732(d)(2). If the Agency can prove that the employee was aware of and understood the standards against which his/her performance was to be measured, then the Agency has met its burden of proof. *See Papritz v. Department of Justice*, 31 MSPR 495, 497 (1986). The MSPB in *Papritz* determined that the employee was made aware of his critical elements upon joining the agency in June 1984 and that he received specific instructions regarding his performance standards as well as agency expectations concerning his assigned projects and that he readily admitted that he was aware of what the duties of his position entailed. He had also received counseling regarding his performance deficiencies before the performance improvement period began. 31 MSPR at 498. Communication as to the standards for retention during an opportunity may occur “in the PIP [performance improvement period], in counseling sessions, in written instructions, or in any manner calculated to apprise the employee of the requirements against which he is to be measured.” *Donaldson v. Department of Labor*, 27 MSPR 293, 298 (1985).

b. Opportunity to Improve

When an employee’s performance is deemed “unacceptable” during a performance appraisal cycle, he/she must be given a reasonable opportunity to improve. GAO Order 2432.1 ¶7a. (Jan. 16, 1998). This opportunity period is a substantive right, *Sandland v. General Services Administration*, 23 MSPR 583, 590 (1984), and gives an employee a reasonable chance to demonstrate acceptable performance in those dimensions in which she was deemed “unacceptable.” GAO Order 2432.1 ¶7a.

The Agency may establish a *prima facie* case that it gave an employee a reasonable opportunity to improve by documentary or testimonial evidence. *See Sandland*, 23 MSPR at 590. Factors relevant to determining whether the employee has been provided a reasonable opportunity period include the nature of the duties and responsibilities of the position, the performance deficiencies involved and an amount of time sufficient to enable the employee to have an opportunity to demonstrate acceptable performance. *See Macijauskas v. Department of the Army*, 34 MSPR 564, 566 (1987), *aff’d*, 847 F.2d 841 (1988) (mem.).

A reasonable opportunity to improve can include counseling on a regular basis during the period, providing recommendations for improvement and asking how the employee is doing with his or her duties. *See Macijauskas*, 34 MSPR at 567. Even if a required written, specific notice of unsatisfactory performance during an opportunity period is not provided to an employee, the MSPB has concluded that the action might be upheld on the basis that the employee was not harmed. This occurred where the record contained “numerous written training evaluations evidencing one-on-one counseling sessions during which [the employee’s]...performance

deficiencies were discussed with him.” *Ketchum v. Department of Transportation*, 28 MSPR 268, 271, *aff’d*, 785 F.2d 325 (Fed. Cir. 1985). The MSPB went on to find that the employee “was on notice, both written and verbal, that his performance was deficient, so that any failure on the part of the agency to issue a particular notice was, at most, harmless error.” *Id.* at 272.

D. Petitioner’s Performance Prior to Proposal to Remove

Petitioner contends that her performance was not “unacceptable” and that the performance appraisal failed to reflect her predominant performance as required. PfR ¶43; *see* P.Br. at 28. As stated *supra*, the Agency is only required to show by substantial evidence that Petitioner was performing at an “unacceptable” level. Petitioner was an Issue Area Support Technician. PfR ¶6. As an Issue Area Support Technician, Petitioner’s duties included mainly administrative tasks such as preparing travel vouchers, checking and retrieving mail, time and attendance records, and memoranda of various types. R.Ex. 10; PfR ¶7; Tr. 1966-68, 1974-76.

The critical element of Petitioner’s performance appraisal rating in question is Checking, Examining, and Recording. The APSS Manual states that “unacceptable” performance in this element occurs when an employee frequently:¹⁸

Overlooks or misses errors, even when there is little time pressure; forwards or processes inaccurate forms, records, documents, etc.

Completes forms slowly or carelessly; selects an inappropriate form for the situation; does not double-check work; overlooks important information on paperwork; fails to respond to forms, orders, or advances that require immediate attention.

Omits appropriate or obtains inappropriate information, signatures, or approvals; forwards materials without verifying that critical information is present or accurate.

Fails to take action to correct errors or problems; corrects errors only in the material at hand, making no attempt to correct the problem in other areas that may also be affected.

Allows logs, records, or files to become outdated, making retrieval and tracking of accurate information difficult or impossible; fails to note important change-of-status information.

Makes computation errors and fails to catch these mistakes; does not question or notice figures that “look wrong.”

R.Ex. 5 at 46.

¹⁸ Frequently is defined as “happening ‘on numerous occasions’.” R.Ex. 5 at 15.

The Agency presented varied examples of Petitioner’s work to show that she consistently made errors as described in the critical element. R.Exs. 120, 122. Petitioner failed to reconcile discrepancies between employee time sheets and GAO’s computerized records of leave balances. Tr. 782-91, 789; R.Ex. 122E. She frequently used wrong transaction codes, and charged leave balances and job codes inaccurately. Tr. 781-816; R.Exs.120E, 122C. The travel orders that Petitioner prepared often included incorrect itineraries. R.Exs. 120B, 122B. They also omitted or included incorrect pertinent personal information about the traveler and amounts to be charged. Tr. 636, 777-80. The Agency provided over 100 documents with errors which showed that she did not double-check her work, that she overlooked important information on paperwork, that she omitted information and forwarded documents without verifying that critical information was correct, that she failed to take action to correct errors or problems, that she made no attempt to correct problems affecting other areas, that she made computation errors and did not question or notice figures that “look[ed] wrong.” Tr. 636-38, 645; R.Exs. 120, 122. These errors were indicative of the types of errors Petitioner frequently made. Tr. 671, 673-79, 690, 694-700, 703, 727-30. The Agency has provided sufficient documentation to meet the substantial evidence standard.

In her Post-hearing Brief, Petitioner, citing *Shuman v. Department of the Treasury*, 23 MSPR 620, 626 (1984), argues that the Respondent failed to show that “Petitioner’s performance was at an unacceptable level under the appropriate performance standards.” P.Br. at 28. The Brief further argues that it is possible “that the Petitioner’s work merely needed improvement or was below expectations, but was not unacceptable” and that there is no evidence to show what portion of the total amount of work she completed is represented by these samples. P.Br. at 28-29.

I find that Respondent’s performance standards and its conclusion that Petitioner’s performance was unacceptable are in total conformance with the decision in *Shuman*. The reasoning of the MSPB applies to this case as well:

Although §4302(b) calls for performance standards “which will... permit the accurate evaluation of job performance on the basis of objective criteria,” it qualifies this requirement with the phrase “to the maximum extent feasible;” and it does not include any requirement that quantitative criteria be included in each performance standard. The evidence of record indicates that the standard at issue here encompassed a fairly broad range of duties, and that these duties apparently varied in complexity and significance. . . . Under these circumstances, we find that the agency cannot reasonably be expected to have stated the exact number of errors which would warrant an unacceptable performance rating on the element.

We also note . . . that the standard permitted subjective judgments by the . . . supervisor regarding the appropriateness of the . . . [employee’s] actions. . . . We concur, . . . that this subjective aspect of the standard did not violate the statute, since a determination of the proper actions which were expected . . . was necessarily subjective in nature. In addition, the evidence...reflects that fairly specific written instructions regarding the duties at issue were made available . . . and other evidence shows that the . . . [employee] was informed

specifically, before she made the errors resulting in her removal, of deficiencies which had been found in her work, and of methods by which she could improve her performance.

Shuman, 23 MSPR at 626-27.

Based on the record before me, I conclude that the Agency has provided substantial evidence to support a conclusion that the range and frequency of Petitioner's errors were such as to make her performance unacceptable. The removal based on unacceptable performance is sustained.¹⁹

E. Allegations of Prohibited Personnel Practices

An employee may present an affirmative defense that the challenged decision was based on a prohibited personnel practice, or that the decision was not in accordance with applicable law. 4 C.F.R. §28.61(c); *see* 5 C.F.R. §1201.56(a). The employee bears the burden of proving any affirmative defense by a preponderance of the evidence. 5 C.F.R. §1201.56(a)(2). In order to establish that the agency's actions were a prohibited personnel practice under 5 U.S.C. §2302(b)(12), Petitioner must show that the agency took or failed to take a personnel action; that the agency's taking of or failure to take this personnel action violated a specific law, rule or regulation; and that the law, rule or regulation that was allegedly violated is one which implements or directly concerns a merit system principle as contained in 5 U.S.C. §2301.

Petitioner in this case claims that the actions taken against her from February 1999 to October 2000 were taken in contravention of GAO regulations. Specifically, Petitioner claims that the May 1999 denial of a within-grade increase violated GAO Order 2531.3, ch. 2 ¶1 (PFR ¶17) because the denial was inconsistent with her last performance appraisal in which she had received an overall rating of fully successful. Petitioner also claims that the Agency engaged in prohibited personnel practices when it rated her "unacceptable" on her May 1999 and September 1999 performance appraisals. PFR ¶¶17, 25. Petitioner alleges that the Agency failed to "coach her, adequately monitor her performance, or give her meaningful feedback" in violation of GAO Order 2430.1 SUP, ch. 3. In addition, regarding her September 1999 appraisal, Petitioner alleges that she was not given a meaningful opportunity to improve. PFR ¶¶20-26.

Petitioner further contends that the Agency engaged in a prohibited personnel practice on the basis that her supervisor did not timely communicate expectations for the period leading up to the June 2000 denial of her within-grade increase and her June 2000 performance appraisal. PFR ¶¶30-31. Further, she contends that the Agency did not provide coaching, training or meaningful feedback, in violation of GAO Order 2430.1 SUP, ch. 3. PFR ¶¶33, 35.

¹⁹ In *Shuman*, the MSPB administrative judge had found that the Petitioner and agency officials were equally credible. This finding, however, was not inconsistent with the presiding official's finding that the agency had met its burden of proof. *See Shuman*, 23 MSPR at 624. The substantial evidence standard does not require that the Agency be more persuasive than the employee. *See* 5 U.S.C. §7701(c)(1). Even though Petitioner in this case may disagree with the outcome, there is sufficient evidence for a reasonable person to accept the decision of the Agency. Petitioner's removal cannot be reversed solely because she disagreed with the rating. *Poole v. GAO*, PAB Docket No. 98-01, slip op. at 24.

Petitioner also alleges that the Agency improperly placed her in an opportunity period beginning June 28, 2000 and rated her “unacceptable” during the period. She contends that her supervisors did not meet with her on a regular basis as stated in the notice of opportunity to improve, that they failed to monitor her training and to apprise her of her performance deficiencies, in violation of GAO Order 2430.1 SUP and the APSS Manual. Pfr ¶¶37-38. Petitioner’s allegations are addressed below.

1. May 1999 and June 2000 Denial of Within-Grade Increases

The Agency denied Petitioner a within-grade salary increase in May 1999, and again in June 2000, on grounds that her performance was not at an “acceptable” level. The Agency argues, correctly, that the Personnel Appeals Board does not have jurisdiction over these claims because Petitioner failed to request reconsideration of these denials as required by GAO Order 2531.3, ch. 4 ¶1.²⁰ R.Br. at 36.

Petitioner contends that a request for reconsideration of the denial of a within-grade increase is not a condition precedent to seeking relief from the Board because the GAO regulation states, “an employee . . . may request reconsideration.” GAO Order 2531.3, ch. 4 ¶1 (emphasis added). Petitioner contends that this language indicates that seeking reconsideration is permissive but not mandatory. P.Br. at 30.

Petitioner is correct that the language is not mandatory in the sense that an employee is not required to request reconsideration. However, in order to raise the denial before the Personnel Appeals Board, employees are required to exhaust their remedies by requesting reconsideration. In analyzing comparable language governing executive branch employees, the Federal Circuit in *Goines v. MSPB* held that a request for reconsideration of a within-grade denial is required prior to going to the MSPB. *See Goines v. MSPB*, 258 F.3d 1289, 1292-93 (Fed. Cir. 2001). The Court concluded:

Although the statute does not explicitly require a request for reconsideration as a condition of appealing the withholding to the Board, that is the reasonable implication of the statutory scheme.

Goines at 1292. In particular, the Court held:

The provision that an employee may seek reconsideration and that if the within-grade increase is affirmed on reconsideration, the employee may appeal to the Board suggests, if not indicates, that such appeal may be taken only after reconsideration is denied.

Id. This linking of the reconsideration to an appeal to the Board is what makes the reconsideration a condition of the appeal.

²⁰ This issue was also addressed in oral arguments prior to hearing. Tr. 12-24.

There is a similar linking of the reconsideration process to the appeal to the PAB. GAO Order 2531.3, ch.4 ¶10²¹ states:

An employee may appeal a within grade reconsideration decision to the Personnel Appeals Board within 30 days of his or her receipt of the decision. [Emphasis added.]

I would also note, as pointed out by the Court in *Goines*, the request for reconsideration allows for two important opportunities: an opportunity for the Agency to correct mistakes early on and an opportunity for higher level management to correct mistakes that were made at a lower level. *Goines*, 258 F.3d at 1292.

Petitioner cannot now complain that the Agency failed to give her notice of unacceptable performance in the denial of the within-grade increase if she did not take advantage of her rights at the appropriate time. *See Cross v. Veterans Administration*, 8 MSPR 370, 372 (1981).

Accordingly, I find that Petitioner did not timely request reconsideration of the denial of her within-grade increases and as a result has not exhausted her remedies regarding them.²² The PAB, therefore, has no jurisdiction to hear these appeals.²³

2. May 1999 Performance Appraisal

“[C]hallenges to performance appraisals in and of themselves do not constitute separate claims cognizable under the Board’s jurisdiction.” *Poole*, slip op. at 24. Petitioner must raise

²¹ While there is no equivalent statute setting out the process for requests for reconsideration, 31 U.S.C. §732(d)(5) states that a procedure for processing other complaints and grievances should be provided. Thus, this Order implements the statute.

²² Petitioner argues on page 32 of her Post-hearing Brief that filing a reconsideration would have been a futile act, and, therefore, she “had exhausted remedies available to her.” I find this argument to be without merit. While the courts have sometimes found exceptions to the principle of exhaustion of administrative remedies, Petitioner has not provided any arguments that would allow for an exception to the exhaustion of remedies principle in this instance. *See Beard v. GSA*, 801 F.2d 1318, 1321 (Fed. Cir. 1986) (exception to principle of exhaustion of remedies sometimes appropriate for constitutional challenges to agency’s actions). *See also Williams v. Navy*, 787 F.2d 552, 559 (Fed. Cir. 1986).

²³ I would note that if the Board had the requisite jurisdiction, Petitioner would not prevail on her claim that the May 1999 denial of the within-grade was flawed because it did not comport with that section of GAO Order 2531.3 dealing with a demonstration of performance “at an acceptable level of competence as supported by their most recent performance appraisal that is based on the most recently completed GAO annual appraisal period” (emphasis added). *See* Order. 2513.2, ch. 2 ¶1a. Petitioner misstates that “the only performance appraisal of record . . . was the last one signed by her supervisor . . . on March 25, 1999 and the reviewer on May 10, 1999.” P.Br. at 33. The required last annual appraisal, rating Petitioner as needing improvement in two of her job’s ten dimensions, was signed by Petitioner on November 5, 1998 and is in the record as Respondent’s Exhibit 133. Furthermore, the Order also provides that a denial may be based on other documentation. The Agency provided such support in Respondent’s Exhibits 120 and 122. GAO Order 2531.3, ch. 2 ¶1a (May 19, 1998).

allegations of a prohibited personnel practice. *See id.* Petitioner’s argument regarding her May 1999 performance appraisal is essentially that the Agency gave Petitioner an “unacceptable” rating on one of her critical elements without providing feedback, in violation of GAO regulations, specifically GAO Order 2430.1 SUP (Dec. 4, 1992).²⁴ Pfr ¶¶20-21; *see* 5 U.S.C. §2302(b)(12). I find that Petitioner did not prove by a preponderance of the evidence that the Agency engaged in a prohibited personnel practice by giving Petitioner an “unacceptable” rating without appropriate feedback.

On the contrary, I find that the Agency provided sufficient assistance and feedback to Petitioner. In fact, I find that Mr. Bouck, the CSG manager, went out of his way to assist Petitioner and help her in learning the skills needed for the position and that Petitioner continued to ignore those attempts. For example, the evidence shows that Mr. Bouck on several occasions worked with Petitioner to complete projects, including helping to clean out the printers and assisting Petitioner in creating spreadsheets for the various assignments that she was given. Tr. 1817-18, 1836. I also find that Mr. Bouck on repeated occasions throughout the period in the Computer Support Group (CSG), spoke with Petitioner, coached her and assisted her. Tr. 134-35, 1101-02, 1845, 2085-86.

Petitioner herself testified that she met with Sally Jaggar, her second-line supervisor, as well as her supervisor, Jim Bouck, once a week and that she went to Mr. Bouck when she did not understand an assignment. Tr. 1915-25, 2085-86. She also stated that she was satisfied with Mr. Bouck’s supervision prior to the opportunity period. Tr. 2088. Petitioner’s characterization of the Agency’s attempts to assist her as being an “utter lack of attention” is not credible.

Petitioner also alleges that the Agency engaged in a prohibited personnel practice when it failed to timely communicate the performance standards that would apply to her work in the Computer Support Group. The governing regulation expressly requires “setting expectations for each employee, including the performance standards and the critical elements at the beginning of each appraisal period.” GAO Order 2430.1 ¶4b(2).

I find that, upon arriving for the detail to CSG, Petitioner’s supervisors did not advise Petitioner of her performance standards or dimensions as required by the APSS Manual. As discussed *supra*, the Agency is obligated to discuss performance standards and expectations with an employee. If a supervisor fails to take this step, the employee will not be alerted to what is expected of her, and is deprived of an opportunity to address any problems with the expectations that supervisors may have with her performance. It was not until after her supervisor determined that her performance was “unacceptable” and denied her within-grade increase in May 1999 (Tr. 145-47, 1517-18), that Petitioner’s supervisors determined what her dimensions would be. Tr. 1439-42. This was not consistent with the Agency’s regulations. Accordingly, the May 1999

²⁴ Petitioner argues that the “utter ‘lack of attention’” by her supervisors constituted a prohibited personnel practice. P.Br. at 43; *see* Pfr ¶¶20, 22. In her Reply Brief, she attempts to clarify that she is not arguing that lack of feedback alone constituted a prohibited personnel practice, but that “the Agency was not privileged to take these actions [the performance appraisals, within-grade denials, and removal] in part because it failed to give the Petitioner timely feedback about her job performance, and particularly, alleged performance deficiencies which purportedly serve as the bases for those actions.” P.Reply at 11.

performance appraisal must be expunged.²⁵

3. September 1999 Performance Appraisal

Petitioner contends that her September 1999 appraisal, resulting from the opportunity period beginning on June 4, 1999, was a prohibited personnel practice under 5 U.S.C. §2302(b)(12) because she was not given a reasonable opportunity to improve. P.Br. at 44-46. Specifically, Petitioner alleges that her supervisors violated GAO regulations by not discussing or communicating the standards by which her performance would be measured, and by increasing the standards by which that performance would be measured.

As discussed *supra*, the Agency can establish that Petitioner was offered a reasonable opportunity to improve by documentary or testimonial evidence. *See Sandland*, 23 MSPR at 590. I find that Petitioner's supervisor discussed with her the standards by which her performance would be measured prior to the opportunity period. Tr. 1866-68. She was given her performance appraisal prior to that time and was given the opportunity to discuss it with her supervisors. *Id.*, 1188. She was given a detailed list of expectations for the opportunity period at the beginning of that time. R.Ex.38 at 3-7. Further, if Petitioner was unclear about her performance standards, she had an obligation under the APSS Manual to discuss and clarify any questions she had with her supervisor.²⁶ R.Ex. 5 at 7-8.

Petitioner argues in her Brief that her performance standards were increased for the 1999 opportunity period.²⁷ P.Br. at 44. This argument was not raised in the Petition for Review, and therefore, is not properly raised in the Brief. Nevertheless, I conclude that the Agency did not increase Petitioner's standards during the opportunity period. While Petitioner may have received some additional assignments during the opportunity period, *e.g.*, preparing a well-written memo (R.Ex. 38 at 6), there was nothing to suggest that the expectations had increased.

²⁵ Expunging the May 1999 performance appraisal does not have any bearing on the other issues in this case since the other issues, over which the PAB has jurisdiction, were not based on this performance appraisal. Petitioner's September 1999 appraisal would not be affected because she would normally have received an annual appraisal at the end of the fiscal year. GAO Order 2430.1, ch. 1 ¶1-6. There were no other adverse actions taken as a result of the May 1999 performance appraisal and thus, there is no ripple effect resulting from expunging this performance appraisal.

²⁶ The Agency could have further clarified these standards for Petitioner by following its own regulations under GAO Order 2432.1 ¶7(b), which requires the written notice of opportunity period to describe the standards for acceptable performance in the dimensions deemed unacceptable. However, I find this to be harmless error since Petitioner's supervisors did discuss the standards and expectations with Petitioner.

²⁷ The MSPB has held that when new standards differ substantially, the employee is entitled to an appraisal period under the new standards. *See Thompson v. Department of the Navy*, 89 MSPR 188, 193 (2001) (citing *Boggess v. Department of Air Force*, 31 MSPR 461, 463 (1986)). An agency may, however, "cure otherwise fatal defects in the development and communication of performance standards by communicating sufficient information regarding performance requirements at the beginning of—and even during—the PIP." *Id.*

In fact, Petitioner was rated on the same dimensions as she had been previously. *See* R.Exs. 6, 7. She was not rated on whether the memo had been written or how well it had been written. Further, Petitioner received an “unacceptable” rating in September 1999 only in the critical element Checking, Examining and Recording. That performance appraisal references the same duties and tasks, *e.g.*, tracking printer usage, preparing and updating information of computers, as were noted in her May 1999 appraisal. Additionally, Petitioner then knew on what dimensions her performance would be rated since she had just been given an appraisal in May when her additional dimensions were established. Tr. 1439-41. Therefore, I do not find that the Agency engaged in any prohibited personnel practice regarding the September 1999 performance appraisal.

4. June 2000 Performance Appraisal

Petitioner argues that the June 2000 performance appraisal was improper because the Agency engaged in prohibited personnel practices. Pfr ¶¶29-35. Specifically, the Petitioner argues that her supervisors did not set or communicate her performance expectations until February 2000. Pfr ¶30. She further argues that her supervisor, Ms. Cortese, “employed an absolute standard in assessing the Petitioner’s work” and that she provided little or no guidance.²⁸ P.Br. at 47-48.

a. Communication of Performance Standards

Pursuant to 31 U.S.C. §732(d)(2), GAO is required to communicate performance standards to employees at the beginning of an appraisal period. Petitioner argues that the Agency violated this section by not communicating the performance standards to Petitioner until February 24, 2000, three months after she began work in AOL. P.Br. at 47.

The MSPB has held that when an employee contends that an agency has not communicated performance standards and critical elements, the agency must prove by substantial evidence that the employee was made aware of and understood the standards and elements in question at the beginning of the appraisal period that forms the basis of the adverse action. *See Papritz v. Department of Justice*, 31 MSPR 495, 497 (1986). In *Papritz*, the MSPB found that the employee had been made aware of the substance of his critical elements upon joining the agency two years earlier; that he received instructions about his performance standards and agency expectations regarding his assignments; that based upon his previous experience and receipt of his position description, he was aware of what the duties of his position entailed and that he received counseling concerning his performance deficiencies before the opportunity to improve began. *Papritz*, 31 MSPR at 498.

Petitioner admits that a meeting took place “soon after” she started in AOL. Tr. 1961-62; P.Br. at 12. However, Petitioner argues that during that November meeting, performance standards were not discussed. Tr. 581, 1965; R.Ex. 119 at 1; P.Br. at 12. Contrary to Petitioner’s contention, the record shows that Ms. Cortese, Petitioner’s supervisor, met with Petitioner on November 17, 1999 to discuss her performance dimensions and standards and that Petitioner had

²⁸ Petitioner also argues that Ms. Cortese’s approach to feedback and counseling was rigid. P.Br. at 48. However, even assuming this was true, it does not rise to the level of a prohibited personnel practice.

an opportunity at that time to question any of the standards on which her performance was being rated. Tr. 571-73, 1961-71; R.Ex. 60.²⁹

I find Ms. Cortese's testimony to be more credible than Petitioner's regarding this matter. Petitioner's signature was on the performance appraisal form dated November 18, 1999 (R.Ex. 60), which is consistent with Ms. Cortese's testimony that she met with Petitioner on November 17, 1999, asked her to take the performance appraisal form, review the standards and come back to discuss any possible changes. Petitioner returned the form the next day and she and Ms. Cortese signed it. Tr. 581-82.

Petitioner claims that her supervisors did not communicate her performance standards to her until February 2000. PFR ¶30. In February 2000, the Agency distributed a new APSS Manual which required supervisors to re-do performance expectations for all APSS staff. The meeting on February 24, 2000, which is referenced by Petitioner (PFR ¶30), refers to a meeting with Mr. Clark and Ms. Cortese when they discussed Agency-wide revisions to the performance standards. See Tr. 454-55, 621-22, 624. However, as discussed above, this was not the first meeting to discuss performance standards. Accordingly, I find the Agency timely communicated Petitioner's performance standards to her.

The MSPB has also found that counseling and discussion of performance standards may occur "in the PIP [performance improvement plan], in counseling sessions, in written instructions, or in any manner calculated to apprise the employee of the requirements against which he is to be measured." *Donaldson*, 27 MSPR at 298. Petitioner's claim that "she received little or no guidance from Ms. Cortese in performing her tasks and, in general, there was little communication between the Petitioner and her supervisors" is not credible. P. Br. at 48; see Tr. 1985, 2046-48; R.Ex. 72. Testimony from both Ms. Cortese and Mr. Clark indicates that Ms. Cortese spent an inordinate amount of time talking with Petitioner about her work assignments. See, e.g., Tr. 199, 503-06, 630-37, 734-767, 2012-15.

Accordingly, I find that the Agency did not engage in a prohibited personnel practice because Petitioner's supervisors communicated her standards to her in November 1999, shortly after her arrival to AOL, as well as on an ongoing basis through regular counseling sessions.

b. Absolute Standards

Petitioner alleges that the Agency engaged in a prohibited personnel practice because it rated her based on absolute performance standards.

²⁹ While it is true that Petitioner should have known what the expectations were, the Agency also had an obligation to ensure that its employees are aware of the standards and to actively address any questions before any problems arose. See *Hendley v. GAO*, 2 PAB 33 (1990). In this case, although the Agency did the minimum required to advise Petitioner of its expectations, it is clear based on the evidence presented that the Agency could have taken additional steps to ensure that Petitioner was aware of what was expected of her.

Unacceptable performance in the critical element of Checking, Examining and Recording is found where an employee “frequently:”

- Overlooks or misses errors, even when there is little time pressure; forwards or processes inaccurate forms, records, documents, etc.
- Completes forms slowly or carelessly; selects an inappropriate form for the situation; does not double-check work; overlooks important information on paperwork; fails to respond to forms, orders, or advances that require immediate attention.
- Omits appropriate or obtains inappropriate information, signatures, or approvals; forwards materials without verifying that critical information is present or accurate.
- Fails to take action to correct errors or problems; corrects errors only in the material at hand, making no attempt to correct the problem in other areas that may also be affected.
- Allows logs, records, or files to become outdated, making retrieval and tracking of accurate information difficult or impossible; fails to note important change-of-status information.
- Makes computation errors and fails to catch these mistakes; does not question or notice figures that “look wrong.”

R.Ex. 5 at 46. “Frequently” is defined as “on numerous occasions.” R.Ex. 5 at 15. The Federal Circuit has held that terms such as “usually” or “most” in performance standards are sufficient enough to invoke a general consensus as to their meaning and content.³⁰ *See Baker v. Defense Logistics Agency*, 782 F.2d 1579, 1582-83 (1986). Use of the term “frequently” similarly invokes a general consensus that it means “on numerous occasions.” *See* R.Ex. 5. Thus, there is nothing in the performance standard *per se* that would make the standard absolute, and accordingly, invalid.

Instead, Petitioner appears to be arguing that the application of the standards was invalid because Ms. Cortese applied “absolute” standards to her. P.Br. at 47-48. Petitioner alleges that Ms. Cortese had a “zero tolerance approach to errors” and that “she attributed even the most minor clerical errors to poor performance.” P.Br. at 26. The record, however, does not support this allegation. A performance standard is not absolute if it allows for one error without being “unsatisfactory.” *See Calloway*, 23 MSPR at 599. A standard is not absolute if it sets a very small number of permissible errors. *See Russi v. Department of the Army*, 40 MSPR 585, 589 (1989).

The evidence shows that Petitioner was not rated “unacceptable” based on only one error but on “numerous” errors. In its exhibits alone (R.Exs. 120, 122), the Agency presented over 100

³⁰The MSPB suggests that if an agency has a 5-tier rating system, the levels need to be described such that employees are aware of the expectations at all five levels. Describing only the acceptable level in a 5-tier system would not be sufficient if the words “frequently” or “usually” are used. *See Donaldson v. Department of Labor*, 27 MSPR 293, 297 (1985). However, in this case, the Agency had a 5-tier rating system but performance was described for three levels, “unacceptable,” “acceptable” and “outstanding,” which would be sufficient to determine the required performance for the other two levels. *See* R.Ex. 5.

examples of errors made by Petitioner before and during the opportunity period. These errors were indicative of the types of errors that Petitioner repeatedly made. *See, e.g.*, Tr. 670-71, 673-79, 682-85, 690, 694-98, 701-05, 726-30. Petitioner committed several errors on time and attendance sheets, and travel vouchers, even after these items were returned to her for correction. The record supports the conclusion that she clearly did not double-check her work. *See, e.g.*, Tr. 614, 616, 634-638, 645, 647, 655-660, 663-666, 671-673; *see also* R.Exs. 120, 121. Petitioner herself testified that Ms. Cortese came to her so many times that it became “a bit much.” Tr. 2111.

Accordingly, I find that Petitioner has failed to show by a preponderance of the evidence that the Agency engaged in a prohibited personnel practice by using absolute measures to rate her performance as “unacceptable.”³¹

5. October 2000 Performance Appraisal

Petitioner alleges that her October 2000 performance appraisal was “flawed” because she was not given a meaningful opportunity period. PfR ¶¶4, 39, 41, 43; P.Br. at 49. Specifically, Petitioner alleges that she was not given sufficient feedback so as to apprise her as to whether her performance was “acceptable” during the opportunity period and that the feedback that she did receive came too late in the opportunity period to allow her to correct any noted deficiencies.³² PfR ¶39. Petitioner also alleges that her supervisor did not monitor her training to determine whether the content was appropriate or to ascertain whether the training was actually provided. PfR ¶38. The record does not support Petitioner’s contentions.

I find that Petitioner was given a meaningful opportunity to improve and that she was made aware that her performance was “unacceptable” prior to and during the opportunity period. *See* R.Exs. 8, 78.

a. Feedback Provided by Petitioner’s Supervisor

During the opportunity period from June 28, to September 15, 2000, Ms. Cortese, Petitioner’s assigned supervisor, met with her on a weekly basis and spoke with her daily regarding her performance. Tr. 586-87. The Agency also extended Petitioner’s opportunity to improve period from August 14 to September 15, 2000 because Petitioner was out on sick leave for three weeks. PfR ¶36.

The Petitioner testified that Ms. Cortese frequently pointed out errors to her. Tr. 2102-08, 2111. Mr. Clark and Ms. Cortese also stated that Ms. Cortese spent significant amounts of time talking with Petitioner about her work assignments. Tr. 495-96, 499-500, 735-58, 761. Moreover, Petitioner and her supervisor had a meeting in July 2000 where Petitioner specifically asked Ms. Cortese for a progress review. Tr. 760. In response, Ms. Cortese stated that it ultimately came

³¹ In fact, the evidence shows that on another performance dimension, Handling Mail, Ms. Cortese increased Petitioner’s rating to “acceptable” following the opportunity period despite numerous instances where Petitioner failed to distribute the mail properly or at all. *See* R.Exs. 8, 9, 121.

³² In fact, she testified that she was advised that things were going well with the mail duties. Tr. 2045-46.

“down to the products” that Petitioner produced. Tr. 761. Further, Ms. Cortese stated that when she returned a document for correction she expected the correction to be made. Tr. 761. “If I give you back your timecards and you don’t do it, and you’re not making the corrections, that’s something we’re taking into consideration.” Tr. 761.

Ms. Cortese also advised Petitioner: “It’s not the friends you have here; it’s the work you produce that’s going to be in a rating. Lenora, stay at your desk. Try to get more work done.” Tr. 761. The evidence shows that Petitioner was not getting the work done (Tr. 761-65), and that Ms. Cortese repeatedly cited errors in Petitioner’s work and reminded her that her work was not completed on time. Tr. 769-813; *see* R.Ex. 121.

Based on the Agency’s evidence, Petitioner’s contention that she was not aware that her performance was “unacceptable” is not credible.

b. Harmless Error

Even assuming that Petitioner was not fully advised that her performance was “unacceptable,” she has failed to show by a preponderance of the evidence that the Agency applied its procedures in a manner that constituted harmful error, as required by 4 C.F.R. §28.61(b).

In a challenge to a performance-based action upon an allegation that the Agency failed to advise the employee of how to improve performance, consideration is given to whether notice of the errors alone would inform the employee of what is needed for improvement. *See Martin v. Department of Transportation*, 795 F.2d 995, 999 (Fed. Cir. 1986) (if it is required by Agency regulations that during the appraisal period the employee receive counseling or performance reviews, the case against the employee will not be set aside for some technical violation of those regulations, *e.g.*, a requirement that the counseling or interim appraisal be documented, as long as the substance of the requirement was met).

In this particular case, Petitioner has failed to show that being told that her performance was “unacceptable” would have improved her performance. In fact, just the opposite is true. For the prior two years, Petitioner had received three performance appraisals with “unacceptable” ratings. R.Exs. 6-8. By June 2000, she was being placed into her second opportunity to improve period. R.Ex. 78. She also was advised by her supervisor on a regular basis that she was continuing to make mistakes. *See, e.g.*, Tr. 199, 503-04, 506, 731-58, 761. However, Petitioner’s performance under the critical element of Checking, Examining and Recording had not improved in those two years. These events should have been sufficient to warn Petitioner that her performance had not improved, or at a minimum, that she should ask her supervisor for another progress report. In addition, the APSS Manual provides that Petitioner also had an obligation to ask questions, particularly if she felt she was getting mixed messages. The Manual states that “the ratee is responsible for actively seeking and receiving feedback.” R.Ex. 5 at 8.

Accordingly, I find that Petitioner was adequately informed of the need to improve her performance.

c. Training

Mr. Clark and Ms. Cortese attempted to assist Petitioner by arranging training sessions for the preparation of travel vouchers and time and attendance sheets. Petitioner argues that the “‘training’ offered ... during the opportunity period was not sufficient to enable her to improve her performance in any measurable degree.” P.Reply at 5. Petitioner also contends that because the training was brief and consisted of only basic issues, the training was not designed to assist Petitioner improve her performance. P.Reply at 5-6; PfR ¶¶37-38.

Contrary to Petitioner’s claims, the evidence shows that Petitioner never even attended the training sessions for preparing travel vouchers. Ralph Bucksell, a travel and financial policy expert, was asked to train Petitioner. Tr. 554-56. Mr. Bucksell testified that he had arranged three different individual sessions and Petitioner failed to appear all three times. Tr. 554-58. Mr. Bucksell also testified that while he was only asked to cover the basics, which would have taken about 15-20 minutes, he had set aside two hours for the training in case “she wanted extra time.” Tr. 553.

The time and attendance session was also a one-on-one session that was scheduled for Petitioner with Drucilla Gray, an Operations Assistant. Tr. 961-67. Petitioner failed to attend two of the three sessions with Ms. Gray. Tr. 963. After Petitioner finally appeared for the third scheduled session, Ms. Gray spent an hour with her going over the time and attendance process and answering all her questions. Tr. 967.

Petitioner’s arguments regarding training are disingenuous. Petitioner implies in the Petition for Review that it was Management’s responsibility to ensure that she attended these training sessions. However, the Agency is not even required to offer formal training in order to provide a meaningful opportunity to improve. *See Macijauskas*, 34 MSPR at 569. Further, Petitioner implies in her Brief that she attended all of her training sessions, that they lasted 15-20 minutes, and that the content of the training was not meaningful. P.Reply at 5-6. However, this implication is refuted by the record. The record shows that both the time and attendance training and travel voucher training were individual sessions designed to assist Petitioner with any questions she had; ample time was offered. Thus, the evidence strongly supports the Agency’s contention that the training was offered to assist Petitioner in improving her performance.

4. Expanded Duties

Petitioner argues that the Agency engaged in a prohibited personnel practice because her duties were expanded during the opportunity period. P.Br. at 49. While not specifically raised in the Petition, this argument bears consideration as a requisite implied in the notion of meaningful opportunity to improve. GAO Order 2432.1, *Dealing with Unacceptable Performance*, states that during an opportunity period, an employee’s “work assignments made during ... [this] period will be commensurate with the duties of the employee’s position.” Order 2432.1 ¶7c(2) (Jan. 16, 1998). The duties and responsibilities listed in the position description for an Issue Area Support Technician include general administrative responsibilities such as reception duties, travel

administration, processing filing and retrieving materials and mail, T&A preparation and review, and word processing. R.Ex. 10.

Petitioner's duties during the opportunity period included preparing time and attendance records, distributing mail and answering phones and other administrative tasks which were a continuation of work she had previously been performing in AOL. Tr. 504-05, 828, 1789, 2036. These were commensurate with the duties of someone in Petitioner's position. I find that Petitioner's duties were not expanded beyond those duties of an Issue Area Support Technician which is consistent with GAO Order 2432.1.

Accordingly, I do not find that Petitioner proved by a preponderance of the evidence that the Agency engaged in any prohibited personnel practice by expanding her duties during the opportunity period.

F. Retaliation

Petitioner alleges that the Agency took actions against her during the period February 1999 to December 2000 because she engaged in protected activities in violation of 5 U.S.C. §2302(b)(9)(A).³³ Pfr ¶¶48-58.

There are four elements for establishing a *prima facie* case of retaliation under 5 U.S.C. §2302(b)(9): (1) the employee engaged in a protected activity; (2) she was subsequently treated adversely; (3) the deciding official had actual or constructive knowledge of the protected activity; and (4) there is a causal connection between the protected activity and the personnel action. Once an employee has established participation in a protected activity, she must then prove that: the official accused of taking a retaliatory action was aware of the activity; the personnel action under review could, under the circumstances, have been retaliation; and there was a genuine nexus between the protected activity and the personnel action. *McMillan v. Department of the Army*, 84 MSPR 476, 483 (1999); *Malphurs v. GAO*, 2 PAB 147, 150 (1992). The causal connection merely consists of an inference of a retaliatory motive, which must typically be inferred from circumstantial evidence. *See id.* at 153.

The analysis of 5 U.S.C. §2302(b)(9)(A) requires that Petitioner have exercised her right to an appeal, a complaint, or a grievance process granted by any law, rule or regulation. 5 U.S.C. §2302(b)(9)(A). Petitioner claims that she engaged in a statutorily protected activity in late Fall 1998 when she spoke with John Luke, Assistant Comptroller General for Human Resources.³⁴ Pfr ¶¶48, 58. She alleges that this constituted protected activity because she advised Mr. Luke that she was being treated differently from two other employees. P.Br. at 52.

The EEOC has held that a complainant may satisfy the requirement of initiating contact with an EEO counselor by contacting any Agency official "logically connected" with the EEO process,

³³ In her Brief, Petitioner appears to claim retaliation under Title VII. P.Br. at 51, 55. This claim is not raised in the Petition for Review, and therefore, is not properly before the Board.

³⁴ This issue was also addressed during oral arguments prior to hearing. Tr. 24-37.

even if that official is not an EEO counselor, so long as the complainant exhibits an intent to begin the EEO process. *Foster v. HHS*, EEOC Appeal No. 01A05067 (Feb. 21, 2002).

The EEOC has also determined that a complainant's initial EEO counselor contact must exhibit, either explicitly or implicitly, "an intent to begin the EEO process." EEOC Management Directive (MD-110), Ch. 2 n.1 (Nov. 9, 1999); *see Allen v. USPS*, EEOC 05950933 (Jul. 8, 1996). The EEOC is very clear that there must be intent shown by the complainant. *See Tom v. HHS*, EEOC Appeal No. 01996598 (Jan. 31, 2002) (multiple discussions with an EEO official did not exhibit intent to file EEO complaint); *Richter v. Department of Commerce*, EEOC Appeal No. 01A15095 (Nov. 28, 2001) (letter sent to director of the office complaining of poor treatment did not express intent to initiate EEO process); *Harris v. Department of the Navy*, EEOC Appeal No. 01991170 (April 18, 2001) (e-mail sent to the captain, director of EEO office, and others complaining of incident where co-workers exchanged negative comments about Black History month and subsequent meeting were not sufficient to exhibit the requisite intent to begin EEO process); *Washington v. Government Printing Office*, EEOC Appeal No. 01964331 (Jan. 23, 1997) (a statement by an employee to counselor that she believed she was being discriminated against was not sufficient to exhibit an intent to file a complaint); *Hash v. Department of Defense*, EEOC Appeal No. 01933900 (Nov. 26, 1993) (just asking an Agency official for assistance was not sufficient to exhibit intent to invoke the EEO process).

In this case, Petitioner has failed to meet the first criterion of engaging in a statutorily protected activity. Petitioner approached Mr. Luke regarding the assignment of preparing time and attendance records. Tr. 405, 1794-95. There was no mention in either Petitioner's testimony or Mr. Luke's testimony to indicate that Petitioner intended to initiate the EEO process. *See* Tr. 404-08, 419, 423, 1794-96. Even viewing the facts in the light most favorable to Petitioner, Petitioner, at most, stated that she was being treated "unfairly," and implied discrimination by stating that two white employees were given the option to decline the assignment of preparing time and assignment records while she was not.³⁵ The discussion was left with Mr. Luke stating that he would talk to Ms. Jaggar, Petitioner's third-line supervisor. Tr. 408-09, 1795. Neither Petitioner nor Mr. Luke, in their testimonies, made any mention of pursuing the EEO process in this regard. In fact, Petitioner did not file a formal complaint until March 2000. *See* R.Ex. 66.

Accordingly, based on the facts and applicable law, I find that Petitioner did not engage in a statutorily protected activity by approaching Mr. Luke because Petitioner did not then exhibit an intent to begin the EEO process.

Petitioner did not engage in protected activity until June 1999 when she filed a charge with the Personnel Appeals Board Office of General Counsel regarding her May 1999 performance appraisal and the May 1999 denial of a within-grade increase. However, having met the first criterion, Petitioner fails to meet the second and fourth criteria of the *prima facie* case of retaliation.

³⁵ During oral arguments, Petitioner also raised the issue of whether Mr. Luke had an obligation to advise Petitioner of her right to file an EEO complaint and the time limits for doing so. Tr. 34-37. However, Mr. Luke credibly testified that Petitioner did not raise any concerns regarding discrimination and thus, he had no reason to refer her to the Civil Rights Office. Tr. 407-08, 419, 423.

According to the elements of retaliation, the adverse action had to have occurred subsequent to the protected activity. In this case, Petitioner engaged in protected activity by exercising her appeal right to file a charge with the Personnel Appeals Board Office of General Counsel in June 1999, after receiving the denial of her within-grade increase and the May 1999 “unacceptable” rating. The evidence also shows that Petitioner was having performance problems as early as the Fall of 1998. Petitioner’s then supervisors approached Ms. Jaggar because of Petitioner’s performance problems and asked that she be reassigned. Tr. 53-54, 64. Ms. Jaggar then attempted to reassign her to another office. Tr. 64-67. There is no causal connection between her protected activity and the adverse action since the actions complained of occurred prior to Petitioner’s protected activity and no inference of a retaliatory motive can be made. Accordingly, I find that the Agency did not retaliate against Petitioner in that there was no causal connection between Petitioner’s filing a charge with the PAB/OGC in June 1999 and the prior personnel actions.

As to the subsequent actions, Petitioner’s pre-existing performance difficulty and well-documented ongoing performance deficiencies amply negate the allegation of retaliatory motive.

G. Discrimination

Petitioner also alleges that the Agency discriminated against her on the basis of race under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Pfr ¶¶5, 59; P.Br. at 56. Specifically, she claims that the denial of within-grade increases in May 1999 and June 2000, the “unacceptable” performance ratings in May 1999, September 1999, June 2000 and October 2000, and ultimately the removal, were all a result of discrimination.

In a Title VII case the ultimate burden of proving discrimination is on Petitioner. Petitioner can establish a *prima facie* case of discrimination by demonstrating that she is a member of a protected class, that she was similarly situated to an individual who was not a member of her protected class and that she was treated more harshly than that individual. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Once an employee establishes a *prima facie* case of racial discrimination, the Agency then must demonstrate that it had legitimate, non-discriminatory reasons for the actions that it took. Where the Agency has provided sufficient evidence to support the personnel action, the Agency is deemed to have met its burden of articulating a legitimate nondiscriminatory basis. The employee may then offer evidence that the reason asserted by the Agency is a pretext for discrimination. *Id.* at 804-05.

However, before Petitioner can bring her discrimination case to the PAB or its Office of General Counsel, she must meet the procedural requirements of GAO Order 2713.2. The Agency argues that all of Petitioner’s race allegations, except for the removal, must be dismissed for failure to exhaust administrative remedies and/or timeliness. R.Br. at 52.

GAO Order 2713.2, Discrimination Complaint Process, requires an employee to contact an EEO counselor within 45 days of the alleged discriminatory act, and to file a formal EEO complaint within 15 days of the counselor’s final interview with the employee. The filing of a formal

complaint is what provides the employee with the right to file a charge with the PAB/OGC. *See* Order 2713.2, ch. 6 ¶¶1b, 4a (Dec. 2, 1997) (P.Ex. 72).³⁶

Petitioner did not initiate contact with an EEO counselor until March 5, 2000 and did not file a formal EEO complaint until July 10, 2000. R.Ex. 66. According to the complaint, Petitioner initiated contact with an EEO counselor on March 5, 2000. In her EEO complaint she alleged the following issues: 1) lack of an explanation of why Petitioner received the ratings she did; 2) retaliation for filing charges with the Personnel Appeals Board; 3) no feedback from May 31, 1999 through November 1999; 4) untimely communication of standards on February 15, 2000; 5) determination of within-grade increase based on only 28 weeks by AOL; 6) the detail to the Computer Support Group from May 31, 1999 to August 31, 1999, and the opportunity period during the detail and failure to provide performance reviews and performance standards during that time.

Petitioner's allegations regarding her 1999 denial of within-grade increase and performance appraisals were untimely because they occurred more than 45 days prior to her initiating contact with an EEO counselor. Petitioner argues briefly that these should be considered timely because they were part of a continuing pattern of discrimination.³⁷ However, this theory does not successfully save the 1999 claims. "A determination of whether a series of discrete acts constitutes a continuing violation depends on the interrelatedness of the past and present acts." *Thrower v. Department of Transportation*, EEOC Appeal No. 01950406 (Mar. 28, 1995) (citing *Berry v. Board of Supervisors*, 715 F.2d 971, 981 (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986)). It is necessary to determine whether the acts are interrelated by a common nexus or theme. *See Thrower, supra*. If a nexus exists, the employee will have established a continuing violation and the Agency would be obligated to overlook the timeliness of the complaint with respect to some of the acts challenged by Petitioner. *Id.*

Incidents that are sufficiently distinct to trigger the running of the limitations period do not constitute continuing violations. *See id.* Discrete acts of discrimination taking place at identifiable points in time are not continuing violations for the purpose of extending the limitations period. *See id.*

The EEOC has consistently held that performance appraisals are single, discrete and isolated acts that are completed on a date certain and that they carry a degree of permanence, which precludes them from constituting a continuing violation. *Myers v. Department of Defense*, EEOC Appeal No. 01985554 (Nov. 5, 1999); *Thrower, supra*; *see Duvvuri v. Department of the Navy*, EEOC Request No. 05910556 (Aug. 22, 1991). Similarly, denials of within-grade increases are also considered isolated and completed acts. *See Myers, supra*; *Robinson v. Department of*

³⁶ 4 C.F.R. §28.98(c) provides an exception: an employee who is removed and wishes to allege discrimination may file a charge directly with the PAB Office of General Counsel within 30 days of the effective date of the personnel action.

³⁷ While Petitioner makes no mention of a "continuing violation" argument in her EEO complaint or her Post-Hearing Brief, the issue is raised briefly in her Response to the Agency's dispositive motion. Accordingly, I will address it here.

Commerce, 1983 WL 411788 (EEOC) (Sept. 29, 1983). Thus, with respect to the 1999 within-grade denial and performance appraisal, Petitioner has failed to articulate a series of acts that could constitute a continuing violation.

With regard to the June 2000 within-grade increase and performance appraisals, while Petitioner has not specifically alleged these items in her July 2000 EEO complaint, they can be read into allegations 1 and 5 of that complaint. Accordingly, I will consider them as being timely raised in her EEO complaint. Petitioner's October 2000 performance appraisal formed the basis for her removal and, therefore, is properly in issue.

Having overcome the procedural hurdles for her June 2000 denial of within-grade increase and performance appraisal as well as her removal, Petitioner still has not established a *prima facie* case of discrimination under *McDonnell Douglas*. Petitioner has met the first criterion of a *prima facie* case because she is in a protected class. However, she fails to show that she was similarly situated to an individual who was not a member of her protected class and that she was treated more harshly than that individual. Petitioner's only evidence of discrimination is her testimony that there were allegedly two white female employees who were given the option to decline the assignment of preparing time and attendance records. Tr. 1795-96. Petitioner, though, has not provided any evidence of whether these two employees were similarly situated, *e.g.*, whether they were also Issue Area Support Technicians, what their regular duties and responsibilities were, whether they were the same grade as Petitioner, whether they had the same level of seniority as Petitioner, whether they had any performance issues, whether they were being offered the assignment as a result of a performance problem, etc.

Petitioner also argues that she was the only career employee removed from AIMD since 1997. P.Br. at 56. However, she again has provided no evidence to support this allegation of discrimination. On the contrary, Ms. Jaggar testified that she proposed the removal of at least eight other employees, seven of whom were white and one of whom was African-American, during the relevant time.³⁸ Tr. 208-09.

Even assuming that Petitioner established a *prima facie* case of discrimination, the Agency proffered a legitimate non-discriminatory reason for the actions that they have taken, *i.e.*, Petitioner's unacceptable performance. Petitioner has not been able to rebut the Agency's evidence that her work was indeed "unacceptable," as discussed above. The Agency has provided exhibits with over 100 examples of errors that the Petitioner made prior to and during the opportunity period which are indicative of the types of errors Petitioner made. R.Exs. 120, 122; *see also* Tr. 671, 673, 678-79, 690, 698, 703, 730. Petitioner could not provide any support to rebut the Agency's evidence and prove that an allegation of unacceptable performance was a pretext for discrimination.

Thus, Petitioner has failed to establish that she was discriminated against based on race.

³⁸ The employees were in their probationary periods at GAO.

V. Conclusion

The Agency's removal action against Petitioner based on unacceptable performance is clearly supported by substantial evidence. Petitioner failed to establish affirmative defenses of retaliation, discrimination and prohibited personnel practices regarding all her claims but one, the May 1999 performance appraisal. Accordingly, the May 1999 performance appraisal is set aside and the Agency must expunge it from the Petitioner's Official Personnel File and any other official files. Petitioner's removal is **sustained**.

SO ORDERED.