

Damian Kelly v. U.S. Government Accountability Office

Docket No. 08-03

Date of Decision: February 3, 2010

Cite as: Kelly v. GAO, No. 08-03 (2/3/10)

Before: Paul M. Coran, Administrative Judge

Headnotes:

Burden of Proof

Notice

Opportunity to Improve Performance

Performance Appraisal System

Performance Ratings

Removal

Unacceptable Performance

DECISION

Damian Kelly (Petitioner), through the PAB Office of General Counsel, filed a seventeen count Petition on May 20, 2008 alleging that the U.S. Government Accountability Office (GAO or the Agency or Respondent), in terminating his employment: (1) discriminated against him on the basis of his race, color, religion, disability, gender, sexual orientation and in retaliation for his protected activities; and (2) committed various prohibited personnel practices under 5 U.S.C. §§2302, 4302 and 4303 that incorporate employment anti-discrimination provisions and prescribe procedural safeguards applicable to the removal of federal employees on work performance grounds.

Pursuant to Petitioner's December 3, 2008 Motion, the undersigned entered an Order on December 5, 2008 granting Petitioner's Motion to Withdraw Counts I – XIV of his Petition. Accordingly, those Counts remaining in play (Counts XV – XVII) essentially assert that GAO: (1) did not properly communicate the applicable performance standards to Petitioner during the rating and Opportunity Period; (2) evaluated Petitioner's performance with impermissibly vague

and subjective criteria, applied in a subjective manner; and (3) denied Petitioner a meaningful opportunity to demonstrate acceptable performance during his Opportunity Period.¹

An evidentiary hearing was conducted from February 9-13, 2009. The parties filed their post-hearing briefs on June 5, 2009.

I. STATEMENT OF FACTS

A. Background—Undisputed Facts²

Petitioner's initial relationship with GAO was as a contractor. Subsequently, the Agency appointed Petitioner as a permanent employee and assigned him, at all times material herein, to Respondent's Health Care (HC) Team. Pet. ¶1. Petitioner received performance appraisals for the periods June 1, 2004 to May 31, 2005 and June 1, 2005 to January 31, 2006 from his immediate supervisor, Cynthia Bascetta, a Health Care Director. She rated him as "meets expectations" in all competences. R. Exs. 12, 13; P. Exs. 17, 27. In March 2006 Petitioner received an individual cash award of \$250, and in April 2006 he received a merit pay increase of \$39. Pet. ¶2. In the Spring of 2006 Petitioner requested that Managing Director Dr. Marjorie Kanof transfer him to another supervisor. ¶5.

In July 2006, Dr. Kanof assigned Laurie Ekstrand, Program Manager, as Petitioner's Designated Performance Manager (DPM) and immediate supervisor. Thereafter, Ms. Bascetta continued to give Petitioner assignments. ¶5. In October 2006, Petitioner received a performance appraisal for the period February 1, 2006 to October 14, 2006, and was rated as "meets expectations" in all competencies. ¶9; R. Ex. 14. Ms. Ekstrand was the rater and Leslie Aronowitz the reviewer on this appraisal. R. Ex. 14. In April 2007, Petitioner reported to Ms. Ekstrand that he experienced a home break-in. ¶10. Ms. Ekstrand placed Petitioner in Absence without Leave (AWOL) status purportedly because he had failed to comply with the Agency's leave policies and procedures. Ans. ¶10. She also issued to Petitioner a Memorandum of Counseling on April 20, 2007 regarding his leave usage. ¶10; R. Ex. 24. *See also* Additional Finding of Fact #19, *infra*. In June 2007, Petitioner received a performance appraisal for the period October 15, 2006 to June 4, 2007, rating his performance "below expectations" in the separate competencies of Achieving Results and Maintaining Customer Focus. R. Ex. 15.

¹ By withdrawing those Counts, Petitioner dropped the discrimination allegations from the case.

² References to paragraphs in the Petition (Pet.) or Answer (Ans.) that are numbered are referenced by ¶ number. Where only the Petition is cited, the Agency's Answer is in agreement with the statement in the Petition. References to unnumbered introductory statements in those pleadings are indicated by page number. Transcript references are indicated by TR [page #]; Petitioner's Exhibits as P. Ex. [#]; and Respondent's Exhibits as R. Ex. [#]. The parties submitted the following common exhibits: R. Ex. 2 /P. Ex. 3; R. Ex. 4/P. Ex. 7; R. Ex. 6/P. Ex. 14; R. Ex. 7/P. Ex. 1; R. Ex. 8/P. Ex. 2; R. Ex. 9/P. Ex. 53; R. Ex. 10/P. Ex. 65; R. Ex. 11/P. Ex. 67; R. Ex. 12/P. Ex. 17; R. Ex. 13/P. Ex. 27; R. Ex. 27/P. Ex. 39; R. Ex. 31/P. Ex. 9; R. Ex. 34/P. Ex. 58.

On or about June 12, 2007, Ms. Ekstrand went on leave for three weeks. ¶12. On June 18, 2007, another HC Director, John Dicken, gave Petitioner written notice placing him in a sixty-day Opportunity Period beginning that day, and ending August 17, 2007, because Petitioner had been rated “below expectations” in two job competencies in his last written performance evaluation. ¶12; P. Ex. 53; TR 882. Mr. Dicken provided Petitioner with a list of specific performance expectations during the first week of the Opportunity Period. See P. Ex. 2; TR 884. He was responsible for monitoring Petitioner’s performance during the Opportunity Period due to Ms. Ekstrand’s absence and this monitoring lasted at least 14 days.³ ¶13. On August 17, 2007, Petitioner’s Opportunity Period ended. ¶15. On September 25, 2007, Ms. Ekstrand issued a Proposal to Remove Petitioner from Respondent’s employment on the asserted basis of unsatisfactory performance during the Opportunity Period. ¶16; R. Ex. 10; P. Ex. 65. Petitioner did not submit a reply. Respondent’s Brief (R. Br.) at 32.

On October 17, 2007, Dr. Kanof issued a decision letter confirming that Petitioner would be removed from employment at GAO effective October 26, 2007. R.Ex. 11; Pet. Ex. 67.

B. Additional Findings of Fact

1. Petitioner initially was engaged in 2002 as a contractor to work in Respondent’s Human Capital Office (HCO) scanning, copying, faxing and filing documents. TR 1015-16. In August 2003 he was hired by GAO’s Health Care Team as an Engagement and Administrative Operations Technician. R. Ex. 5. His supervisor and Designated Performance Manager (DPM) at the time was Sanya Spencer and his duties were to provide physical assistance to two HC Team employees with disabilities. TR 1016-17.

2. In May 2004, GAO adopted the Performance Based Compensation System (PBCS), which grouped employees into various job families and pay plans within those families. TR 588-89, 624-25. Petitioner was placed in the Administrative and Professional Support Staff (APSS) family. The APSS family contains three pay plans, including Petitioner’s category of Administrative Clerical (AC), Program and Technical Specialist (PT), and Managerial Supervisor (MS). Managerial Supervisor employees rate other APSS employees’ work performance, including AC and PT. TR 585-87.

3. AC employees provide either mission team administrative support or engagement operations support. Mission team administrative support duties include maintaining staff calendars, arranging travel authorizations and reimbursements and setting up meetings and conferences. TR 587-88, 596. Engagement operations support involves providing process support to the analysts assigned to GAO’s engagements. TR 596. Typically, AC employees perform both types of support depending on how a team is organized. TR 596-97.

4. In May 2004 the Agency moved from a behaviorally anchored rating scale (BARS) to its present competency-based performance system (CBPS) for evaluating the performance of its APSS employees, including those classified as AC employees. The former focused on what

³ The Petition ¶13 alleges that Mr. Dicken was in charge for 21 days whereas Respondent’s Response to Petition ¶13 states that it was 14 days. Mr. Dicken testified that Ms. Ekstrand was out of the office for about three weeks in June. TR 879.

activities were performed rather than on what activities were appropriate for each band level. TR 600-01, 617-18; *see* R. Ex. 1. Under the new system GAO established broadly defined job competencies for each band of APSS employees. TR 602; *see* R. Ex. 2. Under each competency are listed work activities, which are utilized to further define a job competency. TR 602-03. Band I APSS employees have seven job competencies and twenty-four work activities. R. Ex. 2. Employees are rated as either “below expectations,” “meets expectations,” “exceeds expectations,” or “role model” in each competency. While there are no explicit standards for the “below expectations” rating, “[m]eets expectations” is considered really the base level of performance or the norm of performance.” TR 603; R. Ex. 36 at 6. “Meets expectations is nearly all the time, that your performance is consistent with the standards that have been defined under meets.” TR 605-06. Accordingly, performance below that level would fall “below expectations.” TR 606.

5. The setting of an employee’s performance expectations for the appraisal cycle by the employee’s Designated Performance Manager (DPM) is at the foundation of GAO’s employee evaluation system. Such expectations are to be set at the beginning of a performance management cycle, revisited during the cycle midpoint, and discussed in terms of results during the end-of-year performance evaluation session. TR 705-06. The expectations need not be written, although the Agency strongly encourages DPMs to use written expectations and it created a form on which expectations may be recorded. TR 615-17; P. Ex. 6.

6. GAO’s published policy specifically prescribes that DPMs are responsible for communicating performance requirements, assisting employees in improving performance, and preparing and delivering the performance appraisal to the ratee. R. Ex. 3 (Order 2430.1, Performance Appraisal (Mar. 20, 2006)), Ch. 2 ¶4.a; TR 694-96.

7. The CBPS is a web-based application through which the Agency’s employees could, at all times, access their appraisals online. TR 611-13, 1204-05. Petitioner was aware of how to access CBPS and utilized it to access his performance appraisals. TR 1205. His performance standards were posted on CBPS, which contained a function permitting employees to print their appraisals together with their performance standards so that the documents could be reviewed together. TR 611-14. In addition, GAO maintains a Human Capital web site, which at all relevant times, had the performance standards for AC Band I posted. TR 611-12. Petitioner testified, with regard to his performance standards on the CBPS web site, “There was no reason for me to look at them.” TR 1205.

8. With the guidance of Personnel Decisions Research Institutes, Inc. (PDRI), the Agency designed CBPS and the performance standards applicable to Petitioner and the entire APSS community, in a manner calculated to ensure content validity. TR 620-21, 634; R. Ex. 1 at 4-9. In a purportedly scientific manner, GAO tested its construct draft competencies with a job analysis questionnaire provided to the entire APSS population; the Agency modified the draft competencies in response to the completed questionnaires. R. Ex. 1 at 6-9.

9. GAO took various steps to ensure that all affected employees knew of, had access to, and understood the AC-I Performance Standards on January 1, 2004 and May 5, 2004 through group and individual emails and voicemail messages. R. Exs. 35, 37; TR 647-51, 662-63. The

Agency also offered the affected employees related training and informational sessions in January and May 2004 and at any time through computer accessed videos, and Respondent's intranet site. R. Exs. 35, 36, 37; TR 653-55, 662, 667-68, 770. GAO has reviewed performance standards and appraisal procedures with employees every year since 2004. TR 668-69.

10. While Designated Performance Managers and their ratees, such as Petitioner, share joint responsibility for being fully aware of the ratee's performance expectations, ratees are specifically charged with "becoming familiar with their competencies and performance standards." GAO Order 2430.1, Ch. 2 ¶6.d (R. Ex. 3).

11. HC Director Cynthia Bascetta has written between 50 and 100 performance appraisals since she was promoted to Assistant Director in 1989. TR 733. She discussed the applicable performance standards with Petitioner on various occasions during the time she served as his DPM. TR 767-72. She discussed with Petitioner the new AC-I (Administrative Clerical Band I) standards when the Agency implemented the CBPS in 2004. TR 768-69. She provided Petitioner with performance appraisals for the rating periods June 1, 2004 – May 31, 2005, and from June 1, 2005 – January 31, 2006. R. Exs. 12, 13.

12. In August and September of 2005, HC staff complained to Ms. Bascetta that Petitioner made errors in report printing, on a travel reservation request, and in making van transportation reservations. P. Exs. 18, 21-24. Nevertheless, Ms. Bascetta again rated Petitioner as "meets expectations" in all his job competencies and he received a merit increase or bonus of approximately \$660. R. Ex. 13; TR 1053.

13. Ms. Bascetta broached the AC-I performance standards with Petitioner while setting his expectations annually and during the rating years. TR 760-62, 817-18, 820, 824.

14. Throughout the period that Ms. Bascetta served as Petitioner's DPM, Petitioner's responsibilities were of an administrative nature and included printing documents, printing and distributing Directors' calendars, distributing mail, scheduling meetings through the Groupwise calendar system, copying documents, phone coverage, preparing travel authorizations and vouchers, reserving motor vans, reserving conference rooms, arranging for visitors to access the building, and related duties. TR 735-37. His duties did not materially change during the following years that Ms. Bascetta served as his DPM, except that at some point Petitioner became the primary person responsible for phone coverage on the HC Team. TR 738-39.

15. Laurie Ekstrand, a Director in HC, became Petitioner's DPM in the Summer of 2006 after Petitioner had requested a change from Ms. Bascetta's supervision. TR 35, 38. This occurred mid-appraisal period, which spanned from February 1, 2006 to October 14, 2006. TR 36-37. Ms. Ekstrand possessed extensive experience as a DPM and had served as an instructor for performance evaluation training classes at GAO. TR 34, 346.

16. Petitioner's duties when Ms. Ekstrand became his DPM were substantially the same as they had been under Ms. Bascetta, as referenced in ¶14, *supra*, plus monitoring the printer and copier rooms to ensure that they were clean and well-stocked. TR 38-42.

17. When Ms. Ekstrand first became Petitioner's DPM she suggested that he review his AC-I Performance Standards. TR 65. Upon becoming Petitioner's DPM, Ms. Ekstrand received complaints or personally observed deficiencies in Petitioner's performance in the following areas: failure to deliver customers' calendars on time; periodic failure to deliver mail on a daily basis and maintain the copy rooms; problems with van scheduling; and Petitioner's frequent unauthorized and unannounced disappearances from the work place adversely impacting the performance of work on his Team. TR 44-47. Ms. Ekstrand discussed those performance issues with Petitioner and suggested how he could better organize and communicate about his work. TR 49.

18. Ms. Ekstrand issued Petitioner's performance appraisal for the period February 1, 2006 to October 14, 2006, rating his work as "meets expectations" in all seven job competencies. R. Ex. 14; TR 44-45. She held a feedback session with Petitioner about his October 2006 appraisal; she discussed his AC-I performance standards and again reminded him that he should review them. TR 64-65. Petitioner never indicated that he was unaware of the AC-I performance standards or of how he could locate them. TR 65.

19. Petitioner had frequent attendance problems during the October 2006 appraisal period when he was often tardy or absent and failed to notify the Team that he would be late or absent. TR 56-57. Towards the end of the October 2006 appraisal period HC Team employees witnessed Petitioner napping at his desk on two separate occasions. R. Ex. 26; TR 59. The Team's Managing Director, Dr. Marjorie Kanof, personally witnessed Petitioner asleep at his desk on August 31, 2006. R. Ex. 26. On one occasion Ms. Ekstrand observed Petitioner at his desk snoring loudly and woke him. *Id.* Consequently, she issued a Memorandum of Warning to Petitioner, dated September 14, 2006, counseling Petitioner concerning that behavior. R. Ex. 26; TR 61.

20. During the FY 2007 appraisal period Ms. Ekstrand met with Petitioner and provided him with her written copy of his work expectations, which substantially tracked his previous expectations. TR 69-71; *see* R. Ex. 7.

21. During the FY 2007 appraisal period Petitioner was assigned to provide primary support to four HC Team Directors and backup support to the other HC Team Directors when other support staff members were absent. TR 137. On an infrequent basis Petitioner performed work for the Assistant Directors and other individuals on the HC Team. In addition to Petitioner, the HC Team had two other staff support members during that period. TR 138, 297-98.

22. From the inception of the FY 2007 appraisal period, Ms. Ekstrand believed that Petitioner's performance had declined. She met with him on multiple occasions to discuss issues and problems with his performance. Sometimes this resulted in a temporary and inconsistent improvement in Petitioner's performance. TR 82-84. On March 9, 2007, Ms. Ekstrand met with Petitioner and counseled him regarding problems with his failure to deliver mail to Directors, failure to keep the copier rooms clean and well-supplied, delays in completing work, and failure to inform the Directors when work had been delayed. Ms. Ekstrand particularly noted Petitioner's deficiencies in the competencies of Achieving Results and Maintaining Customer Focus. R. Ex. 2 at 2. During direct examination, Petitioner acknowledged that Ms. Ekstrand

provided him with a copy of the AC-I Performance Standards at their March 9, 2007 meeting and that he took them home where he read them thoroughly. TR 1122, 1125-26, 1171-73; *see* P. Ex. 3.

23. Following Ms. Ekstrand's aforementioned discussion with Petitioner, she believed that his performance did not improve to an acceptable level. She testified, *inter alia*, as to Petitioner's failings regarding mail delivery and maintenance of the copier rooms, failure to notify Directors when he would not complete their work on schedule, failure to maintain and deliver his customers' calendars, untimely document printing, and multiple errors in scheduling van transportation, arranging meetings and misrouting messages. TR 86-87, 91-94, 96-102; *see* R. Ex. 15 at 2. *See also* TR 927-30, 940-41 (testimony of Pamela D. Jones).

24. On May 23, 2007, Ms. Ekstrand advised Petitioner that she would issue him an out-of-cycle performance appraisal and that he would have a few days to prepare a contribution statement. TR 90; R. Ex. 17 at 26.

25. On June 8, 2007, Ms. Ekstrand issued an out-of-cycle performance appraisal to Petitioner covering his performance from October 15, 2006 to June 4, 2007. Her appraisal provided Petitioner with adjectival ratings and supporting narrative rating him "below expectations" in the competencies of Achieving Results and Maintaining Customer Focus. TR 87-89; R. Ex. 15. At the June 8, 2007 meeting, Ms. Ekstrand informed Petitioner that he would be entering an Opportunity Period to improve his performance. R. Ex. 17 at 32.

26. Petitioner's hearing testimony conceded at least a majority of the numerous performance deficiencies that Ms. Ekstrand attributed to him in his out-of-cycle performance appraisal. TR 1259-77.

27. Ms. Ekstrand testified credibly that Petitioner's workload was appropriate for a person of his pay grade and classification (AC-I) and consistent with the achievement that she had previously expected of personnel of that pay grade and classification. TR 135-36. She further testified that Petitioner was not busy during that period. *Id.*

28. Petitioner's attendance deteriorated during the out-of-cycle appraisal period. His arrivals were frequently tardy and he took unscheduled leave. He often failed to notify the office that he was running late or would not report to work on a given day. On April 20, 2007, in response to this problem, Ms. Ekstrand issued Petitioner a Memorandum of Counseling placing him on leave restriction. The Memorandum reiterated Petitioner's duty to inform Ms. Ekstrand or Pam Jones, another support staff member, when he was running late and required that he send Ms. Ekstrand an email or speak to her each day upon his arrival at and departure from the office so that she could confirm when he was in the office. TR 130, 133-35; R. Ex. 24 at 1-2.

29. GAO's Order treats as an unacceptable performer any APSS employee receiving a "below expectations" rating in one or more competencies. Order 2432.1, Dealing with Unacceptable Performance (Nov. 24, 2004), Ch. 3 ¶2.d (R. Ex. 4). The controlling regulation prescribes that the Agency place Petitioner in an Opportunity Period because he received "below expectations" ratings in two competencies. The Opportunity Period was designed to "give the

employee a reasonable chance to demonstrate improved performance in the competency or competencies that rendered the performance unacceptable.” *Id.* ¶3.a. When Ms. Ekstrand discussed the out-of-cycle appraisal with Petitioner she explained that he would be placed in an Opportunity Period. TR 141. Opportunity Periods may range from 30 to 90 days while the work to be performed during the Opportunity Period must be commensurate with the duties of the employee’s position. R. Ex. 4, Ch. 3 ¶3.c.

30. On June 18, 2007, Petitioner commenced a 60-day Opportunity Period. R. Ex. 9; P. Ex. 53; TR 882. John Dicken, an HC Director for whom Petitioner had been providing support since 2006, and who was temporarily filling the role of Petitioner’s DPM while Ms. Ekstrand was on vacation, provided Petitioner with a letter on June 18, 2007, that included information about the Opportunity Period (Opportunity Letter). R. Ex. 9, P. Ex. 53; TR 876, 879-80, 889-90. The Opportunity Letter, *inter alia*, guided Petitioner with a number of steps he should take to improve his performance. The first listed item instructed Petitioner that he should “[f]irst, carefully review the Administrative (AC-I) performance standards.” Opportunity Letter at 2. Petitioner’s testimony acknowledges that he then reviewed the AC-I Performance Standards, as he had done following the March counseling session. TR 1125-26, 1216. After the testimony regarding the March counseling session, Petitioner then contradicted his hearing testimony in affirming his deposition testimony that Ms. Ekstrand had not given him the performance standards, by stating that he had not seen the performance standards outside the context of the litigation. TR 1172-73, 1175-77, 1303. Petitioner’s counsel sought to rehabilitate his testimony by refreshing his recollection through reviewing his deposition transcript. I was less than favorably impressed with Petitioner’s certitude when he testified denying receiving his performance standards. TR 1177. To the contrary, he was much more emphatic when attesting to having received them. In this regard, I am struck with Petitioner’s revealing testimony with regard to viewing his performance standards on the CBPS web site, “There was no reason for me to look at them.” TR 1205. That strongly suggests that he had been provided with his performance standards. Finally, I find Ms. Ekstrand’s testimony that she had provided Petitioner with his performance standards far more convincing. Accordingly, I conclude that at all times material to this Petition, GAO had provided Petitioner with his written performance standards.

31. Mr. Dicken had never previously supervised an employee during an Opportunity Period. TR 911. Previously, he had been one of the Directors to whom Petitioner provided support and he had “some knowledge” of Petitioner’s prior performance. TR 908.

32. Mr. Dicken met with Petitioner on June 22, 2007, and provided him a copy of his written performance expectations for the Opportunity Period. *See* R. Ex. 8, P. Ex 2; TR 884. Mr. Dicken had prepared those written expectations after conferring with Ms. Ekstrand; colleague Directors; Sandra Shufelt, human relations specialist in the Human Capital Office; and Mary Giffin, special assistant to Dr. Kanof (TR 161). TR 884-85. Mr. Dicken derived the Opportunity Period expectations from Petitioner’s previous written expectations, which Ms. Ekstrand provided to him. TR 884-85. The specific duties Petitioner was to perform did not change except that an additional but related task of arranging office cubicle locations was included. TR 145 (testimony of Ms. Ekstrand), 397 (testimony of Ms. Crosse), 505-06 (testimony of Dr. Kanof). Mr. Dicken understood what Petitioner’s work entailed because Petitioner had provided support to him during the interval leading up to the Opportunity Period.

TR 885-86. Those expectations were considered reasonable and achievable tasks appropriate for an AC-I (TR 677, testimony of Cynthia Heckmann) and the 60-day period afforded Petitioner a reasonable amount of time to demonstrate that he could perform those tasks in a manner that met expectations. TR 506 (Kanof testimony), 674-678 (Heckmann testimony), 887-88 (Dicken testimony).

33. The volume of work assigned to Petitioner during the Opportunity Period did not change from what it had been previously nor did the demands of the individuals for whom Petitioner performed work. TR 150, 160-61 (Ekstrand testimony). During the Opportunity Period Petitioner was assigned as the primary support person for John Dicken, James Cosgrove, Marcia Crosse, Laurie Ekstrand, John Pendleton and Randy Williamson. TR 910-13 (Dicken testimony); R. Ex. 8; P. Ex. 2 at 1. Messrs. Pendleton and Williamson worked out of GAO field offices and thus, Petitioner provided them with almost no services because they were present in Headquarters only about five days per month. TR 284, 396-97. Nevy Suteerawongsa and Ganita Randolph, two other APSS employees on the HC team, provided support to the other Directors during this time. TR 904-05.

34. During the June 22 meeting, Mr. Dicken orally summarized Petitioner's work expectations and discussed them with him. TR 888. Mr. Dicken also provided Petitioner with performance feedback for the first week of the Opportunity Period. TR 890; *see* R. Ex. 18 at 7. Petitioner did not indicate to Mr. Dicken that he was unaware of what the AC-I Performance Standards were; Mr. Dicken testified that he would have been surprised if Petitioner had been so unaware. TR 883.

35. Upon her return to the office from vacation, Ms. Ekstrand resumed her duties as Petitioner's DPM. Mr. Dicken and Ms. Ekstrand met with Petitioner on July 16, 2007 to provide him performance feedback. TR 178. During the remainder of the Opportunity Period, Ms. Ekstrand and Petitioner held a scheduled weekly meeting to discuss his performance, which was deferred when Petitioner was absent from work. TR 146-47. In addition to these regularly scheduled meetings, Ms. Ekstrand spoke with Petitioner during the course of the week to discuss his performance. TR 147. She made suggestions to help Petitioner complete all of his tasks in a timely fashion. TR 152. Ms. Ekstrand regularly reminded Petitioner that if he were overloaded with work he should inform her so that she could seek to balance his workload. Ms. Ekstrand also counseled Petitioner to verify his work more carefully to assure he was not making errors. TR 146-47, 152.

36. During the Opportunity Period Ms. Ekstrand suggested to Petitioner that he utilize Respondent's intranet or contact its Training Center to explore training; she particularly suggested his training in organizational management and communications. TR 146. Petitioner did not contact Ms. Ekstrand to discuss possible training courses. *Id.* She testified that Petitioner did not follow through on her training suggestions. *Id.* During the Opportunity Period, Ms. Ekstrand regularly inquired of Petitioner and he had not explored his training opportunities. TR 145-46, 257.

37. Ms. Ekstrand determined that Petitioner's performance during his Opportunity Period had failed to rise to an acceptable level. R. Ex. 16. He frequently performed routine

assignments poorly and/or late. R. Ex. 16 at 2; TR 151. Ms. Ekstrand noted that Petitioner: failed to seek help from her or inform her of any work impediments; often failed to deliver work calendars to the correct recipient or in a timely fashion; frequently failed to deliver the mail, although he was charged with doing so on a daily basis; and made an unacceptable number of errors when completing travel vouchers either from carelessness or by failing to apply the proper standard. R. Ex. 16 at 2; TR 151-56.

38. Ms. Ekstrand also recorded that on multiple occasions Petitioner failed to meet his responsibility for answering the HC phones or for arranging coverage by other support staff when he was out of the office. He frequently left his desk without notice or without indicating when he would return. While Ms. Ekstrand instructed Petitioner to provide her with his daily work summaries to monitor and adjust his workload issues, he often failed to provide her those summaries. Moreover, Petitioner declined to act upon Ms. Ekstrand's invitations to approach her for guidance regarding prioritizing his work and resolving related issues. R. Ex. 16 at 2; R. Ex. 20; TR 161-64, 758-59, 979-81.

39. On August 21, 2007, after the conclusion of the Opportunity Period on August 17, 2007, Ms. Ekstrand advised Petitioner that he could provide a self-assessment and accomplishment statement encompassing his Opportunity Period. TR 209-10; R. Ex. 18 at 83. Petitioner did not avail himself of that option. TR 210. Ms. Ekstrand thereupon prepared an Opportunity Period appraisal in which she rated Petitioner, again, "below expectations" in the competencies of Achieving Results and Maintaining Customer Focus. R. Ex. 16. Ms. Ekstrand testified that her appraisal accurately described Petitioner's performance during that period; Petitioner had a fair opportunity and adequate time to demonstrate performance meeting expectations; Petitioner was assigned representative and appropriate work; and Petitioner was not overburdened with work. TR 168, 209-10, 219-20, 299.

40. Petitioner acknowledges that his Opportunity Period appraisal, at the least, substantially reflects his performance. He admits the constancy of his failures regarding: the delivery of Directors' calendars; delivery of mail; preparation of travel vouchers; untimely completion of an assignment to print Highlights pages; preparation of an accurate list of HC staff arranged alphabetically by Band; and his failure to provide daily summaries of his work, as directed. TR 1279-94.

41. The testimony and exhibits establish Petitioner's errors and omissions during the Opportunity Period:

a. Failure to deliver mail for extended periods or misdelivering mail to the HC Directors. R. Ex. 18 at 9, 71-73; TR 398, 400, 426-27.

b. On or around June 18, 2007, making numerous careless errors on a Director's travel voucher and repeating an error even after the Director brought it to his attention. R. Ex. 18 at 1-2; TR 390-94.

c. On four dates between June 19 and August 17, 2007, either failing to deliver calendars to his Directors or delivering a calendar for the wrong date. On one such

occasion Petitioner failed to respond to a calendar request that was the subject of the Director's email sent at 11:30 a.m. R. Ex. 18 at 3, 59-60, 76, 79; TR 204-05, 207, 394-95.

d. Committing careless errors on the preparation of travel vouchers for his Directors on July 19, 23, 31, and August 16, 2007. R. Ex 18 at 36, 40-42, 48, 77; TR 187-90, 401-02, 405-07, 427-30.

e. Failure to timely perform travel related assignments—*i.e.*, assignment on June 18, 2007 still not completed on June 20; August 1 assignment not completed until August 9; failure to prepare a travel estimate assignment on August 3 by close of business on August 6, and still not completing that task until at least August 13. Petitioner also failed to inform the assigning Directors that he would not meet their work completion dates. R. Ex. 18 at 4, 67, 70; TR 398-99, 420-25.

f. On June 21 and 28, July 10, August 1, 14, and 17, 2007, Petitioner absented himself from his work desk without leaving word or for significantly longer than expected, or reported late, without taking appropriate measures to ensure that other support personnel filled in for him in providing phone coverage. R. Ex. 18 at 5-6, 27, 29, 49, 54, 74, 80; TR 174-78, 193, 199-200, 208, 976-79.

g. On the morning of June 22, 2007 Petitioner received an assignment from Mary Giffin, Dr. Kanof's special assistant, to create an Excel Spreadsheet of HC staff with specified delineations by Directors, Assistant Directors and staff. Despite the simplicity and short time period required to complete the assignment Petitioner did not provide the spreadsheet to Ms. Giffin until 4:15 p.m. that day. Petitioner was seen for extended periods that day being nonproductive—chatting with staff and making personal phone calls. When he produced the spreadsheet it was not alphabetized or broken down into the three groups, as he had been instructed. On the following workday, Petitioner continued working on the assignment and produced unacceptable work, despite Ms. Giffin's guidance. Petitioner only produced an acceptable list on his fourth attempt. R. Ex. 18 at 10-25; TR 983-92.

h. On or about July 12, 2007, Ms. Giffin assigned Petitioner to make 15 copies of a document for an upcoming meeting of the HC Managing Director with members of Congress and staff. She provided Petitioner with an exact model of how the 15 copies should be prepared. At 10:30 a.m. that day Petitioner submitted the copies that were off angle on one section, included duplicates of two sections, and had one section that was missing pages because it had not been copied in a double-sided fashion. Petitioner attempted the task again the following morning, but again submitted copies that contained numerous errors. Only after Ms. Giffin instructed Petitioner for the third time did he complete it correctly. R. Ex. 18 at 33; R. Ex. 19; TR 993-1004.

i. Petitioner was tardy in arranging a July 11, 2007 work trip for Ms. Ekstrand. On July 9 Ms. Ekstrand reminded Petitioner to send the order for her travel to the Agency

travel office. Petitioner did not do so and Ms. Ekstrand again had to remind him to perform that task later on the afternoon of July 9. R. Ex. 18 at 28; TR 172-73.

j. On August 2, 2007, Ms. Giffen gave a “Highlights” printing assignment to Petitioner that required him to print approximately 150 pages, which should have taken him a total of 150 minutes. Although Petitioner resisted the assignment on the basis that he was too busy, Ms. Ekstrand investigated his workload and determined that he had ample time to complete the assignment that day. Nevertheless, by 5:30 p.m.—over five hours later—Petitioner had only printed 26 of the Highlights pages. R. Ex. 18 at 56-58; TR 157-58, 264-65. Although Petitioner testified that he had not previously printed Highlights pages his testimony does not establish that it was beyond his experiential level. TR 1160.

k. On July 31, 2007, Christine Brudevold, another HC staff member, asked Petitioner to place a note on her door informing people that she would be late that day. Petitioner did not perform the task. R. Ex. 18 at 43. On August 1, 2007, HC Director Crosse sent Petitioner a message early in the morning asking that he amend an erroneous travel voucher. Petitioner did not respond or acknowledge the request. R. Ex. 18 at 50; TR 194-95. Petitioner did not complete that task until August 9. R. Ex. 18 at 67. On August 3, Ms. Crosse asked Petitioner to prepare a Notice of Visitor form and send it to the Security Office no later than August 6. On August 6, Petitioner had not completed that task and did not report for work; another support staff member had to perform the work. R. Ex. 18 at 64.

l. In the weeks leading up to August 16, 2007, Petitioner was assigned to schedule meetings for the HC Morale Team. However, the announcements Petitioner provided the Morale Team listed a non-existent room number. R. Ex. 18 at 78; TR 206.

II. CONCLUSIONS OF LAW

A. Legal Standard and Burden of Proof

To support removal of an employee for unacceptable performance, the Agency bears the burden of proving that the removal is based upon substantial evidence. 4 C.F.R. §28.61(a)(1); *Pernell v. GAO*, Docket No. 01-03 (03/13/03). Specifically, the Personnel Appeals Board held:

The Board’s decision in *Poole v. GAO* sets out in very clear terms what the Agency must do prior to removing an employee for unacceptable performance. The employee must have been rated below the “acceptable” level in at least one critical job element; the employee must have been given a meaningful and reasonable opportunity period in which to demonstrate “acceptable” performance; and the employee must have received an unacceptable rating for the opportunity period in at least one critical dimension. *Poole v. GAO*, PAB Docket No. 98-01, slip op. at 19 (June 30, 1999), *aff’d en banc*, Mar. 17, 2000, No. 00-6003 (Fed. Cir. 2001) (unpublished). *Poole* sets forth the logical order of events in effecting

a removal action pursuant to GAO Order 2432.1. It is not, however, a prescription for the order of the AJ's analysis.

The Agency's burden of proof in performance-based actions is to show by substantial evidence that after providing a reasonable opportunity to Appellant to demonstrate acceptable improvement, the Appellant continued to perform unacceptably. 4 C.F.R. §28.61(a)(1); *see Hazzard v. Department of the Navy*, 24 MSPR 593 (1984). The Appellant has the burden when alleging that the agency committed a prohibited personnel practice to prove the prohibited personnel practice by a preponderance of the evidence. 4 C.F.R. §28.61(c); 5 C.F.R. §1201.56(a)(2); *see Anderson v. Department of Agriculture*, 9 MSPR 536 (1982).

Pernell, at 9.

In *Poole v. GAO*, addressing the burden of proof in performance removal cases *vis-à-vis* prohibited personnel practice allegations, the Board stated:

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

Poole v. GAO, No. 98-01 (06/30/1999), at 14 (emphasis added).

B. Adequacy of Performance Standards Applied to Petitioner

Petitioner contends that the performance standards which the Agency applied to him did not permit the accurate evaluation of his job performance. Petitioner Brief (hereinafter "P. Br.") at 11. He submits that the standards were not sufficiently precise and specific to invoke a general consensus as to their meaning and content and to provide a firm benchmark to guide his performance. Petitioner illustrates in the following particulars: (1) management did not particularize what would constitute regular monitoring of his emails and voicemails for requests for assistance; (2) while Petitioner was charged with providing administrative/clerical support to a number of individuals, he was provided with no "objective standard" as to what constituted timely completion of tasks; (3) Petitioner was charged with accounting for his whereabouts and availability at all times, whereas his counterparts were not held to such accountability. P. Br. at 11-15. Petitioner concludes that, because the performance standards as applied to him did not

⁴ Petitioner argues that GAO's alleged application of impermissibly vague performance standards to him, its failure to communicate the performance standards to him and to afford him a meaningful opportunity to improve his performance, are substantive rights not subject to the harmless error standard. Petitioner allocates to the Agency the burden to prove with substantial evidence that it complied with those requirements. While *Poole* (and *Pernell v. GAO*, No. 01-03 (03/13/2003), at 9) may suggest that those claims constitute affirmative defenses subjecting Petitioner to proof by a preponderance of evidence, for purposes of this analysis I consider the burden of proof as that of Respondent.

permit the accurate evaluation of his job performance, his removal should be overturned under the authority of 5 U.S.C. §4302, which prescribes that an agency’s performance appraisal system shall provide for “[p]erformance 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 for each employee or position under the system.” P. Br. at 15; *see* 5 U.S.C. §4302(b)(1).

GAO submits that an agency’s performance standards will satisfy 5 U.S.C. §4302(b)(1) if they are “reasonable, sufficient in the circumstances to permit accurate measurements of the employee’s performance, and adequate to inform the employees of what is necessary to achieve a satisfactory or acceptable rating.” Moreover, in evaluating compliance with that obligation, Respondent argues, it is relevant to consider whether the Agency provided any information to the employee to flesh out the standards. Respondent Brief (hereinafter “R. Br.”) at 39-40 (*citing Wilson v. DHHS*, 770 F.2d 1056 (Fed. Cir. 1985)); *Depauw v. ITC*, 782 F.2d 1564, 1566 (Fed. Cir. 1986)).

The Agency represents that the controlling AC-I Performance Standards “standing by themselves, are reasonable, sufficient to permit accurate measurements of employee performance, and adequate to inform the employees of what is necessary to achieve a satisfactory or acceptable rating.” R. Br. at 41. Respondent illustrates by interpreting the performance standards under Achieving Results for employees to “prioritize[] and balance[] work demands to complete tasks” as requiring that employees complete their assigned tasks and work with their supervisors should they have competing demands. R. Br. at 43.

GAO notes that the performance standards were reinforced when management provided Petitioner with written expectations at the beginning of both the out-of-cycle and Opportunity appraisal periods; and when his temporary Designated Performance Manager and permanent Designated Performance Manager met with him on an ongoing basis throughout those rating periods to discuss his performance, advised him if there were problems with his performance, and offered him suggestions on how to improve his performance. R. Br. at 44.

Under the statutory scheme Congress established for taking performance-based actions against federal employees, the performance standards created by an agency should “to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of **objective** criteria.” 5 U.S.C. §4302(b)(1) (emphasis added); *Boyd v. Department of Navy*, 88 MSPR 435, 439-40 (2001). Thus, performance standards should be specific enough to provide an employee with a “firm benchmark” toward which to aim his or her performance. *See Boyd*, 88 MSPR at 439. A performance standard should include a measurable standard that is sufficiently precise to let a supervisor make a verifiable decision regarding an employee’s performance. *DiPrizio v. Department of Transportation*, 88 MSPR 73, 77-78 (2001). Where a performance standard does not provide a specific benchmark or an “objective basis” against which to measure performance, as required by the statute, such lack of specificity may be cured by providing an employee with clear guidance of expectations through other oral and written instruction. *Thompson v. Department of the Navy*, 89 MSPR 188, 195 (2001); *DiPrizio*, 88 MSPR at 78. Moreover, the degree of objectivity and specificity required in a performance standard depends on the job involved. *DiPrizio*, 88 MSPR at 77; *Greer v. Department of the Army*, 79 MSPR 477, 483

(1998). Because some professional or technical jobs are not susceptible to a mechanical judgment-free rating system, performance standards for such positions may allow for a degree of subjective judgment that would not be proper for a position of a less professional or technical nature. *Greer*, 79 MSPR at 484.

GAO removed Petitioner for failing to meet expectations in the Band I level competencies of Achieving Results and Maintaining Customer Focus as set forth in Respondent’s Exhibit 2 (at 3-4). These are quoted below:

<u>Achieving Results</u>		<u>Maintaining Customer Focus</u>	
<u>Activity</u>	<u>Meets Expectations</u>	<u>Activity</u>	<u>Meets Expectations</u>
Identifies outcomes and approaches to achieve results.	With guidance, uses approaches defined by others to achieve quality, timely results.	Provides products and services to customers to meet their needs.	With guidance, provides quality and timely products and service to customers in routine situations.
Prioritizes and balances work demands to complete tasks.	Performs routine and straightforward tasks that are prioritized with supervisor or senior staff.	Works with customers to understand their needs, set expectations, and keep them informed.	Works with supervisor to understand customers’ needs; keeps supervisor informed of progress.
Anticipates obstacles and addresses them.	With guidance, addresses routine obstacles affecting own work.		
Performs assignments in accordance with GAO, other government, and industry policies and standards.	With guidance, applies policies and standards to perform routine and straightforward tasks.	Resolves issues or conflicts with customers to achieve positive outcomes.	Works with supervisor to resolve routine and straightforward issues with customers.

At the outset of Petitioner’s Opportunity Period covering June 18 – August 17, 2007, the Agency, through HC Director John Dicken, provided Petitioner with “Damian’s Expectations During Opportunity Period.” R. Ex. 8. Those expectations informed Petitioner for whom he was to provide support services. The document additionally states:

To meet expectations for achieving results, it is necessary for you to **almost always** perform these expected tasks accurately and on a timely basis. To meet expectations for **maintaining customer focus** you need to **almost always** provide

support to the Directors as requested in a timely and accurate manner, including clarifying if there is uncertainty in deadlines or priorities.

R. Ex. 8 at 1 (emphases added).

The written expectations included five daily requirements relating to: (1) maintaining the copy room; (2) maintaining and distributing the Directors' calendars; (3) distributing mail and incoming reports to Directors; (4) covering the HC Team's phones and ensuring alternate coverage from other support persons when Petitioner was unavailable; and (5) providing a daily end-of-the-day summary of his work activities that listed any uncompleted assignment. *Id.*

The written expectations also charged Petitioner, as requested, to: (1) cover a colleague's desk and phones; (2) make meeting arrangements; (3) prepare travel orders and vouchers; (4) make van reservations promptly and for the correct time; (5) make GAO visitor arrangements promptly and accurately; (6) remain at his desk except when work required him to be away; (7) print and scan documents; (8) ensure copiers were in working order, and arrange for repairs and notify users if in disrepair; (9) arrange workplace cube locations; and (10) take on additional responsibilities, as assigned. *Id.*

Finally, the written expectations required Petitioner to: (1) remain at his desk except when work required him to be away; (2) regularly monitor e-mail and voice mail for requests for his assistance; (3) always leave a visible note on his desk when away, specifying his whereabouts and when he would return to his desk; (4) ask for work when running out of tasks and speak with Ms. Ekstrand or Mr. Dicken to obtain priorities if overloaded with tasks; (5) ensure that all work was done on time and correctly; and (6) work a full eight-hour day. *Id.* at 2.

The above-quoted GAO APSS Performance Standards and Rating Categories for the Administrative (AC) Pay Plan, Band I, for Achieving Results and Maintaining Customer Focus are generic and are tightly worded to require that the described activity occurs "almost always." See R. Ex. 2 at 11. "Meets expectations" is the expected rating at an individual's Band level; "almost always" is defined as "happening nearly all the time." *Id.* at 11. Moreover, "meets expectations" allows for the rated employee to achieve successful performance as a result of close collaboration and support from his or her supervisor. The higher rating of "role model" is awarded, generally, when the employee successfully performs "independently." This is not so strict a standard as to require perfect performance, *i.e.*, it does not fall within the bounds of absolute—inherently unattainable—standards. See *Jackson v. Department of Veterans Affairs*, 97 MSPR 13, 17 (2004) (recognizing proscribed absolute standard as one "under which a single incident of poor performance will result in an unsatisfactory rating on a critical element").

Further, in my view, the written expectations provided to Petitioner added descriptive detail to what was required under the aforementioned APSS standards—they explicitly informed him of what he was to do on a daily basis and on request. Moreover, they imposed the requirement that he perform those tasks in a timely and accurate manner "almost always." While "almost always" arguably may suggest near perfection, that standard is tempered by the expectations' prescription to Petitioner: "if you get overloaded talk to Laurie or me about priorities." R. Ex. 8 at 2.

Therefore, the performance standards permitted a reordering of Petitioner's priorities so that he not be faulted for untimely work that was beyond his control.

Accordingly, I conclude that Petitioner's performance standards, as fleshed out by GAO's written expectations, were reasonable and attainable; they provided Petitioner a fair benchmark to guide his performance. *See Baker v. Defense Logistics Agency*, 782 F.2d 1579, 1583 (Fed. Cir. 1986); *Ali v. Department of Navy*, 2009 MSPB LEXIS 7932 at 5-6 (Dec. 3, 2009).

C. Whether GAO Effectively Communicated the Performance Standards to Petitioner

Petitioner argues that the Agency did not communicate the performance standards to him at the beginning of his appraisal period or at any time material to this removal action. He further contends that under the controlling legal principles such a failure constitutes a fatal flaw in the removal action. P. Br. at 15, 20-21.

GAO submits that Petitioner should have been—and was—aware of his performance standards during his out-of-cycle and Opportunity rating periods. Particularly, the Agency contends that 5 U.S.C. §4302(b)(2) “relates only to an employee’s awareness of the standards, and does not represent a requirement that an employee’s supervisor physically hand a hard copy of pre-existing standards to an employee every time a new appraisal period begins.” R. Br. at 34.

I do not find it necessary to determine whether Petitioner had constructive knowledge of his performance standards, as Respondent contends. As determined in ¶30 of the *Additional Findings of Fact, supra*, GAO did in fact provide Petitioner with his performance standards prior to and at the outset of his Opportunity Period. Accordingly, the statutory requirement has been met. Moreover, I conclude that the requirement was again met when the Agency provided Petitioner with his complete, specific and clarifying written work expectations at the commencement of his Opportunity Period.

D. Whether Petitioner Had a Reasonable Opportunity to Improve his Performance

Even when an agency demonstrates that an employee’s performance was unacceptable, if it does not show the employee was provided a reasonable opportunity to improve, the action will not be sustained. *Chang v. Department of Educ.*, 30 MSPR 160, 161 (1986). To show the employee received a *bona fide* opportunity to improve performance before proposing removal, an agency must prove that the employee knew the standards against which the performance would be measured, that he or she was adequately instructed on how to perform his or her duties, and that he or she had a reasonable time in which to improve performance. *Jones v. National Gallery*, 36 MSPR 602, 604, *aff’d*, 864 F.2d 148 (Fed.Cir. 1988).

Petitioner contends that, assuming GAO had effectively communicated the performance standards to him, it failed to provide him a reasonable opportunity to improve because it did not provide him any assistance. Petitioner supports his contention with the following assertions: (1) the Agency placed Petitioner in the Opportunity Period just as his supervisor was leaving on an “extended” vacation, assigning him to be supervised by someone who had little familiarity with his work; (2) GAO did not provide Petitioner with timely expectations, and even after they were

provided, those expectations imposed different obligations and conditions than those stated in the expectations; (3) Ms. Ekstrand's feedback sessions with Petitioner were highly critical and non-constructive; (4) despite knowing that Petitioner was suffering migraine headaches that affected his ability to cope, the Agency "allowed him to receive work assignments from multiple individuals who did not even have to advise his supervisor of what assignments they had given him;" (5) GAO offered him no specific training and purportedly denied his request to take time-management training; and (6) Ms. Ekstrand set Petitioner up to fail his Opportunity Period. P. Br. at 25-30.

GAO replies that it was not legally obligated, as Petitioner concedes (P. Reply Br. at 14), to provide Petitioner with formal training during the Opportunity Period. R. Br. at 56. The Agency submits that it did not err by having John Dicken serve as Petitioner's supervisor for the first segment (14 or 21 days, as Respondent and Petitioner contend, respectively) of Petitioner's sixty-day Opportunity Period. GAO notes that Mr. Dicken was familiar with Petitioner's work and that Petitioner has not shown how he was prejudiced by Mr. Dicken's supervision. R. Response Br. at 14-15. Respondent alludes to Mr. Dicken providing Petitioner with appropriate guidance setting and discussion for his performance and performance feedback. The Agency points to record evidence disclosing Ms. Ekstrand's *bona fides* regarding the Opportunity Period, particularly her confirmation that Petitioner was not overburdened by his work assignments and that on only one occasion, involving the reproduction of Highlight pages, did Petitioner ever advise Ms. Ekstrand that he was too busy to accept an assignment. *Id.* at 15.

In reviewing the record, I am constrained to conclude, even applying a preponderance of the evidence standard, that GAO afforded Petitioner a meaningful opportunity to improve his performance during his Opportunity Period. *See Additional Findings of Fact, supra*, ¶¶30-36. Specifically, Mr. Dicken and Ms. Ekstrand provided Petitioner with appropriate written and oral guidance on a regular basis calculated to afford him a full opportunity to improve his performance to the acceptable level. They subjected him to a manageable workload and they had no reason to believe it was otherwise. Although they may not have been aware of each and every task given to Petitioner by those for whom he provided administrative support, Petitioner was under instruction to inform Mr. Dicken or Ms. Ekstrand when he was pressed so that they could prioritize his work. The fact that Petitioner only availed himself of that opportunity once belies his claim that he was being overworked.

Accordingly, I conclude that GAO complied with its obligation to afford Petitioner a fair and meaningful Opportunity Period to improve his performance.

E. Whether Petitioner Met Expectations for Achieving Results and Maintaining Customer Focus During the Opportunity Period

As recently as the rating period covering February 1, 2006 to October 14, 2006, Ms. Ekstrand rated Petitioner's performance as "meets expectations" in all seven job competencies. *Additional Findings of Fact, supra*, ¶18. Soon thereafter Petitioner experienced frequent attendance problems and Ms. Ekstrand noted that Petitioner's performance had seriously declined, necessitating that she meet with and counsel him. *Additional Findings of Fact, supra*, ¶¶19, 21-22. Accordingly, this coupled with Petitioner's out-of-cycle rating and his placement in

an Opportunity Period, clearly signaled Petitioner that he was not being faulted for a level of performance that was previously deemed acceptable by his supervisors.

Having found that Petitioner's performance standards were legally sufficient and properly provided to him, and that the Agency afforded him a meaningful opportunity to demonstrate acceptable performance, the remaining question is whether GAO has presented substantial evidence that Petitioner's performance during his Opportunity Period did not meet expectations in the competencies of Achieving Results and Maintaining Customer Focus. I conclude that the record plainly answers that question in the affirmative, thus warranting the sustaining of Petitioner's removal.

GAO points out that Petitioner admitted on the stand to a majority of work deficiencies attributed to him during his Opportunity Period. R. Br. at 47-48 (*citing* R. Statement of Facts ¶¶38, 52). I find that the record testimony and exhibits support Petitioner's candor and that the testimony of management witnesses renders it plausible that Petitioner was responsible for even those work flaws for which he has not accepted responsibility.

I am not persuaded by Petitioner's testimony that he was overworked and overwhelmed by tasks given to him by various HC Team Managers and Assistant Managers. The evidence instead establishes that Petitioner's performance deficiencies were a product of his frequent and unjustifiable departures from his work station and his display of a degree of carelessness that his work had not previously featured. For whatever reason personal to Petitioner, he was not willing or able to perform at an acceptable level during his Opportunity Period.

The record is replete with Petitioner's unacceptable performance record during the Opportunity Period. *See Additional Findings of Fact, supra*, ¶¶40, 41. I find those numerous and serious instances fully justify the two "below expectations" ratings he received for his performance during the Opportunity Period.

Accordingly, GAO has established the basis for Petitioner's removal with substantial evidence.

CONCLUSION

Based upon the foregoing, and the record as a whole, I find that the Agency has proven by substantial evidence that Petitioner's performance was unacceptable and that his removal from his employment with Respondent should be sustained.

SO ORDERED.