

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE**

ROBERT L. WILSON,
Appellant,

DOCKET NUMBER
DE-0432-12-0130-I-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: January 25, 2012

ORDER

The agency separated the appellant from the federal service based upon unacceptable performance. For the Board to sustain an agency's action under 5 U.S.C. Part 43, the agency must show by substantial evidence that: (1) the appellant's performance failed to meet the established performance standards in one or more critical elements of his position; (2) the agency established performance standards and critical elements and communicated those to the appellant at the beginning of the performance appraisal period; (3) the agency warned the appellant of the inadequacies of his performance during the appraisal period and gave him an adequate opportunity to improve; and (4) after an adequate improvement period, the appellant's performance remained unacceptable in at least one critical element. *See Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250, 255 (2008); *Mahaffey v. Department of Agriculture*, 105 M.S.P.R. 347, ¶ 7 (2007) (citing *Lovshin v. Department of the Navy*, 767 F.2d 826, 834 (Fed. Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1111 (1986); and *Harvey v. Department of the Navy*, 65 M.S.P.R. 120, 124 (1994)).

The agency also has the burden of proving that the Office of Personnel Management (OPM) has approved the agency's performance appraisal system if the appellant specifically raises such a challenge, but the appellant did not raise this issue in the instant case. *See Daigle v. Department of Veterans Affairs*, 84 M.S.P.R. 625, ¶¶ 11-12 (1999).

Where an employee is removed on the basis of fewer than all the components of a performance standard for a critical performance element, the agency must present substantial evidence that the employee's performance warranted an unacceptable rating on the performance element as a whole. *Leonard v. Department of Defense*, 82 M.S.P.R. 597, ¶ 6 (1999).

Substantial evidence is that degree of evidence which a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. 5 C.F.R. § 1201.56(c)(1). In other words, the agency is not required to provide evidence regarding the appellant's performance that is more persuasive than that presented by the appellant. *See Leonard*, 82 M.S.P.R. 597, ¶ 5.

To facilitate the processing of this appeal, I **ORDER** the appellant to respond to the following questions no later than **Friday, February 3, 2012 (receipt date)**. A detailed answer is not required, a yes or no to each question is sufficient.

1. Whether he is challenging whether OPM approved the agency's performance appraisal system.
2. Whether he is challenging the validity of his performance standards.
3. Whether he is claiming he was not warned through a performance improvement plan that there were inadequacies in his performance.
4. Whether he is challenging whether he was provided a reasonable opportunity to improve his performance.
5. Whether he is claiming his performance in fact was at an acceptable level.

I will discuss the appellant's responses at the February 6, 2012 status conference.

FOR THE BOARD:

_____/S/_____
Patricia M. Miller
Administrative Judge
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