COMMENTS BY PETER BROIDA
ON OPM PROPOSED RULES
OF JANUARY 4, 2022
87 FED. REG. 200

REQUIREMENTS OF 5 U.S.C. CHAPTER 43
PERFORMANCE-BASED ACTIONS
EFFECT OF *SANTOS V. NASA*

RIN 3206-A023

OPM seeks to overrule a statute by regulation.

The PIP proves an effective tool for removing or demoting substandard performers if the agency takes the time and effort to meet the statutory prerequisites of an approved appraisal system, provide appropriate performance standards, and offer adequate supervisory assistance during the PIP. The PIP is effective because, properly employed, the agency prevails by the lowest quantum of proof—substantial evidence—and the MSPB is stripped of mitigation authority. A properly-structured performance case is tough to beat.

Before the PIP (or opportunity period) may be imposed and the employee be subjected to what amounts to a brief probationary period, there's another statutory requirement: that the PIP be imposed only after continuing poor performance by the employee. This requirement provides some safeguard against PIPs hastily imposed or imposed by new supervisors. Yes, without that requirement, bad faith may be a defense to a Chapter 43 action. But bad faith is difficult to prove, given the discretion accorded agencies by MSPB in the design and subjective interpretation and application of performance standards.

The statutory requirement of proof of substandard performance leading to the PIP is expressed in 5 USC 4302:

> (c) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for—
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> (1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;
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> . . .
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> (6) reassigning, reducing in grade, or removing employees who

> *continue to* have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

The quoted language is unchanged (but renumbered in the US Code) from its inception in Pub.L. 95-454, 92 Stat. 1132-33, the 1978 Reform Act.

Had the statutory framers sought to avoid examination of pre-PIP performance, omission of two words would have sufficed. Inclusion of the language demonstrates the opposite intent.

The earliest MSPB decision that considered whether examination of pre-PIP performance is required is *Wilson v. Dept. of Navy*, 24 MSPR 583 (1984).

Wilson was incorrectly decided because *Wilson* misquoted or misread the statute.

The error is readily identified. In *Wilson*, MSPB stated:

> 5 U.S.C. § 4302(b)(6) provides that employees may be removed or demoted due to unacceptable performance, but only after an opportunity to demonstrate acceptable performance.
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> . . .
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> The presiding official agreed that appellant did make "errors" during this period. I.D. at 6. However, the presiding official apparently determined that the agency had to establish, by substantial evidence, that appellant was performing unsatisfactorily prior to the issuance of the letter of requirement in order to sustain the demotion.
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> We can find no statutory or regulatory basis to support the presiding official's conclusion concerning such a showing. In the instant case, the agency issued appellant a letter notifying him of the need to improve his performance, and afforded appellant ample opportunity and assistance to make such improvement.

The reason the Board found no statutory basis to support the presiding official's decision was because the Board improperly synopsized the statute by leaving out those two words—"*continue to*"—have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

The error multiplied upon its kind:

> *Stewart v. Dept. of Air Force*, 35 MSPR 622, 625 (1987) (relying on *Wilson*);
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> *Brown v. VA*, 44 MSPR 635, 640 (1990) (relying on *Wilson*);

Clifford v. USDA, 50 MSPR 232, 234 n.1 (1991) (relying on *Wilson* and *Brown*);

Wright v. Dept. of Labor, 82 MSPR 186, 191–92 ¶ 12 (1999) (relying on *Brown* and *Clifford*);

Thompson v. Dept. of Navy, 89 MSPR 188, 196 ¶ 19 (2001) (relying on *Wilson*).

Long and short: *Wilson* erred; the error repeated.

Until *Santos*.

Fernando Santas was fired by NASA from his job as a mechanical engineer after a PIP. Unsuccessfully, Santos sought protection through an appeal to the MSPB's Atlanta office. Based on *Wright*, *supra*, the AJ rejected the contention that the agency was required to demonstrate unacceptable performance before imposing a PIP. *Santos v. NASA* (MSPB ID AT-0432-19-0074-I-1 [May 21, 2019]).

Undeterred, Mr. Santos sought respite at the Federal Circuit.

And the higher authority accepted his argument that the Chapter 43 action failed for lack of demonstration of unacceptable pre-PIP performance, *Santos v. NASA*, 990 F.3d 1355, 1361- (Fed. Cir. 2021):

> . . . Section 4302(c) contains six subsections that detail what must comprise an agency's performance appraisal system. Subsections (c)(5) and (c)(6) advise how an agency's performance appraisal system should handle "unacceptable performance." An agency's performance appraisal system should provide for "assisting employees in improving unacceptable performance," 5 U.S.C. § 4302(c)(5), as well as "reassigning, reducing in grade, or removing employees who *continue to* have unacceptable performance but only after an opportunity to demonstrate acceptable performance," 5 U.S.C. § 4302(c)(6) (emphasis added). Agencies usually provide employees "an opportunity to demonstrate acceptable performance" by placing them on a PIP. *See Harris* , 972 F.3d at 1311.
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> Thus, Section 4302(c)(6) makes clear that an agency is only allowed to "reassign[ ], reduc[e] in grade, or remov[e] employees who *continue to* have unacceptable performance" during a PIP. 5 U.S.C. § 4302(c)(6) (emphasis added). To "continue to have unacceptable performance" during the PIP, as the statutory text requires, an employee must have displayed unacceptable performance prior to the PIP. Under the plain meaning of the statute, then, an agency must defend a challenged removal by establishing that the employee had unacceptable performance before the PIP and "continue[d] to" do so during the PIP.

The Court noted supportive OPM regulatory commentary from 2020, explaining that:

> OPM's statement accords with our understanding that Section 4302(c)(6) requires agencies to justify a challenged post-PIP-based removal by establishing the propriety of the PIP in the first instance.
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> *Id*.

What controls is the Circuit's recognition of the plain language of the statute. That OPM's construction accords is not controlling, and a current expression of discord by OPM does not vary the statute's requirements. That it took years for the Board's original error in statutory construction to be corrected does not make it any less an error.

There's no ambiguity. MSPB error does not statutory ambiguity create. The language of a statutory provision must be regarded as conclusive unless there is a clearly expressed legislative intent to the contrary. *CPSC v. GTE Sylvania*, 447 U.S. 102 (1980). "If the statutory language is plain and unambiguous, then it controls" the inquiry. *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1320 (Fed. Cir. 2003) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

Unless and until OPM, by reconsideration petition or otherwise, secures a contrary precedential decision from the Federal Circuit (or, whenever it is reconstituted, MSPB), OPM is bound by the Circuit's interpretation of the Reform Act. Or, OPM may seek legislative revision.

OPM, to conform with the law, and to avoid a likely successful challenge to a contrary regulation, must incorporate the requirement of a demonstration of pre-PIP unsuccessful performance into its revisions of 5 CFR 432.104-105.

We add that the requirement is not onerous. A PIP will likely be imposed only after an employee receives an unsatisfactory rating or a negative ALOC determination, after well-documented comments about substandard performance in email exchanges with a supervisor, or through a supervisor's markup of work product. And so it should be. The rigor and stress of a PIP should not be first imposed on an employee whose performance is sustained over a substantial period of time at an acceptable level.