THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ILBAY OZBAY,	)	OEA Matter No. 1601-0073-09
Employee	)	
	)	Date of Issuance: July 23, 2012
	)	
DEPARTMENT OF TRANSPORTATION,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Ilbay Ozbay ("Employee") worked as a Civil Engineer with the Department of Transportation ("Agency"). On November 18, 2008, Agency issued a notice of final agency decision, removing Employee from his position for unsatisfactory work performance.[1] On January 22, 2009, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). He argued that he performed his duties in a satisfactory manner despite Agency's failure to assist him with his goals as obligated. Therefore, Employee requested that he be

[1] Agency conducted an unscheduled/unofficial performance evaluation for Employee from April 1, 2007 through March 31, 2008. It initiated the evaluation because of Employee's alleged "deficient job performance in several areas of responsibility." Employee subsequently received an unsatisfactory rating during this period. As a result of his unsatisfactory rating, Employee received a Letter of Warning from Agency that his performance failed to meet the minimum requirements for his position. Employee was provided 90 days to improve his performance to a satisfactory level. However, according to Agency, at the end of the 90-day period, Employee failed to achieve the goals set and an advanced written notice was executed to terminate his employment. *Agency's Answer to Employee's Petition for Appeal,* p. 2-3 (April 17, 2009).

reinstated to his position.[2]

Agency responded to Employee's Petition for Appeal on April 17, 2009. Agency explained that it did assist Employee with reaching his goals as outlined in his Letter of Warning.[3] It asserted that the evidence proved that Employee failed to perform his duties satisfactorily. Therefore, Agency requested that Employee's termination be upheld.[4]

On October 7, 2010, the OEA Administrative Judge ("AJ") conducted an evidentiary hearing. The AJ considered testimony from Employee and Agency witnesses before issuing his Initial Decision on March 18, 2011. He found that Agency had cause to remove Employee from his position. The AJ reasoned that Agency relied on the sworn testimony of three witnesses and several disciplinary action documents in reaching its decision. He held that Agency witnesses credibly provided that Employee failed to properly handle and monitor two job projects that were under his guidance during his evaluation period. According to the witnesses, Employee also failed to visit job sites; failed to keep a daily work diary of his projects; and failed to create work-related reports as directed. Moreover, the witnesses provided that Employee was tardy for work regularly and abused sign-in records to conceal his time and attendance issues. Because Employee's position description highlighted these tasks as significant to Employee's role, the AJ

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[2] *Petition for Appeal,* p. 3 (January 22, 2009).
[3] Agency's Letter of Warning tasked Employee with improving the following areas:

1. Take responsibility for projects as a project manager;
2. Monitor construction activities and submit daily diary and construction reports;
3. Work with construction managers to complete projects and prepare required documents needed for the execution and continuation of projects;
4. Improve his ability to review contract documents, plans, and specifications; resolve construction-related issues; and file documentation for fast and easy reference;
5. Communicate and interact with other employees in a respectful and professional manner; and
6. Cordially work with other employees as a team player.

Agency's Answer to Employee's Petition for Appeal, p. 3 (April 17, 2009).
[4] *Id.* at 4.

held that Agency had cause to remove him.[5]

The AJ relied on D.C. Personnel Manual ("DPM"), Chapter 14, Sections 1414.2 – 1414.5 to determine that Agency took the appropriate steps in removing Employee on the basis of an unsatisfactory performance rating. He also found that Agency properly served the Letter of Warning along with the Performance Improvement Plan. The AJ held that although the Letter of Warning provided by Agency was unsigned, one of Agency's witnesses credibly testified that the original letter was signed and personally served upon Employee.[6]

Employee filed a Petition for Review on April 27, 2011. He disagreed with the AJ's holding and argued that the Letter of Warning was not signed by him or his supervisor. He went on to provide that under the DPM, an unsigned letter of warning cannot serve as the basis for establishing notice.[7] Employee contended that he raised this issue on appeal in his Pre-hearing Statement. As a result, he preserved this argument on appeal before the OEA Board. It is Employee's position that because Agency did not provide a signed copy of the Letter of Warning, it could not prove that he actually received the document. Employee claims that he saw the Letter of Warning for the first time after he was terminated. He also argues that Agency did not prove through proper documentation that it utilized progressive discipline before terminating him for unsatisfactory work performance. Therefore, Employee reasoned that the AJ's ruling was not supported by substantial evidence.

The AJ found that Agency adequately proved, by preponderance of the evidence, that Employee's work was unsatisfactory based on DPM Chapter 14, Sections 1414.2 – 1414.5.

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[5] *Initial Decision*, p. 10-11 (March 18, 2011).
[6] *Id.*, 11-13.
[7] Employee claimed that the Hearing Officer provided that a supervisor must produce a signed Letter of Warning for it to be deemed valid. Moreover, he noted that the dates provided on the Letter of Warning listed the wrong rating period of April 1, 2004 – March 31, 2004. The actual rating period was from April1, 2007 through March 31, 2008.

However, as explained below, it appears that the AJ used the wrong regulation in reaching his decision. Part II, DPM Chapter 14 is the regulation applicable to the current matter. In accordance with OEA Rule 633.3(B) ". . . The Board may grant a petition for review when the petition establishes that the decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation, or policy." We have decided to remand this matter to the AJ to reconsider the facts of the case as it relates to the proper regulation.

History of the D.C. Performance Evaluation System

The District of Columbia Department Human Resources, formerly known as the District of Columbia Office of Personnel, drafted regulation on December 31, 1979, creating the government's performance rating plan.[8] This system was known as the Performance Evaluation System ("PES"). Agencies who evaluated employees under this system were required to follow Part II of Chapter 14 of the District Personnel Manual.[9]

On July 7, 2000, the Department of Human Resources created a new system known as the Performance Management Program ("PMP").[10] The regulation applicable to this system is DPM Chapter 14, the regulation referenced by the AJ. Although the PMP system was in place during Employee's performance rating period, there were many employees within the government to whom the PMP system did not apply. As a result, those employees were still to be evaluated under the PES.[11] Employee is one of those persons to which the exception applied,

[8] *See* 28 District of Columbia Register 3806 (August 28, 1981)
[9] *See* 28 District of Columbia Register 3806 (August 28, 1981) and *Part II, Implementing Guidance and Procedures, Chapter 14, Performance Evaluation* (May 23, 2003). These documents are no longer available online; they were retrieved from the archives at the Department of Human Resources and the D.C. Office of Documents and Administrative Issuances.
[10] *See* 47 DCR 5560 (July 7, 2000).
[11] *See Part II, Implementing Guidance and Procedures, Chapter 14, Performance Evaluation* (May 23, 2003) and 52 District of Columbia Register 1302 (February 11, 2005). Specifically, Section 1401.1 provides the following:

as evidenced by the advanced written notice of proposed removal provided by Agency. Agency makes specific reference to Part II of Chapter 14 as the performance system used to evaluate Employee.[12] Moreover, copies of Employee's evaluations are labeled "Performance Evaluation System" and include a Letter of Warning.[13] The Letter of Warning was discontinued under the PMP system.

Thus, it is well established that Employee was evaluated by Agency using the Performance Evaluation System bound by Part II, DPM Chapter 14. However, the AJ improperly used the PMP system and its applicable regulation when conducting his analysis of Employee's appeal. This is evidenced in the rating language used by the AJ in his Initial Decision. His analysis considers ratings including "does not meet expectations" or "needs improvement." The rating choices that were applicable in Employee's case were "unsatisfactory," "satisfactory," "excellent," or "outstanding." Therefore, we are remanding this matter to the AJ to determine if the outcome would differ given an analysis of the Performance Evaluation System and its applicable regulation.

Letter of Warning

In applying Part II, DPM Chapter 14, the AJ should reconsider Agency's Letter of

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> The provisions of this chapter shall not apply to the following employees, who continue to be covered by the performance evaluation system that was in effect on December 31, 1979:
> (a) Non-supervisory and non-managerial employees in the Career Service, Except as specified in section 1400.1(e) of this chapter;
> (b) Unionized employees in the Career Service; and
> (c) Employees in the Excepted Service other than those appointed under The authority of section 903 of the CMPA (D.C. Official Code § 1-609.03) (2002 Supp.), or as Capital City Fellows under the authority of Section 904(6) of the CMPA (D.C. Official Code § 1-609.04(6))(2001).

Section 1401.2 went on to provide that "the performance evaluation system that was in effect in December 31, 1979 is the system set forth in Part II of Chapter 14 of the District Personnel Manual."

[12] *Agency's Answer to Employee's Petition for Appeal,* Exhibit A (April 17, 2009).

[13] *Agency's Answer to Employee's Petition for Appeal,* Exhibits D,E, and F (April 17, 2009).

Warning to Employee. Because DPM Chapter 14, Sections 1414.2 – 1414.5 did not discuss the Letter of Warning, the AJ must determine if Agency adhered to the requirements of providing a valid Letter of Warning to Employee pursuant to Part II, DPM Chapter 14, Subpart 2.5(D) and (E)(1) and Subpart 1.10(1). These subparts must be read in conjunction with the DPM Instructions for Completing the Letter of Warning Template.

The Letter of Warning Template Instructions provide that "since an unsatisfactory rating may carry negative consequences , including . . . removal . . ., it is essential that a supervisor who decides to begin this process follow the procedures outlined in Part II of Chapter 14 of the DPM very closely. The following *Letter of Warning* template is provided to help supervisors comply with these procedures." The Instructions go on to provide that the purpose of the Letter of Warning is to "ensure that an employee whose job performance fails to meet the minimum requirements of the position is given a fair opportunity to improve his/her performance before the employee receives an 'Unsatisfactory' rating. Since an 'Unsatisfactory' rating may carry negative consequences, including demotion, removal, or a delayed salary step increase, it is essential that a supervisor who decides to begin this process follow the procedures outlined in Part II of Chapter 14 of the District Personnel Manual (DPM) very closely." The instructions are as follows:

> After you have completed the unofficial performance evaluation, you are ready to draft the *Letter of Warning*. In order to produce a valid *Letter of Warning*, you must complete each of the following steps:
>
> 1. Complete the employee information section at the top of the page so that it matches the unofficial *Report of Performance Rating* (P.O. Form 12).
> 2. Next to "Date Issued," provide the date that the *Letter of Warning* will be given to the employee.
> 3. In the "Which specific job requirements are not being met satisfactorily" column, highlight each factor that was rated "Unsatisfactory" on the unofficial *Report of Performance Rating* (P.O. Form 12).

4. In the "What can the employee do to bring his/her performance up to Satisfactory level" column, explain in detail what the employee can do to bring his/her performance up to a satisfactory level.
5. In the "What efforts will be made to assist the employee to improve his/her performance" column, explain what types of assistance will be provided to the employee to help him/her to improve performance.
6. Sign the *Letter of Warning*.
7. Photocopy the unofficial *Report of Performance Rating* (P.O. Form 12) and *Letter of Warning* for your records.
8. Meet with the employee so that you may provide him/her with the unofficial *Report of Performance Rating* (P.O. Form 12) and the *Letter of Warning* and discuss performance expectations.

If the AJ determines that Agency failed to follow the Letter of Warning Instructions, then they must determine if Part II, DPM Chapter 14, Subpart 2.5(G) applies.

Documents Within the Scope of Rating Period

As it pertains to the documents provided by Agency, the AJ should consider if there was enough evidence provided during the rating period to uphold the decision to remove Employee. The AJ went to great length to highlight the testimonies provided by Agency witnesses regarding Employee's performance. However, it appears that many of the documents presented by Agency were dated after the rating period in question. Subpart 2.5(B) provides the following:

> No employee shall be rated deficient with regard to any work requirement that was not in effect during the rating period, not known by the employee, or which the employee had not been given fair opportunity to meet.

Further, Part II, DPM Chapter 14, Subpart 1.5(A) provides that "employees are to be rated for the period which begins on April 1 of each year and ends on March 31 the following year."

Part II, DPM Chapter 14, Subpart 1.8(3) explains that agencies have the responsibility to create and maintain documentation that is used to support performance evaluations. This section provides that

> rating officials are responsible for the true and accurate evaluation of the work performance of employees. Raters are also responsible

> for maintaining adequate notes so as to provide sufficient documentation of their decisions. This is one of the most important operations in the rating process. The success of the program depends upon evaluations that are fair, honest, and unbiased . . . .

If the AJ determines that many of the documents cannot be used when applying the proper regulation, then they may have to determine if the witness statements are enough to establish substantial evidence that Employee engaged in unsatisfactory work performance in light of Part II, DPM Chapter 14, Subparts 2.5(B), 1.5(A), and 1.8(3).

Conclusion

Accordingly, we must grant Employee's Petition for Review and remand this matter to the AJ for further consideration of Part II, DPM Chapter 14; to determine if Agency presented a valid Letter of Warning; and to consider if the documents presented by Agency were within the rating period in question.

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is **GRANTED**, and the matter is **REMANDED** to the Administrative Judge for further consideration.

FOR THE BOARD:

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Clarence Labor, Chair

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Barbara D. Morgan

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Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.