

In the matter of the Arbitration between:

**National Treasury Employees Union
Chapter 60**

- and -

Internal Revenue Service

Grievance: Removal of Ronald Birkland

For the Union: Regina Little, Assistant Counsel, NTEU

For the Agency: Ariya McGrew, Senior Attorney, IRS Office of Chief Counsel

1. Background

Hearings were held on this matter on October 28, 2015 and December 10, 2015 in Springfield, New Jersey. The parties stipulated to these issues:

Whether the Agency's action in removing Grievant from employment based on his unacceptable performance in a critical element of his performance standards, after providing him with a reasonable opportunity to improve, is supported by substantial evidence. If not, what shall be the remedy?

The Grievant, Ronald Birkland, worked for the Internal Revenue Service (“IRS” or “the Agency”) until to May 6, 2014, when the Agency removed him from Federal Service for

unacceptable performance. At all times during his employment with the Agency, Mr. Birkland worked in positions assisting taxpayers. He worked as a Case Advocate in the Taxpayer Advocate Service (“TAS”) from its stand up in 2000 and in precursor IRS jobs assisting taxpayers prior to that time. At the time of removal, Mr. Birkland had worked for the Agency for over 20 years.

There is no dispute that the caseloads of Case Advocates in the Springfield TAS office increased sometime around 2010. Sometime in 2011 or 2012, Mr. Birkland informed his supervisor and the Local Taxpayer Advocate that his inventory was too high and that he was having difficulty meeting deadlines. By letter dated May 20, 2013, Mr. Birkland’s supervisor informed him that his performance was unacceptable under Critical Job Element (CJE) 5, Business Results – Efficiency, which includes three aspects: Workload Management (5A), Planning (5B), and Time Utilization (5C). By this letter, the Agency placed Mr. Birkland on a 60-day Performance Improvement Plan (PIP), providing him with an “opportunity period” to demonstrate that he could perform at a minimally acceptable level. The opportunity period was extended to September 13, 2013. On November 6, 2013, the Local Taxpayer Advocate for Area, 1, Springfield, NJ, notified that Mr. Birkland that she proposed removal from service because he failed to demonstrate minimally acceptable performance on CJE 5 during the opportunity period. This proposal was upheld by the deciding official and Mr. Birkland was removed from Federal Service on May 6, 2014.

The issue in this case is narrow. There is no dispute that Mr. Birkland was not performing satisfactorily or meeting the requirements of CJE 5 before or during the PIP

opportunity period. There is no dispute that the Agency must show by substantive evidence that it provided Mr. Birkland a meaningful opportunity to improve during the PIP as a precondition to removal. The sole issue in contention is whether the Agency provided Mr. Birkland a meaningful, *bona fide* opportunity to improve his performance. Specifically, NTEU argues that the Agency did not provide assistance promised in the letter setting up the PIP and that Mr. Birkland's supervisor otherwise did not provide the type of assistance required, but rather functioned as a critical manager. The Agency contests both assertions and argues that the record shows that it provided extensive assistance and a meaningful opportunity to improve in this case.

The Agency presented the testimony of Denise Walton, Taxpayer Advocate Group Manager and Mr. Birkland's supervisor. Ms. Walton has been with TAS since stand up in 2000. Ms. Walton testified that taxpayers come to TAS as the last resort and it is Case Advocates' responsibility to assist them effectively and expeditiously. She testified that taxpayers who come to TAS are frequently in dire circumstances; sometimes they are in danger of losing their houses or are suffering from illness and have significant financial needs. She testified that Case Advocates handle high volumes of cases and must do so efficiently and effectively. She testified when a taxpayers first comes to TAS, it is important for the Case Advocate who works with them to obtain necessary information and to do research immediately to determine what actions are appropriate.

Ms. Walton testified that in 2010 a new Local Taxpayer Advocate (LTA), Marcie Harrison, was assigned to oversee the work of Area 1, Springfield New Jersey TAS. Ms.

Walton testified that under the new LTA, there was a focus on timely resolution of cases and employee accountability. Ms. Walton testified that she and the LTA generated reports concerning case management within the office, which showed that the office had a problem with failing to meet deadlines and revealed lower performers.

Ms. Walton testified that on November 30, 2012, she gave Mr. Birkland a mid-year review for the first half of his performance period covering from June 1, 2012 through May 2013. In this mid-year review, she checked boxes indicating that he was performing less well than previously on all Critical Job Elements except for CJE 5, for which she checked the box indicating that he was performing equally or better than previously. Ms. Walton testified that she erroneously checked the box concerning his performance on CJE 5 in the mid-year review, but that she believed the comments in this review made it clear that she did not consider his performance on CJE 5 to be improving or adequate.

On May 7, 2013, shortly before the end of Mr. Birkland's performance period, Ms. Walton met with Mr. Birkland and informed him that his performance on CJE 5 was not satisfactory and that he would be placed on a PIP. By letter dated May 20, 2013, Ms. Walton detailed at some length deficiencies and handling of some of his cases. In this letter Ms. Walton listed the following recommendations for improvement and described what the Agency would do to assist Mr. Birkland during his opportunity to improve:

Recommendations for Improvement:

1. You need to schedule your FUDs so that your actions can be completed on that date. Do not stack a lot of FUDs on one day, you need to work the cases, not just touch them.
2. Practice the one touch method; take all the actions you possibly

can each time you open a case (this will eliminate the need to touch a case more than once In a day).

3. Schedule a variety of casework during the day, i.e., do not schedule all difficult cases to work on one day.
4. Use your case action screen to assist you with knowing what your next action is, i.e., IDRS for posted adjustment.
5. Use the outlook calendar, a paper calendar or the portal calendar to schedule your work. Be specific concerning what actions need to be completed on the case.
6. Forward your phone to the voice mail when you &re working a case that requires complete concentration (be sure to timely return any phone messages).
7. Work one case at a time and leave the others in your drawer.
8. Utilize your LCA, your manager and your ROTA/RATA consistently.
9. Consider setting aside an OAR day, where you have scheduled FUDs for one particular day to check all of your OARs to ensure they are acknowledged timely and a negotiated completion date has been set and close all the OARs that are completed or expired.
10. Consider taking time once in the morning, before you start work, and once in the late afternoon before you go home, to check all your messages and return the calls (maybe an hour In the morning and an hour In the afternoon, depending on how many messages you have).
11. Prioritize your work and plan your day to effectively work your inventory.
12. You must make appropriate decisions regarding the actions needed on the case. If the case needs technical assistance, you should do so as soon as possible. If the case needs management assistance, you should elevate the case as soon as possible. Each case should indicate that you have made the correct decision regarding how best to resolve it.
13. You need to complete all research on the cases, and do so sooner rather than later. You have access to IDRS and other databases; you need to do the research, analyze the results and apply the Information you found to the cases in a timely manner.
14. You must take all possible actions on each case as soon as possible. You should not put off taking actions on a case if it the actions can be completed while working the case.
15. You must adhere to the IRM regarding timely contacts. Each and every customer should be contacted on the date promised. You should not let customers go months and months without hearing from you.

16. You must adhere to the IRM regarding case processing. This includes OAR processing (such as acknowledgements of OARs, expired OARs, closing of OARs), as well as acknowledging faxed material when it is sent to you and reviewing documents when they are sent to you. You should not be letting cases age with inactivity.

17. You must use a calendar/monitoring/suspense system that allows for you to properly manage your daily/weekly/monthly activities. You need to review the system to ensure that you are not planning too many actions for one day, but that all cases are scheduled to move to resolution.

18. You need to timely close cases in accordance with established guidelines. If taxpayers fail to respond to a deadline that you have provided to them, you need to take appropriate steps to close the case.

19. If there are areas in which you feel you need other assistance in order to improve your performance, please let me know and I will arrange for assistance.

I will be available to assist you in the following ways:

1. To assist you in improving your overall performance; Maryanne Sancho will be assigned to you as a coach. To properly plan your activities, the Coach will assist you in establishing a planning calendar, which will prioritize your weekly assignments. She will inform you weekly of tasks that will need to be added and it will be your responsibility to update and maintain this calendar. This calendar will identify the tasks that need to be completed and will include a completion date. I will provide you with feedback regarding the content of the calendar.

2. The Coach and I will meet with you on a weekly basis to discuss the status of your progress, at which time we will review your calendar and discuss how you plan to accomplish your assignments timely. These meetings will occur every Wednesday at 10:00 a.m. in my office. In the event that either you or I are absent, we will meet the next available workday.

3. I will measure your improvement in this element by conducting case reviews every two weeks. Written feedback will be provided on these cases. We will meet to discuss the reviews. At that time you will be able to address any concerns you may have with me. Our first meeting will be on June 12, 2013, at 10:00 a.m. At that meeting we will schedule the subsequent meeting.

.....
To attain a fully successfully level of performance, you must meet all of the performance aspects listed in each Critical Element above. To attain a minimally successful level (the minimum standard for retention in your position), you may fail no more than one performance aspect in

each Critical Element above. Your failure to improve to at least a minimally successful level will result either in a reassignment to another position or in a proposal to remove you from the Service or reduce you in grade.

.....

Beginning on the date you receive this letter, you will be given 60 calendar days during which you will have the opportunity to demonstrate that you can perform at least at a minimally successful level with respect to the above critical element and performance standards. I will be monitoring your performance closely during the period and, at the end of the period, I will evaluate your work and make a determination whether your performance during the period has reached the level required for retention in your position. You will be informed soon thereafter of whatever further action is to be taken.

In order to give you an opportunity to utilize these suggestions, I will refrain from giving you new Inventory. Your caseload is currently at approximately 100 cases. The Coach and I expect you to consult her on your cases. I will provide feedback to you concerning your progress. Your Inventory will be increased gradually in the second half of your opportunity period to the inventory level of a grade 11 case advocate.

At this time I expect all old cases to be on track within 14 workdays. When all your cases on are track, I will again start assigning you cases.

I believe that many of your difficulties with timeliness and prioritization could be remedied by greater attention to planning. When you get an assignment, determine what steps are necessary to accomplish it and when they should be completed. Take existing assignments into account and prioritize them. See me if it appears that deadlines may not be met, issues that may cause conflicts in the use of your time, or problems arise which you are having difficulty resolving. You need to make timely decisions. It is important that assigned tasks be completed in a timely fashion.

If you have any questions on this matter, feel free to contact me. I am available to answer your questions and to assist you in improving your performance during this period.

Ms. Walton testified that on May 23, 2013, she and Lead Case Advocate Maryanne Sancho met with Mr. Birkland and discussed his inventory, training needs, and “overdues”.¹

Ms. Walton informed Mr. Birkland that Ms. Sancho would be shadowing him. In addition to

¹ Ms. Walton testified that she met with Mr. Birkland on May 22, 2013, but the memorandum of this meeting does not describe the content of this meeting.

reviewing Mr. Birkland's training needs, Ms. Walton provided two reviews on Form 13095s (forms used by managers to document case reviews) on cases in which Mr. Birkland had made timely contacts and actions. On one, she noted that he should have attempted a phone call to the taxpayer before sending a letter; on the other, she noted "good job". On May 28, 2013 Mr. Birkland sent a memorandum to Ms. Walton indicating that he had 10 "due todays" and 13 overdue actions and that because of his unmanageable inventory he would not be able to complete necessary actions, and asking for assistance with his inventory.² On May 30, 2013, Ms. Walton and Ms. Sancho met with Mr. Birkland, but there is no documentation of what they discussed, or of any assistance Ms. Sancho gave Mr. Birkland to that point. On June 4, 2013, Mr. Birkland sent Ms. Walton a memorandum listing his due and overdue actions, indicating that he would not be able to complete necessary actions on that day and asking for assistance with his inventory.

On June 11, 2013, Ms. Walton sent Mr. Birkland two memoranda, which together indicated that she would reduce Mr. Birkland's inventory from 85 cases to 45 cases, that while his inventory was at the reduced level she would expect him to keep up with his cases, that she had decided that she rather than Ms. Sancho would assist him, and that she would work with him to improve his inventory management skills relevant to CJE 5. Ms. Walton indicated that she would meet with him to review his cases and to review pertinent sections of the Internal Revenue Manual (IRM). She advised him to consider reviewing all of his email messages when he arrived in the morning and to periodically review them throughout the day. She wrote, "I want to be able to provide you with the assistance you need to become

² Ms. Walton testified that at the beginning of the PIP, Mr. Birkland had approximately 100 cases as compared to the national average caseload in the 80's. She testified that in part this was because some of his cases should have been closed.

fully successful. Please know that you can contact me with any question, or, if I'm not available you can contact Lead Case Advocate, the Acting Manger, or the LTA."

Ms. Walton testified that she concluded that she was in a better position to assist Mr. Birkland because she was more experienced than Ms. Sancho and because Ms. Sancho was new to her position as Lead Case Advocate and was coaching other Case Advocates. Ms. Walton testified that she was detailed for 100% of her time to coach Mr. Birkland during the PIP and that during this period she reviewed 100% of his cases. She testified that she reassigned 40 of Mr. Birkland's cases so that his inventory to give him an opportunity to meet with her and work on his skills.

Ms. Walton testified that she met with Mr. Birkland on June 12, 2013 from 9 a.m. to 11 a.m. She reviewed the IRM section addressing "Introduction to Initial Actions," including reviewing the TAMIS system, developing an Initial Action Plan, researching the case and requesting internal information and related IRM provisions concerning actions to be taken when a case is first received. She presented case reviews with Form 13095's signed as "Manager" and with extensive narratives on five cases Mr. Birkland received before the PIP began, outlining errors he made on these cases, ending each case review with a paragraph about potential harm to taxpayers. In two cases she noted "good job" on a specific action within longer list of actions he failed to take. Ms. Walton testified that in this and all subsequent meetings, she asked if Mr. Birkland if he had any questions and understood what they had discussed and that he had no questions and said understood what they had discussed. She noted that Mr. Birkland stated that because of his inventory levels, stress, and

the memorandum from management, he was rushing to meet deadlines, which prevented him from taking all actions in cases. Ms. Walton responded that with reduction of inventory this should not be a problem.

Ms. Walton held a meeting with Mr. Birkland on June 13, 2013, in which she reviewed his Next Actions Summary Report. She noted that Mr. Birkland told her that because of the two-hour meeting on the previous day he was unable to complete all his tasks that day. Ms. Walton suggested to Mr. Birkland that when he documented a "FUD" that he also include a description of specific actions so he would know approximately how long the action would take.

On June 17, 2013, Ms. Walton met with Mr. Birkland and reviewed his Next Actions Summary Report and an IRM provision. Mr. Birkland had reviewed two of his cases per a directive from Ms. Walton, and she critiqued his reviews, noting what he had failed to do. She asked if he was reviewing his emails in the morning, at noon and before he left the office as suggested, and Mr. Birkland responded that he was reviewing his emails and responding to them and answering his phone calls.

On June 18, 2013, Ms. Walton met with Mr. Birkland and reviewed his Next Actions Summary Report and reviewed four IRM provisions, some of which she had reviewed previously.

On June 19, 2013, Ms. Walton met with Mr. Birkland for two hours. She reviewed his Next Actions Summary Report, which showed no "due todays" or overdue actions, and reviewed several IRM provisions. She reviewed 4 cases with him using 13095 Forms and narratives reviewing actions taken and errors on these cases, all involving his work prior to June 11, 2013. According to a memorandum from Ms. Walton, she emphasized that Mr. Birkland should take as many actions as possible during initial actions and set dates on the case action screen, and that when he scheduled follow-up work that he did not schedule too many cases for one day. Ms. Walton testified that in this meeting she told Mr. Birkland that she should be seeing some difference in his cases and she was concerned that he was not reviewing what they had discussed. She documented that she brought to his attention the paragraph in the PIP that stated to attain Fully Successful level of performance he must meet all performance aspects of each critical job element and that his failure to improve to a minimally successful level could result in his removal.

Ms. Walton met with Mr. Birkland on June 24, 2013 and reviewed a case that he had received on April 15, 2013, in which Ms. Walton criticized him for failing to take action to move the case to resolution.

On June 25, 2013, Ms. Walton and Mr. Birkland sat together and watched the 3-hour training course on "Conflict, Stress and Time Management". Mr. Birkland sent Ms. Walton an email stating that because of the 3-hour training course, he was unable to complete his required case actions on that day. Ms. Walton testified that she had informed him a week

earlier that they would take this course on June 25, 2013 so that he could adjust his schedule accordingly.

On June 26, 2013, Ms. Walton met with Mr. Birkland and presented him with case reviews (Form 13095's and narratives) on five of his cases. The reviews and narratives catalogued his errors, virtually all of which concerned case handling prior to June 11, 2013.

On June 27, 2013 Ms. Walton sat behind Mr. Birkland and watched him work for approximately 3 hours. She testified that Mr. Birkland told her it made him uncomfortable. Ms. Walton testified that she observed that when Mr. Birkland spoke with taxpayers, he did not use available tools and did not use a calendar when setting dates. He had no shortcuts set up on his desktop and he did not have a system for an automatic signature for his emails. Ms. Walton testified that she arranged for a tech advisor to help him set up shortcuts and for the secretary to set up an automatic signature for his email. She also reviewed a letter that he had generated to a taxpayer that he had been unable to reach by telephone. In a follow-up memorandum she noted her observations that he was not organized, was not prioritizing his cases, that his TAMIS histories were incomplete and that as a result he had to take time to look in the case file to determine his next action instead of work from the last TAMIS entry..

On July 3 2013, Ms. Walton met with Mr. Birkland and reviewed two cases with him (Form 13095s and narratives). In one she noted that he had properly determined that the case was too complex for him, in the other, Ms. Walton was highly critical of case handling

that took place before the PIP began. On July 17, 2013, Ms. Walton met with Mr. Birkland and reviewed overdue actions with him, noting that his caseload was only 38 cases.

Between July 15, 2013 and July 23, 2013, Mr. Birkland was assigned 19 new cases. Ms. Walton met with Mr. Birkland on July 23, 2013 and July 25, 2013 to review either cases or his Next Action Summary Reports, noting that he was overdue on some actions. On July 30, 2013, she met with Mr. Birkland to discuss two preclosure case reviews. In these reviews she largely reviewed actions that Mr. Birkland had failed to take in accordance with IRM. On July 31, 2013, Ms. Walton met with Mr. Birkland to review his Next Action Summary Reports including actions he had failed to take in a timely manner. Ms. Walton noted that 7 new cases had been assigned to him and that discussed how to incorporate his expired work, current work and new cases into his daily work schedule. She noted, "I asked you for suggestions, and you stated you will take actions on missed initial actions first, and will work one case at a time, and will complete his actions currently due." She also presented him with a case review. She reiterated that he must adhere to the IRM regarding case processing and must use a calendar/monitoring/suspense system to properly manage his activities and should review the system to ensure he is not planning too many actions for one day. She noted in the memorandum that she asked if he had any suggestions and that he responded that positive reviews motivated him. Ms. Walton testified that she told him that she wanted to give him positive reviews but that she also needed to review the cases with him accurately.

On August 7, 2013, Ms. Walton met with Mr. Birkland to review his Next Action Summary Reports dated the previous day and that day. She noted that the reports showed 7

actions due on those days and showed no work overdue and wrote that he should continue to keep his inventory current and continue to prioritize his work and plan his day for effective work on his inventory. She noted that his inventory was at 52. She reviewed cases with him and some IRM provisions. She noted that he was scheduled to take vacation from August 12 through August 26, 2013 and that she would continue to conduct evaluative reviews on cases while he was on vacation. Ms. Walton testified that she communicated to Mr. Birkland that his PIP was being extended because of his vacation, although this is not included in the memorandum of this meeting.

Ms. Walton testified that Mr. Birkland did not take an action that he had been directed to take before leaving for vacation and that a number of actions became due or overdue during the time he was on vacation. Ms. Walton testified that she met with Mr. Birkland on August 28, 2013 and told him that it was critical for him to take into account his vacation when scheduling work and that he should use a calendar/monitoring/suspense system too properly manage his activities. On September 11, 2013 Ms. Walton met with Mr. Birkland and reviewed his next action summary reports for September 5, 6, 9, 10, 11 and 12, 2013. She noted that the reports showed multiple "due todays" or "overdues."

Ms. Walton testified that the PIP ended on September 13, 2013. Ms. Walton thereafter completed a performance appraisal indicating that Mr. Birkland had failed to perform satisfactorily under CJE5, Business Results - Efficiency. Ms. Walton testified that Mr. Birkland did not change the way he worked and did not prioritize cases in terms of urgency. She testified that he did not use shortcuts or other available tools and as a result he

was not able to work at a level of efficiency required to manage the inventory expected of Case Advocates. Ms. Walton testified, "I'm not saying Ronald was a bad employee, because he was not. Ronald came to work every day. Ronald actually sat at his computer all the time and did work."

The Union called William Kearney, Chief Steward for NTEU Chapter 60. Mr. Kearney has been a Revenue Officer for the IRS for 41 years. He testified that during his career he became both a classroom instructor for the IRS for new Revenue Officers and an on-the-job instructor (coach) as well. He testified that he also had experience observing other coaches.

Mr. Kearney reviewed CJE 5 and noted that it is heavily weighted towards managing inventory, utilizing time management skills and scheduling. He noted that this is especially important for TAS Case Advocates because they have high inventories and because of their responsibility to respond quickly to meet the needs of taxpayers.

Mr. Kearney noted that many of recommendations for improvement in the PIP letter concerned scheduling of various tasks and the importance of using a calendar system. He noted further that in the PIP letter, the Agency committed to having Ms. Sancho coach Mr. Birkland in establishing and work with a planning calendar. He emphasized that the Agency acknowledged the importance of a calendar system and committed to helping Mr. Birkland improve in using one.

Mr. Kearney testified that in working as a coach it was important to determine the best method for working with a particular employee because of different learning styles. He testified that one approach is to watch the employee first and then discuss his or her actions or, in the alternative, the coach may perform the actions while the employee watches and then discuss why the coach handled the case in the way he or she did. He testified that one thing that he would coach an employee to do would be to use a monthly calendar effectively, including memory joggers. He stressed the need for interaction with the employee and, if the employee failed to perform a necessary action, to find out why he or she did not perform the action and then talk with the employee about how to address tasks effectively. He testified that it is important to focus on helping employees develop good habits and identify and stop exercising bad habits.

Mr. Kearney reviewed memoranda of meetings between Ms. Sancho, Ms. Walton and Mr. Birkland and between Ms. Walton and Mr. Birkland. He testified that he would have expected to see discussion of training on how to use a calendar early in the PIP and at later times as well. He testified that in his view Ms. Walton's meetings with Mr. Birkland were inventory management discussions performed as an evaluative manager and not as a coach. He testified that with a failure to focus on working with a calendar and the evaluative managerial approach, the meetings did not work and did not have the desired result.

Mr. Kearney noted that part way through the PIP the Agency assigned Mr. Birkland new cases. He testified that in his view this would have been a perfect opportunity to work with and review a calendar to determine how Mr. Birkland could integrate the new cases into

his work. In Mr. Kearney's view, the Agency failed Mr. Birkland by failing to provide him training on effectively using a calendar and by failing to provide other effective assistance.

Mr. Birkland testified that he worked for the IRS for more than 20 years, as a Case Advocate for the TAS and before that in precursor positions helping taxpayers in the IRS's Problem and Resolution Program. He testified that at some point his inventory became very heavy and that when he brought this to the attention of LTA Hamilton, she told him that he was a Grade 11 employee and that he should figure it out.

Mr. Birkland testified that neither Ms. Sancho nor Ms. Walton discussed a planning calendar or worked with him on how to use one. He testified that in May 2013 his inventory was approximately 80 cases. He testified that for a time Ms. Sancho did come over to his cubical occasionally and he went to her cubical every now and then for questions, but their interactions were not consistent.

Mr. Birkland testified that he asked Ms. Walton for help managing his inventory, but he did not receive help that was useful to him. He testified that the meetings with Ms. Walton were almost entirely reviews of how Ms. Walton considered his work inadequate, that these meetings did not help him improve his work, and that they took time away from the work he had to perform. He testified that Ms. Walton did provide some tips when she watched him work, but also that it made him uncomfortable to have her sitting behind him while he worked. On cross-examination, Mr. Birkland acknowledged that he was aware that

there was a calendar on his computer that gave him the days of the week and when things were due and that he knew how to access this calendar.

2. Relevant Statutes, Regulations, and Contract Provisions

Statutes

5 U.S.C. §4302

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for- . . .

(5) assisting employees in improving unacceptable performance; and

(6) 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. §4303

(c) The decision to retain, reduce in grade, or remove an employee . . .

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee . . . (B) for which the notice and other requirements of this section are complied with.

Regulations

5 C.F.R. § 432.104 [a]s part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance.

IRS and NTEU National Agreement II, 2012

Article 40 Unacceptable Performance

Section 1

C. No bargaining unit employee will be the subject of an action based on unacceptable performance unless that employee's performance fails to meet established performance standards in one or more critical job elements of the employee's position, after having been afforded an adequate opportunity to demonstrate acceptable performance.

1. If at any time during the performance appraisal cycle that an employee's performance is determined to be unacceptable in one or more critical job elements, the Employer will:

- (a) notify the employee of the critical job element(s) for which performance is unacceptable; and
- (b) issue a written plan to the employee, including but not limited to suggestions as to how the employee can improve his/her performance, the type of assistance the Employer will provide, and instructions on ways the employee can be expected to raise his/her performance to an acceptable level.

E. Any action based on unacceptable performance will be fair, equitable, and administered as timely as possible.

Section 2

A. Prior to issuing a notice of proposed action based on unacceptable performance, the Employer will issue a letter to the employee which contains the following:

- 4. a description of what the Employer will do to assist the employee to improve the allegedly unacceptable performance during the opportunity period.

3. Positions of the Parties

The Union

The Union emphasizes that the Merit System Protection Board (MSPB) has held that an employee's right to a meaningful opportunity to improve is a substantive right, that the Agency must prove by substantial evidence that it afforded such an opportunity *Sandland v. General Services Administration*, 84FMSR 5871 (1984) and that the employee's right to a meaningful opportunity to improve is one of the most important substantive rights in the Chapter 43 Performance Appraisal Framework. *Zang v. Defense*

Investigative Services 85 FMSR 5037 (1985). The Union argues that in this case the Agency failed to prove that it gave Mr. Birkland a reasonable opportunity to improve before removing him from Federal service.

The Union argues that under the contract and case law, the Agency incurred specific obligations to assist Mr. Birkland when it issued the PIP letter. In this case, the Agency articulated three specific actions it would take to assist Mr. Birkland and failed to follow through on two of them. The Agency first indicated that it would assign Ms. Sancho to assist Mr. Birkland as a coach and that she would assist him in "establishing a planning calendar which will prioritize your weekly assignments." Second, the Agency committed to have the coach and Ms. Walton meet with Mr. Birkland on a weekly basis to review his calendar, discuss his progress, and discuss with him how he planned to accomplish your assignments in a timely manner.

The Union contends that there is no evidence that Ms. Sancho assisted Mr. Birkland in setting up a weekly planning calendar or worked with him to use it. The evidence shows, and Mr. Kearney's testimony reflects, that this was exactly the type of assistance Mr. Birkland needed. When Ms. Walton took over the coaching responsibility from Ms. Sancho beginning on June 12, 2013, she similarly failed to assist Mr. Birkland in setting up a calendaring system or in working with it. The Union argues that the facts of this case are similar to the facts in *Adorador v. Dept. of the Air Force* 38 MSPR 461 (1988), in which the MSPB reversed the Agency's removal of a civilian employee when the Agency did not provide the promised assistance during the early part of the PIP.

The Union argues further that the evidence shows that Ms. Walton functioned as an evaluative manager throughout the PIP period rather than as a coach. While she found numerous mistakes in timeliness and efficiency, she did not assist Mr. Birkland in how to manage his work efficiently. The Union argues that it is common knowledge that "telling isn't teaching." Ms. Walton told Mr. Birkland that he needed to accomplish all the tasks required in the IRM within the deadlines the IRM imposed, but did not show him how to do it. She sat with him only once while he worked for three hours. As arbitrators have held in other cases between these parties, the supervisor must do something other than point out deficiencies and wait for the employee to fail. The vast majority of Ms. Walton's actions during the period from June 12, 2013 forward consisted of case reviews and communications of deficiencies. She did function as a voice of a coach but instead functioned as an evaluative manager.

The Union emphasizes that this was the first PIP process and removal in Ms. Walton's experience as a manager. There is no evidence she was given training necessary to function effectively as a coach. As a result, she was therefore not effective as a provider of a meaningful opportunity period. The failure to provide such a period is a fatal flaw in an adverse action against Mr. Birkland.

The Union argues that during the opportunity period the Agency did not follow through on its promise in Ms. Walton's June 11, 2013 memorandum to increase Mr. Birkland's inventory only when he was able to handle a higher inventory. The Union argues

further that various errors in documents represented disrespect toward Mr. Birkland by management. The Union argues that although the Agency extended the opportunity period until September, where Ms. Walton continued to fail to provide adequate or a meaningful opportunity to improve during the extension period, this extension was meaningless.

For all these reasons, the Union argues that the removal must be rescinded and that Mr. Birkland must be reinstated retroactively to the date of the removal with full back pay and other relief as may be appropriate.

The Agency

The Agency argues that the Grievant's removal for unacceptable performance is supported by substantial evidence and should be sustained. The Agency notes that "substantial evidence" is defined to mean "the degree of relevant evidence that a reasonable person considering the record as a whole might accept as adequate to support a conclusion even though other reasonable people might disagree." 5CFR 1201.56(C)(1)(*Towne v. Dept. of the Air Force*, 120 MSPR 239 ((2013))). If the Agency establishes the essential elements of its case by substantial evidence, no mitigating factors may be considered and the arbitrator may not modify the Agency's penalty in a Chapter 43 action. *Lisiecki v. MSPB*, 729 F.2d 1558 (Fed. Cir. 1985)

The Agency argues that it has established the essential elements for removal. There is no dispute that the Agency had a performance appraisal system approved by the Office of

Personnel Management in place; it communicated to the he performance standards and critical elements of the position; and the record shows, and the Union stipulated, that the Grievant's performance was unacceptable during all relevant times to this case. The only issue in dispute is whether the Grievant was provided with a reasonable opportunity to improve his performance. In determining whether an employee was provided with a reasonable opportunity to improve the MSPB has set out these factors: whether the promised assistance was passive or reactive; whether the employee was instructed how he might seek assistance; whether the Agency officials were specifically charged with providing assistance; and whether the predisposition of the Agency's officials had an impact on the assistance provided. (*Woytak v. Dept. of the Army*, 49 MSPR 687 (1987)). The MSPB has recognized there is no absolute standard regarding the form of assistance that the Agency must offer, as long as the employee receives the type of assistance he is promised. *Gjersvold v. Dept. of the Treas.* 68 MSPR 331 (1995).

The Agency argues that the evidence shows that it delivered the level of assistance promised to the Grievant in the PIP letter. Shortly after the opportunity period began, Ms. Walton became the Grievant's coach, replacing Ms. Sancho. Moreover, the record reflects that while Ms. Sancho was the Grievant's coach she assisted him as promised in the PIP letter. Ms. Walton took over as coach because Ms. Sancho was new to her position and had duties she could not relinquish in order to focus exclusively on coaching the Grievant. She actively pursued assistance and met with the Grievant at least 19 times throughout the opportunity period. She documented these meetings with memoranda to the Grievant providing extensive feedback. Even when she did not meet with the Grievant, she provided

him with extensive written comments on his work that explained how he could reach an acceptable level of performance. Ms. Walton sat with the Grievant during training videos and shadowed the Grievant as well as providing the other assistance described.

The Agency argues that the Union's claims concerning lack of meaningful opportunity to improve should be rejected. The Union contends that no assistance was provided to the Grievant in establishing a planning calendar. The record reflects that the Grievant was advised several times to use a calendar system to manage his inventory. There is no evidence that using a paper calendar, as suggested by Mr. Kearney, was essential to this approach. The Union also argues that Ms. Walton did not assume the role of a coach but rather her feedback was given in an evaluative manner as a supervisor. Neither the governing statute nor the contract prohibits an employee's manager as serving as his coach. The Agency is required only to provide assistance to help the employee improve his performance. The Grievant was provided with active and thorough assistance by Ms. Walton and he was informed he could seek assistance of the Lead Case Advocate, the Acting Manager, or the Local Case Advocate. Even if Ms. Walton's assistance to the Grievant was given in a managerial fashion, this would not establish the Grievant was not provided with a reasonable opportunity to improve.

The Union contends that the assistance provided by Ms. Walton consisted solely of negative comments. Even assuming this were true, this would not establish that he was denied a reasonable opportunity to improve. Unlike in the cases where the Agency's action

was overturned, Ms. Walton was not disparaging and was not predisposed to Mr. Birkland's failure. The evidence establishes to the contrary.

While the Union contends that the Agency acted inappropriately by assigning new cases during the opportunity period, this does not establish that he was denied the opportunity to improve. His inventory was reduced by half and as the Grievant closed cases, it was appropriate to assign him new cases to determine if he could manage an inventory. From the period when his inventory was reduced by half the Grievant's inventory remained well below the national average.

The Agency notes that while Mr. Kearney testified that he would have approached coaching differently, he also acknowledge that his experience as a coach was entirely with Revenue Officers and largely if not entirely with entry level Revenue Officers. He was not present during the meetings between Ms. Walton and the Grievant.

Based on all of the evidence, the arbitrator should find that the type of assistance provided to the Grievant was greater than was required under the statute and the contract and its decision should be sustained.

IV. Opinion

This case concerns the removal of Mr. Birkland from Federal Service for unacceptable performance in his position as Case Advocate for the Taxpayer Advocate

Service (“TAS”). To sustain an action for unacceptable performance, the Agency must show by substantial evidence that 1) it has an performance appraisal system approved by the Office of Personnel Management; 2) performance standards were communicated to the employee and were valid; 3) the employee failed to meet one or more critical performance elements of his position; and 4) the employee was given a reasonable opportunity to improve. There is no dispute the Agency’s Performance Appraisal System was approved or that performance standards were communicated to Mr. Birkland. The Union has stipulated that Mr. Birkland failed to meet a critical element of performance standards (Critical Job Element, or “CJE”) for his position at all times relevant to this matter. The sole issue in dispute is whether the Agency gave Mr. Birkland a reasonable opportunity to improve.

The Merit Systems Protection Board (MSPB) has held that under the relevant statutes, the Agency must show by substantial evidence that it offered a meaningful opportunity to demonstrate acceptable performance to an employee before removal from Federal Service. *Sandland v. General Services Administration*, 84 FMSR 5871 (1984). In *Sandland*, the MSPB held further, “an employee’s right to a reasonable opportunity to improve is a substantive right; indeed, it is one of the most important rights, benefiting both the employee and the agency, in the entire Chapter 43 appraisal scenario” and that Congress “intended that agencies provide employees whose performance is unacceptable with encouragement and afford them training and assistance in order to achieve improved performance.” For the reasons set out below, I conclude that the Agency did not show by substantive evidence that it provided Mr. Birkland with a meaningful opportunity to improve, which is a prerequisite to removal from Federal Service under both Chapter 43

and under the parties' collective bargaining agreement.

Article 40 of the parties' contract. Article 40 provides:

Section 1

D. No bargaining unit employee will be the subject of an action based on unacceptable performance unless that employee's performance fails to meet established performance standards in one or more critical job elements of the employee's position, after having been afforded an adequate opportunity to demonstrate acceptable performance.

1. If at any time during the performance appraisal cycle that an employee's performance is determined to be unacceptable in one or more critical job elements, the Employer will:

(c) notify the employee of the critical job element(s) for which performance is unacceptable; and

(d) *issue a written plan to the employee, including but not limited to suggestions as to how the employee can improve his/her performance, the type of assistance the Employer will provide, and instructions on ways the employee can be expected to raise his/her performance to an acceptable level.* [emphasis added]

Section 2

A. Prior to issuing a notice of proposed action based on unacceptable performance, the Employer will issue a letter to the employee which contains the following:

4. *a description of what the Employer will do to assist the employee to improve the allegedly unacceptable performance during the opportunity period.* [emphasis added]

Ms. Walton, Mr. Birkland's supervisor, sent a PIP letter that met these requirements, in which she notified Mr. Birkland that his performance in CJE 5 was unacceptable, gave examples, and issued a written plan with suggestions on how he could improve his performance and set out the assistance the Agency would provide.

In the plan put forward by the PIP letter, the Agency focused heavily on helping Mr. Birkland learn to schedule and prioritize using a planning calendar. In fact, two of the three elements of promised assistance focused on working with him on such a calendar:

1. To assist you in improving your overall performance; Maryanne Sancho will be assigned to you as a coach. To properly plan your activities, *the Coach will assist you in establishing a planning calendar, which will prioritize your weekly assignments. She will inform you weekly of tasks that will need to be added and it will be your responsibility to update and maintain this calendar. This calendar will identify the tasks that need to be completed and will include a completion date. I will provide you with feedback regarding the content of the calendar.*
2. The Coach and I will meet with you on a weekly basis to discuss the status of your progress, *at which time we will review your calendar and discuss how you plan to accomplish your assignments timely.* [sic] These meetings will occur every Wednesday at 10:00 a.m. in my office. In the event that either you or I are absent, we will meet the next available workday.
3. I will measure your improvement in this element by conducting case reviews every two weeks. Written feedback will be provided on these cases. We will meet to discuss the reviews. At that time you will be able to address any concerns you may have with me. Our first meeting will be on June 12, 2013, at 10:00 a.m. At that meeting we will schedule the subsequent meeting
[emphasis added]

In promising this assistance, the Agency made it clear that it had identified Mr. Birkland's lack of understanding of how to use a planning calendar as a problem. The Agency also made it clear that it had determined that active assistance in developing and working with such a planning calendar would be the most effective way to help him improve his performance

Inexplicably, the Agency failed to follow through with this promised assistance. Ms. Sancho was assigned to coach Mr. Birkland for the first three and one-half weeks of the opportunity period. Mr. Birkland testified that although Ms. Sancho came to his cubicle to help on occasion, she did not do so regularly, and she did not work with him on a planning calendar or any calendar. The Agency presented no evidence that Ms. Sancho worked with Mr. Birkland to set up a planning calendar prioritizing his cases, helped him by adding actions to the calendar weekly, or that Ms. Sancho or Ms. Walton reviewed such a calendar with Mr. Birkland on a weekly basis.³

On June 11, 2013, Ms. Walton notified Mr. Birkland that she would take over coaching him and she met with Mr. Birkland in this capacity on June 12, 2013. The Agency at this point significantly reduced Mr. Birkland's caseload. However, although Ms. Walton interacted with Mr. Birkland extensively in ways I will discuss below, there is no evidence that Ms. Walton provided the promised assistance in setting up or working with Mr. Birkland on a planning calendar or reviewed such a calendar with him, either when she took over coaching Mr. Birkland or at any time during the PIP. Ms. Walton at times admonished Mr. Birkland for his failure to schedule properly and occasionally directed him to use a calendar system, but there is no evidence that she provided him with the promised assistance in doing so. Therefore, the Agency has failed to show by substantive evidence that it provided the assistance it promised in the PIP.

³Ms. Sancho did not testify and there are no memoranda describing any assistance she provided Mr. Birkland. Ms. Walton testified on cross-examination that Ms. Sancho assisted on scheduling as follows: "She set his drawer up to help him monitor. So if a follow-up was due today, as of October 28th, he would put the case behind October 28th." This was certainly not equivalent to the promised assistance of setting up a planning calendar, providing actions to add to it every week, or reviewing a planning calendar on a weekly basis.

Article 40, Section 1 C.1 and Section 2 A.4, both specifically require the Agency to set out the assistance that it will provide in a PIP. Where the assistance promised was integral to the Agency's own analysis of the assistance and training that the Mr. Birkland needed, and where the Agency failed to provide this assistance, this failure constituted a failure to provide a reasonable opportunity to improve under the contract. Moreover, failure to provide promised assistance also constitutes a failure to provide a reasonable opportunity to improve under Chapter 43. *Adorador v. Dept. of the Air Force*, 38 MSPR 461 (1988)

I note further that the approach Ms. Walton did employ was not likely to be effective in assisting Mr. Birkland to improve his performance. While there is no requirement that the Agency provide assistance through a coach other than a supervisor, the MSPB has made it clear that Congress intended that agencies provide employees with “encouragement and afford them training and assistance in order to achieve improved performance.” (*Sandland, supra*). In a case under the parties’ collective bargaining agreement, Arbitrator Roger Abrams, summarized the Agency’s obligation under legal and arbitral precedent. He wrote, “there is an obligation to give an employee a real chance to improve and succeed during the opportunity period, to provide the ‘encouragement, training and assistance reasonably aimed at achieving and improving performance’ that is required under prevailing law”. *NTEU and IRS (Thurman)* 6/30/2003 (Abrams, Arb.).

Not only did Ms. Walton fail to carry through with assistance concerning a planning calendar promised in the PIP letter, she otherwise failed to provide assistance reasonably aimed at achieving and improving performance. Ms. Walton put many hours into doing

case reviews and reviewing IRM's, but her approach did not incorporate elements of effective coaching assistance. First, her approach was devoid of the encouragement the MSPB and arbitrators have held to be essential to effective assistance. She extensively reviewed 100% of Mr. Birkland's cases, which was in fact her primary activity throughout the PIP and virtually her only activity from July through the end of the PIP. Her case reviews were recorded on 13095 Forms used by managers to review cases and the narratives of the reviews were highly critical and almost entirely negative. In many pages of narratives, on approximately a half dozen occasions, Ms. Walton wrote "good job" about a particular task within an overall critical review. She always emphasized the negative consequences of missed deadlines and repeatedly indicated when she considered Mr. Birkland's handling of a case to show a lack of judgment and good decision-making, never indicating when she considered his actions to constitute good decision-making or judgment. In this regard, this case is similar to a case between the parties in which Arbitrator Earle Williams Hockenberry wrote,

The documentation of the reviews of the Grievant's work during the opportunity period . . . reads like a little more than a record of criticisms and perceived shortcomings, and directives to take certain specific actions of referrals to the Internal Revenue Manual. These criticisms may have been accurate assessments of the Grievant's work and the directives may have been appropriate, but by themselves they do not constitute assistance to the Grievant in improving his performance. A close review of the work of an employee whose performance is in trouble may be a necessary component of an opportunity period, but it is not a sufficient one. *IRS and NTEU, Ch. 12, 2/1/1999 (Hockenberry, Arb.)*

Similarly, Arbitrator Peter Meyers held that the affirmative obligation to assist employees during a PIP requires more than "[i]ssuing lists of performance deficiencies based on reviews

[which] simply does not amount to the type of substantive assistance that is required of a manager in this situation." *NTEU, Ch. 4 and IRS, 2/3/2013* (Meyers, Arb.) As Arbitrator Abrams pointed out, this does not mean that the supervisor or coach needs to be a "nice guy" *IRS and NTEU (Thurman), 6/30/2003* (Abrams, Arb.), but it does suggest interaction that has some coaching component of affirmative, encouraging recognition of work successfully accomplished. There were certainly opportunities for such affirmative encouragement not taken in this case.

A related point is that as the PIP letter recognized, Mr. Birkland needed assistance in learning *how* to work more efficiently, not simply to be told that he must do so. Just as Ms. Walton did not show Mr. Birkland how to use a calendar effectively, her primary efforts did not go toward providing coaching focused on how, in practice, to work differently or on giving Mr. Birkland feedback on his current efforts to integrate new ways of working.⁴ The evidence shows that the vast majority of time Ms. Walton spent with Mr. Birkland, Ms. Walton focused on reviewing IRM provisions (that were not necessarily most relevant to the work Mr. Birkland was doing at the time)⁵ and, at least through early July, in communicating critical evaluative reviews of errors that, with a few exceptions, Mr. Birkland made prior to the PIP period. These discussions were in largely disconnected from coaching him on handling of his present work.

⁴ Ms. Walton did reiterate the advice in the PIP letter to work one case at a time, but there is little evidence that she moved beyond this advice to helping Mr. Birkland integrate the advice into his work patterns.

⁵ For example, in her initial meeting as Mr. Birkland's coach on June 12, 2013 Ms. Walton met with Mr. Birkland for two hours during which she reviewed the IRM chapter on initial case handling (although Mr. Birkland was temporarily not receiving new cases) and reviewed errors in his handling of cases in 2012 and prior to the PIP in 2013.

The Agency argues that Ms. Walton did more, pointing to Ms. Walton's one-time "shadowing" of Mr. Birkland on June 27, 2013 and noting that she watched one or two training courses with Mr. Birkland. Ms. Walton did watch Mr. Birkland work for 3 hours on June 27, 2013, and she gave him some useful suggestions and short-cuts. This one-time instance of shadowing and feedback was preceded and followed by continuing critical case evaluations and itself resulted in a memorandum in the critical evaluative tone that characterized Ms. Walton's interactions with Mr. Birkland. Ms. Walton testified (as did Mr. Birkland), that this method of shadowing made Mr. Birkland uncomfortable, which is not surprising, given Ms. Walton's highly critical approach.⁶ The one or possibly two occasions⁷ on which Ms. Walton watched training courses with Mr. Birkland were exceptions to primary the way in which Ms. Walton interacted with Mr. Birkland. Given the Agency's failure to provide assistance centered on a planning calendar promised in the PIP, discussed above, it is unnecessary to determine whether Ms. Walton's highly critical approach, absent the failure to provide promised assistance, would have denied Mr. Birkland a reasonable opportunity to improve. It is clear, however, that her approach lacked the encouragement and other characteristics of assistance that could be expected to assist Mr. Birkland in improving his performance.

The evidence discussed above shows that the Agency not only failed to provide Mr. Birkland a meaningful opportunity to improve and demonstrate acceptable performance, but

⁶ Ms. Walton testified that she observed that Mr. Birkland was not using a calendar system, which seemed to come as a surprise to her. She did not follow up by teaching him how to develop and use a calendar.

⁷ Ms. Walton watched either one or two training videos with Mr. Birkland, one on June 25 and another one initially proposed for August 14 or 15, 2013. It is unclear whether or when they watched his course, as Mr. Birkland was on vacation that and the following week.

it also failed to provide sufficient guidance to Ms. Walton, a relatively new supervisor going through her first PIP process and removal action. Ms. Walton put considerable time and effort into working with Mr. Birkland, but that she did not know how to do so effectively. As a result, she did not provide either the assistance promised in the PIP letter or assistance that was reasonably likely to help Mr. Birkland improve and succeed.

While the record reflects that Mr. Birkland was somewhat set in the ways he had developed in his 20 years of work for the Agency, all agree that he was a conscientious employee who worked hard. As in several other cases in which arbitrators have reinstated employees after they were removed without being given a meaningful opportunity to improve, it is unclear whether Mr. Birkland will be ultimately be able to meet the performance standards of his demanding job.⁸ As the MSPB and arbitral precedent make clear, however, under Chapter 43 and the contract, Mr. Birkland was entitled to meaningful assistance and the opportunity to show that he can meet the requirements of his job.

For all the reasons set out above, I find that the Agency failed to provide Mr. Birkland a reasonable opportunity to improve and therefore violated Chapter 43 and the parties' contract by removing Mr. Birkland from Federal Service. The Agency is directed to reinstate the Grievant with no loss of seniority and full back pay. Under the Back Pay Act, the Grievant was affected by an unjustified personnel action that resulted in loss of pay and benefits. The grievance is sustained and in accordance with the parties' agreement the Agency shall be responsible for 75% of the arbitrator's fees and expenses.

⁸ There is no dispute that Mr. Birkland knows and understands the substantive work of TAS and that his difficulty concerned only CJE 5. I note that the performance appraisal issued at the end of the PIP rated his work as satisfactory in other CJE's.

AWARD

The Agency failed to provide Mr. Birkland a reasonable opportunity to improve and therefore violated Chapter 43 and the parties' contract by removing Mr. Birkland from Federal Service. The Agency is directed to reinstate the Grievant with no loss of seniority and full back pay. Under the Back Pay Act, the Grievant was affected by an unjustified personnel action that resulted in loss of pay and benefits. The grievance is sustained and in accordance with the parties' agreement the Agency shall be responsible for 75% of the arbitrator's fees and expenses.

A handwritten signature in cursive script that reads "Ann Gosline".

Ann Gosline
Arbitrator

April 18, 2016