AFL-CIO
American Federation of Government Employees
National Citizenship and Immigration Services Council
Immigration and Customs Enforcement Council
Local 3377
P.O. Box 560905
Dallas, Texas 75356-0905

January 27, 2011

Angela K. Barrows
Acting Director, Texas Service Center
ATTN: Labor and Employee Relations
7701 N Stemmons freeway
Dallas, TX 75247

Subject: Written Response to Proposed Removal

Acting Director Barrows:

This letter shall serve as the response on behalf of the undersigned, Xxxxxx, in which Ms. Marnie Drumheller (Acting Deputy Director, Texas Service Center), proposed to remove the undersigned, ISO Xxxxxx, from the Service for unacceptable Performance under the provision of Chapter 43, Title 5, U.S.C.

Summary of charges upon which removal was proposed

TSC Acting Deputy Director Drumheller has proposed to remove the undersigned for "Unacceptable Performance." The charges are summarized as follows:

REASON: Unacceptable Performance

Specification: You failed to perform at the "Minimally Successful" performance level in Critical Job Element #1, "Adjudication of Applications/Petitions" during your PIP.

Specification 2. You failed to perform at the "Minimally Successful" performance level in Critical Job Element #2, "Quality" during your PIP.

Burden on Agency

In *Lee v. Dept. of Labor*, 110 MSPR 355, 359 ¶ 6, 2008 MSPB 252 (2008): To sustain an action for unacceptable performance under chapter 43, the agency must demonstrate by substantial evidence that:

1) the removal was effected under a performance appraisal system approved by the OPM;
2) the performance standards are valid;
3) the employee was provided with a reasonable opportunity to demonstrate acceptable performance; and
4) the employee's performance was unacceptable in at least one critical element.

In 5 USC 4302-3, Congress established as a principal part of the Reform Act a requirement that agencies make decisions concerning retention, reassignment, promotion, and demotion of employees on the basis

of performance in critical elements of their jobs, **measured against reasonably objective performance standards.** Removal can be predicated upon failure to meet the requirements of just one of a number of critical elements applicable to a position.

Background – the Employee and the PWP:

Mrs. Xxxxx-Xxxxx entered on duty on November 11, 1987. After several positions she was assigned to the Business Premium Division where she has continued to serve as an Immigration Service Officer, Level II (previously Center Adjudications Officer).

During Mrs. Xxxxx-Xxxxx's 2009-2010 rating period Mrs. Xxxxx-Xxxxx's father passed away. Mrs. Xxxxx-Xxxxx was already burdened with the caring for her chronically ill spouse, who continues to be hospitalized. These responsibilities were in addition to her other family responsibilities of her own children and full time employment with USCIS.

On August 30, 2010, Mrs. Xxxxx-Xxxxx was informed that she was performing at the unacceptable level in Critical Job Element1 (CJE 1) Adjudications and Critical Job Element #2 (CJE 2) Quality and placed on a sixty calendar days Performance Improvement Plan (PIP). On October 6, 2010 Mrs. Xxxxx-Xxxxx's PIP was extended thirty days due to a thirty day FMLA. Therefore, the PIP period ended on December 7, 2010. At the conclusion of the PIP, Mrs. Xxxxx-Xxxxx's performance was rated as Unacceptable in CJE 1, Adjudications/ Production and Unacceptable in CJE 2, Quality.

The Union would like to point out that the procedures and appropriate arrangements were not negotiated for this PWP. Former Vice President Oliver had agreed to allow the Agency to implement the current PWP and negotiate post-implementation. One of the major concerns was the potential adverse impact of using the "Utilization Rate" (65% utilized for production, 35% used for all other activates, to include leave and holidays) as a basis for computing the employees' annual goals. We felt that this would aversely impact employees who became seriously ill, needed to care for a family member, or was actively engaged in representing other employees on official time. With the reduced adjudication hours, they may be unable to make their annual goal, or if they did make it, would be prone to making more errors that they would not have made, but for trying to meet the production goals.

The post-implementation bargaining did not result in an agreement. Although management did agree to not apply the Utilization Rate in computing the annual goal, we could not reach agreement on an appropriate arrangement of particular concern to the employees: that the adjudicating employees be given credit for all their work, to include their decision to request evidence to develop the case, notify the applicant or petition of the intent to deny and decide to relocate to a local office for an interview.

After the Agency unilaterally implemented another PWP, we filed an unfair labor practice charge, which was settled in March 2009, requiring the restoration of the status quo ante and the negotiation of any changes to the extent required by the statute. The Agency then decided not to propose any further changes for the rating period. We asked at that time that the PWP be reconsidered as a whole, particularly in light of how the facts had changed. When facts change so should the positions. To this date managements positions has been clear, conform or suffer the consequences.

Analysis

Specification: You failed to perform at the "Minimally Successful" performance level in Critical Job Element #1, "Adjudication of Applications/Petitions" during your PIP.

Specification 2. You failed to perform at the "Minimally Successful" performance level in Critical Job Element #2, "Quality" during your PIP.

Views pursuant to Article 5D

Conversations with First Line Supervisors (FLS), Assistant Center Directors (ACD), Deputy Director (DD) and the recently retired Center Director (CD) about the unfair realistic approach of expecting performance at a very unreasonable and unattainable rate has been the topic of conversation in many circles, sometimes daily. Most of these conversations have only been that, conversations. And, common to my inquiry was that all would work itself out in the end.

Mrs. Xxxxx-Xxxxx's circumstance is just one of many who have come to fall victim to what lays at the core of it all…an unreasonable and unattainable rate of production. Yet, if you count the victims and affect holding to the unreasonableness of such approach one cannot but wonder how we can speak of core values when by example there are none.

When we speak of our integrity, vigilance I can't help but wonder where. Certainly a rational and reasonable person would argue that the expectation impressed on the rate per hour count is unreasonable and unattainable for the following reason(s): the officer who adjudicates petitions/applications, like Mrs. Xxxxx-Xxxxx more often than not are issued work orders lacking initial evidence, expired fingerprints and name checks, labor certifications, is un-tabbed, and/or have a complex naming conventions or harbor possible national security concern(s). This alone creates additional timing issues in that the officer is now faced with requesting for the missing material, or attending to resolve or vet the cases accordingly. But, what the last three PWP'S, including the most recent one for 2011 which has not yet been issued does not do is to compensated or adjust the rate of production according to the additional time officer's actually spend on such tasks. As an adjudicator and Chief Steward I have often raised these issues only to be told that it would all wash out in the wash. It never does.

Most requests for evidence take most senior experienced officers on average thirty minutes, not considering the depth of the evidence requiring review. This time fluctuates. The point here is that it is no wonder that an officer must cut corners in order to meet the time of rate per petition/application as has been the case in Mrs. Xxxxx-Xxxxx's.

Take for instance NTA'S. In the latter part of 2008, TSC decided that it was time that all officers learned how to prepare NTA'S and used several models to create a training program to accomplish this. Early on, many officers suffered from the lack of experience with both inadmissibility laws, criminal/penal law/codes, and the ENFORCE system. From the very beginning the of rate production was flawed.

It was flawed for this reason. First, unless the officer is the case officer of the final adjudicative process – meaning the petition/application was denied by the very officer preparing the NTA -- then the process to prepare an NTA would require re-adjudicating the entire A-file. If an officer adjudicates a particular petition/application, it is believed that the officer is axxxxx of the alien's method of entry, inadmissibility charges, and if any fraud was involved and/or other issues that would conclude the alien's removability. In this is the case, the officer would only need to populate the required data into ENFORCE, print it out, place the NTA in order, acquire the first line supervisor's initials and ACD's signature, update the necessary systems, such as GUI/ADJ CASE, BATCH, TECS, and/or ENFORCE, then route the NTA to the clerical staff for final review and disposition. This process in whole is now expected to be completed at the rate of 1 per hour, in addition to the petition/application adjudicative process. However, if the officer is not the case officer who adjudicated the petition/application then he/she is for the first time looking at a case which was reviewed by another officer. Now, the rate of production increases, because the officer must review the entire A-file and decide if the benefit was correctly denied, and determine the

charges of inadmissibility, then prepare the NTA for issuance. This means the officer in the latter process does not get the necessary time to perform the pre-adjudication task. Second, and more importantly, for Service Center Adjudicators removing aliens, understanding inadmissibility law, and understanding the functionality of ENFORCE is as new as any other new process. New in that for many adjudicators NTA'S are not day-to-day functions. They are issued randomly and in spurts when the agency has no cases ready to work.

Each of the issues raised in the previous paragraph fits the case of Mrs. Xxxxx-Xxxxx. Important, because during the time when the agency could've issued ready to work cases, they complicated her PIP with NTA'S. The effort was unreasonable. My experience comes from issuing NTA'S for over 11 years. No other officer at the TSC has my experience working NTA'S. I know the trainers and the subject matter experts; and, in both cases at one time and another have sought out my advice.

During the rating period Mrs. Xxxxx-Xxxxx was given 1st preference petitions as part of her work order. For employment-based petitions, the current allotted time for 1st preference I-140's the rate of production is also unreasonable and unattainable. First, the adjudicative process pre-Kazarian, for a low risk E11 petition usually is accomplished within a 4 to 5 hour period. The time TSC has allowed before the last change occurred was approximately 1.50 hrs. At present the rate of count is now 2.51. Not considering that TSC sent out a new rate of 1.79 a few days ago (01/24/11). This clearly lacks realistic compensation for the officers' actual performance during the adjudicative process. Second, what statistics do not reveal is how each petition/application can vary based on the depth or volume of record of proceedings or the complexity of the petitioner and/or beneficiary. For example, many times cases involve 8-12-20-39 parts. This means that the supporting documentation the petitioner provides is of such a large volume that it spans over 1 crate or bucket - the bucket being the size of two crates. So in this case, the adjudicative process increases as the size of the crate/bucket increases. This is a consideration that neither the FLS assesses during the rating period, nor does the mentor during her mentorship of the various cases Mrs. Xxxxx-Xxxxx was assigned. And, to complicated Mrs. Xxxxx-Xxxxx's performance her FLS directed Mrs. Xxxxx-Xxxxx's during her monthly reviews, PWP, and PIP, "ISO should ensure that she read all evidence in the file before making adjudication decisions."[1] What this expectation did was direct Mrs. Xxxxx-Xxxxx to review all of the evidence without discretion as most officers decide the depth of review due to the volume of the case.

Also, affecting the rate of production for Mrs. Xxxxx-Xxxxx and the officer's not included in this rebuttal is the new and constant changing Kazarian adjudicative process. Even trainers have commented on the lack of experience the Training division has having never adjudicated 1st preference kasarian cases, that because the process is so convoluted and subjective the process and expectation is constantly evolving. Unlike a low risk petition, a Kazarian petition regardless of size can take the span of a whole day or an eight hour period for which the officer's PWP rate is 1/2.51. Some officers, like Mrs. Xxxxx-Xxxxx have indicated that depending on the lack of eligibility an RFE and Denial for such a case can take as much as twenty-five pages. The first ten being template in most cases the latter being research and analysis. However, to this end and with this first hand knowledge, even discussed in a recent phone conference with the Deputy Director present no reasonable compensations or adjustments to the officers PWP has occurred. This includes the Mrs. Xxxxx-Xxxxx's rating.

A supervisor explained the other day that the new Kazarian adjudicative process requires the review of material in whole in order for the Service to articulate the task in whole to the petitioner or to the petitioner's legal representative, before denying or sending a Notice of Intent to Deny. The evidence provided in the notice of removal did not reveal Mrs. Xxxxx-Xxxxx worked any 1st preference petitions during the PIP review period, however, the evidence did reflect that throughout the entire rating period

[1] Employee Evaluation Worksheet (January 2010), dated February 16, 2010.

Mrs. Xxxxx-Xxxxx did adjudicate 1st preference petitions at the unreasonable and unattainable rate of production. Therefore, Mrs. Xxxxx-Xxxxx was not provided a reasonable and fair opportunity to demonstrate that she was capable of performing at the level your notice alleges she failed to achieve. This would be true for work orders including NTAs and other adjudicative work orders which were not ready to work which required Mrs. Xxxxx-Xxxxx to request for missing initial evidence and/or additional evidence. Including work orders which lacked labor certificates, which made the beneficiary ineligible, but for which TSC has a practice which prohibits the officer from enforcing statue and spending extra time attempting to resolve the lack of labor certificate. The same is true of denying petitions, where the alien (the beneficiary) is inadmissible. These customer service accommodations are circumstances beyond the officer's control. And, in this case has no issue to dispute how the agency chooses to water down the stipulation of law. What it does dispute is the unreasonable and unattainable expectation that compromises the employment of an officer.

In another example of Mrs. Xxxxx-Xxxxx's duty, an NIW or Exceptional Ability (which, like the 1st preference E-11 and E-12 must follow the Kazarian style format thus it would require more hours than what is been allotted at the TSC) is also subjective. While one officer may decide one piece of evidence is sufficient, another may not. There is no clear cut pattern which the statute or the Service has established. Often when an officer is in doubt of the supporting evidence, the officer relies on communicating with peers and those few experienced 1st line supervisors whom the officer has confidence to ask. This point is made because officers have indicated that where an experience FLS will only superficially check a NOID or DENIAL, usually on the spot, more experienced FLS'S will take days, weeks, months reviewing, discussing it and sending it back and forth between themselves and the officer until the NOID and/or DENIAL is fine tuned. Such as the case with Mrs. Xxxxx-Xxxxx's FLS who indicated that a lot of work was returned to Mrs. Xxxxx-Xxxxx for correction. This is a common occurrence with complex adjudications, yet for unknown reasons not for Mrs. Xxxxx-Xxxxx's relationship with her FLS.

In the case of Mrs. Xxxxx-Xxxxx, her 1st Line Supervisor limited her access by stating, "ISO Hickamn" (grammatical error, it should be Xxxxx-Xxxxx) "has been assigned a mentor to assist her in areas of development. ISO should only seek assistance from a BP supervisor, mentor, or training unit."[2] But, none of the evidence established that Mrs. Xxxxx-Xxxxx was given every opportunity to understand what was wrong, explained how to fix it, and the monitor her development. In fact Mrs. Xxxxx-Xxxxx indicated that she never received notes from her mentor. That in fact her mentor intimidated her and made her feel uncomfortable to the point that she was afraid to ask for advice because she was often feel like she was stupid. She asked her FLS if it was possible that she could have another mentor. Instead of the FLS attempting to figure out the problem, the FLS would tell Mrs. Xxxxx-Xxxxx that the mentor was the best one at the TSC and she should take advantage of the privilege. Yet, no notes were, beyond the FLS comments on return work were ever provided to Mrs. Xxxxx-Xxxxx so that she had something to work from. Additionally, Mrs. Xxxxx-Xxxxx found herself without avenue when neither were available, coupled by the fact that the FLS never provided specific points of contact within the training unit (who require that you send your inquiries via email and through your supervisor). We argue that this method is unreasonable because at a time when the employee is fighting for her career, the agency limited her adjudicative tools and denied her access to well-established subject matter experts situated throughout the work area. It became so frustrating for Mrs. Xxxxx-Xxxxx that on more than one occasion she raised this concern to her FLS as indicated above. Even so far as to ask for another mentor and to point out that another FLS made sure that for those officers assigned to her supervision having been placed on PIPs or difficulty meeting expected goals, that supervisor made it a point to get "ready to work" work orders to her officer(s). I had on more than one occasion expressed to the Director that the mentorship program was nothing more than a management tool to help employee's fail. Fail because no baselines were ever

[2] Employee Evaluation Worksheet (February 2010), dated March 23, 2010.

created to help the employee gain their confidence back. No baseline establishing what was wrong. No strategy that established what the employee's weakness was and how mentoring the employee was going to assist in developing the employee. Mrs. Xxxxx-Xxxxx's failure is not her, but the ineffectiveness of the poor training program she and other employees are often subjected to without other recourse.

Mrs. Xxxxx-Xxxxx's mentoring did not allow for her to increase productivity and/or overcome the hindering rate of production. The mentor doesn't even articulate why Mrs. Xxxxx-Xxxxx was having problems.

The confidence between officer and supervisor is key to any officer relationship. We've spoken on this matter many times before. Even in another recent case where the agency agreed. Lacking confidence disrupts the efficiency the notice so eloquently attempts to speak of but which the evidence fails to support. The lack of trust and confidence hinders how the officer deciphers evidence and the length of time in the adjudicative process and, how well and efficient the employee works. The hostile environment Mrs. Xxxxx-Xxxxx was exposed to, caused her to rush her work, hindering the quality of her work. The rush job and concern of meeting deadlines creates confusion in cases where the material is large in volume. The evidence was clear in that it lack commitment to see Mrs. Xxxxx-Xxxxx through the rough times.

For example, officers like Mrs. Xxxxx-Xxxxx are often advised that if something is missing from a file, in the case of employment-based petitions, the officer should try to find it on the web (i.e. ability to pay, company size, noteworthy achievements…etc) so as to avoid having to RFE. While this is a great example of the agency's attempt to improve great customer service, it fails to compensate the officer for the extra expectation of the adjudicative process. Again, officers are prohibited from denying petitions/applications, even if they are statutorily ineligible. To avoid this type of enforcement the officer has been advised to send a RFE/NOID in the off chance the petitioner could overcome the issue. Yet, as before, the rate of production is not adjusted compensating the officer for the additional expectation during the adjudicative process. To often the result depends on volume.

The case is the same for other categories 2nd and 3rd preference petitions which merit ineligibility. This is key because as the evidence establishes, Mrs. Xxxxx-Xxxxx was issued these types of petitions/applications during the PIP period where the review of material often resulted in RFE-ING which was never compensated or adjusted to reflect the amount of time it actually took Mrs. Xxxxx-Xxxxx to review, prepare and send a request for additional evidence. Also, when petitions have no available visa, the agency has established an internal policy which can place the petition on hold until a visa becomes available which contradicts statute, which is of little concern to Mrs. Xxxxx-Xxxxx because none of her time was properly compensated if and when she was obligated to request information for an ineligible benefit at the time of adjudication.

Also, not considered in the rate of production is the amount of time a petition stayes with the FLS waiting for review. Mrs. Xxxxx-Xxxxx indicated in some cases the A-files were not NFTS-ED to the FLS. Yet, this was never clarified by the FLS. While this is an expected practice, more often than not, there are times when files will sit with the FLS for months at a time while the file remains in the officers NFTS code. At TSC a policy issued in middle of 2010 directed that all denials, especially BP denials, required FLS review and concurrence. Yet, no time was reflected to compensate the officer for the time cases are with the FLS. This is clearly demonstrated when FLS' in BP were sent home to catch up with the excessive backlog so that subordinates and/or other duties did not intervene with the review process. No officer, including Mrs. Xxxxx-Xxxxx, was allowed to "back-out" or report this down time for statistical capture. Mrs. Xxxxx-Xxxxx was constantly reminded in her evaluation, "ISO Xxxxx has reduced the

number of files in her NFTS code, but has failed to adjudicate all cases over 30 days."[3] It is not uncommon that cases sit with the officer longer than 30 days, especially if cases require review.

Another process which hindered Mrs. Xxxxx-Xxxxx's rating and PIP period(s) was the file room processing of the petition/application and its supporting documentation. As the petition/application is processed through data collection, tabbing and evidence identification is removed. Once this is done, holes are punched into the evidence and placed into the receipt or A-file, sometimes and often not in the order the evidence was submitted. This means that the officer has to re-tab each piece of evidence in order to adjudicate it. This adds to the adjudicative process which once again does not adjust at the rate per hour count. This, like many of the other issues, has been brought to the attention of the FLS' and ACDs have not been resolved. To date the response has been, "these are not negotiable issues" or "these issues are being addressed at the national level and are not open to discussion locally." In the meantime, officers like Mrs. Xxxxx-Xxxxx are affected daily, weekly, monthly, and annually. These "issues" have affected not just Mrs. Xxxxx-Xxxxx's own career, as in this case, but has ended many other officer's careers.

The lack of action in the last many years, including Mrs. Xxxxx-Xxxxx's 2009-2010 rating and PIP was a causative effect directly connected with placing upon her an unreasonable expectation to enforce statute, water the statute down with policy and practice, then complicate her performance standard with unreasonable and unattainable expectations.

The notice reflects the lack of loyalty, commitment, and professional development the Agency lacks towards Mrs. Xxxxx-Xxxxx and TSC employees alike. This speaks to the inefficiency of the Service she has faithfully served for over 23 years. Mrs. Xxxxx-Xxxxx fall from achieving realistic expectations started long before her 2009-2010 rating. Like most other officers who have been cutting corners as indicated in the OIG report of 2002, and which TSC'S email mid-summer last about officers not working during breaks, before or after clock time was prohibited the method of production works to create inefficiency without oversight. Mrs. Xxxxx-Xxxxx found herself drowning in the cry of her help to her FLS whom, while faced with the same reality, was unable and unauthorized to modify Mrs. Xxxxx-Xxxxx's performance measure.

On top of Mrs. Xxxxx-Xxxxx's professional frustration, Mrs. Xxxxx-Xxxxx lost her father last year; lost time due to her husband's failing health; and on occasion lost time to attend to her own health, rarely being touched by the helping hand of understanding. The tragedy here is the continued failure of the Agency to legitimately argue that the rate of production at the present level is a true and honest reflection of the quality work it speaks of in reports that are not reflective of what adjudicators do on a daily basis. Time after time, officers, as recent as this morning have asked, when is someone going to step in and truly fix this problem. The failed attempts to correct the PWP are of little consequence if Mrs. Xxxxx-Xxxxx becomes another victim of this failed process.

During the adjudication of the Form I-140 as it relates to ability to pay, if the Regional Commissioner can allow an employer to demonstrate ability to pay during a year where the employer suffers a tremendous loss, then TSC should be able to do the same. *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of significantly more profitable or successful years. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. This is also the case for Mrs. Xxxxx-Xxxxx, whose performance history reflects twenty plus (20+) Outstanding and Excellent performance ratings and one year where Mrs. Xxxxx-Xxxxx's performance

[3] Employee Evaluation Worksheet (April 2010), dated May 25, 2010. But included in every monthly evaluation.

rating was uncharacteristically low; i.e., Unsuccessful. If the Regional Commissioner believed that the petitioner in *Matter of Sonegawa* could resume successful business operations, then TSC should also believe that Mrs. Xxxxx-Xxxxx can also resume successful performance ratings.

Mrs. Xxxxx-Xxxxx does not ask that you give her a free ride or that you not expect anything but the best from her. Mrs. Xxxxx-Xxxxx, like all professional employees of the TSC, only ask that the standard and professional expectation be reflective of our expected obligation to the enforcement of the oath the Service holds us to. If a policy changes the procedure or the eligibility of a benefit, provide Mrs. Xxxxx-Xxxxx and affected employees with written changes, which serve to develop ones skill that she can refer to when addressing the public. Provide her with the best mentorship and supervisor a subordinate can trust in. The PIP never addressed specifically what Mrs. Xxxxx-Xxxxx's problems were nor did it indicate what actions she should take, except to refer her to the PWP which contradicts the Agency's expectations. When Mrs. Xxxxx-Xxxxx attempted to follow the instructions of reviewing all of the evidence, she was told that she did not have to – that she had to develop and "organize adjudication activities."[4]

What egregious act has this veteran of 23 years performed so miserably that effective professional training and mentorship could not have helped her overcome? We are not arguing that Mrs. Xxxxx-Xxxxx is perfect in any way. But, surely 23 years of service speaks for something. We stand on the basic principal of reasonableness. The evidence is not one that has not been professionally supported. The OIG 2002 report spoke directly to what ailed TSC then and now and little has been done to change the very practice(s) which failed our homeland security then and have failed Mrs. Xxxxx-Xxxxx now. These failures and the failed action to properly provide quality service and law enforcement has been the cost of Mrs. Xxxxx-Xxxxx's 23 year service.

We request that you consider the evidence herein, coupled with Mrs. Xxxxx-Xxxxx's long service and settle on how best Mrs. Xxxxx-Xxxxx could best serve the Agency in her present capacity with a renewed and good faith attempt at reforming how TSC rates the productivity and quality of Mrs. Xxxxx-Xxxxx. We recommend that cooperatively we can best develop the opportunity at creating a model performance standard that will serve not only the efficiency of the service, but to return to our core values which the Director referred to during his welcome introduction in 2008, "Of everything that I expect of you, I always expect that you always give the right benefit to the right application and at the right time and never to the wrong applicant at the wrong time."[5]

Elements to be established:

I. The removal was effected under a performance appraisal system approved by the OPM;

The Agency has not addressed whether or not the Performance Appraisal System of which the Performance Work Plan is a part had been approved by OPM.

An agency must have OPM approval of its performance appraisal system prior to its implementation and prior to taking any actions against employees under Chapter 43. *See Cole v. IRS*, 25 MSPR 564 , 565 n.* (1985) (the harmful error doctrine does not apply to the issues of approval of the agency performance appraisal plan by OPM); *Young v. Dept. of Navy*, 7 MSPR 73 , 78, 7 MSPB 7 (1981) (the agency did not assert that an OPM-approved performance appraisal system was in effect).

[4] Employee Evaluation Worksheet (March 2010), dated April 28, 2010.
[5] Welcome Introduction Speech by the TSC Director, January 8th, 2008.

While the Performance Appraisal System used by USINS for many years may have originally been approved by OPM, we believe that the current system contain substantive changes which were not approved by OPM and that these changes have significantly affected the rights of the agency's employees under its performance appraisal system. We believe that these changes require OPM review and approval as covered by statute or regulation. *Brown v. Department of Labor*, 27 M.S.P.R. 255 (1985).

"If an agency significantly alters a previously-OPM-approved performance appraisal system, OPM review of the agency's modifications is necessary to achieve compliance with the basic purpose underlying the OPM-approval requirement." *Adamsen v. Dept. of Agric*., 571 F.3d 1363, 1363-64 (Fed. Cir. 2009)

While there is no statutory requirement for renewing approval of an agency's performance appraisal system once in place, and thus that it is no longer necessary to perpetuate an outmoded paperwork requirement. However, if an appellant alleges that there is reason to believe that an agency is not in compliance with the law, the Board may require an agency to submit evidence that it has received OPM approval of its performance appraisal system.

See Rangel v. DHS, 310 Fed. Appx. 385 (Fed. Cir. 2009

In the instant case, we challenge that the current system does not meet the requirement to be approved by OPM in that it contains substantive changes which were not approved by OPM, that these changes have significantly affected the rights of the agency's employees under its performance appraisal system and that these changes require OPM review and approval as covered by statute or regulation

II. The performance standards are valid

"Valid standards" are those that "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). The standards must be objectively achievable as well as under the particular circumstances faced by an employee. *Wright v. Dep't of Labor*, 82 M.S.P.R. 186, 194-P17 (M.S.P.B. 1999) (discussing objective reasonableness versus as-applied reasonableness of standards, where employee was required to process a certain percentage of injury cases within a specified period).

To meet the statute's objectivity requirement, performance standards must be reasonable, sufficient under the circumstances to permit accurate measurement of the employee's performance, and adequate to inform the employee of what is necessary to achieve a satisfactory or acceptable rating, though strict numerical standards are not required. *Fletton v. Department of the Air Force*, SF-0432-07-0597-I-2 (AJ 01/08/08), *citing Wilson v. Department of Health and Human Services*, 85 FMSR 7063, 770 F.2d 1048 (Fed. Cir. 1985); *Greer v. Department of the Army*, 79 MSPR 477 (MSPB 1998); *Smith v. Department of Energy*, 49 MSPR 110 (MSPB 1991).

The Merit Systems Protection Board (MSPB) has held that performance standards must be reasonable, based on objective criteria, and communicated to the employee in advance. *Eva Boyd v. Department of the Navy*, 88 MSPR at 441 (2001); *Walker v. Department of the Treasury*, 28 MSPR 227, 229 (1985). This has been affirmed in the Federal Circuit Court. *Wilson v. Department of Health and Human Services*, 770 F.2d 1048, 1052 (Fed. Cir. 1985); *Cynthia A. Guillebeau v. Department of the Navy*, 362 F.3d 1329, March 24, 2004.

Regardless of whether a party raises it, the MSPB will consider whether an agency established that its performance standards were valid. *Smith v. Department of Veterans Affairs*, 93 FMSR 5406, 59 MSPR 340 (MSPB 1993); *Burnett v. Department of Health and Human Services*, 51 MSPR 615 (MSPB 1991).

An Agency may exercise managerial discretion in establishing performance standards. The Merit System Protection Board has held that the establishment of a standard that is unduly strict constitutes an abuse of discretion. See *Romero v. Equal Employment opportunity Commission*, 55 MSPR 527, 537 (1992), a*ff'd*, 22 F. 3d 1104 (Fed. Cir. 1994).

If the Agency is unable to demonstrate by substantial evidence that the performance standards are realistic and reasonably attainable, any action based on these performance standards cannot be sustained upon appeal. *Walker v. Department of the Treasury*, 28 MSPR 227, 229 (1985).

The MSPB will not sustain a performance-based adverse action if the employee was prevented from meeting performance requirements by factors outside his control. *Cowins v. Department of Veterans Affairs*, 64 MSPR 551 (MSPB 1994).

While a performance standard of processing 80% to 85% of traumatic injury cases within 45 days of receipt may be reasonable and attainable if one receives a small number of such cases within a two-month period and if there are not an unusually high number of other cases to process, that standard might be unreasonable and unattainable if there are a multiple of those type cases received within the same time period or if the demands of other duties severely impinge on the time available for processing traumatic injury cases. See *Patricia A. Wright v. Department of Labor*. MSPB Docket No.CH-0432-98-0134-I-1, May 12, 1999.

The arbitrator specifically found that the performance goals of an "accuracy rate of 92.2% with a productivity rate of 7.8 cases/day on the full range of Benefit Authorization work" was "unreasonable high and operated to the grievant's detriment". In this grievance, the grievant was removed for not meeting the accuracy rate. The arbitrator sustained the grievance. See *AFGE Local 1760 and Northeastern Program Center of the Social Security Administration*, NY-03-R-0015 (June 7, 2004).

Another MSPB appeal also involved measuring performance by number of items processed compared against an accuracy rate. The judge found that a performance measurement based on a national standard failed because it was not representative of the actual work being done by the employee. *Ricks v. Dep't of the Navy,* 2005 MSPB LEXIS 5573 (M.S.P.B. Aug. 24, 2005).

In a performance case involving an Immigration Services Officer at the Vermont Service Center, the MSPB judge upheld the removal. She found it acceptable that the agency had not held other employees to the same production numbers where they either had a more difficult, "ugly" caseload or had low production due to being out on maternity leave. *See Homick v. Dep't of Homeland Sec*., 2009 MSPB LEXIS 719 (M.S.P.B. Jan. 21, 2009). The same considerations should be applied here.

In *Williams v. Dep't of the Treasury,* 35 M.S.P.R. 432, 436-437 (MSPB 1985), the Board rejected production numbers that, as applied, failed to accurately account for down time and improperly gave the same weight to tasks requiring a different amount of work. The Board there also referenced a case in which a national standard was found to be improperly applied to an employee who had not been shown to have a comparable complexity of work. *Id.*, at 437 (citing *Rocheleau v. Securities Exchange Commission*, 29 M.S.P.R. 193, 195-196 (1985), *aff'd*, 802 F.2d 469 (Fed. Cir. 1986) (table).

The Board also has rejected performance actions where it found the employee's "ability to meet these goals was significantly hampered by the actions of the agency." *Cowins v. Dep't of VA*, 64 M.S.P.R. 551, 556 (M.S.P.B. 1994).

In a survey conducted by the Union in May 2009, after the midterm evaluations, 56% of the respondents reported that they were performing at less that fully successful (40.79% Unacceptable and 15.79% Minimally Successful).

In an attempt to meet the production requirements, 63% reported working through their two 15 minute beaks each day, 55% reported working through their unpaid lunch periods, 49% reported working past Close of Business without pay and 37% reported working early without pay.

The results of this survey had previously been submitted to the Director on or about June 9, 2009, as an attachment to an Article 5D letter.

Further, the performance measures do not completely measure the work that the officers are required to perform.

Of particular concern is that the adjudicators do not receive credit for deciding to use the tools available to them to develop the case and determine if the applicant or beneficiary has established eligibility by a preponderance of the evidence; to ensure that they are giving the right benefit to the right person and not giving a benefit to one who is not eligible, or is attempting to obtain a benefit by fraud and misrepresentation.

The officers are not given credit for a decision to request evidence, send a Notice of Intent to Deny or Relocate the case for an interview.

In the report of the investigation conducted by the Department of Justice Office of the Inspector General, the IG determined:

> ". . . while the adjudicator approved the applications in accord with standard INS practices and policies existing at the time, these practices and policies were significantly flawed. They resulted in adjudicators approving applications without complete information." (Pg 104, *The Immigration and Naturalization Service's Contacts With Two September 11 Terrorists:* DOJ, OIG, 5/20/2002).

Because of this, the IG made several recommendations, of which recommendation No. 23 states:

> "The INS should change service center adjudicators' performance standards to allow more time to review files and seek additional information. At a minimum, in light of the new processing requirements described in this report, the INS should reconsider the performance standards for service center adjudicators and adjust the standards to accommodate the additional time that will be spent by these adjudicators implementing the new processing requirements." (Pg A-15, *the Immigration and Naturalization Service's Contacts With Two September 11 Terrorists:* DOJ, OIG, 5/20/2002).

Adverse impact

The current PWP does not provide for the mitigation of adverse impacts on an employee due to circumstances beyond the employee's control.

Beginning in July, there were complaints of officers not being issued sufficient amounts of work to meet the quotas imposed on them by the PWP. This lasted through the end of the rating period. Thus, the Board's reasoning in *Cowins v. Dep't of VA*, 64 M.S.P.R. 551, 556 (M.S.P.B. 1994). Stated above in that the employee's "ability to meet these goals was significantly hampered by the actions (or rather, "Inactions") of the agency

FMLA ISSUES

Among the stated purposes of the 1993 Family and Medical Leave were to "balance the demands of the workplace with the needs of families" and "entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." While Congress also spoke of the interests of employers, the law in fact tipped the scales more in favor of employees than had been the case prior to its enactment. The law also spoke to the need to prevent gender discrimination and the Supreme Court recognized that remedial intent in finding the law could be applied to states notwithstanding the 11thAmendment. Women are intended to be protected notwithstanding the fact that they are the ones who undergo pregnancy and often the one in a couple that bears greater childcare responsibilities.

FMLA allows employees up to twelve weeks per year of unpaid designated leave. An employee using the full twelve weeks in a fifty-two-week year essentially is working about 77% of the time, if using no other leave. The 2010 collective bargaining agreement similarly protects the jobs of employees who find they must take leave to care for themselves, family members, or both

A court understandably would have reservations about an employee who was absent that much claiming entitlement to something like a bonus based on production, yet was not meeting the production target to which other employees were held. But in ISO Xxxxx-Xxxxx's case, the question is not whether she is entitled to a bonus or other particularly-positive treatment. Instead it is whether she will be fired based on a finding she has failed to meet a minimum level of production during a period when she took leave that would qualify under the FMLA.

In one case, a federal appeals court considered a claim that a school district intentionally had violated the FMLA. The court found that, rather than taking steps to assuage the impact of the plaintiff-bookkeeper's leave on the District's operations, the District expected her to complete fulltime duties while she worked and effectively was paid on a part-time basis. "Viewed in this way," the Court ruled, "a reasonable jury could find that the FMLA leave granted to Ms. Lewis was illusory." The Court explained that the District could have shifted some job duties to other employees, hired part-time help, or transferred Ms. Lewis to a temporary position for the period she was unable to fulfill the essential duties of the bookkeeper position. The Court concluded:

> "In short, we believe that a jury would be entitled to conclude that the school board and the superintendent held Ms. Lewis to the unrealistic expectation that she should accomplish satisfactorily all of the duties of the bookkeeper position during her period of FMLA-protected intermittent leave. The imposition of such unreasonable expectations, if accepted by the jury, would be relevant and probative evidence of a retaliatory intent.

2 *Lewis v. Sch. Dist. #70,* 523 F.3d 730, 743-744 (7th Cir. Ill. 2008). (The school board also had made derogatory remarks about the FMLA's requirements.)

The balancing would more obviously fall in favor of the employer's interest as to ISO xxxxx-Xxxxx's situation if she was absent in spite of being denied permission for leave. But the leave requests she made were granted. Having been allowed the leave, she should not be punished for having taken it.. There has been no allegation of leave abuse; instead this involves an employee
who has been in an unfortunate period when her family's medical needs have been so great as to cause her to be willing to take even extended unpaid leave to meet them.

Conclusion

The annual goal is devoted to production and is unreasonable and unattainable. No national or local evidence has ever reported actual work. It is noted that the overwhelming majority of the employees placed on PIPS in 2009 were employees who had taken significant amounts of leave, either for their own or to care for a family member under the FMLA. Not considered was how not counting RFE/ NOIDS/ MOTIONS/ NTAS affected the outcome of the rating scheme.

III The employee was provided with a reasonable opportunity to demonstrate acceptable performance;

It is not in dispute that a period of time was set aside for ISO Xxxxx-Xxxxx to "improve her performance". It is the conduct of the PIP that is in question. As discussed above, during this time period, she was given more complicated cases, the "mentorship" was illusory, in that she was not provided any real instruction and advice on how to improve her adjudication time.

The PIP was merely a perfunctory gesture by management to provide an appearance of complying with the statutory and regulatory requirements, without substantively doing so.

IV The employee's performance was unacceptable in at least one critical element.

As measured by the supervisor, it is not in dispute that ISO. Xxxxx Xxxxx was found unacceptable in two critical elements.

What is in dispute is 1) that there have been substantial changes to the performance management system which requires re-approval by OPM, 2), the performance measures are unreasonable and unattainable and pose a threat to public safety and 3), ISO Xxxxx-Xxxxx was not provided with a bona-fide opportunity to improve.

Thus, it is disputed that the supervisor's measurement of ISO Xxxxx-Xxxxx's performance was an accurate, reasonable and objective measurement of her work.

Prohibited Personnel Practice

5 U.S.C. 2302(a)(2)(A)(vii) defines a performance evaluation under chapter 43 of Title 5 as a personnel Action.

5 U.S.C. 2302(b)(8) states in pertinent part:

take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,"

It should also be noted that a large number of employees exercised their statutory rights pursuant to 5 U.S.C. § 7211 by signing a letter to numerous congressmen and senators concerning the unreasonable and unattainable performance measures in the Texas Service Center PWP and how they constitute a threat to the security of the Homeland. Upon Information and belief, the Agency has been provided with copies of these letters with the employees signature. Ms. Xxxxx was one of these employees.

Thus, in that Ms. Xxxxx Xxxxx acted in concert with several of her fellow officers in disclosing information to Congress that she believed constituted a substantial and specific danger to public safety, this proposal to remove her for failing to meet those unreasonable and unattainable performance measures that are tantamount to a threat to public safety, constitutes a prohibited personnel practice.

Local 3377 and Mrs. Xxxxx-Xxxxx sincerely hopes that he Deciding Official considers all factors and decides to withdraw the proposed removal.

Sincerely,

Crispin Y. Perez
AFGE Chief Steward, Local 3377
Email: lamigra6@yahoo.com

Attachments:
Letter of Designation
Email dated 01/04/11 from USCIS Union (Workplace News)