

VINCENT DOWNS,

Appellant

v.

MARYLAND STATE DEPARTMENT
OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 10-37

OPINION

This appeal involves the dismissal of a Category III Professional Assistant pursuant to §2-104(c)(2) of the Education Article, MSDE Policy HR-9B, and the Department's *Procedures for Removal of Professional Assistants and Special Appointments*. The Appellant, a Vocational Rehabilitation Technical Specialist who was employed by the Maryland State Department of Education, Division of Rehabilitation Services, filed this appeal challenging the decision of the State Superintendent of Schools to terminate him from his position. The State Superintendent of Schools terminated the Appellant for receiving a "Needs Improvement" rating on his January 12, 2009 end-of-cycle PEP, for failing to achieve a "Meets Standard" rating on his July 13, 2009 mid-cycle PEP, and for incompetence.

We referred this case to the Office of Administrative Hearings (OAH) as required by the Department's *Procedures for Removal of Professional Assistants and Special Appointments*. On May 7, 2010, the Administrative Law Judge (ALJ) issued a Proposed Decision recommending that the State Board affirm the decision of the State Superintendent of Schools to terminate the Appellant.¹

The Appellant filed no objections to the ALJ's Proposed Decision.

FACTUAL BACKGROUND

The factual background in this case is set forth in the ALJ's Proposed Decision, Findings of Fact at pp. 5 – 6.

¹ The ALJ heard the Appellant's termination case at the same time as the Appellant's grievance of his 2009 mid-cycle performance evaluation and issued one decision concerning both matters. With regard to the grievance, the ALJ's decision is a final agency decision. With regard to the termination, the ALJ issued a proposed decision. The State Board issues the final agency decision in the termination case.

STANDARD OF REVIEW

Neither State Board decisions nor the State Board appeal procedures identify a specific standard of review to be used in cases involving the dismissal of an MSDE Professional Assistant pursuant to §2-104(c)(2) of the Education Article. Thus it is up to this Board to determine the appropriate standard to be used in this case.

The State Board appeal procedures set forth two standards of review used in cases involving the termination of employees. In cases involving a local board of education's suspension or dismissal of a certificated school system employee pursuant to §6-202 of the Education Article, the State Board uses the *de novo* standard of review. COMAR 13A.01.05.05F. This means that the State Board exercises its independent judgment on the record before it in determining whether to sustain the suspension or dismissal of the certificated school system employee. (*Id.*). The State Board gives no deference to the local board's decision under this standard.

In cases involving the dismissal of a Board of Library Trustees' employee, this Board considers the decision of the Board of Library Trustees to be *prima facie* correct. The State Board will not substitute its judgment for that of the Board of Library Trustees unless the decision is arbitrary, unreasonable or illegal. COMAR 13A.01.05.05H. The State Board uses this same standard of review in cases involving the dismissal of noncertificated employees by a local board of education. COMAR 13A.01.05.05A.

When courts review the decision of an administrative agency, they typically use a deferential standard. The court considers the agency decision to be *prima facie* correct, and will affirm the decision when it is supported by substantial evidence in the record and the decision is not erroneous as a matter of law. *Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 67-68 (1999); *United Parcel Serv. v. People's Counsel for Baltimore County*, 336 Md. 569, 577 (1994). In such cases, the court acts in its appellate capacity reviewing the final agency action.

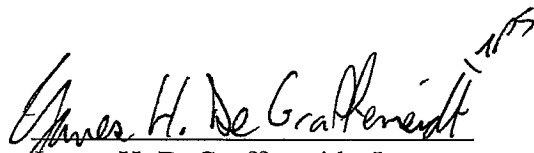
This case is an appeal of a termination decision made by the State Superintendent of Schools. The role of the State Board here is unlike its role in the usual State Board appeal. In the usual appeal, this Board acts as an appellate body reviewing the final decision of another board. In cases involving the termination of an MSDE Professional Assistant, the State Board acts as the final decision maker of its own agency's termination action. Because the State Board's decision serves as the final agency action regarding the dismissal of one of its own employees, we believe that it is appropriate to use the *de novo* standard of review in which the State Board takes an independent look at the record to determine whether the termination is supported by the facts and law.


The State Board referred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify, or remand the ALJ's Proposed Decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications, or amendments to the Proposed Decision. *See* Md. Code

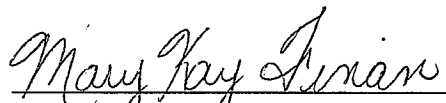
Ann., State Gov't § 10-216. In reviewing the ALJ's Proposed Decision, the State Board must give deference to the ALJ's demeanor based witness credibility findings unless there are strong reasons present that support rejecting such assessments. See *Dept. of Health & Mental Hygiene v. Anderson*, 100 Md. App. 283, 302-303 (1994).


CONCLUSION

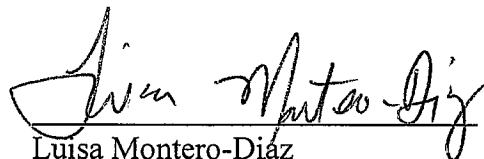
We have reviewed the record in this case and find that the ALJ's Proposed Decision is supported by the evidence and is legally correct. Accordingly, we adopt the ALJ's Proposed Decision and affirm the Appellant's termination by the State Superintendent of Schools.



James H. DeGraffenreidt, Jr.
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Mary Kay Finan


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Sayed M. Naved

Madhu Sidhu

Madhu Sidhu

Guffie M. Smith, Jr.

Guffie M. Smith, Jr.

Donna Hill Staton

Donna Hill Staton

ABSENT

Ivan C.A. Walks

Kate Walsh

Kate Walsh

September 21, 2010

VINCENT DOWNS,
VOCATIONAL REHABILITATION
TECHNICAL SPECIALIST,
GRIEVANT

* BEFORE MICHAEL D. CARLIS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS

v.

*

MARYLAND STATE DEPARTMENT
OF EDUCATION,
DIVISION OF REHABILITATION
SERVICES

* OAH No.: SPMS-MSDE-30-09-45903
* OAH No.: MSDE-BE-05-10-13744¹
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**DECISION ON SPMS-MSDE-30-09-45903 AND
PROPOSED DECISION ON MSDE-BE-05-10-13744²**

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
ORDER

STATEMENT OF THE CASE

On or about July 23, 2009, Vincent R. Downs, Jr. (Grievant), Vocational Rehabilitation Technical Specialist with the Maryland State Department of Education (MSDE), Division of Rehabilitation Services (DORS), filed a grievance, alleging that his overall needs improvement rating on the July 2009 mid-cycle Performance Planning and Evaluation Program (2009 mid-

¹ The Office of Administrative Hearings (OAH) incorrectly numbered this case as SPMS-MSDE-10-09-29105. The case number has been changed to MSDE-BE-05-10-13744 to correct the error.
² SPMS-MSDE-30-09-45903 is a grievance of the Grievant's 2009 mid-cycle performance evaluation. MSDE-BE-05-10-13744 is an appeal of the Grievant's termination from employment. The two cases were heard together. This decision includes decisions on both the grievance and appeal. The decision on SPMS-MSDE-30-09-45903 is a final agency decision. The decision on MSDE-BE-05-10-13744 is a proposed decision.

cycle PEP)³ "is not an accurate reflection of my work."⁴ On or about December 17, 2009, the Department of Management and Budget (Department) forwarded the grievance to OAH for a hearing. Md. Code Ann., State Pers. & Pens. § 12-205(b)(2)(iii) (2009).⁵

On July 23, 2009, MSDE notified the Grievant that his employment had been terminated, effective August 26, 2009. MSDE explained:

On January 12, 2009 [the Grievant] received an End-of-Cycle "needs improvement" Performance Planning and Evaluation (PEP) and a Performance Improvement Plan (PIP) with a rating of 1.24. During the six months after the End-of-Cycle Mr. Breeden, DORS Regional Director[,] met with [the Grievant] on a monthly basis to coach and train [the Grievant]. On April 8, 2009 [the Grievant] was given a 90[-]day PEP and received a rating of 1.52 "needs improvement." On July 13, 2009 [the Grievant] received a "needs improvement" on his Mid-Cycle PEP with a score of 1.2. The Grievant is in violation of COMAR 17.04.05.03G(1)[.] The Grievant is also in violation of Education Article 2-104(c)[.] Category III may be dismissed for incompetence.

On August 6, 2009, the Grievant appealed the termination.⁶ He wrote: "I disagree with my [t]ermination letter dated 7/31/09 from Dr. Nancy S. Grasmick, State Superintendent of Schools. This is not an accurate reflection of my work. This is retaliation [sic] due to past

³ A PEP is done on a standard form. The form includes two general categories: (i) performance standards and (ii) behavioral elements. The performance and behavioral categories contain a number of subcategories. An employee is given a numerical "level of importance" score and a numerical net score for each performance subcategory and in each behavioral category. The scores for levels of importance range from 1 to 3. The net score in each subcategory and behavioral category is determined by multiplying the level of importance score by the score that corresponds to the descriptive rating as follows: outstanding (4), exceeds standards (3), meets standards (2), needs improvement (1), and unsatisfactory (0). A standard formula is used to calculate an employee's overall performance rating as follows: First, separate sub-total level of importance scores in the performance and behavior categories and separate sub-total net scores in the performance and behavior categories are calculated by adding each subcategory scores in the respective category. Second, a total level of importance score and a total net score are calculated by adding the respective sub-total scores. Third, an overall score is determined by dividing the total net score by the total level of importance score. Finally, the overall performance rating is determined by placing the overall score within the correct numerical range for the ratings. The numerical range for each ratings is: outstanding: 4.0 - 3.74; exceeds standards: 3.74 - 2.75; meets standards: 2.74 - 1.75; needs improvement: 1.74 - .75; and unsatisfactory: .74 - 0.0). See Appellant #2 at pages 13-14.

⁴ The Grievant also claimed a violation of Section 2-202 of the State Personnel and Pensions Article and "Discrimination, harassment prohibited. Violations of the Americans with Disability Act."

⁵ All subsequent references to the State Personnel and Pensions Article are to sections only.

⁶ Although an individual who files an administrative appeal is customarily referred to as an "Appellant," I refer to Mr. Downs throughout this decision as the Grievant.

complaints and grievances." MSDE sent the appeal to OAH for a hearing on or about August 10, 2009.

On October 16, 2010, I conducted a hearing at OAH in Hunt Valley, Maryland. Section 4-401 (2009); §12-205(c) (2009); Md. Code Ann., Educ. § 2-104(c)(2) (Supp. 2009); MSDE Procedures for Removal of Professional Assistants and Special Appointments. Michele Minor, AFSCME Staff Representative, represented the Grievant. Philip Dietchman, Chief, Employee Relations Section, represented MSDE.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009); Code of Maryland Regulations (COMAR) 17.04.07 and 17.04.06.01D; and COMAR 28.02.01.

ISSUES

The issues are:

1. Whether MSDE misinterpreted or misapplied the performance appraisal process when it evaluated the Grievant's work performance during the period from January 2009 through June 2009 and, if so, whether the Grievant is entitled to have his performance appraisal changed.
2. Whether MSDE lawfully terminated the Grievant's employment based on the overall needs improvement ratings on the Grievant's annual Performance Planning and Evaluation Program (2008 PEP) and the 2009 mid-cycle PEP, or for incompetence.

SUMMARY OF THE EVIDENCE

Exhibits

The following were admitted for MSDE:

Dept. #1: Field Service Vocational Program goals for fiscal year 2009;

Dept. #2: Individual Performance Plan;

- Dept. #3: PEP Rating Worksheets for Counselors;
- Dept. #4: Caseload – Closed Rehabilitated form;
- Dept. #5: VR Performance Statistics for June 2009;
- Dept. #6: Eligibility Decisions for 1/1/2009 – 6/30/2009;
- Dept. #7: 120 Days Plan development for 1/1/2009 – 6/30/2009;
- Dept. #8: Memo, dated February 9, 2009;
- Dept. #9: Case Note for D;
- Dept. #10: Memo, dated April 3, 2009;
- Dept. #11: Memos from March 2009 and Case Notes from January and April 2009;
- Dept. #12: Case Notes from July and November 2008 and January 2009;
- Dept. #13: PIP reviews for January through June 2009;
- Dept. #14: PEP from December 2007 to December 2008;
- Dept. #15: Memo, dated January 12, 2009;
- Dept. #16: Memo, dated April 8, 2009, and PEP, dated December 2008 to December 2009;
- Dept. #17: Memo, dated July 7, 2009;
- Dept. #18: Memo, dated July 14, 2009;
- Dept. #19: Memo, dated July 15, 2009;
- Dept. #20: Letter, dated July 23, 2009;
- Dept. #21: Notice of Termination;
- Dept. #22: Procedure for Removal;
- Dept. #23: Memo, dated July 30, 2009; and
- Dept. #24: Letter, dated July 31, 2009.

The following were admitted for the Grievant:

- Appellant #1⁷: Withdrawn by Grievant before admitted;
- Appellant #2: PEP from December 2008 to December 2009;
- Appellant #3: Withdrawn before admitted;
- Appellant #4: Performance Improvement Plan, dated January 12, 2009;
- Appellant #5: Notes from June 2009 progress meeting;
- Appellant #6: Withdrawn before admitted; and
- Appellant #7: Appeal and Grievance form.

Testimony

The Grievant testified for himself.

James Michael Breeden, Regional Director, Region III, DORS, testified for MSDE.

FINDINGS OF FACT

I find the following by a preponderance of the evidence:

1. Since on or about August 1, 2007, the Grievant had been an employee by MSDE, DORS, as a Vocational Rehabilitation Technical Specialist at the Gas Light facility in Baltimore City.
2. During 2009, Linda Davis, Vocational Rehabilitation Supervisor I, was the Grievant's immediate supervisor until her retirement in May 2009.
3. Since about July 2006, James Michael Breeden has been the Regional Director of DORS, Region III, which includes the Gas Light facility.
4. On or about January 12, 2009, the Grievant received an overall needs improvement rating on his 2008 PEP.⁸

⁷ Despite note 4, I labeled these exhibits as "Appellant #."

⁸ "Needs improvement" means "[j]ob requirements and results are partially met. Performance needs development to meet the standards expected of an experienced and competent employee." Appellant #2 at page 3.

5. On or about January 12, 2009, Mr. Breeden and Ms. Davis met with the Grievant. They developed a performance improvement plan (PIP) to help the Grievant improve his job performance to at least meet standards for the mid-cycle period from January 2009 through June 2009.⁹ The Grievant was informed that his failure to meet job performance standards by the end of the six-month period could result in the termination of his employment.

6. During the 2009 mid-cycle period, Mr. Breeden met weekly with the Grievant to help the Grievant improve his work performance. During this same six-month period, Mr. Breeden and Ms. Davis, until her retirement in May 2009, met monthly with the Grievant to provide supervision, guidance, and instruction to help him improve his job performance and to provide regular feedback on the status of his work performance. Mr. Breeden gave the Grievant detailed, written summaries of the monthly meetings that addressed each goal in the PIP and assessed the Grievant's level of performance in reaching the goals.

7. On April 8, 2009, Mr. Downs reviewed the Grievant's overall job performance through March 2009, the midway point of the mid-cycle period. At that time, the Grievant's job performance remained at the needs improvement level.

8. On or about July 13, 2009, Mr. Breeden completed the Grievant's 2009 mid-cycle PIP. The Grievant received an overall needs improvement rating. The Grievant failed to meet specific job performance goals, blamed others for his poor work performance, failed to cooperate with Mr. Breeden's remedial and tutorial efforts throughout the mid-cycle period, and generally failed to demonstrate competence.

⁹ "Meets standards" means "[m]et the requirements and expected results for the job. Good performance which is expected of a fully experienced and competent employee." Appellant #2 at page 3.

DISCUSSION

The Grievance (SPMS-MSDE-30-09-45903)

The Grievant's Evidence

The Grievant completed a 2009 mid-cycle PEP self-evaluation on July 13, 2009. In two performance subcategories -- (i) timely service to consumers and (ii) commitment to continuous improvement -- he rated himself as outstanding.¹⁰ In the remaining subcategories, he rated himself as exceeds standards.¹¹ In the three behavioral elements, the Grievant rated himself as outstanding. The Grievant's overall PEP self-rating was 3.4, which falls within the exceeds standards range.

The Grievant signed the 2009 mid-cycle PEP "under protest," because he disagreed with the ratings in "quite a few" areas. When asked with which ratings he disagreed, the Grievant, at first, only addressed two performance subcategories. He first testified about the unsatisfactory rating in subcategory one: "annual standards for successful employment outcomes will be achieved."¹² Mr. Breeden explained the reason for the rating: "Goal is 9 for Mid Cycle[.] Achieved 4 = 44% of goal. Rating is Unsatisfactory." Appellant #2 at page 2.

The Grievant testified that subcategory one measures success in getting clients "through the system" to employment. According to the Grievant, he challenged this rating by discussing the following with Mr. Breeden: (1) four of the customers¹³ he worked with had died; (2) the recession limited job availability, and (3) "what happens" when a client quits a job. The Grievant also

¹⁰ "Outstanding" means "[e]xceptional performance. Achievements are clearly superior to the level of performance required for the job." Appellant #2 at page 3.

¹¹ "Exceeds standards" means "[c]learly surpassed the standards required for the job. Used exceptional application of knowledge, skills and/or abilities to exceed the required standards." Appellant #2 at page 3.

¹² Unsatisfactory means: "Performance is unacceptable and shows no significant progress or improvement. Improvement is critical." Appellant #2 at page 3.

¹³ DORS calls the individuals to whom services are provided "customers."

testified that he gave Ms. Davis a list of ten job-ready customers who had not obtained employment because "it was part of my [PIP]."

Second, the Grievant testified about the unsatisfactory rating in subcategory two: "80% of assigned employment goal will be competitive (75% for OBVS)." Mr. Breeden explained this rating: "80% of goal = 7 rehab[,] Achieved 2 = 29% of [goal[,] Rating is [u]nsat." Appellant #2 at page 2. The Grievant disagreed with the rating because he was "not sure" if the "80%" standard was measured on a yearly or monthly basis. He later testified, however, that it was "correct" that he had made only two competitive assignments out of the goal of seven.

When asked by Ms. Minor whether he wanted the administrative law judge to consider any other ratings on the 2009 mid-cycle PEP, the Grievant testified, "I'm not sure." Ms. Minor then directed him to the needs improvement ratings in two other performance subcategories, asking the Grievant for his "rebuttal."

The Grievant first testified about the needs improvement rating in subcategory three: "[p]rovision of timely services to consumers including, but not limited to: 100% of [e]ligibility [d]ecisions will be made within 60 days." Mr. Breeden explained: "Although 81% of case[s] in 60 days compliance[,] [d]ecisions are not sound[] or justified. Many cases closed prior to services developed." Appellant #2 at page 2. The Grievant testified:

Many of my efforts to get consumers from application to eligibility were being hindered because my work was sitting on my supervisor's desk . . . and then waiting to be forwarded to Mr. Breeden and then he would need to review them for any time he needed, which would increase the days of actually getting it through. A lot of things were slowed down and not making the mark because

my work was intentionally being held onto to increase the time frames.¹⁴

The Grievant also testified about the needs improvement rating in subcategory six:

"[p]rovision of quality and appropriate services as evidence by vocational guidance and counseling leading to goal identification and related services as well as the contribution of services to successful employment outcomes." Appellant #2 at page 2. Mr. Breeden explained this rating: "Case [n]otes are often incomplete and redundant. Service coordination not consistent, services start late, not contributing to outcome. High number of cases closed at eligibility." Appellant #2 at page 2.

The Grievant testified that DORS' "numbers" were "not hurt" when cases were closed during the sixty-day determination period for eligibility. He also testified that, based on a review of his notes on the ninety-six consumers on his caseload, he improved his note-taking efficiency by using "generic notes" that allowed him to "cut and paste," individualizing the notes as necessary. He testified that in only "one or two" case notes had he forgotten to change the gender of a personal pronoun. "I got beat to death on this." According to the Grievant, he "drastically" reduced these errors during the mid-cycle period.

Mr. Breeden summarized the Grievant's overall performance on the 2009 mid-cycle PEP as follows:

Overall Mid Cycle rating is Needs Improvement. [The Grievant] does not

¹⁴ According to the Grievant, he had to have his work approved by Ms. Davis because management did not trust him. "When I submitted [a] file after everything I needed to do and gave it to Ms. Davis for her review, it would remain with her for two to three days or more." He later testified that Ms. Davis would "delay" his work by "one to two weeks," then "a week to three weeks," and later "until it was late." The Grievant also testified that he told Mr. Breeden about this, but he "always took Ms. Davis's side." Mr. Breeden, on the other hand, testified that vocational technical specialists earn "delegate authority," which allows them to approve a customer's eligibility without a supervisor's prior approval. He further testified that, when the Grievant first started at Gas Light, he did not have the experience to perform at the level that warranted delegate authority, and he never achieved that level. Mr. Breeden also testified that he investigated the Grievant's complaints about Ms. Davis and found them to be unfounded.

demonstrate the skills, knowledge and abilities to perform essential aspects of the job. [The Grievant] does not evaluate and integrate medical, psychological or other evaluation information into coordinated service plans with the Client or the casework on a consistent basis. Eligibility determination and initial processing of case files show difficulty in understanding how and when clients can benefit from services. Also required Guidance and Counseling towards approved goals and services is [sic] often not evident in reviewed work. [The Grievant] has often blamed others for his inability to perform at required levels. In the past six months he was usually uncooperative in his demeanor and response to follow up and critique of his work. His actions are not trustworthy.

Appellant #2 at page 3.

The Grievant generally testified that the overall needs improvement rating was "all Mr. Breeden" and "he [Mr. Breeden] made it what it was" for retaliatory purposes.¹⁵ He also testified more specifically about Mr. Breeden's supervision and Mr. Breeden's comments on the 2009 mid-cycle PEP.

The Grievant testified about what he described as Mr. Breeden's interference in two of his cases during the mid-cycle period.¹⁶ In regard to the first case, the Grievant testified that he received medical documentation about a consumer that suggested to Mr. Breeden that a family conference might be indicated. Mr. Breeden instructed him to pursue that and other issues raised in the medical documentation, although the Grievant thought it was "not important." According to the Grievant, he wasted valuable time doing what Mr. Breeden had instructed only to confirm that it was unnecessary. As a result, testified the Grievant, the case was "out of compliance."

In regard to the second case, the Grievant testified that he had already developed an

¹⁵ According to the Grievant, he was transferred to the Gas Light facility in August 2007. Before that, he had worked at the Workforce Technology Center. While there, he filed a PEI grievance and a complaint about discrimination. I sustained MSDE's objection to further testimony about discrimination or retaliation, after the Grievant did not offer any evidence to connect Mr. Breeden or Ms. Davis to the prior filings.

¹⁶ The Grievant had a caseload of about ninety-six customers.

employment plan for a consumer with job-ready skills who was working. Nonetheless, Mr. Breeden required him to offer the consumer an "extended evaluation" and do "specific things that [were] not necessary." According to the Grievant, after the case "sat for a long time" because of Mr. Breeden's questioning of psychological documentation, and after the consumer refused the extended evaluation, the case was "out of compliance."

The Grievant denied that he had "difficulty in understanding how and when clients can benefit from services" -- one of Mr. Breeden's criticisms in the summary on the 2009 mid-cycle PEP -- testifying that "[Mr. Breeden] made it what it was." He also denied that he was uncooperative or blamed others for his poor performance. According to the Grievant, Mr. Breeden discussed uncooperativeness "every time we met" and would "call[] it blaming others" whenever he (the Grievant) criticized Ms. Davis's obstructionism.

The Grievant acknowledged that Mr. Breeden's comment that he was usually uncooperative in his demeanor and response to follow-up and critique of his work was "not without basis because I was constantly being told [what to do] and I'd do it and I'd get it wasn't good enough." According to the Grievant, under fair supervision his performance would have been gauged differently, but because Ms. Davis and Mr. Breeden supervised him, "there was nothing I could do."

The Grievant's PIP contained six "areas of concern" in which the Grievant had to improve during the 2009 mid-cycle period. The areas of concern included: (i) increase productivity in competitive outcomes, (ii) maintain timely provision of services, (iii) adhere to procedures related to caseload management and documentation, (iv) provide quality and appropriate services, (v) improve job placement and community outreach activities, and (vi) participate in technician specialty and professional development activities, assigned and self-identified.

Mr. Breeden met monthly with the Grievant to review his progress in each PIP area of concern. Mr. Breeden's detailed, written summaries of the meetings are part of the record. Dept.

#13. The Grievant specifically testified about the summary of his job performance in May 2009, which included needs improvement ratings in (i) increase competitive outcomes, (ii) provide timely, quality services, and (iii) provide quality and appropriate services.¹⁷

In the "increase competitive outcomes" area, Mr. Breeden wrote:

No clients have moved into employment over the last 90 days. Counselor offers no solutions on how to impact this area. Provide focus [sic] job development activities to assist increasing clients on caseload who are moving into employment. What are Clients doing to assist with this process[?] No follow up discussed to which Clients could benefit from additional efforts, such as JDPR assistance.

Appellant #5.

According to the Grievant, that was "inaccurate." He testified that he told Mr. Breeden what he had done and gave him documentation at each monthly meeting.¹⁸ The Grievant further testified that he had visited "many hotels and places like the YMCA," because most of his customers were job ready in the areas of environmental or food services. He also testified that he visited the Baltimore Museum of Art and spoke to its human resources department about employment for his job-ready customers in maintenance and security.

In the area of "provide quality and appropriate services," Mr. Breeden wrote that the Grievant was "[a]t least nine cases behind in documentation" and that "delayed status" customers "[h]ave not had needed assessments" and the customers coming off delayed status "still need plans completed." Appellant #5. Mr. Breeden also noted that one of the Grievant's customers was transferred to another counselor based the customer's complaint about the Grievant's work. The Grievant acknowledged that "those nine cases, they may have been a month or so behind . . .

¹⁷ The Grievant received ratings of meets standards in (i) adhere to procedures related to caseload management and documentation and (ii) provide quality and appropriate services.

¹⁸ The Grievant did not offer this documentation at the hearing.

something to that degree.”¹⁹ The Grievant offered this explanation for his poor performance ratings:

Everything that I did it was never good enough. I was pointed out at meetings in 2008 and 2009. It never changed. As far as co-workers, the other counselors, and some of the office assistants, I was made to feel I could be part of the team or I was part of the team. But, as far as the supervision, I was never made to feel that way. I always felt a sinister motive behind what they were doing. It never felt like we got you on this plan to help you.

Ms. Minor also directed the Grievant to Mr. Breeden's overall summary of his job performance in May 2009. Mr. Breeden wrote this summary:

There were improvements in some areas of review this month. However overall performance is still below where an employee with more than 18 months experience and training should be. [The Grievant] has had a caseload well under 100 cases for nearly two years. In June the caseload size will reach nearly 96. The caseload size has grown, and will continue to grow as many new customers who were in Delayed Service status, but now the waiting list for services has been nearly eliminated [sic]. There will be more cases to manage and at a faster pace. The Eligibility status cases this month have fallen back out of compliance. [The Grievant] still spends a lot of time reviewing work and submitting work that needs to be done over after Supervisor review.

He still does not take responsibility for his own work performance. [The Grievant] has developed no effective system for monitoring and assisting employment ready clients. [The Grievant's] approach to identifying and interacting with consumers while in eligibility status for essential beginning good casework development needs improvement. There are too many cases closed from Eligibility status due to lack of follow through or follow up activities by the counselor.

The requirements and demands of this increasing caseload are a challenge for [the Grievant]. It is my assessment that the overall performance of the essential aspects of the duty as Rehabilitation Specialist as [sic] still rated as "Needs Improvement" for the May assessment of the PIP.

¹⁹ The Grievant also testified about the meets standards ratings in (i) adherence to caseload management and documentation procedures and (ii) cooperation and teamwork. He did not directly testify about the needs improvement rating in the area of providing timely and quality service. In that area, Mr. Breeden indicated that the Grievant had completed twenty-two eligibility decisions in twenty-one days with seventy-seven percent accuracy and that four cases were out-of-compliance with the sixty-day requirement. According to Mr. Breeden's note, the Grievant attributed the out-of-compliance cases to being "very busy." Appellant #5.

Appellant #5.

In response, the Grievant testified that Mr. Breeden unfairly accused him of not using his secretary to prepare letters. According to the Grievant, many standard letters are "automatically generated" and often only minor modifications are required. "In coordination with my secretary," and once when his secretary was not at work, the Grievant mailed letters because "consumers should not suffer because my secretary is out." The Grievant also testified that "whatever improvement I was making I knew [Mr. Breeden] would target it as a small improvement." According to the Grievant, "no matter what I did," Mr. Breeden did not give him credit. In regard to Mr. Breeden's note that eligibility decisions had fallen out of compliance in May 2009, the Grievant blamed Mr. Breeden for this. Finally, the Grievant "disagreed" that he had no effective system to monitor and assist job-ready customers and, although he did not specifically deny that he blamed others for his poor performance, he testified that he had told Mr. Breeden that he had learned as a veteran to take responsibility for what he does, but he would not take responsibility for Ms. Davis's and Mr. Breeden's obstructionism.

MSDE's Evidence

Mr. Breeden testified for MSDE. He has worked for DORS for twenty-two years, starting as a rehabilitation counselor in 1988 and becoming a Regional Director in July 2006. Mr. Breeden, not Ms. Davis, was responsible for evaluating the Grievant on the 2009 mid-cycle PEP: "I took the lead responsibility for supervising and reviewing, with [the Grievant] and his supervisor, most of his work product."²⁰ Appellant #2 shows the ratings in the performance subcategories:

²⁰ Mr. Breeden testified he assumed this responsibility because of the Grievant's complaints about Ms. Davis.

Sub-Category	Results, Objectives, Goals, Outcomes, Work Products	Rating	Comments
1.	Annual standards for successful employment outcomes will be achieved.	U	Goal is 9 for Mid Cycle Achieved 4=44% of goal. Rating is Unsatisfactory
2.	80% of assigned employment goal will be competitive (75% for OBVS).	U	80% of goal = 7 rehabs Achieved 2 = 29% of goal. Rating is Unsatisfactory
3.	Obtain a successful Rehabilitation Rate based on Agency Performance Standards.	M	Goal is 64% achieved 60% Rating is Meets Standards
4.	Provision of timely services to consumers including, but not limited to: 100% of Eligibility Decisions will be made within 60 days.	NI	Although 81% of case in 60 days compliance. Decisions are not sound, or justified. Many cases closed prior to services developed.
5.	Adherence to policy and procedures related to caseload management: includes timely IPE development, case documentation, and fiscal management.	M	Has written 10 plans over required 20. Other issues of case management varied and require improvement overall see PIP. Monitoring improvement for good client/counselor relationship.
6.	Provision of quality and appropriate services as evidenced by vocational guidance and counseling leading to goal identification and related services as well as the contribution of services to successful employment outcomes.	NI	Case Notes are often incomplete and redundant. Service coordination not consistent, services start late, not contributing to outcome. High number of cases closed at eligibility.
7.	Commitment to continuous improvement as evidenced by effective utilization of staff development opportunities and participation in outreach activities to develop community and business relations.	M	Minimum outreach activities, Minimal development of community and business relationships. Shows difficulty in area to demonstrate actions.

Mr. Breeden explained the ratings on the 2009 mid-cycle PER. First, he identified Dept. #1 as the Office of Field Services' goals for the local DORS programs. Dept. #1 lists twenty-two successful job placements, eighteen of which had to be competitive placements, as the annual goal for specialists during fiscal year 2009. According to Mr. Breeden, he reduced the Grievant's goal to

eighteen because he was a relatively inexperienced counselor. "I thought it would be much fairer to reduce his goal and allow him the opportunity to learn the position." For the six-month mid-cycle period, the goal was prorated to nine. This goal was used to rate the Grievance performance in subcategories one through three.

Next, Mr. Breeden identified Dept #3 as DORS' standard PEP rating worksheet for rehabilitation counselors. Dept. #3 describes the method used to determine what rating an employee should receive in the seven performance subcategories on the PEP. The method requires information about the employee's productivity, which, Mr. Breeden explained is retrieved from AWARES, DORS' electronic case management system.

The goal in subcategory one was nine successful employment outcomes. Dept. #4, data from AWARES, shows that the Grievant achieved four successful outcomes, or 44% of the goal, during the mid-cycle period. The rating worksheet lists as unsatisfactory anything less than 78% of the assigned goal. Mr. Breeden testified that that standard was applied to the Grievant's performance to assign the Grievant an unsatisfactory rating on the first performance subcategory on the 2009 mid-cycle PEP.

Mr. Breeden also testified that he used Dept. #4 and Dept. #3 to assign an unsatisfactory rating to the Grievant on the second performance subcategory: 80% competitive employment outcomes. Eighty percent of nine successful employment outcomes is seven. Dept. #4 -- the raw data from AWARES -- shows that two of the Grievant's successful employment outcomes were competitive. Two successful competitive outcomes represent 29% of the Grievant's goal in subcategory two. The rating worksheet assigns an unsatisfactory rating to anything less than 78% of the assigned goal. Mr. Breeden testified that he used that standard to rate the Grievant as

unsatisfactory in subcategory two.²¹

Mr. Breeden testified that he used Dept. #6 to determine the Grievant's rating in subcategory four. Subcategory four required the Grievant to make 100% of his decisions on eligibility within sixty days. Dept. #6 shows (i) the Grievant made seventy-two eligibility decisions during the mid-cycle period; (ii) thirteen of the Grievant's eligibility decisions were made outside the requisite time frame; (iii) Eighty-one percent of the Grievant's eligibility decisions were made within the requisite time period. The rating standard assigns an unsatisfactory rating to anything less than 90% of eligibility decisions in fifty-nine days or less. Mr. Breeden testified that he used that standard to rate the Grievant as needs improvement in subcategory four.²²

The needs improvement rating in the remaining performance subcategory -- providing quality and appropriate services toward successful employment outcomes -- and the needs improvement ratings in two behavioral subcategories categories -- (i) cooperation and teamwork and (ii) productivity -- are inherently more subjective. Mr. Breeden testified that these subcategories are "not statistically based" and, therefore, require "the use of behavioral observation and casework activities."²³ According to Mr. Breeden, he met with the Grievant weekly and monthly for much longer periods to review his work and discuss his job performance. Mr. Breeden used the weekly meetings "to review [the Grievant's] work and provide guidance and instruction."

²¹ The Grievant received a rating of meets standards in subcategory three. Mr. Breeden testified he used Dept. #5 for this rating. Dept. #5 shows an adjusted rehabilitation rate of 56%, which, based on the worksheet at Dept. #3, equals a needs improvement rating. Mr. Breeden testified, however, that his report did not capture the ten-day period immediately prior to July 13, 2009, when the mid-cycle PEP was signed. Mr. Breeden, therefore, gave the Grievant credit for that period, which increased the Grievant's successful rehabilitation rate to 60%. Dept. #3 shows that sixty percent falls within the lower end of the meets standards rating.

²² Mr. Breeden identified Dept. #7 as data from AWARES that he used to rate the Grievant as meets standards in subcategory five: adherence to policy and procedures related to caseload management.

²³ According to Mr. Breeden, some of the non-statistical based data he used to evaluate performance subcategory six and the behavioral subcategories were also used to evaluate performance subcategories five and six.

The monthly meetings lasted between one and three hours and focused on the PIP goals and objectives.

The 2009 mid-cycle PEP includes three behavioral subcategories: (i) customer service, (ii) cooperation and teamwork, and (iii) productivity. The Grievant received a needs improvement in cooperation and teamwork and productivity.²⁴ Mr. Breeden explained the rating of needs improvement in cooperation and teamwork as follows: "Reluctantly cooperates with others to achieve goals of the organization; reluctantly accepts direction from supervisors; minimally supports team leader. Does not work actively to resolve conflicts. Develops own way of approaching work. Is not often open to discussions. Has been occasionally impolite and disrespectful." Appellant #2 at page 11. Mr. Breeden explained the rating of needs improvement in productivity in as follows:

Some routine developments require supervisory guidance. Requires close supervision. Inconsistent in completing assigned work in time allocated; cannot be given additional tasks. Case management activities/time management is compromised with his own methods to manage work product. Primary job duties not followed through consistently. Ability to handle volumes of work is very questionable.

Appellant #2 at 12.

Mr. Breeden also identified the work-related documents contained in Dept. ## 8, 9, 10, 11, and 12 that he testified were examples of the information he used to rate the Grievant as needs improvement in performance subcategory six and the two behavioral subcategories. He testified that the rating on subcategory six is "work product review based."

Dept #8 includes three memoranda sent from Ms. Davis to the Grievant in February, March, and April 2009. The memorandum dated February 9, 2009, describes the Grievant's misuse of the

²⁴ He received a meets standards rating in customer service.

office procedure for the approval of his work, and the Grievant's refusal to meet weekly with Ms. Davis, because such meetings were, according to the Grievant, a waste of time. In the memorandum dated March 17, 2009, Ms. Davis reminds the Grievant that "follow up is always necessary" to facilitate the case management process and instructs him to submit "all case notes from March contacts on the 28 customers in Service status" to her no later than March 30, 2009. Ms. Davis's April 3, 2009, memorandum reminds the Grievant that "[t]hese case notes are still due to me."

Dept. #9 contains copies of three case notes that the Grievant wrote in April 2009; two medical reports about customers that the Grievant received in April 2009; and an April 2009 exchange of memoranda between Mr. Breeden and the Grievant about the system in place for the supervisory review and approval of his work. Mr. Breeden wrote notes to himself while he reviewed the case notes and medical documents. The notes describe the Grievant's deficiencies in case management. Mr. Breeden's notes include: "Rush to eligibility," "not considering medical facts," "this should not be made eligible," "treatment needs," "no documentation of disability," and "too long to make determination." In summarizing one case note, Mr. Breeden wrote: "4 months has passed since eligibility 'presumed' - Where are the updates. Case documentation concerning evaluation requested @ RTS. Why no voc. Evals scheduled during this period. Why no discussion concerning what is needed to be a grief counselor @ King Memorial or anywhere else. Considering waiting list, this could have been done B4 now." Dept. #9 at page 8.

Dept #10 includes an April 2009 memorandum from Mr. Breeden to the Grievant that identifies errors the Grievant made in the management of a case. Dept. #10 also includes a summary of a case review meeting that Mr. Breeden had with the Grievant in April 2009 during which Mr. Breeden discussed the Grievant's case management errors. In the memorandum, Mr. Breeden denied approval of an eligibility determination because the customer's file showed "rushed

work" and "incorrect" documentation. Mr. Breeden also found that three customers deemed eligible by the Grievant "were [] not ready for a determination of [e]ligibility or required additional information and counseling or meetings with consumers to analyze and interpret the documentation prior to a determination of [e]ligibility." Dept. #10 at page 2. Mr. Breeden told the Grievant to reread the chapters in "RSM" about documentation and medical consultations. Mr. Breeden testified about the disillusionment he had about the Grievant's professional development: "[In April 2009 the Grievant was] still having trouble with making just the general essential function of eligibility determination of how to use documents received in a case."²⁵

Dept. #11 includes a number of emails sent among Mr. Breeden, Ms. Davis, and the Grievant about the Grievant's approval of a training program as part of a customer's individual plan for employment (IPE) and two case notes that the Grievant had written in January and April 2009 about the same customer. The emails show that Ms. Davis informed the Grievant on March 6, 2009, that Mr. Breeden had to approve the IPE. On March 9, 2009, the Grievant responded by telling Ms. Davis that Mr. Breeden had told him on March 4, 2009, that only she, Ms. Davis, had to approve the IEP because the driver's training program he was trying to arrange for the consumer was a "certificated training program." Dept. #11 at page 2. The Grievant further wrote: "Due to this delay the consumer has missed the opportunity to begin his class on 03/07/09. The case file is in your mail box for approval, please sign the IPE as to not further delay the consumers [sic] chance to start in April." Dept. #11 at page 2. On March 13, 2009, Mr. Breeden acknowledged that the Grievant had earlier "present[ed]" the case to him," and "I said we could move ahead with giving it to you [Ms. Davis] without my further review. I thought we could move ahead, and maybe help

²⁵ The context of Mr. Breeden's testimony made clear that he meant that the Grievant, four months into his PIP period, continued to demonstrate a poor ability to properly use documentation to make eligibility determinations, which is an essential function of a vocational specialist's job.

you, Mr. Downs, demonstrate you can process cases appropriately" Dept. #11 at page 1. Mr. Breeden's email also shows, however, that he reviewed the case file and found that the Grievant had "left out substantially important information." Dept. #11 at page 1. He informed the Grievant that the customer's failure to produce a valid driver's license meant he was ineligible for the training program: "We are not going to approve a plan with out [sic] the minimum qualifications to participate in the program. I called Allstate yesterday, spoke to Mr. Solomon, who confirmed they had not received verification of an approved MD Driver's License. Consumer cannot move ahead without this documentation. You cannot get an approval for a plan which does not meet the minimum guidelines." Dept. #11 at page 1. The final two documents in Dept. #11 are the Grievant's case notes from January 15, 2009, and April 20, 2009. According to Mr. Breeden, these notes illustrate the Grievant's lack of productivity because they show that three months after the first case note, the second case note about the same customer showed that the Grievant had not done anything toward the development of an employment plan for him.²⁶

Dept. #13 contains Mr. Breeden's detailed summaries of the monthly meetings he had with the Grievant, and Ms. Davis until her retirement in May 2009, to review the Grievant's progress toward the achievement of the goals contained in his PIP during the mid-cycle period.²⁷ Each summary includes ratings and their specific justifications in the following performance and behavioral categories: (i) increase competitive outcomes, (ii) provide timely, quality services, (iii) adherence to policy and case management, (iv) provide quality and appropriate services, and (vi)

²⁶ Three of the four documents contained in Dept. #13 are outside the mid-cycle period. Based on Mr. Breeden's testimony, these documents illustrate the Grievant's spelling and grammar errors and failure to use "spell-check" to correct spelling errors, despite repeated reminders. The case note dated January 5, 2009, within the six-month period, does contain a number of misspelled words.

²⁷ Each summary reviews the Grievant's performance in the month that immediately precedes the date of the summary. In other words, the summary dated February 3, 2009, is the summary of the Grievant's job performance in January 2009.

cooperation and teamwork. Each summary also includes an assessment of the Grievant's overall job performance.

The summaries (January through June 2009) show that Mr. Breeden rated the Grievant in "increase competitive outcomes" as needs improvement five times; in "provide timely and quality service" as meets standards three times, needs improvement one time, and unsatisfactory one time; in "adheres to policy and case management" as needs improvement three times and as meets standards two times; in "provide quality and appropriate services" as meets standards three times and as needs improvement two times; and in "cooperation and teamwork" as unsatisfactory once, needs improvement twice, and meets standards twice.²⁸

A review of the summaries shows that Mr. Breeden thought the Grievant had made insignificant progress toward acquiring the requisite knowledge, skills, and work habits that a counselor needs to successfully perform his duties and responsibilities. The following comments from the January, March, and June 2009 summaries illustrate Mr. Breeden's concerns.

[The Grievant] has not appropriately read or developed appropriate actions to meet PIP responsibilities [sic]. Is not cooperative in discussing each area as benefit to improve current deficiencies [sic]. Using grievance End Cycle rating as reason not to comply with PIP standards and requirements. "Stuck" in refusal mode, and routinely exhibits anger towards management's guidance and direction. Will not move on to proceed in the here and now. Constantly identifies source of all his problems to Agency decision to transfer him to Field Program over a year ago. Actions usually borderline insubordination. Often receives verbal warnings of written disciplinary action, due to aggressive and borderline inappropriate passive resistant actions

Dept. #13 at page 2 (for January 2009).

This month has been an attempt to review more documentation activities of the Counselor through an evaluation of case contact notes of the two most important areas[:] Job ready clients and Service clients. Through this process the Counselor could get updated on the current status of the

²⁸ The summary for April 2009 does not include ratings for the separate subcategories.

client, case direction and what he needs to do to stay current with the cases. It was a time to synthesis [sic] reports and services; and the impact currently or future needs to bring the cases to successful outcomes [sic].

The overall performance in this activity was Unsatisfactory. [The Grievant] did not use reports from providers and monthly contact information to connect with his consumers and document where they are in there [sic] processes and current and future needs. He shows minimum ability to integrate information into a sustainable plan for the consumer. And sometimes even directs little participation or responsibility in making their outcomes a success [sic].

He is easily confused and cannot articulate actions and interventions used or taken by himself in the progression of the client, case services, even when recent activity with a client or case has been performed by him.

He does not take responsibility for problems associated with his work. Denies need for direction and supervision, yet continues to blame others when mistakes are noted.

Dept. #13 at page 11 (for March 2009).

There were improvements in some areas of review this month. However[,] overall performance is still below where an employee with more than 18 months experience and training should be. The eligibility status cases this month have fallen back out of compliance. [The Grievant] still spends a lot of time reviewing work and submitting work that needs to be done over after Supervisor review.

He still does not take responsibility for his own work performance. [The Grievant] has developed no effective system for monitoring and assisting employment ready clients. [The Grievant's] approach to identifying and interacting with consumers while in the eligibility status for essential beginning good casework development needs improvement. There are too many cases closed due to lack of follow through activities by the counselor.

The requirements and demands of this increasing caseload are a challenge for [the Grievant]. It is my assessment that the overall performance of the essential aspects of the duty as Rehabilitation Specialist is still rated as "Needs Improvement" for the May assessment of the PIP.

Dept. #13 at page 17 (for May 2009).

Mr. Breeden testified that, during the mid-cycle period, he was unaware that the Grievant had filed any past grievances or charges of discrimination. He also testified that he did not discriminate against the Grievant. According to Mr. Breeden, he was "very comfortable" with his evaluation of the Grievant's job performance and stressed that he had not relied on reports from the Grievant's supervisor but, instead, based his evaluation on personal reviews of the Grievant's work and the weekly and monthly meetings with him during which he had the opportunity to ask the Grievant questions about his knowledge of and approach to his work with customers. "One of the things that struck me about the meetings with [the Grievant] had to do with he was never able to go into detail about his cases." Mr. Breeden testified that the Grievant consistently failed to demonstrate in the monthly meetings that he had an understanding of how decisions regarding eligibility should be made. According to Mr. Breeden, the Grievant's approach to cases was "superficial."

Analysis

In a grievance procedure, the grievant has the burden of proof by a preponderance of the evidence. Section 12-205(c)(1)(iii). Here, the Grievant must prove that MSDE has incorrectly interpreted or applied a State personnel regulation or policy, or some other rule, regulation, or policy over which management has control. See Section 12-101(c)(1). For the reasons discussed below, I find that the Grievant has failed to prove that DORS misinterpreted or misapplied any law, policy, or procedure related the rating of an overall needs improvement on the 2009 mid-cycle PEP.

Employee evaluations involve an amount of subjectivity. An unscrupulous supervisor with "an axe to grind" against an employee might exploit the subjective nature of performance evaluations to unfairly evaluate an employee for an improper purpose. In addition, a requirement that an employee obtain approval of his work before other time-sensitive tasks can be performed can also be exploited by an unscrupulous supervisor to sabotage an employee's work performance.

One of the Grievant's allegations was that Ms. Davis orchestrated the poor ratings on his 2009 mid-cycle PEP by withholding or delaying approval of his work and thereby making it appear as though he was responsible for poor work performance and that Mr. Breeden had predetermined the ratings on the 2009 mid-cycle PEP. In fact, according to the Grievant, "Minus the sabotage of my work, it would have been easy for me to attain that level [the level of exceeds standards on his 2009 mid-cycle PEP self evaluation]."

The record includes testimonial evidence and a faint hint of documentary evidence to support the allegation against Ms. Davis. First, the Grievant testified that Ms. Davis engaged in such conduct.²⁹ Second, an exchange of emails among Ms. Davis, the Grievant, and Mr. Breeden in March 2009 suggests that one of the Grievant's customers might have missed one March deadline to enroll in a training program because Ms. Davis had sought Mr. Breeden's approval of an IPE before she would sign off on it. The e-mail exchange began on March 6, 2009, when Ms. Davis told the Grievant that she had sent the IPE to Mr. Breeden for his approval. The Grievant responded three days later, telling Ms. Davis that sending the IPE to Mr. Breeden was unnecessary and, due to the delay, the customer missed the March 7, 2009, enrollment deadline. Mr. Breeden's subsequent email to the Grievant on March 13, 2009, confirmed that he had agreed that his approval was unnecessary. Dept. #11.

The Grievant's general testimony and the emails, however, do not prove that Ms. Davis caused, or even contributed to, the Grievant's poor job performance. The email exchange only proves, if it proves anything relevant at all, a single instance of a breakdown of communication among Ms. Davis, Mr. Breeden, and the Grievant. There is no evidence that Ms. Davis knew that Mr. Breeden had agreed that the Grievant "could move ahead with giving it to you without my

²⁹ The Grievant offered no documentary evidence, or corroborating testimony, to support his testimony.

further review." Dept. #11 at page 1. Moreover, I find that Mr. Breeden was a credible witness, based on his demeanor throughout his testimony and his testimony in light of all the evidence in the record. Mr. Breeden testified that he investigated the Grievant's complaints about Ms. Davis's obstructionism and found them to be baseless. Accordingly, I find that the Grievant offered no competent, material, and substantial evidence to prove that Ms. Davis was responsible for any part of his poor job performance during the 2009 mid-cycle period. Furthermore, assuming some probative evidence that supports the Grievant's theory about Ms. Davis, Mr. Breeden's testimony, and the record's substantial documentary evidence, effectively counterbalances the Grievant's evidence and, in fact, supports finding that Mr. Breeden's ratings on the Grievant's 2009 mid-cycle PEP were justified. Accordingly, I do not find that MSDE had misinterpreted or misapplied any rule, regulation, or policy related to the ratings the Grievant received on the mid-cycle 2009 PEP based on the Grievant's allegation that Ms. Davis caused his poor work performance.³⁰

The Grievant also alleged that Mr. Breeden was motivated by impermissible retaliation or discrimination when he evaluated the Grievant's job performance and gave him an overall rating of needs improvement on the 2009 mid-cycle PEP.³¹ The Grievant referred to Section 2-302 of the State Personnel and Pensions Article and the Americans with Disabilities Act on his grievance.³² Section 2-302 states in pertinent part:

§ 2-302. Discrimination, harassment prohibited

(a) *Purpose.* — The State recognizes and honors the value and dignity of every person and understands the importance of providing employees and applicants for employment with a fair opportunity to pursue their careers in an environment free of discrimination or harassment prohibited by law.

³⁰ There is no evidence to support his allegation that Mr. Breeden had predetermined the Grievant's ratings on the 2009 mid-cycle PEP.

³¹ The Grievant included Ms. Davis in this allegation. It was Mr. Breeden, however, not Ms. Davis, who evaluated his work performance during the 2009 mid-cycle period.

³² The Grievant did not identify any specific sections in these statutes that he believed MSDE had violated.

(b) *Personnel actions.* — (1) Except as provided in paragraph (2) of this subsection or by other law, all personnel actions concerning a State employee or applicant for employment in State government shall be made without regard to:

- (i) age;
- (ii) ancestry;
- (iii) color;
- (iv) creed;
- (v) marital status;
- (vi) mental or physical disability;
- (vii) national origin;
- (viii) race;
- (ix) religious affiliation, belief, or opinion; or
- (x) sex.

(c) *Responsibilities of employees, managers and supervisors; penalties for violations of subtitle.* — (1) Each State employee is expected to assume personal responsibility and leadership in ensuring fair employment practices and equal employment opportunity in Maryland State government.

The Grievant offered no evidence to link the ratings he received on the 2009 mid-cycle PEP to either Ms. Davis's or Mr. Breeden's knowledge that he had previously filed grievances while an employee at DORS or that their supervisory actions were motivated by discriminatory animus. As discussed above, the record contains competent, material, and substantial non-discriminatory based evidence to support the overall rating of needs improvement on the 2009 mid-cycle PEP.³³ Accordingly, I do not find that MSDE misinterpreted or misapplied any rule, regulation, or policy related to the Grievant's ratings on the 2009 mid-cycle PEP based on the Grievant's allegations of retaliation or discrimination.

The Termination (MSDE BE-05-10-13744)

By letter dated July 23, 2009, MSDE notified the Grievant that "your employment with the Maryland State Department of Education will terminate effective with the close of business on

³³ The Americans with Disabilities Act is a federal statute enforced by the Equal Employment Opportunity Commission, the Maryland Human Relations Commission, and State and federal courts.

Thursday August 6, 2009. The reason for your termination is CO.MAR 17.04.05.03(G) [sic] receiving a needs improvement on your End of Year PEP and failing to achieve a Meets Standards on the following Mid-Cycle PEP." (Emphasis in the original). Dept. #20. MSDE also notified the Grievant that "Education Article 2-104(c) Category III may be dismissed for incompetence" was another reason for the termination.³⁴ Dept. #21.

MSDE has the burden of proof. COMAR 17.04.05.03G states in pertinent part:

G. Performance Appraisals.

(1) When an employee has been given an overall rating of "needs improvement" on an annual performance appraisal, the employee's supervisor shall inform the employee that the employee has 180 days from the issuance of the rating to improve to the level of "meets standards." Approximately midway through the 180-day period, the employee and the employee's supervisor shall meet to evaluate the employee's progress toward meeting standards. Failure to meet standards at the end of the 180-day period shall result in the employee's termination.

The Grievant received an overall rating of needs improvement on his 2008 PEP. Dept. #14. On January 12, 2009, the Grievant met with Mr. Breeden and Ms. Davis and was told that his "failure to bring ratings to Meets Standards in the next six months could result in your removal from State Service." Dept. #15. On April 8, 2009, midway through the six-month mid-cycle period, Mr. Breeden met with the Grievant to review his job performance. Dept. #16. The Grievant's midway overall rating was needs improvement. Dept. #16.

As discussed above, the record contains competent, material, and substantial evidence to support the Grievant's overall needs improvement rating on the 2009 mid-cycle PEP. Accordingly, based on the Grievant's overall rating of needs improvement on the 2008 PEP and

³⁴ Md. Code Ann., Educ. § 2-104(c)(2) (Supp. 2009) states: "All other professions [this includes the position occupied by the Grievant] shall be removed in accordance with the procedures set by the State Board." The Procedures for Removal of Professional Assistants and Special Appointments at Category III states: "All other Professional assistants . . . may be dismissed for . . . incompetence[.]" Dept. #12 at page 1.

his overall rating of needs improvement on the 2009 mid-cycle-PEP, I find that MSDE's termination of the Grievant's employment under COMAR 17.04.05.03G(1) and MSDE's Procedures for Removal, Category III, was consistent with the law and based on substantial evidence.

CONCLUSIONS OF LAW

I conclude the following:

- A. The Grievant failed to prove that DORS violated any law, regulation, or policy when it gave him an overall rating of needs improvement on the 2009 mid-cycle PEP.
- B. The Grievant's overall rating of needs improvement on his 2009 mid-cycle PEP was supported by substantial evidence and was consistent with the law.
- C. MSDE's termination of the Grievant's employment was supported by substantial evidence and consistent with the law. COMAR 17.04.05.03G(1); Md. Code Ann., Educ. § 2-104(c) (Supp. 2009); MSDE's Procedures for Removal, Category III(1).

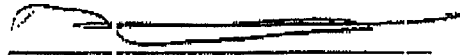
ORDER

I **ORDER** that the Grievant's grievance be, and hereby is, **DENIED**.

I further **RECOMMEND** that the Grievant's appeal of MSDE's termination of his employment be **DENIED** and that the termination of his employment be **UPHELD**.

May 7, 2010
Date Decision Mailed

MDC/lc
#113222



Michael D. Carlis
Administrative Law Judge

REVIEW RIGHTS

A party aggrieved by a final administrative decision (SPMS-MSDE-30-09-45903) may file a petition for judicial review with the circuit court for the county where any party resides or has a principal place of business within thirty days of the date the Decision is mailed. Md. Code Ann., State Gov't § 10-222 (2009); Md. Rules 7-201 through 7-210. The Office of Administrative Hearings is not a party to any review process

Any party adversely affected by this Proposed Decision (MSDE-BE-05-10-13744) has the right to file written objections within fifteen days of receipt of the decision; parties may file written responses to the objections within fifteen days of receipt of the objections. Both the objections and the responses shall be filed with the Maryland State Department of Education, Maryland State Board of Education, 200 West Baltimore Street, Baltimore, Maryland 21201-2595, with a copy to the other party or parties. Procedures for Removal, Category III. The Office of Administrative Hearings is not a party to any review process.

Copies Mailed To:

Vincent Downs, Sr.
3501 Cascade Avenue
Baltimore, MD 21206

Michelle Minor
AFSCME Council # 92
190 West Ostend Street
Baltimore, MD 21230

Philip Deitchman, Chief
Maryland State Department of Education
Employee Relations
200 West Baltimore Street
Baltimore, MD 21201-2595

Heinrich J. Losemann, Jr., Director
Department of Budget and Management
Employee Relations Division
301 West Preston Street, Room 607
Baltimore, MD 21201

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MAY 13 2010

EMPLOYEE RELATIONS
OHR