

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

ROBERT JEFF DEMPSEY,
Petitioner

v.

UNITED STATES MARSHALS SERVICE,
Respondent

2022-1665

Petition for review of an arbitrator's decision in No. FMCS 211117-01415 by Melinda G. Gordon.

Decided: March 5, 2024

ROBERT JEFF DEMPSEY, Brunswick, GA, pro se.

LIRIDONA SINANI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON, TARA K. HOGAN, STEVEN C. HOUGH, PATRICIA M. MCCARTHY.

Before TARANTO, CHEN, and STOLL, *Circuit Judges*.

PER CURIAM.

Robert Jeff Dempsey worked as a Property Management Specialist in the United States Marshals Service (USMS) until USMS, acting under 5 U.S.C. Chapter 43, removed him from that position for unacceptable performance, with the removal effective on September 25, 2020. Mr. Dempsey's union, the American Federation of Government Employees Local 2272 (the Union), filed a grievance on his behalf challenging the removal. Under 5 U.S.C. § 7121(e)(1) and pursuant to the collective bargaining agreement between the Union and USMS, the parties selected an arbitrator, who ultimately affirmed USMS's removal decision. *See* J.A. 1–15. On Mr. Dempsey's petition for review, we affirm the arbitrator's decision.

I

Mr. Dempsey was a Property Management Specialist with the USMS Training Division in Glynco, Georgia, from 2011 until 2020. His duties, according to USMS's and Mr. Dempsey's evidence, included accounting for and keeping inventory of training division property, such as training weapons, and ensuring that the division's motor vehicles received routine and required maintenance.

On December 18, 2019, Mr. Dempsey acknowledged that he was being evaluated under a “performance work plan” (also referred to as a “performance plan”) during the period from October 1, 2019, to September 30, 2020. J.A. 671–72. The plan listed “Time Management” as one of the “critical elements” of his position. J.A. 676; *see* J.A. 674–677. On April 30, 2020, Mr. Dempsey met with his direct supervisor, Chief Abra Lattany-Reed, and the then-Deputy Assistant Director of his division, Stephanie Creasy. Ms. Lattany-Reed and Ms. Creasy informed him, and he also received a written notice, that he was being placed on a “performance improvement plan” in accordance with 5 C.F.R. Part 432 for 30 calendar days due to unacceptable performance in the earlier-adopted performance work plan.

He was also informed that he had been denied a scheduled within-grade pay increase due to his poor performance.

The written notice emphasized the “Time Management” critical element from his performance work plan and expressed concern that Mr. Dempsey “continually fail[ed] to manage [his] time in a manner that ensure[d] timely completion of assignments.” J.A. 698. The notice provided six examples of Mr. Dempsey’s failures to manage his time, J.A. 698–702, and outlined both specific tasks to be completed (*e.g.*, “accomplish a complete review of the Training Division inventory for all division property”) and general standards to be met (*e.g.*, “respond to emails and correspondence timely”) under the new performance improvement plan, J.A. 702. The notice also advised Mr. Dempsey that if, at the end of the 30-day period, his performance continued to be unacceptable, he could be subject to “reassignment, reduction in grade or removal from the [f]ederal service.” J.A. 703.

During the April 30 meeting, Mr. Dempsey and his supervisors agreed that he would make a plan to accomplish the tasks required of him during the performance-improvement period. Mr. Dempsey was advised that the 30-day period of the performance improvement plan would start immediately, *i.e.*, on April 30. The next day, May 1, Mr. Dempsey met with Ms. Lattany-Reed and Ms. Creasy to discuss his work plan for the 30-day period, but Ms. Lattany-Reed and Ms. Creasy found his work plan to be inadequate. Mr. Dempsey then proposed a new plan and began working on his assigned tasks, and he and Ms. Lattany-Reed continued to communicate by email over the performance-improvement period.

On July 21, 2020, Mr. Dempsey received a notice of proposed removal under 5 U.S.C. § 4303 and 5 C.F.R. Part 432 for “[f]ailure of a [p]erformance [i]mprovement [p]lan,” which “concluded on June 1.” J.A. 719. The notice sets forth five examples of performance deficiencies during the

performance-improvement-plan period. Mr. Dempsey replied orally on August 31, 2020. On September 25, 2020, Mr. Dempsey was notified that the deciding official had considered the record and found his “performance deficiencies” with respect to time management had been “substantiated” and that Mr. Dempsey would be removed effective the close of business that day. J.A. 818.

In accordance with the collective bargaining agreement between the Union and USMS, which provides for grievance procedures as required by 5 U.S.C. § 7121, the Union filed a grievance challenging Mr. Dempsey’s removal. The Union and the USMS jointly selected an arbitrator via the Federal Mediation and Conciliation Service. The arbitrator held a series of virtual hearings in June through August 2021, hearing testimony from Mr. Dempsey, Ms. Lattany-Reed, Ms. Creasy, the deciding official, and a number of other USMS employees.

The arbitrator issued a decision denying the Union’s grievance and affirming Mr. Dempsey’s removal, because USMS’s removal decision was supported by substantial evidence, as required by 5 U.S.C. §§ 7121(e) and 7701(c)(1)(A) and 5 C.F.R. § 1201.56(b)(1)(i). In particular, the arbitrator determined that substantial evidence existed of Mr. Dempsey’s poor performance before the performance-improvement period, USMS’s notice to him of his performance issues, USMS’s provision of a reasonable opportunity to improve, and Mr. Dempsey’s continued poor performance. She also noted that, although USMS made an error in its proposed removal letter, by giving “May 20” as the day of a meeting, Mr. Dempsey “was not harmed by this error.” J.A. 10–11.

The arbitrator’s decision issued on February 14, 2022. On April 8, 2022, within the 60 days allowed by 5 U.S.C. §§ 7121(f) and 7703(b)(1), the Union and Mr. Dempsey petitioned this court for review of the arbitrator’s decision. The parties then stipulated to the dismissal of the Union

as a party, *see* Fed. R. App. P. 27, leaving Mr. Dempsey the sole petitioner. We have jurisdiction under 5 U.S.C. §§ 7121(f) and 7703(b)(1) and 28 U.S.C. § 1295(a)(9).

II

When presented with an arbitral decision arising from a grievance procedure established under 5 U.S.C. § 7121 for a collective bargaining agreement, we review it “in the same manner and under the same conditions as if the matter had been decided by the [Merit Systems Protection Board].” 5 U.S.C. § 7121(f); *see AFGGE Local 3599 v. Equal Employment Opportunity Commission*, 920 F.3d 794, 796–797 (Fed. Cir. 2019); *Dixon v. Department of Transportation, Federal Aviation Administration*, 8 F.3d 798, 803 (Fed. Cir. 1993). Consequently, we will affirm the arbitrator’s decision unless it is “(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence.” 5 U.S.C. § 7703(c); *see also Dixon*, 8 F.3d at 803. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *McLaughlin v. Office of Personnel Management*, 353 F.3d 1363, 1369 (Fed. Cir. 2004) (cleaned up). “This court’s role is further circumscribed when reviewing a performance-based action taken under chapter 43 because of the deference owed to each agency’s judgment regarding its employees’ performance in light of the agency’s assessment of its own personnel needs and standards.” *Harris v. Securities and Exchange Commission*, 972 F.3d 1307, 1315 (Fed. Cir. 2020) (cleaned up).

Chapter 43 authorizes the reduction in grade or removal of an employee for “unacceptable performance.” 5 U.S.C. § 4303(a).

In order to properly remove or demote an employee under chapter 43, the agency must have (1) established a performance appraisal system approved by

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