
Case Summary

Salmon v Social Security Administration

U. S Court of Appeals, Federal Circuit (Case No. 2011-3029 (C.A. Fed., Dec. 9, 2011))

Background

Victoria Salmon, a former service representative with the Social Security Administration (SSA), appealed to the Federal Circuit Court to review the final decision of the Merit Systems Protection Board affirming SSA's removal of her from her position. Ms. Salmon worked for SSA as a service representative and her duties were to assist SSA beneficiaries and others with questions about SSA programs and procedures in person, by telephone, and by written correspondence. In September 2008, Ms. Salmon met with her supervisor and received her Performance Plan for 2009 pursuant to SSA's Performance Assessment and Communications System (PACS).

As the year proceeded, Ms. Salmon was called into further meetings with her supervisor and informed that her work was considered deficient. During a 40 day "Performance Assistance" period and a 4 month "Opportunity to Perform Successfully" (OPS) period, a mentor assigned to Ms. Salmon observed her work, noted deficiencies, gave corrective instruction, and reported back to Ms. Salmon's supervisor. In between the two periods, Ms. Salmon's supervisor relayed to Ms. Salmon the mentor's observations and conclusions, noted where Ms. Salmon's performance was deficient, and gave instruction about what ought to have been done in each observed situation. But at the end of the OPS period in July 2009, the supervisor concluded that the situation was beyond repair and the supervisor removed Ms. Salmon from her position. Ms. Salmon appealed to the MSPB; the Administrative Judge assigned to the case affirmed the removal; on appeal, the full Board agreed with the AJ and Ms. Salmon appealed to the Court. The Court sustained the removal. This paper examines Ms. Salmon's arguments and how the agency was able to prevail through good performance management practices.

Argument #1: Objective Criteria

On appeal to the Court, Ms. Salmon presented three arguments:

- PACS fails the Congressional requirement that federal agencies' performance appraisal systems evaluate employee job performance on the basis of objective criteria "to the maximum extent feasible" (5 U.S.C. § 4302(b)(1)).
- The performance standards applied to her did not meet statutory requirements for employee participation in their development (5 U.S.C. § 4302(a)(2)).
- SSA failed to carry its burden to show that its use of PACS was approved by the Office of Personnel Management (OPM).

Ms. Salmon's initial argument centered around the requirements found in 5 U.S.C § 4302(b)(1):

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

*(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of **objective criteria** (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system. . . . [Emphasis added]*

Documentation showed that Ms. Salmon's performance plan laid out 4 critical elements: Interpersonal Skills, Participation, Demonstrates Job Knowledge, and Achieves Business Results. Each of these elements was accompanied by several elaborating standards. For example, element 3, Demonstrates Job Knowledge, included the following standards:

- Effectively applies knowledge and skills to meeting customer needs and expectations;
- Contributes to the success of organizational operating plans by producing high-quality work results
- Maintains current knowledge of SSA programs, procedures and systems through office training and review of policy and procedural updates, such as daily Policy Net postings

Ms. Salmon argued that these metrics, and others like them in the 2009 plan were not sufficiently "objective" to meet the requirements of 5 U.S.C § 4302(b)(1). She argued that numerical standards (such as, "no more than x errors in time period y") or some other standards of more exact application were needed to meet the conditions of 4302(b).

In its decision the Court, citing *Wilson v. Department of Health & Human Services, 770 F.2d 1048 (Fed. Cir. 1985)*, rejected the argument that the term "objective criteria" in 4302(b)(1) binds the government to use only "precise quantitative or numerical standards." The court reiterated that the statute does not require quantitative standards. It requires only that the standards be "sufficiently precise and specific." The Court further pointed out that *Wilson* clarified that the section 4302(b) analysis is not confined to the written standards but also the efforts of a supervisor to instruct the employee on how best to satisfy the standard also mattered. In Ms. Salmon's case, her supervisor:

- Gave direct, precise feedback on the deficiencies in Ms. Salmon's work and clear instruction on how to remedy them.
- In February of 2009, Ms. Salmon and her supervisor signed a written memorandum, Opportunity to Perform Successfully (OPS) that set forth over 30 case studies, each describing some error in Ms. Salmon's conduct and stating what should have been done.
- The supervisor provided Ms. Salmon with a mentor to provide guidance and correction during the subsequent 4 month OPS period.

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In light of this record, the court found no error in the Board's conclusion that the performance standards applied to Ms. Salmon met the requirements of section 4302(b). Specifically the court found that the criteria in the 2009 Performance Plan, combined with the supervisor's efforts at instruction, were clear, precise, and specific enough to be "objective" and "sufficient to invoke a general consensus among reasonable people in Ms. Salmon's position as to their meaning and content."

Argument #2: Employee Participation

Ms. Salmon next argued that SSA, in its adoption of PACS, disregarded the "employee participation" requirement of section 5 U.S.C. § 4302(a):

- (a) *Each agency shall develop one or more performance appraisal systems which—*
- (1) *provide for periodic appraisals of job performance of employees;*
 - (2) *encourage **employee participation** in establishing performance standards; and*
 - (3) *use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and re-moving employees. [Emphasis added]*

Ms. Salmon argued that PACS "did not provide for and did not result in employee participation [in establishing performance standards]," and thus its use by SSA is unlawful. Ms. Salmon emphasized her belief that section 4302(a) required SSA to solicit and consider her input in the development of her own performance standards. The agency argued that the section required only that employees have input into the larger process under which specific standards would be developed and communicated and that the PACS system was proposed to the American Federation of Government Employees (AFGE) in 2005 and was approved as part of the collective bargaining agreement between SSA and AFGE.

In its decision, the court cited 5 CFR § 430.203, which assigns final authority for performance standards with the agency:

Performance standard means the **management-approved** expression of the performance threshold(s), requirement(s), or expectation(s) that must be met to be appraised at a particular level of performance....[Emphasis added]

Thus the court agreed with the agency that, while SSA has an obligation to seek employee input into performance standards, the precise means of input and the use to which it is put, is within SSA's discretion. In this case PACS was expressly endorsed in the national agreement between

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SSA and the AFGE. PACS also states that employees will be issued Performance Plans by their supervisors prior to the start of any appraisal period, at which time “expectations” will be discussed and documented by the supervisor. The court also found that all this was done.

Argument #3: OPM Endorsement

Finally, Ms. Salmon contended that SSA failed to demonstrate that its use of PACS had been properly endorsed by OPM. In 1995, shortly after SSA was spun off from the Department of Health and Human Services, it submitted its performance appraisal system to OPM. OPM responded by letter, “We have reviewed the system and determined that it meets the requirements of 5 CFR part 430 subpart B. The system is approved.” SSA began using PACS for employee performance appraisal 10 years later, and Ms. Salmon argued that PACS was not covered by OPM’s 1995 approval.

The court again cited a previous case, *Adamsen v. Department of Agriculture*, 571 F.3d 1363 (Fed. Cir. 2009), which held: “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.” In Ms. Salmon’s case, the Court ruled:

*“On the record before us, we agree with the Board that PACS did not change the obligations of SSA employees to such an extent that OPM re-review was necessary. The performance appraisal system description that SSA gave OPM in 1995 was a **framework-type overview**, not a detailed implementation. PACS further developed the details of SSA’s performance appraisal system, in a manner consistent with the outline provided to OPM.”*
[Emphasis added]

The court again pointed out that the regulations disseminated by OPM embrace this approach, wherein OPM approves a high-level plan and the agency fills in the details. The court determined that while “PACS may have differed substantially from its predecessor program, we see nothing in the proffered testimony indicating that PACS was inconsistent with the 1995 submission to OPM. Indeed, the 1995 submission specifically states that implementing ‘appraisal programs’ could use any of a variety of ‘summary levels’ to assess employee performance, ranging from a binary ‘unacceptable/fully successful’ metric to a five-tier system ranging from ‘unacceptable’ to ‘outstanding.’”

Conclusion

This case illustrates the impact that a supervisor’s diligence in crafting reasonable elements and standards combined with regular communication and feedback with his/her employees can result in successful performance management. Performance management is a collaborative effort. The supervisor (and by progression, the agency) in this case could not have

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been successful without the efforts and cooperation of upper management along with the HR support staff. Ultimately, the supervisor exercised sound performance management practices that anyone can achieve:

- Develop a performance plan with clear, objective elements and standards
- Give direct, precise feedback
- Provide clear instructions on how to remedy any deficiencies
- Make available necessary coaching, mentoring, and training
- Document all counseling sessions, performance-related meetings, and performance assistance plans
- Keep upper level management and HR Staff informed of your efforts