



United States Department of the Interior



FISH AND WILDLIFE SERVICE
South Florida Ecological Services Office
1339 20th Street
Vero Beach, Florida 32960

November 5, 2004

Mr. Andrew C. Eller, Jr
1805 19th Place, #203
Vero Beach, Florida 32960

Dear Mr. Eller:

This is notice that you will be removed from your position, Fish and Wildlife Biologist, GS-0401-11, South Florida Ecological Services Office, U.S. Fish and Wildlife Service, Vero Beach, Florida, and from the Federal service on the basis of unsatisfactory performance. The effective date of your removal is November 5, 2004.

On July 13, 2004, a notice, also dated July 13, 2004, was issued by your supervisor, Mr. Allen Webb, proposing your removal for failing to achieve Critical Results B and C of your Performance Plan. These failures were based upon a Performance Improvement Plan (PIP) that was in effect from June 23, 2003 to December 31, 2003.

You were allowed thirty (30) calendar days from the date you acknowledged receipt of the notice cited above to reply orally and/or in writing, to the proposed action. You provided an e-mail request to me on August 11, 2004, requesting an extension until August 19, 2004 to present your response, which I granted. On August 19, 2004, I received your written response dated August 19, 2004.

I have carefully reviewed and considered your response, as well as additional information from office files, discussions with your immediate supervisor, and all other available information relevant to your performance during the period encompassed by your PIP (June 23 - December 31, 2003).

You claim that your performance standard requiring the timely completion of work product is absolute and therefore inappropriate (pages 4 - 8). I do not believe this to be the case inasmuch as Critical Results B and C provide exceptions for meeting the time frames established in your standards. For example, Critical Result B (a) and (c) and Critical Result C (a) and (b) provide that, "An exception to meeting this time frame must be approved in advance by your supervisor." This same exception was made part of your

PIP. I, therefore, disagree with your claim and, to the contrary, believe your performance standard requiring the timely completion of work assignments is appropriate and is not absolute.

During the time your PIP was in effect, for Critical Result B, nine (9) projects were identified in Tables 3 and 4, which were used as the basis for your "Not Achieved" rating. On page 6 of your response to the proposed removal, you provide information challenging the results of this evaluation. Specifically, you conducted an analysis of the time it took for the assignments to reach you and the time it took for internal reviews before the final letter or report was finalized by this office. Your analysis shows that even when these "mitigating factors" -- for example, time that was not within your control -- are taken into consideration, your initial response letters were still untimely. For example, using your analysis, the Jerry Wells project was assigned to you on July 25, 2003 and your first response was provided to your supervisor for review on December 12, 2003, almost four and a half months after it was due. Again, using your analysis, the projects identified in your PIP were overdue by a range from 71 to 140 days, even when the "mitigating" circumstances you identified are taken into consideration. In addition, I found no evidence that a Request for Additional Information (RAI) was ever submitted by you in connection with these projects. An RAI could possibly have explained the untimely responses and resulted in new due dates being established. Furthermore, there is nothing in the record to indicate that you informed your supervisor of the need for additional time as required by your PIP.

Table 5 in the letter proposing your removal identifies 51 requests for technical assistance, your response to which was used as the basis for your "Not Achieved" rating for Critical Result C. You conducted an analysis for these projects similar to the analysis you conducted for the projects for Critical Result B. Again, even by your own analysis, you were still untimely in preparing your initial responses (ranging from four days to 345 days), with an average response of 140 days late. This average response time takes into consideration the mitigation factors that you requested be considered and evaluated.

You also identified several factors as being beyond your control that you contend contributed to the untimely responses. You have requested that these factors be considered in my decision on your proposed removal. You identified bookkeeping errors, non-responsiveness of applicants, project complexity, workload, and other assigned duties as factors that contributed to the untimely project responses. With regard to the bookkeeping errors, I found no evidence of any errors of this type affecting the timely completion of your responses. However, even if these types of error did occur, it would nonetheless be your responsibility to ensure that your supervisor was made aware of any time delays associated with the projects. Furthermore, it is your responsibility to update and verify the accuracy of the data entries for each project assigned to you.

I also considered the issue of non-responsiveness of applicants as a factor beyond your control that may have caused delays in the timely completion of your work. The time frame in which an applicant provides a complete initiation package does not affect your response time. Your timeline for response begins with receipt of any requested information from the applicant. You are then expected to notify the applicant of the sufficiency of the information provided within a reasonable period, generally accepted as 30 days from receipt of the information. Therefore, the amount of time an applicant needs to complete an initiation packages is not relevant to the timeliness of your response.

The complexity of projects was also considered as a possible mitigating factor in the timeliness of you responses. You specifically reference the Lely Drainage District project as an example of this factor. While I believe that this is an example of a complex project, I can find no evidence that its complexity in any way contributed to your untimely response. Specifically, there is no response from you in the files until 342 days after the due date, and then only after you received a written request from your supervisor to provide a response. Likewise, I find no indication that you ever attempted to inform your supervisor during that 342-day period that more review time was required or needed due to project's complexity.

Your workload is another factor that I considered in my decision. Workload and work assignments, including the equitability and complexity of the work assigned, are based on several factors, among them the particular biologist's level of experience and knowledge of the Project Planning program. With 17 years of Federal service, you are an experienced Project Planning biologist, and are well acquainted with the resource needs of the species to be addressed in your daily work. You, therefore, should be efficient in determining the complexity and review times needed for each project. As you have previously stated, the complexity of a project can affect the level of effort needed to review the project and, thus the amount of time needed per project can not be determined with absolute certainty. However, the general approach that all staff biologists follow in reviewing projects is to conduct a cursory review of the project to estimate the level of effort necessary to address the species concerned and then to provide sufficient time to address each project. This is generally achieved through time management by providing a block of time for complex projects and a block of time for more common, non-controversial projects, with no project being inadvertently or purposely overlooked or selectively reviewed. Moreover, supervisor are available to provide assistance if needed. This type of time management in handling all types of projects was discussed with you on many occasions during your PIP period and was also discussed during your bi-weekly performance reviews.

I likewise considered your other assigned duties in making my decision. In the Project Planning program, Congressional inquiries, Freedom of Information Act requests, and

requests for administrative record documents are routinely received. Preparing responses to these requests and inquiries is generally assigned to the biologist most familiar with the location and compilation of files, if necessary. These assignments, depending on their complexity, are generally approached as a team effort. The specific projects you referenced in your response letter were handled through this process. The expectation of all Project Planning staff is to monitor their own workloads and request assistance in completing these special assignments if they determine assistance is needed. You requested and received such assistance on the Florida Rock administrative record request and the Lieberman Congressional Inquiry. Thus, you were fully familiar with this process.

The final issue that you requested me to consider as a factor outside of your control involves reassignment of projects. In your response, you maintain that the amount of time that you had expended on the four listed projects versus the amount of time it actually took the biologist to complete the projects was not considered in the evaluation of your performance. The timeliness issues in each of the four projects you referenced related to the lack of formal responses by the Service to the Army Corps of Engineers and the applicants for project-specific related issues; they had nothing to do with the amount of time you expended on the projects prior to their reassignment to the biologist who eventually completed the projects. You also request clarification of delinquency issues associated with the Tenabrook, Tractebel Pipeline, and Preserve Estates projects. You state that these projects were delinquent prior to or immediately following their assignment to you. In reviewing the records for the three projects, the date of assignment and date of delinquency, I could not, with certainty, determine if the untimely responses could be attributable to your actions or to the actions of the prior project biologist. I have therefore not considered this information in making my decision.

You also requested that I consider seven factors as mitigating or as explaining your performance during the PIP period. I have addressed four of the seven factors you listed which I believe to be relevant to your overall performance evaluation and my decision on your proposed removal. These factors are:

Positive aspects of your performance;

Other assigned duties that consumed substantial amounts of your time;

Other mitigating factors that caused delays and that were not considered in your performance review; and

Consideration of your performance in the context of office conditions of understaffing and heavy workload.

The other three factors that you noted in your response are not related to your "Not Achieved" performance rating and thus were not considered in my decision.

In addition to the factors listed above, I have reviewed the three prior disciplinary actions taken against you. These prior disciplinary actions were also considered in the proposal to remove you from Federal service. There are no outstanding reviews regarding these matters as final agency action as to each has been taken.

Having carefully weighed all the available information, I conclude that the recommendation to remove you from your position of Fish and Wildlife Biologist, GS-0401-11, Ecological Services, Vero Beach, Florida and from Federal service is appropriate.

In deciding an appropriate penalty, I have considered the Department of the Interior's Handbook on Charges and Penalties for disciplinary and adverse actions, as well as the Douglas Factors. In particular, I considered that you have over 17 years of Federal service and that you do have a prior disciplinary record for both performance and conduct as it relates to the performance of your duties. I have also considered other potential mitigating circumstances such as the complexity of your job, that you were assigned other work, and that there were factors outside of your control that could have affected your performance. However, I have lost confidence in your ability to perform your duties, in your judgment, and your ability to represent the Service to the public.

I consider the penalty of removal to be warranted due to the nature and seriousness of the offense. Accordingly, it is my decision that the reasons set forth in the proposed action are sustained and that your removal from your position and the Federal service is warranted and will promote the efficiency of the Service.

You have the right to appeal this action to the Merit System Protection Board (MSPB), Atlanta Field Office, 401 W. Peachtree Street, NW, 10th Floor, Atlanta, Georgia 30308-3519 within thirty (30) calendar days after the effective date of this action. A copy of the Board's appeals form and the Board's publication "Questions & Answers About Appeals" are enclosed.

A petition for appeal must contain the following:

- (a) Your name and the name of the agency or bureau taking action;
- (b) A statement of the action taken and the effective date of the action;
- (c) A statement requesting a hearing, if you want one;
- (d) A statement of the reasons why you, the appellant, believe the agency action is wrong;
- (e) A statement of the specific action(s) you, the appellant, would like the presiding official to take;
- (f) The name of your representative, if any;
- (g) Attachments of any relevant documents, including the decision notice;

- (h) A statement as to whether you or anyone acting on your behalf has filed a grievance within the agency regarding the matter being appealed; and
- (i) Your signature and the signature of your representative, if any.

You may use the attached appeal form, although it is not required that you file your appeal using the form. To be timely, an appeal to the Board must be filed anytime during the period beginning with the day after the effective date of this action, and ending thirty (30) days after that date. Filing can be by personal delivery during normal business hours to the Board field office indicated above, in which case the date of receipt in the Board's Office is the date of filing, or filing can be by mail to that office, in which case the postmark date of mailing is the date of filing.

Information about appeal rights and procedures may be obtained by contacting the Human Resources Office, Labor and Employee Relations, Attn: Ms. Linda Johnson, 1875 Century Boulevard, Suite 230, Atlanta, Georgia, 30345, or by calling Ms. Johnson at 404-679-4012.

The Standard Form 50 effecting your removal will be forwarded to you when available.

Please acknowledge receipt of this letter by signing the attached copy and returning it to me.

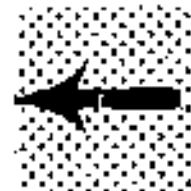
Signed,



Thomas E. Grahl
Deputy Field Supervisor

Enclosures

I acknowledge receiving this document



**SIGN
HERE**

Signature

Date