

## **Reflecting on 2011, and Federal Employees'™ Unsung Performance**

By Mathew B. Tully

With the end of the year comes the opportunity to reflect on the events and accomplishments of the last 12 months. For many federal employees, it also means having their supervisors look back on the work they've done over the year, and appraise their performance.

While most employees remember all they have accomplished from January through December, sometimes their rating officials' memories may be geared more toward the short-term. That is, supervisors may tend to remember only more recent work events (especially mistakes and shortcomings) because they are fresher in memory.

Unfortunately, these types of events can leave a stronger impression than earlier achievements. Consequently, supervisors may issue an inappropriate performance rating; one that is lower than what the employee deserves. These types of undeserved performance ratings potentially limit employees' opportunities for promotion, within-grade pay increases and retention service credits.

Discrimination appears to be a growing motivating factor behind lower-than-deserved performance ratings. Between fiscal 2009 and fiscal 2010, the number of federal employee discrimination complaints filed with the Equal Employment Opportunity Commission due to allegedly unwarranted evaluations or appraisals rose by 11 percent, to 1,346. Retaliation was the most commonly alleged discriminatory grounds, accounting for 765 of these complaints in fiscal 2010, up 15 percent from the previous fiscal year, according to the EEOC

Meaningful performance reviews must be conducted at least once every 12 months and be based on an Office of Personnel Management-approved performance appraisal system. Employees have cause to appeal an appraisal if more than 12 months passed since their last performance evaluation, or if the standards under which they were evaluated were not in place for and were not communicated to the employee at least 90 days prior to the date of the evaluation. In cases where aspects of an employee's performance were deemed unacceptable, the agency must inform him or her as to what steps he or she could take to bring his or her allegedly deficient performance into compliance with agency standards.

It is important to remember that just because an agency claims to have an OPM-approved appraisal system does not mean that is always true. Last April, the Merit Systems Protection Board

found that changes made some 16 years ago to the Department of Agriculture's performance appraisal system had not been approved by OPM. This fact was revealed when the USDA

had attempted to remove a research soil scientist in April 2007 for performance issues based on its unsanctioned appraisal system. On remand from the U.S. Court of Appeals for the Federal Circuit, the MSPB

scrutinized the USDA's appraisal system and found that it showed "nothing more than suspicion" of OPM approval and carried "little weight." Consequently, in *Adamsen v. Department of Agriculture*, the full board ordered the USDA to reinstate the scientist to his former position, with back pay.

Federal employees can challenge ratings through their agency's internal grievance procedures or through negotiated grievance procedures. In instances where discrimination is suspected of being a motivating factor behind an unjustified rating, the employee could file a complaint with Office of Special Counsel or with the EEOC

. A federal-sector employment lawyer should be consulted to determine your options and the best way to preserve your rights moving forward.

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. The information in this column is not intended as legal advice.