

CHAPTER 10

PERFORMANCE APPRAISAL

Performance appraisals¹ are part of the federal sector "performance management system" established by Congress when it enacted the Civil Service Reform Act ("CSRA") of 1978. Prior to passage of this legislation, evaluations were conducted in accordance with the Performance Rating Act ("PRA") of 1950. The former statute included a three level performance system with removals based on an unsatisfactory rating. Before an adverse action could be initiated, however, a separate review would occur to determine the validity of the evaluation.

Much criticism was levied against the PRA, thus creating the impetus for reform. The following quote from the Senate Report accompanying S. 2640 reveals the mood on Capitol Hill at the time revisions were being contemplated. "The welter of inflexible structures that have developed over the years threatens to asphyxiate the merit principle itself."

Under the guise of providing a meaningful replacement for the former performance system--one regarded as useless and ineffective--came CSRA. One of its "central tasks" was to "allow civil servants to be able to be hired and fired more easily, but for the right reasons." The Office of Personnel Management ("OPM") was designated the protector of employees against subjective performance standards established at the unreviewed discretion of agencies.

While the effective date of the CSRA revisions was 90 days after passage on October 13, 1978, agencies were given until October 1, 1981 to establish new performance appraisal systems. Despite the high expectations of the reformers, constant oversight is necessary to ensure that employee appraisals are accomplished in a fair and objective manner. A close review of this Chapter will hopefully enhance your understanding of the process and enable you to properly represent NTEU members.

I. Definitions

To grasp the intricacies of the federal sector performance appraisal process, it is important to understand the following OPM definitions found at 5 CFR 430.

- A. **APPRAISAL:** The process under which performance is reviewed and evaluated.
- B. **APPRAISAL PERIOD:** The established period of time for which performance will be reviewed and a rating of record will be prepared.

- C. **APPRAISAL SYSTEM:** A framework of policies and parameters established by an agency as defined at 5 U.S.C. 4301(1) for the administration of performance appraisal programs under subchapter I of chapter 43 of title 5, United States Code, and this subpart.
- D. **CRITICAL ELEMENT:** A work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable. Such elements shall be used to measure performance only at the individual level.
- E. **NON-CRITICAL ELEMENT:** A dimension or aspect of individual, team, or organizational performance, exclusive of a critical element, that is used in assigning a summary level. Such elements may include, but are not limited to, objectives, goals, program plans, work plans, and other means of expressing expected performance.
- F. **PERFORMANCE:** Accomplishment of work assignments or responsibilities.
- G. **PERFORMANCE APPRAISAL SYSTEM:** See Appraisal system.
- H. **PERFORMANCE MANAGEMENT PLAN:** The description of the agency's methods which integrate performance, pay, and awards systems with its basic management functions for the purpose of improving individual and organizational effectiveness in the accomplishment of agency mission and goals. The Performance Management Plan, which includes the performance appraisal plan, must be submitted to OPM for review and approval.
- I. **PERFORMANCE PLAN:** All of the written, or otherwise recorded, performance elements that set forth expected performance. A plan must include all critical and non-critical elements and their performance standards.
- J. **PERFORMANCE STANDARD:** 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. A performance standard may include, but is not limited to, quality, quantity, timeliness, and manner of performance.
- K. **PROGRESS REVIEW:** Communicating with the employee about performance compared to the performance standards of critical and non-critical elements.
- L. **RATING:** See Summary rating.
- M. **RATING OF RECORD:** The performance rating prepared at the end of an

appraisal period for performance of agency-assigned duties over the entire period and the assignment of a summary level within a pattern (as specified in § 430.208(d), or (2) in accordance with § 531.404(a)(1) of this chapter. These constitute official ratings of record referenced in this chapter.

- N. SUMMARY RATING:** The written record of the appraisal of each critical and non-critical element and the assignment of a summary rating level.

II. Important Aspects of the Overall System

While it is imperative that each appraisal system include critical elements, an agency has the option of including non-critical elements. Employees are to be evaluated on these job components, unless they have not been provided with a sufficient opportunity during the appraisal period to demonstrate performance.

Performance plans shall be provide to employees at the beginning of the appraisal period (normally within 30 days) 5 CFR 430.206(b)(2). Each performance plan shall include elements that are derived by assigning a summary level, including at least one critical element and any non-critical elements.

Each critical element must have a minimum of two levels of rating. In the past, the overall system had to have five summary rating levels: two levels above fully successful and two levels below. Many agencies still use this five-point system, however the requirement now is that there be at least two levels: one for “fully successful” or its equivalent and another for “unacceptable” or its equivalent. See 5 CFR 430.206(b)(8)

Each agency’s appraisal program must establish a minimum period of performance that must be completed before a performance rating may be prepared. The appraisal period will generally be 12 months so that employees are provided a rating of record on an annual basis. In addition, a "progress" review is required for each employee once a year. If a detail lasts 120 days or longer, an appraisal should be included in the next rating of record, but is no longer required by the CFR. Instead, because these practices have become discretionary, they are governed by the language of the collective bargaining agreement.

The performance rating of record must be approved by a higher official. This rating may not be communicated to the employee prior to the final review. When an employee moves to a new agency, a "transfer rating" must be issued and taken into account by the receiving agency.

An agency may not prescribe a "forced distribution" of ratings. Therefore, it is improper to suggest that a certain number or percentage of "outstandings" or any other rating be issued.

As explained in Chapter 430 of the Federal Personnel Manual² ("FPM"), each performance standard should be objective, realistic, reasonable, and clearly stated in writing. While most elements relate to results and products, "behavior" (i.e., how a job is done rather than accomplished) may also be included. Nonetheless, performance elements should encompass tasks, duties, functions, dimensions, or other job components. An agency can change performance requirements as long as it is done before the beginning of the appraisal period. Smallwood v. Dept. of the Navy, 52 MSPR 678, 685 (1992). An Agency may not use the PIP (Performance Improvement Plan) period to increase or decrease standards at the beginning of the appraisal period. Brown v. VA, 44 MSPR 635, 643 (1990).

III. Conducting a Critical Review of Performance Elements

The OPM regulations set out examples of ways to facilitate employee input when performance plans are being established. Whether review occurs at the drafting stage or in conjunction with a performance-based action, involvement of the affected employee and a union representative should help to identify flaws in the system. Participation is encouraged under 5 USC 4302 (a)(2), but there is no statutory or regulatory right for an employee to participate in the development of performance standards. Beverly v. DLA, 27 MSPR 600, 603-4 (1985). Here are some important questions to ask when examining job components.

1. Are the elements all inclusive and understandable?
2. Are the elements consistent with the position description, functional statement, budget or planning documents, or some other administrative requirement?
3. Is the total job covered?
4. Are there elements relating to behavior? If so, do they relate to those aspects of the work behaviors that can be observed and measured?
5. Do the elements refer to work activities under the control of the employee?
6. Is there a way to measure performance? If so, what existing indicators will provide information about performance? If not, what additional steps would be required to provide this information?
7. Are they compatible with and supportive of results assigned to other organizations in your agency?
8. Are the elements clear and specific?

² The FPM is the predecessor of the CFR on this subject matter and provides guidance to the official CFR where these principles have been subsequently codified.

9. Are the performance elements defined too broadly to provide useful information or would it be too costly to obtain?
10. Are all elements the same for all employees of the work unit who have the same position description? If not, can differences in elements be explained and justified?

Standards should be performance-related rather than trait-related. The use of factors such as "dependability" "interest" "reliability" and "initiate" do not meet the statutory requirement, unless they are clearly job-related and can be documented and measured. Performance standards are to be objective to the maximum extent practicable. 5 USC 4302(b)(1). An agency may not impose absolute standards, or 100% accuracy for satisfactory performance. See Dept. of Veterans Affairs Medical Center, Houston, Tx and AFGE Local 1633, (Schieber, 1997). Standards cannot be absolute and must meet criteria of "reasonable, attainable, and realistic," citing Calloway v. Department of Army, 23 MSPR 592, 599 (1984) and Blaine v. VA, 36 MSPR 322, 325 (1988).

Remedial action must be taken when below standard performance occurs in one critical element, regardless of satisfactory performance on other elements. Supervisors must give employees the opportunity to demonstrate acceptable performance, and assist employees improve their performance. Although the determination of critical versus non-critical elements is totally within an agency's discretion, FPM Chapter 430 offers the following guidance in determining whether an element is critical.

1. Is it a major component of the job?
2. If the element were not included, would the work that is carried out by the organization be adversely affected?
3. Does unacceptable performance on the element have serious consequences to accomplishing the work of the organization?
4. Would management initiate removal or demotion if the performance standard is not met?
5. Is it a regular, recurring part of the job?
6. Is it directly related to the agency's mission?
7. Does it require a significant amount of the employee's time?
8. Is there a statutory or regulatory requirement related to its performance?

IV. Rules on Removals and Downgrades

The following is a summary of 5 CFR Part 432, the regulations concerning reduction-in-grade and removal based on unacceptable performance.

Addressing unacceptable performance - At any time during the performance appraisal cycle that an employee's performance becomes unacceptable in one or more critical elements, the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position. For each critical element in which the employee's performance is unacceptable, the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position. As part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance. There must also be adequate communication of standards and the instruction on how the employee is to perform his/her duties. There is no set time for a PIP, but it must be reasonable. 5 CFR 432.104. If the employee demonstrates acceptable performance during the PIP period, the Agency is precluded from removing or demoting the employee solely on the basis of deficiencies that preceded or caused the PIP.

Proposing and taking action - Once an employee has been afforded a reasonable opportunity to demonstrate acceptable performance pursuant to 5 CFR 432.104, an agency may propose a reduction-in-grade or removal action if the employee's performance during or following the opportunity to demonstrate acceptable performance is unacceptable in 1 or more of the critical elements for which the employee was afforded an opportunity to demonstrate acceptable performance. A proposed action may be based on instances of unacceptable performance which occur within a 1 year period ending on the date of the notice of proposed action. 5 USC 4303(c)(2)(A) Thus, an Agency can support the action with instances of unacceptable performance that occurred prior to the PIP period. Also, an action may be taken on the basis of post-PIP performance in certain instances if they were within one year of the action. An agency may not delay taking action more than one year after the beginning of a PIP.

Advance notice - The agency shall afford the employee a 30 day advance notice of the proposed action that identifies both the specific instances of unacceptable performance by the employee on which the proposed action is based and the critical element(s) of the employee's position involved in each instance of unacceptable performance. Kadlec v. Dept of the Army, 49 MSPR 534, 540 (1991)

Opportunity to answer - The agency shall afford the employee a reasonable time to answer the agency's notice of proposed action orally and in writing.

Representation - The agency shall allow the employee to be represented by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as a representative would cause a conflict of interest or position or an

employee whose release from his or her official position would give rise to unreasonable costs to the Government or whose priority work assignment precludes his or her release from official duties.

Medical conditions - The agency shall allow an employee who wishes to raise a medical condition which may have contributed to his or her unacceptable performance to furnish medical documentation of the condition for the agency's consideration. In considering documentation submitted in connection with the employee's claim of a medical condition, the agency may require or offer a medical examination in accordance with the criteria and procedures of 5 CFR Part 339, and shall be aware of the affirmative obligations of 29 CFR 1613.704.

Final written decision - The agency shall make its final decision within 30 days after expiration of the advance notice period. Unless proposed by the head of the agency, such written decision shall be concurred in by an employee who is in a higher position than the person who proposed the action. The Agency must consider the answer by the employee or the employee's representative. Franco v. DHHS, 32 MSPR 653 (1987)

Election of forum - As provided at 5 U.S.C. 7121(e)(1), a bargaining unit employee who by law may file an appeal with the Merit Systems Protection Board or a grievance under the contract. An employee who has exercised his or her option to grieve an action taken based upon unacceptable performance under this part may not also file an appeal on the matter with the Merit Systems Protection Board, and vice versa.

V. Handling Performance Cases

For an agency to sustain a removal or downgrade action against an employee under Chapter 43, it need only prove its case by substantial evidence. The term "substantial" evidence means whether, in light of all relevant and credible evidence presented, a reasonable person could agree with the agency's decision. 5 CFR 1201.56(c)(1). The burden of proof is on the Agency.

Prior to issuing a notice of unacceptable performance, an agency must communicate the elements and standards to the employee, and provide him/her with an opportunity to demonstrate acceptable performance. An opportunity period is normally referred to as a Performance Improvement Period or Plan (PIP).

If it can be proven that the employee is performing at a marginally acceptable level, the employee cannot be removed for unacceptable performance. Moreover, an agency must have OPM approval of its performance appraisal system to sustain an action under Chapter 43. This review, however, does not entail an analysis of the particular elements and standards for each position.

An Agency cannot base a performance removal or downgrade on an employee's performance during a detail. Department of the Air Force and AFGE Local 1776, LAIRS 19752 (Henderson, 1990) No. 89-03792

In situations where OPM approval of the system was dependent upon the accomplishment of certain modifications of the performance plan, and proof is absent concerning such changes, the agency will fail to establish approval of its system.

Communication is another important stage of the process. Failure of agency to communicate performance standards is a violation of an employee's substantive right under Chapter 43. The opportunity to challenge the standards as improper, absolute or subjective is permissible when contesting an action based on unacceptable performance. The agency will be required to show that its standards do not constitute an abuse of discretion. When attacking standards, it is important to show how the elements lacked in specificity or accuracy and the resultant harm. The agency may rebut allegations of subjectivity by introducing a supervisor's written instructions, letters and memoranda to employees.

A standard may be objective, yet not realistic or reasonable. Some standards involve subjective aspects, but it does not necessarily invalidate the standard. It is the agency's burden to show the legal requirements have been satisfied.

An "absolute" standard is one where a single error or lapse results in the failure to meet the standards of performance. A performance requirement of near perfection in a critical element fails to provide a reasonable basis for rewarding the employee. A standard that equates to an exceptionally low margin of error will not likely survive the reasonableness standard.

An agency is not obligated to devise numerical standards. Yet, the standards should not be impermissibly vague. To meet both statutory and regulatory requirements, an employee should be given a firm benchmark rather than an illustrative goal which the agency may find has or has not been met.

An agency has the freedom to initiate a Chapter 43 action (i.e., a removal or downgrade) at the first instance of unacceptable performance, or after repeated instances. Absent regulatory changes to the contrary, a Chapter 43 action should only be based on the inability of an employee to attain a minimally acceptable rating during the performance improvement period.

Where an agency fails to satisfy its burden in a Chapter 43 case, the appropriate relief is to return the employee to his/her status prior to the action. Neither an arbitrator nor the Merit Systems Protection Board may consider mitigating factors in an attempt to modify the agency's action. It must be either sustained or overturned.

Notwithstanding the aforementioned discussion, an agency may still initiate a performance-based removal under Chapter 75 of the CSRA, except that the "efficiency of the Service" standard is used. This is the same standard used to take disciplinary actions. Lovshin v. Dept. of the Navy, 767 F.2d 826 (Fed. Cir. 1985). But restrictions can't be used to cure a defect in a Chapter 43 case; e.g. Agency failed to give the employee opportunity to improve, and an Agency can't discipline an employee for not performing higher than his/her performance

standards. If a misconduct case is used to discipline an employee for poor performance, then a lack of an improvement period can be considered in mitigation of the penalty. Fairall v. VA, 33 MSPR 33 (1987).

VI. Arguments for Consideration

After interviewing the affected employee and reviewing all evidence relied upon by the agency in proposing a performance downgrade or removal action, the following arguments may be used depending upon the respective facts and circumstances of the case.

A. The employee:

1. acted consistent with agency regulations and procedures;
2. exercised sound professional judgment;
3. performed consistent with other similarly-graded employees;
4. was asked to perform under extremely adverse working conditions and situation was beyond the employee's control;
5. was assigned an unmanageable workload;
6. was not afforded a reasonable opportunity to improve performance; or
7. was discriminated against e.g. the employee was not given a reasonable accommodation; reprisal; downgrade caused by a medical condition.

B. The agency:

1. used a "pyramiding" approach where performance in a particular case was used to support multiple charges;
2. failed to consider events beyond the employee's control;
3. failed to follow internal guidelines in providing assistance;
4. failed to communicate a plan for improvement to the employee;
5. failed to exhaust all reasonable possibilities to provide assistance; or
6. predetermined that the employee would fail.

C. The opportunity period:

1. was not reasonable, fair, meaningful, bias-free, and without a predetermined result;
2. failed to evidence the agency providing encouragement, counselling; training, guidance, advice or other assistance;
3. included counselling which merely reviewed the employee's work product and identified errors;
4. included instructions to the employee which were general and simplistic; or,
5. was not meaningful because of the personal animosity between the employee and the supervisor.

VII. Harmful Error

When an agency makes an error in the application of its procedures, it may be guilty of harmful error. Such a serious defect can be the basis to overturn an action under Chapters 43 or 75, provided that the employee can identify how his/her rights were prejudiced. Some examples of harmful error are use invalid or outdated OPM regulations, and actions taken without adherence to procedural requirements.

A finding of harmful error is not automatic. An employee must show that the error would likely have affected the outcome of the agency's decision, provided minimal constitutional due process requirements were met. Stephens v. Department of the Air Force, 91 FMSR 5192 (1991). Thus, under the MSPB's revised standard, the burden is on the employee to demonstrate that a statutory, regulatory, or contractual breach would likely have caused the agency to reach a different conclusion.

VIII. Grieving Performance Ratings

When an Agency issues a less than successful performance evaluation, the Agency bears the burden of proof. McLellan Air Force Base and International Federation of Professional and Technical Engineers, (Angelo, 1990).

In January of 1988, the Federal Labor Relations Authority refined its position on the remedial powers of arbitrators in resolving performance appraisal disputes. When certain conditions are met, an arbitrator may direct an agency to grant an employee the performance rating they would have received if they had been appraised properly. When an employee challenges the rating and contends that he/she should be granted a higher rating, the employee bears the burden of proof.

The FLRA ruled that an arbitrator cannot force an Agency to adopt specific performance standards. 30 FLRA 1156 (1988) An arbitrator can sustain a grievance if management fails to apply established standards in violation of law, rule, regulation, or a properly negotiated provision of a Collective Bargaining Agreement. If an Agency does that, the arbitrator can cancel the rating. If the arbitrator, based upon the record, can determine what the rating would have been under the established elements and standards, if the Agency violation did not occur, then the arbitrator can direct the Agency to grant a specific rating. If the record does not provide the arbitrator with the evidence necessary to determine the rating, the arbitrator can direct that the grievant's work product or performance be reevaluated as appropriate.

An arbitrator may not establish new performance standards. The proper remedy would be to direct the agency to establish a plan which complies with applicable legal requirements.

IX. Table of Authorities and Cases

- A. 5 U.S.C. Chapter 23 - Merit Systems Principles
- B. 5 U.S.C. Chapter 43 - Performance Appraisal
- C. 5 U.S.C. Chapter 75 - Adverse Actions
- D. 5 CFR Chapter 430 - Performance Management
- E. 5 CFR Part 432 - Reduction in Grade and Removal Based on Unacceptable Performance
- F. FPM Chapter 430
- G. Wells v. Harris, 79 FMSR 7005 (1979)
- H. Shuman v. Department of the Treasury, 84 FMSR 5868 (1984)
- I. Callaway v. Department of the Army, 84 FMSR 5870 (1984)
- J. Lovshin v. Department of the Navy, 85 FMSR 7038 (Fed. Cir. 1985)
- K. Lisiecki v. Federal Home Loan Bank Board, 84 FMSR 5872, affirmed, Lisiecki v. MSPB, 769 F.2d 1558 (Fed. Cir. 1985)
- L. Walker v. Department of the Treasury,

85 FMSR 5296 (1985)

- M. Wilson v. Department of Health and Human Services, 85 FMSR 7063 (Fed. Cir. 1985)
- N. Martin v. Federal Aviation Administration, 86 FMSR 7065 (Fed. Cir. 1986)
- O. Social Security Administration, 30 FLRA No. 126 (January 28, 1988)
- P. Veterans Administration, 31 FLRA No. 115 (April 28, 1988)
- Q. Sullivan v. Department of Navy, 90 FMSR 5268 (April 17, 1990)
- R. Brown v. Veterans Administration, 90 FMSR 5273 (April 17, 1990)
- S. Stephen v. Department of Air Force, 91 FMSR 5192 (April 26, 1991)
- T. Hober v. Dept. of Army, 64 MSPR 129, 131 (1994)
- U. Blaine v. VA, 36 MSPR 322, 325 (1988)