



U.S. Department of Housing and Urban Development
Office of the Chief Human Capital Officer

Performance Based Reduction in Grade and Removal Actions Policy

Excellent
Good
Average
Poor

HANDBOOK 432.1

REV-1

MAY 2019

Policy, Programs, and Advisory Staff
Office of the Chief Human Capital Officer
Office of the Assistant Secretary for Administration

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**U.S. Department of Housing and Urban Development
Administration**

Departmental Staff

Transmittal for Handbook No.: 432.1 REV-1

Special Attention of:

Issued: Insert Date

1. This Transmits: Handbook 432.1 REV-1, Performance Based Reduction in Grade and Removal Actions.
2. Summary: This Handbook establishes the Department's policies and procedures for taking performance-based Reduction in Grade and removal actions. It provides a separate and distinct Departmental authority for taking performance-based actions.
3. Filing Instructions:

Remove:	Insert:
Handbook 432.1	Handbook 432.1 REV-1
4. Significant Provisions:
 - A. This policy conforms to Executive Order 13839, "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles," issued May 25, 2018.
 - B. It is no longer a HUD requirement to issue a performance improvement plan (PIP) to an employee whose performance is determined to be below the "Fully Successful" (or equivalent), but above the "Unacceptable (or equivalent) level on any Critical Element.
 - C. The opportunity to improve performance (OIP) notice has been renamed the Opportunity to Demonstrate Acceptable Performance (ODAP). Generally, this period will not exceed thirty (30) days.
 - D. An employee receiving a Proposed Notice of an Unacceptable Performance Action, has seven 7 calendar days to answer the Notice.
 - E. Management shall issue a final written decision as soon as practicable, but no sooner than the expiration of the Response Period stating the specific reasons, including a statement of the employee's appeal rights. The decision shall be made by a management official above the level of the official who proposed the action."

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CHAPTER 1. GENERAL PROVISIONS

1-1 Purpose

- A. This Handbook establishes policy and guidance regarding proposing and effecting Reduction in Grade and removal actions based solely on Unacceptable performance. It supersedes previous policy guidance prescribed by HUD Handbook 432.1, dated December 18, 2000.
- B. Performance-based actions may be taken by using either the procedures of Handbook 0752.02 REV-4, Adverse Actions or this Handbook. Before initiating a performance-based action, the policy and procedural requirements of Handbook 0752.02 REV-3, and those of this Handbook must be considered. Of particular importance, note the differences in the evidentiary standards or "degree of proof" required under two pertinent regulatory procedures in order to support the action. 5 CFR Part 432, requires **substantial evidence**; conversely, 5 CFR Part 752, requires **preponderance of the evidence**.
- C. Requirements stated in this Handbook are consistent with law, regulations, and Agency policy applicable at the time of its issuance. It is essential that current rules be researched, and that this Handbook be used in conjunction with the Department's Performance Management System plan and applicable negotiated agreements for employees in a bargaining unit, in order to ensure adherence to unique provisions, procedures, and time frames.

1-2 Authorities

- A. The Civil Service Reform Act (CSRA) of 1978, P.L. 95-454 (codified at 5 U.S.C. § 4303)
- B. Office of Personnel Management (OPM) Regulations, 5 CFR Part 432.

1-3 Exceptions to Handbook Provisions. The Chief Human Capital Officer, Office of the Chief Human Capital Officer, Office of Administration, may authorize waivers to the provisions of this Handbook insofar as the waivers are consistent with applicable law, regulations, agency policy and collective bargaining agreements. Any request for a waiver must be made in writing and must contain sufficient justification to support the need for the exception.

1-4 Definitions. For purposes of this Handbook, the following definitions are used:

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- A. Acceptable Performance** means performance that meets an employee's performance requirement(s) or standard(s) at or above the Unacceptable level in the Critical Element(s) at issue.
- B. Appeal** means a request by an employee for an impartial review of the Department's Reduction in Grade or removal action filed with the MSPB or through a grievance procedure in a collective bargaining agreement that permits a grievance challenge to a performance-based action, but not both.
- C. Critical Element** means a component of a position consisting of one or more duties and responsibilities that contributes toward accomplishing organizational goals and objectives and is of such importance that Unacceptable Performance on the element would result in a determination that an employee's overall performance is unacceptable.
- D. Current continuous employment** means a period of employment or service, immediately preceding a performance-based action, in the same or similar position without a break in Federal civilian employment of a workday.
- E. Days** mean "calendar" days, except where otherwise indicated.
- F. Deciding Official** is an official at an organizationally higher level of the Department than the Proposing Official, when that exists.
- G. Department** means the Department of Housing and Urban Development (HUD).
- H. Management Official** means an employee and labor relations specialist, Administrative Officer, supervisor, manager, or HUD attorney whose duties include representation of management in administrative cases.
- I. Merit Systems Protection Board (MSPB)** is an independent Federal agency used by an employee to seek adjudicative review of Reduction in Grade or removal actions taken against the employee by the Department.
- J. OPM** means the U.S. Office of Personnel Management.
- K. Opportunity to Demonstrate Acceptable Performance (ODAP)** means a reasonable opportunity for the employee whose performance has been determined to be Unacceptable in one or more Critical Elements to demonstrate Acceptable Performance in each Critical Element at issue.
- L. Opportunity to Demonstrate Acceptable Performance (ODAP) Notice** provides written notice to the employee of each Critical Element on which performance is determined to have reached the Unacceptable Performance level (Level 1),

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and advises of specific tasks that must be successfully accomplished in order to demonstrate Acceptable Performance in each Critical Element at issue for retention in the position. It also affords the employee an opportunity to demonstrate Acceptable Performance within a specified time period.

- L. Performance** means accomplishment of work assignments or responsibilities.
- M. Performance-based action** means Reduction in Grade or removal based on Unacceptable Performance.
- N. Performance standards** mean the expressed measure of the level of achievement established by management for the duties and responsibilities of a position or group of positions. A performance standard may be expressed in, but is not limited to, measurements such as quality, timeliness, cost-effectiveness, quantity, manner of performance, effects desired, etc., or any combination thereof.
- O. Proposing Official** is any immediate supervisor or manager, or official at a higher organization level within the Department.
- P. Reasonable Accommodation.** Means a specified time period, generally not more than 30 days for the employee to demonstrate Acceptable Performance of the job duties and responsibilities of the Critical Element(s) at issue. This time period is established by management and must be of an appropriate duration to enable the employee to demonstrate such Acceptable Performance.
- Q. Reasonable time period** means a specified time period, generally not more than 30 days, for the employee to demonstrate Acceptable Performance of the job duties and responsibilities of the Critical Element(s) at issue. This time period is established by management and must be of an appropriate duration to enable the employee to demonstrate such Acceptable Performance. Reduction in Grade means the involuntary assignment of an employee to a position at a lower classification or job grading level.
- R. Reduction in Grade** means the involuntary assignment of an employee to a position at a lower classification or grade level.
- S. Removal** means the involuntary separation of an employee from employment with the Department.
- T. Similar positions** mean positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications,

so that the incumbent could be interchanged without significant training or undue interruption to the work.

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- U. **Unacceptable Performance** means performance is determined to be below “Marginally Successful” or equivalent (Level 2) in one or more Critical Elements for an employee’s position.

1-5 Employee Coverage

- A. This Handbook applies to all Department employees, except those persons who are specifically excluded by law, regulation, or elsewhere in this Handbook.

1-6 Employees Excluded

- A. Employees in the competitive service who are serving a probationary or trial period under an initial appointment. A probationary period should be used as the final step in the hiring process of a new employee. Supervisors should use that period to assess how well an employee can perform the duties of a job. A probationary period can be a highly effective tool to evaluate a candidate’s potential to be an asset to an agency before the candidate’s appointment becomes final.
- B. Employees who have not completed one year of current continuous employment in the same or similar positions under other than a temporary appointment limited to one year or less and who are in the competitive service serving in a type of appointment that requires no probationary or trial period (e.g., Status Quo or TEMP APPT-PER (sometimes referred to as “TAPER” appointments), Term, Provisional, Emergency, and Overseas Limited Appointments).
- C. A manager or supervisor who has not completed the one-year probationary period under 5 U.S.C. 3321(a)(2), if such a reduction is based on supervisory or managerial performance and the reduction is to the grade held immediately before becoming a supervisor or manager in accordance with 5 U.S.C. 3321(b).
- D. Employees in the excepted service who have not completed two years of current continuous employment in the same or similar positions.
- E. Employees occupying a position not in the competitive service excluded from coverage by regulations of the OPM.

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- F. Employees occupying a position in Schedule C as authorized under 5 CFR Part 213.
- G. Administrative Law Judges appointed under 5 U.S.C. 3105.
- H. Employees in the Senior Executive Service.
- I. Employees appointed by the President.
- J. Re-employed annuitants.

1-7 General Standards

A performance-based action may not be taken against an employee if the action is based on unlawful discrimination or a personnel practice prohibited by any law, rule, or regulation, including reprisal for engaging in whistle-blowing activity.

1-8 Delegation of Authority

- A. Any supervisor or manager at or above the level of first line supervisor is authorized to issue a notice of proposed performance-based action to an employee whose performance does not meet the Acceptable Performance level in one or more of the Critical Elements at issue.
- B. The decision on a proposed performance-based action must be made by a supervisor or manager who is at an organizationally higher level of the Department, when that exists, than the official who proposed the action. Normally, the Deciding Official should be in the chain of command of the employee subject to the performance-based action.
- C. When the Secretary or Deputy Secretary is the Deciding Official, he/she may designate an appropriate official to serve in his or her stead. However, the designee's position must be either equivalent to, or organizationally higher than the position of the person who proposed the action.

- D. When the Deputy Secretary is both the Proposing and Deciding Official, the written decision must be concurred in by either an organizationally higher-level official, when that exists or the Secretary.
- E. The Secretary may serve as both the Proposing and Deciding Official on a performance-based action.

An alternate Proposing Official or Deciding Official may be assigned in some circumstances.

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1-9 Distribution of Proposal and Decision Notices

- A. The original to the employee;
- B. Employee's attorney or other representative, if any (decision notice only);
- C. The Proposing and Deciding Officials;
- D. Appropriate Branch of the Office of the Chief Human Capital Officer, Employee and Labor Relations Division in the Field when the proposing and/or deciding official is a Field manager; the Office of the Chief Human Capital Officer's Labor and Employee Relations Division in Headquarters when the Proposing and/or Deciding Official is a Headquarters manager in an action taken against a Field employee.
- E. Appropriate Administrative Officer in Headquarters (Decision Notice Only).
- F. Appropriate Regional Counsel or in Headquarters, the Assistant General Counsel for Personnel Law (to alert counsel in the event the action is appealed to the MSPB or reviewed in a negotiated grievance procedure).

1-10 Timing of Actions

- A. Action may be initiated to reduce-in-grade or remove an employee at any time during the performance appraisal cycle when employee's performance in one or more Critical Elements of the job reaches the Unacceptable Performance level. (See paragraph 1-4R for definition of Unacceptable Performance.)
- B. A notice of proposed action may not be issued until the employee has been issued an Opportunity to Demonstrate Acceptable Performance (ODAP) notice in writing and has been given a reasonable time to demonstrate Acceptable Performance. (See paragraph 1-4P for definition of reasonable time.)
- C. A decision to reduce in grade or remove an employee for Unacceptable Performance (Level 1) may be based only on those instances of Unacceptable Performance that occurred during the 1-year period ending on the date of issuance of the advance notice of proposed action.
- D. The decision to retain, reduce-in-grade, or remove an employee shall be made as soon as practicable after the end of the employee reply period following a notice of proposed action. While the decision may be issued prior to the expiration of

the 30-day advance notice period, a removal or reduction in grade may not be effected prior to the expiration of the 30-day advance notice period.”

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Removal decisions not issued within fifteen (15) business days of the employee's reply period must be reported to the Director, Employee and Labor Relations Division, Office of the Chief Human Capital Officer. Extension beyond the 30-day advance notice period is authorized under the limited circumstances that follow:

1. To obtain and/or evaluate medical information when the employee has raised a medical issue in the answer to a proposed Reduction in Grade or removal;
2. To arrange for the employee's travel to make an oral reply to an appropriate Departmental official, or the travel of a Departmental official to hear the employee's oral reply;
3. To consider the employee's answer if an extension to the period for an answer has been granted (e.g., because of the employee's illness or incapacitation);
4. To consider reasonable accommodation of a disability;
5. To consider positions to which the employee might be reassigned and/or reduced-in-grade; and
6. To comply with a stay ordered by a member of the Merit Systems Protection Board.

The Office of the Chief Human Capital Officer Employee and Labor Relations Division staff will coordinate requests for a waiver requested under Section 1-3 for extensions beyond 30 days when the need is for reasons other than those specifically authorized above.

- E. The decision on a notice of proposed action must be delivered to the employee on or before the effective date of the Reduction in Grade or removal. If actions are affected on the delivery date, diligence must be taken to ensure the decision notice

cites the **exact time** of the effected action. This time must be earlier than the end of the employee's tour of duty on that given day. Consequently, the employee's work schedule (e.g., flextime, etc.) is an important factor.

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1-11 Records

- A. The Department shall make as part of its records, copies of the following:
1. The Notice of Proposed Action;
 2. The employee's written reply and/or summary of any oral reply;
 3. Decision Notice;
 4. Any supporting material relied upon by HUD to support the decision (including documentation regarding the opportunity afforded the employee to demonstrate accepted performance); and
 5. The employee's performance elements and standards, including the date of communication.
- B. Departmental records shall be furnished to the MSPB or other third party forum, and to the affected employee or his or her designated attorney or other representative, upon request.
- C. Appropriate servicing Office of the Chief Human Capital Officer, Employee and Labor Relations Division staff in Headquarters and the field are responsible for proper establishment, maintenance, and availability of records relating to performance-based actions covered by this Handbook.
- D. When a performance-based action is affected, and the employee has not appealed the action, records shall be retained for no less than four years after the effective date of the action. If the action is appealed, the applicable record retention scheduled is dictated by the forum in which the action is appealed (e.g. Equal Employment Opportunity Commission).
- E. When a performance-based action is appealed, appropriate Regional Counsel or in Headquarters, the Assistant General Counsel for Personnel Law, will ensure that the appropriate servicing Office of the Chief Human Capital Officer, Labor and Employee Relations Division staff in Headquarters and the field timely receive records related to the action (settlement agreements, decisions, awards, etc.).

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CHAPTER 2. ADDRESSING UNACCEPTABLE PERFORMANCE

2-1 Performance Counseling/Assistance

- A. Performance evaluation should be an ongoing process which includes periodic communication between supervisors and employees. Thus, supervisors are to undertake timely employee counseling as an effective means of addressing performance problems as they arise. Counseling employees about specific performance deficiencies as soon as they arise and offering appropriate assistance can often prevent more serious performance problems.
- B. Supervisors are responsible for assisting employees in achieving and maintaining Acceptable Performance levels. Towards this end, supervisors should communicate with employees regularly about performance expectations, and provide counseling about specific performance problems as they arise. If performance problems continue, supervisors must consult with the servicing employee and labor relations staff as soon as possible to obtain advice and assistance in initiating a performance-based action. This consultation is necessary to ensure technical and procedural consistency of the action.
- D. If the employee indicates, or the supervisor strongly suspects, that an employee's performance deficiencies are the result of, or have been affected by, alcoholism, drug dependency, emotional problems, family pressures, or other problems of a personal nature, the supervisor should refer the employee to the Department's employee assistance program (EAP) for counseling and assistance as appropriate.
- E. Unacceptable Performance requires specific attention to ensure an effective solution of the problem. It is important for supervisors to ensure employees are completing the essential functions required for the work center to be successful. It is strongly discouraged for a supervisor to remove or reassign duties from an employee simply because they believe that employee cannot do them or does not do them well. This practice creates a workload imbalance for the better performing employees. The problem may be corrected by reassigning the employee to a position with different duties, eliminating workload imbalances, additional training, and/or restructuring of the current position. The preceding options are at the discretion of the supervisor and in no way are intended to preclude a supervisor from reducing in grade or removing an employee for Unacceptable Performance. In addition, a supervisor may elect to address Unacceptable Performance

under 5 U.S.C. chapter 75 procedures, consistent with Handbook 752.02 REV-4.

- 2-2 Procedures for Addressing Unacceptable Performance.** If, at any time during the appraisal cycle, an employee's performance reaches the Unacceptable Performance level in one or more Critical Elements, the supervisor must notify the employee of the Critical Element(s) involved. This written notification of Unacceptable Performance constitutes the Opportunity to Demonstrate Acceptable Performance (ODAP) notice. The supervisor should adhere to the following procedures:
- A.** The moment the supervisor determines the employee is below fully successful, the supervisor should check when that employee's next Within Grade Increase (WGI) is due. If appropriate, coordinate with employee and labor relations staff to delay or deny that WGI until the employee demonstrates Fully Successful performance (reference Handbook 430.1, "Performance Management Plan Policy and Procedures," and 5 CFR 531 Subpart D Within Grade Increases).
 - B. Communication.** Prior to, or at the time of, giving an ODAP notice, the supervisor should inform the employee of the performance requirement(s) that must be met and/or standard(s) that must be attained in order to demonstrate Acceptable Performance and be retained in the position.

C. Opportunity to Demonstrate Acceptable Performance (ODAP). Supervisors must give an employee whose performance has reached the Unacceptable Performance level (Level 1) in one or more Critical Elements, a reasonable period of time (generally not more than 30 days) to demonstrate Acceptable Performance on each Critical Element at issue. The time period established must be specified in the ODAP notice and it must be adequate--commensurate with the duties and responsibilities of the position--to allow the employee an appropriate amount of time to demonstrate Acceptable Performance. A time period of more than 30 days will be permitted if a waiver is granted under Section 1-3. The ODAP notice shall include the following information:

1. Each Critical Element on which performance is at an Unacceptable level (Level 1);
2. A statement and description of the specific tasks that must be successfully accomplished in order to demonstrate Acceptable Performance (Level 2 or better) in each Critical Element at issue for retention in the position that the employee must attain in order to demonstrate Acceptable Performance on each Critical Element at issue by the conclusion of the ODAP;
3. A reasonable period of time, commensurate with the duties and responsibilities of the employee's position, to demonstrate an acceptable level (Level 2), or better performance (as noted above, generally not more than 30 days);
4. Offer of assistance to the employee in attaining an acceptable level (Level 2) or better performance; and
5. Referral to the Department's Employee Assistance Program (EAP) for counseling or assistance, as appropriate, if the employee indicates, or the supervisor strongly suspects, that an employee's performance deficiencies are the result of, or have been affected by, alcoholism, drug dependency, emotional problems, family pressures, or other problems of a personal nature

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- D. Assistance.** An employee whose performance has reached the Unacceptable Performance level must be offered assistance to aid him/her in demonstrating Acceptable Performance as part of the opportunity to demonstrate Acceptable Performance. Such assistance may include training (classroom or on-the-job), informal coaching, and/or clarification of performance requirements in any one or combination of counseling sessions or discussions, memoranda, written instructions, or other means which convey the nature and level of performance required of the employee.
- E. Supervisor counseling sessions** or discussions with employees and memoranda should critique the employee's work, cite specific errors or performance problems, and suggest specific ways on "how to" correct the errors and performance problems. Samples of acceptable work may be provided as a model or guide. A record should be made to document any oral discussions held and the results achieved. For example, oral discussions may be memorialized via e-mail or other documentation.

2-3 Completion of the Opportunity to Demonstrate Acceptable Performance

At the earliest practicable date following expiration of the opportunity to demonstrate Acceptable Performance, the HUD manager or supervisor shall obtain advice and assistance from the servicing employee and labor relations staff before making an acceptable level of performance determination and shall complete one of the following steps:

- A.** If a determination is made that the employee failed to demonstrate Acceptable Performance level on any Critical Element at issue during or upon the conclusion of the opportunity period, a written notice of proposal to remove or reduce-in-grade must be issued to employee as soon as practicable.
- B.** Any written notice issued to an employee as a result of improved performance by the end of the opportunity to demonstrate Acceptable Performance, shall also inform the employee that failure to sustain Acceptable Performance on each Critical Element at issue for one year from the date of the notice of opportunity to demonstrate Acceptable Performance could result in a Reduction in Grade or removal action, without another opportunity to demonstrate Acceptable Performance in the Critical Elements at issue.

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- C. If a determination is made that the employee's performance remained at the **Unacceptable Performance** level on any Critical Element at issue by the end of the opportunity to demonstrate Acceptable Performance, a written notice of proposal to remove or reduce-in-grade must be issued to employee as soon as practicable.

2-4 **Extending the Opportunity to Demonstrate Acceptable Performance**

The timeframe for the opportunity to demonstrate Acceptable Performance may be extended if the HUD supervisor or manager is unable to make a determination that the employee's performance has improved to an acceptable level. Examples of situations where a supervisor or manager may be unable to make an acceptable level of performance determination include:

- A. Employee is incapacitated for the performance of their duties by physical or mental illness, or is otherwise granted approved leave, during a significant portion of the period of opportunity to demonstrate Acceptable Performance because the employee cannot be held accountable for work not completed during the period of approved leave; or
- B. Administratively uncontrollable reasons for which the employee cannot be held responsible, such as lack of sufficient work or inadequate supervisory assistance during the opportunity to demonstrate Acceptable Performance.

CHAPTER 3. PROPOSING AND TAKING ACTION BASED ON UNACCEPTABLE PERFORMANCE: REMOVAL OR REDUCTION IN GRADE

3-1 General Provisions

- A. The Department may propose or take a performance-based action against an employee only on those Critical Elements in which the employee is performing unacceptably and on which the employee has had an opportunity to demonstrate Acceptable Performance.
- B. Instances of Unacceptable Performance prior to an ODAP may not be relied upon solely as the basis for proposing a reduction in grade or removal action. These instances of Unacceptable Performance serve as the basis for initiating the employee's ODAP.
- C. Instances of Unacceptable Performance which occur during an ODAP may be used as a basis for a Performance-Based Action including a Reduction in Grade or a Removal.
- D. Instances of Unacceptable Performance which occur **following** the opportunity to demonstrate Acceptable Performance may be used solely or partially to propose an action if:
 - 1. employee's performance following the opportunity to demonstrate Acceptable Performance is Unacceptable in one or more of the Critical Elements which formed the basis of the opportunity to demonstrate Acceptable Performance (and the employee's performance standards for the Critical Elements at issue have not been revised substantially); and
 - 2. Unacceptable Performance occurred within one year from the beginning of the opportunity period.

- E. Performance-based actions must be based on Critical Elements of an employee's position of record. An employee shall continue to hold his/her position of record while on detail to a different position or work assignment. When an employee is detailed to a different position within the Department that is expected to last 120

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days or longer, the employee must be provided with written Critical Elements and standards and rated at the end of the detail. An employee's performance appraisal from the detail must be considered in deriving employee's next rating of record.

- F. Any determination made to propose an action is based primarily on Unacceptable Performance in the employee's position of record. Therefore, the employee must have been afforded an opportunity to demonstrate Acceptable Performance in his/her position of record.
- G. There is no legal, regulatory, or HUD requirement for a supervisor to consider an employee's improved performance during the 30-day notice period. The only requirement is to consider the employee's performance during the ODAP.

3-2 Requirements

- A. Before proposing or taking a performance-based action, supervisors must obtain advice and assistance from the servicing employee and labor relations staff. This consultation is required to ensure technical and procedural consistency of the action with statutory, regulatory, and HUD-specific requirements. It includes the employee and labor relations staff's advice on the appropriateness of the performance-based action, adequacy of the evidence, and guidance in drafting the proposal and decision notices.
- B. The employee and labor relations specialist and the Proposing Official must consult with Assistant General Counsel for Ethics, Appeals and Personnel Law in HQ regarding the legal sufficiency of the proposal to take the actions described below. When the action will be proposed by a Field manager, consultation with the Assistant General Counsel for Personnel Law in Headquarters must be done through the Regional Counsel. All Notices and Decisions related to Performance-Based Actions will be reviewed by OGC.
 - 1. A proposal notice to reduce-in-grade or remove a Headquarters or Field employee at the GS-14 level or higher, or a HUD attorney.
 - 2. A proposal notice to reduce-in-grade or remove a Headquarters employee at the GS-13 level or below when the facts or issues are controversial or precedent-setting.

C. The employee and labor relations staff and the Deciding Official must consult with the Assistant General Counsel for Personnel Law or the Regional Council about the legal sufficiency of a decision to reduce-in-grade or remove a Field employee at the GS-13 level or below (except a HUD attorney) when the facts or issues are controversial or precedent-setting.

D. Paragraphs 3-2B and 3-2C above do not preclude the employee and labor relations specialist and/or proposing official from consulting with appropriate individuals in the Office of General Counsel on any case.

3-3 Notice Requirements. When a Reduction in Grade or removal for Unacceptable Performance is proposed, the advance notice of proposed Reduction in Grade or removal must contain the following information:

- A. the action proposed;
- B. Specific instances of Unacceptable Performance on which the proposed action is based;
- C. The Critical Elements involved in each instance of Unacceptable Performance;
- D. Employee's right to be represented by an attorney or other representative;
- E. Employee's right to answer both orally and in writing and the time allowed for the answer, which is seven 7 calendar days; and
- F. Any additional information required by government-wide regulations or applicable collective bargaining agreement.

3-4 Notice of Proposal. At the earliest practical date following a determination that the employee's performance remained at the Unacceptable level on **any** Critical Element which formed the basis for the opportunity to demonstrate Acceptable Performance, the proposing official shall issue a 30-day advance notice which shall include the following information:

- A. Whether the specific performance-based action that is being proposed is a Reduction in Grade or removal. If the action is to be a Reduction in Grade, the proposed grade and pay rate must be stated. An employee who is involuntarily reduced-in-grade shall normally be placed at the same step of the grade from which he or she is demoted (e.g., from GS-13/3 to GS-12/3);
- B. A statement that the action is proposed to be effective not less than 30 calendar days following the date the employee receives the notice;
- C. The specific instances of Unacceptable Performance on which the proposed action is based;

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- D. The Critical Element(s) involved in each instance of Unacceptable Performance;
- E. Where material relied on to support the reasons for the proposed action is located and available for review;
- F. A statement identifying the name, title, and location of the Deciding Official;
- G. A statement that the employee is entitled to answer both orally and in writing, and that any reply submitted to the Deciding Official in a timely fashion will be considered in reaching a final decision on the proposal notice. (The right to answer orally does not include the right to a formal hearing and the appearance of witnesses will not be permitted.);
- H. The employee has seven 7 calendar days to answer the Notice;
1. If the employee wishes additional time in which to answer, he/she must submit a request in writing to the Deciding Official (or designee) before the expiration of the answer period. The request must include the amount of time needed and state a good reason for needing the extension.
 2. The Deciding Official shall respond to the employee, in writing, either granting or denying the time extension request.
- I. The name of the person who will hear any oral response or receive any written reply, if different from the Deciding Official.
- J. A reasonable amount of regular duty time, up to 16 hours, within the authorized reply period for preparing the oral and written responses. The amount of regular duty time authorized for this purpose covers both the employee's oral and written replies;
1. The use of regular duty time for this purpose must be requested and approved in advance by the employee's supervisor,
 2. Requests for additional regular duty time beyond 16 hours to prepare the oral or written reply must be submitted, in writing, to the Deciding Official to be considered for approval. Such request must provide a good reason to justify the need for additional time.
- K. Notification that the employee may be represented by an attorney or other representative. The employee must designate the representative, in writing, to the Deciding Official prior to any oral or written reply. If employed by the

Department, the representative is also entitled to regular duty time but only during the oral reply;

- L. A statement whether the employee will or will not remain in a duty status during the advance notice period. Under ordinary circumstances, the employee shall remain in a duty status in his/her regular position. In circumstances when the continued presence of the employee in the workplace may pose a threat to the employee or others, result in the destruction of evidence relevant to an investigation, result in loss of or damage to Government property (such as electronic or hard copy files, work products or systems, emails or other HUD property), or otherwise jeopardize legitimate Government interests, the employee may be placed on administrative leave or notice leave during the advance notice period. Before using this type of leave, supervisors must consider options to avoid or minimize the use of paid leave, such as changing the employee's duties or work location. The Chief Human Capital Officer, Office of the Chief Human Capital Officer, Office of Administration, must approve requests by program offices to place an employee on administrative leave to cover the period before the decision is issued, when the administrative leave is expected to exceed 3 days. Such requests must be made in writing to the Chief Human Capital Officer, Office of the Chief Human Capital Officer, Office of Administration, and they must contain sufficient justification to support the need.
- M. A statement informing the employee where this Handbook, pertinent statutes, and U.S. Office of Personnel Management (OPM) regulations are available for review.

3-5 Representation

- A. The Department may disallow, as an employee's representative, an individual whose activities as a representative would cause a conflict of interest or position; an employee who cannot be released from his or her official duties because of a priority work assignment; or an employee whose release would give rise to unreasonable costs to the Government.
- B. An employee and labor relations specialist, Administrative Officer, supervisor, manager, or HUD attorney whose duties include representation of management in administrative cases is considered to be a part of management. As such, they may be called upon to testify for management in an MSPB hearing or other administrative proceeding. Therefore, they may not accept a request to represent, or assist in representing, an employee in connection with a performance-based action.
- C. A HUD management official may not use a union official to represent him/her in any action taken under the provisions of this Handbook under no circumstances.

3-6 Employee's Reply

- A. The Deciding Official who hears the oral reply is reminded that the employee or his/her designated representative has the right to say whatever he/she wishes to influence the decision on the proposed action.
- B. If the employee makes an oral reply, the Deciding Official shall prepare a written summary or arrange for a verbatim transcript of the meeting. If a court reporter is used, the cost will be incurred by the HUD program office. The summary or transcript shall become part of the Department's record.
- C. The employee's oral and written replies, if made, shall both become a part of the Department's record.

3-7 Notice of Decision. The Deciding Official shall issue a decision notice as soon as practicable after the end of the employee's reply period or following expiration of the period within which the employee was given the opportunity to respond; but no sooner than thirty (30) days after advance notice was provided. The decision notice shall include the following information:

- A. The performance-based action being taken and specific instances of Unacceptable Performance on which the action is based:
 - 1. Instances of Unacceptable Performance are stated with specificity in the proposal notice, it is only necessary to reference them in the decision notice. A direct reference to the instances of Unacceptable Performance found sustained will be sufficient;
 - 2. Where one or more of the instances cited in the proposal notice are not accepted by the Deciding Official, the decision notice should specify which instances of Unacceptable Performance are being relied on and which are not; and

3. Any instances cited in the final notice must have occurred during the one-year period ending on the date of issuance of the advance notice of proposed action.

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- B. A statement that the Deciding Official considered the issues raised by the employee in the oral and/or written reply, if made:

Communication between the proposing and deciding officials is allowed. In the interest of due process, however, the employee must be afforded a fair opportunity to respond to any new arguments or evidence shared among the officials and considered in reaching a decision;

- C. A statement of whether the action decided is the same as that proposed, or different;
- D. The effective date of the decided action, which must not be less than thirty (30) days following the date the employee received the advance notice of proposed performance-based action. If a Saturday, Sunday, or holiday is the last day of the notice period, the notice period is automatically extended to the next workday;
1. The decision notice must be issued to the employee at or before the time the action will be made effective.
 2. A decision will be made as soon as practicable following the employee's reply or expiration of the employee's reply period.
- E. A statement that the employee may appeal the decision to the MSPB. Employees covered by a collective bargaining agreement that permits a grievance challenge to a performance-based action, may elect to appeal to the MSPB, or the Union may invoke arbitration, but not both. The address of the appropriate MSPB Regional Office must also be provided;
- F. A statement of the time limit for appealing to the MSPB which is not later than 30 calendar days after the effective date of the performance-based action;
- G. Notice of the employee's right to raise allegations that the action is motivated by or the result of illegal discrimination or another prohibited personnel practice by one of the following: (1) raise the claim as an affirmative defense in an MSPB appeal action; (2) file an equal employment opportunity (EEO) discrimination complaint 3) file a complaint with the Office of Special Counsel (OSC); or (4) file a discrimination grievance under a negotiated grievance procedure, if applicable;

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- H. A copy, or access to a copy, of the MSPB regulations;
 - I. A copy, or access to a copy, of MSPB's appeal form;
 - J. Information on applying for disability retirement when he or she is being removed from the Federal service, if the employee has the requisite years of service and he or she alleges a medical condition as the cause of his or her performance problems; and
 - K. Information on the employee's potential eligibility for discontinued service retirement, if applicable; when the employee has 25 years of more creditable service or when the employee has 20 years or more of creditable service and is age 50 or more, and the decision to be affected is removal from the Federal service.

3 - 8 **Administrative Guidance**

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CHAPTER 4. MEDICAL DETERMINATIONS/REASONABLE ACCOMMODATION

4-1 Americans with Disabilities Act

- A. The Americans with Disabilities Act (ADA) which was enacted July 26, 1990, specifically Title V, Section 512, amends the Rehabilitation Act of 1973 to exclude persons who currently illegally engage in the use of drugs from the definition of an individual with a handicap. With respect to claims of discrimination, this means that the Department has no legal obligation under the Rehabilitation Act to provide reasonable accommodation to individuals whose performance problems are caused by current illegal drug usage.
- B. For purposes of Title V of the ADA, the term "individual with handicaps" does not include an individual who is currently engaging in the illegal use of drugs when an employer takes action on the basis of such use.

- C. The Rehabilitation Act, as amended in 1992 by Section 104(c) of the ADA, provides that:
- D. A covered entity (1) may prohibit ... the use of alcohol at the workplace by all employees; (2) may require that employees shall not be under the influence of alcohol ... at the workplace; ... (4) may hold an employee who ... is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees even when unsatisfactory performance or behavior is related to the ... alcoholism of such employees ...

4-2 Medical Considerations

- A. An employee may submit a request for reasonable accommodation at any time in accordance with Handbook 7855.1, "Procedures for Providing Reasonable Accommodation for Individuals with Disabilities." Medical documentation may be helpful in determining whether a particular accommodation is feasible and reasonable under the circumstances. When an employee does not give notice of the need for accommodation until after a performance problem has occurred, reasonable accommodation does not require that the Department:

- tolerate or excuse the poor performance;
- withhold disciplinary action (including removal) warranted by the poor performance;
- raise a performance rating; or
- give an evaluation that does not reflect the employee's actual performance.

Example: An employee is put on a 30-day Opportunity to Demonstrate Acceptable Performance (OPAP). In response, the employee requests a reasonable accommodation. The supervisor postpones the start of the ODAP and immediately discusses the request with the employee, enlisting the agency's Reasonable Accommodation Branch (Reasonableaccommodationbranch@hud.gov). The supervisor and Reasonable Accommodation Branch determine that a reasonable accommodation might help address the employee's performance problems. The supervisor arranges for the reasonable accommodation and the 30-day ODAP commences.

The employer did not have to cancel the ODAP because reasonable accommodation never requires excusing poor performance or its consequences. However, the fact that the employee did not ask for an accommodation until being placed on an ODAP does not relieve the agency of its obligation to

provide reasonable accommodation if the employee has a disability and an accommodation will help improve her performance.

The temporary postponement of the ODAP to process the request for a reasonable accommodation ensures that, if a reasonable accommodation is needed, the employee will have an equal opportunity to improve her performance. If the employer determines that the employee is not entitled to a reasonable accommodation (e.g., the employee does not have a “disability”), the employee should be so informed and the ODAP should begin. If the reasonable accommodation was granted, the ODAP may begin as soon as the reasonable accommodation is in place.]

Requests for reasonable accommodation should be handled expeditiously, in particular because unnecessary delays in determining or providing an effective accommodation may violate the ADA. In this example the supervisor recognized the need to address the request promptly so as not to unnecessarily delay the commencement of the ODAP.¹

- B. Consideration of medical conditions. The Department 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 (as defined in 5 CFR § 339.102) of the condition for the agency’s consideration. Whenever possible, the employee shall supply this documentation following the notification of Unacceptable Performance described in Section 2-2(B), “Communication,” of this handbook. If the employee offers such documentation after the Department has proposed a Reduction in Grade or removal, he or she shall supply this information in accordance with 5 CFR § 432.105(a)(4)(ii). In considering documentation submitted in connection with the employee’s claim of a medical condition, the Department 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. If the employee who raises a medical condition has the requisite years of service under

the Civil Service Retirement System or the Federal Employees Retirement System, the Department shall provide information concerning application for disability retirement. As provided at 5 CFR § 831.501(d), an employee’s

¹ Question 6 in the EEOC Fact Sheet, “EEOC Fact Sheet, “The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities,” <https://www.eeoc.gov/facts/performance-conduct.html>

application for disability retirement shall not preclude or delay any other appropriate decision or personnel action by the Department.

C. A fitness for duty examination is appropriate only when an employee is in a position that requires a medical qualification. When an employee holds such a position, the employee may be ordered to take, if appropriate, a medical examination in connection with his or her claim of a medical condition which impacts upon performance. For all employees, consideration must be given to the affirmative obligations of 29 CFR Part 1613.704 (Reasonable Accommodation) when an employee asserts that his/her medical condition contributed to the performance problems at issue. Reasonable accommodations are always prospective and will not excuse past instances of Unacceptable Performance. Employees requiring an accommodation are encouraged to request one at the earliest time.

D. When the employee requests an accommodation which would require additional time to demonstrate Acceptable Performance following treatment and/or rehabilitation for his or her medical condition, consideration should be given to putting an Opportunity to Demonstrate Acceptable Performance (ODAP) in abeyance until the accommodation has been provided. When an accommodation is not requested until after the opportunity period described in the ODAP has ended, there is no requirement for management to delay proposal or decision of a performance-based action.

E. If an employee alleging a medical condition has the requisite years of service under the Civil Service Retirement System or the Federal Employees Retirement System, he or she shall be provided information concerning application for disability retirement. This process should not preclude or delay any decision on the performance-based action.

F. Employee Assistance Program

Supervisors must offer an opportunity for counseling and assistance through the Department's Employee Assistance Program to employees whose performance problems are suspected to be causally related to a documented medical condition, alcoholism, or drug addiction.

4-3 Alcoholism and Drug Abuse

- A. When proposing a performance-based action that may be attributable to alcoholism or drug abuse, refer to the Department's Drug-Free Workplace policy and to HUD's Employee Assistance Program policy
- B. If a supervisor or manager knows, or has reasonable grounds to believe, that the employee's performance might be attributed to alcoholism or drug addiction, the employee must be made aware in general terms: (1) that the supervisor or manager suspects he/she has a problem that is affecting his or her performance; (2) that counseling is available through the Department's Employee Assistance Program; and (3) that the supervisor or manager recommends that the employee participate in a rehabilitation and/or counseling program. The supervisor or manager must allow the employee to take leave to participate in such a program, if necessary to meet any reasonable accommodation requirements under the ADA.

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