

ARTICLE 13
UNACCEPTABLE PERFORMANCE ACTIONS

Section 13.01 - General.

- (1) **Applicability.** If, after being given the opportunity to demonstrate acceptable performance and assistance to improve, the employee's performance is determined to be unacceptable on one (1) or more critical elements, the Department must initiate reduction in grade or removal, subject to the provisions of 5 CFR 432, and 5 U.S.C. 4303 and 4305. The Department may consider reassignment in lieu of initiating action under 5 CFR 432, and 5 U.S.C. 4303 and 4305.

This Article does not apply to those exclusions of 5 CFR 432.102(b), which are partially stated below:

- (a) Actions based in whole or in part on misconduct;
 - (b) A reduction in the grade of a supervisor or manager who has not completed a probationary period;
 - (c) A reduction in grade or removal of an employee who is serving a probationary period or trial period under an initial appointment; or
 - (d) Discharge of employees serving on temporary appointments.
- (2) **Applicable Grievance Procedure.** The grievance procedure for employees who have been reduced in grade or removed for unacceptable performance under Chapter 43 is set forth in this Article and is in lieu of the procedures identified in Article 51 (Grievance Procedure).
- (3) **Definitions.** The definitions set forth in the regulations at 5 CFR 430.203 and 432.103 apply to this Article:
- (a) **Critical Element.** A work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that employee's overall performance is unacceptable.
 - (b) **Opportunity to Improve Performance (OIP).** A reasonable opportunity, including sufficient time, for an employee whose performance has been determined to be Unacceptable in one or more critical elements to demonstrate acceptable performance in the critical element(s) at issue.
 - (c) **Performance Improvement Plan (PIP).** A reasonable opportunity, including sufficient time, for an employee whose performance has been determined to be marginal in one or more critical elements to demonstrate Fully Successful performance in the critical element(s) at issue.
 - (d) **Performance Standards.** 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.

- (e) **Acceptable Performance.** Performance that meets an employee's performance requirement(s) or standard(s) at a level of performance above Unacceptable in the critical element(s) at issue.
- (f) **Reduction in Grade.** The involuntary assignment of an employee to a position at a lower classification or grade level.
- (g) **Removal.** The involuntary separation of an employee from employment with an agency except when taken as a reduction-in-force action.
- (h) **Unacceptable Performance.** Performance of an employee which fails to meet established minimum performance standards in one (1) or more critical elements of such employee's position.
- (i) **Marginal Performance.** Whenever performance is determined to be below "Fully Successful" or equivalent but above "Unacceptable".

Section 13.02 - Procedures. The Department must determine that the performance standards and elements are valid before issuing a notice of unacceptable performance.

- (1) **Prior to Determining Acceptable Performance.** The Department and the employee have the responsibility in maintaining or improving performance in the employee's current position through on-going performance communication. This is encouraged throughout the performance cycle prior to a PIP/OIP being issued. Serious declines in performance should be addressed at the earliest detection.
- (2) **Failure to Meet Minimum Performance Standards.** If at any time during the performance appraisal cycle an employee fails to meet the minimum performance standards, the Department shall identify in writing for the employee the critical element(s) for which performance is unacceptable and specific work examples illustrating the performance which is deficient. The employee shall be provided a reasonable time and opportunity to demonstrate acceptable performance. The Department shall assist the employee to the maximum extent feasible to improve the performance to the required level. Standards used in determining the employee to be unacceptable will be the same standards used the opportunity for improvement. Unacceptable performance prior to the rating period will not be considered in the current rating period.
- (3) **Proposed Notice of an Unacceptable Performance Action.** Normally, the notice of proposed action must be consistent with the most recent performance rating or progress review. An employee for whom reduction in grade or removal for unacceptable performance is proposed is entitled to: Advance, written, thirty (30) day notice which identifies the specific instances of unsatisfactory performance within the last twelve (12) months and the critical element or elements of the employee's position involved in each instance. The Department shall provide to the employee one (1) copy of the documentation relied upon to support the proposed action.

Only instances of unacceptable performance which occurred during the one (1) year period ending on the date of the proposed notice may be used as the basis for an action.

- (4) **Response.** The employee has the right to reply to the proposal orally and/or in writing within twenty-one (21) days. An extension to prepare a response may be provided to the employee in accordance with the terms of this Agreement.
- (5) The **PIP/OIP** process may be extended where the reasonable accommodation process has been initiated.
- (6) **Decision.** The deciding official shall issue a final written decision, including a statement of the employee's appeal rights, within thirty-five (35) days of the receipt of the employee's response, or after the expiration of time limits for the employee to respond if the employee fails to respond.

If the Department determines that further investigation is necessary, the time limit for issuance of the decision shall be extended. The employee shall be notified of such an extension and shall continue to be notified at thirty (30) day intervals thereafter.

Any improvement in the employee's performance during the notice period shall be considered when the final decision is made.

- (7) **Representation.** The employee has the right to be represented by an attorney or other representative, which includes the right to Union representation.
- (8) **Appeals.**
 - (a) **Merit Systems Protection Board (MSPB).** Within thirty (30) calendar days of the effective date of the action, the employee may appeal the matter to MSPB.
 - (b) **Arbitration.** If the employee elects not to appeal the matter to the Merit Systems Protection Board, then the Union may invoke arbitration within the timelines stated in this Agreement.
 - (c) **Equal Employment Opportunity (EEO).** If an employee believes the unacceptable performance action is based in whole or in part on prohibited discrimination (race, age, sex, national origin, etc.), they may file an EEO complaint in accordance with the statutory and regulatory appeals process.

Section 13.03 - Performance Improvement Plan (PIP)/Opportunity to Improve Performance (OIP) Notice. The purpose of the performance improvement period is to help the employee improve.

- (1) If there are mitigating circumstances concerning a performance deficiency, the supervisor may consider alternative means of addressing the deficiency.
- (2) The PIP/OIP notice shall include the following information:

- (a) Each standard and element on which performance is less than Fully Successful.
 - (b) Specific examples illustrating the less than Fully Successful performance.
 - (c) A specific description of the requirements that the employee must attain in order to demonstrate acceptable performance on each critical element at issue by the conclusion of the PIP/OIP.
- (3) After the notice is given to the employee, they shall be provided a reasonable time, normally not less than 30 days (depending on the complexity of the critical element or other relevant factors); the employee has the opportunity to demonstrate acceptable performance. The time period established must be specified in the PIP/OIP 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. The performance improvement period may be extended.
- (4) The supervisor shall assist the employee to the maximum extent feasible which may include training, meetings, or counseling to improve the performance to an acceptable level. Performance requirements presented at a meeting may be provided in writing.
- (5) Training may be an integral component of the supervisor's responsibility to improving employee's performance. If there are multiple employees in the same or similar position that resulted in minimal performance, a determination needs to be made if there was a training deficiency.
- (6) The employee shall be given an opportunity to provide suggestions for assistance in the PIP/OIP throughout its process. The supervisor will consider the employee's suggestions.
- (7) Notify the employee that unless their performance in the unacceptable critical element(s) reaches the acceptable performance level and is sustained at an acceptable level, the employee may be reduced in grade or removal.

Section 13.04 - Union Notification. When the Department issues a notice of proposal and/or a decision to reduce in grade or remove an employee in the unit for unacceptable performance, the Department shall provide to the Union a general statement of the unacceptable performance, proposed action, and subsequent decision.

Section 13.05 - Standard of Evidence. The standard of evidence required for unacceptable performance action is "substantial evidence."

Section 13.06 - Evidence. The Department shall timely produce all evidence, including the names of witnesses that were relied upon to support the proposed action, to facilitate preparation of the oral and/or written response. Nothing will waive the employee's or Union's right to request additional information under other authorities.