
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 opportunity to demonstrate acceptable performance may not be relied upon solely as the basis for proposing a reduction in grade or removal action. These instances of performance serve primarily as the basis for initiating the employee's opportunity to improve. They may be relied upon, however, to support the overall performance determination, as long as the instances occurred within one year prior to the notice of proposed action.
- C. Instances of unacceptable performance which occur **during** an opportunity to demonstrate acceptable performance may be used solely or partially to support a proposal notice, as long as the instances of unacceptable performance occurred within one year prior to the notice of proposed action.
- 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 improve is unacceptable in one or more of the critical elements which formed the basis of the opportunity to improve (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

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 advance notice period.

3-2 Requirements

- A. Before proposing or taking a performance-based action, supervisors must obtain advice and assistance from the servicing human resources staff. This consultation is required to ensure technical and procedural consistency of the action with OPM and HUD requirements. It includes the human resources 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 human resources staff and the Proposing Official must consult with the Associate General Counsel for Human Resources Law in Headquarters regarding the legal sufficiency of proposal notice. When the action will be proposed by a Field manager, consultation with the Associate General Counsel for Human Resources Law in Headquarters must be done through the Field Assistant General Counsel. Such actions are described below:
 - 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 human resources staff and the Deciding Official must consult with the Associate General Counsel for Human Resources Law or the Field Assistant General Counsel in the Office of General Counsel 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 human resources specialist and/or proposing official from consulting with appropriate individuals in the Office of General Counsel on any case.

3-3 Employee Entitlement. 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 15 days; and
- F. Any additional information required by government 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 improve, 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 15 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 official time, up to 16 hours, within the authorized reply period for preparing the oral and written responses. The amount of official time authorized for this purpose covers both the employee's oral and written replies;
1. The use of official time must be requested and approved in advance by the employee's supervisor,
 2. Requests for additional official 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
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Department, the representative is also entitled to official 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;
- M. A statement informing the employee where this Handbook, pertinent statutes, and 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. A human resources 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 may designate an individual to hear the employee's oral reply. The designee may not be the official who issued the Notice of Proposed Action. In addition, the designee must not be subordinate to the official who proposed the action. The designee must, however, be in a position to effectively recommend or actually decide on the proposed action.
- B. The Deciding Official or designee 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.

- C. If the employee makes an oral reply, the Deciding Official, or his/her designee, 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.

- D. The employee's oral and written replies, if made, shall both become a part of the Department's record.

3-7 Employee Entitlements. When a reduction-in-grade or removal for unacceptable performance is decided, the decision notice must provide the following information:

- A. A notice of time limits for appealing to MSPB, including the Board's requirements on timeliness and the address of the appropriate Board office for the appeal.
- B. A copy, or access to a copy of the MSPB regulations;
- C. A copy of MSPB's appeal form; and
- D. A notice of any rights the employee has to file a grievance and/or appeal.

3-8 Notice of Decision. The Deciding Official shall issue a decision notice within 30 days after the end of the advance notice period, or following expiration of the period within which the employee was given the opportunity to respond. 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. If charges and 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 charges and instances of unacceptable performance found sustained will be sufficient;
 - 2. The decision notice should specify which instances of unacceptable performance are being relied on and which are not where all of the instances cited in the proposal notice are not accepted by the Deciding Official; and

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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.
- 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 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 within 30 days following expiration of the 30-day advance notice period.
 3. The time limit for issuance may be extended for a limited amount of time under certain circumstances. (Refer to paragraph 1-11D.);
- E. A statement that the employee may appeal the decision to the MSPB. Employees covered by a collective bargaining agreement, 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. If the employee has raised discrimination as an issue in his or her reply, the employee should be advised of the right to 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; or (3) file a discrimination grievance under a negotiated grievance procedure, if applicable.

- H. A copy of the MSPB regulations;
- I. 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. Specification of the employee's potential eligibility for discontinued service retirement when the employee has 25 years of more creditable civilian service, and the decision to be effected is removal from the Federal service.

3-9 Administrative Guidance

- 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. 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.
- C. Unacceptable performance requires specific attention to ensure an effective solution of the problem. While substandard performance must be corrected, the corrective action normally does not include the application of discipline unless it is believed that a disciplinary action can motivate a change in behavior which can remedy the cause of the performance problem. 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.

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- D. There is no HUD requirement for a supervisor to consider an employee's performance following the opportunity to improve period as long as the instances occurred within one year prior to the notice of proposed action. Where numerical standards are prorated during the opportunity to improve period, the proposal notice must meet the annual numerical standard in the year preceding the proposal notice. In these cases, it may be necessary to cite instances of unacceptable performance which occurred outside of the opportunity to improve period in order to demonstrate sufficiently the employee's failure to perform acceptably.