REFERENCE GUIDE

PERFORMANCE-BASED ACTIONS UNDER CHAPTER 75

Purpose

The purpose of this guide is to address performance related adverse actions for employees under the National Security Personnel System, to review the significant procedural requirements that distinguish Chapter 43 and Chapter 75 (Title 5) performance-based actions, and to highlight Merit System Protection Board cases on this topic. It is not intended to be an exhaustive review of all applicable case law or as a replacement for case law research.

Discussion

Under the National Security Personnel System (NSPS), Subpart D, Performance Management, §9901.403 Waivers, all provisions of 5 U.S.C. Chapter 43 have been waived. Agencies must therefore ensure compliance with the requirements of 5 U.S.C. Chapter 75 when initiating performance-based actions against NSPS employees.

Taking an NSPS performance-based action under Chapter 75 is no different than taking a Chapter 75 performance-based action under the General Schedule (GS). Indeed, prior to the Civil Service Reform Act (CSRA) amendments to Chapter 43, Chapter 75 provided the only framework for taking disciplinary actions for performance reasons. Since enactment of the CSRA, agencies have been able to use either Chapter 43 or Chapter 75 when addressing poor performance. In *Lovshin v. Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985), the Court reaffirmed that agencies could continue to take performance-based actions under Chapter 75, despite the enactment of the CSRA. Specifically, the Court stated,

> "Whichever action an agency chooses to pursue, it will have to comply with the procedural requirements of that Chapter. If an agency sees some advantage in pursuing performance-based action under Chapter 75, it is not inconsistent with the Act so long as the agency meets the higher burden of proof—and the more difficult standard of demonstrating that the action will promote 'the efficiency of the service'."

Obviously, as the Court noted, there are significant procedural requirements that distinguish between Chapter 43 and Chapter 75 actions. Since all performance related

adverse actions under NSPS (suspensions, reduction in band or pay, and removal), must be taken under Chapter 75, the following discussion will highlight the differences between Chapter 43 and Chapter 75 performance-based actions and the Merit System Protection Board's (MSPB) findings relative to those differences.

The first distinction is the burden of proof. To sustain an action under Chapter 43, an agency must prove its charge of unacceptable performance by substantial evidence. In other words, the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree (5 CFR § 1201.56(c)(1)).

To support an action under Chapter 75, an agency must prove its charges by a preponderance of the evidence, a higher burden of proof than substantial evidence. Preponderance of the evidence is defined as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue (5 CFR § 1201.56(c)(2)). Additionally, to prevail in a Chapter 75 action, the agency must show that it took the action for such cause as will promote the efficiency of the service, and that the chosen penalty was within the bounds of reasonableness. (See *Rogers v. Department of Transportation, Federal Aviation Administration*, 33 MSPR 690 (1987)).

Another significant distinction has to do with the MSPB's mitigation authority. The MSPB does not have the authority to mitigate penalties in Chapter 43 cases. It must either sustain the action or reverse it. (See *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558 (Fed. Cir. 1985)). On the other hand, the MSPB is empowered to review and mitigate penalties in performance cases brought under Chapter 75. Thus, an agency must be prepared to demonstrate that their chosen penalty is reasonable in light of the Douglas factors.

In *Sokolove v. Department of the Treasury*, 30 MSPR 180 (1986), on remand from the Federal Circuit Court of Appeals, the MSPB found that it is required to consider relevant mitigating factors in performance cases brought under 5 U.S.C. Chapter 75. On remand, the Board concluded, consistent with the findings of the Federal Circuit, that "Under the court's decision, we must consider not only appellant's performance, but other relevant factors listed in *Douglas v. Veterans Administration*, 5 MSPB 313, 332 (1981) [5 MSPR 280 (1981)], in considering the appropriateness of the agency-imposed penalty."

A third major distinction is procedural. When addressing performance deficiencies under Chapter 75, the procedural requirements of Chapter 43 do not apply. Therefore,

performance-based actions taken under Chapter 75 may be based upon ad hoc standards or expectations, as well as established performance standards. Additionally, there is no statutory requirement under Chapter 75 to provide a performance improvement period.

The MSPB has recognized that, unlike performance appraisal systems established pursuant to 5 U.S.C. Chapter 43, the measurement of performance in actions brought under Chapter 75 will frequently be ad hoc in nature. Such standards must, however, be based on criteria which permit an accurate measurement of an employee's job performance. See *Wellman v. Department of Commerce*, 10 MSPR 591 (1982).

In *Shorey v. Department of the Army*, 77 MSPR 239 (1998), the full Board reversed an initial decision mitigating appellant's removal for unsatisfactory performance. In sustaining the agency's removal action, the Board found that the Administrative Judge erred in applying Chapter 43 standards to a Chapter 75 case. The Board reiterated that a specific standard of performance need not be established and identified in advance in a performance action brought under Chapter 75, but an agency must prove that its measurement of the appellant's performance was both accurate and reasonable. Review of the record demonstrated that specific performance requirements had been conveyed to the appellant and that there had been numerous discussions of those requirements, including memoranda of deficient performance, followed by a 90-day performance improvement plan with a 60-day extension. The Board thus found that the agency proved that its measurement of the appellant's performance was both accurate and reasonable.

While the MSPB has found that an employee subject to a performance-based adverse action under Chapter 75 has no statutory right to a performance improvement period, it has also found that an agency's failure to provide such an improvement period is relevant to a consideration of the propriety of the penalty. In *Fairall v. Veterans Administration*, 33 MSPR 33 (1987), the Board stated,

> "The lack of an improvement period is not a mitigating factor *per se* but is relevant to a mitigating factor identified in *Douglas* that addresses the extent to which the employee was on notice that his deficient performance or misconduct might be the basis for an adverse action. Where the employee's position description, performance standards, or other relevant documentation give sufficient notice of the kind of performance that is considered deficient, the fact that an improvement period was not afforded is not, standing alone, a sufficient basis for mitigating the penalty. Conversely, the fact that an improvement period was provided, will generally establish that the employee was on notice that his performance was considered deficient, but is not necessarily dispositive.

> Accordingly, where the issue of notice is considered relevant to an assessment of the penalty at all, the focus of our inquiry will center on whether the employee received actual or constructive notice of performance deficiencies. The absence or presence of an improvement period is evidence that is relevant to this determination."

In *Madison v. Defense Logistics Agency*, 48 MSPR 234 (1991), the Board found that appellant's demotion under Chapter 75 for his unsatisfactory work in one critical element and his failure to carry out his supervisory duties was a reasonable penalty. Despite appellant's contention to the contrary, the Board found that he had been informed of his unsatisfactory performance and that he had no statutory entitlement to a performance improvement period since the action had been taken under the procedures of Chapter 75. Additionally, the Board found that the lack of a formal improvement period was not, standing alone, a sufficient basis for mitigating the penalty because the appellant's performance standards, a letter of warning, and other relevant documents of record provided sufficient notice of the kind of performance that was considered deficient, and because the agency provided him a 3-month extension of his rating period in order to afford him an opportunity to show improvement.

Conclusion

As previously stated, agencies have been taking performance-based adverse actions under Chapter 75 since before the enactment of the CSRA. The procedural requirements for taking such actions remain the same, irrespective of the personnel system involved – whether it is an alternative personnel system such as the NSPS or the GS. An agency must be able to prove its charge of unsatisfactory performance by a preponderance of the evidence, show that it took the action for such cause as will promote the efficiency of the service, and that the chosen penalty is within the bounds of reasonableness. Additionally, the agency must prove that its measurement of the employee's performance was both accurate and reasonable and that the employee was on clear notice of the performance deficiency.

References

5 U.S.C. Chapter 43 – Performance Appraisal
5 U.S.C. Chapter 75 – Adverse Actions
5 C.F.R. §9901.403 – Waivers
Merit Systems Protection Board Case Decisions
Federal Court Case Decisions