



REFERENCE GUIDE

PERFORMANCE APPRAISALS FOR EMPLOYEES ON 100% OFFICIAL TIME

Purpose

The purpose of this guide is: (1) to summarize the statutory and regulatory provisions and applicable case law related to performance appraisals of employees who spend all or a significant amount of time as union representatives; and (2) to summarize reduction in force regulations as they relate to such union officials (and other employees) lacking an appropriate number of actual ratings of record. Under governing statute and regulations, employees who spend 100% of their time as union representatives cannot be rated for purposes of performance appraisal ratings of record. Those employees who spend a significant amount of time as union representatives must have their appraisal period extended until such time they have performed enough work as an employee to be rated.

Background

Performance Management

1. 5 USC 4302 requires that "each agency shall develop one or more performance appraisal systems which – (1) provide for periodic appraisals of job performance of employees."
2. 5 CFR 430.203 defines performance to mean "accomplishment of work assignments or responsibilities."
3. In *Hawaii Federal Employees Metal Trade Council vs. U.S. Department of Navy, Pearl Harbor Naval Shipyard 34 FLRA No. 145*, the union proposed that "employees who, for one reason or another, are unable to be rated, such as full-time union officials, will receive a rating that reflects the average rating of all Shipyard personnel with the same JP/PD and normally will not receive a rating less than 'Fully Successful'." The Authority found the proposal to be contrary to government-wide regulation. Specifically, the proposal conflicted with 5 CFR Part 430. This regulation requires that employees who have not performed work in assigned positions for a sufficient period to permit an evaluation of their performance during the rating period (such as full-time union officials) shall have their appraisal period extended until the employees have worked in a position for the minimum amount of time necessary to be rated.
4. In *National Federation of Federal Employees Local 405 and U.S. Department of Army, Army Information Systems Command 42 FLRA No. 78*, the union proposed



that "any presumptive rating, if required, will be, at least the minimum, equal to the employee's last rating." The Authority found this provision to be contrary to government-wide regulation at 5 CFR Part 430. As in Hawaii Federal Employees Metal Trade Council vs. U.S. Department of Navy, Pearl Harbor Naval Shipyard 34 FLRA No. 145, the Authority found that the regulation required the appraisal period to be extended if the employees have not performed work in assigned positions for a sufficient period to permit an evaluation.

5. In National Association of Government Employees, Federal Union of Scientists and Engineers Local R1-144 and U.S. Department of Navy, Naval Underwater Systems Center 42 FLRA No. 88, the Authority concluded that, based on their reading of 5 USC Chapter 43 and its implementing regulations, job performance may not encompass duties and responsibilities performed on official time on behalf of a labor organization. Instead, the Authority noted that job performance is intended to encompass an employee's performance of agency assigned duties and responsibilities.
6. On August 23, 1995, the Office of Personnel Management (OPM) issued the final revised regulations for 5 CFR Parts 430 et al. OPM noted that it had received comments on this regulation related to employees who serve as representatives of labor organizations in their agencies. OPM pointed out that one suggestion proposed to add a requirement that union officials be granted "presumptive ratings at the 'fully successful' (or equivalent) level." OPM stated:

"Under performance appraisal provisions in part 430, the performance to be planned, monitored, and rated covers the work, duties, and responsibilities that accomplish the agency mission and for which the employee is accountable to the employing organization. When an employee is serving as the representative of a labor organization, he or she is performing duties for that labor organization. To intermingle performance of the representational duties into the appraisal program would be inappropriate because appraisal of the employee's performance must be based solely upon the employee's performance of agency duties. For employees who spend 100 percent of their time as labor representatives, and for employees who spend a significant amount of time as determined by the agency, this means they cannot, and should not, be given performance appraisal ratings of record. In the interest of preserving the distinction between the agency-assigned duties of an official position and union duties and responsibilities, OPM is not adopting this suggestion. The regulations at part 430 continue to preclude a "presumptive" or "assumed" rating of record and such employees are considered "un-ratable." The only place in

regulations where an "assumed" rating is used is in the regulations at § 351.504 for granting additional service credit based on performance in a reduction in force."

7. In Labor-Management Relations Guidance Bulletin, Labor Relations Case Law on Performance Management, December 1995, the Office of Personnel Management addressed ratings for employees on official time as union representatives. Specifically, OPM stated that "OPM's new performance regulations continue to limit ratings of record to the actual performance of agency-assigned work during the rating period and continue to preclude "presumptive" or "assumed" or "carry-over" ratings of record. See 5 CFR 430.208(g)."

8. On October 5, 1998, OPM issued final regulations to codify the longstanding policy (as discussed above) regarding assumed and carry-over ratings of record. These regulations explicitly specify that assumed and carry-over ratings of record are prohibited. Specifically, 5 CFR 430.208(a) has been revised as follows:

"(a)(1) A rating of record shall be based only on the evaluation of actual job performance for the designated appraisal period.

(a)(2) An agency shall not issue a rating of record that assumes a level of performance by an employee without an actual evaluation of that employee's performance."

9. In addition, 5 CFR 430.208(h) has been revised as follows:

"Each rating of record shall cover a specified appraisal period. Agencies shall not carry over a rating of record prepared for a previous appraisal period as the rating of record for a subsequent appraisal period(s) without an actual evaluation of the employee's performance during the subsequent appraisal period."

Reduction-in-Force

As noted by OPM when it revised 5 CFR Part 430, the only place in regulations where an "assumed" rating is used is in 5 CFR 351.504 for granting additional service credit based on performance in a reduction-in-force. Specifically, until the revised 5 CFR Part 351 is implemented, 5 CFR 351.504(c)(1) states that:

"an employee who has not received an annual performance rating of record shall receive credit for performance on the basis of three assumed ratings of fully successful (Level 3) or equivalent." 5 CFR 351.504(c)(2) states that "an employee who has received at least one but fewer than three previous annual performance ratings of record shall receive credit for performance

on the basis of the actual rating(s) received and of one, or two assumed rating(s) of fully successful (Level 3) or equivalent, whichever is needed to credit the employee with three ratings."

1. On October 1, 1998, the revised 5 CFR Part 351 will provide service credit for those employees who do not have three actual ratings of record. Specifically, 5 CFR 351.504(c)(1) states that:

"an employee who has not received any rating of record during the 4-year period shall receive credit for performance based on the modal rating for the summary level pattern that applies to the employee's official position of record at the time of the reduction-in-force." The modal rating is the summary rating assigned most frequently among the actual ratings of record. 5 CFR 351.504(c)(2) states that "an employee who has received at least one but fewer than three previous ratings of record during the 4-year period shall receive credit for performance on the basis of the value of the actual rating(s) of record divided by the number of actual ratings received. If an employee has received only two actual ratings of record during the period, the value of the ratings is added together and divided by two (and rounded in the case of a fraction to the next higher whole number) to determine the amount of additional retention service credit. If an employee has received only one actual rating of record during the period, its value is the amount of additional service credit provided."

If you have any questions concerning this reference guide, please contact the Field Advisory Services, Labor Relations Team, at (703) 696-6301, Team 3. Our DSN is 426-6301.

References:

- Chapter 71 of Title 5, United States Code (U.S.C.), "The Federal Service Labor-Management Relations Statute"
- 5 USC Chapter 43, Performance Management
- 5 CFR Chapter 430, Performance Appraisal
- 5 CFR Part 351, Reduction-in-Force, Federal Labor Relations Authority Decisions
- Federal Court Case Decisions