

# Employee Relations Practitioners Performance Issues Facts

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## Performance Elements & Standards

### Generic standards

The problems associated with generic standards are mostly concerned with whether an employee's expectations are clearly and specifically communicated to him or her. Generic standards can usually be clarified to the point that third parties will consider them valid as a basis for taking action. A generic standard can be clarified via counseling, memoranda, standard of operating procedures, formally revising standards, on-the-job training, or checklists for office processes. Be sure the supervisor can answer these questions:

- Does the employee know what has to be done to keep his or her job?
- Is the requirement possible?
- Does the standard measure the performance being required by the supervisor?
- Are there any general descriptors (usually, rarely, timely, etc.) that need to be explained?

### Backward standards

Backwards standards have been overturned by the Merit System Protection Board and the courts because they describe unacceptable performance rather than tell the employee what level of performance is necessary to keep the job. OPM considers it to be good practice not to use backwards standards. When modifying such a standard, ask yourself the following questions:

- If the employee did nothing, would he or she meet the standard as written?
- If the employee requires assistance more than 50% of the time, would he or she meet the standard?
- If the quality of the employee's work products is bad most of the time, would he or she meet the standard?

If the answer is "Yes" to any of these questions, your standard would be considered backwards by the Merit Systems Protection Board. Stay away from standards that describe a negative level of performance, such as "fails to meet deadlines" or "performs work inaccurately." Instead, describe the amount or quality of work needed in order for the employee to keep the job. Always be sure that the employee will be able to distinguish between acceptable and unacceptable performance.

### **Absolute standards**

An absolute standard provides that a single incident of poor performance will result in an unsatisfactory rating on a job element. Neither the law nor OPM regulations bar absolute performance standards for federal employees. However, performance standards must be reasonable, based on objective criteria, and communicated to the employee in advance. See *Guillebeau v. Navy*, 362 F.3d 1329 (Fed. Cir. 2004). This does not mean an agency may adopt an unreasonable standard or that absolute performance standards are always reasonable. For example, it might be unreasonable for an agency to adopt a standard permitting so few errors in pulling medical records from files that, based upon the number of records the employee is required to pull, the employee must be at least 99.91% accurate.

### **Pass/fail performance appraisal systems**

Under a pass/fail appraisal system an employee cannot be rated at a marginal level. One of the unique features of a pass/fail system is that it does not allow for marginal performance. Basically an employee is either performing at an acceptable level or not. However, this does not mean that a supervisor should ignore deteriorating performance. There are various ways of handling acceptable performance that appears to be deteriorating. For example, a supervisor can include a narrative explanation with a pass rating which also elaborates on the areas that need further improvement. Additional performance elements can also be used to clarify an employee's performance expectations. An additional performance element is a dimension or aspect of individual, team, or organizational performance that is not a critical or non-critical element. These types of elements are most useful as a further means of communication between a supervisor and an employee.

Moving to a pass/fail system is a difficult adjustment for many supervisors because they haven't figured out what to do with performance that is inadequate but not "bad enough" to merit a failing rating. This is partly a communication problem that occurs when new performance programs are put in place. Some supervisors still don't understand that there has been an agency decision to raise the performance expectation level and that what used to be considered marginal performance now equates to failure under the new program. For many others, there is a legitimate concern that although performance is slipping, the employee has not merited a Fail rating. These supervisors need to be encouraged not to ignore deteriorating performance. Supervisors should also be reminded that Pass/Fail performance programs inherently require much more oral communication

with employees throughout the appraisal period so that these problem areas can be addressed, and hopefully corrected, before formal corrective action is necessary.

### **Performance elements involving team goals**

Federal regulations require that each employee have at least one critical element that is based on individual performance. Therefore, in a team environment, an employee cannot be rated exclusively on their team performance. However, critical elements can be used to measure an employee's contribution to a team. Be sure to keep in mind other alternatives that can be used to emphasize the importance of team involvement. One option includes establishing additional elements for use as the basis for team awards. Another option includes giving increased weight to non-critical elements that address team performance.

### **Identifying differences between elements, standards, and activities**

Although there are distinct differences between elements, standards, and activities, they are all related. An element describes what an employee is expected to do, such as a work assignment or responsibility. A standard describes how well an element is to be performed. It basically allows a supervisor to rate an employee's performance at various levels. Finally, an activity is compilation of tasks that must be completed in order to perform an element. The technical definitions for these terms are as follows:

#### ***Performance Standard***

- 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.

#### ***Element***

- ***Critical*** - a work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable.
- ***Non-critical*** - a dimension or aspect of individual, team, or organization performance, exclusive of a critical element, that is used in assigning a summary level. Such elements may include, but are not limited to objectives, goals, program plans, work plans, and other means of expressing expected performance.
- ***Additional*** - a dimension or aspect of individual, team, or organizational performance that is not a critical or non-critical element. Such elements are not used in assigning a summary level but, are useful for purposes such as communicating performance expectations and serving as the basis for granting awards.

#### ***Activity***

- A task produced through the application of methods, procedures and techniques.

### **Applying standards to a manager's work plan**

Many organizations use work plans, for both managers and employees, as a tool for defining the major tasks and goals for the year. Hopefully, these plans are designed in tandem with the elements and standards given to the employees within the organization. The work plans should provide the detail regarding specific tasks that underlie the broader statement in a critical element. However, some supervisors will forget to look at the performance standards that have been developed for an employee and will attempt to counsel the employee about poor performance using only the work plan. This may lead to trouble when a PIP needs to be developed because the supervisor must be able to explain how the employee failed to meet the standard and what improvement needs to be made against the requirements of the standard, not the work plan. Ideally, the work plan will serve as an effective tool to explain the specific assignments and time frames that are expected of employees but it cannot substitute for the expectations of the performance standards.

### **Informal gathering of appraisal information by the supervisor**

Long before the concept of 360 degree appraisal was formalized, supervisors were soliciting information about subordinate performance from their customers and others who worked closely with the employees they were appraising. There is nothing wrong with informally gathering this information as a means of supplementing the supervisor's evaluation of performance for the year. Supervisors should be careful to use this approach in circumstances where they don't have first hand knowledge of the employee's work or where they are seeking confirmation of their own assessment of an employee's performance on a specific project or task. Supervisors should document any comments received during the appraisal period so they will be able to explain the employee's rating more effectively. Further, supervisors should be thoughtful when soliciting comments about job performance so that they receive input from a fair sampling of individuals with whom the employee comes in contact while working.

### **Standard with various components**

When you are reviewing standards for adequacy and considering what needs to be explained during a PIP, one issue to be determined is whether the performance standard measures a single quality or whether it is written to measure multiple performance qualities. For example, one standard might address both the timeliness and the quantity of work to be accomplished. In that case, the supervisor needs to make it clear that both timeliness and quantity must be at an acceptable level in order to succeed in the PIP, or to explain that one is more important and success is needed in only that one aspect of the standard in order to succeed. This last situation may be more common when the standard measures different types of work assignments, some of which may not be as critical as others. Standards with different components may be very effective but it is essential that

these components are identified and performance expectations for each are established at the time an employee is placed on a PIP.

## **The Performance Improvement Period (PIP)**

Under Part 432 of Title 5, an employee must be provided with a formal opportunity to improve before a removal or demotion action can be taken based on unacceptable performance. On the other hand, Part 752 of Title 5 does not require a supervisor to provide an employee with such an opportunity and a supervisor has the option of proposing an action for unacceptable performance under Part 752 procedures. One reason a supervisor may elect not to provide an opportunity period may be that the employee has several years of experience on the job and additional training would prove useless. Another reason may be that an employee has already received extensive informal training and additional training or assistance would seem unreasonable.

### **Formal training requirements while an employee is on a PIP**

Contrary to popular belief, there is no requirement for formal training during a PIP. However, supervisors need to be reminded that they need to ensure that their employees are provided with all of the assistance that was promised to the employee at the beginning of the PIP. As an alternative to traditional classroom training, on-the-job training is the most common form of training provided during an opportunity period. Self-instructional manuals, videos, or agency-funded training programs can be offered by a supervisor as assistance during a PIP.

### **Prorated standards during a PIP**

For an employee who works under quantitative or numerical standards, prorated standards are used during a PIP due to the shortened amount of time that an employee has to improve his or her performance. The Board has validated the use of prorated numerical standards as long as the agency can demonstrate that the proportioned standard used during the PIP was reasonable [*Brown v. Veterans Administration*, 44 MSPR 635 (1990)]. Agencies who develop prorated standards should take special care to avoid creating an absolute standard during the PIP. This is more likely to occur when an employee's annual standard only allows a small number of errors. When reviewing these types of standards, be sure to remember that a retention level standard must allow for a margin of error while still describing an acceptable level of performance.

### **Continuing the formal rating during the PIP**

A timely, formal rating of record should be given to an employee after the end of an appraisal period. The fact that an employee may be currently serving a PIP does not preclude a supervisor from issuing a formal rating of record. This rating of record should reflect an entire year's performance, including the employee's PIP performance through the end of the appraisal period.

## **Union representation**

Because the meeting is not disciplinary or investigatory in nature, and because it is not a formal discussion of general conditions of employment, there is no requirement to have a union representative present. The purpose of the meeting is to allow the supervisor to explain his or her expectations of the employee and describe any specific efforts that will be made to assist the employee in improving his or her performance. Although any employee who is being told that his or her work is unacceptable will view this as a negative process, it is a meeting to discuss methods of assisting an employee and is not disciplinary or punitive in nature.

## **Handling approved leave**

Once leave has been approved, an employee cannot be held accountable for work that does not get done during the absence. In terms of short absences, the deadlines or requirements may not need to be adjusted at all. However, if the employee is out for an extended time during the opportunity period, the opportunity period may have to be extended to ensure that the employee has a chance to perform acceptably. Depending on the nature of the work, an opportunity period shortened by approved absence may be valid if the work assignments and expectations were such that the employee still had the chance to demonstrate improved performance.

## **Handling accommodation requests during an improvement period**

The question of who is "disabled" under the law is one that is exceptionally complex. In most cases, you will want to turn over any documentation you receive from the employee or supervisor to the agency's contract physician to obtain a medical review of the documentation. Once you get a decision from the medical experts that the employee's condition significantly impacts his or her ability to perform, you will need to work with the employee and supervisor to carefully consider what the employee is requesting in the way of accommodation and assess whether or not the accommodation can be provided.

Remember, an employee with a disability who can be accommodated on the job is still responsible for acceptable performance. In some cases, the accommodation may not even be related to the reason for the poor performance. When a request for accommodation comes after an employee has been notified of unacceptable performance, supervisors need to make all appropriate accommodation for an employee's disability, based on supporting documentation. A part of that accommodation process should be to discuss the employee's performance deficiencies and clarify whether the employee is asserting that he or she will be able to perform acceptably once the accommodation has been granted. On a case by case basis, supervisors will need to determine whether it is appropriate to go forward with the performance improvement plan once accommodations have been put in place.

## **When conduct related issues arise during a PIP**

Despite all of the training we receive on distinguishing between misconduct and poor performance issues, we all know that it is not always easy to decide how to address certain behavior on the job. While Chapter 432 is simply not designed to deal with misconduct issues, there are times when some types of misconduct lead to unacceptable performance. Take for example, the employee who never refuses an assignment, never says it is not going well, never fails to respond to supervisory inquiries, and never gets the job done. This could be a classic case of unacceptable performance that can be addressed through a PIP, and if necessary, by action under Part 432. Or it could be that the employee is acting deliberately, and the supervisor may need to be counseled on the option of taking action for failure to carry out assignments under Part 752.

## **Within Grade Increases (WIGI)**

### **Delayed ratings**

There are only two circumstances in which a rating can be delayed for the purposes of a WIGI. These circumstances are as follows:

When an employee has not had the minimum period of time to demonstrate acceptable performance on his or her standards; and

when an employee is reduced in grade because of unacceptable performance to a position in which he or she is eligible for a within-grade increase or will become eligible within the minimum appraisal period.

### **WIGI approval without the knowledge of the supervisor**

If a WIGI has been processed without the approval of the supervisor, the agency has the authority to rescind the WIGI. In fact in *Worthington v. Department of Agriculture*, 43 MSPR 620 (1990), the full Merit Systems Protection Board (Board) held that an agency's rescission of a WIGI that was erroneously issued, did not constitute a reduction in pay.

### **Handling a WIGI approval following an unacceptable rating**

Unfortunately, for many agencies, this has become an increasing problem. In most cases, it is unusual for an employee's performance to fall dramatically in a very short period of time. If you are faced with this type of situation, be sure that the supervisor has provided you with enough information/documentation that supports the employee's sudden drop in the level of performance. Remember, the approval of a WIGI is based upon the current rating of record which could have been issued any time in the year preceding the WIGI anniversary date. OPM's regulations on WIGIs states that if the last rating does not reflect current performance, a new rating should be issued to support a denial or approval of the WIGI. Therefore, an employee can reasonably count on the approval of a WIGI as statement that his or her performance is acceptable. Supervisors should be counseled that

they may not refer to performance occurring before the date of the WIGI to demonstrate that the employee is performing unacceptably.

### **Within-grade increases during the middle of an opportunity period**

Technically, the within-grade increase determination is based on the most recent rating of record as long as it was issued within the last year. However, the regulations provide that a supervisor, in making an "acceptable level of competence" determination, may issue a new rating if the most recent rating does not reflect the employee's current performance.

Consider the case where an employee's within-grade increase is due in three weeks, the last rating was Fully Successful, and the employee was given an opportunity to improve that began last month. You should advise a supervisor to decide whether the employee's current performance has come back up to Fully Successful, and if so, approve the within-grade increase. However, it is more likely that the current performance is still below the acceptable level, in which case a new rating needs to be issued to support the denial of the within-grade increase.

## **Development of Proposal and Decision Notices**

### **Advising a supervisor on the decision to demote/remove**

Under Part 432, you have the option of demotion or removal and the reasoning for choosing the action does not have to be defended. Furthermore, mitigation to a lesser action by a third party is not possible. So, if the requirements for proving unacceptable performance are met, and the employee is given an opportunity to improve, no third party can challenge the reasons for removing instead of demoting an employee. Therefore, a decision should be based on an analysis of whether an employee can function acceptably in a lower graded position or not. Some agencies may have policies that require supervisors to explore demotion options before going to removal, but that policy would be an internal policy, not one that governs all agencies.

### **Information contained in the proposal notice**

Each agency has a "culture" that defines the amount of information and documentation that will go into a proposal notice. At a minimum, a notice will state which regulation the action is being taken under, specify what critical performance element(s) the employee failed to meet, cite the evidence of unacceptable performance, and discuss the opportunity period (or the lack of one). The notice will explain to the employee the time allowed for a written and/or oral response and the right to obtain representation.