

Providing an Opportunity to Improve

Before you even begin the formal process of taking a performance-based action, please be aware that you have certain options. The law provides for two different processes for taking performance-based actions. If a performance-based action is taken under Title 5 CFR Part 432, a formal opportunity to improve is required. If a performance-based action is taken under Title 5 CFR Part 752, an opportunity period is not required. Regardless of the process you use, an opportunity period is a useful tool for assisting employees in improving their performance.

The Opportunity Period

In most cases, the informal steps you take with employees, such as the counseling described previously in Step One, will prove very effective in your efforts to avoid or resolve poor performance. However, if an employee is still working at an unacceptable level in one or more critical elements, you will need to give the employee a formal opportunity to improve his or her performance.

Over the years, agencies have developed different mechanisms for providing employees with a formal opportunity to improve unacceptable performance. Many agencies have adopted the use of the Performance Improvement Plan, often referred to as a “PIP.” In this booklet, we will use the term “opportunity period” as a generic reference to a formal period for improving unacceptable performance.

This period is designed to give the employee an opportunity to bring his or her performance up to an acceptable level. It is also the supervisor’s opportunity to clearly express his or her expectations and the consequences of not meeting those expectations. If the employee fails to improve to an acceptable level by the end of the opportunity period, further action is warranted.

Under the current regulations for performance appraisal (5 CFR Part 430), there are three types of performance elements: critical, non-critical, and additional. But remember, you can only remove or demote an employee for unacceptable performance in a critical element.

Depending on the nature of the job and the employee's experience, it may be appropriate to offer assistance in a variety of ways. For example, an employee may be given a checklist, paired with another employee, offered training, and/or given closer supervision. Not every employee will require every type of assistance, but once assistance is offered, be sure to follow through with it in the opportunity period. The procedures for providing a formal opportunity to improve are:

Determination of unacceptable Performance - Employee's performance is determined to be unacceptable in one or more critical elements.

"Opportunity Period" Notice Issued - Inform the employee in writing of the critical element(s) in which he or she is failing, what is needed to bring performance up to an acceptable level, what assistance will be provided, and the consequences of failing to improve during the opportunity period.

Formal Opportunity to Improve - Employee must bring performance up to an acceptable level in failed critical element(s). Duration of opportunity period may vary. Be sure to document the employee's progress and to provide any appropriate assistance.

Determination of Performance Improvement - Consider the evidence of performance and compare with standards and expectations outlined in the opportunity period notice.

Hopefully, an employee will improve and maintain acceptable performance. However, if an employee fails to perform acceptably by the end of the opportunity period or improves but then fails again in the same critical element within 1 year from the start of the opportunity period, the supervisor may demote or remove the employee without going through another opportunity period. Determination of Performance Improvement Formal Opportunity To Improve "Opportunity Period" Notice Issued Determination of Unacceptable Performance

Special Considerations

In reality, performance-based actions do not always run as smoothly as the procedures just described. Some issues may occur that deserve special consideration.

Requests for Accommodations

When counseling, providing an opportunity period, or taking action, you may discover that a performance problem is due to a mental or physical condition. As a result, an employee may request some type of accommodation. If the accommodation request does not cause the agency an undue hardship, you are required to accommodate the employee if he or she has a disability and is a "qualified" individual with a disability. This type of situation is an area in which you will have to get technical assistance from your agency's human resources staff. However, as a starting point in your determination as to whether or not an employee is entitled to such an accommodation, review the checklist below.

Does the employee have a disability?

Yes if . . .

- ✓ Medical documentation supports a physical or mental condition that substantially limits one or more major life activities, or
- ✓ A record of impairment exists that substantially limits one or more major life activities.

Is the employee a “qualified disabled” person?

Yes if . . .

- ✓ The employee can perform essential functions with or without reasonable accommodation.
- ✓ There is no endangerment of health and safety of employee or coworkers.
- ✓ The employee otherwise meets the requirements of the position.

If the employee demonstrates that he or she is a qualified individual with a disability, you will need to work with your human resources office to determine whether the accommodation request will cause an undue hardship.

Does the accommodation request cause an undue hardship?

Consider the following factors . . .

- ✓ The number of employees in the organization.
- ✓ The type of facilities.
- ✓ The size of the organization’s budget.
- ✓ The cost of the requested accommodation(s).

An accommodation should be designed to address an employee’s physical or mental limitations so that the employee has as much of a chance to achieve acceptable performance as a non-disabled person. While each case may be different, as a supervisor your responsibility is to resolve the performance problem, not the mental or physical disability. Keep in mind that a request for accommodation does not preclude you from proceeding with a performance-based action. In many situations, accommodations can be put in place at the same time an opportunity period is started.

Requests for Leave

Another issue that sometimes “stumps” supervisors is what to do when an employee requests leave during the opportunity period. You should consider each request for leave based on the specific circumstances in the request. Know your agency’s rules for approving or disapproving leave and get some technical advice from the human resources office before you deny any leave during this time. Additionally, keep these thoughts in mind:

- An employee on approved leave (annual, sick, or leave without pay) cannot be penalized for work that is not completed while on approved leave.
- An employee should be aware of agency (or office) procedures for requesting leave and for providing medical documentation (especially important for accommodation requests). The employee should also be aware of what action the agency may take if these procedures are not followed.
- Be sure you understand the various family-friendly leave entitlements available to employees, such as the Family and Medical Leave Act of 1993 and the Family Friendly Leave Act of 1994.
- If an employee is on approved leave for a significant period of time during the opportunity period, you may want to extend the period to allow the employee a “reasonable” time on the job to improve.

Deciding What Comes Next

Deciding what comes next depends on the employee’s performance at the conclusion of the opportunity period. If the employee has reached an acceptable level of performance, there is no need for any action except to keep providing feedback and encouragement to the employee. If the employee is still performing unacceptably, you must determine the best solution. Your options include reassignment, demotion, or removal. Although Government-wide regulations allow supervisors to choose any of these options, your agency may have some internal rules about considering reassignment before the other choices. Before you reach a decision on what to do, find out from your human resources staff what your responsibilities are.

No Improvement During Opportunity Period

Supervisors may reassign employees without conducting the formal process outlined in the next step. Step Three explains the procedures used after you have decided to demote or remove an employee. This next section also explains the employee’s appeal rights.