

# 5 CFR Parts 432 and 752 Similarities and Differences

[U.S. Merit Systems Protection Board | Performance-Based Actions under Chapters 43 and 75 of Title 5 - Similarities and Differences](#)

	5 CFR Part 432	5 CFR Part 752
<b>Critical Element</b>	Agency must prove the performance deficiency is in a critical element.	Agency is <i>not</i> required to prove the performance deficiency is in a critical element.
<b>Efficiency of the Service</b>	Agency is <i>not</i> required to prove that the adverse action will promote the efficiency of the service.	Agency <i>must</i> prove that the adverse action will promote the efficiency of the service.
<b>Burden of Proof</b>	<p>Action must be supported by <i>substantial evidence</i>. This means that a reasonable person might find the evidence supports the agency’s findings regarding the poor performance, even though other reasonable persons might disagree.</p> <p>5 U.S.C. § 7701(c)(1)(A). Substantial evidence means “[t]he 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 C.F.R. § 1201.4(p).</p>	<p>Action must be supported by a <i>preponderance of the evidence</i>. This means that a reasonable person would find the evidence makes it more likely than not that the agency’s findings regarding the poor performance are correct.</p> <p>5 U.S.C. § 7701(c)(1)(B). Preponderance of the evidence means “[t]he 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 C.F.R. § 1201.4(q).</p>
<b>Establishment of Performance Expectations</b>	When the employee’s performance in one or more critical elements is unacceptable, the employee will: (1) be notified of the deficiency; (2) be offered the agency’s assistance to improve; and (3) be warned that continued poor performance could lead to a change to lower grade or removal. (This is commonly referred to as the PIP, an abbreviation for both performance improvement plan and also for performance improvement period.)	The extent to which an employee is on notice of the agency’s expectations is a factor in determining the appropriateness of the penalty. Also, an agency cannot require that an employee perform better than the standards that have been communicated to the employee.

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<b>Recency of Events</b>	A change to a lower grade or a removal action cannot be based on performance that is more than 1-year old at the time of the issuance of the proposal notice.	While there is no requirement that an action be proposed within a particular period of time, unexplained excessive delays can have a negative effect upon the agency's ability to prove the action is proper and warranted.
<b>Advance Notice</b>	The agency must provide a notice of proposed action and a reasonable opportunity to reply 30 days before any action can be taken.	The agency must provide a notice of proposed action and a reasonable opportunity to reply 30 days before any action can be taken.  For chapter 75 actions, the agency may effectuate the removal in less than 30 days if there is reasonable cause to believe the employee has committed a crime for which a prison sentence may be imposed (5 U.S.C. § 7513(b)(1) and (2)).
<b>Content of Advance Notice</b>	The notice must state the specific instances of poor performance that are the basis for the action <i>and also the critical performance element involved</i> .	The notice must state the specific instances of poor performance that are the basis for the action.
<b>Deciding Official</b>	Must be a person higher in the chain of command than the person who proposed the action.	The deciding official does <i>not</i> have to be a person higher in the chain of command than the person who proposed the action.
<b>Agency Decision</b>	Agency must issue a final decision within an additional 30 days of the expiration of the 30-day advance notice period.	Agency is under no particular time constraint, other than there cannot be a delay so extensive that it constitutes an error that harms the employee.
<b>Decline Following Improvement</b>	If the employee's performance improves during the PIP, and remains acceptable for 1 year, a new PIP is necessary before taking an action <i>under this chapter</i> .	There is no obligation to offer a period of improvement at any point.

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<b>Penalty Mitigation</b>	Once the agency meets the requirements to take an action, MSPB <i>cannot</i> reduce the agency's penalty.	After finding that the agency meets the requirements to take chapter 75 action, MSPB <i>may</i> reduce the agency's penalty if that penalty is unreasonable.
<b><i>Douglas</i> Factors</b>	The <i>Douglas</i> factors are not used.	The agency must consider the relevant <i>Douglas</i> factors when reaching a decision on the appropriate penalty.
<b>Affirmative Defenses</b>	The agency action will not be sustained if the employee was harmed by the agency's failure to follow procedures or if the agency decision was reached as a result of the commission of a prohibited personnel practice.	The agency action will not be sustained if the employee was harmed by the agency's failure to follow procedures or if the agency decision was reached as a result of the commission of a prohibited personnel practice.
<b>Merit Principles</b>	Merit principles must be adhered to in all performance-based actions.	Merit principles must be adhered to in all performance-based actions.