


Performance-Based Discipline

Presented by Chris Burton and Geraldine
Rowe Associate Directors
Office of Appeals Counsel
Merit Systems Protection Board

September 21, 2017

What we will cover:

- Two alternative methods for proving poor performance at the MSPB – Chapter 43 and Chapter 75 of Title 5 of the U.S. Code
- +/-  of Chapter 43 versus Chapter 75
- Affirmative defenses and due process
- Wrap up and questions

Overview

- Chapter 43 reductions in grade and removals are taken under 5 U.S.C. section (§) 4303
- Chapter 75 adverse actions are taken under 5 U.S.C. § 7513
- *Lovshin v. Department of the Navy*, 767 F.2d 826, 840-43 (1985) – an agency can take a performance-based action under either chapter.
- However, an agency may not charge an employee with unacceptable performance under chapter 75 based solely for performance that is governed by and meets the critical elements set forth for the employee's position. *Id.* at 842.

Introduction

Chapter 43 applies only to:

- Reductions in grade and removals; it does not include suspensions
- "Agencies"
- "Employees"

Chapter 43: Limits

The agency's burden to prove the charge is "substantial evidence."

Substantial evidence is 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 C.F.R. § 1201.56(c)(1).

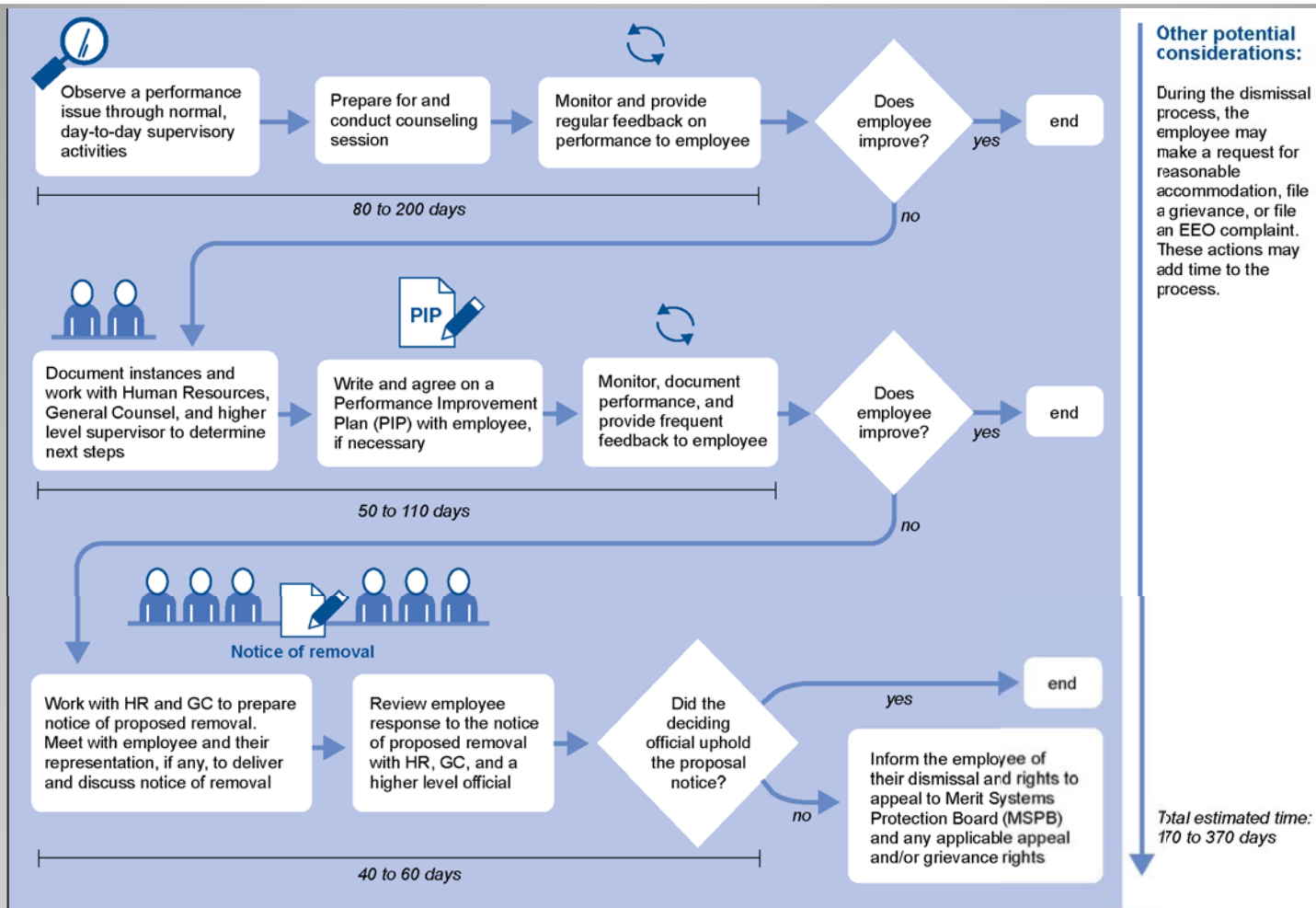
Chapter 43: The agency's burden of proof

The agency must prove by substantial evidence that:

- (1) OPM approved its performance appraisal system;
- (2) the agency communicated to the appellant the performance standards and critical elements of his position;
- (3) the appellant's performance standards are valid under 5 U.S.C. § 4302(b)(1);
- (4) the agency warned her of the inadequacies of her performance during the appraisal period and gave her a reasonable opportunity to improve; and
- (5) Her performance remained unacceptable in at least one critical element.

The proposed removal is not sufficient to prove these elements, corroborating evidence is required. *Thompson v. Department of the Army*, 122 M.S.P.R. 372, ¶¶ 12, 16 (2015).

Chapter 43: Proving the charge



Chapter 43: Proving the charge

The first two elements of the charge are generally not contested:

- (1) OPM approved the agency's performance appraisal system,
 - including any significant changes to the system; and
- (2) the agency communicated to the appellant the performance standards and critical elements of his position.

Chapter 43: Proving the charge

The third element of the charge:

(3) the appellant's performance standards are valid under 5 U.S.C. § 4302(b)(1).

- To be valid, performance standards must inform the employee of what is required to achieve acceptable performance. *Henderson v. NASA*, 116 M.S.P.R. 96, ¶ 16 (2011).
- Near-perfect performance can be required under certain circumstances. *Guillebeau v. Department of the Navy*, 362 F.3d 1329, 1337 (Fed. Cir. 2004).

Chapter 43: Proving the charge

The fourth element of the charge:

(4) the agency warned the appellant of the inadequacies of her performance during the appraisal period and gave her an adequate opportunity to improve.

- Opportunity can be as short as 30 days in certain circumstances. *Melnick v. HUD*, 42 M.S.P.R. 93, 101-02 (1989).
- Agency must offer assistance. *Goodwin v. Department of the Air Force*, 75 M.S.P.R. 204, 207-08 (1997).

Chapter 43: Proving the charge

The fifth element of the charge: (5) After an adequate improvement period, the appellant's performance remained unacceptable in at least one critical element.

- If an employee demonstrates acceptable performance during the PIP, an agency cannot remove/demote the employee solely on the basis of deficiencies which preceded or triggered the PIP. *Brown v. Veterans Administration*, 44 M.S.P.R. 635, 640 (1990).
- However, an agency is entitled to rely on performance deficiencies occurring at any time during the year preceding the notice of proposed action if it can show that the employee failed to demonstrate acceptable performance or to sustain such performance after receiving a reasonable opportunity to do so. *Id.* at 641-43.
- Where an employee is removed on the basis of fewer than all the components of a performance standard for a critical element, the agency must present substantial evidence that the appellant's performance warranted an unacceptable rating on the element as a whole. *Shuman v. DOT*, 23 M.S.P.R. 620, 628 (1984).

Chapter 43: Proving the charge

The fifth element of the charge, continued:

The roller coaster employee.

- The PIP is effective for 1 year: No new PIP is required for a chapter 43 action if the employee successfully completed a PIP but his performance on a critical element of the PIP remained unacceptable during the 1-year period following the advance notice of the PIP. *White v. Department of Veterans Affairs*, 120 M.S.P.R. 405, ¶¶ 6-7 (2013).
- In these circumstances, the Board will determine on a case-by-case basis what constitutes substantial evidence of genuinely unacceptable performance in the context of the employee's annual performance plan. *Muff v. Department of Commerce*, 117 M.S.P.R. 291, ¶¶ 8-10 (2012).

Chapter 43: Proving the charge

In a chapter 43 action, an agency is not required to prove that its action is for the efficiency of the service.

Chapter 43: Nexus

- The Board has no authority to mitigate the agency's chapter 43 removal or reduction in grade.

Chapter 43: Penalty

Applicability of chapter 75

- Applies to removals, reductions in grade/pay, and suspensions longer than 14 days.
- SES employees may only be removed for poor performance under chapter 75 if it amounts to misconduct, neglect of duty, or malfeasance.
Berube v. GSA, 820 F.2d 396, 398-99 (Fed. Cir. 1987), *superceded by statute, on other grounds, as stated in Lachance v. Devall*, 178 F.3d 1246, 1253, 1256 (Fed. Cir. 1999).

Chapter 75: Limits

The agency must prove the charge, nexus, and penalty by preponderant evidence.

Preponderant evidence is 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 C.F.R. § 1201.56(c)(2).

Chapter 75: The agency's burden of proof

The agency must prove by preponderant evidence that its measurement of the appellant's performance was accurate and reasonable. *Shorey v. Department of the Army*, 244 (1998).

- Unlike chapter 43, an agency need not prove that a specific standard of performance was established and identified in advance.
- The agency is not required to prove that poor performance was intentional.

Chapter 75: Proving the charge

Proving the charge: the agency's measurement of the appellant's performance was accurate and reasonable.

- The agency may consider a representative sample of work; however, the agency must establish some objective, systematic method for selecting examples. *Bowling v. Department of the Army*, 47 M.S.P.R. 379, 383 (1991).

Chapter 75: Proving the charge

The agency must prove that the standard to which the appellant is held bears a relationship to the efficiency of the service. *Graham v. Department of the Air Force*, 46 MSPR 227, 237 (1990).

Chapter 75: Nexus

In reviewing the penalty, the Board will consider relevant *Douglas* factors, including:

- Whether the appellant was on notice that his conduct was unacceptable;
- The appellant's length of service and performance history;
- Consistency of the penalty with those imposed upon other employees;
- Mitigating circumstances such as unusual job tensions, mental impairment, harassment.

Chapter 75: Penalties

- An appellant's allegation that the agency treated him disparately to another employee, without claiming prohibited discrimination, is an allegation of disparate penalties to be proven by the appellant. *Lewis v. DVA*, 113 MSPR 657, ¶ 5 (2010).
- The appellant has the initial burden of showing that there is enough similarity between both the nature of the misconduct and other factors to lead a reasonable person to conclude that the agency treated similarly situated employees differently. *Boucher v. USPS*, 118 MSPR 640, ¶¶ 20, 24 (2012).
- If the appellant meets his initial burden, the agency must prove a legitimate reason for the difference by preponderant evidence. *Boucher*, 118 MSPR 460, ¶ 20.

Chapter 75: Penalties

- An agency can switch from defending its performance-based action under Chapter 43 to Chapter 75 (or vice-versa) prior to the hearing.
- If the agency has not followed the procedures of both chapters in effecting the action, switching the nature of its defense might not be possible.

Chapter 43 v. Chapter 75

Why defend under Chapter 75 rather than Chapter 43?

- Some procedural flaw regarding the performance standards or the PIP.
- The appellant's poor performance constitutes (or at least includes) intentional misconduct such as negligent performance of duties or failure to follow instructions.
- The appellant is medically unable to perform.

Chapter 43 v. Chapter 75

For both chapter 43 and 75:

The Board cannot sustain an agency's action if the appellant shows that

(A) the agency committed harmful procedural error in reaching its decision;

(B) the decision was based on a prohibited personnel practice under 5 U.S.C. § 2302(b); or

(C) the decision was not in accordance with law.

5 U.S.C. § 7701(c)(2)

Chapters 43 & 75: Affirmative defenses

- In order to prove disability discrimination based on failure to accommodate, an appellant must prove that she is a disabled person, that the action appealed was based on her disability and, to the extent possible, she must articulate a reasonable accommodation under which she believes she could perform the essential duties of her position or of a vacant funded position to which she could be reassigned. *Sanders v. SSA*, 114 MSPR 487, ¶ 16 (2010).

Chapters 43 & 75: Affirmative defenses

- Reasonable accommodation is always prospective; an agency does not have a duty to retroactively excuse poor performance based upon a subsequent request to accommodate a previously unknown disability.
- Reasonable accommodation does not require an agency to lower production or performance standards. *Byrne v. DOL*, 106 MSPR 43, ¶ 7 (2007).

Chapters 43 & 75: Affirmative defenses

- If an appellant raises an affirmative defense of whistleblower reprisal, the appellant must show by preponderant evidence that he made a protected disclosure and that the disclosure was a contributing factor in the agency's action.
- If the appellant makes this showing, the action must be reversed unless the agency shows by clear and convincing evidence that it would have taken the same action absent the protected disclosure. *Grubb v. Dep't of Interior*, 96 M.S.P.R. 377 (2004).

Chapters 43 & 75: Affirmative defenses

- In determining whether the agency has met its burden by clear and convincing evidence, the Board will consider:
 1. The strength of the agency's evidence in support of its action;
 2. The existence and strength of any motive to retaliate on the part of the agency officials involved in the decision; and
 3. Any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. SSA*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

Chapters 43 & 75: Affirmative defenses

- The employee has a right to due process whether the action is being adjudicated under Chapter 43 or Chapter 75.
- Due process requires that the employee be afforded notice “both of the charges and of the employer’s evidence,” as well as an opportunity to respond to the proposed action.

Chapters 43 & 75: Due process

- Consideration of ex parte communications by the deciding official violate the employee's right to due process if the ex parte communication introduces new and material information to the deciding official and is "so substantial and so likely to cause prejudice that no employee can fairly be required to subjected to a deprivation of property under such circumstances." *Stone v. FDIC*, 179 F.3d 1368, 1377 (Fed. Cir. 1999)

Chapters 43 & 75: Due process

- An ex parte communication that influences the deciding official violates the employee's due process rights, regardless of whether the communication relates to the charge or the penalty. *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1280 (Fed. Cir. 2011).
- Does the same standard apply to the penalty determination in a Chapter 43 case?

Chapters 43 & 75: Due process



Wrap up and questions