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(HISTORICAL) QUESTIONS AND ANSWERS ON REDUCTIONS IN GRADE AND REMOVALS

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SUBJECT: Questions and Answers on Reductions in Grade and

Removals Based on Unacceptable Performance Under 5

CFR Part 432

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Heads of Departments and Independent Establishments:

1. The attached material provides policy guidance on reduction-in-grade and removal actions into consideration when developing the new FPM Chapter 432. Comments should be sent

taken under the authority of 5 CFR Part 432 (Reduction in Grade and Removal Based on Unacceptable Performance).

2. The guidance material has been arranged in a question and answer format and addresses the issues most commonly raised by agencies and other parties who contact OPM for technical assistance in the area of performance-based actions taken under 5 CFR Part 432. It clarifies agencies' authorities and obligations as well as employees' rights and responsibilities in addressing unacceptable performance.

3. The guidance states OPM's policy and represent OPM's interpretation of applicable law and case law with respect to reduction-in-grade and removal actions based on unacceptable performance. Citations to cases do not necessarily represent OPM's endorsement of the holdings of the decisions or their application to other similar circumstances. In this regard, users of this material are cautioned that cases in this area are often fact-specific and should be reviewed closely in determining how they may apply to a given set of circumstances.

4. The issuance of this guidance coincides with the publication of final regulations at 5 CFR Part 432 (54 FR 26172) and provides interim policy guidance in advance of the issuance of a new FPM Chapter 432, Reduction in Grade and Removal Based on Unacceptable Performance.

5. OPM welcomes comments on the guidance and will take the comments by August 31, 1989 to Timothy Dirks, Chief, Employee Relations Division, Office

of Employee and Labor Relations, Office of
Personnel Management, 1900 E Street,
N.W., Room 7412, Washington, DC
20415.

Constance B. Newman
Director

Attachment

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Attachment to FPM Bulletin 432-

Questions and Answers on Reductions in
Grade and Removals Based
on Unacceptable Performance Under 5
CFR Part 432

July 1989

Prepared by:

Employee Relations Division
Office of Employee and Labor Relations
Personnel Systems and Oversight Group
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PART I. COVERAGE AND
APPEAL/GRIEVANCE RIGHTS 1
procedural requirements of 5
CFR Part 432?

A. Generally, Executive agencies, along with the Administrative Office of the U.S. Courts, the Government Printing Office, and independent establishments that are established in the Executive branch, are covered by Part 432. Major agencies excluded from Part 432 coverage are the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, the General Accounting Office and the U.S. Postal Service. See OPM's regulations at 5 CFR 432.102(c) and (d) for a complete listing of agencies covered and excluded.

2. Q. Which personnel actions are covered under the procedural requirements of 5 CFR Part 432?

A. Only reductions in grade and removals based solely on unacceptable performance are covered under the procedural requirements of Part 432. See 5 CFR 432.102(b) for a complete listing of specific actions which are excluded from coverage.

3. Q. Which employees are covered by the procedural requirements of 5 CFR Part 432?

A. Generally, most employees in those agencies which are covered by Part 432 are covered by the procedural requirements of Part 432, with the following exceptions:

Employees in the competitive service who the Senior Executive Service; individuals appointed by the President; employees occupying a position in Schedule

are serving a probationary or trial period under an initial appointment;

Employees in the competitive service serving in a type of appointment that requires no probationary or trial period (e.g., status quo or TAPER) who have not completed one year of current continuous employment in the same or similar positions under other than a temporary appointment limited to one year or less (see 5 CFR 432.103(c) and (g) for the definitions of "current continuous employment" and "similar positions");

Employees in the excepted service who have not completed one year of current continuous employment in the same or similar position (see 5 CFR 432.103(c) and (g) for the definitions of "current continuous employment" and "similar positions"); and

The following other categories of employees: employees outside of the United States who are paid in accordance with local native prevailing wage rates for the area in which employed; individuals in the Foreign Service of the United States; physicians, dentists, nurses, or other employees in the Department of Medicine and Surgery of the Department of Veterans Affairs whose pay is fixed under Chapter 73 of title 38, U.S. Code, except persons appointed under 38 U.S.C. 4104(3); administrative law judges appointed under 5 U.S.C. 3105; individuals in C as authorized under Part 213; reemployed annuitants; National Guard technicians; employees

occupying a position in the excepted service for which employment is not reasonably expected to exceed 120 calendar days in a consecutive 12 month period; individuals occupying a position filled by Noncareer Executive Assignment under Part 305 of this chapter; and managers or supervisors returned to their previously held grade pursuant to 5 U.S.C. 3321(a)(2) and (b).

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4. Q. Which employees may appeal to the MSPB or grieve under a negotiated grievance procedure if they have been reduced in grade or removed under 5 CFR Part 432?

A. In accordance with 5 U.S.C. 4303(e), those employees who are covered by the procedural requirements of Part 432 (see question 3 above) and have been reduced in grade or removed under 5 CFR Part 432 may appeal to the MSPB or grieve under a negotiated grievance procedure (but not both) if they are:

In the competitive service; or

Preference eligibles in the excepted service.

5 U.S.C. 4303(e)), which sets forth the above categories of employees who may appeal to the Merit Systems Protection Board, applies with the basis of objective criteria (5 U.S.C.4302(b)(1) and (2)).

(3) Notification of Unacceptable

equal force to negotiated grievance procedures established under 5 U.S.C. 7121. See, e.g., U.S. v. Fausto, 108 S.Ct. 668 (1988), FLRA v. HHS, 858 F.2d 1278 (7th Cir. 1988), Department of the Treasury v. FLRA, No. 88-1159 (D.C. Cir. May 2, 1989), Schwartz v. Labor, 714 F.2d 1581 (Fed. Cir. 1985), Harrison v. Bowen, 815 F.2d 1505 (D.C. Cir. 1987), and Department of Justice v. FLRA, 709 F.2d 724 (D.C. Cir. 1983).

PART II. PRINCIPAL REQUIREMENTS FOR TAKING ACTION UNDER PART 432

1. Q. What are the principal legal and regulatory requirements for taking a reduction-in-grade or removal action based on unacceptable performance under Part 432?

A. The following are the principal requirements for taking a reduction-in-grade or removal action under Part 432:

(1) OPM Plan Approval: Have an OPM-approved performance appraisal system in place (5 U.S.C. 4302(a) and 5 U.S.C. 4304(b)(1)).

(2) Communication of Performance Elements and Standards: Communicate to the employee performance elements and standards which, to the maximum extent feasible, permit the evaluation of job performance on

Performance: Notify the employee when performance is unacceptable in one or more critical elements and inform the employee of the performance

requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position (5 CFR 432.104). (Note: If the employee is covered under the PMRS, the agency shall provide written notice of the employee's unacceptable rating as required by 5 U.S.C. 4302a(b)(6).)

(4) Opportunity to Demonstrate Acceptable Performance: Afford the employee a reasonable opportunity to demonstrate acceptable performance (providing assistance as appropriate) before deciding whether to propose action (5 CFR 432.104). (If the employee is covered under the PMRS, the employee shall be provided a reasonable opportunity to demonstrate performance at the "fully successful" level or higher as required by 5 U.S.C. 4302a(b)(6).)

(5) Advance Notice of Proposed Action: Issue to the employee a 30-day advance notice of the agency's proposed action which includes the specific instances of unacceptable performance, as related to the employee's critical element(s), on which the proposed action is based (5 U.S.C. 4303(b)(1)(A)). These instances must have occurred within one year preceding the date of the notice of proposed action (5 CFR 432.105(a)(3) and 5 U.S.C. 4303(c)(2)(a)).

(6) Representation: Allow the employee to be represented by an

2. Q. On appeal of a Part 432 removal or reduction in grade, what elements must an agency prove in order for the action to be sustained?

attorney or other representative in responding to the agency's proposed action (5 U.S.C. 4303(b)(1)(B)).

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(7) Opportunity to Respond to the Proposal Notice: Allow the employee a reasonable time to respond orally and in writing to the notice of proposed action (5 U.S.C. 4303(b)(1)(C)).

(8) Issuance of a Written Agency Decision: Issue to the employee a written decision within 30 days after expiration of the notice period which specifies the instances of unacceptable performance relied upon in taking the action and which is concurred in by an official who is in a higher position than the employee proposing the action (5 U.S.C. 4303(c)(1) and 5 U.S.C. 4303(b)(1)(D)). The decision to reduce in grade or remove an employee under Part 432 may be based only on those instances of unacceptable performance which occurred during the one year period ending on the date of the notice of proposed action (5 U.S.C. 4303(c)(2)(A)). (Note: The same official may propose and decide the action as long as the decision is concurred in by a higher level official, unless agency regulations require a separate deciding official.)

2 A. The agency must prove its determination of unacceptable performance by substantial evidence (5 U.S.C. 7701(c)(1)(A)). 5 CFR

1201.56(c)(1) defines substantial evidence as "that degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of evidence." In addition, in order for an agency's action to be sustained on appeal the agency must show that it: (1) had in place an OPM-approved performance appraisal plan (*Griffin v. Army*, 23 M.S.P.R. 657 (1984)); (2) effectively communicated performance elements and standards to the employee (*Cross v. Air Force*, 25 M.S.P.R. 353 (1984); *Weirauch v. Army* 782 F.2d 1560 (Fed. Cir. 1986)); (3) based the employee performance standards on objective criteria to the maximum extent feasible if the validity of the standards is challenged (*Callaway v. Army*, 23 M.S.P.R. 592 (1984), and *Wilson v. HHS*, 770 F.2d 1048 (Fed. Cir. 1985)); (4) notified the employee of unacceptable performance in one or more critical element(s) (*Colgan v. Navy*, 28 M.S.P.R. 116 (1985) and *Grant v. Transportation*, 24 M.S.P.R. 663 (1984)); and (5) afforded the employee a reasonable opportunity to demonstrate acceptable performance prior to taking its action (*Sandland v. GSA*, 19 M.S.P.R. 223 (1984)). (Note: In reviewing a Part 432 action, the MSPB, arbitrators, and the courts are

The MSPB has ruled that "(5 U.S.C.) 4302(b)(2) constitutes a substantive right which requires an agency to ensure that employees are aware in advance of the performance

without authority to modify the agency-selected penalty. See *Lisiecki v. FHLBB*, 23 M.S.P.R. 633 (1984), affirmed, *Lisiecki v. MSPB*, 769 F.2d 1558 (Fed. Cir. 1985), cert. denied, 54 U.S.L.W. 3662, and *Horner v. Bell*, 825 F.2d 382 (Fed. Cir. 1987).)

PART III. COMMUNICATION OF PERFORMANCE ELEMENTS AND STANDARDS

1. Q. May employees be reduced in grade or removed if they have not received or had communicated to them performance elements and standards for the positions they are occupying?

A. No. A Part 432 reduction in grade or removal must be based on "unacceptable performance" which is defined in statute as performance which fails to meet established performance standards in one or more critical elements (5 U.S.C. 4301(3)). The performance elements and standards must be communicated to employees at the beginning of the appraisal period (5 U.S.C. 4302(b)(2)), must be in writing and must be reviewed and approved by a person at a higher level in the organization than that of the appraising official (5 CFR 430.204 (f)).

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standards and critical elements of their positions." *Cross v. Air Force*, 25 M.S.P.R. 353 (1984); *Weirauch v. Army*, 782 F.2d 1560 (Fed. Cir. 1986). In affirming MSPB's holding in

Cross, however, the Federal Circuit noted that an employee's substantive right to proper communication under Cross need not be tied directly to nor coincide with the officially designated appraisal period of the agency. Rather, an employee has a substantive right to communication at the beginning of the appraisal period which forms the basis of the action. OPM agrees with this interpretation of 5 U.S.C. 4302(b)(2).

2. Q. Is it necessary to have the employee sign a statement saying that he or she has received and understands his or her performance elements and standards?

A. No. There is no requirement in law or OPM regulation that an employee must sign a statement acknowledging receipt and understanding or performance elements and standards. However, if challenged on appeal, the agency must be able to show that "the appellant was made aware of and should have understood the performance standards and critical elements of the position at the beginning of the appraisal period which forms the basis of the adverse action." *Cross v. Air Force*, 25 M.S.P.R. 353 (1984); *Weirauch v. Army*, 782 F.2d 1560 (Fed. Cir. 1986).

857 F.2d 1439 (Fed. Cir. 1988). (See question 3 on page 10 for discussion of "backward" standards.) The agency may clarify the employee's performance requirements by means of counseling sessions and

In anticipation of a challenge on appeal, the agency should maintain evidence of the conveying and receipt of performance elements and standards, as well as counseling sessions or discussions with the employee regarding the requirements of the position, documents issued to clarify the elements and standards, or evidence of any other situations in which the agency answered questions or clarified the elements and standards. Alternatively, the agency may wish to rely on the obvious clarity of the elements and standards themselves if they have been properly communicated.

3. Q. What course of action does OPM recommend when an agency determines that an employee is performing unacceptably, but hesitates to initiate further action because the employee's performance standards are somewhat vague or unclear?

A. Although OPM encourages agencies to clarify performance requirements as early in the appraisal cycle as possible, an agency may clarify or further explain performance requirements to the employee prior to or during an employee's opportunity to demonstrate acceptable performance, unless the performance standard is the type of "backwards" standard found to be invalid by the Federal Circuit in *Eibel v. Navy*, memoranda, revised performance standards, written instructions, on-the-job training, and other means which convey the nature and level of performance required of the employee.

MSPB and court decisions are consistent with OPM policy. The U.S. Court of Appeals for the Federal Circuit in *Baker v. DLA*, 782 F.2d 1579 (Fed. Cir. 1986), in affirming MSPB's earlier decision in this case, indicated that the MSPB, when reviewing an appellant's performance standards, should consider not only the actual language of the standards, but also evidence presented by the agency regarding the efforts it made to clarify and explain performance requirements.

4. Q. May an agency change an employee's performance elements and standards during the appraisal cycle and still be able to initiate action for unacceptable performance?

A. Yes. An agency may change an employee's performance elements and standards during the appraisal cycle as long as the change is properly communicated to the employee. Nothing in law or OPM regulation precludes an agency from changing performance elements and standards. In fact, OPM encourages agencies to change them when necessary to accurately reflect current work requirements.

The court and MSPB have agreed that the law allows elements and standards to be changed.

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See, for example, *Mouser v. HHS*, 32 M.S.P.R. 543 (1987) and *Weirauch v. Army*, 26 M.S.P.R. 53 (1985), affirmed, *Weirauch v. Army*, 782 F.2d 1560 (Fed. Cir. 1986).

In revising elements and standards, agencies should recognize any applicable procedures in its performance appraisal system. If the performance appraisal system does not address procedures for revising elements and standards or initiating action after elements and standards have been revised, the following approaches are suggested:

a. When the revision is substantial (i.e., when the revision reflects a significant change in the performance expected and poses significant additional burdens on the employee): substantially revised elements and standards become effective after they have been reviewed and approved by a higher level official and communicated to the employee in writing (5 CFR 430.204(f)). The employee should then be allowed to perform under the new elements and standards for a reasonable time (the length of time will differ, depending on the nature of the employee's position and the revised performance requirement(s)) prior to making further determinations on the level of the employee's performance. If performance under the revised elements and standards becomes unacceptable, the agency should notify the employee of the unacceptable performance and afford the employee a reasonable opportunity to demonstrate acceptable performance.

b. When the revision is not substantial (i.e., when the revision serves to clarify or provide greater specificity with respect to the standards which will, "to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria..." Unfortunately, agencies often interpret the phrase "objective criteria" to mean that performance standards should be largely quantifiable or numerical. However, there is nothing in law of OPM regulation to require agencies to establish quantitative criteria.

employee's basic performance requirements; or when the revision does not cause a significant change in the employee's understanding of the performance expected): the agency may revise the elements and standards without higher level review and approval and without a delay in making performance determinations. Revisions of this nature can take place at any time during the performance appraisal cycle, including the time the agency notifies the employee of unacceptable performance and affords the employee an opportunity to demonstrate acceptable performance. See previous question. See *Anthony v. Army*, 27 M.S.P.R. 271 (1985).

PART IV. VALIDITY OF PERFORMANCE STANDARDS: IMPACT ON TAKING AND DEFENDING ACTIONS

1. Q. In terms of taking and defending performance-based actions, what is the significance of the statutory requirement for objectivity as expressed in 5 U.S.C. 4302(b)(1)?

A. 5 U.S.C. 4302(b)(1) requires that agencies establish performance standards. In the past, many standards were written that emphasized quantifiable criteria over more important, but more difficult-to-measure, qualitative criteria. While standards must, to the maximum extent possible, permit appraisal on the basis of objective criteria, they should not remove management judgment from the performance appraisal process. Many systems which strive to achieve maximum objectivity

become overly mechanistic, thereby obscuring the more important aspects of job performance. Also, as discussed in Part III, question 3, standards may be supplemented and made more specific or clear during the appraisal period, as well as during an employee's opportunity to demonstrate acceptable performance.

Employees against whom performance-based actions are taken sometimes challenge the propriety of those actions on the basis that the performance standards relied upon by

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the agency were improper. The U.S. Court of Appeals for the Federal Circuit in *Wilson v. HHS*, 770 F.2d 1048 (Fed. Cir. 1985) indicated that a proper measure by which MSPB and the court should judge the objectivity of challenged standards is whether the standards are "reasonable, sufficient in the circumstances to permit accurate measurements of the employee's performance, and adequate to inform the employee of what is necessary to achieve a demonstrate acceptable performance by such means as informing the employee of specific deficiencies needing improvement and specific tasks which must be accomplished. *Wilson* at 1056 and *Baker v. DLA*, 782 F.2d 1579 (Fed. Cir. 1986). See also Part III, questions 3 and 4.

Other holdings of the court and MSPB further interpret the statutory requirement for objectivity. The court and MSPB have held that there is no requirement that quantitative criteria be

satisfactory or acceptable rating." The court said that if performance standards satisfy this test, they further Congressional purpose and protect employees against arbitrary treatment.

In *Wilson* the court further explained that Congress intended that a performance standard, to be objective, should be "sufficiently precise and specific so as to invoke a general consensus as to its meaning and content," i.e., that most people would understand what it means and what it requires. *Wilson* at 1052 and 1054. Responding to the employee's allegation that the agency could have drawn up a more precise standard, the court said that Congress did not mandate that agencies develop the most exact standard conceivable but left discretion to the agency so long as it created an "objective" and "adequate" standard "to the maximum extent feasible" (emphasis added by the court). *Wilson* at 1056, footnote 6. The court also indicated that agencies could make standards more specific and precise when they afford employees an opportunity to included in performance standards. See *Wilson* at 1052 and *Siegelman v. HUD*, 14 M.S.P.R. 326 (1983). If quantitative criteria are included, however, they should be applied in an objective fashion. See *Player v. VA*, 32 M.S.P.R. 448 (1987) and *Johnson v. VA*, 32 M.S.P.R. 443 (1987). The MSPB has held that for positions which are not susceptible to a mechanical, judgment-free rating system (e.g., positions which involve a fairly

broad range of duties which vary in complexity and significance) performance standards may allow for the subjective judgment of the employee's supervisor. See *Shuman v. Treasury*, 23 M.S.P.R. 620 (1984), *Stubblefield v. Commerce*, 28 M.S.P.R. 572 (1985), and *Seay v. HHS*, 24 M.S.P.R. 688 (1984).

Finally, the court and MSPB have held that certain types of performance standards do not meet the statutory requirements of 5 U.S.C. 4302(b)(1). These include the following three categories of standards: (1) standards which are not reasonably attainable (see *Walker v. Treasury*, 28 M.S.P.R. 227 (1985), *Blain v. VA*, 36 M.S.P.R. 322 (1988), and *Benton v. VA*, 37 M.S.P.R. 284 (1988)); (2) standards which are improperly absolute (see question 2 below); and (3) standards which do not permit an accurate measurement of an employee's level of performance and do not adequately inform the employee of the performance required to achieve acceptable performance, including generally constitutes an abuse of discretion warranting reversal of an agency's Part 432 action based on that absolute standard unless a single failure to meet the standard could result in death, injury, breach of security or great monetary loss. (In *Callaway*, the Board found

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appellant's standard for her secretarial position to be an invalid absolute standard since a single instance of

"backwards" standards discussed in question 3 below. The MSPB and the court have held that actions based on these type of standards cannot be sustained because they do not meet the requirements of 5 U.S.C. 4302(b)(1).

2. Q. Are "absolute" performance standards (i.e., ones that do not allow for error) appropriate in some cases and may performance-based actions be based on failure to meet an absolute performance standard?

A. There is nothing in law or OPM policy that prohibits agencies from establishing absolute standards. Positions such as nurse, physician, air traffic controller, and others in which public safety, health or national security is involved, may warrant absolute standards. Agencies are in the best position to define their needs in this regard. However, agencies should be aware that the MSPB has held in *Callaway v. Army*, 23 M.S.P.R. 592 (1984) that the establishment of an absolute standard discourtesy would result in unacceptable performance.) The Board further held in *Callaway* that when an absolute standard is challenged by an appellant, the burden of proving the validity of the standard lies with the agency. It will determine ". . . whether the agency abused its discretion in establishing the performance standard by considering whether, in light of the particular performance standard, job element, and position involved, the absolute performance standard

promotes the statutory purpose."

There is somewhat of a "catch-22" situation for an agency taking action under Part 432 based on a valid absolute standard in that the Board has held in *James v. VA*, 27 M.S.P.R. 124 (1985), that if an agency chooses to proceed under Part 432 based on failure to meet such a standard, it must afford the employee an opportunity to demonstrate acceptable performance under that particular standard. The Board further held in *James* that if the employee performs acceptably when afforded the opportunity to improve, the agency cannot demote or remove the employee under Part 432 for the same errors which preceded and precipitated the opportunity to improve. The Board noted, however, that the agency could have proceeded on the basis of a valid absolute standard under Part 752 without having afforded an opportunity to improve.

level describes unacceptable performance rather than informing the employee of what is necessary to achieve acceptable performance, it is an invalid "backwards" standard, according to the U.S. Court of Appeals for the Federal Circuit in *Eibel v. Navy*, 857 F.2d 1439 (Fed. Cir. 1988). For example, a standard written at the minimally satisfactory level which allows an employee to "fail to meet deadlines" or "perform work inaccurately" does not inform the employee of what he or she must do to achieve acceptable performance, but

Based on the foregoing, it is OPM's view that when basing an action on failure to meet a valid absolute standard, agencies should carefully consider proposing action under Part 752 (Adverse Actions) without affording the employee an opportunity to improve. OPM believes that if an absolute standard is valid, an agency is entitled to take a Part 752 action based on that standard so as not to risk the loss to life, property or national security which could result from affording an opportunity to improve.

3. Q. What is a "backwards" standard (held to be invalid by the Federal Circuit) and may an agency base a reduction in grade or removal action on such a standard if it clarifies the employee's performance requirements prior to or when it affords the employee an opportunity to demonstrate acceptable performance?

A. If a performance standard written at the minimally satisfactory

rather describes unacceptable performance. Employees can actually meet such standards by doing little or no work or making numerous errors. The Federal Circuit held that an agency may not take action against an employee on the basis of such an invalid standard. It reasoned that a "backwards" standard fails to meet the statutory requirements of 5 U.S.C. 4302(b)(1) because it neither provides an accurate objective measurement of an employee's level of achievement nor reasonably informs the employee of what is acceptable

performance. Moreover, if an employee's performance standard is "backwards," it may not be relied upon to take a reduction-in-grade or removal action under Part 432, even if it has been clarified or fleshed out, according to the court. "Backwards" standards should be rewritten to describe performance which is good enough to get the job done, i.e., the standard should inform the employee of the performance that must be achieved in order to perform acceptably. See Part III, question 4 on page 7 for a discussion on revising performance standards.

4. Q. May an agency take a Part 432 action based on failure to perform acceptably on one component or fewer than all components of a performance element or standard?

A. Yes. Nothing in law or OPM regulation prohibits the use of multiple components of elements or standards. In fact, a performance element or standard containing several components may be an appropriate unacceptable rating on the element as a whole and that the employee knew or should have known the significance of the component. *Shuman v. Treasury*, 23 M.S.P.R. 620 (1984); *Adkins v. HUD*, 781 F.2d 891 (Fed. Cir. 1986). In *Shuman*, the Board suggested the following ways for an agency to show that the employee knew or should have known the significance of a component: it could show ". . . that the appellant was notified (e.g., by a statement in the standard itself, in a document issued to clarify it, or in

vehicle for capturing the various dimensions of a job, each of which may be important in accomplishing the work of the organization. Thus, if an employee's unacceptable performance of one or more components of a single element or

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standard provides sufficient justification to give an unacceptable rating on the element, the agency may initiate action.

The U.S. Court of Appeals for the Federal Circuit has affirmed MSPB's case law which holds that a performance standard or element may consist of more than one component, and that an employee may be reduced in grade or removed on the basis of unacceptable performance of one or more components. The Board qualified this holding by stating that the agency must present substantial evidence that unacceptable performance of one or more components of a single element or standard warranted an

discussions with the appellant) that failure to perform acceptably with respect to each component of the standard could be the basis for demotion or removal. It also may include a showing that other circumstances have indicated the importance of the part or parts of the standard which are at issue in the case. The latter category of evidence may include the importance of the component or components in relation to the duties and responsibilities with which the critical element as a whole is

concerned; the relative importance of the component or components with respect to which the appellant has not been found to be deficient; and the consequences to the agency's mission of its employee's failure to perform acceptably with respect to the component or components at issue."

PART V. OPPORTUNITY TO DEMONSTRATE ACCEPTABLE PERFORMANCE

1. Q. What information and assistance is the agency required to give to an employee in connection with his or her opportunity to demonstrate acceptable performance?

A. OPM regulations at 5 CFR 432.104 require that an agency notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in the position. (Note: If the unacceptable performance and given an opportunity to demonstrate acceptable performance during the appraisal cycle?

A. For employees covered under PMS: Neither the law nor OPM regulations require that a formal performance appraisal or rating be given to an employee covered under the PMS when initiating an opportunity to improve. Rather, the agency is required to notify the employee of unacceptable performance in one or more critical elements per 5 CFR 432.104. However, a rating of

employee is covered under the PMRS, the agency must provide written notice of the employee's unacceptable rating to the employee per 5 CFR 432.104. See next question.) As part of the opportunity to improve the agency is also required to offer assistance to the employee in improving his or her unacceptable performance. An agency's internal regulations or performance appraisal system may place additional requirements on the agency in connection with an employee's opportunity to improve. In addition, OPM recommends that agencies consider informing the employee that unless his or her performance improves to and is sustained at an acceptable level, the employee may be reduced in grade or removed. Further, OPM suggests that the agency inform the employee that counseling is available through the Employee Assistance Program.

2. Q. Is it necessary to give an employee a formal performance appraisal and performance rating when the employee is notified of

record may be required by an agency's internal regulations or Performance Appraisal Plan, and if so, that rating may be subject to higher level review (5 CFR 430.206(c)). MSPB decisions are consistent with OPM's regulations in requiring notification (and not a formal appraisal or rating) of unacceptable performance in a critical element prior to the employee being given an opportunity to improve. See *Tobias v. HUD*, 19 M.S.P.R. 223 (1984) and *Benton v. Labor*, 25 M.S.P.R. 430 (1984).

For employees covered under the PMRS:

5 CFR 432.104 requires that the agency provide

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written notice of the employee's unacceptable rating to the employee before affording an opportunity to demonstrate acceptable performance. "Written notice of unacceptable rating" is defined in 432.103(i) as "the written notice provided to an employee of unacceptable performance in one or more critical elements," and, thus, does not require that an official performance rating be provided. In support of this policy, the requirement for a "rating of record" in this situation has been deleted from 5 CFR 430.404.

3. Q. May an agency properly initiate an opportunity to demonstrate acceptable performance while an employee is performing at level 2 (minimally satisfactory)?

A. No. Since the law (5 U.S.C. 4302(b)(6)) provides for action to be

4. Q. When affording an opportunity to demonstrate acceptable performance, may an agency require that an employee's performance improve to the "fully successful" standard in order to demonstrate acceptable performance in the position?

A. The answer depends on whether the agency's OPM-approved performance appraisal system provides for a rating level between "fully successful" and "unacceptable" on an employee's critical elements. (Note: This answer refers to levels at which

taken only against employees "who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance," an opportunity to demonstrate acceptable performance which may result in a reduction in grade or removal may not be initiated unless an employee's performance is determined to be unacceptable in one or more critical elements. However, if an employee's performance is at level 2 (minimally satisfactory), the agency must take steps to improve that performance per 5 CFR 430.204(i). If, instead of improving, the employee's performance falls to an unacceptable level, an agency may initiate an opportunity to demonstrate acceptable performance per 5 U.S.C. 4302(b)(6) by notifying the employee of the unacceptable performance. See *Colgan v. Navy*, 28 M.S.P.R. 116 (1985) and *Grant v. Transportation*, 24 M.S.P.R. 663 (1984).

ratings can be given for each individual critical element, rather than the levels at which standards are written, or the five summary rating levels required for all agencies by 5 CFR 430.204(h).) If the agency's system provides for an element rating level between "fully successful" and "unacceptable," such as in most five-level systems, acceptable performance would be level 2 (minimally satisfactory or equivalent). If the system does not provide for an element rating level between "fully successful" and "unacceptable" for each element, such as in

most three-level systems, acceptable performance would be the "fully successful" performance level. See *Byrd v. Army*, 32 M.S.P.R. 300 (1987), *Iacobonni v. Army*, 33 M.S.P.R. 663 (1987) and *Cochran v. VA*, 35 M.S.P.R. 555 (1987).

5. Q. If a PMRS employee is under a performance appraisal system with five critical element rating levels, may an agency reduce in grade or remove a PMRS employee for less than "fully successful" performance on one or more elements?

A. 5 U.S.C. 4302a(b)(6) provides that an employee covered under the PMRS whose performance is determined to be unacceptable may be notified of such performance and given an opportunity to demonstrate performance at the "fully successful" level or higher. However, 4302a(b)(6) also provides that PMRS employees may be removed or reduced in grade only if they continue to perform at the level which within one year from the beginning of the opportunity to improve.

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6. Q. May those agencies with five-level element rating systems which include written standards only at the "fully successful" level extrapolate more than one level below the written standard in order to give an employee a rating (or a determination) of unacceptable performance in a critical element?

A. Yes. OPM regulation 5 CFR

is 2 levels below the fully successful level, i.e., the unacceptable level. Therefore, if an employee covered under the PMRS improves to the minimally acceptable level of performance during an opportunity to improve, he or she could not be reduced in grade or removed under Part 432 and would continue to be given an opportunity to raise performance to the fully successful level (5 CFR 432.104). However, if the employee who is being given the continued opportunity to demonstrate fully successful performance fails to maintain at least minimally acceptable performance and instead performs at an unacceptable level once again, the agency may propose a removal or reduction-in-grade action. In addition, and in accordance with 5 CFR 432.105(a), PMRS employees who demonstrate fully successful performance when given the opportunity to improve, may be reduced in grade or removed if their performance once again becomes unacceptable. 430.204(e) allows agencies with five-level element rating systems which include written standards only at the "fully successful" level to extrapolate more than one level below the written standard in order to give an employee a rating (or a determination) of unacceptable performance in a critical element. The important thing to remember is that the agency is required to inform the employee, at the time the employee is given an opportunity to improve, of the performance requirement(s) or standard(s) which he or she must attain in order to demonstrate acceptable performance in the

position (5 CFR 432.104). This level of performance must fall between the "fully successful" and "unacceptable" levels for agencies with five-level element rating systems. See *Donaldson v. Labor*, 27 M.S.P.R. 293 (1985).

7. Q. Is there a minimum number of days or time period to which an employee is entitled to demonstrate acceptable performance under 5 CFR 432.104?

A. No. To the extent that the agency establishes a specific period of time within which the employee will be allowed an opportunity to improve, neither the law nor OPM regulations specify required time frames. Instead, OPM believes that any such time frame should be reasonable under the circumstances of the particular case (e.g., 30, 60 or 90 days). performance to an acceptable level when given an opportunity to improve, but later resumes performance at an unacceptable level.)

9. Q. Is an agency obligated to provide an additional opportunity to improve (prior to proposing a Part 432 action) to the employee who improves his or her performance to an acceptable level when afforded an opportunity to improve but then later resumes performance at an unacceptable level?

A. Generally not. If the employee resumes performance at the unacceptable level within one year from the beginning of the

8. Q. If an agency informs an employee that he or she will be given a certain length of time to demonstrate acceptable performance, e.g., 60 days, and at the end of that time the employee has not adequately demonstrated acceptable performance, may the agency extend the time frame to further evaluate the employee's performance?

A. Yes. An agency may extend the time frame of an opportunity to improve where the employee has not demonstrated acceptable performance and the agency determines that it needs to further evaluate the employee's performance. This includes situations where the agency cannot make a determination about whether the employee's performance has improved to an acceptable level. (See next question for a discussion of the situation where an employee improves his or her opportunity to improve, and the unacceptable performance is in one or more of the same critical element(s) for which he or she was prior afforded a reasonable opportunity to improve, the agency may propose action without affording an additional opportunity to improve (5 CFR 432.105(a)). Implicit in the 5 U.S.C. 4302(b)(5) and (6) requirements that an employee who is performing unacceptably be given assistance and a chance to demonstrate acceptable performance is the corresponding responsibility of the employee to maintain improved performance which results from the opportunity and to independently perform the duties and requirements of the position. That is,

although the employee is entitled to a reasonable opportunity to improve, the employee assumes a considerable obligation to take advantage of the opportunity and bears the burden to demonstrate acceptable performance and overcome serious performance deficiencies.

The Chapter 43 requirement for giving employees an opportunity to improve is intended to ensure that employees are informed of their performance deficiencies and given a fair and reasonable chance to correct them. It is not intended to allow employees to

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improve temporarily and later resume unacceptable performance. These notions are embodied in the language of 5 U.S.C. 4302(b)(6) which states, "Under regulations which the Office of Personnel Management performance which occurred within one year prior to the date of the notice of proposed action.

Other options available to an agency when an employee performs at an acceptable level while being afforded an opportunity, but later resumes unacceptable performance include: (1) affording another opportunity to demonstrate acceptable performance prior to deciding whether to propose a reduction-in-grade or removal action; (2) reassigning the employee; and (3) proposing action under Part 752 if the agency believes it can support its action by a preponderance of the evidence (see *Fairall v. VA*, 33 M.S.P.R. 33 (1987)).

shall prescribe, each performance appraisal system shall provide for reassigning, reducing in grade or removing employees who continue (emphasis added) to have unacceptable performance but only after an opportunity to demonstrate acceptable performance."

In exercising their authority to take action based on unacceptable performance which resumes after the employee's opportunity to improve, agencies should consider the extent to which the employee's performance requirements or standards have remained the same. In addition, agencies should be mindful of the statutory requirement to prove by substantial evidence that the employee's performance is unacceptable in the critical element(s) at issue, and the statutory restriction in 5 U.S.C. 4303(c)(2)(A) to base action only on those instances of unacceptable

10. Q. Are agencies required to provide assistance to employees to help them improve their performance in connection with a reasonable opportunity to demonstrate acceptable performance? If so, what are some of the various means of providing assistance?

A. Agency assistance must be offered to employees whose performance becomes unacceptable and who are provided with an opportunity to improve (5 U.S.C. 4302(b)(5) and 5 CFR 432.104)). However, agencies have great latitude in choosing the method or methods to assist employees and there is no single type or

form of assistance that must be offered. Agencies can use a wide range of formal and/or informal procedures to attempt to assist employees in improving unacceptable performance. The following methods are some of the most commonly utilized:

(1) Supervisory Assistance/Counseling: This may include informal discussions or meetings on an as needed or regular basis to ensure that the employee understands work objectives, is aware of progress or lack of it in meeting those objectives, and is offered suggestions on how to improve performance; written memoranda critiquing the employee's work which cite errors and deficiencies, along with specific ways to correct them; or samples of acceptable work for the employee to follow as a model or guide.

assist employees, but agencies may find one or more of the above or other approaches to be valuable in a given situation. An agency, of course, cannot ensure that the assistance offered to the employee will result in improved performance. Careful records should be kept of any such assistance offered and the results achieved.

If the employee indicates, or the supervisor strongly suspects, that the employee's

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performance problems are the result of alcoholism, drug dependency, family pressures or other external influences, the employee should be referred to the agency's employee assistance

(2) Training: Types of training that may be considered as a means of improving skills, knowledges, and abilities may include formal training, on-the-job training, mentoring, or other forms of assistance by coworkers or senior personnel. (Note: There is no requirement in law or regulation that formal training be provided. See *Macijauskas v. Army*, 34 M.S.P.R. 564 (1987).)

(3) Performance Improvement Plans (PIPs): Some agencies have procedures for providing formal, written Performance Improvement Plans (PIPs) to employees. PIPs provide a structured means of identifying the areas of unacceptable performance and laying out a plan for improving the employee's performance.

OPM recognizes that there is no one "correct" way to attempt to

program for counseling and assistance as appropriate. See FPM chapter 792 for additional details.

11. Q. What course of action does OPM recommend when an employee is sick or otherwise not available during a substantial portion of the time afforded to demonstrate acceptable performance?

A. If the employee is sick during a significant portion of the opportunity to demonstrate acceptable performance, OPM recommends that the agency allow the employee additional time when he or she returns to compensate for the time on leave so that a fair and representative

determination of performance can be made. The MSPB has indicated that if an employee is granted sick leave during the opportunity to improve, he or she cannot be held accountable for work not completed during the period of excused absence. In *Even v. Interior*, 25 M.S.P.R. 190 (1984), a case in which the appellant was present only 44 percent of the time during the improvement period, the Board said that "the agency's speculation that the appellant would not have performed satisfactorily even if she had been at work, and that the agency was justified in evaluating her performance on a pro rata basis, is without merit and cannot excuse the agency's statutory obligation to accord appellant a reasonable opportunity period." (Note: 5 CFR Part 752 is available as an authority for taking action based on an employee's inability to employee to have a representative during the reply to a proposed action.)

MSPB case law agrees with OPM's position that employees do not have the right to a representative during counseling on performance problems. See *Lim v. Agriculture*, 10 M.S.P.R. 129 (1982) and *Munisteri v. Army*, 14 M.S.P.R. 317 (1983). In addition, the Federal Labor Relations Authority has ruled that 5 U.S.C. 7114(a)(2)(B) does not give a right to representation at meetings regarding performance because they are not investigations and are not usually adversarial in nature. *IRS Detroit, MI and NTEU*, 5 FLRA 421, and *IRS and NTEU Chapter 22*, 8 FLRA 324.

perform when an employee's medical condition cannot permit the agency to provide the employee with an opportunity to demonstrate acceptable performance.)

12. Q. Does the employee have a right under 5 U.S.C. 7114(a)(2)(B) -- the so-called Weingarten Provision -- to have a representative present when the agency counsels the employee about his or her unacceptable performance?

A. Since meetings to discuss performance problems are not disciplinary or investigatory in nature, employees do not have the right to a representative during counseling sessions on performance problems before or during the opportunity to demonstrate acceptable performance. (Note, however, that 5 U.S.C. 4303(b)(1)(B) does allow an

PART VI. TAKING ACTION BASED ON PERFORMANCE DURING A DETAIL

1. Q. Can an agency reduce in grade or remove an employee under Part 432 based solely or partially on unacceptable performance while in a detailed position?

A. An agency may base a Part 432 action partially on an employee's unacceptable performance while in a detailed position, but may not base the action solely on performance during a detail. Under 5 U.S.C. 4303(b) actions must be based on the critical element(s) of the employee's position. An employee is still assigned to his position of record while on detail (FPM chapter 300, subchapter 8, section 8-1).

However, 5 CFR 430.205(d) provides that when an employee is detailed within his or her own agency for a period expected to last 120 days or longer, the agency is to provide the employee with written critical elements and standards, rate the employee at the end of the detail, and consider the appraisal in deriving the employee's next official rating. Thus, if an agency takes a Part 432 action against an employee who has been on detail, the agency may include in the charges instances of unacceptable performance during the detail as long as its final action is based primarily on unacceptable performance in the employee's position of record and the employee has been given an opportunity to demonstrate acceptable performance in his or her the situation: (1) Return the employee to the original position. (If the employee had been notified earlier of unacceptable performance in the original position, the agency may either proceed with initiating the required opportunity to demonstrate acceptable performance in the original position or, if the opportunity to improve was afforded prior to the detail, the agency may be able to proceed with its action if the employee resumes unacceptable performance.) (2) Officially reassign the employee. (3) Initiate action under 5 CFR Part 752 if the burden of proof of that part can be met. This latter course of action may be particularly appropriate if the employee has been on a long-term detail and a return to the position of record would serve little purpose. (Note: See MSPB's decision in *Shustyk v. USPS*, 32 M.S.P.R. 611 (1987), which involved a Part 752 action based partially on unacceptable performance during a detail.)

position of record.

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The MPSB addressed the issue of taking action based on performance while on detail in *Smith v. Navy*, 30, M.S.P.R. 253 (1986). Appellant's removal in *Smith* was based solely on unacceptable performance while on an extended detail. The MSPB reversed the removal action because appellant was not afforded an opportunity to demonstrate acceptable performance in her position of record.

When an employee is performing unacceptably while on detail, the agency may wish to consider the following suggestions for dealing with

PART VII. NOTICE OF PROPOSED REDUCTION IN GRADE OR REMOVAL

1. Q. What information should the 30 days' advance written notice of proposed reduction in grade or removal contain?

A. The written notice of proposed reduction in grade or removal should contain the following information:

the action proposed;

the specific instances of unacceptable performance on which the proposed action is based;

the critical elements involved in each instances;

the employee's right to be represented by an

attorney or other representative;

and the employee's right to answer both orally and in writing and the time allowed for the answer.

2. Q. May an agency propose action to reduce in grade or remove an employee under Part 432 based in whole or in part on instances of unacceptable performance which occurred prior to the employee's opportunity to demonstrate acceptable performance?

A. An agency may not rely solely on unacceptable performance which occurs prior to the employee's opportunity to improve as the basis for proposing a reduction in grade or removal action under Part 432. To do so would render meaningless an employee's opportunity to such instances as support for its overall determination that the employee's performance is unacceptable. The MSPB has held that it is not necessary for the agency to prove by substantial evidence that the appellant's performance prior to the opportunity to improve was unacceptable in order to support the agency's final determination that the employee's performance is unacceptable. See *Wilson v. Navy*, 24 M.S.P.R. 583 (1984).

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3. Q. May an agency propose action to reduce in grade or remove an employee under Part 432 based in whole or in part on instances of unacceptable performance which occur following the employee's opportunity to demonstrate acceptable performance?

improve. However, in addition to relying on instances of unacceptable performance which occur during or following an opportunity to demonstrate acceptable performance, the agency may rely on instances of unacceptable performance which occurred prior to the beginning of the opportunity to improve, and within one year prior to the notice of proposed action, as support for its overall determination that the employee's performance is unacceptable (5 U.S.C. 4303(c)(2)(A)). See *Martin v. FAA*, 795 F.2d 995 (Fed. Cir. 1986), and *NRC and NTEU*, 31 FLRA 36. Performance which is unacceptable prior to the opportunity to demonstrate acceptable performance serves primarily as an impetus for initiating the employee opportunity and need not be listed in the advance notice of proposed action unless the agency wishes to rely on

A. An agency may propose action under Part 432 based solely or partially on instances of unacceptable performance which occur following the employee's opportunity to improve if: the employee's performance following the opportunity to improve is unacceptable in one or more of the critical elements which formed the basis of the opportunity to improve, the unacceptable performance occurred within one year from the beginning of the opportunity to improve, and the instances of unacceptable performance relied upon by the agency in making its determination of unacceptable performance occurred within the one year period ending on the date of the advance notice. If the employee performs acceptably in the critical element(s) at issue for a year or more from the beginning of his or her opportunity to improve, and the employee's performance again becomes unacceptable, the agency is required to

provide the employee with an additional opportunity to improve before deciding whether to propose action under Part 432 (5 CFR 432.105(a)).

4. Q. To what extent may an agency base its proposed action on instances of unacceptable performance which occurred prior to the date of issuance of the notice of proposed action?

A. In taking a Part 432 action, the agency may not base the action on any instances of unacceptable performance which occurred more than a year before the date of the notice of proposed action (5 U.S.C. 4303(c)(2)(A)). See *Martin v. FAA*, 795 F.2d 995 (Fed. Cir. 1986).

(Note: There is no such limitation on actions taken under Part 752, regardless of whether the basis for the charges is deficient performance, misconduct, or a combination of both.)

1. Q. If at any time during the notice period the agency determines that the charges in the proposal notice are not sufficiently specific, may it issue a new proposal notice and begin the 30 day period again?

A. Yes, as long as the agency gives the employee a new chance for an oral/written reply on the more specific charges. Also, the charges should continue to relate only to those performance elements which the agency has determined to be unacceptable and on which the employee has had an opportunity to demonstrate acceptable performance.

2. Q. May an agency extend the notice period beyond the 30-day period provided in 5 U.S.C. 4303(b)(1)(A)? If so,

5. Q. When proposing an action, is it better for an agency to concentrate on one critical element or list deficiencies in all critical elements if they have occurred?

A. Although action may be taken for failure in only one critical element, OPM believes that it is prudent to base the action on all deficiencies which result in unacceptable performance. This would become especially important in supporting a performance-based action when, on appeal, the MSPB, an arbitrator, or a court determines that the agency has not supported its charges on a particular critical element by substantial evidence.

PART VIII. AGENCY ACTIONS AND COMMUNICATIONS PRIOR TO A FINAL DECISION

under what circumstances?

A. Yes. In addition to the 30 day period provided in 5 U.S.C. 4303(b)(1)(A), 5 U.S.C. 4303(b)(2) provides for an additional 30 days under regulations prescribed by the head of the agency. If the agency needs a further extension beyond the 60 days allowed by law, 5 CFR 432.105(a)(4)(i) provides that an agency may extend the notice period for the following reasons: (1) to obtain and/or evaluate medical information when the employee has raised a medical issue in the answer to a proposed reduction in grade or removal; (2) to arrange for the employee's travel to make an oral reply to an appropriate agency official, or the travel of an agency official to hear the employee's oral reply; (3) to consider the employee's answer if an extension to the period for an answer has been granted

(e.g., because of the employee's illness or incapacitation); (4) to consider

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reasonable accommodation of a handicapping condition; (5) if agency procedures so require, to consider positions to which the employee might be reassigned or reduced in grade; and (6) to comply with a stay ordered by a member of the Merit Systems Protection Board under 5 U.S.C. 1208(b). If the agency needs an extension of the notice period for another reason, it may request prior approval for such an extension from the Chief, Employee Relations Division, Office of Employee and Labor Relations, 1900 E Street, N.W., Washington, D.C. 20415. However, in most cases agencies do not need more time than the original 30 day advance notice good management practice for the deciding official to have the broadest and most detailed information possible prior to making a final decision. The MSPB addressed this issue in *Andersen v. Department of State*, 27 M.S.P.R. 344 (1985). Citing *Depte v. United States*, 715 F.2d 1481 (Fed. Cir. 1983), the Board found that ex parte communications between the proposing and deciding officials or any other officials or persons during the decision-making process are proper unless the appellant can show that they were prohibited by statute, OPM regulation, or agency internal regulation. The Board stated that it will not place nonstatutory or nonregulatory encumbrances on the agency decision-making process when the information shared is advisory, and of an investigative, nonadversarial nature. When an employee alleges that new information which bears on the agency's decision, and to which he

period and the additional 30 days provided by the agency's internal regulations, since the decision need not be made until after the expiration of the notice period. Furthermore, while a decision is required within 30 days of the expiration of the notice period, if necessary, it need not be made effective until later.

3. Q. During the course of deciding whether to take a performance-based action, what types of communication are allowable between the proposing official and other agency officials, including the deciding official?

A. There is nothing in statute or OPM regulation to prevent communication between and among the proposing official, the deciding official, or any other relevant agency officials. Furthermore, it is or she had no access, was shared among officials during the decision-making process, the Board will apply a harmful error analysis. The appellant has the burden of showing that new information was introduced which he or she did not have the benefit of reviewing and responding to, that the deciding official was influenced by the new information in his or her decision-making process, and that the procedural error of considering the new information likely had a harmful effect upon the outcome before the agency. Citing *Sullivan v. Navy*, 720 F.2d 1266 (Fed. Cir. 1983), the Board also noted that the appellant may show that that the additional information was motivated by animus, reprisal, or some other improper motive, and thus also establish that the agency's action was based on a prohibited personnel practice. The Board indicated that its concern in addressing an appellant's allegation is whether the deciding official

predicated the ultimate decision on the information contained in the advance written notice and not on the additional information.

4. Q. What should the agency do if the employee alleges in an oral or written reply to a proposed action that a handicapping condition is causing the unacceptable performance?

A. The agency may want to request the employee to supply medical documentation concerning the nature of the handicapping condition and ask the employee to articulate an accommodation for the handicap. Medical documentation may help in determining whether a particular accommodation is feasible or would constitute an undue hardship. If the employee is a "qualified handicapped employee" (i.e., an employee who, *M.S.P.R.* 565 (1984), and *McCall v.*

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USPS, 839 F.2d 644 (Fed. Cir. 1988). If the employee has the requisite years of service under the Civil Service Retirement System or the Federal Employees Retirement System, the agency should provide information concerning application for disability retirement. Agencies should note, however, that the employee's application for disability retirement should not preclude or delay the agency's action (5 CFR 432.105(a)(4)(iv)).

5 CFR Part 339 contains considerable guidance which addresses medical issues relating to employees with performance or conduct problems. Agencies should also note that a decision by the MSPB, *Noe v. USPS*, 28 M.S.P.R. 86 (1985), emphasizes the requirement that agencies consider any medical or handicapping condition (in

with or without reasonable accommodation, can perform the essential duties of the position without endangering the health or safety of the employee or others) and the requested accommodation will not impose an undue hardship on the agency, the agency afford the accommodation if possible. See 5 CFR 432.105(a)(4)(iv) and 29 CFR 1613.704. When the employee requests an accommodation which would require that he or she be provided with additional time to demonstrate acceptable performance following treatment and/or rehabilitation for his or her handicapping condition, the agency may want to consider extending the notice period of the action, putting a decision to take action in abeyance, or some form of "last-chance" agreement. See *Rhodes v. GSA*, 27 M.S.P.R. 366 (1985), *Ferby v. USPS*, 26 M.S.P.R. 451 (1985), *Walton v. Navy*, 24 this case, alcoholism) raised in the employee's answer to a proposed action. The Board's decisions in *Ziembra v. Navy*, 7 M.S.P.R. 28 (1981), *Nealen v. Treasury*, 24 M.S.P.R. 578 (1984), and *Savage v. Navy*, 36 M.S.P.R. 148 (1988) are also instructive on the issue of reasonable accommodation.

PART IX. AGENCY FINAL DECISION

1. Q. Must the agency wait until the advance notice period has expired to issue or effect its decision?

A. The agency may issue its decision to the employee prior to the end of the notice period. However, in accordance with 5 U.S.C. 4303(c)(1), it must not effect its decision until after the notice period has expired. See *McCallon v. Air Force*, 36 M.S.P.R. 616 (1988).

2. Q. What is the agency's obligation if the employee's performance during the advance notice period (following the opportunity to demonstrate acceptable performance) improves to an acceptable level?

A. There is no legal or regulatory requirement to consider an employee's improved performance after the notice of proposed action has been issued. The MSPB has held that when an agency takes a Part 432 action, it need not consider the employee's performance during the 30-day advance notice period. See *Sandland v. GSA*, 23 M.S.P.R. 583 (1984). (Note: In the final decision letter, agencies should not cite any instances of unacceptable performance which occurred during the 30-day notice period, unless the employee has had a chance to reply to them.)
found sustained is sufficient." *Coltrane v. Army*, 25 M.S.P.R. 397 (1984). Where not all of the instances of unacceptable performance are accepted by the deciding official, the decision notice should specify which instances are being relied on and which are not.

4. Q. If the agency official who heard the employee's oral reply is reassigned or otherwise unavailable at the time the decision is to be made, does the employee have a right to a second oral reply to the deciding official?

A. No. The agency official who hears the oral reply must either be the deciding official or an agency official empowered to recommend a decision to the deciding official. Therefore, if the agency official who heard the reply is empowered to recommend a decision and does, so, the employee is not entitled to a second oral

3. Q. Must the written decision of a reduction in grade or removal specify the instances of unacceptable performance upon which the action is based?

A. 5 U.S.C. 4303(b)(1)(D) provides that the written decision specify the instances of unacceptable performance upon which the action is based. The MSPB, however, has stated that "... where the charges and instances of unacceptable performance are stated with sufficient specificity in the proposal notice, it is not necessary to repeat them in the decision notice in order to satisfy the requirement that the specific instances of unacceptable performance be stated. A direct reference to the charges and instances of unacceptable performance

reply to the deciding official. MSPB case law is consistent with this interpretation. See *Peterson v. HHS*, 25 M.S.P.R. 572 (1985).

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5. Q. Is it necessary for the agency to choose a deciding official who has personal knowledge of the charges?

A. OPM has long advised agencies that deciding officials are not required to have personal knowledge of the employee's work or the charges upon which the action is based in order to review the proposed action and make a decision. Consistent with this view, the Board has ruled that "nothing prohibits an agency official from taking action against an employee even though the official lacks personal knowledge of the charges." *Benton v. Army*, 25 M.S.P.R. 430 (1984).

6. Q. Must the decision letter include the deciding official's response to all the contentions raised by the employee in the oral/written reply?

A. No. While it is necessary for the agency to consider all of the factors raised in the oral/written reply, it is not required for the agency to address them formally in its decision letter. However, OPM suggests that agencies carefully consider the employee's reply in making their final decision and include a statement to the effect that the deciding official considered the factors raised by the employee.

PART X. CONTENTS OF AGENCY FILE

1. Q. What should an agency keep in the

These records should be retained for four years after the action is effected, unless the action is appealed. If the action is appealed, the file should be maintained for four years after the case is closed.

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FOOTNOTES

Footnote 1The citations to 5 U.S.C. Chapter 43 and 5 CFR Parts 430 and 432 used throughout this issuance refer to statutes and regulations governing employees occupying General Schedule and Wage Grade positions covered by the Performance Management System (PMS). Unless otherwise noted in the text, the procedures and requirements are the same for supervisors and management officials occupying positions at grade levels GS-13 through GS-15 covered by the Performance Management and Recognition System (PMRS). This FPM bulletin does not

way of agency records for an action taken for unacceptable performance? How long should such records be maintained?

A. The agency, under 5 CFR 432.107, must maintain copies of the following documents: notice of proposed action; employee's written reply and/or a summary of the employee's oral reply; decision notice; and any supporting material including documentation regarded the opportunity afforded the employee to demonstrate acceptable performance.

OPM recommends that the agency also maintain the following: proof of OPM-approved performance appraisal system; and copy of performance elements and standards, including the date communicated. cover procedures for actions with respect to SES appointees.

Footnote 2Arbitrators are bound by the same substantive law as the Merit Systems Protection Board in adjudicating Part 432 actions. See *Cornelius v. Nutt*, 472 U.S. 648, 660-61 (1985), *Horner v. Bell and AFGE*, 825 F.2d 382 (Fed. Cir. 1987), and *Rogers v. DODS*, 814 F.2d 1549 (1988).

Footnote 3If the agency's performance appraisal system requires that a rating be given to an employee at the time an opportunity to improve is afforded, then the agency should be aware of the 5 CFR 430.205(b) requirement to allow the employee to perform for the agency's minimum appraisal period before giving that rating.

*** End of Document ***

