
FEDERAL HR SERVICES
Promoting HR Training, Learning, and Professional Development

Maximizing Accountability in Performance

Presented By
Barbara I. Haga

March 29, 2022

Federal Managers Association
Management Training Seminar
Alexandria, VA

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 1

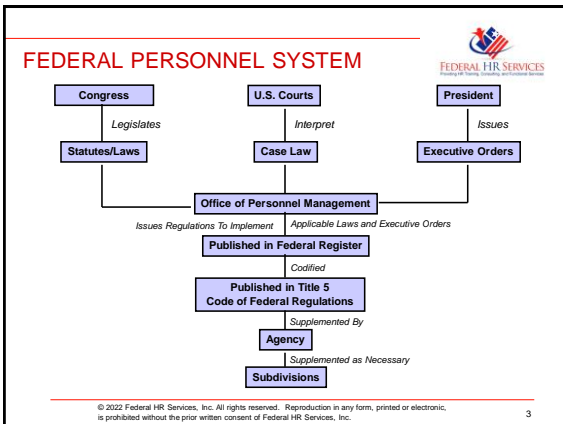
1


FEDERAL HR SERVICES
Promoting HR Training, Learning, and Professional Development

LEGAL AND REGULATORY BACKGROUND

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 2

2



3

Performance References



- 5 USC Chapter 43
- 5 CFR 430 and 432 (also 531, 532, 351)
- Agency Appraisal Plan
- Union agreement
- MSPB Case Law
- EO 13839 of May 25, 2018
- EO 14003 of January 22, 2021



© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 4

4

Legislative History



- Civil Service Reform Act of 1978
 - Introduced Critical Elements and Performance Standards for the first time
 - Employees to be advised in advance of the key areas of performance and what acceptable performance looks like in those key areas
 - Why did Congress deem it necessary?



© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 5

5


Pre-Reform Act Appraisals



© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 6


6

Legislative History



▶ Civil Service Reform Act of 1978 also:


- Established procedures for dealing with poor performance
- Linked appraisal to retention, pay, rewards, promotions
- Implemented Merit Pay for managers and supervisors at GS-13 to GS-15



© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

7

EO 13839 of May 25, 2018




▶ Requirements related to unacceptable performance:

- Minimize burden on supervisors - Sec. 2.(a)
- Limit demonstration periods to 30 days in most cases
- Eliminate pre-demonstration period requirements - Sec. 4.(b)(ii)
- Eliminate any requirement to use 432 procedures - Sec. 4.(b)(ii) and use 752 (conduct) when appropriate - Sec. 2.(h)

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

8

OPM Revised Regulations



▶ Issued October 16 effective Nov. 16, 2020 - 85 FR 65940

- Nature of assistance given during PIP/DP is in the sole and exclusive discretion of the agency
- Demonstration period shall be commensurate with the duties and responsibilities of the employee's position
- No additional performance assistance period or similar informal period shall be provided prior to or in addition to the opportunity period provided under this section

5 CFR 432.104

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

9

Biden Order

- ▶ Cancelled the three Trump EO's and clarification memo issued Oct. 11, 2019 after injunction was lifted - Sec 3a, b, c, d
- ▶ Required heads of agencies (including OPM) to review and identify actions related to or arising from those orders and to revise policies and bargain with unions on things not consistent with Biden EO
- ▶ OPM issued revised regulations to comply with this order on Jan 4, 2022 (87 FR 200)

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

10

UNDERSTANDING THE SYSTEM

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

11

Definition - 5 CFR 430.203

- ▶ Critical element - component of a position of such importance that failure in the element would mean overall performance would be unacceptable
- ▶ Non-critical element - dimension of individual, team, or organizational performance that is used in assigning the summary rating (optional)
- ▶ Additional performance element - dimension or aspect of performance exclusive of critical or non-critical element - could serve as basis for award (optional)

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

12

Definitions II




▶ Performance Standard -- management-approved expression of the performance threshold(s), requirement(s), or expectation(s) that must be met to be appraised at a particular level of performance

- May include, but is not limited to, quality, quantity, timeliness, and manner of performance

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 13

13

Non-Critical Element



▶ May be used to assess:

- Group performance, or
- Performance that is not important enough to result in an unacceptable performance action


▶ Non-critical element ratings

- Factor into summary rating but may not result in an Unacceptable rating 5 CFR 430.208(b)(2)

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 14

14

Establishing Performance Plans



▶ Performance plans must be provided to employees at beginning of cycle – normally within 30 days


▶ Most agency systems have requirements for plans for details of more than 120 days or matrix assignments

▶ Signatures certify that step was completed – annual requirement

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 15

15

Employee Participation




- ▶ Employees to provide input in establishing critical elements and performance standards
- ▶ Employee to be similarly involved in changes to plan – and typically have minimum 90-day period to perform under revised plan before rating
- ▶ Final decision about content of plan rests with management

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

16

16

Grievances and Appeals




- ▶ Determination of critical elements and standards is not grievable under administrative grievance procedure – narrow opening for bargaining unit if plan “illegal”
- ▶ Elements and standards can be reviewed in conjunction with a grievable/appealable action
- ▶ May ask for reconsideration of the rating of record, ratings on individual critical elements, and/or any recorded comments under applicable grievance procedures

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.


17

17

Level 1 and 2 Performance




- ▶ 5 CFR 432.103(a) - *Acceptable performance* means performance at a level of performance above “unacceptable” in critical element(s) at issue
- ▶ 432 procedures apply to reduction in grade and removal of employees based solely on performance at the unacceptable level on critical element



© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

18


18


FEDERAL HR SERVICES
Providing HR Training, Consulting, and Technical Services

SETTING PERFORMANCE PLANS


© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 19

19


FEDERAL HR SERVICES
Providing HR Training, Consulting, and Technical Services


Critical Element

- ▶ Work assignment or responsibility of such importance that unacceptable performance in that element would result in a determination that the overall performance is unacceptable
- ▶ Used to measure individual performance
 - Significantly influenced by employee's work effort
 - Within employee's control
- ▶ Not appropriate to assess group's performance -- except team leader, supervisor, or manager




© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 20

20


FEDERAL HR SERVICES
Providing HR Training, Consulting, and Technical Services

Defining Critical Elements


- ▶ "Taking off" and "Landing" functions
- ▶ Express in short, precise phrases:
 - Provides advice and assistance to . . .
 - Serves as the technical reviewer for . . .
 - Maintains equipment . . .
 - Performs inspections for . . .
 - Contracts for services and products . . .
- ▶ Element name is just a label – doesn't need to be lengthy



© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 21

21

Standards




© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 22

- ▶ Standard is the “yardstick” by which performance on the element is measured
- ▶ All that the measures that you need to assess the level of performance need to be in the standard
- ▶ May include any reasonable measures

22

Standards May Measure




© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 23

- ▶ Quality
 - How well the work is performed and accuracy/effectiveness of final product
 - Could include error rates, customer satisfaction rates, etc.
- ▶ Quantity
 - How much work is expected to be produced
 - Numbers of products or services expected
- ▶ Timeliness
 - How quickly, when, or by what deadline work is produced
- ▶ Cost Effectiveness
 - Dollar savings or cost control
 - Covers money, personnel, and/or time

23

Standards May Also Measure




© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 24

- ▶ Manner of Performance - how the work is performed
 - Thoroughly
 - Completely
 - Properly
 - Effectively
- ▶ Must be a reasonable measure for the type of work performed in the position

24

Standards Guidance




- ▶ Standards should describe observable results - not knowledge that someone may possess or his/her personal characteristics
- ▶ Use objective standards where there is quantifiable performance - specific numbers, percentages, dates, timeframes, etc. that can be tracked
- ▶ Use subjective criteria to measure performance not subject to judgment-free ratings
- ▶ Mixing objective & subjective standards is best

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

25

25

Measures with Numbers



- ▶ Are they good measures?
 - Percentage of accurate outputs (e.g., accurate 90% of the time)
 - Number of allowable errors (e.g., 3-8% errors per quarter)
 - Timeframe of performance (e.g., responds within 1-8 hours of request)

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

26

26

Legal Requirement - Performance Standards





- ▶ Under 5 USC 4302(b)(1) systems must provide for
 - standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria related to the job in question for each employee or position under the system

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

27


27

Performance Plan Content 


- ▶ No requirement that performance standards contain quantitative criteria
 - Must be sufficiently precise and specific as to invoke a general consensus as to their meaning and content
Wilson v. HHS, 770 F.2d. 1048 (Fed. Cir. 1985)
- ▶ Professional/research positions are not susceptible to a mechanical, judgment-free rating system
 - Performance standards may allow for subjective judgment by supervisor -- and peer review for scientist
Siegelman v. HUD, 83 FMSR 7004 and Stubblefield v. Commerce, 85 FMSR 5364

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 28

28


Standards with Numbers 

- ▶ Financial Analyst -- Completes submissions by the 30th of every month
- ▶ Secretary -- Typed documents contain an average of no more than 3 errors
- ▶ HR Assistant -- All appointment and pay actions are processed by the payroll deadline each pay period
- ▶ Program Analyst -- reports and official documents are properly written and technically accurate 95% of the time




© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 29

29

Standards with Numbers II 


- ▶ Math can be a problem
 - Impossibly low error rates cannot be upheld
Walker v. Treasury, 85 FMSR 5296
 - GS-4 Accounting Clerk required to meet 99.5% accuracy – in pulling files
- ▶ Percentages require counting all instances or sampling



© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 30

30

When is 99.9% Not Good Enough?





- ▶ Hospitals would give twelve newborns to the wrong parents every day
- ▶ Two planes arriving at Chicago O'Hare Airport would land unsafely every day
- ▶ 315 entries in Webster's Dictionary would be misspelled
- ▶ 20,000 incorrect drug prescriptions would be written this year

OOPS!

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 31

31

Questions





- ▶ What types of work do you (or your unit) produce that are easy to count?
- ▶ Are the number of things produced truly reflective of the individual's level of performance?


© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 32

32

Last Thought on Numbers



- ▶ Just because you can measure it doesn't necessarily mean it should be in a standard
- Are you measuring what's important or what's easy?




© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 33

33

Results-Oriented Measures

- ▶ Measures should focus on what can be seen, touched, heard, etc.
- ▶ Concentrate on what comes out of the process, not what happens in it --
 - Like a faucet -- focus on what is coming out!



© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

34

Fully Successful

- ▶ Don't write too low!
- ▶ Fully Successful level should encompass all the expected work accomplishments envisioned for the position – on time, following policy, complete, thorough, properly communicated, etc. – with the employee performing within established level of supervisory controls
- ▶ Ex. – turning XX things in on time isn't enough – need to be accurate, complete, etc.

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.


35

DOCUMENTING PERFORMANCE


© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

36

Documentation



- ▶ Documentation explains how the employee met the level assigned
- ▶ Documentation should be limited to the elements and standards – if not in plan, it shouldn't be used





© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

37

37

Documentation II


- ▶ Supervisor “memory aids” are generally not covered by agency record keeping requirements or the Privacy Act – however,
- ▶ In most cases there is no reason to keep performance documentation secret – more feedback and more timely feedback is best

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.


38

38

Good Documentation



- ▶ Contains specific examples & outcomes
 - In narrative you can address quantity/numbers even if none in standards
 - You rewrote the department's standard operating procedure which was released without any major and two minor changes three weeks ahead of deadline.
 - You gave a 4-hour training session to the staff in Feb 2022. Attendees evaluated the training at 9 on a scale of 1 to 10 and commented that handouts were particularly helpful for reviewing maintenance requirements for the equipment.




© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.


39

39

What Does Belong? Impact



- ▶ Achievements and Results
 - Saved \$50K on purchase of equipment by conducting research on capabilities of a different manufacturer THEREBY ensuring enough funds were available to cover extended maintenance agreement
 - Improved processing time by 15% on processing document update requests by setting up process to submit requests by e-mail THEREBY ensuring that up-to-date information is available and improving satisfaction of staff and other users




© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

40

40

Effective Documentation




- ▶ If standards include numerical quantity and timeliness measures, the narrative should also be written that way
 - Standard. Actions to fill positions are completed within 100 days on average, with no more than five instances of overages up to additional 25 days, and none over 25 days.
 - Documentation. *Fully Successful* - Your average time frame for filling positions for the rating cycle was 98 days. There were three instances of overages (11,14, and 20 days).

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

41

41

Appraisal "Issues"



- ▶ Narrative doesn't clearly differentiate between lower and Outstanding levels
 - Same words such as "compliance with guidelines," "thorough," and "complete" show up at both levels
 - Outstanding narrative should include examples identifying how the employee anticipates, defuses, demonstrates initiative, maximizes use of time and resources, etc.
 - What did the employee do in addition to what is described at next lower level to merit Outstanding?

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

42

42

Appraisal Issues II

FEDERAL HR SERVICES
Providing HR Training, Coaching, and Consulting Services

- ▶ Identified as Outstanding (GS-13 Attorney)
 - (5 or 3?) “You consistently did your work in a timely fashion, using technology appropriately, and thinking of alternative solutions to problems. You also worked independently. I note that most of your day is spent commenting on drafts, e-mailing the writers, and reviewing revised drafts...”

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

43

43

Things to Watch For

FEDERAL HR SERVICES
Providing HR Training, Coaching, and Consulting Services

- ▶ Focus on result rather than the steps:
 - Rather than focus on attending meetings, write about what was achieved by employee's participation
 - Rather than focus on preparing documents and briefings, what having them issued or delivered meant
 - Rather than focus on completing special projects, focus on the regularly assigned work of the position

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.


44

44

Preparing the Assessment

FEDERAL HR SERVICES
Providing HR Training, Coaching, and Consulting Services

- ▶ Be careful with feedback from others –
 - Need to make an independent determination of whether the work was correct or not
 - If using feedback, ensure that the person who gave it is willing to stand behind it
 - Get it signed and dated!




© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

45

45

Anticipate Employee Reaction

FEDERAL HR SERVICES
Providing HR Training, Consulting, and Technical Services



- ▶ Be prepared for strong reactions
 - Clearly document the reasons for ratings
 - Have examples ready
 - Avoid adjectives that denote negative traits - sloppy, careless, argumentative
 - Focus on the work
 - ↳ The report contained numerous typographical errors
 - ↳ Footnotes were not properly numbered
 - ↳ You raised your voice and asked if your colleague had any understanding of the depth of the problem

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

46

46

MEASURING PERFORMANCE NOT CONDUCT

FEDERAL HR SERVICES
Providing HR Training, Consulting, and Technical Services

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.


47

47

Measures Not Needed

FEDERAL HR SERVICES
Providing HR Training, Consulting, and Technical Services

- ▶ Measures on conduct issues do not need to be included
- ▶ Set conduct standards separately
- ▶ Disciplinary systems can be used to deal with any problems in those areas



© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

48

48

Performance v. Conduct

Performance
Duties
Responsibilities
Requirements of the Position

Conduct
Attendance
Use of Leave
Behavior
Security
Misuse of authority
Work Rules

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

49

Performance v. Conduct II

- ▶ Keep conduct out of the appraisal
 - If discipline was warranted, take it
 - If it corrected the issue, it is done
- ▶ Following work rules isn't an appraisal issue
 - Things that shouldn't be in an appraisal:
 - ↳ Following leave procedures
 - ↳ Properly completing time cards
 - ↳ Following guidance on use of computers, travel credit cards, etc.

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.


50

Performance v. Conduct III

- ▶ More things not to include in an appraisal:
 - Consideration of work not performed while the person was on leave - or on official time
 - Showing up for meetings/attending required training
 - Speculation about personal problems outside of work impacting performance
 - Working "off the books" overtime
 - Collateral duty activities - ex. CFC

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.


51


FEDERAL HR SERVICES
Helping You Thrive, Today and Tomorrow

MSPB DECISIONS ON PERFORMANCE MEASURES

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 52

52



FEDERAL HR SERVICES
Helping You Thrive, Today and Tomorrow

Absolute Standards


- ▶ Case law changed!!!! Forget about 'em!
- ▶ Single mistake = unacceptable performance
- ▶ *Callaway v. Army*, 84 FMSR 5870:
 - Secretary removed for failing to meet "one substantiated instance of discourtesy" - action overturned
- ▶ *Johnson v. Interior*, 101 FMSR 5058:
 - Contract Specialist removed under standards that required "timely work, reviewing documents in accordance with policy, communicating effectively" - action overturned

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 53

53


FEDERAL HR SERVICES
Helping You Thrive, Today and Tomorrow

The Saga Continues



- ▶ Post *Johnson*
 - "Weasel words" added to standards - provided a margin for error
 - "Normally," "generally," and "usually" added
- ▶ *Guillebeau v. Navy*, 362 F.3d. 1329 (Fed. Cir., 2004):
 - Terms like "proper," "timely," and "correct" may be used but under most circumstances should not be applied absolutely

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 54


54

Backwards Standards

FEDERAL HR SERVICES
Helping HR Training, Coaching, and Leadership Services

► *Eibel v. Navy*, 857 F.2d 1439 (Fed. Cir. 1988):

- Standards that label unacceptable performance as acceptable fail to inform employee of level needed to be retained - action cannot be sustained
- *Marginal Standard*: No agenda for annual Energy Awareness Week is developed. No more than six energy conservation articles for the Marine Corps Development and Education Command base newspaper. Major assistance is required at least 50% of the time to complete articles.



© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

55

55

Backwards Standards II

FEDERAL HR SERVICES
Helping HR Training, Coaching, and Leadership Services

► Generic MS standard for all elements:

- Performance shows deficiencies that require correction. Work frequently needs revision or adjustments to meet a minimally successful level. Assignments are completed, but often require assistance from supervisors and/or peers. Organizational goals and objectives are met only as a result of close supervision . . .
- MS Standard did not inform employee of what was needed to retain her job -- too "wrong" to be fleshed out

Wutunee v. Interior, DE-0432-08-0307-1-1 (August 20, 2008)
Kealy v. Interior, PH-0432-08-0618-1-1 (January 14, 2009)

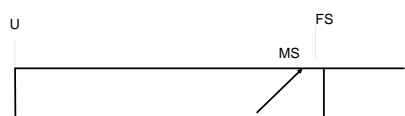
© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

56

56

Proof of Poor Performance

FEDERAL HR SERVICES
Helping HR Training, Coaching, and Leadership Services



© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

57

57




UNACCEPTABLE PERFORMANCE

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

58

58




Civil Service Reform Act of 1978

- ▶ Created a specific procedure for dealing with unacceptable performance
 - Required that employee have an opportunity period before action taken
 - Possible results of an unacceptable rating: reassignment, demotion, or removal
 - Lower burden of proof on appeal than under 5 USC Chapter 75 (conduct)
 - MSPB given no authority to mitigate penalty

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

59

59



Is Taking Action Important?



- ▶ Unacceptable performance left unattended is a problem with awards, selections for assignments and training, basic pay, reduction-in-force, etc.
- ▶ Other employees' morale and motivation are affected if not corrected
- ▶ Not taking action has become one of the rallying calls for pay for performance

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

60

60

MSPB Statistics


1995 – 8,785 appeals	2018 – 5,134 appeals
- 146 (2%) performance-based	- 142 (3%) performance-based
- 4,302 (49%) disciplinary	- 2,267 (44%) disciplinary
2016 – 5,886 appeals*	2019 – 4,893 appeals
- 158 (3%) performance-based	- 113 (2%) performance-based
- 2,267 (39%) disciplinary	- 2,092 (43%) disciplinary
2017 – 5,406 appeals	2020 – 5,265 appeals
- 160 (3%) performance-based	- 125 (2%) performance-based
- 2,177 (40%) disciplinary	- 2,129 (40%) disciplinary

* minus furloughs

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 61

61

Does it Matter?




- ▶ President's Management Agenda FY 02
 - Strategic Management of Human Capital
 - Goal: Develop a high-performance culture - defined by accountability for results, with positive rewards for success, and real consequences for failure
- ▶ GEAR (Initiative during Obama Administration)
 - Recommendations
 - ↳ Articulate a high performance culture
 - ↳ Implement accountability at all levels
- ▶ Trump Administration
 - OMB Directive to reduce barriers to acting on poor performance
 - EO 13839 promoting accountability in performance and conduct

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 62

62

Performance Correction




```

graph TD
    A[Informal Assistance] --> B[Notice of Opportunity to Improve]
    B --> C[Observation/Assistance/Documentation]
    C --> D[Review of Work]
    D --> E[Unacceptable]
    D --> F[Minimally Satisfactory]
    D --> G[Fully Successful]
    E --> H[Reassign  
Reduce in Grade  
Remove]
    F --> I[ ]
    G --> J[ ]
  
```

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 63

63

Initiating a Demonstration Period




- ▶ Board's case law previously said:
 - Agency not required to prove that an employee was performing unacceptably prior to the PIP/DP
Wright v. Labor, 82 MSPB 186
- ▶ *Santos v. NASA* overruled that interpretation
 - Court pointed out that it had not directly addressed the question of whether, when an agency predicates removal on an employee's failure to satisfy obligations imposed by a PIP/DP and that removal is challenged, the agency must justify its imposition of the PIP/DP in the first instance

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 64

64

Initiating a Demonstration Period II




- ▶ Federal Circuit ruling:
 - 5 USC 4302(c)(6) states appraisal systems may provide for "reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance"
 - To "continue to have unacceptable performance" during the PIP/DP, the employee must have been performing unacceptably prior to the PIP/DP
 - Thus, an agency is required to establish that the employee was unacceptable before, as well as during, the PIP/DP
Santos v. NASA, No. 2019-2345, (Fed. Cir. Mar. 11, 2021)

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 65

65

Initiating a Demonstration Period III





- ▶ OPM proposed regulations (Jan 2020):
 - Court misinterpreted what OPM had written in prior regulations
 - OPM does not agree that agency must prove pre-PIP/DP performance was unacceptable
 - OPM's interpretation should be entitled to some deference
- ▶ What will the MSPB and/or Fed. Cir. do?

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 66

66

Opportunity Period Notice



- ▶ **Must include:**
 - Critical element(s) in which performance is deficient
 - **New** - Examples of prior unacceptable performance on element(s) in question (*Santos v. NASA* (No. 2019-2345, (Fed. Cir. Mar. 11, 2021)))
 - Standard which must be met to be retained (Fully Successful or Minimally Successful depending on system)
 - How long the demonstration period will be
 - What type of assistance will be provided

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

67

67

Opportunity Period


- ▶ **Document**
 - Errors/omissions identified by element/portion of standard as identified in PIP/DP notice
 - Copies of work products
 - Provide copies to employee as changes/corrections made

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

68

68

Notice of Proposed Reduction in Grade or Removal




- ▶ Thirty days advance written notice that includes:
 - Specific instances of unacceptable performance by critical element(s) and standard(s) involved
 - Name of official to receive reply and number of days to reply
 - Right to representation
 - Right to submit medical documentation

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

69

69



FEDERAL HR SERVICES
Helping You Thrive, Today and Tomorrow

Decision Notice on Reduction in Grade or Removal


- ▶ Written decision which:
 - Is signed by an official higher than the proposer (except head of agency)
 - Specifies the instances of unacceptable performance on which decision is based
 - Considers reply
 - Specifies right to grieve and/or appeal

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 70

70


FEDERAL HR SERVICES
Helping You Thrive, Today and Tomorrow


Some Possible Outcomes



- ▶ Employee may:
 - Improve
 - Leave voluntarily
- ▶ Disabled employee may apply for disability retirement -- performance documentation used to establish impact on the job
- ▶ Employee with personal problems may finally be convinced to get help

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 71

71


FEDERAL HR SERVICES
Helping You Thrive, Today and Tomorrow

Possible Outcomes II


- ▶ Discontinued Service Retirement (DSR)
 - Employee who **receives a removal notice** for unacceptable performance (not misconduct) qualifies with 25 years of service/any age or age 50 and 20
CSRS and FERS Handbook, (CSRS) 44A2.1-9
 - DSR is **INVOLUNTARY**
 - Can't settle for clean record
Komiskey v. Army, 96 FMSR 5210
- ▶ Reassignment - another job at same grade or pay

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc. 72

72

More Outcomes

- ▶ Reduction in Grade - lower grade or pay - management sets the step
- ▶ Removal
- ▶ Grievances
- ▶ Appeals



© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

73

73

Thank you for your participation!

Barbara Haga
 Federal HR Services, Inc.
bhaga@fedhrservices.com
www.fedhrservices.com
 (757) 814-5764

© 2022 Federal HR Services, Inc. All rights reserved. Reproduction in any form, printed or electronic, is prohibited without the prior written consent of Federal HR Services, Inc.

74

74
