DELRS 2024

Forging the DoD Workforce of the Future

Performance-Based Actions

Administrative Judge Chizoma Ihekere
Administrative Judge Martha Russo
U.S. Merit Systems Protection Board

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OPTIONS

Chapter 75

- Preponderant evidence
- No statutory right to a PIP (though failure to provide notice of deficiencies may be relevant to penalty)
- Agency must prove nexus
- Agency must prove penalty is reasonable
- Cannot use Ch 75 to charge that an employee should have performed to higher standards than those communicated to them in accordance with Ch 43

Chapter 43

- Substantial evidence
- Must provide employee a PIP & standards must be valid
- No requirement to show nexus
- Actions limited to reassignment, reduction in grade, and removal
- Board has no authority to mitigate the action

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SANTOS v. NASA & LEE v. VA

990 F.3d 1355 (Fed. Cir. 2021); 2022 MSPB 11

- To prevail in an appeal of a performance action under chapter 43, the agency must establish by substantial evidence that:
  - OPM approved its performance appraisal system and any significant changes thereto;
  - the agency communicated to the appellant the performance standards and critical elements of his position;
  - the appellant's performance standards are valid under 5 U.S.C. § 4302(c)(1);
  - the appellant's performance during the appraisal period was unacceptable in one or more critical elements;
  - the agency warned the appellant of the inadequacies of his performance during the appraisal period and gave him a reasonable opportunity to demonstrate acceptable performance;
  - after an adequate improvement period, the appellant's performance remained unacceptable in at least one critical element

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ELEMENT 1: OPM APPROVAL

- *Griffin v. Army*, 23 M.S.P.R. 657 (1984)
  - Substantial evidence may consist of documentary evidence and/or testimony
- *Adamsen v. Agriculture*, 563 F.3d 1326 (Fed. Cir. 2009); *Daigle v. VA*, 84 M.S.P.R. 625 (1999)
  - Proof needed only when challenged
- OPM must approve system, not standards

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ELEMENT 2: COMMUNICATION

- Employees have a ***substantive right*** to be informed of in advance of the performance standards and critical elements of their positions
  - *Cross v. Air Force*, 25 M.S.P.R. 353 (1984)
- Harmful error does not apply to violations of 5 U.S.C. § 4302(c)(2)

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ELEMENT 3: VALID STANDARDS

- Standards must permit the ***accurate evaluation*** of job performance on the basis of ***objective criteria***
- A standard should be "sufficiently precise and specific as to invoke a general consensus as to its meaning and content"
  - See *Wilson v. HHS*, 770 F.2d 1048 (Fed. Cir. 1985)
- "Backwards" standards (stating what is unacceptable) are permissible
- Greater discretion and independence in the job involved → less objectivity and specificity required in the standards
  - See *Diprizio v. Transp.*, 88 M.S.P.R. 73 (2001)
- Must set forth the minimum level of performance for employee to avoid removal for unacceptable performance
- Agency can cure lack of specificity w/ clear guidance during the PIP
- Cannot demand perfection

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ELEMENT 4: PIP IS JUSTIFIED

- Section 4302(c)(6): agency may reassign, demote, or remove employees "who continue to have unacceptable performance"
- *Santos*: "We are not prescribing any particular evidentiary showing . . ."
- However, the mere fact of a PIP does not create a presumption that pre-PIP performance was actually unacceptable
- Same types of evidence as for Element 6

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ELEMENT 5: WARNING

- ***Harris v. SEC, 972 F.3d 1307 (Fed. Cir. 2020)***
  - While an employee must be warned about her poor performance before being removed for it, there is no requirement that she be warned before she is placed on a PIP, and the PIP itself serves as that warning
- Reasonable opportunity to demonstrate acceptable performance
  - 30-day PIP can be enough
  - See *Melnick v. HUD*, 42 M.S.P.R. 93 (1989), aff'd, 899 F.2d 1228 (Fed. Cir. 1990)

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ELEMENT 6: STILL UNACCEPTABLE

- Performance remained unacceptable during the PIP
- Board should give deference to an agency's judgment of the employee's performance in light of the agency's assessment of its own personnel needs and standards
  - See *Lisiecki v. MSPB*, 769 F.2d 1558, 1562 (Fed. Cir. 1985)
  - See *Greer v. Department of the Army*, 79 M.S.P.R. 477, 485 (1998).
- Agency's burden can be met through the charges and appellant's working papers
- Proposal notice may constitute valid proof of charge, if sufficiently detailed and corroborated
- "Rollercoaster employee"

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ANY
QUESTIONS
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