

## The How and Why of an Effective Performance Improvement Plan

As explained in our 2009 report, *Poor Performers and the Law*, title 5 of the U.S. Code currently provides two avenues by which agencies can demote or remove poor performers. The first avenue is codified in Chapter 43, while the second is in Chapter 75. Chapter 43 requires that agencies offer assistance to employees in an attempt to improve their unacceptable performance prior to implementing a performance-based adverse action<sup>1</sup>. Chapter 75 does not require agencies to provide such assistance. However, under Chapter 75, an adverse action's reasonableness depends, in part, on the extent to which the employee was on notice of the required behaviors<sup>2</sup>. Therefore, a performance improvement plan (PIP) and a reasonable period of time to improve under the plan is necessary under Chapter 43, and can be helpful under Chapter 75.

An effective PIP will typically:

- State in clear detail what performance is expected from the employee and how it will be measured.
- Specify the assistance the agency will provide to the employee (*e.g.*, on-the-job training, formal class training, mentoring).
- Designate a person responsible for helping the employee through the performance improvement period and indicate how often this person will meet with the employee. (This person is often the supervisor, but it could be a team leader, co-worker, or other appropriate person).
- Instruct the employee to notify a particular person (often the supervisor) and request help if the employee does not understand a work task or how to complete it.
- State how long the PIP will be in effect.
- State the possible consequences if the employee's performance does not improve.

We note that not all of these individual elements are required in a PIP<sup>3</sup>. The overall requirement is that the opportunity to improve is *meaningful*.<sup>4</sup> When an agency is deciding what to place in a PIP, it is crucial that the agency limit its commitments to what it is prepared to actually provide. If the agency includes promises in the PIP that it fails to keep, its unmet promises may compromise its ability to take a performance-based action under Chapter 43<sup>5</sup>. Thus, the agency

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<sup>1</sup> 5 U.S.C. § 4302(b)(5)-(6). See *Sandland v. General Services Administration*, 23 M.S.P.R. 583, 588 (1984) (an employee has a substantive right to an improvement period prior to the institution of a chapter 43 performance based action); 5 C.F.R. § 432.104-05.

<sup>2</sup> *Fairall v. Veterans Administration*, 33 M.S.P.R. 33, 41-45, *aff'd*, 844 F.2d 775 (Fed. Cir. 1987) (an employee is not entitled to a PIP in a chapter 75 action, but the lack of a PIP can be a relevant factor when the Board assesses the reasonableness of the penalty).

<sup>3</sup> Regulations require that the employee be told of the critical element(s) for which performance is unacceptable; what is necessary to demonstrate acceptable performance; and the possible consequences if performance does not become acceptable. The agency also must offer assistance to the employee in improving unacceptable performance. See 5 C.F.R. § 432.104.

<sup>4</sup> See *Brown v. Veterans Administration*, 44 M.S.P.R. 635, 641 (1990) (the statutory purpose of chapter 43 was to afford a meaningful opportunity to demonstrate acceptable performance).

<sup>5</sup> *Adorador v. Department of Air Force*, 38 M.S.P.R. 461, 466 (1988).

should include in the PIP whatever will provide the most meaningful opportunity for improvement rather than adhere too strictly to any checklist beyond the items required by statute or regulation.

We encourage supervisors to involve the employee in the creation of the PIP when it is practical. The employee may have a better sense of the source of the problem, or a better way to express the performance requirements, and therefore be able to help the supervisor to draft a PIP more likely to result in improved performance. Involving the employee also sends the message that the PIP is a genuine effort to help the employee rather than a punishment.

OPE is currently working on a series of new studies related to evaluating performance and addressing poor performance. In the meantime, we invite you to read *Poor Performers and the Law*, available at no cost at: [www.mspb.gov/studies](http://www.mspb.gov/studies).

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