



## Basic Employee Relations Course

### Using Chapter 43 or Chapter 75

Even though procedures are established for taking performance-based actions under 5 U.S.C. Chapter 43, an ER Specialist should be aware that 5 U.S.C. Chapter 75 is another process that can be used for such actions. The following are a few examples of when Chapter 75 could be an appropriate process to address specific performance related matters:

- Employee is not covered by Chapter 43.
- Suspension considered a more appropriate penalty than a demotion or removal.
- Performance deficiencies are not covered in the performance plan.
- Performance deficiency occurred prior to one-year period before proposal notice.

While the employee's behavior impacts performance, the poor performance is willful or negligent rather than due to a lack of knowledge. Thus, the poor performance may be attributed to misconduct.

If choosing a Chapter 75 action, there are special concerns and requirements that must be addressed, including:

- The standard for action is efficiency of the service.
- The burden of proof is preponderance of the evidence which is a more difficult standard to meet than the substantial evidence standard of Chapter 43.
- The agency table of penalties will be considered by the MSPB.
- Progressive discipline should be appropriately used.
- Mitigation of the penalty by the MSPB could occur.

If using Chapter 75 instead of Chapter 43, it is important to recognize that there is no statutory right to a performance improvement period, however, a supervisor may elect to provide such a period.

A supervisor must be able to show MSPB that he or she:

- Communicated the expectation to the employee.
- Used an accurate means to measure the performance of the employee.

On appeal, MSPB will be reviewing the action to determine that it is taken for such cause as will promote the efficiency of the service. The penalties must be reasonable in consideration of the Douglas factors.