



Basic Employee Relations Course

Figures A, B, and C

Figure A. Elements of a Part 432 Action

| Demotion and Removal Based on Unacceptable Performance Under 5 CFR Part 432 | |
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| 1. Beginning of appraisal period | Give employee the performance elements and standards in writing. Establish which elements are critical. |
| 2. Informal steps to improve performance | Provide counseling, discussion, training, etc. |
| 3. Formal opportunity to improve | Provide a formal period to demonstrate acceptable performance. |
| 4. Notice of proposed action | Give employee 30 days advance written notice; only specify instances of unacceptable performance occurring in the past year and relating to the critical elements involved. |
| 5. Employee's answer to proposal notice | Provide a reasonable time to reply; employee has a right to representation. |
| 6. Decision issued | Issue decision within 30 days after notice period expires; a higher level official concurs with the decision. |
| 7. Notice of right to appeal | Give employee appeal rights information. |

Figure B. Elements of a Part 752 Action

| Suspension, Demotion, and Removal Based on Unacceptable Performance Under 5 CFR Part 752 | |
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| 1. Informal steps to improve performance deficiencies. | Provide discussion, counseling, training, etc. |
| 2. Notice of proposed action | Give employee 30 days advance written notice. |
| 3. Employee's answer to proposal notice | Provide a reasonable time to reply, not less than 7 days. |
| 4. Decision issued | No requirement exists for higher level review. |
| 5. Notice of right to appeal | Give employee appeal rights information. |



Basic Employee Relations Course

Figure C. Comparison of Part 432 vs. Part 752

| | Chapter 43 | Chapter 75 |
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| Critical Element | Agency <i>must</i> prove the performance deficiency is in a critical element. | Agency is <i>not</i> required to prove the performance deficiency is in a critical element. |
| Establishment of Performance Expectations | When the employee's performance in one or more critical elements is unacceptable, the employee will: (1) be notified of the deficiency; (2) be offered the agency's assistance to improve; and (3) be warned that continued poor performance could lead to a change to lower grade or removal. (This is commonly referred to as the PIP, an abbreviation for both performance improvement plan and also for performance improvement period.) | The extent to which an employee is on notice of the agency's expectations is a factor in determining the appropriateness of the penalty. Also, an agency cannot require that an employee perform better than the standards that have been communicated to the employee. |
| Decline Following Improvement | If the employee's performance improves during the PIP, and remains acceptable for 1 year, a new PIP is necessary before taking an action <i>under this chapter</i> . | There is no obligation to offer a period of improvement at any point. ¹ |
| Efficiency of the Service | Agency is <i>not</i> required to prove that the personnel action will promote the efficiency of the service. | Agency <i>must</i> prove that the personnel action will promote the efficiency of the service. |
| Burden of Proof | Action must be supported by <i>substantial evidence</i> : that a reasonable person might find the evidence supports the agency's findings regarding the poor performance, even though other reasonable persons might disagree. | Action must be supported by a <i>preponderance of the evidence</i> : that a reasonable person would find the evidence makes it more likely than not that the agency's findings regarding the poor performance are correct. |
| Advance Notice | The agency must provide a notice of proposed action 30 days before any action can be taken, and must provide the employee with a reasonable opportunity to reply before a decision is made on the proposal. | |



Basic Employee Relations Course

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| Content of Advance Notice | The notice must state the specific instances of unacceptable performance that are the basis for the action <i>and also the critical performance element involved.</i> | The notice must state the specific instances of poor performance that are the basis for the action. |
| Deciding or Concurring Official | A person higher in the chain of command than the person who proposed the action must concur. | The deciding official does not have to be a person higher in the chain of command than the person who proposed the action. |
| Agency Decision | Agency must issue a final decision within an additional 30 days of the expiration of the 30 days advanced notice period. | Agency is under no particular time constraint, other than there cannot be a delay so extensive that it constitutes an error that harms the employee. |
| Penalty Mitigation | Once the agency meets the requirements to take an action, the MSPB cannot reduce the agency's penalty. | After finding that the agency meets the requirements to take a Chapter 75 action, the MSPB may reduce the agency's penalty. |
| Douglas Factors | The Douglas factors are not used. | The agency must consider the relevant Douglas factors when reaching a decision on the appropriate penalty. |
| Time Limits | Time limited to performance deficiencies occurring within the 1 year prior to the proposal notice. | No time limit for inclusion of "incident/charges". |
| Affirmative Defenses | The agency action will not be sustained if the employee was harmed by the agency's failure to follow procedures, if the agency decision was reached as a result of the commission of a prohibited personnel practice, or if the decision is otherwise not in accordance with the law. | |

¹ *Although there is no statutory requirement to place an employee on a PIP when taking a chapter 75 action, a manager/supervisor may do so. Under chapter 75, the supervisor still must be able to show a third party that they:

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