

Supervisory Guide for Addressing Unacceptable Performance
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Background:

This guide is in support of the Office of Management and Budget (OMB) directive, M-17-22, Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce, and the HHS Maximizing Employee Performance Plan, submitted to OMB June 2017.

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Department of Health and Human Services

Supervisory Guide for Addressing Unacceptable Performance

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HHS Guide on Supervisory Procedures for Addressing Unacceptable Performance

Purpose. This document (“Guide”) provides guidance to agency supervisors relative to employee unacceptable performance.

Responsibilities. Appropriate OpDiv and StaffDiv supervisory and management staff are delegated the authority to make these decisions relative to an employee’s unacceptable performance.

For advice and counsel: Appropriate staff in the Human Resources Centers and the Office of General Counsel are to review actions, letters and supporting documents to ensure the agency is acting in compliance with law, regulation and policy.

Coverage. This Guide is applicable to all General Schedule employees (Title 5), who have completed a probationary or trial period.

Employees serving a probationary period or trial period usually may be terminated or otherwise removed from the position due to unacceptable performance anytime during the probationary or trial period without resorting to formal procedures. Instructions relative to these employees may be found in HHS Instruction 315-1: Probationary and Trial Periods.

Actions Based on Unacceptable Performance. The supervisor should constantly evaluate each employee’s performance throughout the performance appraisal period. When unacceptable performance arises, the supervisor should take immediate steps to remove (i.e., reassign, demote, remove) the employee from the position if the employee does not demonstrate acceptable performance. The two available processes are:

(a) **5 C.F.R. Part 432 Procedures:** Supervisors should use these procedures when the supervisor determines that the employee is performing at the unacceptable level in one or more critical elements and that a formal period to demonstrate acceptable performance is warranted prior to making a removal decision. These procedures require that the supervisor notify the employee of the deficient performance and simultaneously initiate an Opportunity to Demonstrate Acceptable Performance period (ODAP, formerly PIP). The specifics for implementing an ODAP are outlined below. If the employee fails to demonstrate acceptable performance during the ODAP and is removed from the position, the employee will have a right to challenge the removal through a grievance or a third-party appeal or complaint. If challenged, the supervisor will have to prove that the action was warranted by presenting substantial evidence, the lowest burden of proof in a removal action.

(b) **5 C.F.R. Part 752 Procedures:** Supervisors should use these procedures when it is determined that the employee has performed unacceptably and that a formal period to demonstrate acceptable performance is not warranted prior to making a removal decision. Although a supervisor may use these procedures to implement a reprimand, a suspension, a demotion, or a removal, in general they are used when an assignment is made to the employee outside of the regular scope of the employee’s performance plan or when the level of unacceptable performance is so serious as to warrant immediate demotion or removal from the position without the need for an ODAP. If challenged, the supervisor will have to prove that demotion or removal was warranted by presenting a preponderance of evidence, a higher burden of proof than in a 5 C.F.R. Part 432 removal action.

Overview Chart:

	5 CFR Part 432	5 CFR Part 752
Actions	Removal or demotion	Removal, demotion, suspension, or reprimand
Taken for	Unacceptable performance	Efficiency of the service
Proof Burden	Substantial evidence; a reasonable person might conclude that the action is warranted (lower than preponderance)	Preponderant evidence; the action is more likely than not warranted (higher than substantial)
Basis	Failure of one or more critical elements in the performance plan	Failure to meet a performance expectation or standard
Demonstration Period	An ODAP is required; generally, 30 days in length	No ODAP; the action is based on what has already occurred
Mitigation	On appeal, the action will be either affirmed or set aside	On appeal, the action will be either affirmed, set aside, or lowered to a less severe action

NOTE: Many collective bargaining agreements provide specific information, detailed procedures, or other timeframes for actions involving bargaining unit members. The collective bargaining agreement timeframes and requirements supersede these procedures for bargaining unit employees. However, where a collective bargaining agreement is silent, these procedures apply.

Responding to Performance Deficiencies. *At any time during the rating cycle* that the supervisor determines that an employee is performing unacceptably, the supervisor shall initiate one of the following courses of action:

- (1) **5 C.F.R. Part 432:** These are the more commonly used procedures for addressing unacceptable performance. A performance action under this authority is appropriate when an employee’s performance is unacceptable in one or more critical elements of the performance plan.

Under these procedures, the supervisor must give written notice to the employee whose performance is unacceptable in one or more critical elements and afford the employee a reasonable period of time to demonstrate an acceptable level of performance (the ODAP period). The ODAP notice must identify all the critical elements that are being performed at the unacceptable level. During the ODAP period the supervisor should provide the Employee Relations Specialist and the Office of the General Counsel feedback regarding the employee’s ongoing performance during the ODAP, the supervisor, Employee Relations Specialist, and the Office of the General Counsel should consider drafting a proposed action at that time. If the employee does not demonstrate acceptable performance on all identified critical elements during the ODAP, the supervisor must take steps to remove the employee from the position by reassignment, a proposed demotion, or a proposed removal from service. An action taken using these procedures must be supported by substantial evidence (e.g. proof that a reasonable person could accept that the conclusion reached was correct.)

(a) **Developing the ODAP.** Once the supervisor has determined that an opportunity to demonstrate an acceptable level of performance is warranted due to unacceptable performance in at least one critical element, the supervisor must provide the employee with an ODAP notice. The notice should:

1. Be attached to a copy of the employee's most recent performance plan and identify all the critical elements for which performance is unacceptable;
2. Inform the employee of the performance expectations related to the failed critical element(s) that must be attained during the ODAP in order to demonstrate minimally acceptable performance and for the supervisor to retain the employee in the position. It is critically important that the ODAP expectations state what the employee is to do to be rated above unacceptable, not what the employee must not do;
3. Establish one or more counseling sessions during the ODAP to assist the employee to improve performance by providing critical feedback and clarifying expectations;
4. Indicate the length of the ODAP to include the beginning and ending date; and
5. Inform the employee that unless performance improves to at least the minimally acceptable level, the employee will be removed from the position by demotion or removal from federal service.

(b) **Length of an ODAP:** In general, an ODAP should be for the minimum amount of time necessary for an employee to demonstrate an acceptable level of performance. In most situations, a 30-day ODAP will be sufficient for the employee to have the opportunity to demonstrate acceptable performance. In unusual circumstances, and in consultation with your servicing Employee Relations Specialist, a supervisor may end the ODAP early should the employee demonstrate intractable failure before the period is scheduled to conclude.

(c) **Determination of ODAP Performance.** Within seven calendar days of the completion of the ODAP the supervisor must determine if the employee did or did not demonstrate acceptable performance.

1. **Successful Completion of the ODAP.** If the employee demonstrated an acceptable level of performance for each critical element during the ODAP, the supervisor must issue the employee a memorandum informing the employee of that fact within seven (7) calendar days following the supervisor's determination. In addition, the memorandum will inform the employee that if the employee's performance again falls to the unacceptable level in one or more of the same critical element(s) during the subsequent 12-month period following the beginning of the ODAP, the supervisor will initiate steps immediately to remove the employee from the position without another ODAP period.

2. **Unsuccessful Completion of the ODAP.** If the employee failed to demonstrate an acceptable level of performance for each critical element during the ODAP, the supervisor must either reassign the employee or propose action to demote or remove the employee from the position. (Consult your servicing Human Resources Office for assistance.)

3. **Unacceptable Performance Beyond the 12-Month Period from the Issuance of the ODAP.** If the employee successfully completes the ODAP and the related 12-month period, and the employee's performance subsequently becomes unacceptable in a critical element, the supervisor must afford the employee a new opportunity to demonstrate acceptable performance.

(2) **5 C.F.R. Part 752:** These are the less commonly used procedures for addressing unacceptable performance. A performance action under this authority may rely upon *ad hoc* performance expectations, as well as the performance standards in the employee's performance plan, as long as the standards are based on criteria permitting an accurate measurement of job performance. Actions under this authority may be taken when an ODAP is not advisable or it is unlikely to result in improvement. These procedures may not be used to hold the employee to a higher standard of performance than that required in the employee's performance standards.

In general, upon identification of an employee's unsatisfactory performance, the supervisor will determine the appropriate level of corrective action: reprimand, suspension, demotion, or removal, and take the necessary procedural steps specified in HHS Instruction 752. A typical response to an employee's unacceptable performance will be to either demote or remove the employee from the federal government. An action taken using these procedures must be supported by a preponderance of the evidence (e.g. proof that it is more likely than not that the conclusion reached was correct.)

Review. All conduct based actions must be reviewed by your servicing Employee Relations Specialist, who will engage with the Office of General Counsel, to ensure that the action, letter and supporting documents are in compliance with law, regulation and policy. In most instances, the draft letter should be submitted to your servicing Employee Relations Specialist within seven (7) calendar days of your determination of unacceptable performance, and in general, the Employee Relations and Office of General Counsel review will not take more than fourteen (14) calendar days.

Proposing a Removal or Demotion Using 5 C.F.R. Part 432 Procedures. When the supervisor decides that the employee has failed to demonstrate acceptable performance during the ODAP, within seven (7) calendar days of the conclusion of the ODAP, the supervisor will determine what action to take: (a) either reassign the employee to another position, or (b) propose the employee's demotion or removal from Federal service. The supervisor must complete the above determined action within thirty (30) days of the conclusion of the ODAP. The following must be included in a proposed notice for a demotion or removal action:

- (1) Identification of which critical element(s) were performed unacceptably during the ODAP;
- (2) Identification of the specific instances of unacceptable performance during the ODAP related to each failed critical element;
- (3) Notice of the employee's right to review the materials relied upon in making the proposal and of the right make an oral and written reply to the proposal within seven* (7) calendar days of receipt of the proposal notice. In response to a request, and at the discretion of the deciding official, the reply period may be extended for a reasonable period of time. An extension should be granted for the least amount of time to accommodate the employee's need, typically, this is no more than fourteen (14) calendar days, but not beyond a total of 30 calendar days;

* **NOTE:** This timeframe is dependent on any collective bargaining agreements or past practices established by you and/or your organization. Consult with your servicing Employee Relations Specialist to identify the appropriate timeframe for your organization.

- (4) Notice of the employee's right to be represented in that reply (other than by a management official), and;
- (5) Notice that the action will not be effected sooner than 30 days.

NOTE: In general the decision letter should not be issued more than 60 calendar days from the proposal date, however there may be circumstances in which it is, in which case it must be issued as soon as possible after all necessary information is received.

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Final Decision. Unless the action was proposed by the Secretary, the decision shall be issued, or concurred in, by a deciding management official who is in a higher position than the proposing official.

In arriving at a decision, the deciding official shall take into consideration only the proposal notice, with attachments, if any, and the employee's reply, as well as any materials provided in the employee's reply. Generally, the deciding official shall issue the decision within seven (7) calendar days after the close of the 30-day advance notice period.

The decision notice must:

- (1) Specify the instances of unacceptable performance by the employee on which the action is based; and
- (2) Inform the employee of applicable appeal or grievance rights, as called for by regulation or collective bargaining agreement.

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