



How to Write a Performance Improvement Plan

Participant Guide



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COURSE OBJECTIVES

1. Understand the process of the performance improvement plan
2. Understand the legal framework
3. Knowledgeable of the regulatory requirements and employee rights
4. Knowledgeable of the tools and resources available
5. Ability to develop a performance improvement plan

WHY ADDRESS PERFORMANCE PROBLEMS?

Performance issues are those that involve how well an employee is accomplishing the tasks functions or duties of their position. Dealing with performance problems is a real challenge for any supervisor. Experienced supervisors often say it is one of the toughest parts of their jobs. Nevertheless, it is a key supervisory responsibility, and failure to address poor performance can have a greater impact than you may appreciate.

True or False: Dealing with poor performance can be time consuming. My time is better spent supervising my productive employees.

True or False: If I take action against one employee, it will lower morale among other employees and create a less productive work environment.

True or False: Advising an employee that they are not performing satisfactorily is unpleasant and requires special human relations skills.

True or False: The procedural steps involved in addressing poor performance are complex and highly technical.

True or False: If I do take formal performance-based action, it is likely to be appealed and ultimately overturned.

THE CAUSES OF POOR PERFORMANCE

There are many causes of substandard or unacceptable performance. Some of them are attributable to the organization, and some to the individual employee.

Employee Based Causes

Lack of ability	Lack of effort
Lack of attention	Lack of basic knowledge
Lack of skill	Lack of judgment
Problems not work-related	Substance abuse

Organization Based Causes

- Lack of communication on performance expectations
- Lack of performance feedback
- Failure to provide necessary training or instruction
- Failure to provide necessary information
- Failure to provide necessary tools or other resources
- Failure to provide a reasonable accommodation that would permit the employee to perform satisfactorily
- Unrealistic performance expectations
- Harassment or otherwise hostile work environment

WHY THE CAUSE MATTERS

It's important to carefully consider the cause or causes of a performance problem before attempting to deal with it. The reason is that different actions are likely to be effective in different situations.

For example, if the root cause of a performance problem is an employee's lack of effort, then counseling, a direct warning, and then either discipline or a performance based adverse action would make sense.

But if the root cause of the problem is a lack of resources necessary to do the job properly, counseling, warning and then disciplining the employee won't help at all and may make things worse.

Similarly, if the root cause of the performance problem is a disability that could be reasonably accommodated, taking the traditional counseling/warning/discipline route would not only be ineffective, but would violate laws and regulations.

UNDERSTANDING THE PERFORMANCE IMPROVEMENT PLAN PROCESS

Addressing and resolving performance is a three step process.

- Step One: Communicating Expectations and Performance Problems (Counseling)
- Step Two: Providing an Opportunity to Improve (Performance Improvement Plan)
- Step Three: Taking Action

LEGAL FRAMEWORK – TITLE 5 CFR PART 432 OR TITLE 5 CFR PART 752

Before you begin the formal process of taking a performance-based action, be aware that you have options. The law provides for two different processes for taking performance-based actions. If a performance-based action is taken under Title 5 CFR Part 432, a formal opportunity to improve is required. If a performance-based action is taken under Title 5 CFR Part 752, an opportunity period is not required.

Step Two will walk you through the Part 432 process of giving an employee a formal opportunity to improve his/her performance. Step Three will provide more details on deciding under which process to take your action. Regardless of the process you use, an opportunity period is a useful tool for assisting employees in improving their performance.

STEP ONE: COMMUNICATING EXPECTATIONS & PERFORMANCE PROBLEMS

Most performance problems can be resolved through effective communication between supervisors and their employees. A counseling session is the opportunity to clarify expectations and discuss performance problems.

If, despite the preventive steps you have taken you still find an employee's performance is not meeting expectations, the best approach is to meet with the employee to discuss the performance problem.

PERFORMANCE COUNSELING

Performance counseling has several objectives. It aims to:

- **Advise an employee** that performance is inadequate.
- **Ascertain the reasons** why performance is inadequate.
- **Specify precisely what is unacceptable** in the employee's performance.
- **Specify precisely what the employee is expected to do** in the future.
- **Provide clear warning** that a failure to correct performance deficiencies will result in adverse consequences.

PREPARING FOR A COUNSELING SESSION

1. Once you recognize that a performance problem exists, find out what guidance the employee has been given on performance.
2. Read the performance standards. If they don't really describe what you want from the employee, take the time to fix them.
3. Contact the human resources office and ask a specialist to review the performance standards to ensure that there aren't any problems with them.
4. Contact the human resources office and find out what your technical advisor would say if you do need to take formal action later.
5. Before counseling, make sure you can clearly state what would constitute acceptable performance.
6. Focus on the poor performance, not on personalities or other distractions
7. If you have operating manuals, guides, or other tools that all employees use, take a look at them and see how these could be used to help the employee improve.
8. Write out and practice saying what acceptable performance in the job would mean. Be specific as possible.
9. Have specific examples of poor performance so that you can respond to the question "What do you mean"?
10. Do not emphasize past poor performance, seek to clarify future good performance.
11. Locate the Employee Assistance Program information to have available.
12. Remember, your goal is to improve the employee's performance.

EFFECTIVE COUNSELING TIPS

- **Get the right place, time and day:** meet in private, no one wants to have this sort of conversation within hearing distance of co-workers. Arrange adequate time for your comments as well as comments from the employee.
- **Get the right attitude:** set and maintain a constructive tone, be calm, professional and focused. There is a clear business purpose to performance counseling sessions.
- **Get the right facts:** always have your facts straight before going into a counseling session. Be prepared to state precisely what performance elements the employee is not meeting with illustrated examples. Also be prepared to spell out exactly what you expect the employee to do from this point forward.
- **Explain the purpose of the meeting:** it is to notify the employee of performance deficiencies, and spell out precisely what must be done to correct them.
- **Pinpoint the deficiencies:** highlight exactly where performance is not up to the requirements of the employee's performance standards. Provide concrete examples, and explain why it's important the employee meet the required standards. Also discuss how the employee's performance fits into the performance of the total organization
- **Nail down the cause:** if you're not sure why the employee is underperforming, ask. If you suspect there might be a substance abuse or other outside problems, clearly inform the employee about the Employee Assistance Program and how to contact.
- **Specify performance expectations:** clearly explain exactly what the employee must do to attain a satisfactory level of performance in the deficient area(s) and seek confirmation that the employee understands the expectations.
- **Offer appropriate help:** if the employee indicates an underlying cause for the performance deficiency that you can reasonably help to fix, for example, lack of knowledge of new software, then arrange to help overcome the problem. And then follow through.
- **Do not offer inappropriate help:** if the employee lacks the basic knowledge or skills necessary to perform the essential duties of the job at the current grade level, it is not your place to provide basic training. Nor should you offer to reduce workload below regular requirements simply because the employee can't handle the load.
- **Point out the consequences:** clearly state to the employee that failure to bring performance in line with performance standards will lead to adverse action. It is important not to fudge this point, or soften it by saying that action might result. Make it definite.
- **End the session:** on a positive note by emphasizing that your mutual goal is improving the employee's performance.
- **Document the meeting:** it doesn't have to be extensive, but the documentation should reflect the time, date and place of the meeting, as well as the main points made to the employee. A copy can be given to the employee to confirm your mutual understanding of the counseling session. Such documentation can be crucial if an adverse action ultimately becomes necessary. See Appendix, Sample Letter: Counseling Memorandum.
- **Follow up:** if the employee shows improvement, let him or her know immediately! If the employee appears to be still struggling, go back and talk again.

Q & A COMMUNICATING EXPECTATIONS AND PERFORMANCE PROBLEMS

Do I have to wait for the annual performance appraisal to tell an employee that his or her performance is unacceptable?

Should my employee get a copy of all my notes about his or her performance?

I've never had to counsel an employee before. What kind of information is worth putting into "supervisory" notes?

This person is the first employee with "unacceptable performance" I've ever had in our group. When I looked at the performance standards, I found out that he isn't even doing the work described in them. What now?

CHECKLIST

COMMUNICATING EXPECTATIONS AND PERFORMANCE PROBLEMS

Item	Yes	No
Are you sure the issue is primarily a performance problem (as opposed to misconduct)?		
Knowledgeable of the DOI regulations governing performance?		
Have you previously communicated clearly to the employee what constitutes minimally successful performance?		
Are the standards clear and reasonable?		
Have you asked the human resources staff to review the standards for any possible problems?		
Have you told the employee what critical elements he or she is failing?		
Have you counseled the employee on how to improve to an acceptable level?		
<i>Let the employee know if performance is improving or not!</i>		

EXERCISE

Take 5 minutes and write down the steps and key points of a counseling session with John, the Visitor Use Assistant.

[illegible]

RECONSIDERATION PROCESS

If an employee is dissatisfied with the results from a performance appraisal on a critical element rating that affects the Summary Rating, they can begin the Reconsideration Process. The process includes both an informal and a formal procedure, setup with specific timeframes, with the final decision remaining within the Bureau/Office.

DOI RECONSIDERATION PROCESS

The employee will meet with the rating official within 7 calendar days of receipt of the Employee Performance Appraisal to discuss the rating. After this discussion the Rating Official has 7 calendar days to provide a verbal or written explanation for the rating. If the employee does not accept the explanation, they may request formal reconsideration through the Human Resource Office. They have 7 calendar days after receiving the Rating Official's informal decision to submit a written request for reconsideration to the Human Resource Office.

There are 7 items that must be included:

1. Employee organization and duty station
2. Copy of the annual appraisal for which a reconsideration is being requested
3. Specific area(s) or details of the annual appraisal for which the reconsideration is being requested
4. The identity of the employee's designated representative (name, title, address, phone #)
5. Why the employee believes the rating is in error, with supporting facts and documents
6. The action the employee requests of the reconsideration official or the reconsideration committee
7. A copy of the written decision of the informal reconsideration by the rating official, a statement confirming that the informal process was followed, or a written request to move directly to the formal stage

The Human Resource Office will review the informal decision and determine if it is appropriate for acceptance. If it is determined that it is not acceptable it will be returned to the employee with an explanation. If it is determined to be acceptable, it will be referred to the Reconsideration Official within 14 calendar days. The employee has the right to representation in this formal process.

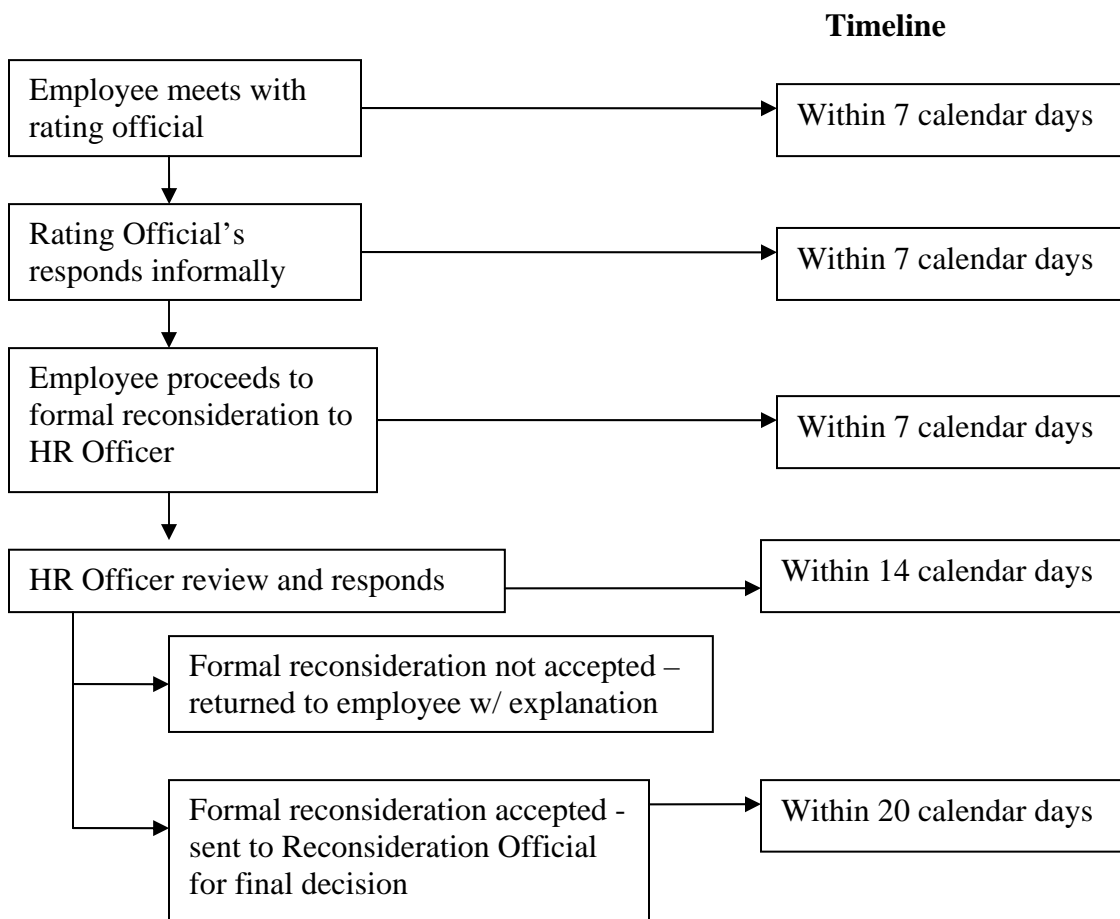
Be aware that this review is limited to reconsideration of rating only on that critical element that will impact the Rating of Record. Nothing else will be considered.

The Reconsideration Official is typically the Rating Official's supervisor. This individual reviews the evidence, consults with the necessary individuals, and issues a final written decision within 20 calendar days. A copy of the decision is given to the employee and filed in the Employee's Performance File. The decision is final; the employee has no further right of review.

If the Reconsideration Official rules against the employee and the rating was minimally successful, a step increase is withheld. If the rating was unsatisfactory, the employee is placed on a PIP. If a PIP was already started, it does not have to stop during this reconsideration period.

RECONSIDER PROCESS TIME LINE

After the dissatisfied critical element rating:



STEP TWO: PROVIDING AN OPPORTUNITY TO IMPROVE

PERFORMANCE IMPROVEMENT PLAN – TITLE 5 CFR PART 432

After you have explored informal ways to address employee performance issues, and have documented your counseling sessions with the employee, you may now need to move to a more formal method, with more severe consequences, with which to resolve these issues.

The “Opportunity to Improve” letter is the formal mechanism by which employee performance issues are addressed. This letter lays out the Performance Improvement Plan, or PIP, under which the employee’s performance will be evaluated for a specific period of time. If the employee fails to perform during that time, with the expectations and resources provided, he or she may be terminated from their position.

Before you begin the formal process of taking a performance-based action, please be aware that you have options. The law provides for two different processes for taking performance-based actions. If a performance-based action is taken under Title 5 CFR Part 432, the performance improvement plan, an opportunity to improve is required. If a performance-based action is taken under Title 5 CFR Part 752, the performance improvement plan is not required. However, regardless of the process you use, the performance improvement plan is a useful tool for assisting employees in improving their performance.

PERFORMANCE IMPROVEMENT PLAN PROCEDURES

The procedures for providing a formal performance improvement plan should include:

1. **Determination of Unacceptable Performance:** Employee's performance is determined to be unacceptable in one or more critical elements.
2. **Performance Improvement Plan Notice Issued:** Inform the employee in writing of the critical element(s) in which he or she is failing, what is needed to bring performance up to an acceptable level, what assistance will be provided, and the consequences of failing to improve during the opportunity period. (See Sample Opportunity Notice Example 1 and 2.)
3. **Formal Performance Improvement Plan to Improve:** Employee must bring performance up to an acceptable level in failed critical element(s). Duration of opportunity period may vary, however the normal rule is 60-90 days. Be sure to document the employee's progress and to provide any appropriate assistance.
4. **Determination of Performance Improvement:** Employee's performance is determined to be acceptable or unacceptable in one or more critical elements.

Depending on the nature of the job and the employee's experience, it may be appropriate to offer assistance in a variety of ways. For example, an employee may be given a checklist, paired with another employee, offered training, and/or given closer supervision. Not every employee will require every type of assistance, but once assistance is offered, be sure to follow through with it during the performance improvement plan period.

TOOLS AND RESOURCES FOR DEVELOPING A PERFORMANCE IMPROVEMENT PLAN

- The employee's position description
- The Position Classification Standards
 - OPM's website @ http://www.opm.gov/HR_Tools_Resources/
- Employee Tracking Kit
 - HR Office should have a copy
- The Essential Competencies for the Career Field
 - NPS Training website @ www.nps.gov/training
- Training
 - On the job
 - Detail
 - Classroom; on-line, etc.

Other Examples – What have you used or done in the past?

WHAT MUST BE IN THE PERFORMANCE IMPROVEMENT PLAN WRITTEN NOTICE?

1. **Statement of Unacceptable Performance:** Identify the critical elements under which the employee's performance is unsatisfactory and specific examples of the deficiencies.
2. **Performance Improvement Plan Timeframe:** Identify the specific period of time the employee is being given an opportunity to demonstrate acceptable performance.
3. **Description of Acceptable Level of Performance:** State the improvements that are expected.
4. **Statement of Assistance:** State what you, as the supervisor will do and what special training (if appropriate) will be given to assist the employee to improve. State the availability of the Employee Assistance Program (EAP).
5. **Consequences of failing to improve to an Acceptable Level:** State that if the employee's performance does not improve to a minimally successful level, a proposal may be issued to separate the employee from his/her position.
6. **Signatures and date.**

We will now work on developing a performance improvement plan for Tom, our Visitor Use Assistant. Please take out the Case Study document.

SUPERVISORS RESPONSIBILITY DURING THE PERFORMANCE IMPROVEMENT PLAN

- Implement closer supervision and counseling
- Provide formal training, on-the-job training, peer coaching, task demonstration, etc.
- Provide frequent feedback
- Provide referral information about the Employee Assistance Program
- Referral for a fitness-for-duty medical examination

Hopefully, an employee will improve and maintain acceptable performance. However, if an employee fails to perform acceptably by the end of the performance improvement plan or improves but then fails again in the same critical element within 1 year from the start of the opportunity period, the supervisor may demote or remove the employee without going through another performance improvement plan.

If the employee fails to improve to an acceptable level by the end of the opportunity period, further action is warranted.

SPECIAL CONSIDERATIONS

In reality, performance-based actions do not always run as smoothly as the procedures just described. Some issues may occur that deserve special consideration.

Request for Accommodations

When counseling, providing a Performance Improvement Plan, or taking action, you may discover that a performance problem is due to a mental or physical condition. As a result, an employee may request some type of accommodation. If the accommodation request does not cause the agency an undue hardship, you are required to accommodate the employee if he or she has a disability and is a “qualified” individual with a disability. This type of situation is an area in which you will have to get technical assistance from your human resources office. However, as a starting point in your determination as to whether or not an employee is entitled to such an accommodation, review the checklist below.

1. Does the employee have a disability? Yes, if:
 - Medical documentation supports a physical or mental condition that substantially limits one or more major life activities, or
 - A record of impairment exists that substantially limits one or more major life activities.
2. Is the employee a “qualified disabled” person? If yes,
 - Can the employee perform essential functions with or without reasonable accommodation?
 - Is there endangerment of health and safety of employee or coworkers?
 - Can the employee meet the requirements of the position?

If the employee demonstrates that he or she is a qualified individual with a disability, you will need to work with your human resources office to determine whether the accommodation request

will cause an undue hardship.

3. Does the accommodation request cause an undue hardship? Consider the following factors:
 - The number of employees in the organization
 - The type of facilities.
 - The size of the organization's budget
 - The cost of the requested accommodation(s).

Request for Leave

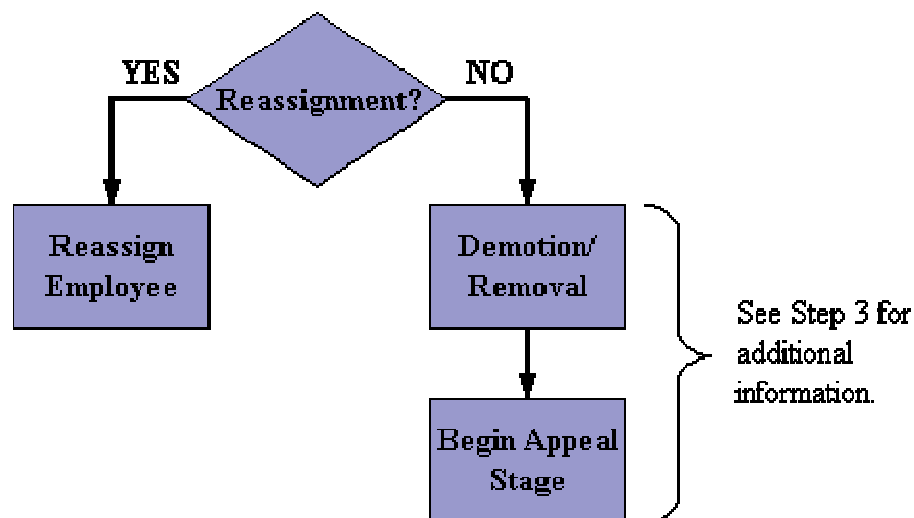
Another issue that sometimes “stumps” supervisors is what to do when an employee requests leave during the performance improvement plan period. You should consider each request for leave based on the specific circumstances in the request. Know the rules for approving or disapproving leave and get technical advice from the human resources office before you deny any leave during this time. Additionally, keep these thought in mind:

- An employee on approved leave (annual, sick, or leave without pay) cannot be penalized for work that is not completed while on approved leave.
- An employee should be aware of procedures for requesting leave and for providing medical documentation (especially important for accommodation requests). The employee should also be aware of what action may be taken if these procedures are not followed.
- Be sure you understand the various family-friendly leave entitlements available to employees, such as the Family and Medical Leave Act of 1993 and the Family Friendly Leave Act of 1994.
- If an employee is on approved leave for a significant period of time during the performance improvement plan period, you may want to extend the period to allow the employee a “reasonable” time on the job to improve.

DECIDING WHAT COMES NEXT

Deciding what comes next depends on the employee's performance at the conclusion of the performance improvement plan period. If the employee has reached an acceptable level of performance, there is no need for any action except to keep providing feedback and encouragement to the employee. If the employee is still performing unacceptably, you must determine the best solution. Your options include reassignment, demotion, or removal. Before you reach a decision on what to do, consult your human resource office on what your responsibilities are.

No Improvement during the Performance Improvement Plan



Supervisors may reassign employees without conducting the formal process outlined in the next step. The next section explains the procedures used after you have decided to demote or remove an employee and the employee's appeal rights.

CHECKLIST FOR PERFORMANCE IMPROVEMENT PLAN

Item	Yes	No
In the PIP did you tell the employee that his or her work was unacceptable in one or more critical elements?		
Did the PIP tell the employee specifically what he or she had to do to improve performance in order to keep his or her job?		
Did you explain what efforts would be made to assist the employee (including training, if appropriate)?		
Was the notice clear that continuing failure to meet performance standards would result in demotion or removal?		
Did you provide the promised assistance (training, etc.) to the employee?		
Did you consider any requests for accommodation?		
Did you document the employee's performance during the PIP?		
Did you take into account any approved annual, sick, or other leave during the opportunity period?		
When the PIP ended, was the employee still performing at an unacceptable level?		
<i>If the employee succeeds in raising his or her performance to an acceptable level, remind the employee of his or her continuing obligation to maintain acceptable performance.</i>		

Q&A PROVIDING AN OPPORTUNITY TO IMPROVE

Is there a law that requires me to allow an employee to bring a union representative into a meeting where I plan to issue a performance improvement plan notice?

How will I know if my employee is "disabled" and should be accommodated?

What should I do about an employee who just won't talk to me? How can I give this person an opportunity to improve?

If my employee asks for leave during the opportunity period, do I have to grant it?

If I do approve leave during an opportunity period, what happens to the deadlines I've set up?

We don't have any money for training. What should I do about training during the opportunity period?

Do I have to follow the counseling steps before initiating a performance improvement plan?

STEP THREE: TAKING ACTION LEGAL FRAMEWORK

This section is designed to give you an overview of the process used in taking action for unacceptable performance. It will describe the role and responsibilities of the proposing official and deciding official. There is also a brief explanation of employee appeal rights.

A Supervisor's Authority

A supervisor has the authority to take action against an employee based on poor performance in accordance with Title 5 Code of Federal Regulations Part 432, Performance Based Reduction in Grade and Removal Actions, and Part 752, Adverse Actions.

Although it may strike you as peculiar that a performance deficiency would be handled through adverse action procedures, there are times supervisors determine that using Part 752 procedures, which differ from Part 432 requirements, is the most appropriate method of taking action. The specific facts of your case, along with the weight of your evidence, will be determining factors in deciding under which authority to take your action.

PERFORMANCE ACTIONS

There are three ways to take action in response to unacceptable performance:

1. Performance Based Actions – 5 CFR Part 432

The agency uses the procedures set up in law specifically to deal with performance, rather than conduct problems. These are usually referred to as 432 procedures, since they come under 5 CFR Part 432.

2. Discipline Based Actions – 5 CFR Part 752

Although this is not the actual term used, it's descriptive of what actually happens. These actions, regardless of whether they involve a suspension, demotion or removal are processed using the procedures set up for dealing with misconduct problems. They are usually referred to as 752 procedures, since they come under 5 CFR Part 752. You can only remove or demote an employee for unacceptable performance in a **critical** element.

3. Negotiated Settlements

Sometimes managers are able to avoid the time and effort involved in taking adverse action by working out a settlement agreement with an under performing employee. Often such agreements provide the employee with a specified time period in which to retire, resign or find another job before action is initiated.

PERFORMANCE BASED ACTIONS STEPS

This period is designed to give the employee an opportunity to bring his or her performance up to an acceptable level. It is also the supervisor's opportunity to clearly express his or her expectations and the consequences of not meeting those expectations.

The following steps must be taken in preparation for a performance based adverse action under part 432.

- **Notify the employee of performance standards.** The standards must be understandable, measurable and attainable.
 - **Allow sufficient time for the employee to demonstrate acceptable performance.** This can vary substantially, since an agency is not required to tolerate damaging or dangerous performance for an extended period of time before taking action.
 - **Notify the employee of performance deficiencies.** This requires you to explain in detail what is inadequate or unacceptable in the employee's performance.
 - **Document.** As always, it's necessary to create a paper record that will demonstrate precisely what performance was required, what was actually delivered, and what was done in response to deficient performance.
 - **Provide an appropriate level of assistance and guidance.** It is necessary for supervisors to provide feedback on how the employee is (or isn't) progressing, as well as to offer verbal guidance and an appropriate level of assistance.
 - **Place the employee on a performance improvement plan.** PIPs require written notification of specifically what performance improvements must be made over a reasonable period of time. Although there is not a time period specified in law, agency regulations sometimes prescribe or recommend a particular PIP period usually between 60 to 120 days.
 - **Notify the employee of proposed adverse action.** If the employee fails to improve performance to an acceptable level during the PIP, the agency must provide a written proposal to take action. In your participant guide, page 42-45 in the Appendix is a Sample Letter Proposed Notice.
 - **Provide final decision.** The agency must provide a final decision on the proposed adverse action. If the employee filed a reply to the proposal, it is addressed in the response and final decision letter. In your participant guide, page 46-48 in the Appendix is a Sample Decision Notice.
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DISCIPLINE BASED ACTIONS

- **Inform the employee of exactly what performance is required and where deficiencies exist.** Regardless of whether 432 or 752 procedures are used, fundamental fairness require that you put an employee on clear notice of what is required and where the employee's performance falls short, before you initiate action. Be sure to document. See Sample Letter: Counseling Memorandum.
- **Notify the employee of proposed adverse action.** The content of this notice will vary, depending on circumstances, but will generally address precisely what the employee did or did not do properly, and the action that is proposed. In your participant guide, on page 33 is a sample Memorandum of Counseling.
- **Provide final decision and response to the employee's reply.** This is just what it sounds like – the final decision, including a response to any issues or points brought up in the employee's reply to the notice of proposed action. In your participant guide, page 42-45 in the Appendix is a Sample Letter Proposed Notice.
- **Take Action.** Carry out the final decision. And, in most cases, prepare to defend against the appeal or grievance that will be filed.

NEGOTIATED SETTLEMENT STEPS

- **Notify the employee of your intent to propose adverse action.** Presumably, before doing so you will already have had several conversations with the employee in which you will have addressed performance deficiencies. In your participant guide, see the sample memorandums for Counseling (page 33); Proposal (page 42-45); and Decision (page 46-48).
- **Propose consideration of a settlement agreement.** Contrary to what many managers think, it is not illegal or immoral to candidly inform the employee of a genuine intent to propose action, and then to offer an opportunity to resign or retire. But, be sure to get help from your HR or legal experts before agreeing to settlement terms.
- **Finalize the settlement and put it into effect.** If it requires you to give the employee what amounts to a substantial chunk of administrative leave to hunt for another job, do so.

To help you understand the differences in these regulations, Figure A and B on the following pages describe the procedures for taking a performance-based action under Parts 432 and 752, respectively. Figure C compares regulations to further clarify the differences between each authority.

Figure A. Elements of a Part 432 Action

**Demotion and Removal Based on Unacceptable Performance
Under 5 CFR Part 432**

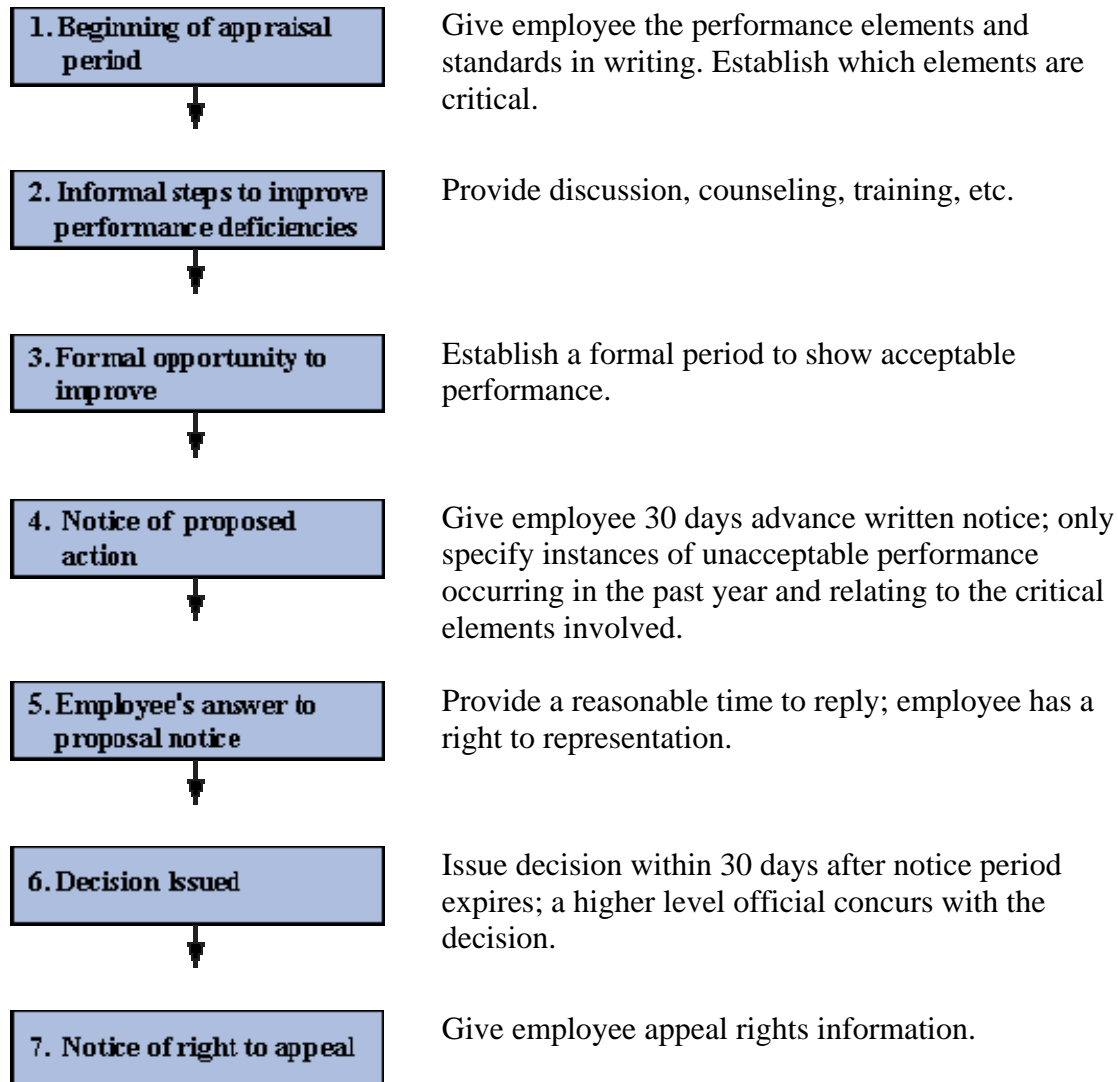


Figure B. Elements of a Part 752 Action

Suspension, Demotion, and Removal Based on Unacceptable Performance Under 5 CFR Part 752

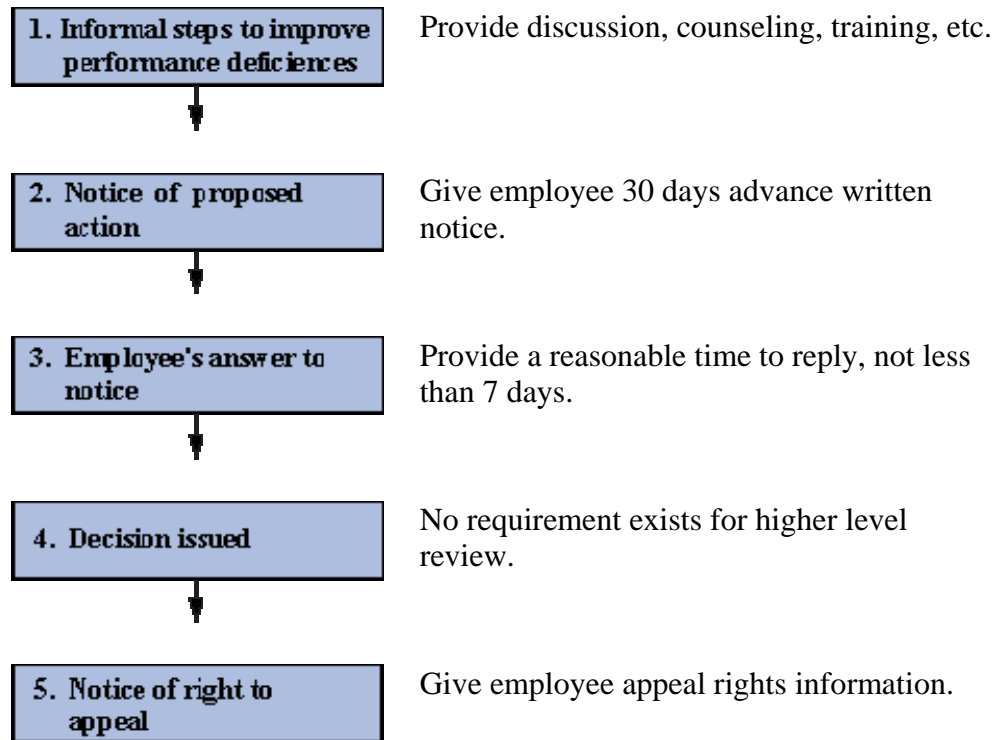


Figure C. Comparison of Part 432 vs. Part 752

The table below compares the regulations to further clarify the differences between each authority.

	Part 432	Part 752
Types of Actions	Actions: Demotion or Removal	Actions: Suspension, Demotion, or Removal
Actions Taken For	Actions taken for "unacceptable performance."	Actions taken for "such cause as will promote the efficiency of the service."
Proof	Actions must be proven by "substantial evidence" (lower standard than Part 752).	Actions must be proven by a "preponderance of the evidence" (higher standard than Part 432).
Actions Based On	Actions can only be based on an employee's formal, established, communicated standards.	Actions can be based on expectations or established/formal standards.
Opportunity Period - PIP	Employee is entitled to an opportunity period.	No requirement for an opportunity period.
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" in Part 752.
Immediacy of Action	Employee remains on the job throughout the opportunity period.	Can take immediate action because no requirement for an opportunity period exists.
Mitigation	Action may <i>not</i> be mitigated (action will either be sustained or reversed).	Action may be mitigated (penalty reduced).

As you can see, there are distinct differences between these regulations. For example, Part 432 requires that you give the employee an opportunity to bring his or her performance up to an acceptable level, while Part 752 does not require such an opportunity period. With this difference in mind, you may question the reasoning behind providing an opportunity period if it is not required. Keep in mind that third parties (for example, arbitrators, judges) place a strong emphasis on a supervisor's effort to communicate what is expected to the employee as well as the supervisor's effort to assist the employee in improving his or her performance. An opportunity period addresses both of these concerns. While an opportunity period may not be required under Part 752, providing such an opportunity may assist the agency in developing a stronger case before a third party.

Another difference between the regulations is that Part 432 requires the use of established performance elements and standards. Under Part 752, employees can be held to ad hoc standards such as explicit instructions or work assignments or professional standards established for certain occupations such as physicians. In some cases, it may be more appropriate to hold employees to these ad hoc standards, as long as they are no more stringent than the established performance standards. As always, consult with your human resources staff to determine if the use of ad hoc standards or if a formal opportunity period is appropriate in your specific case. Also, talk with your human resources staff concerning any internal agency policies regarding the use of a formal opportunity period.

APPEAL RIGHTS

Employees will generally have the right to appeal a removal or demotion to the Merit Systems Protection Board or to grieve the action through the agency's negotiated grievance procedure. The employee can choose between these two methods of appeal, but cannot pursue both avenues. Allegations of discrimination, reprisal for whistle blowing, and other prohibited personnel practices can be raised in an employee's appeal. Such allegations can also be filed directly with your agency's Equal Employment Office or the Office of Special Counsel.

Regardless of the route an employee chooses to appeal a performance-based action, following the guidance in this booklet and getting assistance as needed from your agency's human resources staff and legal counsel will prepare you to present a strong case supporting your actions before any third party. Remember, the staffs of those two offices are the experts in this area, and will be glad to explain your role in the appeals process and provide the technical assistance you need.

CHECKLIST FOR PROPOSAL AND DECISION NOTICES IN PERFORMANCE BASED ACTIONS

For Actions Based on 5 CFR Part 432

Item	Yes	No
Do you have written performance standards/elements for the employee?		
Do you have copies of any supervisory notes of counseling or assistance given to the employee?		
Do you have copies of memoranda of counseling provided to the employee?		
Do you have a copy of the written notice providing an opportunity to improve?		
Did you document the employee's performance during the opportunity period?		

For Actions Based on 5 CFR Part 752

Item	Yes	No
Do you have written performance standards/elements for the employee OR evidence that performance expectations were communicated?		
Is there documentation that the employee was clearly "on notice" of performance expectations?		
Do you have copies of any supervisory notes of counseling or assistance given to the employee?		
Do you have copies of memoranda of counseling provided to the employee?		
Do you have a copy of the written notice providing an opportunity to improve OR can you explain your reasons for not providing an opportunity to improve?		
Did you document the employee's performance during the period in question?		

Q&A TAKING ACTION

How much specific information needs to go into a proposal notice to remove?

What reasons warrant not providing an employee with a formal opportunity to improve?

What if I fail to issue my Part 432 decision within 30 days after the notice period expires?

How should I decide whether to suspend, demote, or remove?

SPECIAL TOPICS

During the process of addressing and resolving performance problems, you will need to keep abreast of certain situations that are driven by an employee's length of service. The two most common situations involve the consideration of an employee's probationary/trial period and the denial of his or her within-grade increase.

THE PROBATIONARY/TRIAL PERIOD

One of the most important times to address performance is during the probationary/trial period. As the final step in the examination process of a new employee, this period—which generally lasts 1 to 2 years and is designed to give supervisors the opportunity to assess how well an employee can perform the duties of a job.

Probationary period (1 year) = competitive service employees
Trial period (1 to 2 years) = excepted service employees

Employees' performance during this time period usually serves as a good indication of how well they will perform throughout their career. During this period, supervisors should provide assistance to help new employees improve their performance while, at the same time, determine whether or not the employee is suited for a position.

If a performance-based action is warranted against a probationer, please keep in mind that probationers can only appeal their termination to the Merit Systems Protection Board if:

- Termination is based on marital status, or
- Partisan political affiliation

Employees working during their probationary/trial periods are not covered under Parts 432 or 752 of the Code of Federal Regulations. This exemption is due, in part, to the fact that the very nature of this period is to allow supervisors the chance to determine whether a new employee will be an asset rather than a liability to the organization.

The lapse of a probationary/trial period without a proper assessment of a new employee's performance may result in future performance problems. For supervisors, the probationary/trial period should always be considered a key period for addressing and resolving poor performance.

WITHIN-GRADE INCREASE DENIALS

While in the process of assisting an employee with improving performance, or sometimes in the process of taking a performance-based action, a supervisor often has to deal with the issue of a within-grade increase denial. Within-grade increases (often called WIGI) are routinely granted for employees whose performance is acceptable, but supervisors need to be aware of the process required to "deny" a within-grade increase when an employee's performance is not at the acceptable level.

In order to be eligible for a within-grade increase, an employee must be performing at an "acceptable level of competence." In most agencies, this eligibility requires a rating of minimally successful or equivalent. Depending on the nature of an agency's performance management system, it is not unusual for an employee to be above the unacceptable level but below the level required for a within-grade increase.

As soon as you determine that an employee's performance is falling below the acceptable level, even if it is not yet at the unacceptable level, find out when the employee's next within-grade increase is due. Depending upon the step of the employee, there may be a 1-, 2-, or 3-year waiting period until the next within-grade increase could be granted. If it is coming up anytime soon, you need to assess where the employee stands in terms of meeting the standards for an overall rating of acceptable performance.

- Granting of within grade increases is determined based on meeting the appropriate waiting period and having the most recent rating of record be at an acceptable level of competence or better.
- To grant a within-grade increase, you must issue a determination that the employee is demonstrating an "acceptable level of competence" as documented in a current rating (i.e., not more than 1 year old).
- Once a within-grade increase has been denied, a supervisor has the flexibility to approve a within-grade increase at any time thereafter once the employee is determined to be performing at an acceptable level of competence, but the agency must consider the employee's performance at least every 52 weeks after the denial.

Q&A SPECIAL TOPICS

Do I have to give a probationary/trial employee an opportunity to improve?

What happens when a within-grade increase comes due right in the middle of an opportunity period?

HELPFUL WEB SITES

Department of the Interior:

- DOI Personnel Manager
www.doi.gov/hrm/pmanager

Office of Personnel Management:

- Resource Center for Addressing and Resolving Poor Performance
www.opm.gov/er/poor/ppp_tips.asp
- Employee Relations Performance-Based Actions guidance
www.opm.gov/er/performance.asp
- Human Resource Guidance at:
www.doi.gov/hrm/guidance/curronly.htm
- 370 DM 430, Performance Management System
- Performance Appraisal Handbook

*Any questions should be directed to your servicing Human Resource Office

TO RECEIVE CREDIT FOR THIS COURSE

1. PRINT your name on the attendance roster.
2. UPON RECEIPT OF E-MAIL NOTIFICATION, complete the online course evaluation.

APPENDIX

SAMPLE MEMORANDUM OF COUNSELING

This sample notice is provided as a guide for supervisors but is not to be considered a model or even a suggested version for final use. The names used in this sample are fictional. Actual notices will include more specific information about the performance deficiencies and must include any additional statements or referrals required by agency policy or collective bargaining agreements that may exist. Supervisors should contact their human resources offices for technical assistance and review of actual notices.

SUBJECT: MEMORANDUM OF COUNSELING

FROM: DANA SMITH, ASSISTANT DIRECTOR
OFFICE OF INFORMATION TECHNOLOGY

FROM: PAMELA WASHINGTON
COMPUTER SPECIALIST

The purpose of this memo is to provide a summary of our August 20th meeting. This meeting was held to informally discuss your performance during the implementation of a new local area network (LAN). As I said last Tuesday, there are three areas of concern with your work. My understanding of the issues addressed are as follows: (1) Missed deadlines, (2) customer complaints, and (3) careless mistakes. During our discussion, it was quite evident that the lack of good communication between the two of us has contributed to deficiencies in your performance. Particularly, you noted that although I gave you overall time frames for the LAN implementation, I never explained the importance of specific deadlines and how that would impact the organization. You also said that my style of supervision was more detailed and closer than that of your previous supervisor. Finally, you seemed genuinely surprised by the number of customer complaints I had received about your work and the number of times I had to follow up and fix problems. To help improve your performance, we agreed on the following:

1. While I may not change my "hands-on" management style, I agreed to give you more flexibility to work independently. In turn, this will allow you to be able to focus more on your job rather than worry about what my intentions are.
2. I agreed to inform you of all complaints I receive from customers concerning your work. In turn, you agreed to handle these complaints yourself and correct the problems associated with them.
3. We both agreed to meeting weekly to discuss our progress.

Based on your experience, I believe you can succeed in this job, but it is essential that you work to reduce the number of errors and focus clearly on completing work within the assigned time frames. If you have any comments to add to these notes, please feel free to inform me orally or in writing.

SAMPLE OPPORTUNITY NOTICE: EXAMPLE #1

This sample notice is provided as a guide for supervisors but is not to be considered a model or even a suggested version for final use. The names used in this sample are fictional. Actual notices will include more specific information about the performance deficiencies and must include any additional statements or referrals required by agency policy or collective bargaining agreements that may exist. Supervisors should contact their human resources offices for technical assistance and review of actual notices.

SUBJECT: NOTIFICATION OF UNACCEPTABLE PERFORMANCE/OPPORTUNITY TO IMPROVE

FROM: TUAN LEUNG
CHIEF, ACCOUNTING AND FINANCE DIVISION

FROM: ANGIE SMITH
ACCOUNTING TECHNICIAN

This notice is written confirmation that I am providing you with an opportunity to improve your performance to the Minimally Successful level. I have determined that your performance is unacceptable in two critical elements of your position, and therefore, a performance improvement plan (PIP) is required under Article 10 of our Collective Bargaining Agreement. The PIP outlines activities that you must complete to attain a Minimally Successful rating on the two critical elements in which your performance has fallen to an unacceptable level. If you have any concerns about the PIP or you require additional guidance in following it, please let me know as soon as questions arise

The PIP becomes effective today and will continue for 60 calendar days from today. It is important to perform well under the standards set out in your performance plan, which was provided to you on _____. A copy of the elements and standards for your job is attached. By the end of the opportunity period, you must have brought your performance up to at least the Minimally Successful level on the elements in which you are currently unacceptable in order to avoid a reduction in grade, removal, or reassignment. This PIP is to assist you in reaching that objective.

[This sample uses a performance system with a level 2 (Minimally Successful) requirement. Be sure to review your agency's system to determine the level of performance that an employee must reach to stay in the job.]

During the period of the PIP, you are to report directly to me for problems relating to your performance. Given the nature of my duties, I realize there are times when I may not be available for several hours at a time during the day. During these times, you should report any problems or address your questions to Ron Santilli. Beginning this Tuesday at 9:00 and every Tuesday morning throughout the PIP, you and I will meet at least once a week to discuss the quality of your work. Although I don't foresee any long-term absences on my part, if I am gone for a full week, Ron will act on my behalf and meet with you to review your performance.

The deficiencies in your performance have centered on two critical elements: Coding of

Accounts Payable Documents and Performance of Scheduled Reconciliations. During your first year in this job, you received all of the formal training associated with these elements that is normally provided to accounting technicians in this branch. However, you have been unable to apply this training and demonstrate the necessary skills in these elements. Your most recent annual performance rating of minimally successful was given despite the fact that these performance discrepancies existed to some degree even during your first year. I made that decision on the basis that some of those performance problems reflected the fact that you were still in the learning curve on your assignments. These problems were communicated to you during the annual performance review. However, in the 6 months since that rating was given, your work performance has declined and, despite the fact that I have routinely pointed out your errors, you have not been able to perform acceptably in some of the key areas of your position.

In the critical element of "Performance of Scheduled Reconciliations" your performance plan states that the Minimally Successful level of performance is:

Routinely reconciles accounting transactions affecting the employee's assigned work, including obligations, accruals, and payments, in an accurate manner. These transactions are reconciled accurately to the accounts payable open document listing in a timely manner.

Currently, your performance on this critical element is at an unacceptable level due to the number of errors I have found in your work because you continually post transactions in the wrong category and then extensive work is needed to determine why your records are not reconciled. Over the past month, I frequently had to point out to you mistakes that occurred because accounting documents were not input in the appropriate categories in the system. Further, I found that 25 errors occurred where your worksheets did not balance with the open document listing. Although your performance standard does not include numerical requirements, 25 errors in one month does not meet the requirement for routinely accurate work. This type of performance is representative of the performance deficiencies you have been exhibiting over the past several months.

[At this point an actual notice would include a more detailed assessment of the mistakes in the employee's work.]

During this opportunity period, you must improve your performance to at least the Minimally Successful level in order to continue in your position. In particular, you must conduct your reconciliation work with an error rate of no more than 10% per week, in accordance with the requirement for accuracy listed in your standard. You must also reconcile your worksheets with the accounts payable open document listing with an error rate of no more than 10% per week. Each of these two functions within this standard are equally important and failure to perform adequately on either one will result in an overall finding of unacceptable on the standard as a whole.

To assist you in this area, I would like to spend some time during our first weekly meeting next Tuesday to review the reconciliation process and go over with you the thought process that is needed when deciding where certain transactions should go in the system. Please bring with you your reference material from the training class and we will adapt the generic checklist provided in that book to include our internal requirements as well. You can then use that amended checklist as a reference point in the future.

[Specific examples of various forms of assistance should be included here.]

In the critical element, "Coding of Accounts Payable Documents," your performance plan states that the Minimally Successful level of performance is:

Routinely codes appropriate accounting data from original documentation onto the Document History Record (DHR) in an accurate and timely manner. These data include such entries as the schedule number, cross reference, transaction code, document number, management code, money amount, and vendor name/order number.

Your performance in this element is unacceptable based on both your problems with accurate coding and your lack of timeliness. Although some level of error is anticipated given the large number of data items that must be coded by the technicians in the Branch, the constant number of corrections that you must make on your work is not acceptable. With each of my counseling memos to you, I have attached copies of DHR error reports that reflect the repetitive nature of your errors. Further, as reflected in the "overdue corrections" column of these reports, you often take up to 10 working days to make the correction and return the work for input into the automated system. This creates the potential for an even greater negative impact because any reports generated from those data prior to the correction contain the erroneous information and are also incorrect.

[At this point an actual notice would include a more detailed assessment of the mistakes in the employee's work.]

In order to achieve Minimally Successful performance in this critical element, you will need to reduce your number of errors to no more than 20 coding errors on any biweekly error report. I arrived at the figure of 20 errors based on the fact that the number of data items coded in a 2-week period is typically 300. Here, errors will be defined as coding mistakes in situations where you received all the correct information on the original documentation. Errors that resulted because you were given incorrect information or because the data were changed after they were originally coded will not count against your standard. 95% of the time, corrections to the DHR error report will be made within 5 working days of receipt of the report. Both accuracy and timeliness are equally important in the performance of this critical element, and failure to meet the requirements of either will result in an overall finding of unacceptable on the standard as a whole.

To assist you in improving in this aspect of your job, I have asked Ron Santilli to create a "cheat sheet" of commonly used codes for a variety of entries. I have also pulled up your coding sheets for each of the errors shown on the latest DHR error report. During our first weekly meeting, we will go over each of the mistakes and perhaps I can determine a pattern that may show why you are not selecting the correct codes. Also, each week, bring three or four of your current assignments to the meeting and we will go through the coding together.

I believe that if you use these written tools and our weekly meetings to develop and hone your accounting skills, you will be able to bring your performance to an acceptable level. You must meet and maintain the Minimally Successful level of performance on both the critical elements listed above for 1 year from the beginning of the opportunity period. Failure to achieve

acceptable performance on these critical elements during the opportunity period, or to maintain it during the remainder of the 1 year, may result in removal or reduction in grade without any further opportunity to demonstrate acceptable performance.

If you have any questions about this PIP or require additional guidance on implementing the provisions of it, please let me know as soon as questions arise. Keep in mind that it is important to refer to this plan throughout the PIP period.

[It is essential that you contact your human resources office to determine what additional information should be included in an actual notice. Agency policies and collective bargaining agreements sometimes provide that specific notice or referrals are given to employees.]

If you feel that you have a personal or medical problem that may be impeding your ability to perform your duties at an acceptable level, I suggest that you seek assistance through the Employee Assistance Program (EAP). This is a confidential program, and you may reach a counselor by calling 1-800-555-1212 to schedule an appointment.

Please sign a copy of this memorandum, which serves only to acknowledge your receipt of this notice.

Receipt Acknowledged

Signature

Date

SAMPLE OPPORTUNITY NOTICE: EXAMPLE 2

This sample notice is provided as a guide for supervisors but is not to be considered a model or even a suggested version for final use. The names used in this sample are fictional. Actual notices will include more specific information about the performance deficiencies and must include any additional statements or referrals required by agency policy or collective bargaining agreements that may exist. Supervisors should contact their human resources offices for technical assistance and review of actual notices.

SUBJECT: NOTIFICATION OF UNACCEPTABLE PERFORMANCE/OPPORTUNITY TO IMPROVE

FROM: MARIA SANCHEZ
CHIEF, EMPLOYEE RELATIONS DIVISION

FROM: JOHN BROOME
EMPLOYEE RELATIONS SPECIALIST

Since your mid-year progress review on January 6th, your performance has declined steadily and has reached the Unacceptable level. You have not improved in any of the areas we discussed during the mid-year review, nor has your performance improved in response to counseling sessions and memoranda that you have received over the past few months. I have determined that you are Unacceptable in the critical element, "Providing Technical Assistance to Managers." Consequently, I am providing you with an opportunity to improve your performance to the minimally successful level, and this notice outlines the required activities and the level of performance that you must attain in order to be considered Minimally successful on this critical element. If you have any questions concerning the contents of this notice, the performance standards involved, or my expectations of you during the opportunity period, please see me immediately.

[This sample uses a performance system with a level 3 (Minimally successful) requirement. Be sure to review your agency's system to determine the level of performance that an employee must reach to stay in the job.]

The opportunity period begins today and will continue for 90 calendar days from today. As you are aware, the agency adopted a three-level performance appraisal system last year. Your performance elements and standards were given to you on _____. A copy of those are attached. Therefore, it is essential that you improve to the Minimally successful level by the conclusion of the opportunity period, or I will take action to remove or reduce you in grade. Since your annual rating is due in 3 weeks, our agency program allows me to delay the issuance of your summary rating until the conclusion of this opportunity period. While you are currently performing at an Unacceptable level, I am prepared to place greater weight on your performance during the opportunity period, and, if you improve to the Minimally successful level on this critical element, the improved performance will be reflected in the annual rating.

[Check your agency policies on the issue of delaying a final rating when an opportunity period is in effect.]

We will need to work together closely during the opportunity period, and I want to encourage

you to discuss your cases with me at any time that you need some clarification or just want a sounding board for your ideas. At a minimum, we will meet once a week to go over your caseload and work through any problem issues. This will also be an opportunity for you to ask questions or seek clarification from me. For my part, I will give you an assessment of your performance progress for the week, provide recommendations for improvement, or give specific assignments and deadlines. We will plan to meet on Thursday afternoons from 2:00 - 3:00 p.m., throughout the opportunity period.

The Minimally successful level of performance in the critical element, "Providing Technical Assistance to Managers" states, "Provides accurate and timely advice and technical guidance to supervisors on a full range of issues involving discipline, leave, standards of conduct, and procedures for performance-based and adverse actions." The deficiencies in your performance are basically the same problems we have been discussing for some months. You are an experienced employee relations specialist and have done your job well in the past, but your current work products are plagued by incomplete, haphazard preparation and background work. Additionally, your work is not timely and I am routinely receiving complaints from supervisors that you are not returning their calls in a timely manner and draft documents are not delivered as promised.

Specifically, you and I have discussed several times that it is not appropriate for you to rely on your recollection of case law from the Merit Systems Protection Board (MSPB) and the Equal Employment Opportunity Commission (EEOC). Instead, you must research the current case law whenever you are preparing to give a supervisor advice on how to proceed and certainly before drafting a proposed notice of action based on misconduct or performance problems. While numerous examples of this problem are noted in my counseling notes to you, one example is illustrative. You advised a manager that she could send home an employee who was not "ready, willing, and able" to work and the employee would be forced to use his own leave. The case law on this topic is clear that the MSPB has not allowed the use of enforced leave without adverse action procedures, and it has been years since the "ready, willing, and able" standard was dropped by the Board. Your failure to stop and check the status of the cases in this area caused the supervisor to erroneously place an employee on leave, an action that had to be corrected as soon as I heard about it from a union steward. The supervisor was embarrassed when she had to contact the employee about the correction and was furious for being made to look ignorant. Even after I brought this to your attention, you were adamant that the old case law prevailed and only agreed with me after I ordered you to review the case law from the last 4 years. As noted earlier, additional examples of this type of problem are in the counseling memorandum (dated _____), which I have provided to you.

The other key performance deficiency that we have been discussing is your lack of attention to specific deadlines and a general lack of attentiveness to the supervisors who seek your technical expertise and guidance. In all cases where a supervisor has complained to me about your failure to follow up, I have notified you and asked for an explanation before responding to the manager who raised the issue. Dr. Tiberius, a manager in the finance department, was particularly frustrated when you did not return several of his calls (over a 4-day period) and finally called me to get an answer to a relatively simple question about the procedures for invoking leave under FMLA. Similarly, I had to respond to calls from Ms. Capulet, another of your customers, who was in her second week of waiting for a proposed suspension notice. When I asked you about the action, you told me it was a routine AWOL action but you just hadn't gotten to it. Looking at

everything else you had responsibility for during that 2-week period. I found no justification for the delay and assigned the notice to another specialist who prepared it in 2 days.

[Actual notices will include more details concerning unacceptable performance. Often data cited to support the determination of unacceptable performance are attached to the notice.]

I recognize that you have many competing demands on your time, but it is essential that you keep supervisors apprised of what you are doing and set realistic timeframes for responding to their inquiries or for drafting memos or notices. A GS-13 is required and expected to make independent judgments and appropriately schedule their work for timely completion. In all of our discussions, you have not articulated a good reason for your failure to return a phone call or deliver a promised draft. Your statement that you are doing your best does not seem viable when large numbers of deadlines are missed and telephone calls are not returned. The impact of your poor performance is severe because it causes me or other staff members to do additional work, and it lessens the respect that supervisors have for you and makes them unwilling to work with you on employee relations matters.

Under the critical element, "Provides Technical Assistance to Managers," the Minimally successful level states, "Provides accurate and timely advice and technical guidance to supervisors on a full range of issues involving discipline, leave, standards of conduct, and procedures for performance-based and adverse actions."

During the opportunity period, you must perform in at least a Minimally successful manner in this critical element. Specifically, you must research the current case law before issuing any draft notice and should use your best judgment to determine the need for research in response to inquiries from managers. This should not cause a great increase in time per case because you have access to a computerized research tool that provides access to MSPB, EEOC, and court decisions and has a very effective search mechanism. For the duration of the opportunity period, you will need to keep a short but concise telephone log of calls and issues to which you respond. During our weekly meeting, we will discuss your responses so that I can review the advice you are providing to supervisors and managers. Additionally, print out a copy of relevant decisions (or case summaries, if that will suffice) that will support your position on the actions for which you are drafting notices. We will review this research each week during our meeting. Over the course of the opportunity period, I expect to find routinely that your advice and notices are accurate, based upon solid and up-to-date research.

I believe that your problems with timeliness can be addressed by a more organized approach to your work. First, you must set reasonable deadlines for accomplishing research and drafting notices. If you know you have several cases where action is pending, do not over commit yourself to supervisors; come to see me and we will decide whether the work needs to be passed on to another staff member. Realistically, notices such as leave restriction memos, reprimands, and proposal notices for the more routine misconduct should be returned to supervisors in draft in 3 working days. More complicated notices should be returned in draft within 5 working days. I recognize that there are always exceptional cases, and I want to work closely with you on establishing deadlines for each of your assignments during the opportunity period. To be determined minimally successful, you will need to meet established deadlines in 90% of your work. Unless I set a specific date for an assignment, "established deadlines" will be the 3 or 5 working days noted above. During our first weekly meeting, bring a list of everything currently

pending on your desk and we will prioritize the work and set deadlines.

Secondly, keeping a telephone log will serve two purposes. The first, as noted above, will give me an understanding of what advice you are giving and will enable me to make recommendations for additional research where necessary. It will also be a way for you to keep records of when you received a call from a manager and when you responded to it. We will review this log at each of our weekly meetings, and I will use it as a method of keeping track of your workload as well as to monitor your progress in becoming more responsive to management inquiries. For the Minimally successful standard, I expect to receive no more than three justified calls during the opportunity period from supervisors complaining that you have not yet returned a call. In order to handle what may be a backlog of unanswered calls, however, I will not count any calls received during the first 2 weeks of this opportunity period.

If you follow the activities outlined above, your performance in the area of providing technical assistance should improve in both accuracy and timeliness. Additionally, I strongly encourage you to discuss cases with me on an informal basis throughout the opportunity period as well as in our scheduled weekly meetings. These meetings will focus on progress made and problems encountered as well as suggestions for improvement in your performance.

[Although this sample involves a non-bargaining unit employee, always be sure to contact your human resources office to determine what agency policies might require you to provide in the way of additional information or referrals for the employee.]

If you believe that a personal, medical, or other problem is causing these performance deficiencies, I encourage you to seek assistance through the agency's Employee Assistance Program (EAP). You can obtain assistance by contacting our EAP contract office at 1-800-555-1212. Participation in this program is voluntary and, with certain restrictions, confidential.

At the completion of the opportunity period, I will make an assessment of your performance. I believe at that time that you will have attained the minimally successful level in this critical element. You must meet and maintain the minimally successful level on this critical element for 1 year from the beginning of the opportunity period (the date of this memorandum). Failure to achieve Minimally successful performance on this critical element during the opportunity period or to maintain it during the remainder of the 1-year period may result in removal or reduction in grade without any further opportunity to demonstrate acceptable performance.

If you have any concerns about this memorandum or require additional guidance on implementing the provisions of it, please let me know as soon as possible. Keep in mind that it is important to refer to the requirements laid out in this notice throughout the opportunity period. Please sign a copy of this memorandum, which serves only to acknowledge your receipt of this notice.

Receipt Acknowledged

Signature

Date

SAMPLE PROPOSAL NOTICE

This sample notice is provided as a guide for supervisors but is not to be considered a model or even a suggested version for final use. The names used in this sample are fictional. Actual notices will include more specific information about the performance deficiencies and must include any additional statements or referrals required by agency policy or collective bargaining agreements that may exist. Supervisors should contact their human resources offices for technical assistance and review of actual notices.

SUBJECT: PROPOSAL TO REMOVE FOR UNACCEPTABLE PERFORMANCE

FROM: MARIA SANCHEZ, CHIEF EMPLOYEE RELATIONS DIVISION

FROM: JOHN BROOME, EMPLOYEE RELATIONS SPECIALIST

This is to inform you that I propose to remove you from your position as Employee Relations Specialist, GS-230-13, and from the Federal Service, for unacceptable performance under the provisions of 5 CFR Part 432. This proposal is based upon your unacceptable performance in the following critical element: Providing Technical Assistance to Managers. This action, if taken, will be effected no sooner than thirty (30) calendar days from your receipt of this proposal.

On June 10th, after several months of informal counseling about your performance problems, I issued you a memorandum stating my determination that your performance was at an unacceptable level in the critical element of Providing Technical Assistance to Managers and provided you with an opportunity to demonstrate acceptable performance. Attached you will find a copy of your performance elements and standards as well as the opportunity notice that further clarified your performance standards. During the 90-calendar-day opportunity period (from date _____ to date _____), you failed to achieve the required level of performance in the element listed above. The specific reasons for this proposal follow.

During the opportunity period, I met with you every Thursday with the exception of two dates (July 17th and August 21st) when I was on annual leave and official training, respectively. During those weeks, you were encouraged to contact the Director of Human Resources with any significant cases that came up and I met with you on the Monday following my absences to cover any issues that needed further attention. One purpose of these meetings was for you to demonstrate that you were researching current case law prior to issuing any draft notices to supervisors or providing them with verbal guidance on how to proceed in certain circumstances. As indicated in my summary notes from those weekly meetings (a copy of which you received each week), your performance in this activity was spotty at best. On several occasions, you simply failed to present any research, while at other times you submitted copies of cases dating from the mid-to-late 1980s, which, although relevant to the topic, could not be considered current by any means. I was forced routinely to inform you of specific cases that I knew conveyed the current legal holdings of the Merit Systems Protection Board (MSPB) and the Equal Employment Opportunity Commission (EEOC) that were relevant to the cases you were handling. In several cases this caused rewrites of the draft notices you had prepared, and, in two cases (Montague and Tyrone), you needed to meet with the supervisors and restructure the advice you had given regarding responding to their employees about their appeal rights, if adverse actions were taken against them.

[An actual proposal notice would include more specific examples and documentation of the unacceptable performance.]

By far, the most egregious mistake occurred because you failed to research the current case law on the issue of providing a "firm choice" to alcoholic employees. A supervisor, Dr. Hamlet, presented you with a situation in which an employee with a long history of disciplinary actions associated with his use of alcohol had created a disturbance at work, left work without approval, and remained in an AWOL status for 5 days. You informed the supervisor that no action could be taken at this time because the agency had not given the employee a firm choice between getting medical help for his addiction or facing the consequence of being fired. In fact, the case law on this changed in 1996 when the EEOC and the MSPB found that a firm choice for alcoholics is no longer a requirement and agencies may take actions, including removal for misconduct, even if directly related to the alcoholism. You went on to prepare a notice to the employee providing a firm choice, and, until we reviewed the matter in our weekly meeting of August 28th, you were unaware of the change in the case law. Your failure to properly research resulted in delays in the issuance of an appropriate proposal notice of adverse action to the employee. Additionally, you had to go back to the supervisor and admit that you had given him erroneous advice regarding the need for a firm choice, which he had unfortunately already conveyed to the employee. Clearly, your performance has fallen far short of routinely providing accurate technical advice to the management of this agency, and I find you to be unacceptable in this aspect of your performance.

The second aspect of your performance standard for this critical element involves the timeliness of advice given to supervisors. As I indicated in your notice of an opportunity to improve, I expected you to respond to supervisors in a timely manner by establishing reasonable deadlines for yourself and keeping supervisors apprised of your progress. As an employee at the grade 13 level, I expected you to carry out this assignment with minimal assistance from me. However, I reviewed all of your pending work during our first meeting and established priorities and deadlines for those assignments. Additionally, I asked you to maintain a telephone log for the duration of the opportunity period so I could monitor who was calling and when you were responding to them. On several occasions (dates), when I questioned you, you were unwilling to discuss your own decisions on deadlines for new cases you received during the opportunity period. Finally, as stated in my summary notes from our August 7th meeting, I worked closely with you to set deadlines for all of the work you brought to the meeting. An audit of all of your work submitted during the opportunity period indicates that you met your established deadlines in only 78% of your assignments. This number does not include the three cases (Bottsworth, Carey, and Lucas) where we agreed to extend the deadline due to unusual circumstances beyond your control. Further, I continued to receive a large number of complaints from supervisors that you simply would not return their calls and I was forced to provide them with a status report in the cases where I had that information. Discounting the calls I received during the first 2 weeks of the opportunity period (as stated in the opportunity period notice); I received 12 complaints from supervisors where you were unable to provide me with a supportable reason for your failure to respond to their calls. At this time, I have determined that you continue to be unacceptable under the timeliness aspect of your performance standard.

Conclusion

During the opportunity period, you were given every opportunity to improve to the Minimally successful level but failed to do so. It is my conviction, based on your unacceptable performance that you are unable to handle all the aspects of the position you hold. Therefore, based on your unacceptable performance in the critical element, Providing Technical Assistance to Managers, as described above, I am proposing your removal from your current position and from the Federal Service.

Request for Reasonable Accommodation

In our weekly meeting on June 26th, you presented medical documentation stating that you were suffering from diabetes and would need accommodation on the job due to your disabling condition. I requested clarification regarding the impact of the diabetes on your ability to work as well as your accommodation request. You responded that you would need sick leave for doctor's visits while you are getting your medication program established and that you would need to store insulin in the agency's health unit and administer that medication once a day. As I stated at the time you submitted this information, I am extremely sorry to hear that you have diabetes, but there didn't appear to be any reason to alter the conditions of the opportunity period except to handle your work myself or assign it to other staff members during your sick leave absences. This was done on each occasion when you were absent, and there were no instances when you were denied use of sick leave.

Additionally, given the brief nature of the absence, I excused your absence without charge to leave each day when you went to the health unit to take your medicine. I have determined that your medical condition has not had any negative impact on your ability to perform because none of the medical documentation you submitted would support that position.

[Always contact your human resources office when an employee raises a medical issue that may be disabling.]

You have the right to respond to this notice both orally and in writing, to prepare and present your response, and to present affidavits of other documentary evidence in support of your response if you elect to make one. You have the right to represent yourself, or to be represented by an attorney or other individual. Designation of your representative must be made in writing to the Human Resources Director within () calendar days of your receipt of this memorandum. You will have () calendar days to present your oral and/or written response to Mr. Taylor, the Assistant Director for Administration. Consideration will be given to extending the ()-day answer period if you submit a written request to Mr. Taylor stating your reasons for desiring more time. If you choose to make an oral reply, either in lieu of or in addition to a written response, you should contact Mr. Taylor and he will schedule an appointment for you to make your response.

You will be allowed a reasonable amount of official time, not to exceed () hours, to review the evidence in support of the reasons advanced in this proposal, and to prepare your written reply. Documentary evidence relied on to substantiate the reason for this proposal is available for your review. Please contact me to if you wish to schedule the use of official time or to review the documentation.

You will receive a written notice of Mr. Taylor's decision as soon as possible after all the

evidence in your case, including your written and/or oral reply and all associated documents, has been reviewed and considered. If you do not respond, the decision will be issued after the time allotted for your response has elapsed. If it is determined that your removal is warranted due to an unacceptable level of performance, the decision notice will explain applicable grievance and appeal procedures and how to exercise them.

You will remain in a duty status during the notice period of this memorandum. If you do not understand the reasons given for proposing to remove you, you may contact me for further explanation. Please sign and date the attached copy of this memorandum, which serves only to acknowledge the date on which you received it.

Receipt Acknowledged

Signature

Date

SAMPLE DECISION NOTICE

This sample notice is provided as a guide for supervisors but is not to be considered a model or even a suggested version for final use. The names used in this sample are fictional. Actual notices will include more specific information about the performance deficiencies and must include any additional statements or referrals required by agency policy or collective bargaining agreements that may exist. Supervisors should contact their human resources offices for technical assistance and review of actual notices.

SUBJECT: DECISION TO REMOVE FOR UNACCEPTABLE PERFORMANCE

**FROM: BEN TAYLOR, ASSISTANT DIRECTOR
 FOR ADMINISTRATION**

**FROM: JOHN BROOME
 EMPLOYEE RELATIONS SPECIALIST**

In a notice dated and received by you on October 20th, Maria Sanchez, Chief of Employee Relations, proposed to remove you from your position of Employee Relations Specialist, GS-230-13 and from the Federal Service, on the basis of unacceptable performance.

As the deciding official, I have carefully reviewed all the material that formed the basis for the proposal and that was also made available for your review. I have also given full consideration to our meeting of November 2nd, during which you presented your oral response to the proposed removal as well as your written response. While you mentioned several times that you believed I had already made up my mind about this case and that your response was meaningless, you nevertheless challenged, in general terms, the validity of the opportunity period and alluded to many technical inaccuracies. Despite my request that you provide me with a listing of specific errors that occurred in the course of the opportunity period, you never did so. Without any specific information, I cannot give your statements any weight in my considerations. Nonetheless, I have reviewed the documentation for technical inaccuracies and have found none.

You did state that you believed you had a heavier workload than the other specialists in the branch and that it was not possible to keep up with all of the calls from supervisors who needed assistance. However, I have reviewed the monthly case report from your branch and have found that you were assigned approximately the same number of cases to handle as your colleagues during June and July and were given fewer cases, comparatively, during the month of August. Secondly, your cases were not the most complex or arduous available. Although several were complicated, I found nothing of a difficulty that a specialist at the grade 13 level should not be expected to handle. I cannot, therefore, find any justification for your continuing failure to contact supervisors in a timely manner or your failure to meet your assigned deadlines. The evidence in the proposal notice and evidence file clearly indicates that you failed to meet the requirements for Minimally successful performance regarding the timeliness of your work.

You did not specifically respond to the issue of your failure to provide accurate technical guidance to supervisors and managers. I find the evidence compelling that your supervisor attempted to give you a mechanism for reviewing current case law and ensuring that your advice

reflected any and all recent changes in the law. It is also obvious that, in many cases, you did not conduct appropriate research prior to advising managers and drafting notices that had to be revised or completely redone based on poor preparation on your part.

Your response dealt with the issue of "blame" for cited errors or delays; you felt you were being blamed for actions that were not your fault. The real issue is not one of blame but of responsibility; the examples cited by your supervisor clearly indicate that you have too frequently not met your responsibilities and have shown no indication of improvement or even of particular concern. While you have demonstrated an ability to perform this job in the past, you are currently failing to carry out one of the key functions and responsibilities of the position, and have made no effort to improve in this respect.

[An actual decision notice will discuss all pertinent issues raised by the employee in the response. Deciding officials may need to look into statements in the response or appoint a fact finder to determine the validity of some statements.]

I have very carefully reviewed your allegations of disability discrimination based on your medical documentation, including the diagnosis of diabetes. Although you did not inform your supervisor of this condition until 2 weeks into the opportunity period, I concur with the assessment by Ms. Sanchez that your medical condition did not impact on your performance and that there was no need to alter the conditions of the opportunity period. Memoranda of counseling reflect that your work was handled by coworkers or by your supervisor on any day that you were on sick leave for doctor's visits. I have reviewed your statements regarding your supervisor's negative attitude toward you after you revealed your condition. However, the examples you cite are of your supervisor's counseling you concerning errors in your work or criticizing your failure to research appropriately. These reactions from Ms. Sanchez are typical of any supervisor reviewing an employee's work during an opportunity period and I cannot find any evidence of a discriminatory motive. Nor can I find anything to support your argument that the opportunity period should have been discontinued until you got your medical situation under control.

I find that all the instances of unacceptable performance specified in the proposal notice of October 20th are sustained and that your performance in the critical element, Providing Technical Assistance to Managers, failed to meet the minimally successful standard, as clarified in the opportunity period notice you received from Ms. Sanchez. I also find that you were given a reasonable opportunity to demonstrate acceptable performance, but failed to do so. Therefore, I find that your removal for unacceptable performance is warranted.

Accordingly, it is my decision that you be removed from your position of Employee Relations Specialist, GS-230-13, and from the Federal Service, effective November 30th. You will be continued in an active duty status with pay until the effective date of this action.

Because you have raised the argument that your medical condition, diabetes, prevented you from working in your position, I am notifying you of your option to file a request for disability retirement with the U.S. Office of Personnel Management. Should you wish additional information on how to submit this application for retirement, please contact Ms. Sarah Gloucester at (202) 555-1212. Disability retirement applications must be filed within 1 year of your last day of employment (November 30th).

Additionally, in accordance with Title 5 USC 4303 and 7121(e) and (f), you have the right to appeal this action to the Merit Systems Protection Board (MSPB), Washington Regional Office, 5203 Leesburg Pike, Suite 1109, Falls Church, VA 22041. You will be deemed to have exercised your option at such time as you timely file a notice of appeal to the Board.

An appeal to the Board must be in writing and must contain the information required by MSPB regulations, a copy of which is attached. You may submit an appeal at any time after the effective date of this action, November 30th, but not later than thirty (30) calendar days after that date. A copy of the appeal form that you may use is also attached. Please sign and date the attached copy of this memorandum, which serves only to acknowledge the date on which you received it.

[Note that this sample involves a non-bargaining unit employee who would not have grievance rights under a collective bargaining agreement. It is essential that you obtain information from the human resources office regarding appropriate appeal and/or grievance rights.]

Additionally, because you have alleged that this action was discriminatory based on your medical condition, I am informing you of your right to file a complaint with the agency's Office of Equal Employment Opportunity (EEO). You may elect to file an appeal with the MSPB or to file a complaint with the EEO office, but you may not elect both at the same time.

You may bring any questions you have about this removal to me and I will explain any points that are unclear to you. If you have questions about your rights or the procedures used in this matter, you may contact Mr. Garrett Johnson, Director of Human Resources.

Receipt Acknowledged

Signature

Date