U.S. Merit Systems Protection Board

REMOVING POOR PERFORMERS IN THE FEDERAL SERVICE

Issue Paper

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The Civil Service Reform Act of 1978 (CSRA) was passed, in part, to make it easier for managers to remove poor performers from the Federal workplace. Experience over the last 15 years, however, shows that this goal has not been achieved. In particular, very few Federal managers bother to use the performance-based removal procedures established by the CSRA. The U.S. Merit Systems Protection Board (MSPB) recently surveyed Federal managers and supervisors regarding their perceptions and experiences in this regard. This issue paper highlights the results of that survey and discusses some of the possibilities for improvement in this area.

Summary: According to more than 5,700 managers and supervisors who responded to an MSPB survey, a number of factors combine to discourage them from taking formal actions against employees who cannot or will not perform at an acceptable level. Chief among these factors are the following:

- Supervisors do not understand either of the two major processes established by law for removing poor performers (often referred to as Chapter 43 and Chapter 75 provisions—after those sections of title 5 of the United States Code which contain the statutory authority for both).

- When seeking help from agency "experts" on Chapter 43 and Chapter 75 removal procedures, supervisors report that they frequently receive inadequate or confusing advice and assistance.

- Although both procedures can be used to address a poor performance problem, most supervisors believe that they must use only Chapter 43 procedures, which they perceive to be too complicated, time consuming, or onerous.

- Already reluctant to create an unpleasant work environment, many supervisors believe that if they take formal action against a poor performer there is a real possibility that (1) higher level management will not support them, (2) their decisions will be reversed upon review or appeal, or (3) they will be falsely accused of having acted for discriminatory reasons.

In contrast to these perceived disincentives are the beliefs of many supervisors that there is little downside cost to them if they do not take action. Many supervisors believe they can work around the deficiencies of their poor performers and still get the missions of their work units accomplished. In essence, many supervisors believe it is simply not worth the effort to attempt to remove Federal employees who cannot or will not perform adequately.

Retaining these employees, of course, costs both the organization and the taxpayer, since poor performance translates into higher than necessary payroll costs and lower productivity. Further, shrinking budgets and downsizing initiatives are starting to change the equation for some supervisors as they find it increasingly difficult to accomplish the work assigned to their work units while tolerating poor performers.

Responses to the MSPB survey make it clear that a key to improving the Federal response to poor performance is to reduce the disincentives that supervisors associate with taking appropriate action. A serious effort to do this will require answering the following three questions:

1. **Should the removal provisions of Chapter 43 (5 U.S.C. § 4303) be abolished?** Since these provisions are so infrequently used yet so often cited as a reason not to take appropriate action against a poor performer, perhaps those provisions should be repealed be favor of having all actions taken under Chapter 75 procedures?

2. **Will supervisors be more likely to take formal action against poor performers if substantial reforms are implemented to reduce or consolidate the number of available dispute resolution forums or the levels of review within those forums?** Employees who wish to contest a proposed performance-related removal can potentially have access to five different dispute resolution forums-each with multiple review levels.

3. **Should the law be changed to allow agencies to RIF poor performers?** Under existing law, agencies can't take poor performance directly into account in determining who will be separated during a reduction in force (RIF).

Background: The statutory merit principles underlying Federal personnel management policies and practices provide that the Government's employees should be treated equitably and that they should be protected against arbitrary action. The appeal rights of Federal employees exist as part of—and as a mechanism for enforcing—those guarantees. Federal employee due process rights were enacted, in part, to enhance the Government's ability to attract and retain a qualified workforce. The manner in which these rights have been protected has changed over time as the Federal Government continues to search for the most effective way to balance the Government's responsibility that it treat civil servants fairly with its need to manage the nation's largest civilian workforce efficiently.[1] The most comprehensive attempt to redo that balance was contained in the Civil Service Reform Act of 1978 which made significant alterations to Government's removal and appeal systems.

A major goal of the Civil Service Reform Act of 1978—enabling managers to more easily take action against poor performers—unfortunately has not been achieved. In transmitting the Reform Act to Congress, President Carter described the Government's personnel management system as one that had "serious defects" and "neglects merit, tolerates poor performance . . . and mires every personnel action in red tape, delay, and confusion."[2] To address the poor performance aspect of these problems, the proposed act included new procedures that were intended to simplify the way supervisors handle performance-based removal and demotion actions. These new procedures—known as Chapter 43 for their placement in title 5 of the United States Code—were intended to supplement the adverse action procedures contained in Chapter 75 of title 5. In particular, it was hoped that they would get around the

[1] Supreme Court rulings have also created a constitutional underpinning for many of the rights to fair treatment which Federal employees possess. See *Arnett v. Kennedy*, 416 U.S. 134, 150 (1974), for a discussion of the history of Federal employee due process rights.

[2] Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Civil Service Reform Act of 1978, at 639 (1979).

delays associated with the handling of Chapter 75 actions under which employees can be removed in the interests of the "efficiency of the service." The Senate Report on the legislation said that the new procedures were intended to "allow civil servants…to be fired more easily, but for the right reasons."[3] Because this goal has not been met, it is time to ask whether the Chapter 43 provisions that were intended to simplify matters have themselves proven to be so complex that they are now a part of the removal system's problems.

To this end, MSPB is currently conducting a study on the use of Chapter 43's removal and demotion provisions. As part of that study, MSPB distributed a survey in 1994 to approximately 9,300 randomly selected Federal managers and supervisors. The more than 61 percent who responded represent a cross-section of the Government's cadre of nearly 200,000 supervisors and managers. The survey completed by these respondents asked about actions they had taken (or not taken), their reasons for doing so, and the results of their actions in dealing with employees who had performance problems.

One of the Board's objectives in conducting the study was to gain insight as to why Chapter 43's removal and demotion provisions are so rarely used. According to the Office of Personnel Management, civilian employee files contain a record of only about 350 personnel actions under Chapter 43 per year. Most personnel actions taken against poor performers are still processed under Chapter 75. One reason is that Chapter 75 is perceived to be the quicker process because supervisors associate time-consuming performance improvement plans and other complexities with Chapter 43.

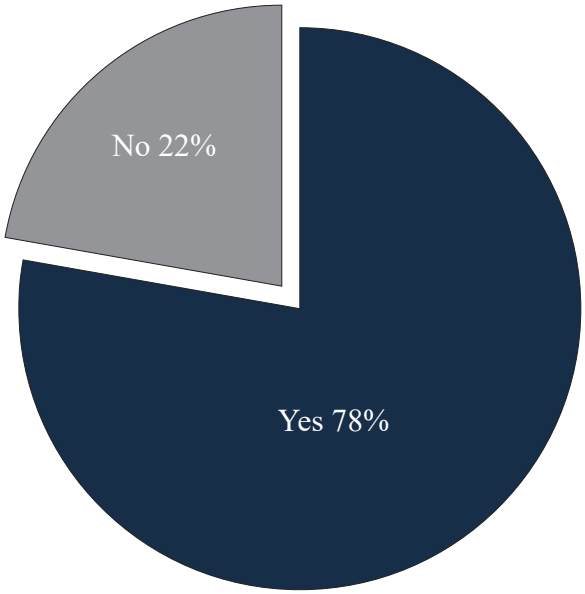
Our research findings with regard to the use of Chapter 43 will be released later this year in a report titled "Dealing with Employee Performance Problems in the Federal Government." However, we are releasing this paper now to promote discussion of our findings regarding the reluctance on the part of Government supervisors to remove or demote employees. Their problems in dealing with poor performers are so pronounced that we believe concerned parties should begin now to join us as we examine the causes for that reluctance and suggest what can be done to overcome it.

Findings: The Government has nearly 2 million civilian employees, most of whom are good performers. Still, with so many employees, it is inevitable that there will be some who are not performing well. And, as our research reveals (see fig. 1), the majority of Government supervisors (78 percent) have supervised poorly performing employees at some point in their career. Moreover, we found that nearly all supervisors who do so experienced difficulties in dealing with the situation (87 percent) and only a small percentage took formal action against the poorly performing employees. When we asked about the last time they had dealt with a poor performer, the vast majority of our respondents said they had counseled the employee (86 percent); but, as figure 2 shows, less than a quarter proposed a removal or a demotion.

Our survey data (augmented by information gained in interviews and focus groups sessions) revealed that an array of forces discourage Federal supervisors from acting against poor performers. One of those forces is the apparent belief that it is simply too hard to fire a Federal employee. As figure 3 shows, over a third of the supervisors who had dealt with a poor performer said they lacked confidence in the Government's removal systems (34 percent), and more than a fifth believed their actions would be reversed if appeals were filed (21 percent).

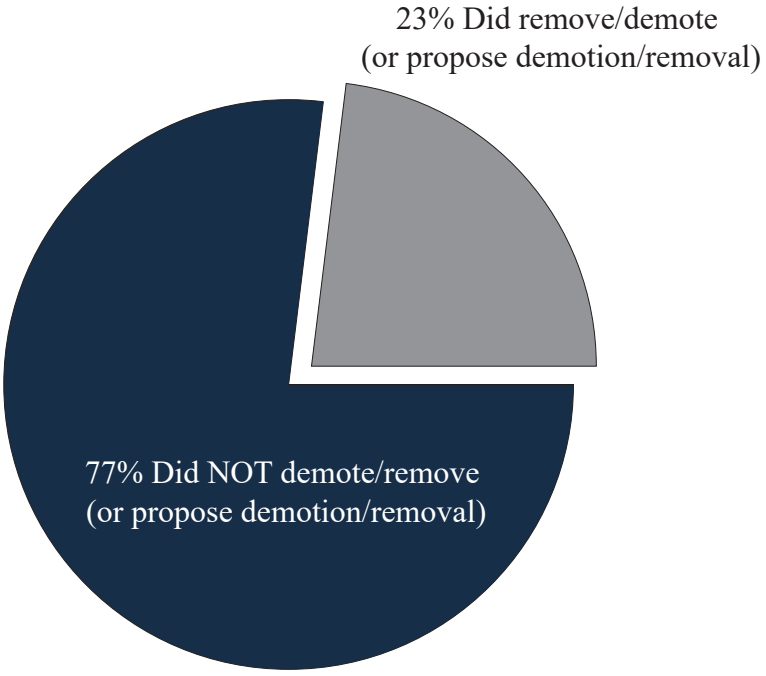
[3] *Ibid*., at 1468.

Figure 1. "Since you became a supervisor, have you had an employee with a performance problem?"



Source: MSPB survey data, 1994

Figure 2. Propensity of Supervisors Who Had a Poor Performer to Remove or Demote the Employee

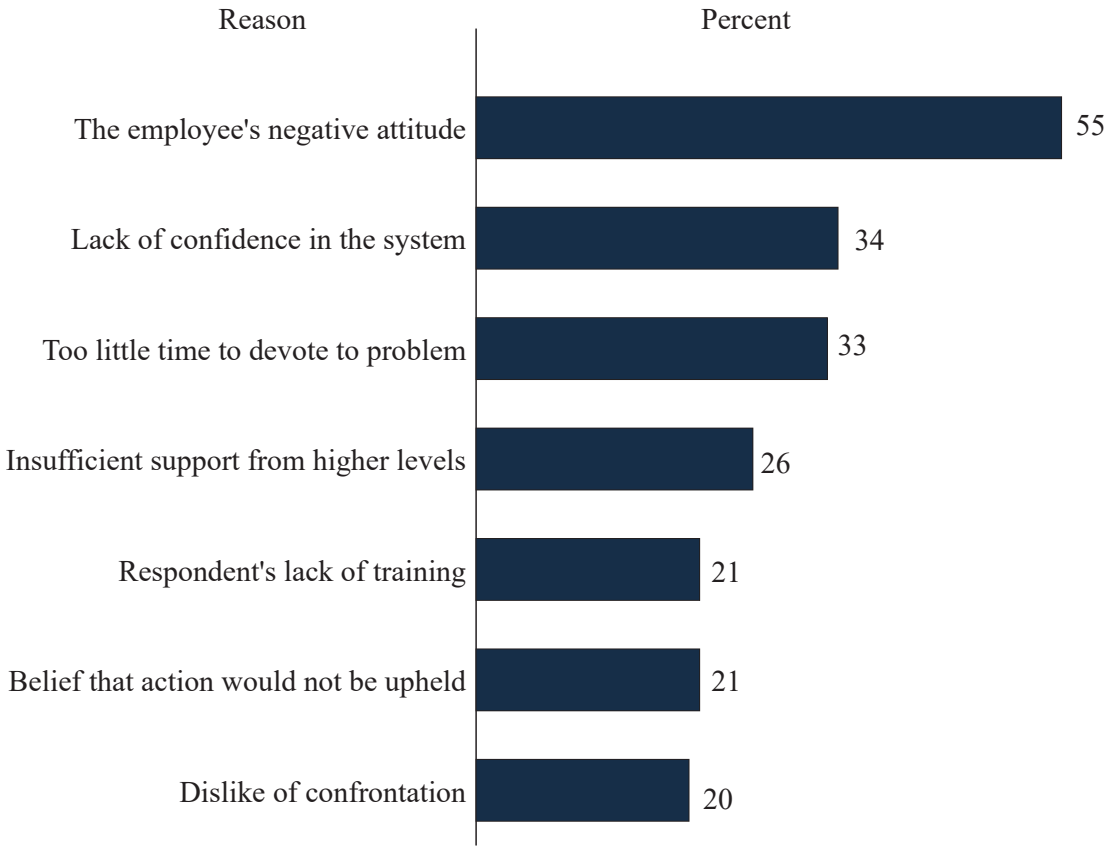


Source: MSPB survey data, 1994

The often-expressed view that it is useless to try to fire an employee exists even though most actions taken against Federal employees are not contested—and when employees do contest the actions, most of the time they don't win. In conversations we have had with officials of Government agencies, they estimate that only about 20 percent of all removals and demotions are appealed. And, at the Board, our records show that penalties are reduced, or actions are reversed in only about 17 percent of Board decisions.

Figure 3. Difficulty Dealing With Poor Performers

The most frequently cited reasons why respondents had difficulty dealing with performance problems were:



Source: MSPB survey data, 1994

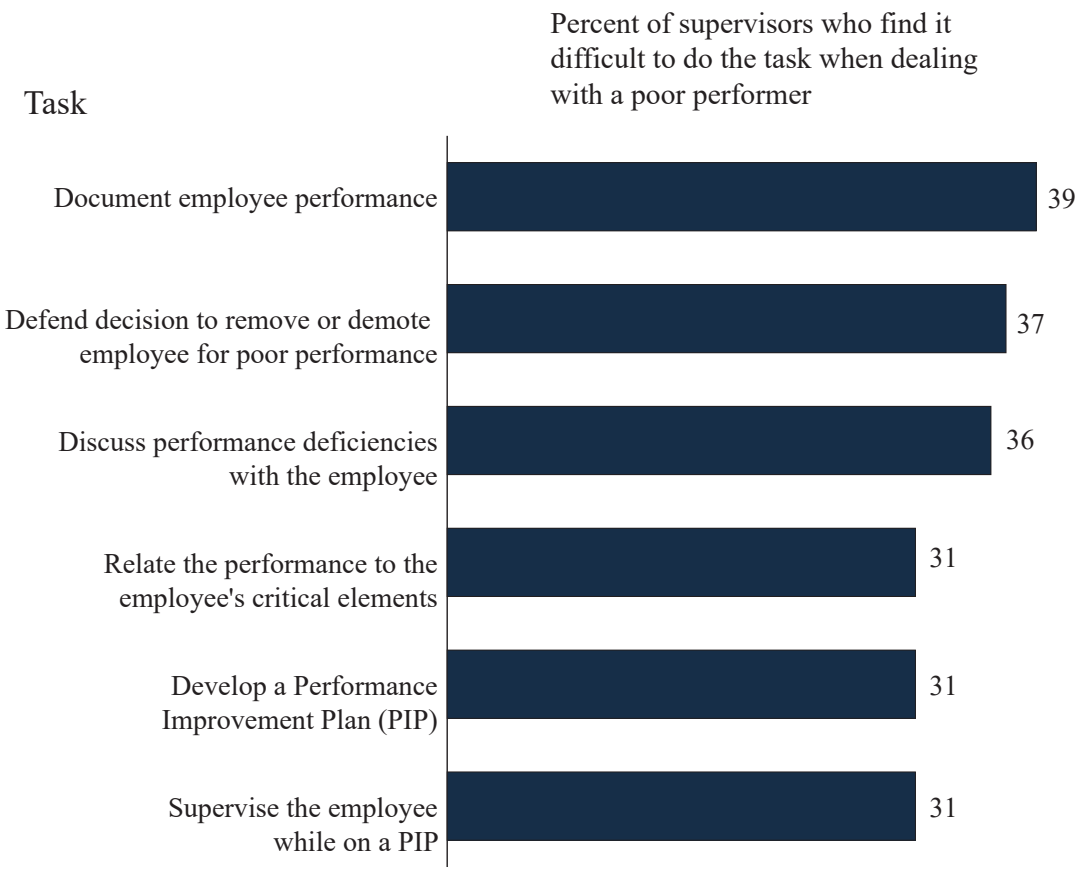
This level of success, however, has not helped supervisors feel comfortable with the Government's systems for firing and demoting employees. As can be seen in figure 3, when asked about the difficulty they had in dealing with poor performers, more than half of the supervisors (55 percent) said that the employees' negative attitudes contributed to those problems. In a similar vein, one fifth of the supervisors of poor performers said that their own dislike of confrontation made it difficult for them to deal with those employees. And a third of the supervisors who had difficulty dealing with an employee experiencing performance problems cited insufficient time as a reason for the difficulty. Supervisors also appear to be concerned about the prospect of being charged with discrimination when trying to manage a poorly performing employee. Seventeen percent of the respondents who supervised poor performers said they did not take an action against an employee whose performance warranted such action because of that possibility.

Responses to some of our inquiries raise serious questions about how well those responsible for the Government's performance management systems have informed Federal supervisors about the Federal removal systems. Forty percent of the supervisors and managers say that they are not familiar with the differences between removals under Chapter 43 versus those effectuated under Chapter 75. And 21 percent believe that their lack of training in how to deal with poor performers contributed to their difficulty in handling the problem. In addition, 13 percent say that inadequate advice from their personnel office made dealing with problem employees more difficult; and 26 percent cite insufficient support received from their higher-level supervisors and managers.

Given their lack of knowledge about the Government's removal systems, supervisors naturally seek help from others when performance problems arise. Most often they go to the personnel office for assistance. But many seek help from other supervisors. For example, the majority of the respondents who had supervised poor performers sought assistance from their immediate supervisors, but also close to half (44 percent) went to second-line and higher-level supervisors. From the interviews and focus groups we conducted, we know supervisors are usually advised in such situations that it is extremely hard to remove employees and probably not worth the effort to try.

Supervisors are particularly reluctant to act under the provisions of Chapter 43. As indicated above, OPM estimates that fewer than 350 Chapter 43 actions are taken in any given year. Supervisors' difficulties with some of the tasks associated with Chapter 43, which are identified in figure 4, cause them to conclude that it is too hard to use.

Figure 4. Supervisors; Difficulties in Performing Tasks Associated With Chapter 43



Source: MSPB survey data, 1994

Of the supervisors who have had a problem performer, about a third (31 percent) of the supervisors say they have trouble relating performance deficiencies to their employees' critical elements. The same percentage has difficulty developing performance improvement plans and similarly has problems supervising employees placed on such plans.

Comments made during the interviews and focus groups we conducted revealed that supervisory reluctance to use Chapter 43 may often be increased by the receipt of incorrect advice. For example, one supervisor was told that under Chapter 43 she was required to place a poor performer on a performance improvement plan. PIP's, while common under the Chapter, are not required by its provisions or by case law, and they were not required by the regulations of her agency. She was also told that, if the employee improved at all while under the PIP, the employee could not be fired. That, too, was wrong. Agencies can fire employees under Chapter 43 who fail to demonstrate sustained, satisfactory improvement. And, to make matters worse, the supervisor was not told that Chapter 43's requirements did not apply to the employee in question since the employee occupied a position not covered by its provisions. Wrong or incomplete advice like this—seen by some as an inevitable consequence of implementing a fairly complex system in a large bureaucracy—adds an unnecessary burden to the tasks faced by supervisors.

And many supervisors, put off by the complexities of Chapter 43's tasks, never consider the possibility of using Chapter 75 instead. They believe incorrectly that Chapter 43 is the only route that can be used to fire an employee who is not performing well. It has been judicially determined that Chapter 75—the historic method for discharging all employees including poor performers—continues to be an available option for Federal supervisors to use in dealing with poor performers.[4] Even so, the belief that Chapter 43 is the exclusive remedy for dealing with performance problems remains firmly entrenched. In that regard, when members of our study team explained that any employee who could be removed under the provisions of Chapter 43 could also be removed for the same poor work under the provisions of Chapter 75, agency officials attending our focus groups interpreted those comments as still requiring, for Chapter 75 to be used, that the employee also present a conduct problem.

The misperceptions and disincentives discussed above work in combination to keep supervisors from firing their poor performers. And those factors are not counterbalanced by sufficient forces encouraging supervisors to act. Historically, in fact, there have been very few costs associated with not taking action against unsatisfactory employees. Supervisors have been able, by controlling assignments and using other strategies, to work around the deficiencies of their problem employees. Whatever burden this places on co-workers is not one directly borne (if noticed at all) by the supervisor. And supervisors are unlikely to feel in any direct sense the incremental cost burden that keeping unproductive workers on the payroll places on their agency's budget. Moreover, because of the size of the Federal workforce, supervisors have often been able to get their poor performers assigned to, or hired into, other offices where they might improve or where they would be someone else's problem if they didn't.

[4] *Lovshin v. Department of the Navy*, 767 F.2d 826 (Fed.Cir. 1985) (in banc).

Conclusions: Our findings demonstrate the need to correct the imbalance between the forces discouraging supervisors from firing poor performers and the near total absence of forces encouraging them to act. Some realignment is already occurring. Downsizing initiatives are making it much harder to continue the practice of working around poor performers. As offices shrink, there are many fewer "spare" positions in which to carry nonproductive workers. And supervisors have a greater need to staff the remaining positions with good performers who can get the work done.

Agencies also need to make an effort to overcome their institutional cultures that acquiesce in allowing supervisors to work around performance problems. They should consider providing supervisors with more information on how to deal with problem performers, since ignorance about the Government's removal systems has served as a breeding ground for action-inhibiting misinformation. They might also check on—possibly by interviewing supervisors of poor performers—the quality of advice supervisors receive to ensure that supervisors and managers are being adequately assisted by agency experts.

However, our study results suggest a major key to improving the Federal response to poor performance will be to systematically reduce the disincentives currently associated with the taking of necessary actions. In that regard, our data suggest three questions that ought to be asked. First, does it make sense to keep the removal procedures contained in Chapter 43 (5 U.S.C. § 4303) on the books? They are only rarely utilized. They have not served the purpose for which they were enacted in that they have not made it easier for supervisors to deal with unsatisfactory performers. Unfortunately, they appear to have made it harder. Supervisors are reluctant to use Chapter 43's provisions, and believing that its provisions constitute the exclusive route for dealing with poor performers, they never consider using the procedures set forth in Chapter 75. If the removal provisions of Chapter 43 were repealed, supervisors would no longer have to deal with—or be frightened off by—a system they find too complex and one which encourages them to work around their performance problems.

The second question is whether the ways in which employees currently contest adverse and performance-based actions need to be streamlined. We know that one reason supervisors are hesitant to act is because of the possibility their actions will be reversed by outside review. Even when they firmly believe their decisions are justified, they are still concerned about the time and effort they will have to expend defending against allegations that they were wrong—or that they acted incompetently, unlawfully, or in a discriminatory manner. The wide choice of review paths available to employees serves to exacerbate that situation.

Appellants can seek an initial review, *inter alia*, through negotiated grievance procedures, or at MSPB or the Equal Employment Opportunity Commission. (And at each of these *initial* reviews, they can pursue their case through more than one stage. For example, the grievance can be taken to arbitration; the hearing before an MSPB administrative judge can be appealed to the full Board.) And, after the initial stage, employees can then seek further review in the courts or, in some cases, by having a different agency reexamine the first decision. This maze of appellate routes does not have to exist. The Supreme Court has held that, in determining how much process is needed, there should be a balancing of the importance of interest at stake with the costs and risks of error involved.[5] Our current multilevel, multi agency processes should be reexamined against that criterion. We need a system that ensures fairness, not one that deters appropriate actions from being taken.

And the third question is whether reduction-in-force (RIF) procedures should be changed to allow poor performance to be taken into account. Good performance is now considered indirectly through the changing of service computation dates for employees with high ratings. But bad performance cannot be

[5] *Matthews v. Eldridge*, 424 U.S. 319 (1976)

considered at all. An employee who have establishes that poor performance was considered in a RIF will have the action set aside and the agency instructed that it should have used Chapter 43 or Chapter 75 procedures instead to try to have the poor performer removed.

Given the current fiscal crisis, RIF's involving thousands or even tens of thousands of Federal employees are possible. In light of the massive nature of the current downsizing efforts, the logic of continuing a policy that precludes managers from firing poor performers as part of a RIF needs to be examined anew. The efficiency of a vastly reduced Federal workforce will undoubtedly be enhanced if agencies, as part of their streamlining endeavors, are able to remove the poor performers they are currently carrying on their rolls.

The laws which make consideration of poor performance in a RIF unlawful are susceptible to change. The factors that agencies consider when conducting RIF's have, in fact, been amended several times. Originally, Congress allowed only veteran status to be taken into account. Then seniority and good performance were added as auxiliary factors. And recently, OPM exercised its authority to materially alter the balance between performance and seniority. Therefore, Congress could once again change the factors that are taken into account and allow agencies, during RIF's, to separate poor performers from their jobs—so long as due process concerns are also addressed, perhaps by making the issue of performance subject to review on appeal.

Recommendations: The reluctance of supervisors to act against poor performers makes it clear that a better balance needs to be struck between the safeguards protecting employees from arbitrary dismissals and the flexibilities needed for the Government to manage its workforce efficiently. The Merit Systems Protection Board hopes that the information in this paper will inform and stimulate renewed efforts to achieve the goal of making it easier to remove poor performers for the right reasons and without undue red tape. Agencies can address some of the disincentives affecting supervisors by providing better training and oversight. However, fundamental changes—which do not slight the due process rights of Federal employees—may be needed in our current removal procedures. In that regard, the following questions suggested by our research findings need to be considered:

- Should Chapter 43's removal provisions be repealed since they have not, in fact, made it easier to fire poor performers for the right reasons with less red tape?

- Should the ways employees can contest discharges be streamlined since the availability of multiforum, multilevel reviews serve to discourage supervisors from acting against poor performers?

- Should the reduction-in-force laws be changed so that in this period of massive downsizing agencies will be able to use RIF procedures to separate employees they already have cause to fire for poor performance?

Steps Required to Fire A Poor Performer

UNDER CHAPTER 75
What Needs To Be Proven?

Agencies must establish by a preponderance of the evidence that the firing is in the interests of the efficiency of the service because the employee has performed poorly, and that all relevant factors were considered in selecting the penalty of removal.

What Steps Have To Be Followed in All Agencies under Chapter 75?

Agencies, under 5 U.S.C. 7512 and 5 C.F.R 752.404, must give the employee:

1. Notice in writing, 30 days in advance, of the specific reasons removal is being proposed.
2. A chance to review the supporting material relied on by the agency.
3. A reasonable amount of official time to review that material and prepare an answer, including time to obtain affidavits to attach to the answer.
4. An opportunity (at least 7 days after the notice) for the employee to respond both orally and in writing to the charges.
5. The opportunity to be represented by an attorney or other representative.
6. A written decision giving specific reasons for the decision.

UNDER CHAPTER 43
What Needs To Be Proven?

Agencies must establish by substantial evidence that they are firing the employee for unacceptable performance of a critical element.

What Steps Have To Be Followed in All Agencies under Chapter 43?

Agencies, under 5 U.S.C. 4303 and 5 C.F.R 432.104, must:

1. Obtain approval from OPM of a Performance Management Plan which describes how performance elements and standards will be established and how poor employees will be given assistance in improving unacceptable performance and an opportunity to improve.
2. Establish elements and standards (and designate at least one element as “critical”) for the employee’s position.
3. Communicate those elements and standards to the employee.

Then they must give the employee:

4. An opportunity to demonstrate performance at an acceptable level during which assistance is offered to the employee to improve unacceptable performance.
5. Notice in writing, 30 days in advance, of an intention to let the employee go, containing the specific instances of unacceptable performance in critical elements upon which the removal is based.
6. An opportunity to respond both orally and in writing to the proposal to remove the employee for poor performance.
7. The opportunity to be represented by an attorney or other representative.
8. A written decision giving specific reasons for the decision which is concurred in by a higher-level official than the supervisor proposing the removal.

Are There Additional Requirements in Some Agencies under Chapter 75?

Yes, a few agencies, by internal regulations, require additional procedures. For example, defense agencies typically required that a supervisor other than the one proposing the action serve as the deciding official and rule on the employee's answer.

Are There Additional Requirements in Some Agencies under Chapter 43?

Yes, the Performance Management Plans of most agencies contain additional requirements. For example, OPM requires its supervisors to document discussions they have with the employee concerning inadequate performance and to also document the measures taken by the supervisor to assist the employee in improving performance. And, other agencies require that Performance Improvement Plans (PIP's) be provided to employees who are given an opportunity to demonstrate acceptable performance. For example, at the Department of the Air Force, supervisors have to prepare a PIP which puts in writing "what elements are making the performance unacceptable, how performance is unacceptable [and] what the employee must do to remain in the position." The PIP lasts 30 to 60 days, usually, and Air Force supervisors are also encouraged to simultaneously complete a performance appraisal which the employee can appeal to a higher level supervisor. The Air Force plan also provides that the supervisor "must help" the employee improve performance and states that only if performance does not improve under the PIP can the supervisor, seeking permission from personnel, continue on to step 5 and give the employee a notice of proposed removal.

What Then Happens on Appeals Outside the Agency?

Discharged Employees Can :

1. **File an appeal with the U.S. Merit Systems Protection Board**. Employees with appeal rights can seek review from MSPB. After a decision from an administrative judge, the discharged employee can request a further review by the Board or the employee can appeal that decision to the U.S. Court of Appeals for the Federal Circuit. (But, if the employee contends that the dismissal resulted from discrimination, the employee must take the case to a U.S. District Court for a new trial.) Where the employee chose to seek further Board review, once the Board issues that decision, the employee can seek review in court.

   Discharged employees who appeal to MSPB can also ask the Equal Employment Opportunity Commission to review the Board's action, and in some cases they can obtain additional review from a Special Panel appointed by the two agencies. Matters taken to the EEOC (and the Special Panel) can then be taken to court.

2. **File a grievance**. Bargaining unit members (who comprise approximately 60 percent of the Federal workforce) can file grievances under the negotiated procedures agreed to by their union and their agency. The first step in the grievance process is typically an informal hearing presided over by an agency official other than the employee's supervisor. With concurrence from the union, further review can be obtained by taking the grievance to arbitration. The arbitrator's decision can then be reviewed in the U.S. Court of Appeals for the Federal Circuit or, if discrimination issues are involved, alternatively at the MSPB. After the MSPB issues a decision, the employee can take the case to a U.S. District Court for a new trial.

3. **File a discrimination complaint**. Employees can seek review of discrimination claims, first in their agencies and then the Equal Opportunity Employment Commission. At the agency level, the process includes a counselling stage and an investigative stage. The agency's EEO office then issues a recommended decision stage which the agency then accepts or modifies in its final decision. Further multilevel review is then available at the EEOC, and, after that, the employee can file a discrimination complaint in a U.S. District Court and obtain a *de novo* determination. (In addition, at various points during the administrative process the employee can decide to go directly to court.)

4. **Seek assistance in other forums**. There are a variety of other, less frequently used, ways for employees to contest a discharge. Among them is seeking to have the agency's Inspector General conduct an investigation or seeking to have the Office of Special Counsel pursue a corrective action against the agency.