

Performance-Based Actions under Chapters 43 and 75 of Title 5 – Similarities and Differences

There are two different statutes that authorize an agency to demote or remove an employee for performance-based reasons: (1) 5 U.S.C. § 4303 (which can only be used for failure in a critical performance element); and (2) 5 U.S.C. § 7513 (which can be used for performance or conduct that harms the efficiency of the service).

This choice of chapters may be confusing for laypeople, as chapter 75 is typically thought of in the context of misconduct, since that is the section of the statute for misconduct-based actions. However, agencies are permitted to take a performance-based action under either statute, provided they comply with the process for the chapter they select. It is very important that the agency put the employee on notice of which law is being used – and for which charges – prior to taking the action, as it usually cannot later re-characterize an action into one taken under a different law and MSPB has been told it cannot do so for the agency.¹

As explained in our 2009 report, [Addressing Poor Performers and the Law](#), the decision by management regarding which section of the law to use for a performance-based action tends to vary greatly by agency and by the nature of the work being performed. Some officials may opt for chapter 75 because they prefer not to have a formal performance improvement period (a requirement in chapter 43), while others may opt for chapter 43 because of its lower standard of proof or the ability to impose a penalty that is not subject to outside review once the agency has proven the performance failure. Agencies may also layer their own, internal, requirements on actions under either chapter that may cause that chapter to become a less appealing option for management. For example, at least one agency requires that management offer an informal performance improvement period before implementing a formal performance improvement period.

Below is a table showing where the two chapters share common practices and where they differ.

	Chapter 43	Chapter 75
Critical Element	Agency <i>must</i> prove the performance deficiency is in a critical element. ²	Agency is <i>not</i> required to prove the performance deficiency is in a critical element. ³
Efficiency of the Service	Agency is <i>not</i> required to prove that the adverse action will promote the efficiency of the service. ⁴	Agency must prove that the adverse action will promote the efficiency of the service. ⁵
Burden of Proof	Action must be supported by <i>substantial evidence</i> . This means that a reasonable person might find the evidence supports the agency's finding regarding the poor performance, even though other reasonable persons might disagree. ⁶	Action must be supported by a <i>preponderance of the evidence</i> . This means that a reasonable person would find the evidence makes it more likely than not that the agency's findings regarding the poor performance are correct. ⁷

	Chapter 43	Chapter 75
Establishment of Performance Expectations	When the employee’s performance in one or more critical elements is unacceptable, the employee will: (1) be notified of the deficiency; (2) be offered the agency’s assistance to improve; and (3) be warned that continued poor performance could lead to a change to lower grade or removal. ⁸ (This is commonly referred to as the PIP, an abbreviation for both performance improvement plan and also for performance improvement period.)	The extent to which an employee is on notice of the agency’s expectations is a factor in determining the appropriateness of the penalty. ⁹ Also, an agency cannot require that an employee perform better than the standards that have been communicated to the employee. ¹⁰
Recency of Events	A change to a lower grade or a removal action cannot be based on performance that is more than 1-year old at the time of the issuance of the proposal notice. ¹¹	While there is no requirement that an action be proposed within a particular period of time, unexplained excessive delays can have a negative effect upon the agency’s ability to prove the action is proper and warranted. ¹²
Advance Notice	The agency must provide a notice of proposed action and a reasonable opportunity to reply 30 days before any action can be taken. ¹³	
Content of Advance Notice	The notice must state the specific instances of poor performance that are the basis for the action <i>and also the critical performance element involved.</i> ¹⁴	The notice must state the specific instances of poor performance that are the basis for the action. ¹⁵
Deciding Official	Must be a person higher in the chain of command than the person who proposed the action. ¹⁶	The deciding official does <i>not</i> have to be a person higher in the chain of command than the person who proposed the action. ¹⁷

	Chapter 43	Chapter 75
Agency Decision	Agency must issue a final decision within an additional 30 days of the expiration of the 30 days advance notice period. ¹⁸	Agency is under no particular time constraint, other than there cannot be a delay so extensive that it constitutes an error that harms the employee. ¹⁹
Decline Following Improvement	If the employee’s performance improves during the PIP, and remains acceptable for 1 year, a new PIP is necessary before taking an action <i>under this chapter</i> . ²⁰	There is no obligation to offer a period of improvement at any point. ²¹
Penalty Mitigation	Once the agency meets the requirements to take an action, MSPB <i>cannot</i> reduce the agency’s penalty. ²²	After finding that the agency meets the requirements to take a chapter 75 action, MSPB <i>may</i> reduce the agency’s penalty if that penalty is unreasonable. ²³
<i>Douglas</i> Factors	The <i>Douglas</i> factors are not used. ²⁴	The agency must consider the relevant <i>Douglas</i> factors when reaching a decision on the appropriate penalty. ²⁵
Affirmative Defenses	The agency action will not be sustained if the employee was harmed by the agency’s failure to follow procedures or if the agency decision was reached as a result of the commission of a prohibited personnel practice. ²⁶	
Merit Principles	Merit principles must be adhered to in all performance-based actions. ²⁷	

¹ *Wilson v. Department of Health and Human Services*, 770 F.2d 1048, 1055 (Fed. Cir. 1985) (holding that the agency cannot later use a law it did not invoke). See *Hanratty v. Federal Aviation Administration*, 780 F.2d 33, 35 (Fed. Cir. 1985) (holding that MSPB cannot re-characterize which law was used); *Lovshin v. Department of the Navy*, 767 F.2d 826, 843 (Fed. Cir. 1985). *Lovshin* specifically stated that the agency using chapter 43 could use “an alternative” or “additional” charge under chapter 75. The Board does not have any precedential decisions in which an agency proposed a removal simultaneously using both chapters 43 and 75 with one expressed as the alternative to the other. As 5 U.S.C. § 1204(h) prohibits the Board from issuing advisory opinions we will not use this opportunity to resolve that question, only note that *Lovshin* uses both “alternative” and “additional” as words to describe the agency’s options.

² 5 U.S.C. § 4301(3).

³ “Case law does not require that a specific standard of performance be established and identified in advance for the appellant in an action brought under chapter 75; rather, it simply requires that, when an agency takes an action for unacceptable performance under chapter 75, it prove that its measurement of the appellant’s performance was both accurate and reasonable.” *Moore v. Department of the Army*, 59 M.S.P.R. 261, 265 (1993).

⁴ *Lovshin v. Department of the Navy*, 767 F.2d 826, 834 (1985).

⁵ 5 U.S.C. § 7513(a). The action must be taken “only for such cause as will promote the efficiency of the service.”

⁶ 5 U.S.C. § 7701(c)(1)(A). Substantial evidence means “[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree.” 5 C.F.R. § 1201.4(p). When enacting the Civil Service Reform Act of 1978 (CSRA), the conference report indicates this lower burden of proof was used “because of the difficulty of proving that an employee’s performance is unacceptable.” H.R. Conf. Rep. 95-1717, 139.

⁷ 5 U.S.C. § 7701(c)(1)(b). Preponderance of the evidence means “[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.” 5 C.F.R. § 1201.4(q).

⁸ 5 C.F.R. §§ 432.104, 432.105(a).

⁹ *Fairall v. Veterans Administration*, 844 F.2d 775, 776 (1987); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). This means that if the agency did not express a performance expectation to the employee (in performance standards or by other means), the lack of notification would be considered as a mitigating factor when deciding if the agency’s action was appropriate. *Fairall v. Veterans Administration*, 33 M.S.P.R. 33, 45-46 (1987).

¹⁰ *Shorey v. Department of the Army*, 77 M.S.P.R. 239, 244 (1998).

¹¹ 5 U.S.C. § 4303(c)(2)(a).

¹² See *Baldwin v. Department of Veterans Affairs*, 109 M.S.P.R. 392, ¶ 15 (2008) (reiterating that a charge may be dismissed if an agency’s delay in proposing the adverse action is unreasonable and prejudicial to the appellant). An unexplained delay may create the appearance that the agency did not consider the conduct serious or chose to act for an improper reason. Compare *Brown v. Department of the Treasury*, 61 M.S.P.R. 484, 492 (1994) (holding that it was a mitigating factor when the agency did not propose disciplinary action until 11 months after it learned about the incident) with *Cates v. Department of Agriculture*, 24 M.S.P.R. 468, 471 (1984) (holding that a 1-year delay in proposing the removal action, resulting in the proposal occurring shortly after the appellant filed his grievance, was not proof of retaliation when the agency adequately explained the reasons for the delay), *aff’d*, 776 F.2d 1065 (Fed. Cir. 1985).

¹³ For chapter 75 actions, the agency may effectuate the removal in less than 30 days if there is reasonable cause to believe the employee has committed a crime for which a prison sentence may be imposed. 5 U.S.C. § 7513(b)(1) and (2).

¹⁴ 5 U.S.C. § 4303(b)(1)(a)(i) and (ii).

¹⁵ An agency must give the employee a notice containing the charges as well as an explanation of its evidence and provide the employee an opportunity to respond. A failure to take any of these steps will result in the action being reversed on the basis that it violates the employee’s minimum due process rights. *Greene v. Department of Health and Human Services*, 48 M.S.P.R. 161, 166 (1991); see also *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 680-81 (1991).

¹⁶ 5 U.S.C. § 4303(b)(1)(D)(ii). Technically, for a chapter 43 action, the term is that a higher-level official must “concur” in the action, not that the “deciding” official must be at a higher level. See *Franco v. Department of Health and Human Services*, 32 M.S.P.R. 653, 657 (1987). However, when practitioners speak of this role, the term “deciding official” is often used for both chapter 75 and chapter 43 actions.

¹⁷ The decision will be valid if it has “the knowledge and approval of an official with termination authority.” This power to terminate is derived from the power to appoint. *Vandewall v. Department of Transportation*, 55 M.S.P.R. 561, 564 (1992). In a chapter 75 action, “it is well settled that the proposing and the deciding official may be the same person.” *Davis v. Department of Transportation*, 39 M.S.P.R. 470, 478 (1989). See also *Cross v. Veterans Administration*, 16 M.S.P.R. 429, 431 (1983); *Belanger v. Department of Transportation*, 16 M.S.P.R. 304, 309 (1983).

¹⁸ 5 U.S.C. § 4303. An extension of an additional 30 days is possible for any one of six purposes described at 5 C.F.R. § 432.105(a)(4)(i)(B). An extension for any other purpose must be obtained from the Office of Personnel Management (OPM) under the procedures specified at 5 C.F.R. § 432.105(a)(4)(i)(C).

¹⁹ See 5 U.S.C. § 7701(c)(2)(A); *Day v. Department of Housing and Urban Development*, 50 M.S.P.R. 680, 682 (1991). In *Day*, the appellant claimed the agency action should be invalidated because of a 4-month delay between the issuance of the notice of proposed removal and the removal decision. MSPB held that the appellant failed to show he was harmed by the agency’s delay, and thus the action would not be invalidated on those grounds.

²⁰ 5 C.F.R. § 432.105(a)(2).

²¹ “The requirement of prior notification of deficient performance necessary to a chapter 43 removal is conspicuously and purposely absent from” the criteria to take a chapter 75 action. *Fairall v. Veterans Administration*, 844 F.2d 775, 776 (1987).

²² *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1567-68 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986).

²³ *Id.*

²⁴ The *Douglas* factors come from a case (*Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981)) that lists what a deciding official should consider when determining the appropriate penalty to address problems with an employee. Because the *Douglas* factors are used to determine if an agency’s penalty should be mitigated, and a chapter 43 penalty cannot be mitigated, the *Douglas* factors are not used for chapter 43 actions. *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1565-66 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986).

²⁵ See *Cunningham v. U.S. Postal Service*, 112 M.S.P.R. 457, ¶ 6 (2009) (explaining that if an agency imposes a removal action under a zero tolerance policy without giving bona fide consideration to the appropriate *Douglas* factors, its penalty determination is not entitled to deference); *Hilliard v. U.S. Postal Service*, 111 M.S.P.R. 634, ¶ 7 (2009) (holding that an agency’s failure to consider relevant *Douglas* factors of which it was aware warrants an award of attorney fees), *aff’d*, 403 F. App’x 504 (Fed. Cir. 2010); *Halper v. U.S. Postal Service*, 91 M.S.P.R. 170, ¶ 7 (2002) (explaining that a failure to consider all of the relevant *Douglas* factors will result in the adjudicator performing the assessment using the *Douglas* factors and modifying the penalty if necessary).

²⁶ 5 U.S.C. § 7701(c)(2).

²⁷ *Lovshin v. Department of the Navy*, 767 F.2d 826, 840-41 (1985) (explaining that “Congress intended that merit principles must be adhered to by agencies in all performance-based actions” and “Congress itself designed a statutory framework which implements merit principles in connection with chapter 75 actions”).