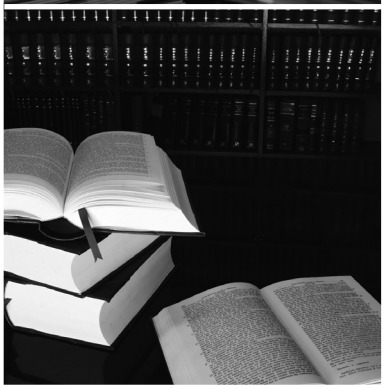


Addressing Poor Performers and The Law

A Report to the President and the Congress of the United States
by the U.S. Merit Systems Protection Board

THE CHAIRMAN

U.S. MERIT SYSTEMS PROTECTION BOARD
1615 M Street, NW
Washington, DC 20419-0001

September 2009

The President
President of the Senate
Speaker of the House of Representatives

Dear Sirs and Madam:

In accordance with the requirements of 5 U.S.C. § 1204(a)(3), it is my honor to submit this Merit Systems Protection Board (MSPB) report, *Addressing Poor Performance and the Law.* The purpose of this report is to describe the similarities and differences between 5 U.S.C. §§ 4303 and 7513, the two sections of the law that authorize an agency to take an adverse action against a Federal employee for poor performance. In that context, the report addresses the limited ability of the law to address the underlying challenges of a performance-based action.

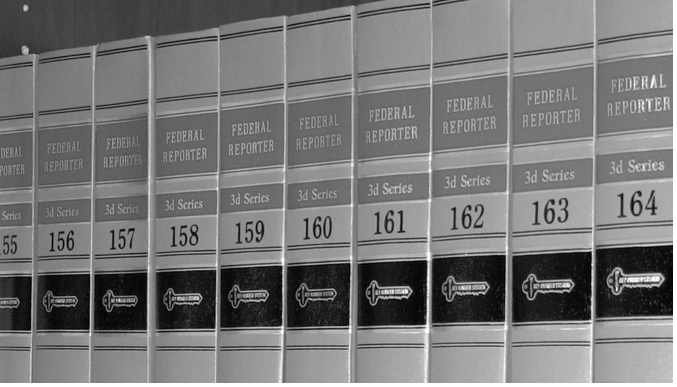
Poor performers are a serious concern for the Federal workforce, and one that the Government has historically had difficulties addressing. This challenge was the reason for the creation of 5 U.S.C. § 4303 in the Civil Service Reform Act of 1978. Section 4303 was intended to make it easier for agencies to demote and to remove poor performers by providing an avenue for agencies to take an action based upon substantial evidence—a relatively low burden of proof—rather than the preponderance of the evidence standard which is used for actions taken under section 7513.

The result has not been what was expected. Agencies have used 5 U.S.C. § 4303 to some degree, but they have opted to continue to use 5 U.S.C. § 7513 with its higher standard of proof in a majority of cases. However, even with both sections of the law being used, agencies still encounter difficulties taking performance-based actions because the underlying problem does not originate in the law. In order to take a performance-based adverse action, agencies must first engage in performance management. The agency is required to articulate a performance expectation, measure it, and document the extent to which the employee has met or failed to meet expectations. According to an MSPB survey of proposing and deciding officials, this is where the actions become difficult. Our survey respondents told us that supervisors have difficulty creating standards for performance and documenting how well employees are meeting those standards. Ultimately, at least part of the solution to the issues of dealing with poor performers may be in educating and encouraging supervisors in the use of better performance management practices.

I believe that you will find this report useful as you consider issues affecting the Federal Government's ability to manage its workforce for optimal performance.

Respectfully,

Neil A. G. McPhie



Addressing Poor Performers and The Law

A Report to the President and the Congress of the United States
by the U.S. Merit Systems Protection Board

U.S. Merit Systems Protection Board

Neil A. G. McPhie, *Chairman*

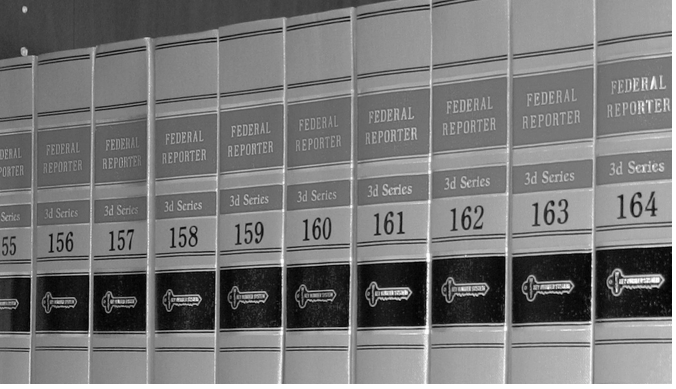
Mary M. Rose, *Vice Chairman*

Office of Policy and Evaluation

Director
John Crum, Ph.D.

Project Manager
Sharon Roth

Project Contributors
Annette Butler
J. Peter Leeds, Ph.D.



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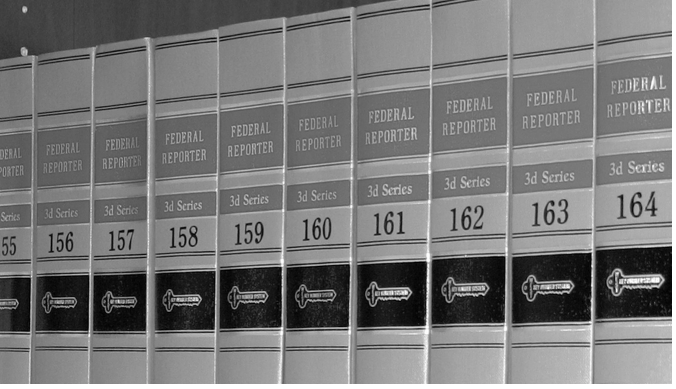

Executive Summary

This report takes a new look at the issue of using Chapter 75 versus Chapter 43 of Title 5 of the U.S. Code to remove or demote a poor performer.[1] Chapter 43 permits agencies to take actions to address poor-performing Federal employees by following a specific set of rules. Chapter 75 permits agencies to take either performance- or conduct-based actions, following a set of rules that is somewhat similar to the set of rules in Chapter 43, but differs in several substantive ways.[2] When dealing with poor performers, agencies have the authority to choose which chapter to use, and therefore which set of rules to follow.

This report examines the requirements of Chapter 43 and 75, the choices agencies have made in the past on when to use one authority versus the other, and what agencies and supervisors say are the barriers to taking performance-based actions. (Perhaps surprisingly for some readers, many of the barriers do not come directly from the law in either chapter, but rather are inherent in managing performance in a merit-based system.) This report also provides a brief analysis of the similarities and differences between these two authorities to help agencies decide which authority may be right for them in any particular case.

The U.S. Merit Systems Protection Board (MSPB) does not assert that either authority is superior to the other. Rather, each authority has advantages and disadvantages for both agencies and employees. As long as both options remain available, agencies and supervisors must make an educated decision on which authority to use and when.

Findings

1. Most of the work involved in removing an employee for poor performance is inherent in managing employee performance in a merit-based system rather than the requirements of any particular statute or regulation.

2. Chapter 75 is notably more popular than Chapter 43 for addressing poor performance, but many agencies still use both authorities. Use varies primarily by occupation, with Chapter 43 being more popular for professional occupations, and Chapter 75 being more popular for clerical and blue-collar occupations. Agency representatives told us that Chapter 43 has some benefits over Chapter 75. These include that Chapter 43 makes the supervisor get more involved with the employee and the work; has a provision that the penalty cannot be mitigated on appeal; and has a lower burden of proof. However, some agency representatives expressed concerns that Chapter 43 has too many technicalities which can be mishandled by the supervisor.

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[1] We previously explored this issue in our 1995 Issue Paper, *Removing Poor Performers in the Federal Service*, available at www.mspb.gov.

[2] Each section of the U.S. Code contains specific statutory provisions with which agencies must comply. More detailed instructions are contained within the Code of Federal Regulations. *See* 5 C.F.R. Parts 432 and 752.

Recommendations

This study indicates that many of the challenges of taking performance-based actions are inherent in performance management in a merit system. Because the underlying issue is not the language of Chapter 75 or Chapter 43, simply choosing one authority over the other does not solve the Government's problems in addressing poor performers. We therefore make the following suggestions for how the Government might better address the challenges of taking demotion or removal actions for poor performance.[3]

For Congress

Some aspects of the civil service may need reforming, and how agencies address poor performers should be on the table in any such effort. However, when amending the statutes regarding personnel actions and poor performers, it will be important to recognize the difference between what can and cannot be legislated. That Chapter 75 (with its higher burden of proof) is consistently and notably more popular than Chapter 43 for performance-based actions likely indicates that the level at which the burden of proof was set is not the problem with addressing poor performers, nor is it the solution.

For Agencies

We recommend that agencies allow supervisors the flexibility to use either Chapter 43 or Chapter 75 to address poor performance. Having both options available may increase the willingness of a supervisor to take an appropriate action by choosing the authority that best suits the particular situation.

Supervisors carry the responsibility for performance management. As a result, having skilled supervisors is crucial to avoiding the retention of poor performers. Therefore, it is important for agencies to pick supervisors with the skills and willingness to deal effectively with poor performers, and to provide those supervisors with training and guidance on how to use the regulations to address poor performers. (Effectively dealing with these poor performers is more than a willingness to fire someone. It also means recognizing employees' training needs early, distinguishing between that which can and cannot be trained, and providing the most effective assistance to employees as is practical.) We urge agencies to select supervisors carefully, and then hold supervisors accountable for dealing with poor performers. Having an authority under which a supervisor may demote or remove an employee is of little use if the supervisor is opposed to taking an appropriate action, or if the supervisor is unwilling or unable to do what is necessary to assist employees who could benefit from an appropriate level of help.

[3] The technical term for a demotion is that the employee experiences a reduction in grade. However, for ease of use, the term demotion may be used in this report to describe those events. *See* 5 U.S.C. §§ 7512, 4303.

For Human Resources (HR) Staff

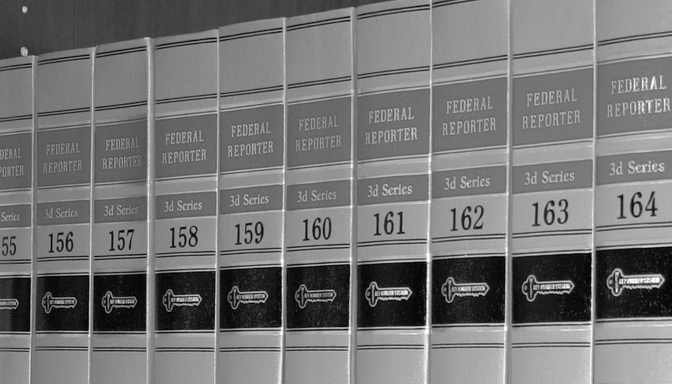
We recommend that HR staff be proactive. HR staff should educate supervisors on their options regarding poor performers and not wait for the supervisors to report a problem to HR. If supervisors are to address poor performance when it arises, before the problem becomes critical, then they need to know early what steps to take in order to lay the framework for later actions.

After a poor performer has been identified, and the process to help the employee has begun, we recommend that HR staff check with the supervisor to see if the poor performer has improved, and to see if the better performance remains in effect. HR should advise the supervisor on what to do if the poor performer has not improved, or is backsliding. While the responsibility to act belongs to the supervisor, it may be difficult for a supervisor to know what the options are unless HR educates the supervisor. We strongly recommend that HR provide proactive customer service and not limit themselves to situations where the manager must approach HR to ask if there are any options available. Previous studies have shown that sometimes managers erroneously believe they already know the answers, and therefore do not ask HR the questions they need to ask.[4] For this reason, HR needs to make sure supervisors do know their options and responsibilities, and not assume that silence from the supervisor means that nothing is wrong.

For Supervisors

We recommend that supervisors intervene as soon as they identify a performance problem and not wait for the situation to worsen. The sooner the agency addresses the performance issue, the sooner the agency may benefit from improved performance. And, if a poor performer's performance cannot be improved, the sooner the supervisor begins to offer assistance, the sooner the supervisor will be able to establish whether the employee is able and willing to improve or whether it will be necessary to initiate a demotion or removal action.

[4] U.S. Merit Systems Protection Board, *Federal Appointment Authorities: Cutting through the Confusion*, p. 30, and *The Probationary Period: A Critical Assessment Opportunity*, p. 31, available at www.mspb.gov.



Introduction

We were inspired to look at the issue of Chapter 75 versus Chapter 43 in part because of a decision by the Department of Defense to use only Chapter 75 procedures for its employees in the National Security Personnel System (NSPS), even though it had the choice to keep Chapter 43 as an avenue if it chose. We were also intrigued by a bill introduced in the House of Representatives to create a commission to study, among other things, "[p]olicies and barriers related to the termination of under-performing workers."[5] While the bill did not make it out of the subcommittee before the end of the 110th Congress, the proposal once more prompted the question: What can be done with the law and regulations to make it easier for agencies to deal with poor performers? Can legislation fix the problem, or are the challenges inherent in performance management? We therefore looked at Chapters 43 and 75 to see what each had to offer, how agencies were using each chapter, and what possible barriers they might pose to effectively taking an appropriate action to address a poor performer. However, when we surveyed supervisors about what made it difficult for them to take performance-based actions, their answers focused more on performance management issues than on rules, regulations, or the law.[6]

Purpose of the Study

The purpose of this study was to look at what barriers supervisors and agencies face when initiating demotion or removal actions for poor performance, and what the Government can do to address these barriers. This includes not only any possible barriers in the laws, but barriers in how agencies use the laws. We also looked at how Federal agencies were choosing between Chapter 43 and Chapter 75, to see if any lessons could be learned that might help supervisors when selecting an authority to use for a performance-based action. While this report discusses the content and use of Chapter 43 and Chapter 75, it does not assert that either chapter is superior to the other. Rather, each has its advantages and disadvantages for both agencies and employees.

Methodology

This report uses data from the Office of Personnel Management's (OPM) Central Personnel Data File (CPDF). The CPDF lists different codes for actions taken under Chapter 43 and actions taken "under agency procedures that are equivalent to those required" by Chapter

[5] 110 Cong. H.R. 5439 § 2(b)(1)(E).

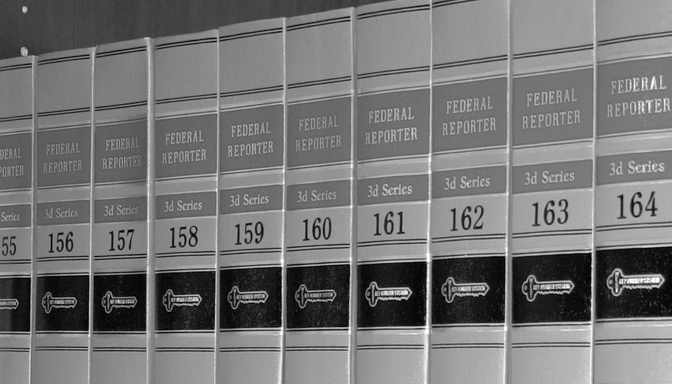
[6] For more on managing employee performance outside the context of taking demotion or removal actions, please see our recent report, *Managing for Engagement: Communication, Connection, and Courage* available at www.mspb.gov.

43.[7] Similarly, there are different codes for actions taken under Chapter 75 and those taken under equivalent procedures. For this report, we have merged the CPDF data for actions taken under Chapter 43 and actions taken under procedures that are equivalent to Chapter 43. Likewise, we have merged the data for actions taken under Chapter 75, and actions taken under procedures that are equivalent to Chapter 75. All CPDF data used in this report is based only upon permanent employees.

In addition to data from the CPDF, this report includes information from a survey we conducted on a related topic. Proposing and deciding officials for suspension and removal actions in nine agencies were surveyed regarding their experiences using Title 5 rules to take adverse actions.[8] We received responses from 1817 officials (a 45 percent response rate). The answers to two questions from that survey are included in this report. Furthermore, in September 2008, we sent a brief questionnaire to a small group of agency representatives who had appeared before the MSPB on performance-based cases within the prior year to obtain their perspectives regarding Chapter 43 and Chapter 75. Their views are included in this report.

[7] U.S. Office of Personnel Management, "Guide to Processing Personnel Actions," chapter 31-4.

[8] The agencies or components surveyed were the Defense Logistics Agency, the Defense Commissary Agency, the Department of the Army, the Department of the Air Force, the Veterans Health Administration, the Forest Service, the Bureau of Prisons, Customs and Border Patrol, and the Internal Revenue Service. The data from those surveys regarding the experiences of managers involved in conduct-based actions will be the subject of a future report by the U.S. Merit Systems Protection Board.



Chapter 43 and Chapter 75 - Two Paths to the Same Goal

This section of the report provides a brief history of how Chapter 43 came into existence, and looks at how its requirements are different from those of Chapter 75. When comparing and contrasting these two chapters of the U.S. Code, it is helpful to remember that while Chapter 43 can be used only to address poor performance, Chapter 75 is written in a manner that permits it to be used for either conduct or performance (or a combination of both). Both chapters allow for an employee to be demoted or removed, provided that the agency has followed the procedures spelled out in that chapter.[9] Many of the procedures are the same in both chapters, but there are a few vitally important differences.

The information we provide here is designed to give the reader a basic framework for the discussion of these two chapters throughout this report. As a result, some explanations are simplified. Before taking or responding to any action, we strongly recommend that the parties involved consult the appropriate statutes, regulations, and case law. Management and human resources should also confer with their legal counsel to obtain an opinion as to whether or not the action appears legally sustainable.

The History Behind Chapter 43

Understanding the reasons why Chapter 43 exists in its current form begins with understanding why there is a Civil Service. In the period from 1829-1883, Federal hiring and removals were predominantly based on party loyalty, with little regard to qualifications or performance quality. This "spoils system" led to problems with corruption in the Government, incompetence in the workforce, and excessive civil service turnover after each election.[10]

Throughout this era, various political figures attempted to bring an end to the most serious abuses, but without success. The spoils system era finally culminated in the assassination of President James Garfield by a disappointed office-seeker who felt he should have been given a Federal job as a reward for his party loyalty.[11]

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[9] The use of Chapter 43 is limited to a reduction in grade or removal, whereas Chapter 75 authorizes additional actions, such as suspensions. 5 U.S.C. §§ 4303(a), 7512.

[10] U.S. Merit Systems Protection Board, *Reforming Federal Hiring: Beyond Faster and Cheaper*, p. 4, available at www.mspb.gov.

[11] *Biography of an Ideal*, available at www.opm.gov/BiographyofAnIdeal/.

The assassination of the president pushed Congress to act. The Pendleton Act of 1883, which established the merit-based civil service, was passed shortly thereafter. While the precise words used to describe merit have evolved over the last 125 years, the concepts have remained fairly consistent. Today's merit principles have their roots in the language of the Pendleton Act. This includes that appointments should be based upon qualifications, employees should conduct themselves honestly with high standards of integrity, and employees should operate free of political coercion.[12]

However, the various mechanisms put into place to pursue these lofty goals have, at times, been seen as bureaucratic obstructions. As a result, every few decades, select pieces of the civil service are reformed in a constant attempt to make it function better while seeking to preserve the goal of a merit-based system.[13] In the late 1970s, Jimmy Carter created the President's Personnel Management Project to recommend a redesign.[14] Following the submission of the project's plans to Congress, the Senate and House held their own hearings to determine what the new civil service law should look like. The result was the Civil Service Reform Act (CSRA) of 1978, which was considered a major redesign at the time. In the Senate's report listing the 10 things the new law was supposed to accomplish, one item read, in part, that Congress sought to establish "a new standard for dismissal based on unacceptable performance."[15]

Prior to the CSRA, agencies used provisions of the law codified at Chapter 75 of the U.S. Code to remove a Federal employee, or to change the employee to a lower grade. There were complaints that these provisions made it much too hard to remove someone for poor performance. In the debate over the CSRA, one figure was constantly cited—that in 1976 there were only 226 discharges for unsatisfactory performance of duties.[16] The presumption was that there were far more poor performers than this, but that they were not being removed for their poor performance. Alan "Scotty" Campbell, Carter's lead architect for the reorganization, claimed, "the reason that number is so low is because it is so difficult to make a case in relationship to performance, and agencies have over the years learned that they are likely to have their actions overruled…if they take that route."[17] The result of this concern was Chapter 43, which was intended to be a better process for empowering (and to a degree, even forcing) supervisors to take action to address poor performance.[18]

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[12] 5 U.S.C. § 2301(b); Pendleton Act of 1883.

[13] For a history of civil service reforms, *see Biography of an Ideal*, available at www.opm.gov/BiographyofAnIdeal/.

[14] S. Rep. 95-969, 13, 1978 U.S.C.C.A.N., 1978, Vol 4. p. 2735.

[15] *Id*., 2724. The Federal Circuit has described Chapter 43 as "the centerpiece of the Reform Act." *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1565 (Fed.Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986).

[16] S. Rep. 95-969, 9, 1978 U.S.C.C.A.N, 2731. (In FY 2007, 649 employees were removed for performance, with an additional 210 removed for a combination of performance and conduct.)

[17] Hearings on S. 2640 before the Committee on Government Affairs, 95th Congress, 2d session at 21 (1978).

[18] *Id*., 102-03.

When Congress created Chapter 43 to deal with performance-based actions, it never specifically removed agencies' authority to take such actions under Chapter 75. As a result, the U.S. Court of Appeals for the Federal Circuit (the MSPB's reviewing court) has held that agencies are still permitted to use Chapter 75 for performance-based actions.[19] However, given that Chapter 43 was supposed to be much easier to use than Chapter 75, one would expect Chapter 43 to be the only chapter being used for performance-based actions. Yet, that is not the result.

In the decade between Fiscal Years (FY) 1998 and 2007, 38 percent of removals based solely on poor performance were under Chapter 43 or an equivalent authority, while 62 percent were under Chapter 75.[20] Thus, Chapter 75 may be more popular for performance-based actions, but Chapter 43 does have some attractive qualities in the eyes of its users. Perhaps most interesting, the same agencies that use one chapter for some performance-based cases often use the other chapter as well for other cases. This report discusses why agencies are using both chapters for performance-based actions, but first it may be helpful to understand the similarities and differences between the two chapters.

The Property Right

The most important feature that Chapter 43 and Chapter 75 share is the legal framework in which they operate. Both exist in a merit-based employment system. This is a remarkably important characteristic, because it drives the question of what can and what cannot be done through legislation.

When a law states that an employee cannot be removed except for cause, certain procedures become mandatory. The U.S. Supreme Court has held that while "the legislature may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."[21] "The right to due process is conferred, not by legislative grace, but by constitutional guarantee."[22] Thus, once conditions are placed upon the removal of an employee, the employee has a property right in how the job is taken away. In this context, "property" is a legal concept. A job may not match the average person's idea of what constitutes property. However, according to the Supreme Court, it is how one must view the removal of a public employee. As a result, any law addressing the removal of a Federal employee must, as a matter of constitutional law, comport with the rules of due process. This requirement drives many of the procedures that exist in both Chapter 43 and Chapter 75.

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[19] *Lovshin v. Department of the Navy*, 767 F.2d 826, 834 (Fed. Cir. 1985). "There is not the slightest evidence in the legislative history to suggest that Chapter 43 was ever to be a refuge for employees to escape Chapter 75. Chapter 43 originated as a relief measure for agencies and it was enacted for that purpose." *Lovshin*, 767 F.2d at 837.

[20] CPDF, FY 1998-2007, permanent employees only.

[21] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (internal punctuation deleted).

[22] *Id.* Amendment V of the U.S. Constitution states: "No person shall… be deprived of life, liberty, or property, without due process of law…."

Performance-Based Action Procedures under Chapters 43 and 75

One important distinction between Chapter 43 and Chapter 75 is that Chapter 75 is dedicated entirely to the taking of an adverse action against a Federal employee. In contrast, Chapter 43 is about performance management for all employees, with only one portion of the chapter dedicated to taking an action against an employee whose performance is unacceptable. This report discusses the elements of the statutes relevant to the taking of an action, and does not discuss all of Chapter 43.

In order to aid in the discussion of Chapter 43 and Chapter 75, the table below provides various aspects of a performance-based action, and the requirements from each chapter. This list is not all-inclusive, and should not be used as a sole reference. We strongly encourage agencies to consult the U.S. Code, the Code of Federal Regulations, and relevant case law when pursuing a performance-based action.

Table 1: Similarities and Differences Between Chapter 43 and Chapter 75 [23]

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

[23] See the Appendix for references to this table.

Table 1: Similarities and Differences Between Chapter 43 and Chapter 75 (continued)

	Chapter 43	Chapter 75
Advance Notice	The agency must provide a notice of proposed action 30 days before any action can be taken, and must provide the employee with a reasonable opportunity to reply before a decision is made on the proposal.	
Content of Advance Notice	The notice must state the specific instances of poor performance that are the basis for the action *and also the critical performance element involved.*	The notice must state the specific instances of poor performance that are the basis for the action.
Deciding or Concurring Official	A person higher in the chain of command than the person who proposed the action must concur.	The deciding official does *not* have to be a person higher in the chain of command than the person who proposed the action.
Agency Decision	Agency must issue a final decision within an additional 30 days of the expiration of the 30 days advanced notice period.	Agency is under no particular time constraint, other than there cannot be a delay so extensive that it constitutes an error that harms the employee.
Penalty Mitigation	Once the agency meets the requirements to take an action, the MSPB *cannot* reduce the agency's penalty.	After finding that the agency meets the requirements to take a Chapter 75 action, the MSPB *may* reduce the agency's penalty.
Douglas Factors	The *Douglas* factors are not used.	The agency must consider the relevant *Douglas* factors when reaching a decision on the appropriate penalty.
Affirmative Defenses	The agency action will not be sustained if the employee was harmed by the agency's failure to follow procedures, if the agency decision was reached as a result of the commission of a prohibited personnel practice, or if the decision is otherwise not in accordance with the law.	
Merit Principles	Merit principles must be adhered to in all performance-based actions.	

Burden of Proof

Of all the elements listed in the table above, the one Congress thought would simplify performance-based actions the most was the difference in the burden of proof provided for by Chapter 43. Both "substantial evidence" (Chapter 43) and "preponderance of the evidence" (Chapter 75) use a "reasonable person" standard. However, in plain English, the difference is that under the substantial evidence test, the agency must only prove that the deciding official was *reasonable* in reaching the conclusion (a reasonable person could reach the conclusion); whereas under the preponderance test, the agency has the burden to prove it is more likely than not that the conclusion reached was *correct*.

The Performance Improvement Plan (PIP)

Other than the requirement for a PIP, most of the procedures for performance-based actions under Chapters 43 or 75 are the same or similar. The use of a PIP is the primary trade-off supervisors must accept if they want to use the lower burden of proof that Chapter 43 offers. However, a PIP can be challenging to write and to comply with in full.

A good PIP typically will:

- ✓ State in clear detail what performance is expected from the employee and how it will be measured.[24]
- ✓ Specify the assistance the agency will provide (on-the-job training, formal class training, mentoring by a more successful employee, etc.).
- ✓ Specify a person who is responsible for helping the employee through the performance improvement period and indicate how often this person will meet with the employee. (The person tasked with guiding the employee is often the supervisor, but it could be a team leader, co-worker, or other appropriate person.)
- ✓ Explain to the employee that if the employee has questions or does not understand something, the employee has the responsibility to notify a particular person (often the supervisor) and ask for help.
- ✓ State how long the PIP will remain in effect.
- ✓ State the possible consequences if the employee's performance does not improve.[25]

While the above will frequently appear in a high-quality PIP, all of these elements are not required. The MSPB has held that "an employee's right to a meaningful opportunity to improve is one of the most important substantive rights in the entire Chapter 43 performance appraisal framework."[26] When the agency is deciding what to place in the PIP, it is crucial that the agency only include that which the agency is prepared to actually provide. If the agency includes in the PIP promises which they do not keep, those unmet obligations can compromise the agency's ability to take the Chapter 43 action.[27] Thus, the agency should include in the PIP whatever will provide the most meaningful opportunity for improvement rather than adhere too strictly to any checklist.

The performance standards in the PIP also must meet certain requirements for clarity, or the action will not be sustained.[28] However, as discussed later in this report, supervisors often find that evaluating subordinates' work is very subjective, and sometimes the standards under which the employees operate are unclear or fail to address important aspects of the employees' duties. While a clear expression of performance standards is a part of good supervision—separate from the creation of a PIP—the fact that the PIP relies upon clear standards so heavily can make creating a PIP challenging for some supervisors.

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[24] Stating the performance expected from the employee and how it will be measured is inherent in performance management and should already be established between the employee and the supervisor outside the PIP. However, it can be clarified in the PIP, and the details can be more fully explained.

[25] This list is not exhaustive. Some agencies have written guidance for supervisors on how to create a PIP. One example can be found at: http://www.nps.gov/training/tel/guides/pip_guide_080707.pdf. In addition to any available written guidance, we recommend that supervisors also consult with their human resources staff when creating PIPs.

[26] *Thompson v. Farm Credit Administration*, 51 M.S.P.R. 569, 578 (1991).

[27] *Beasley v. Department of the Air Force*, 25 M.S.P.R. 213 (1984); *Adorador v. Department of Air Force*, 38 M.S.P.R. 461, 466-467 (1988); *Thompson v. Farm Credit Administration*, 51 M.S.P.R. 569, 578 (1991); *Zang v. Defense Investigative Service*, 26 M.S.P.R. 155 (1985).

[28] *Wilson v. Department of Health and Human Services*, 770 F.2d 1048 (1985).

We encourage supervisors to involve employees in the creation of the PIP whenever it is practical. The employee may have a better sense of the source of the problem, or a better way to express the performance requirements, and therefore be able to help the supervisor to draft a PIP with a greater potential to result in improved performance. Also, by involving the employee, the supervisor can send the message that the PIP is not a punishment, but rather a genuine and meaningful effort to help the employee.

The *Douglas* Factors and Penalty Mitigation

As stated in the table above, the *Douglas* factors are not required for a Chapter 43 action, but must be considered by the deciding official in a Chapter 75 action when determining the appropriate penalty. The 12 *Douglas* factors are: (1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.[29]

While not all 12 factors will be relevant in every case, an agency undertaking a Chapter 75 adverse action must show that the deciding official considered the relevant *Douglas* factors in performing a reasoned analysis on the penalty. Among the factors that may be particularly relevant to a performance-based Chapter 75 action are: "the seriousness of appellant's deficiencies; the effect of those deficiencies on her supervisor's confidence in her ability to perform assigned duties; the employee's past work and disciplinary records, the clarity with which the employee had been warned about the deficiencies in question; and the adequacy

[29] The *Douglas* factors come from a 1981 case (*Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06) and list what a deciding official should consider when determining the appropriate penalty to address problems with an employee. 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. *See Halper v. U.S. Postal Service*, 91 M.S.P.R. 170, ¶ 7 (2002).

of alternative sanctions to deter such deficiencies in the future."[30] Considering alternative sanctions can include the "question of whether there is available a lower-grade position which appellant is qualified to fill and in which he could be expected to perform in a fully satisfactory manner."[31] A failure to consider all of the relevant *Douglas* factors in a Chapter 75 action will result in the adjudicator using the *Douglas* factors to determine an appropriate penalty and modifying the agency's penalty if necessary.[32]

In contrast, under a Chapter 43 action, the agency's penalty cannot be mitigated (reduced) by the MSPB. If the agency meets its burden of proof to show that it followed the regulatory and legal requirements to take a demotion or removal action under Chapter 43, the penalty is not subject to review.[33]

A Critical Element

One requirement agencies must meet to use Chapter 43 is that the basis for the action must be a failure to perform a critical element adequately. A critical element "means a work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable."[34] The critical elements must be put into the performance plan that is being used to assess the employee.[35]

If the critical elements of the employee's performance plan are vague, they can be "fleshed out" and "clarified" in a PIP.[36] The clarified standard explained in the PIP must "provide an accurate objective measurement" and "reasonably inform the employee of what is acceptable performance."[37] However, if the standard is "beyond salvage" to an extent that the standard would have to be rewritten instead of clarified, it cannot be used for a Chapter 43 action.[38]

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[30] *Person v. Social Security Administration*, 12 M.S.P.R. 175, 178 (1982).

[31] *Miller v. Department of Air Force*, 9 M.S.P.R. 102, 108 (1981).

[32] If the MSPB finds a penalty excessive, it will correct the penalty to the maximum penalty that the MSPB finds is "within the parameters of reasonableness" based on its own analysis of the *Douglas* factors. *Davis v. Department of Treasury*, 8 M.S.P.R. 317, 320-21 (1981); *see also Halper v. U.S. Postal Service*, 91 M.S.P.R. 170, ¶ 7 (2002).

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

[34] 5 C.F.R. § 430.203.

[35] *Id*.

[36] *Dancy v. Department of Navy*, 55 M.S.P.R. 331, 335 (1992); *Eibel v. Department of Navy*, 857 F.2d 1439, 1443 (Fed. Cir 1988).

[37] *Eibel v. Department of Navy*, 857 F.2d 1493, 1444 (1988).

[38] *Dancy v. Department of Navy*, 55 M.S.P.R. 331, 335 (1992); *see also Eibel v. Department of Navy*, 857 F.2d 1493, 1444 (1988) (holding that reasonable, objective performance standards that permit accurate measurements of the employee's performance, and are adequate to inform the employee of what is necessary to achieve a satisfactory or acceptable rating, "are the foundation for any performance-based action under Chapter 43").

In a Chapter 75 action, however, a critical element is not required. The law requires that a Chapter 75 action "promote the efficiency of the service."[39] In order to demonstrate this for a performance-based action, the agency must prove that it used a reasonable standard to measure the employee's performance accurately. However, unlike performance appraisal systems established under Chapter 43, the measurement of performance in actions brought under Chapter 75 is allowed to be *ad hoc* in nature.[40] There is no requirement to prove that it was a critical standard, or that it was in the employee's performance plan.

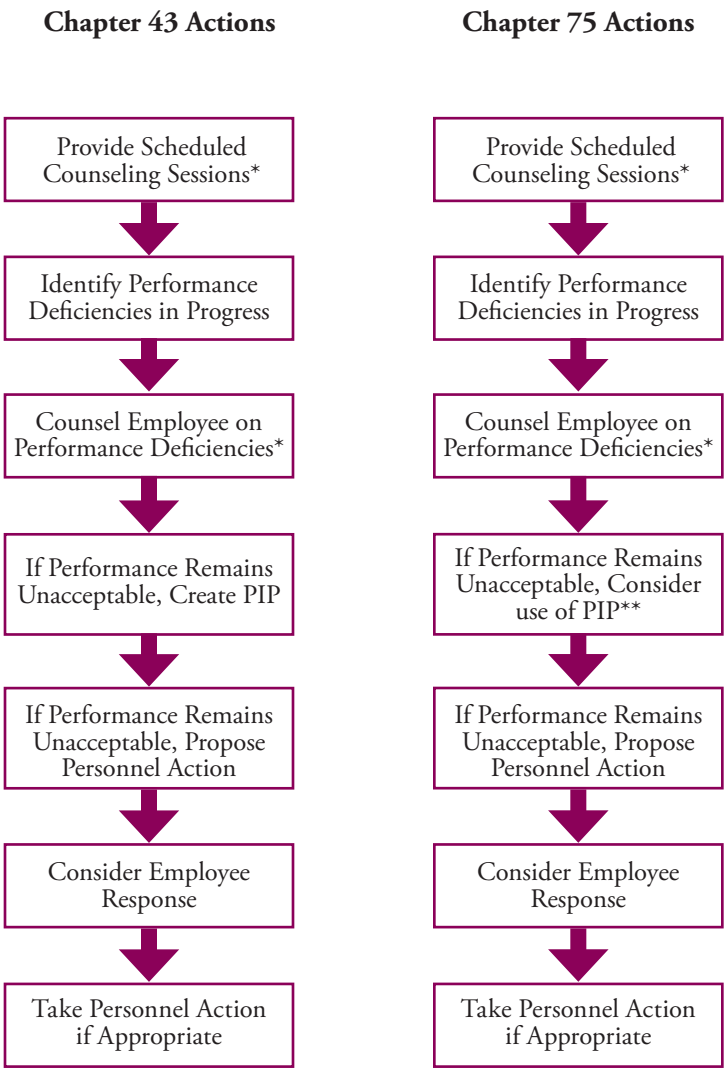
The Process to Take a Performance-Based Action

The following figure illustrates that some aspects of the process are alike in Chapter 75 and Chapter 43 actions. Below is a chart illustrating the extent to which the responsibilities of a supervisor to communicate with an employee are consistent between the two chapters. The only important difference is the use of a PIP, which is an option under Chapter 75 but mandatory under Chapter 43. (This chart does not provide sufficient detail to guide an agency taking an action. As stated above, agencies should consult the U.S. Code, the Code of Federal Regulations, agency policies, and relevant case law when taking a performance-based action).

[39] 5 U.S.C. § 7513(a).

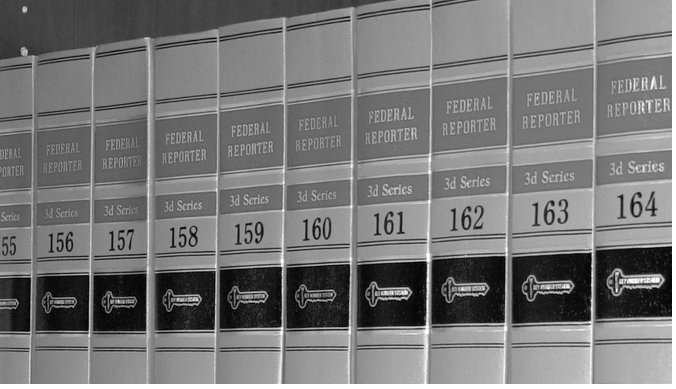
[40] *Graham v. Department of Air Force*, 46 M.S.P.R. 227, 235 (1990).

Figure 1: Supervisory Communication Responsibilities



* Employees should receive counseling at intervals required by the agency's performance appraisal system, as well as whenever the employee does something well or poorly. These are not features unique to poor performers, but rather are a supervisor's responsibility toward all employees.

** A PIP is not required for a Chapter 75 action, but can be used to demonstrate the extent to which the employee was on notice of expectations prior to the poor performance that formed the basis for the action. The level of detailed guidance provided in earlier counseling sessions may play a role in determining if a PIP is appropriate for a Chapter 75 action.



Chapter 43 and Chapter 75 - A Choice

As stated earlier, both Chapter 43 and Chapter 75 are legitimate authorities for an agency to use when addressing poor performance. Which chapter is more advantageous for an agency may vary based on the situation. As we examine the extent to which each chapter is used, it is important to remember that the use of one authority or the other is a choice to be made by the agency, and neither authority is more "correct" or "incorrect" than the other. The choice belongs entirely to the agency and its officials.[41]

The information below on when agency officials have chosen to use one authority or the other is provided to help readers see under what conditions agencies favored one authority over the other, and to illustrate that officials appear to desire that both options be available.

We examined CPDF data to learn more about how each chapter is used, and when. One of our most interesting findings from the CPDF data is that the use of Chapter 43 has become more popular over the past decade, increasing from 32 percent to 42 percent of all performance-based actions, as can be seen in Figure 2.[42] Thus, while agencies still opt to use Chapter 75 a majority of the time, Federal agencies seem to be finding Chapter 43 increasingly attractive.

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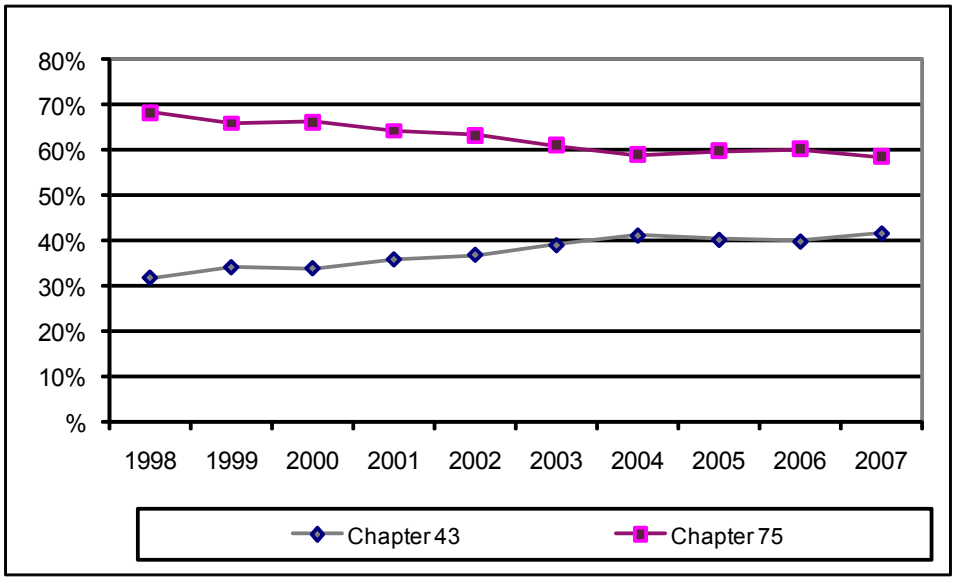
[41] *Lovshin v. Department of the Navy*, 767 F.2d 826, 843 (1985). While the choice belongs to the officials who take the action, it may be possible for an agency to order its supervisors to use only one particular authority. See our discussion on the National Security Personnel System later in this report for an example.

Throughout this section of the report, we discuss the choice to be made between the two chapters. This is not a choice that belongs to a single individual or role. Technically, the agency's selection of which chapter it will use must take place at some point in time prior to the closing of the record on any initial appeal, and thus can be selected by the agency's representative, rather than the proposing or deciding official. *Ortiz v. U.S. Marine Corps*, 37 M.S.P.R. 359, 362 (1988). However, because many of the requirements of one chapter versus the other must be met before the notice of proposed action is issued, it is unusual for an agency to change which chapter it elects to use once the notice of proposed action is issued. Furthermore, there are also differences between what a deciding official must consider under Chapter 43 versus Chapter 75, including a different burden of proof and the use of *Douglas* factors under Chapter 75. There is also a great potential to confuse the employee if the agency attempts, mid-process, to change the chapter being used. For all these reasons, we strongly encourage agencies to carefully select one chapter to use by the time that the agency proposes the action, and then adhere to that choice. The laws and requirements for a performance-based action under either chapter are confusing enough for both the agency and the employee without interjecting a second set of rules into the picture.

[42] These data are for actions that were coded as being purely performance-based, and do not include actions that were taken in which an employee had both conduct-based and performance-based charges.

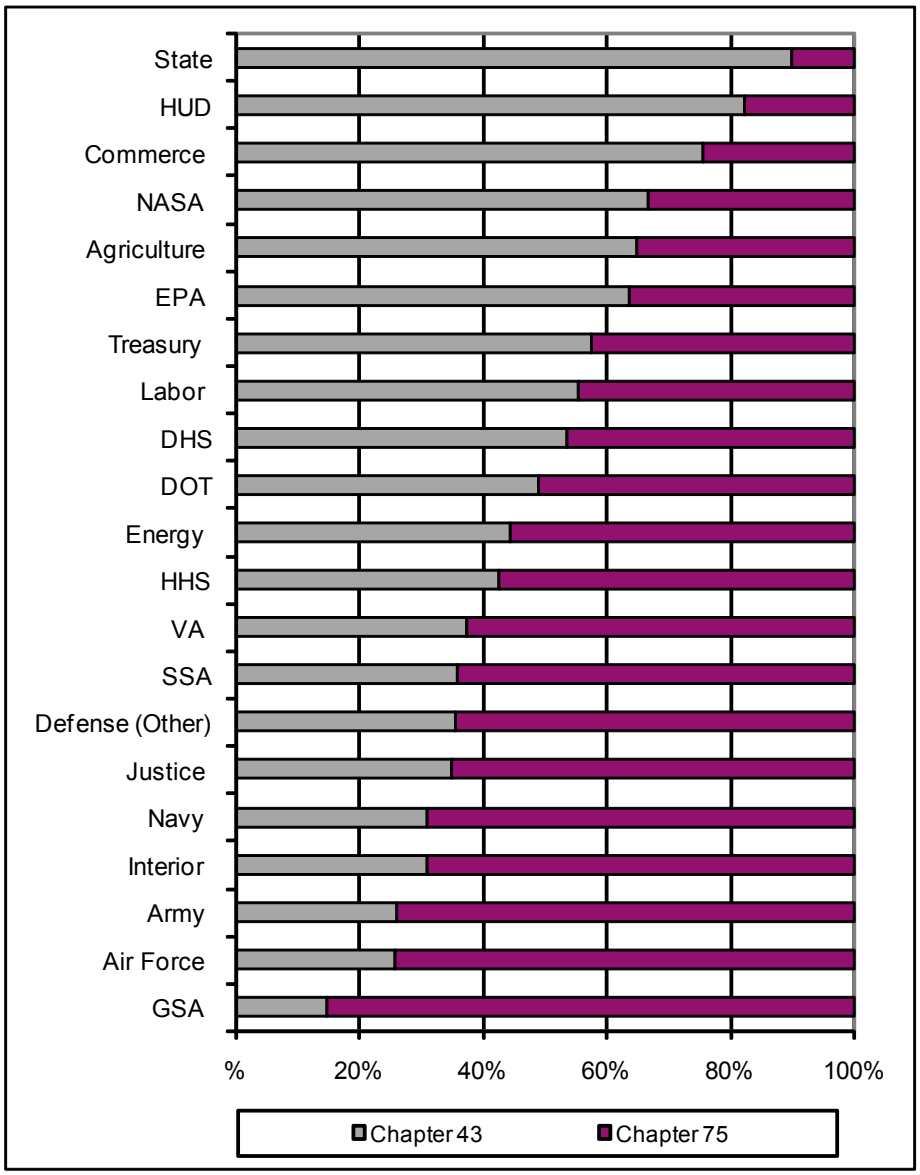
Figure 2: Authority Used for Performance-Based Actions, FY 1998 - FY 2007, by Year

(Totals may not equal 100 percent due to rounding.)



This split in preference between the two authorities is not a result of officials in particular agencies opting strictly for one authority or the other, as can be seen in Figure 3. Even when an agency heavily prefers a particular chapter, the other chapter is also being used by that agency.

Figure 3: Authority Used for Performance-Based Actions, FY 1998 - FY 2007, by Agency

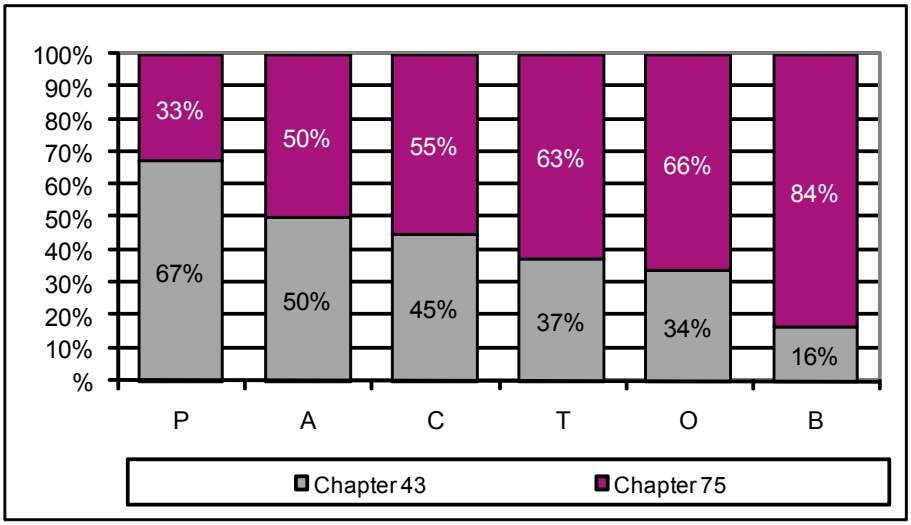


The Role of Occupational Category

The factor that seems to make the most difference in which authority is used is the *nature* of the employee's work; that is whether the work is professional, administrative, technical, clerical, other, or blue-collar (abbreviated as PATCOB). (Other applies to positions in the General Schedule, such as corrections officers or fire-fighters, which do not fit into any of the other categories.) We found that PATCOB coincided remarkably with the chapter that was used. As illustrated in Figure 4, if an employee who experienced a performance-based demotion or removal action was in a professional occupation, there was a 67 percent likelihood that Chapter 43 would be used. However, if the employee was engaged in blue-collar work, there was only a 16 percent likelihood that Chapter 43 would be used. Thus, occupation appears to have some connection to which chapter is selected.

Figure 4: Authority Used For Performance-Based Actions, FY 1998 - FY 2007, by PATCOB

(Totals may not equal 100 percent due to rounding.)



We considered the possibility that agency preferences were responsible for the differences among occupational groups, as some agencies tend to have a large number of one type of occupational group. However, we found that agency alone did not account for these differences. For example, in one large agency with more than 100 occupations,[43] over the course of a decade only 15 percent of poor-performing blue-collar employees were removed using Chapter 43, while 71 percent of poor-performing professional employees were removed using Chapter 43.[44] In another large agency, also with more than 100 occupations, the distinctions were not quite as extreme. In this agency, professionals still were subjected to Chapter 43 procedures instead of Chapter 75 procedures for performance-based removal actions far more than blue-collar workers (53 percent and 14 percent, respectively).[45]

We asked several agency representatives what role they thought an employee's occupation had in the decision to use one authority versus the other. Some representatives were not aware of any relationship between occupation and the chapter used, while others felt the nature of how an individual in a particular occupation needed to be supervised could be important. One representative said that he felt managers were disinclined to use Chapter 43 for positions that involved routine day-to-day work, and that this could account for the higher use of Chapter 75 for the blue-collar and clerical positions.

Why would a Chapter 43 PIP be less appealing for supervisors whose employees perform repetitive daily tasks? One possible explanation offered by an agency representative was that these employees are supervised differently from those in more knowledge-based positions and therefore might need more time-intensive supervision during a PIP. For example, to manage the PIP of a personnel clerk whose job consists primarily of entering codes on actions, and who has made too many errors, the supervisor would probably be expected to frequently look at a random sampling of actions, see how often any errors occurred, and meet with the

[43] This agency had more than 1,000 performance-based actions over the decade.

[44] In this agency, Chapter 43 was used for 53 percent of administrative employees, 53 percent of technical employees, 47 percent of clerical employees, and 41 percent of other employees.

[45] This agency had more than 900 performance-based actions over the course of the decade.

employee to discuss what went wrong. This type of responsibility could require the supervisor to spend time on the PIP on an almost daily basis. For a physicist employee, on the other hand, daily progress meetings might be impractical, because it could take days or weeks (if not months) for the employee to sufficiently complete a task in order for the supervisor to realistically evaluate the employee's performance of that task.

Because each PIP needs to be designed around the particular performance shortcomings of a particular employee, as well as the relationship between the tasks of a job and the opportunities to demonstrate improvement in a particular task, there appears to be a connection between the occupation and the decision to use (or not use) the authority that requires a PIP. It seems that for jobs which require repetitive tasks, supervisors may consider PIPs more time-consuming and unappealing.

This does not imply that a PIP for a knowledge-based position is somehow less thorough than for other positions. For a professional position, the guidance portion of a PIP could be more complicated than it would be for a job that involves simpler and more routine work. After all, if a job involves a repetitive task, the actual means to perform the task need only be explained once in the PIP, and then applied each time the task is performed. If the job involves a series of complex steps to complete the task, each step may need to be explained, requiring more explanation than would be needed for an uncomplicated job. In this way, the creation of the PIP for a knowledge-based position could be more resource intensive than a PIP for repetitive tasks; even though implementing the PIP could potentially be less resource intensive for the knowledge-based position because improvement may be monitored differently.

Another possible reason why Chapter 43 and the PIP may be more popular for knowledge-based positions could be a recognition by the supervisor that he or she may eventually need a higher level supervisor to understand the employee's performance in order to support the action being taken. If the action is appealed, there may also be a need to help the adjudicator understand the position and performance requirements in order to get the action affirmed. The more complicated the job, the harder it may be to educate these individuals. By creating a PIP in which the employee's job and performance requirements are set forth in clear detail, not only does the supervisor meet the requirement of Chapter 43 to provide a PIP, but the supervisor also has the document available to help the deciding official and any possible adjudicator likewise understand the job and how that job is to be performed. An additional advantage for the proposing official is that when Chapter 43 is used, the law instructs the deciding official and potential adjudicator to use a lower burden of proof to determine if the performance failed to meet the required standards. For those knowledge-based positions in which successful performance is particularly subjective, the lower burden of proof may be especially appealing.[46]

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[46] It is also possible that some professional and administrative positions require the possession of particular knowledge or skills that are rare and could make such employees harder to replace. Supervisors may be more willing to invest the time and energy involved in a PIP for positions where obtaining a replacement employee would be more difficult. Another potential explanation not offered by our respondents is that many professional and administrative employees will be supervised by someone in a professional or administrative occupation, while a position with more manual labor is more likely to be supervised by a person with a manual labor background. Supervisors whose past experiences include drafting complex documents may have a greater comfort level with the drafting of a PIP than supervisors who have not written as many documents. This could result in more PIPs for the professional and administrative workforce than for the other occupations.

Regardless of the employee's occupational category, or any additional uses for the PIP, the purpose of the PIP is to provide the employee with the tools for success (where practical) and an opportunity to demonstrate that success.[47] It should represent a genuine effort on management's part to assist an employee based on that employee's deficiencies, and not be a half-hearted exercise designed solely to demonstrate that a PIP occurred. Depending on the employee's deficiencies, and the complexity of the job involved, a PIP could be a simple document to write; or it could be incredibly detailed and therefore time-consuming to create.

Managerial perceptions of the PIP may be a consideration for HR staff and attorneys who advise supervisors on taking performance-based actions. It can be enough of a challenge to persuade a supervisor to do something about a poor performer. If the supervisor perceives that Chapter 43 requires more effort on his or her part than Chapter 75, then Chapter 43 can make the action even less appealing. Thus, even for those situations where the agency representative may prefer the lower burden of proof from Chapter 43, using Chapter 75 may make sense as a way of getting a supervisor to take an action at all.

If a supervisor selects which chapter to use based upon the effort required in a PIP, it will be important for the supervisor to remember that a lack of an improvement period can be relevant as a mitigating factor when the *Douglas* factors are applied.[48] In some cases, it may be worth the extra time to use the PIP to ensure that whatever action is taken does not get mitigated on appeal. In other cases, the use of a PIP may be clearly pointless, making Chapter 75 more appealing. However, taking a Chapter 75 action, only to find the penalty mitigated because the employee was not on notice of what was expected and given an opportunity to meet those expectations might not be in the best interest of either the agency or the employee.[49] Once again, the particular situation will determine which chapter is more practical and appropriate.

The Role of Length of Service

As discussed earlier, the length of service is a *Douglas* factor that agencies must consider when determining what penalty under Chapter 75 is appropriate.[50] Thus, as the length of service increases, one would expect that Chapter 43 would become increasingly appealing to the agency, given that the *Douglas* factors are not applied to actions taken under Chapter 43. Yet, the general trend was the reverse. As the length of service increased, agencies became *more* likely to use Chapter 75.

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[47] Not every competency can be developed through training or short-term guidance. For more on the difference between what can and cannot be learned through training, see our upcoming report, *Making the Right Connections: Targeting the Best Competencies for Training*.

[48] *Fairall v. Veterans Administration*, 33 M.S.P.R. 33, 45 (1987). The agency can neutralize this effect by showing that "the appellant had notice of performance deficiencies even without being afforded an improvement period" or by showing special circumstances. *Id.*, n. 16.

[49] Mitigation of agency penalties is not common but can occur. *See Parton v. Federal Communications Commission*, 7 M.S.P.R. 236, 239-40 (1981). ("We find that because the agency did not provide the appellant an opportunity to improve his performance, the appellant's removal was a clearly excessive penalty.")

[50] The fourth *Douglas* factor is "the employee's past work record, including length of service[.]" *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981).

A likely explanation for this outcome is that the employee's occupation drives the agency's choice of which authority to use more than length of service does. For those employees removed for performance between their 25th and 30th year of service, 37 percent were in blue-collar occupations. However, for those employees removed after their first but before their 5th year of service, only 21 percent were in blue-collar occupations. Length of service is a factor that must be considered when using Chapter 75, but this does not appear to have much of an impact on the choice of authority used to remove poor performers. This result was also reflected in our communications with agency representatives, who reported that length of service did not play a role in the advice they gave to management.

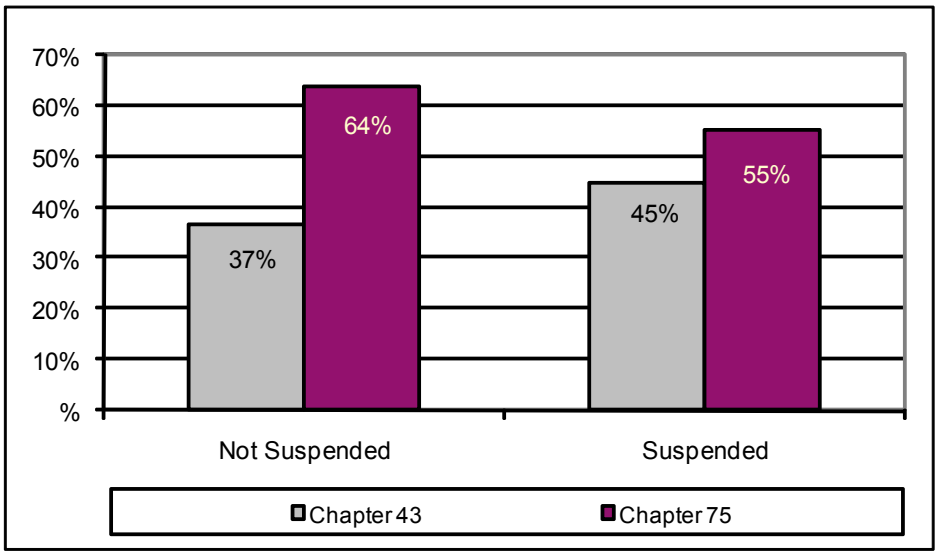
The Role of Disciplinary History

The employee's disciplinary record is also a *Douglas* factor,[51] and therefore Chapter 75 could be more attractive to an agency than Chapter 43 if the employee has a prior disciplinary action. Our analysis of CPDF data confirms the connection between prior discipline and the use of Chapter 75, even though the relationship was not reflected at first glance in the data. In order to see the connection between prior discipline and the use of Chapter 75 for purely performance-based actions, we first must factor in the effect of those cases that involve a combination of performance and conduct.

As can be seen in Figure 5, Chapter 75 was more popular than Chapter 43 regardless of whether or not the person's history included any suspensions. However, if the employee had been suspended, agencies were *less* likely to use Chapter 75 to remove solely for performance than if the person had never been suspended.[52]

Figure 5: Authority Used Based Upon Past Discipline, FY 1998 - FY 2007

(Totals may not equal 100 percent due to rounding.)



[51] *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981).

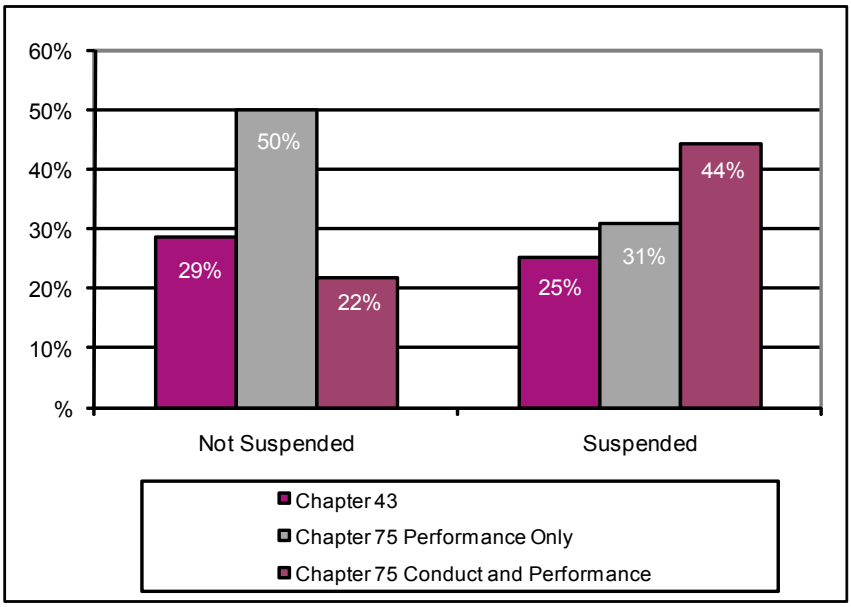
[52] This includes all suspensions that occurred from 1990 to 2007, regardless of the removal date. Because reprimands are not recorded in the CPDF, we cannot report which employees did or did not have reprimands or letters of admonishment in their records.

The explanation for this outcome may rest in the likelihood that an employee who has misbehaved in the past will misbehave again. This report focuses on actions taken solely for performance, as Chapter 43 cannot be used for conduct-based actions. But, when agencies' officials decide to remove a poor performer, they sometimes may have conduct issues to consider.[53]

Employees with past suspensions were twice as likely to be removed for a combination of performance and conduct reasons compared with those who had never been suspended, as can be seen in Figure 6. Once we remove the impact of the cases where both poor performance and misconduct were charged, what remains appears to be a slightly greater preference to use Chapter 43 for purely performance-based actions when there have been no past suspensions (29 percent) compared to when there has been a past suspension (25 percent).

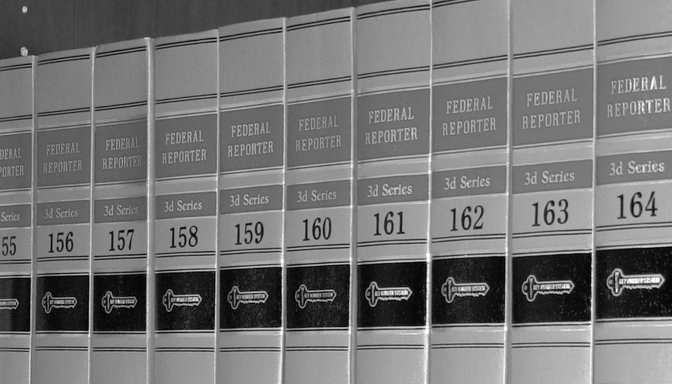
Figure 6: Authority Used Including Cases with Both Performance and Conduct Charges, FY 1998 - FY 2007

(Totals may not equal 100 percent due to rounding.)



From this data, it appears that it is not the use of disciplinary history as a *Douglas* factor that influences which chapter is used so much as it is the likelihood that an individual who has engaged in misconduct in the past will have conduct issues at the same time as the employee has performance issues. For these situations where misconduct and poor performance coincide, the agency cannot put all the charges into Chapter 43, but can combine it all under Chapter 75. This understandably makes Chapter 75 more appealing.

[53] Between 1998 and 2007, more than a quarter of the individuals removed for a performance-based reason were also charged with a conduct-based offense. Because Chapter 75 allows for the mixing of these two types of charges, while Chapter 43 actions must be only performance-based charges, Chapter 75 is understandably popular for removing employees who are being charged with both performance and conduct offenses. Data on these individuals were not included in this report because the inclusion of conduct-based charges eliminates the agency's ability to use Chapter 43 alone to take the action. Actions that involve a conduct-based element will be the subject of a future report.



Chapter 43 and Chapter 75 - Agency Perspectives

Before the Government can attend to any problems with how the law enables supervisors to address poor performers, it is important to discover how agencies are using the law, and if the law is actually a barrier. However, an agency does not consist of just one level of management. An agency's leaders may not share the same perspective as the line managers, who in turn may not see things in the same light as their legal or HR advisors. Everyone who plays a role in deciding which authority to use comes at it from his or her own viewpoint.

Leadership Perceptions of Chapter 43 in the Two Largest Departments

While agencies have a choice to use either Chapter 75 or Chapter 43 for any particular performance-based action, two of the Government's largest departments, Defense (DoD) and Homeland Security (DHS), recently concluded that Chapter 43 was essentially more trouble than it was worth and sought to create department-wide policies to use only Chapter 75 to take performance-based actions. In its proposed regulations for its new personnel system (which was ultimately discontinued without most elements ever taking broad effect),[54] DHS stated:

> This [proposed rule] represents a return to a simplified approach that existed prior to the 1978 passage of the Civil Service Reform Act and chapter 43 of title 5, U.S. Code. Congress enacted chapter 43 in part to create a simple, dedicated process for agencies to use in taking adverse actions based on unacceptable performance. Since that time, however, chapter 43 has not worked as Congress intended. In particular, interpretations of chapter 43 have made it difficult for agencies to take actions against poor performers and to have those actions upheld. As a result, agencies have consistently preferred to use the procedures available under chapter 75 of title 5 rather than chapter 43 when taking actions for unacceptable performance.[55]

Defense cited this same rationale in its own proposed regulations for the National Security Personnel System (NSPS), in which only Chapter 75 would be used for performance-based actions.[56]

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[54] Department of Homeland Security, Memorandum from Thomas D. Cairns, Oct. 2, 2008, rescinding application of the new DHS human resources system.

[55] Department of Homeland Security and U.S. Office of Personnel Management, Department of Homeland Security Human Resources Management System; Proposed Rule, 69 F.R. 8045, Feb. 20, 2004.

[56] Department of Defense and U.S. Office of Personnel Management, National Security Personnel System; Proposed Rule, 70 F.R. 7565, Feb. 14, 2005.

In the National Defense Authorization Act of 2008, the authority for several elements of NSPS was withdrawn, and Defense became required to use the Government-wide appeals process.[57] Despite this change, Defense still chose to mandate the use of Chapter 75 when taking a performance-based adverse action against an NSPS employee.[58] However, Chapter 43 remains an option if the employee is outside NSPS. In FY 2007, more than a quarter of all performance-based removals in Defense occurred under Chapter 43.[59] Thus, while there may be an interest by agency leaders to move towards using only Chapter 75, when individual officials were given a choice, both approaches had adherents.

Agencies may want to consider why their supervisors, or the supervisors' advisors, are choosing to use both Chapter 43 and Chapter 75, and ensure that any decision to limit the agency to one authority actually serves the needs of the agency. We are not saying that it is wrong to pick just one authority for an agency, only that we encourage agencies to consider why both chapters still have adherents before reaching any decision on what is correct for their particular agency.

Agency Representatives' Perceptions of Chapter 43

To better understand why individual officials choose to use Chapter 43 or Chapter 75, we sent a questionnaire to a small group of individuals (fewer than 20) who had represented their agency before the MSPB in a performance-based action.[60] Because of the small size of the agency representative population that received the questionnaire, these data should not be considered definitive when applied to the Government as a whole. However, the responses we received can help us understand some of the influences that affect the decisions by supervisors to use Chapter 43 or Chapter 75.

Why is Chapter 43 still popular in some situations? According to the agency representatives, the greatest benefits of using Chapter 43 are:

- It makes the supervisor get more involved with the employee and the work.
- The MSPB cannot mitigate the penalty.
- The burden of proof is lower.
- The agency has to prove failure in only one of the critical elements.

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[57] Department of Defense and U.S. Office of Personnel Management, National Security Personnel System; Final Rule, 73 F.R. 56346, Sept. 26, 2008.

[58] *Id*. at 56419 (§ 9901.410). This section also advises the supervisor to "consider the range of options available to address the performance deficiency, including remedial training, improvement periods…."

[59] CPDF, FY 2007.

[60] Because only a few hundred performance-based actions occur each year, and only a fraction of those are appealed, a full scale survey of agency representatives is not practical.

However, there are drawbacks. According to the agency representatives, the drawbacks of using Chapter 43 are:

- The supervisor may choose not to follow through once he or she sees how much work is involved.
- There are more details to document to prove that the performance level has not been met.
- There are too many technicalities that management might mishandle, preventing the action from occurring, or causing it to be reversed.

Agency representatives appeared to put particular weight on what is necessary to prove an action was appropriate. This is understandable, as we located these individuals based on their having represented their agency before the MSPB in a performance-based action.

To the agency representatives, the greatest appeal of Chapter 43 appeared to be what one agency representative called the "winner takes all" nature of the authority. He implied that his managers took great comfort in knowing that if they could prove that the requirements of Chapter 43 had been met, then there was no risk of having the employee returned to the organization. (As discussed earlier, the MSPB has the power to mitigate the penalty in a Chapter 75 action, even if the agency proves the employee's performance was deficient, although such mitigation is not common.) Several other representatives agreed that the absence of any risk of mitigation was the most attractive feature of Chapter 43.

The other major feature in question appeared to be the PIP. Agency representatives' viewpoints on PIPs were remarkably varied. Some representatives indicated management did not like the time and effort involved, while others indicated that they had at least some supervisors who considered the PIP a *benefit* of Chapter 43. The representatives reported that these supervisors genuinely wanted to help the employees to do better, and the supervisors were more comfortable taking the action once they knew they had done what they could reasonably do to help the employee.

It is important to note that an agency can implement a PIP and then still use Chapter 75. However, the agency representatives we spoke with about this indicated that for at least some managers, once the manager had gone to the effort of implementing a PIP, the manager wanted the lesser burden of proof and absence of a risk of mitigation that Chapter 43 offered. Apparently, those two aspects of Chapter 43 were sometimes seen as a sort of reward for the manager in exchange for jumping through "all the procedural hoops" involved in a Chapter 43 action. Thus, agencies interested in using Chapter 43 may want to consider using the lower burden of proof and the absence of the risk of mitigation as selling points when discussing the responsibilities of a PIP with managers.

Supervisors' Perceptions of Performance-Based Actions

According to the supervisors we surveyed, taking performance-based actions can be difficult. However, it is unlikely that this situation can be improved by any statutory amendments or changes in the regulations governing performance-based actions. Better training and education might be helpful in addressing some aspects of the difficulty in taking performance-based actions, but much of what complicates performance-based actions is inherent in managing performance in a merit-based system and cannot be altered by changing any rules.

In the MSPB's 1995 report, *Removing Poor Performers in the Federal Service*, we discussed the results of a survey in which we asked supervisors about various tasks associated with addressing poor performance. Respondents told us that the most difficult task for supervisors was to document the employee's performance (39 percent reporting difficulty), followed by defending the decision to demote or remove the employee (37 percent), and discussing the performance deficiencies with the employee (36 percent). Fewer than a third of supervisors cited the difficulty of developing a PIP or supervising employees under a PIP (31 percent each).[61]

Our 2009 survey found somewhat similar results. The greatest problem most supervisors encounter when taking performance-based actions is not the PIP. It is documenting performance, dealing with the subjective nature of performance, creating quality standards, and other tasks inherent in managing performance.

For the 2009 survey, we asked supervisors if they thought that "taking a performance-based action is more difficult than a conduct-based action."[62] Thirty percent strongly agreed that performance-based actions are more difficult. An additional 24 percent at least somewhat agreed with this statement. Only 11 percent either disagreed or strongly disagreed with this statement, with an additional 36 percent responding neutrally that they neither agreed nor disagreed. (See Figure 7).

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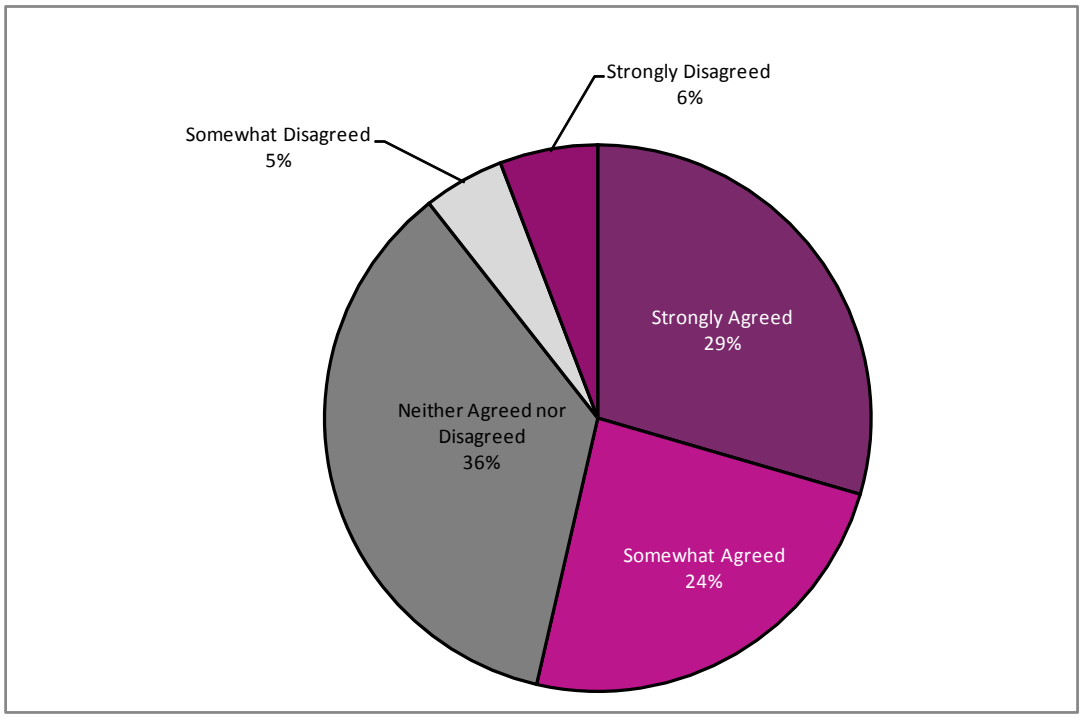
[61] U.S. Merit Systems Protection Board, *Removing Poor Performers in the Federal Service*, p. 8, available at www.mspb.gov.

[62] Respondents were asked to compare performance-based actions with conduct-based actions because the respondents were all officials who were involved in a Chapter 75 adverse action, and thus would likely have the conduct-based action as a viable frame of reference. The survey did not ask respondents about the extent of their experience taking performance-based actions or using PIPs.

Figure 7: Taking a Performance-Based Action is More Difficult than Taking a Conduct-Based Action

(Totals may not equal 100 percent due to rounding.)



We then asked those respondents who thought performance-based actions were more difficult to take to write a brief narrative explaining why they thought performance-based actions were harder.[63] The purpose of this question was to try to capture some of the challenges in taking performance-based actions. We wanted see if these challenges could be overcome, and if so, by what means. As with the 1995 study, our 2009 survey found that while PIPs were unpopular, they were not seen as the greatest roadblock.[64]

[63] Respondents were not asked what aspects of the rules regarding performance-based actions they thought should be changed, as we were seeking to understand their experiences, rather than asking them questions regarding rules that they may or may not have been well educated about.

[64] At least some of the issues that respondents addressed regarding PIPs could be overcome through the use of Chapter 75. One supervisor told us that he had issued many PIPs during his 20 years as a supervisor, but that "employees would pass and later have the same poor performance." When he then recommended an action be taken for poor performance, he was told he needed to place the employee on a PIP again. In such a situation, if the poor performance recurred within a year, the supervisor could have used Chapter 43 without a new PIP. If it took place after the year expired, and the poor performance was "the same" as had been addressed during the initial PIP, Chapter 75 likely could have been used without the necessity for a new PIP.

Only 16 percent of respondents who wrote a narrative expressed a dislike of the use of PIPs. However, 39 percent of respondents indicated the greatest problem with performance-based actions was that conduct is "cut and dry" while performance is subjective. The second most common difficulty reported was related to the challenges of tracking and documenting performance (27 percent).

Although the standard of proof is higher under Chapter 75, both chapters require documentation of the poor performance in order to take a performance-based action. Likewise, the subjective nature of whether or not an employee's performance was unacceptable applies to both chapters. Because these challenges are inherent in managing employees, a supervisor cannot avoid them by using one chapter instead of the other one. As long as performance deficiencies must be articulated—to the employee or to a reviewing third party—the subjective nature of measuring performance for a knowledge-based workforce will remain a challenge. As long as supervisors must establish a justification to explain a demotion or removal action, documentation of that justification will be necessary. The pertinent statutes and regulations can be amended, but the inherent challenges do not emanate from the statutes or regulations, and therefore cannot be wholly avoided so long as the Government has a merit-based system.

The Willingness to Act

A majority of respondents (54 percent) expressed that performance-based actions were more difficult to take than conduct-based actions, which may be one of many reasons why only a few hundred employees are removed for performance each year, even though approximately 3.7 percent of employees deserve to be fired for poor performance according to their co-workers.[65] However, 46 percent of respondents did not think that a performance-based action was harder.[66] In the words of one official, "The rules for both performance-based and conduct-based actions are clear and precise. It is simply a matter of having the courage to pursue the course required." In our 1995 report, *Removing Poor Performers in the Federal Service,* we noted that one in five respondents to a survey reported that one reason why they did not take action to address a poor performer was because they disliked confrontation.[67] It is unlikely that this problem could be resolved through legislation, because Congress cannot legislate how a person *feels* about engaging in an interpersonal conflict.

One in four respondents in the 1995 study said that they did not take action because they thought they would not get the necessary support from managers above them in their chain of command.[68] This barrier, which may be a part of an agency's culture, likewise does

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[65] U.S. Merit Systems Protection Board, *The Federal Workforce for the 21st Century: Results of the Merit Principles Survey 2000*, p. 23 (2003), available at www.mspb.gov.

[66] This includes both those who disagreed that a performance-based action was harder, and those who neither agreed nor disagreed.

[67] U.S. Merit Systems Protection Board, *Removing Poor Performers in the Federal Service*, p. 6 (1995), available at www.mspb.gov.

[68] *Id*.

not emanate from the statute, and therefore is unlikely to be changed by any amendment to the CSRA. Similarly, the willingness of supervisors and managers to act when there is poor performance is a part of an agency's culture. If the agency tolerates it when a first-line supervisor either fails to train a poor performer or keeps a poor performer once it is clear the person cannot be trained to become a good performer, then changing the rules for how the poor performer may be removed is unlikely to have a large impact. The single greatest key to addressing poor performers is having supervisors who are willing to address poor performance.

Barriers that Cannot be Prevented through Legislation

If Congress (or any individual agency authorized by Congress in the future to create its own system) seeks to change the rules of how performance-based actions occur, we encourage it to look closely at what the actual barriers are to the current system being used. It appears that many barriers are not caused by regulations or the statute, but rather are inherent to performance management. The subjective nature of assessing performance, the challenges in creating standards for different positions, the uncomfortable nature of telling someone you are displeased with his or her performance—these things cannot be changed by a statute, they simply exist. What agencies can do is try to give managers the training and support to perform these tasks as well as possible and create a culture where performance matters. However, the tasks themselves cannot be legislated away as long as the role of a supervisor includes an obligation to manage a subordinate's performance.

The few barriers that are affected by regulations seem to be essentially inherent to a merit-based system in which the Government cannot arbitrarily remove employees without cause.[69] As long as the Government must justify a removal or demotion, regardless of how low the burden of proof may be, documenting the reasons for the action is necessary. This means that the supervisor must go to the effort of creating standards (either in a performance appraisal or less formally), communicating the standards, measuring the employee against those standards, documenting poor performance that fails to meet the standards, etc. For all their challenges, merit-based systems work better than the alternatives that abandon merit.[70] However, merit-based systems do require work.

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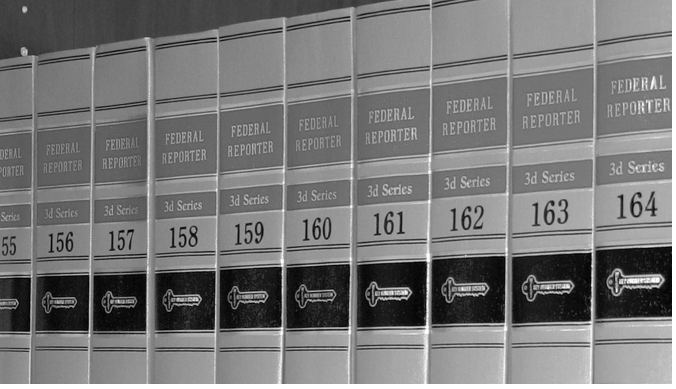
[69] *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

[70] The MSPB frequently receives visitors from other nations who come to study the Federal merit system and learn from it.



Conclusion

When taking a performance-based action, supervisors have two legitimate choices: Chapter 43 and Chapter 75. Each has advantages and disadvantages. However, the greatest challenges for addressing poor performers in the Government do not come from the responsibilities set forth in either chapter of Title 5. Performance management is inherently complex, particularly when dealing with a knowledge-based workforce. Addressing poor performance by merely changing a law that sets forth how to demote or remove a poor performer is not a feasible solution. Rather, the Government must concentrate on managing the performance of its employees. Once that has been done, either chapter becomes much easier to use.

Findings

While supervisors provided a number of reasons why they felt that taking a performance-based action was difficult, the concerns tended not to be a result of the use of Chapter 43 or 75, but rather were inherent to performance management in a merit system, or resulted from misunderstandings regarding existing regulations. Thus, these concerns are unlikely to be resolved by any change to Chapter 43 or 75.

Chapter 75 is notably more popular than Chapter 43 for addressing poor performance, but both are still used by many agencies. Which authority is used varies primarily by occupation, with Chapter 43 being more popular for professional occupations and Chapter 75 being more popular for clerical and blue-collar occupations.

Agency representatives told us that Chapter 43 has some benefits over Chapter 75. These include that Chapter 43 makes the supervisor get more involved with the employee and the work; it has a provision that the penalty cannot be mitigated on appeal; and it has a lower burden of proof. However, some agency representatives expressed concerns that Chapter 43 has too many technicalities that can be mishandled, and that detailing the evidence for a tightly defined level of performance could be resource intensive.

Recommendations

For Congress

Some aspects of the civil service may need reforming, and how agencies address poor performers should be on the table in any such effort. However, when efforts are made to amend the U.S. Code regarding poor performers, it will be important to recognize the difference between what can be legislated and what cannot. That Chapter 75 is consistently and notably more popular than Chapter 43 for performance-based actions likely indicates that the level at which the burden of proof was set is not the problem with addressing poor performers, nor is it the solution.

For Agencies

We recommend that agencies make strategic decisions when limiting their options as to which chapter may be used. It may, for example, make sense for an agency to decide to use only one chapter for performance-based actions in order to simplify the education of supervisors. However, if such a limitation applies to only a portion of the workforce, and not the entire agency, there is a risk of exacerbating confusion rather than limiting it.

Agencies should recognize that supervisors carry the responsibility for performance management, and therefore having skilled supervisors is crucial to avoiding the retention of poor performers. This means that it is important for agencies to pick supervisors with the skills and willingness to effectively deal with poor performers, and to provide those supervisors with training and guidance on how to use the regulations to address poor performers. (Effectively dealing with poor performers is more than a willingness to fire someone. It also means recognizing employees' training needs early, distinguishing between deficiencies that can be corrected though training and those that cannot, and providing the most effective assistance to employees as is practical.) We urge agencies to select supervisors carefully, and then hold supervisors accountable for dealing with poor performers.

For Human Resources (HR) Staff

We recommend that HR staff be proactive. HR staff should educate supervisors on their options regarding poor performers and not wait for the supervisors to report a problem to HR. If supervisors are to address poor performance when it arises, before the problem becomes critical — then they need to know early on what steps to take in order to lay the framework for later actions.

After a poor performer has been identified, and the process to help the employee has begun, we recommend that HR staff check back with the supervisor to see if the poor performer has improved, and to see if the better performance remains in effect. HR should advise the supervisor on what to do if the poor performer has not improved, or is backsliding. While the responsibility to act belongs to the supervisor, it may be difficult for a supervisor to know what the options are unless HR educates the supervisor. We strongly recommend that HR provide proactive customer service and not limit themselves to situations where the manager

must approach HR to ask if there are any options available. Previous studies have shown that sometimes managers erroneously believe they already know the answers, and therefore do not ask HR the questions they need to ask.[71] For this reason, HR needs to make sure supervisors do know their options and responsibilities, and not assume that silence from the supervisor means that nothing is wrong.

For Supervisors

We recommend that supervisors intervene as soon as they identify a performance problem and not wait for the situation to worsen. The sooner the agency addresses the performance issue, the sooner the agency may benefit from improved performance. Offering assistance earlier in the process will also enable the supervisor to establish whether the employee is able and willing to improve in a timely manner, or if it will be necessary to initiate a demotion or removal action.

[71] See U.S. Merit Systems Protection Board, *Federal Appointment Authorities: Cutting through the Confusion*, p. 30, and *The Probationary Period: A Critical Assessment Opportunity*, p. 31, available at www.mspb.gov.

Appendix: Similarities and Differences Between Chapter 43 and Chapter 75

	Chapter 43	Chapter 75
Critical Element	Agency *must* prove the performance deficiency is in a critical element.[1]	Agency is *not* required to prove the performance deficiency is in a critical element.[2]
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.[3] (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.[4] Also, an agency cannot require that an employee perform better than the standards that have been communicated to the employee.[5]
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 *under this chapter*.[6]	There is no obligation to offer a period of improvement at any point.[7]
Efficiency of the Service	Agency is *not* required to prove that the personnel action will promote the efficiency of the service.[8]	Agency *must* prove that the personnel action will promote the efficiency of the service.[9]
Burden of Proof	Action must be supported by *substantial evidence*. This means that a reasonable person might find the evidence supports the agency's findings regarding the poor performance, even though other reasonable persons might disagree.[10]	Action must be supported by a *preponderance of the evidence*. 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.[11]
Advance Notice	The agency must provide a notice of proposed action 30 days before any action can be taken, and must provide the employee with a reasonable opportunity to reply before a decision is made on the proposal.[12]	
Content of Advance Notice	The notice must state the specific instances of poor performance that are the basis for the action *and also the critical performance element involved*.[13]	The notice must state the specific instances of poor performance that are the basis for the action.[14]

Similarities and Differences Between Chapter 43 and Chapter 75 *(Continued)*

	Chapter 43	Chapter 75
Deciding or Concurring Official	A person higher in the chain of command than the person who proposed the action must concur.[15]	The deciding official does *not* have to be a person higher in the chain of command than the person who proposed the action.[16]
Agency Decision	Agency must issue a final decision within an additional 30 days of the expiration of the 30 days advanced notice period.[17]	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.[18]
Penalty Mitigation	Once the agency meets the requirements to take an action, the MSPB *cannot* reduce the agency's penalty.[19]	After finding that the agency meets the requirements to take a Chapter 75 action, the MSPB *may* reduce the agency's penalty.[20]
Douglas Factors[21]	The *Douglas* factors are not used.[22]	The agency must consider the relevant *Douglas* factors when reaching a decision on the appropriate penalty.
Affirmative Defenses	The agency action will not be sustained if the employee was harmed by the agency's failure to follow procedures, if the agency decision was reached as a result of the commission of a prohibited personnel practice, or if the decision is otherwise not in accordance with the law.[23]	
Merit Principles	Merit principles must be adhered to in all performance-based actions.[24]	

[1] 5 U.S.C. § 4301(3).

[2] "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).

[3] 5 C.F.R. § 432.104. The nature of assistance offered by the agency will vary based upon the requirements of the position and the employee's performance deficiencies. For example, if training is not necessary for the work required during the PIP, then training is not required to be a part of the PIP. *See Goodwin v. Department of the Air Force*, 75 M.S.P.R. 204, 207 (1997).

[4] *Fairall v. Veterans Administration*, 844 F.2d 775, 776 (1987); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (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).

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

[6] 5 C.F.R § 432.105(a)(2).

[7] "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).

[8] *Lovshin v. Department of the Navy*, 767 F.2d 826, 834 (Fed. Cir. 1985).

[9] 5 U.S.C. § 7513(a). The action must be taken "only for such cause as will promote the efficiency of the service."

[10] 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. § 1201.56(c)(2). When enacting the 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.

[11] 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. § 1201.56(c)(2).

[12] 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)-(2).

[13] 5 U.S.C. § 4303(b)(1)(A)(i) and (ii).

[14] 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 Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 680-81 (1991); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

[15] 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.

[16] 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).

[17] 5 U.S.C. § 4303(c)(1). 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 OPM under the procedures specified at 5 C.F.R. § 432.105(a)(4)(i)(C).

[18] *See* 5 U.S.C. § 7701(c)(2)(A); *see also 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. The administrative judge 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.

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

[20] *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1567. (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986). (Penalty mitigations are not common. Between FY 2001 and FY 2007, MSPB mitigated or modified the penalty in less than 3 percent of initial decisions. U.S. Merit Systems Protection Board, Annual Reports, available at www.mspb.gov.)

[21] The *Douglas* factors come from a 1981 case (*Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06) and list what a deciding official should consider when determining the appropriate penalty to address problems with an employee. 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. *See Halper v. U.S. Postal Service*, 91 M.S.P.R. 170, ¶ 7 (2002).

[22] 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).

[23] 5 U.S.C. § 7701(c)(2).

[24] *Lovshin v. Department of the Navy*, 767 F.2d 826, 840-41 (Fed. Cir. 1985).

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