

ARTICLE 31

ACTIONS BASED ON UNACCEPTABLE PERFORMANCE

SECTION 1

This Article applies to all members of the bargaining unit who have completed a probationary or trial period. No employee will have an action, under 5 CFR 432, proposed against him or her that relies on a performance plan under which he or she has not been working for at least the minimum rating period or where performance expectations have not been communicated to the employee consistent with the requirements of law and the terms of this Agreement.

SECTION 2

Unacceptable performance is defined as performance by an employee that fails to meet one or more critical job elements of his/her performance plan. Unacceptable performance is synonymous with unsatisfactory performance.

SECTION 3

To the maximum extent feasible, the Employer will act in a fair and objective manner, giving particular attention to avoiding disparate treatment of employees, when taking actions based on unacceptable performance.

SECTION 4

When an employee requests a change to lower grade due to his or her inability to perform the duties of the current position, the Employer will consider placing the employee in a lower-grade position identified by the Employer which the Employer believes the employee can successfully perform provided there is such a vacancy and the vacancy is available to be filled.

SECTION 5

- A. No bargaining unit employee will be the subject of an action based on unacceptable performance unless that employee's performance fails to meet established performance standards in one or more critical job elements of the employee's position, after having been afforded an adequate opportunity to demonstrate acceptable performance.
1. If at any time during the performance appraisal cycle that an employee's performance is determined to be unacceptable in one or more critical job elements, the Employer will:

- (a) notify the employee of the critical job elements(s) for which performance is unacceptable; and
 - (b) issue a written plan to the employee, including but not limited to suggestions as to how the employee can improve his/her performance, the type of assistance the Employer will provide, and instructions on ways the employee can be expected to raise his/her performance to an acceptable level.
2. To avoid a reduction in grade or removal, the employee must meet and sustain at an acceptable level, the performance standard(s) for which the critical job element(s) at issue.
- B. The Employer will provide more extensive assistance and feedback to an employee undergoing a PIP in an effort to secure the attainment of the requisite level of improved performance during the time period designated for the reasonable opportunity to improve. As necessary, the Employer will provide counseling at regular and reasonable intervals and times, written and/or oral feedback, and other reasonable efforts to assist the employee to bring performance up to an acceptable level prior to initiating any removal or demotion action under this Article.

SECTION 6

- A. Prior to issuing a notice of proposed action based on unacceptable performance, the Employer will issue a letter to the employee which contains the following:
1. an identification of the critical job elements and performance standards for which performance is unacceptable;
 2. provide specific examples of how the employee's performance does not meet the requisite standards;
 3. specify ways in which the employee must improve performance to meet the requisite standards;
 4. a statement that the employee has a reasonable period of time (specified in calendar days) but not fewer than sixty (60) days, unless the employee demonstrates acceptable performance prior to sixty (60) days, and not more than ninety (90) days in which to bring performance up to an acceptable level;
 5. a description of what the Employer will do to assist the employee to improve the unacceptable performance during the opportunity period; and
 6. inform the employee that failure to improve performance to a level above unacceptable and sustain it at that level in the time period specified may result in the employee being reduced in grade or removed.

- B. A grievance may not be filed on either the substance or procedural aspects of this notice until a final decision is issued.

SECTION 7

- A. An employee whose reduction in grade or removal is proposed under this Article is entitled to at least thirty (30) calendar days' advance written notice of the proposed action. The written notice will contain the following:
1. The action being proposed;
 2. The critical elements of the employee's position on which the performance is considered unacceptable;
 3. The specific instances of unacceptable performance on which the present action is based;
 4. The employee's right to be represented;
 5. Information stating that the employee is entitled to respond, orally and/or in writing, within fifteen (15) work calendar days;
 6. The name of the individual to whom the response shall be made; and
 7. Information stating that a decision as to the retention, reduction in grade or removal will be made no sooner than thirty (30) calendar days after the receipt of the notice and no later than thirty (30) calendar days from the expiration of the notice period.
- B. The Employer will not make a decision until after the oral or written reply is heard/submitted and considered, unless such restriction would violate the Employer's statutory obligation to make a decision within thirty (30) calendar days after expiration of the notice period.

SECTION 8

- A. An employee must inform the deciding official, in writing, if s/he is represented by the Union. The Union will notify the deciding official of the representative's name once the Union determines whom the representative will be.
- B. The Employer will provide a written summary of the employee's oral reply. The Employer may elect to hire a transcription service to provide a verbatim transcript of the oral reply. A copy of the summary or transcript will be included in the material relied upon, and it will also be provided to the employee's representative (or to the employee if s/he is unrepresented). Within five (5) workdays after receiving the written summary, the employee or representative may submit comments to it. The comments will be added to the official record and will be

considered by the Employer before a final decision on the matter is rendered.

- C. If an employee chooses to make an oral reply, it may be held via audio or videoconference when the employee, the employee's representative, and the oral reply official do not work in the same commuting area. However, if the employee or the employee's representative requests a face-to-face meeting, management will determine where the face-to-face reply will be heard and the employee and one representative will be reimbursed for travel and per diem that is reasonable under GSA regulations.

SECTION 9

Reasonable requests for extensions of time for submitting or delivering a reply will be granted.

SECTION 10

In reaching a final decision, the Employer may not rely on any employee performance that the employee has not been given the opportunity to reply to either orally or in writing.

SECTION 11

A written decision to retain, reduce in grade, or remove an employee will be issued to the employee and will:

- A. Specify directly or by reference the instances of unacceptable performance by the employee on which the reduction in grade or removal is based;
- B. Unless proposed by the Head of the Agency, be concurred on by a management official who is in a higher position than the official who proposed the action; and
- C. Specify the effective date, the action to be taken and the employee's right of appeal.

SECTION 12

If, due to performance improvement by the employee during the PIP period, the employee's reduction in grade or removal is not proposed, and the employee's performance continues to be acceptable for one (1) year from the date of the notice of the PIP, any entry or other notation of the PIP shall be removed from the files of the Employer.

SECTION 13

- A. The Employer will make available for review a copy of the material relied upon for the proposed action, subsequent to the advance notice being delivered to the employee. If

requested by the employee or her/his representative, the Employer will furnish a copy of such material.

- B. Nothing in this section is to be construed as a waiver of the employee's or Union's right to request additional information under other authorities such as the Freedom of Information Act, Privacy Act, or Civil Service Reform Act.

SECTION 14

Within thirty (30) calendar days of the effective date of the action, final Employer decisions may be challenged by the employee in only one of the following ways:

- A. By filing an appeal with the MSPB in accordance with applicable law and regulations (currently within thirty (30) calendar days);
- B. Under this Agreement and with the Union's concurrence, by appealing directly to binding arbitration (which may include an allegation of discrimination), within the time frame set forth in Article 46, Arbitration, of this Agreement; or
- C. By filing a formal complaint of discrimination filed under the administrative EEO process.

The final decision letter that is issued to the employee will contain a statement of his or her right to challenge the action in one of these three (3) ways. Once an employee has elected one of these procedures, the employee may not change thereafter to a different procedure.

SECTION 15

To the extent not prohibited by law, the Employer will provide the Union with unsanitized copies of all unacceptable performance action proposal and decision letters, no later than the next workday. The Employer will provide this notice to the designated representative, if one is known, or to the local chapter president.

SECTION 16

If at any time before a removal action is effected, an employee raises as a defense that he or she is suffering from a disability, the employee must submit acceptable medical documentation simultaneously with any request for reasonable accommodation. The Employer will accommodate the employee to the extent that the employee is a "qualified handicapped Individual" under the law based on the medically documented disability. A request for accommodation does not preclude the Employer from proceeding with a performance-based action. Simply, the Employer will design to the maximum extent possible, an accommodation to address the employee's physical or mental limitations so that the employee has as much of a chance to achieve acceptable performance as a non-disabled person.

SECTION 17

- A. If the employee is the subject of removal for unacceptable performance, the Employer will consider the employee's request to stay the action for a reasonable period of time to allow a determination to be made concerning any pending application for disability retirement filed prior to the effective date of the action. If the Employer agrees to stay the removal action but at any subsequent time determines that a continuation of the stay poses an undue hardship on the Employer or the application for disability retirement has no reasonable probability of being approved, the Employer may process the adverse action.

- B. If the Office of Personnel Management approves the application for disability retirement of the employee covered by Subsection A, above, the employee may elect to use his or her available sick leave prior to retiring, to the extent allowed by law, rule or regulation.