

REPRESENTING FEDERAL EMPLOYEES IN PERFORMANCE IMPROVEMENT PLANS

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Federal employees should always be wary and consult an attorney if they know a Performance Improvement Plan (PIP) is being considered as part of any evaluation by supervisors of their individual work performance. In this Firm's experience the use of a PIP is almost always the beginning of the removal or demotion process at a federal agency. Often times federal employees will be told that a PIP is only designed to be a positive benefit to them and to make them better performers. Managers often promise employees that they will be given special assistance to ensure that they are successful during a PIP period, only for the employee to later find themselves facing a potential demotion or removal some months later having not received any sort of the promised assistance during the process.

It is important for federal employees to realize that there is an extremely high removal and demotion rate when a PIP is initiated by a federal agency. Federal employees often do not realize the very serious process occurring to them during a PIP, or the performance evaluation that often comes first until it is too late to effectively pass the PIP. This is why it is crucial that federal employees on PIPs, or those that have just received a poor performance evaluation, consult with an attorney familiar in these areas as soon as possible.

A PIP is governed by Chapter 43 of the United States Code which requires federal agencies to provide employees with an opportunity to improve prior to taking performance-based action. 5 U.S.C. § 4302; 5 C.F.R. § 432.104. The federal statutes, regulations, and case law dealing with the PIP process emphasizes the importance of providing an employee with a meaningful opportunity to improve, as a PIP is meant to assist employees in achieving performance goals. "The agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance . . . As part of the employee's opportunity . . . the agency shall offer assistance to the employee in improving unacceptable performance." 5 C.F.R. § 432.104 (emphasis added).

In processing a PIP, a federal agency typically begins by placing that employee on a Performance Appraisal Period (PAP). The Performance Appraisal Period must allow the employee a true opportunity to show his or her capabilities in the position. "An employee's rights to a meaningful opportunity to improve . . . is one of the most important substantive rights in the entire Chapter 43 performance appraisal framework." Zang v. DIS, 26 M.S.P.R. 155, 157 (1985) (emphasis added). Indeed, "[t]he legislative history of the Civil Service Reform Act . . . specifically notes the opportunity to improve performance as an important aspect of a valid performance appraisal system." Sandland v. GSA, 23 M.S.P.R. 583, 587 (1984).

As part of this meaningful opportunity to improve, generally an employee must receive the assistance promised by the agency at the onset of the PIP period. Adorador v. Dep't of the Air Force, 38 M.S.P.R. 461 (1988) (an employee prevailing in an Merit Systems Protection Board appeal where the agency failed to prove that it provided the assistance promised in the Notice of Unacceptable Performance). In addition, the agency must also provide assistance to the employee during their PIP period. Thompson v. Farm Credit Admin., 51 M.S.P.R. 569, 579 (1991) (MSPB held that the employee did not receive promised supervisory assistance and supervisors had predetermined the employee's failure in PIP employee gave the Board reason to reverse the agency's decision to remove the employee).

Moreover, a supervisor's negative actions toward an employee after the performance of his or her PIP or during a PIP period may constitute a violation of Chapter 43. In Zang, the Merit Systems Protection Board found that the agency violated the employee's Chapter 43 rights and that the employee was denied a "fair and meaningful" opportunity to improve her performance where, inter alia, the employee's supervisor did not provide guidance on how to improve, and "the counseling sessions given the appellant by her supervisor were often disparaging in nature." 26 M.S.P.R. at 157. See also Beasley v. Dep't of the Air Force, 25 M.S.P.R. 213, 215 (1984) ("Although the agency claimed that it 'counseled' the appellant, this counseling only consisted of them merely reviewing her work product and indicating her errors"). Thompson, 51 MSPR at 579 and Adorador

OPPORTUNITY TO IMPROVE

Chapter 43 requires a federal agency to provide employees with an opportunity to improve before a performance-based action is taken. See 5 U.S.C. § 4302. The reason for this is clearly spelled out in the legislative history of Chapter 43. This requirement was applied in Zang when it was ruled that an employee must be provided the "meaningful opportunity to improve" before action is taken. Id.

EMPLOYEE NEEDS A REASONABLE OPPORTUNITY TO SUCCEED

A Performance Improvement Plan (PIP) is meant to assist employees in achieving performance goals. "The agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance . . . As part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance." 5 C.F.R. § 432.104.

The PAP should allow the employee a true opportunity to show his or her capabilities in the position. "An employee's rights to a meaningful opportunity to improve . . . is one of the most important substantive rights in the entire Chapter 43 performance appraisal framework" (emphasis added). Zang 26 M.S.P.R. 155 (1985). Indeed, "[t]he legislative history of the Civil Service Reform Act . . . specifically notes the opportunity to improve performance as an important aspect of a valid performance appraisal system." Sandland, 23 M.S.P.R at 587.

THE REALITIES OF THE PIP PROCESS

As noted above, often times the PIP is the first step towards attempting to remove an employee from their position. A failed PIP can result in removal, demotion, or reassignment. In our experience, the result of the PIP is usually predetermined by the agency and this outcome is usually removal. PIP's tend to be usually 90 days in duration and very detailed and lengthy. They are sometimes impossible to complete on purpose so any person receiving a PIP should take it seriously as it is usually designed for failure.

At the end of the PIP process, the result will depend on the employee's performance at the conclusion of the PIP period. If the employee has been deemed to have an acceptable level of performance, there is no need for any action except to keep providing feedback and encouragement to the employee.

If the employee is still performing unacceptably, however, the next step is for the proposing official or supervisor in charge of the PIP to determine the best solution. The options include reassignment, demotion, or removal. If deemed unacceptable performance (which most times it is), the employee is most often proposed for removal and can be removed in a very short period of time after the decision on the PIP. Keep in mind that both at the Agency and MSPB levels there are no requirements to issue or consider the Douglas or mitigating factors. Douglas v. Veterans Administration, 5 M.S.P.R 208 (1981).

POTENTIAL DEFENSES TO THE POST-PIP REMOVAL

When facing a PIP there are some key defenses for federal employees faced with these performance issues include the following:

- a. The Agency gave no meaningful assistance to the employee during the PIP period even though they said they would;
- b. The Agency said the employee did not perform well on the PIP even though their issue or problem with performance was not even listed in the PIP;
- c. The Agency designed a PIP that is impossible for any employee to pass; or
- d. The Agency made errors where one can elicit testimony or evidence shows that there was a conspiracy to essentially fail the employee.

A SAMPLING OF CASES INVOLVING PIP'S

- a. Beasley v. Dep't of the Air Force, 25 M.S.P.R. 213 (1984) – The Agency was found to have not met substantial evidence burden where agency didn't counsel employee. In Beasley the agency had just reviewed his work & pointed out errors that he had made. The Agency neglected to inform employee that his work was unacceptable; they did not offer a reasonable opportunity to improve and the supervisor had already predetermined that employee could not do his job.
- b. Gjersvold v. Dep't of the Treasury, 68 MSPR 331 (1995) – The action that the Agency took was in accordance with PIP policy. The Agency supplied employee with a detailed 19-page PIP and instructed employee to contact the supervisor; employee never initiated any contact and received written evaluations. It was ruled that “[T]here is no mechanical requirement regarding the form of [the] assistance.”
- c. Deskins v. Dep't of the Navy, 29 MSPR 276 (1985) – employee was subject to verbal abuse, insults, and harassment that interfered with his ability to perform his job. In addition, employee was denied privileges other employees were granted. Employee was denied reasonable opportunity to demonstrate improved performance.
- d. Bryne v. Dep't of Labor, M.S.P.R. 143 (2007) –Appellant was put on PIP because he was not meeting the critical production element for his position. The agency gave him an opportunity to improve but he was removed after his PIP period. The Appellant then claimed that the agency failed to accommodate his disability. The Arbitrator sustained the decision to remove “because he could not perform the essential functions of his position with or without reasonable accommodation”

CONCLUSION

There are a number of issues that come up in the context of PIPs, PAPs and other Performance actions by federal agencies, which is why it is important for an individual to seek legal advice early on in the process. This article is intended for only general information. Federal employee performance issues are extremely individual in nature and vary in each case. You should consult an attorney for specific legal advice.