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## Performance Improvement Plans for Federal Employees

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

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

### Opportunity to Improve

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 actions, 5 U.S.C. § 4302; 5 C.F.R. § 432.104. The federal statutes, regulations, and case law dealing with the PIP process emphasize 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 an employee on a Performance Appraisal Period (PAP). The PAP must provide the employee a true opportunity to show his or her capabilities in the position. “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.” 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 the meaningful opportunity to improve, an employee generally must receive the assistance promised by the Agency at the onset of the PIP period. Adorador v. Dep’t of the

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Air Force, 38 M.S.P.R. 461 (1988) (An employee prevailing in a Merit Systems Protection Board (MSPB) 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; the employee gave the Board reason to reverse the Agency's decision to remove the employee.)

Moreover, a supervisor's negative actions toward an employee during or after the performance of his or her PIP period may constitute a violation of Chapter 43. In Zang, the MSPB 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.

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.

### **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 toward attempting to remove an employee from his or her position. A failed PIP can result in removal, demotion, or

reassignment. In our experience, the result of the PIP is often predetermined by the Agency and the outcome is usually removal. PIP's tend to be typically 90 days in duration and very detailed and lengthy. They are sometimes purposely impossible to complete so any person receiving a PIP should take it seriously as it is usually designed for failure.

The result of the PIP process 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 continue 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 the employee is proposed for removal, he or she 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 Douglas or other 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 such as the following:

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

### **Examples of Cases Involving PIPs**

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 did not counsel the employee. In Beasley, the Agency had just reviewed his work and 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.

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.”

Deskins v. Dep't of the Navy, 29 MSPR 276 (1985) – The employee was subjected 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.

Bryne v. Dep't of Labor, M.S.P.R. 143 (2007) – Appellant was put on a 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.”

Dennis v. VA, 119 M.S.P.R. 412 (2013) – Appellant was placed on a PIP and was removed from federal employment. The Administrative Judge upheld the removal of the Appellant reaffirming the principle that PIP cases are not subject to mitigation of the penalty by the MSPB.

## Contact Us

Federal employee performance issues are extremely individual in nature and vary from case to case. A number of issues may arise 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.

Berry & Berry, PLLC represents federal employees in these types of federal employment matters and can be contacted at (703) 668-0070 or [www.berrylegal.com](http://www.berrylegal.com) to schedule an initial consultation regarding performance and other federal employment issues.

This article is intended for general information only.

## Attorneys

John V. Berry

## Practice Areas

Federal Adverse and Disciplinary Actions