



Report to the Chairman, Committee on
Homeland Security and Governmental
Affairs, U.S. Senate

February 2015

FEDERAL WORKFORCE

Improved Supervision
and Better Use of
Probationary Periods
Are Needed to
Address Substandard
Employee
Performance

Accessible Version

GAO Highlights

Highlights of [GAO-15-191](#), a report to the Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate

Why GAO Did This Study

Federal agencies' ability to address poor performance has been a long-standing issue. Employees and agency leaders share a perception that more needs to be done to address poor performance, as even a small number of poor performers can affect agencies' capacity to meet their missions.

GAO was asked to examine the rules and trends relating to the review and dismissal of federal employees for poor performance. This report (1) describes and compares avenues for addressing poor performance, (2) describes issues that can affect an agency's response to poor performance, (3) determines trends in how agencies have resolved cases of poor performance since 2004, and (4) assesses the extent to which OPM provides guidance that agencies need to address poor performance. To address these objectives, GAO reviewed OPM data, and interviewed, among others, OPM and MSPB officials, selected CHCOs, and selected union officials.

What GAO Recommends

GAO is making four recommendations to OPM to strengthen agencies' ability to deal with poor performers including working with stakeholders to assess the leadership training agencies provide to supervisors. OPM concurred or partially concurred with all but one recommendation noting that GAO's recommendation to explore using an automated process to notify supervisors when a probationary period is about to end is an agency responsibility. GAO agrees and has clarified the recommendation.

View [GAO-15-191](#). For more information, contact Robert Goldenkoff at (202) 512-2757 or goldenkoffr@gao.gov.

February 2015

FEDERAL WORKFORCE

Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance

What GAO Found

Federal agencies have three avenues to address employees' poor performance:

1. **Day-to-day performance management activities** (such as providing regular performance feedback to employees) can produce more desirable outcomes for agencies and employees than dismissal options. However, supervisors do not always have effective skills, such as the ability to identify, communicate, and help address employee performance issues.
2. **Probationary periods for new employees** provide supervisors with an opportunity to evaluate an individual's performance to determine if an appointment to the civil service should become final. According to the Chief Human Capital Officers (CHCOs) that GAO interviewed, supervisors often do not use this time to make performance-related decisions about an employee's performance because they may not know that the probationary period is ending or they have not had time to observe performance in all critical areas.
3. **Formal procedures**—specifically chapters 43 and 75 of title 5 of the United States Code and OPM implementing regulations—require agencies to follow specified procedures when dismissing poor performing permanent employees, but they are more time and resource intensive than probationary dismissals.

Federal employees have protections designed to ensure that they are not subject to arbitrary agency actions. These protections include the ability to appeal dismissal actions to the Merit Systems Protection Board (MSPB) or to file a grievance. If employees are unsatisfied with the final decision of the MSPB or an arbitrator decision, they may seek judicial review.

The time and resource commitment needed to remove a poor performing permanent employee can be substantial. It can take six months to a year (and sometimes longer) to dismiss an employee. According to selected experts and GAO's literature review, concerns over internal support, lack of performance management training, and legal issues can also reduce a supervisor's willingness to address poor performance.

In 2013, agencies dismissed around 3,500 employees for performance or a combination of performance and conduct. Most dismissals took place during the probationary period. These figures do not account for those employees who voluntarily left rather than going through the dismissal process. While it is unknown how many employees voluntarily depart, the CHCOs that GAO interviewed said voluntary departures likely happen more often than dismissals.

To help agencies address poor performance, the Office of Personnel Management (OPM) makes a range of tools and guidance available in different media, including its website, in-person training, and guidebooks. However, CHCOs and other experts said agencies are not always aware of this material and in some cases it fell short of their needs. Going forward, it will be important for OPM to use existing information sources, such as Federal Employee Viewpoint Survey results, to inform decisions about what material to develop and how best to distribute it.

Contents

Letter	1
Background	4
Agencies Have Multiple Avenues Available to Address Employee Performance	5
Various Considerations Can Reduce Willingness to Deal with Poor Performance	19
Agencies Dismissed Around 3,500 Employees for Performance in 2013, but the Overall Magnitude of Employees Leaving for Performance Reasons Is Unknown	21
OPM Provides a Range of Tools and Guidance to Address Poor Performance but This Assistance May Not Meet All Agency Needs	26
Conclusions	29
Recommendations for Executive Action	30
Agency Comments and Our Evaluation	31
<hr/>	
Appendix I: Objectives, Scope, and Methodology	34
Appendix II: Chapters 43 and 75 Similarities and Differences	37
Appendix III: Appeal of Removal or Demotion Actions	39
Appeal Avenues: Chapter 43 and 75 Removal or Demotion Actions	40
Appeal Avenues When Discrimination is Alleged	44
<hr/>	
Appendix IV: Examples of Tools and Guidance the Office of Personnel Management Provides to Help Agencies Address Poor Performance	47
Appendix V: Comments from the Office of Personnel Management	48
Appendix VI: GAO Contact and Staff Acknowledgments	51
GAO Contact	51
Staff Acknowledgments	51
<hr/>	
Appendix VII: Accessible Data	52
<hr/>	
Table	
Table 1: Comparison of Approaches for Addressing Poor Performance – By Legal Authority	16

Table 2: Chapters 43 and 75 Similarities and Differences	37
Table 3: Examples of Tools and Guidance the Office of Personnel Management Provides to Help Agencies Address Poor Performance	47
Data Table for Figure 3: Trends in Performance Dismissals and Hiring Fluctuations (Career Permanent Employees) – 2004-2013	52
Data Table for Figure 4: MSPB Decisions on Dismissal Appeals under chapter 43 – 2013	52

Figures

Figure 1: The Dismissal Process under Chapter 43	15
Figure 2: Performance Dismissals By Legal Authority and Employment Status – 2013	22
Figure 3: Trends in Performance Dismissals and Hiring Fluctuations (Career Permanent Employees) – 2004-2013	23
Figure 4: MSPB Decisions on Dismissal Appeals under chapter 43 – 2013	26

Abbreviations

CHCO	chief human capital officer
CSRA	Civil Service Reform Act of 1978
EEOC	Equal Employment Opportunity Commission
EHRI	Enterprise Human Resources Integration
Federal Circuit	U.S. Court of Appeals for the Federal Circuit
FEVS	Federal Employee Viewpoint Survey
GEAR	Goals-Engagement-Accountability-Results
MSPB	U.S. Merit Systems Protection Board
NOA	Nature of Action
OPM	Office of Personnel Management
OSC	U.S. Office of Special Counsel
PAAT	Performance Appraisal Assessment Tool
SES	Senior Executive Service

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Letter

U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

February 6, 2015

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate

Dear Chairman Johnson:

A high-performing, effective workforce with the requisite talents, multidisciplinary knowledge, and up-to-date skills is critical to helping the federal government address increasingly complex and rapidly evolving challenges. However, managing employee performance has been a long-standing government-wide issue and the subject of numerous reforms since the beginning of the modern civil service. Without effective performance management, agencies risk not only losing (or failing to utilize) the skills of top talent, they also risk missing the opportunity to observe and correct poor performance. As even a small number of poor performers can negatively affect employee morale and agencies' capacity to meet their missions, poor performance should be addressed sooner rather than later, with the objective of improving it. The Office of Personnel Management (OPM) characterizes poor performance as the failure of an employee to do his or her job at an acceptable level.

Federal employees and agency leaders share a perception that (1) supervisors ineffectively address poor performance, and (2) federal performance management systems are not built to address poor performance. For example, in the 2014 Federal Employee Viewpoint Survey (FEVS), 28 percent of respondents said that steps are taken to deal with a poor performer who cannot or will not improve in his or her work unit.¹ A recent report analyzing the views of agency chief human capital officers (CHCO) found their agencies' respective performance

¹FEVS is a tool offered by OPM that measures employees' perceptions of whether, and to what extent, conditions characterizing successful organizations are present in their agencies. Forty-two percent of respondents disagreed with the statement and 27 percent neither agreed nor disagreed.

management systems make it difficult for managers to address poor performers and that many are doing so inadequately.²

We were asked to examine the rules and trends relating to the review and dismissal of employees for poor performance. Our objectives were to (1) describe and compare avenues for addressing poor performance, including the formal procedures required when dismissing employees for poor performance; (2) describe issues that can affect an agency's response to poor performance; (3) determine trends in dismissals and other agency actions taken for poor performance since 2004; and (4) assess the extent to which OPM provides the policy, guidance, and training that agencies say they need to address poor performance.

To address the first objective, we reviewed relevant sections of title 5 of the United States (U.S.) Code—commonly referred to as title 5—and OPM regulations to determine the authority agencies have to address poor performance in the competitive and excepted services and in the senior executive service, including formal procedural and employee appeal rights.³ To describe issues that can affect an agency's response to poor performance, we interviewed

- OPM officials from the Merit System Accountability and Compliance Office, Office of Employee Services, and other offices that work with agencies to address poor performance;
- officials of the Merit Systems Protection Board (MSPB), including the Executive Director, and representatives from the Office of Regional Operations, the Office of Appeals Counsel, and an administrative judge;

²Partnership for Public Service, *Embracing Change: CHCOs Rising to the Challenge of an Altered Landscape* (Washington, D.C.: May 2014).

³Our discussion of procedural and appeal rights under title 5 applies to competitive service positions as well as those excepted service positions in executive agencies which have not been excluded from these title 5 (and OPM regulation) provisions. Many positions in the excepted service are not covered under title 5 (in whole or in part), including those positions covered under alternative personnel systems. Even where excepted service positions are covered under the procedural and appeal rights under title 5, differences exist in that coverage and will be noted, as appropriate.

- selected CHCOs chosen for their particular expertise in the issue area, as identified through the Executive Director’s Office of the CHCO Council and previous GAO work on related topics;
- National Treasury Employees Union officials;
- American Federation of Government Employees officials;
- officials from the Federal Managers Association;
- individual members of the Federal Employees Lawyers Group;
- officials from the Partnership for Public Service;
- officials from the Senior Executives Association; and
- selected individuals with expertise in performance management from academia and the private sector.

To address the third objective, we analyzed data from OPM’s Enterprise Human Resources Integration (EHRI) data warehouse to identify trends in ratings and performance-related personnel actions. This includes the number of employees dismissed, demoted, or reassigned for performance reasons and the number of employees who voluntarily resigned or retired over a three year period after receiving a “less than fully successful” or lower performance rating.

We also interviewed individuals with extensive experience in federal performance management issues to better understand the magnitude of other strategies agencies use to address poor performance, such as employees voluntarily leaving as a result of supervisory performance management activities. We reviewed MSPB data on employee appeals for performance-related actions and interviewed MSPB officials to determine the number, time to process, and outcomes of those appeals. We determined the data used in this report to be sufficiently reliable for our purposes. To determine data reliability, we reviewed our past analyses of the data maintained by OPM, interviewed OPM and MSPB officials knowledgeable about the data, and conducted electronic testing of EHRI to assess the accuracy and completeness of the data used in our analyses.

To address the fourth objective, we reviewed the guidance and tools that OPM provides to agencies to assist them in addressing poor performance. We assessed OPM’s tools and guidance by comparing their content to what is needed, as determined by CHCOs, key stakeholders,

and experts. For further information on our scope and methodology, see appendix I.

We conducted this performance audit from February 2014 through January 2015 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

How and when federal agencies can dismiss or take action to address poor performance has been a long-standing personnel issue that dates back to the creation of the civil service and has been the subject of a number of reforms since the civil service began. Modern merit principles state that appointments should be based upon qualifications, employees should maintain high standards of integrity and conduct, and employees should operate free of political coercion. However, according to the MSPB, the mechanisms put in place to ensure merit principle goals are met have at times been seen as bureaucratic obstructions that reduce civil service effectiveness.⁴ The Civil Service Reform Act of 1978 (CSRA) was intended, in part, to address the difficulty of dismissing employees for poor performance.⁵ Among other changes, CSRA established new procedures for taking action against an employee based on poor performance set forth under chapter 43 of title 5 of the U.S. Code.⁶

Despite CSRA's enactment, addressing poor performance continues to be a complex and challenging issue for agencies to navigate. In 1996, we testified that the redress system that grew out of CSRA and provides protections for federal employees facing dismissal for performance or other reasons diverts managers from more productive activities and

⁴U.S. Merit Systems Protection Board, *Addressing Poor Performers and the Law* (Washington, D.C.: September 2009).

⁵Pub. L. No. 95-454, 92 Stat. 1111 (Oct. 13, 1978).

⁶Prior to CSRA, in order to dismiss an employee for poor performance, an agency had to follow adverse action procedures under chapter 75 of title 5 of the U.S. Code, which permitted removal only if it would promote the efficiency of the service. S. Rep. No. 95-969, at 9-10, 39-43 (1978). CSRA also made amendments to chapter 75.

inhibits some of them from taking legitimate actions in response to performance or conduct problems.⁷ In 2005, we reported on ways agencies have sought to better address poor performance, including more effective performance management and efforts to streamline appeal processes.⁸ In 2014, we testified that opportunities remain for agencies to more effectively deal with poor performance through enhanced performance management.⁹

Agencies Have Multiple Avenues Available to Address Employee Performance

In general, agencies have three means to address employees' poor performance, with dismissal as a last resort: (1) day-to-day performance management activities (which should be provided to all employees, regardless of their performance levels), (2) dismissal during probationary periods, and (3) use of formal procedures. Agencies' choices will depend on the circumstances at hand.

Effective Performance Management Can Produce Desirable Outcomes for Agencies and Employees

The first opportunity a supervisor has to observe and correct poor performance is in day-to-day performance management activities. Performance management and feedback can be used to help employees improve so that they can do the work or—in the event they cannot do the work—so that they can agree to move on without going through the dismissal process. Agencies invest significant time and resources in recruiting potential employees, training them, and providing them with institutional knowledge that may not be easily or cost-effectively replaceable. Therefore, effective performance management – which consists of activities such as expectation-setting, coaching and feedback – can help sustain and improve the performance of more talented staff and can help marginal performers to become better. According to officials we interviewed and our literature review, agencies should seek ways to improve an employee's performance and only dismiss that employee if he or she does not reach an acceptable performance level. OPM's

⁷GAO, *Federal Employee Redress: A System in Need of Reform*, [GAO/T-GGD-96-110](#) (Washington, D.C.: Apr. 23, 1996).

⁸GAO, *Issues Related to Poor Performers in the Federal Workplace*, [GAO-05-812R](#) (Washington, D.C.: June 29, 2005).

⁹GAO, *Federal Workforce: Human Capital Management Challenges and the Path to Reform*, [GAO-14-723T](#) (Washington, D.C.: July 15, 2014).

experience suggests that many employees who are considered to exhibit performance problems can often improve when action is taken to address their performance, such as employee counseling, clarification of expectations, or additional training. Performance improvement is considered a win-win for both the agency and the employee because it preserves the investments agencies have already made in that individual and those investments that the individual has made with the agency.

We have previously reported that day-to-day performance management activities benefit from performance management systems that, among other things, (1) create a clear “line of sight” between individual performance and organizational success; (2) provide adequate training on the performance management system; (3) use core competencies to reinforce organizational objectives; (4) address performance regularly; and (5) contain transparent processes that help agencies address performance “upstream” in the process within a merit-based system that contains appropriate safeguards.¹⁰ Implementing such a system requires supervisors to communicate clear performance standards and expectations, to provide regular feedback, and to document instances of poor performance.

In cases where an employee cannot do the work, regular supervisory feedback may help the employee realize that he or she is not a good fit for the position and should seek reassignment to a more appropriate position within the agency or should voluntarily leave the agency, rather than go through the dismissal process. According to the performance management experts and labor union officials we interviewed, an employee voluntarily leaving is almost always preferable to dismissal and benefits all parties. Experts stated that such an arrangement can produce the following benefits:

- The employee maintains a clean record of performance, allowing him or her to pursue a more suitable position. Unacceptable performance scores and dismissal actions can severely limit job prospects for the employee, within and outside of the federal government. In some cases, an employee leaves before a poor rating is issued. Other times, employees and agencies may agree to have the record

¹⁰GAO, *Results-Oriented Cultures: Creating a Clear Linkage between Individual Performance and Organizational Success*, [GAO-03-488](#) (Washington, D.C.: Mar. 14, 2003).

expunged. Organizations we interviewed stressed that agreeing to a clean record of performance as part of a voluntary separation can be appropriate, particularly in cases when an employee has otherwise demonstrated professional aptitude. They cautioned, however, that clean record agreements must be used judiciously, in an effort to avoid making a low-performing employee another agency's problem.¹¹

- The supervisor can focus on fulfilling the agency's mission, rather than expending the time and energy associated with the dismissal process.
- The agency and employee avoid costs associated with litigation.

However, effective performance management has been a long-standing challenge for the federal government and the issue is receiving government-wide attention. In 2011, the National Council on Federal Labor-Management Relations (in conjunction with the CHCO Council, labor unions, and others) developed the Goals-Engagement-Accountability-Results (GEAR) framework. The framework was designed to help agencies improve the assessment, selection, development, and training of supervisors. GEAR emphasized that agencies should select and assess supervisors based on supervisory and leadership proficiencies rather than technical competencies, and should hold them accountable for performance of supervisory responsibilities. In June 2014, OPM officials said that the agency will facilitate the collaboration and information-sharing between agencies on their approaches to implement the principles outlined in the GEAR framework. They added that OPM will continue to provide technical support and expertise on successful practices for performance management.¹²

¹¹According to OPM officials, employees generally expect a clean record to prevent potential employers from learning any adverse information about them. This potentially puts an agency official in the position of avoiding inquiries when asked by a potential employer about an employee's performance on the job. OPM officials noted that clean record agreements should address, among other things, how the agency will be permitted to respond if queried by investigators conducting federal background investigations that will form the basis for future decisions about the individual's suitability or fitness for future federal employment, eligibility for access to classified information, or eligibility for access to federal systems or facilities.

¹²[GAO-14-723T](#).

Given the critical role that supervisors play in performance management, it is important for agencies to identify, promote and continue to develop effective supervisors. However, according to CHCOs we interviewed and to our literature review, performance management continues to be a challenge at many agencies for three reasons:

- Some employees promoted to supervisory positions because of their technical skill are not as inclined towards supervision. According to CHCOs we interviewed, as higher-graded work in the federal government is typically in managerial and supervisory positions, career advancement in many agencies requires that employees take on supervisory responsibilities. However, some employees critical to meeting the agency's mission are not interested in (or as inclined to conduct) supervisory duties, but are promoted by the agency to increase their pay and to retain them. As a result, some supervisors are not able to effectively conduct performance management activities. NASA addresses this problem by offering a dual career ladder structure: one ladder to advance employees who may have particular technical skills and/or education but who are not interested or inclined to pursue a management or supervisory track, and another for those seeking managerial responsibilities. One potential benefit to this approach is that agencies may have more flexibility to promote supervisors who are better positioned to effectively address poor performance.
- Supervisory training may not cover performance management sufficiently. Under 5 U.S.C. § 4121, agencies, in consultation with OPM, are required to establish training programs for supervisors on actions, options, and strategies to use in relating to employees with unacceptable performance and in improving that performance, and in conducting employee performance appraisals, among other things. OPM implementing regulations state that all agencies are required to have policies to ensure they provide training within one year of an employee's initial appointment to a supervisory position.¹³ However, some agencies include performance management as part of a general new supervisory curriculum that also includes training on subjects such as cybersecurity, ethics, and an array of human resource policy

¹³5 C.F.R. § 412.202(b).

topics. CHCOs told us that receiving training in this way can be “like drinking from a fire hose” and can be difficult to fully retain, particularly for topics that can benefit from experiential learning, such as dealing with poor performance. Some agencies seek to address this problem by assigning a new supervisor a mentor to assist with ongoing coaching in performance management and in other areas where the supervisor may have limited previous experience.

- Agencies may not be using the supervisory probationary period as intended. A new supervisor is given a 1-year probationary period to demonstrate successful performance as a supervisor. During the supervisory probationary period, the agency is to determine whether to retain that employee as a supervisor or to return the employee to a non-supervisory position.¹⁴ The MSPB found that agencies are not consistently using the probationary period to assess new supervisors’ capabilities and supervisors in general received varying levels of feedback from management.¹⁵ CHCOs told us a related issue is that the supervisory probationary period may not be long enough for the supervisor to conduct many performance management responsibilities associated with the agency’s employee appraisal cycle.¹⁶ As a result of these issues, agencies may not be providing adequate feedback to help new supervisors understand where further development is needed and if they are well suited for supervisory responsibilities, and new supervisors may not have the opportunity to demonstrate

¹⁴A current federal employee who is appointed to a supervisory position for the first time in the competitive service is required to serve a probationary period. 5 U.S.C. § 3321(a)(2). During that period, if the employee does not perform his or her supervisory functions satisfactorily, the agency should remove the employee from the supervisory position and return the employee to a position of no lower grade and pay than the previous position. 5 U.S.C. § 3321(b). An employee properly returned to a non-supervisory position has no appeal rights, unless the employee alleges the action was based on partisan political affiliation or marital status, in which case the employee may appeal to the Merit Systems Protection Board. 5 C.F.R. part 315, subpart I.

¹⁵U.S. Merit Systems Protection Board, *A Call to Action: Improving First-Level Supervision of Federal Employees* (Washington, D.C.: May 2010).

¹⁶Under OPM regulations, agencies may determine the length of the probationary period for a supervisor in the competitive service, provided it is of reasonable fixed duration, appropriate to the position, and uniformly applied. An agency may establish different probationary periods for different occupations. 5 C.F.R. § 315.905.

performance management capabilities. MSPB officials told us that some agencies address these issues by providing details or rotation opportunities where employees interested in supervisory positions can observe and, as appropriate, participate in performance management activities in other parts of the organization. These rotations not only give the employee more experience in that role, but can also give the agency time to observe and assess that employee's potential for success as a supervisor. We previously reported that within the Nuclear Regulatory Commission, where a high number of technical experts are employed, rotational assignments are encouraged to build supervisory capacity and to allow interested employees an opportunity to gain new experiences and responsibilities.¹⁷

As described above, although effective performance management continues to be a challenge at many agencies, individual agencies have taken steps to better identify those employees with an aptitude towards performance management, to develop related leadership skills, and to more fully assess those employees before those individuals are given supervisory responsibilities. According to OPM officials, other agencies have authority to take similar actions as appropriate for their agency.

Supervisors Need to Make Effective Use of the Probationary Period for Individuals Entering the Competitive Service

When an individual enters the competitive service, he or she is put on a probationary period which lasts for 1 year.¹⁸ Individuals entering the excepted service may serve a trial period, often for 2 years. The probationary period is the last step in the employee screening process during which time, according to an MSPB report, the individual needs to demonstrate "why it is in the public interest for the government to finalize an appointment to the civil service." The appeal rights of an individual in the probationary period are limited. If an agency decides to remove an individual during the probationary period, the agency is not required to follow the formal procedures for removing an employee (described below). Rather, the agency's only obligation is to notify the individual in

¹⁷GAO, *Human Capital: Strategies to Help Agencies Meet Their Missions in an Era of Highly Constrained Resources*, [GAO-14-168](#) (Washington, D.C.: May 7, 2014).

¹⁸In the competitive service, probationary periods are required by statute. By regulation, OPM has provided for a one year probationary period 5 U.S.C. § 3321(a)(1) and 5 C.F.R. § 315.801(a). These provisions do not apply to the excepted service.

writing of its conclusions regarding the individual's inadequacies and the effective date of the removal.¹⁹

Generally, a probationary employee may not appeal their removal.²⁰ Appeal rights are extended to employees in the competitive service and to preference eligible employees in the excepted service who have completed 1 year of current continuous service.²¹ Appeal rights are extended to non-preference eligible excepted service employees after 2 years of current continuous service.²²

Because dismissing a poorly performing employee becomes more difficult and time consuming after the probationary period, it is important that agencies use this time to assess employee performance and dismiss those that cannot do the work. However, according to our interviews, supervisors are often not making performance-related decisions about an individual's future likelihood of success with the agency during the probationary period. Interviewees said this can happen for two reasons: (1) the supervisor may not know that the individual's probationary period is ending, and (2) the supervisor has not had enough time to observe the individual's performance in all critical areas of the job. Because of these two possible issues, agencies risk continuing poorly performing

¹⁹5 C.F.R. § 315.804. This requirement applies to competitive service probationary employees.

²⁰Probationary employees may only appeal a dismissal action to the MSPB if the employee is in the competitive service and alleges the removal was based on partisan political reasons or due to the employee's marital status. 5 C.F.R. § 315.806(b).

²¹A preference eligible is an individual who is eligible for veterans' preference. This preference affects appeal rights (for those in the excepted service) and is a consideration in hiring and reduction-in-force actions as well. The term is defined in 5 U.S.C. § 2108(3) to include certain veterans, including disabled veterans. The term also extends to individuals having a specified relation to certain veterans, such as widow or widower, wife or husband.

²²Individuals regarded as probationary employees with limited appeal rights may be entitled to full rights based on prior relevant service, irrespective of the probationary status of that individual. See, *Van Wersch v. Department of Health and Human Services*, 197 F.3d 1144 (Fed. Cir. 1999) and *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002), *pet. for reh'g in banc denied*, 329 F.3d 1354 (Fed. Cir. 2003). These cases involved the interpretation of 5 U.S.C. § 7511, which defines who is covered under the adverse action provisions of chapter 75 of title 5 of the U.S. Code pertaining to removal and demotions.

individuals in a position in the civil service, with all the rights that such an appointment entails.

According to OPM, to remedy the first problem, some agencies are using a tool, such as an automatic notification issued from the agency's payroll system, to remind supervisors that an individual's probationary period is nearing its end and to take action as appropriate. While not all agencies use this tool, OPM officials told us that all Shared Service Centers' existing HR systems already contain the functionality to notify supervisors that the probationary period is ending. Because it is the agencies' decision whether or not to use automated notifications, it is important that agencies are aware of and understand the potential benefits of this tool. Other agencies require an affirmative decision by the individual's supervisor (or similar official) before deciding whether to retain an individual beyond the probationary period. By sending a reminder or requiring an affirmative decision, supervisors know when the probationary period is ending and are prompted to consider the prospects of the individual, according to CHCOs we interviewed and to our literature review. OPM considers an affirmative decision a leading practice and has implemented it for its supervisors. However, not all agencies have an automated tool to alert supervisors prior to the expiration of an employee's probationary period.

CHCOs also told us supervisors often do not have enough time to adequately assess an individual's performance before the probationary period ends, particularly when the occupation is complex or difficult to assess. This can happen for a number of reasons, including

- the occupation is complex and individuals on a probationary period spend much of the first year in training before beginning work in their assigned areas,
- the occupation is project based and an individual on a probationary period may not have an opportunity to demonstrate all of the skills associated with the position, and
- individuals on a probationary period often rotate through various offices in the agency and supervisors have only a limited opportunity to assess their performance.

In the past, agencies exempt from provisions of title 5 have sought to address this by extending the probationary period and limiting appeal rights during that time. Unless exempt however, a decision to allow

agencies to extend probationary periods beyond 1 year and to limit appeal rights during that period would require legislative action in certain circumstances.²³ CHCOs told us such an extension of the probationary period would provide supervisors with time to make a performance assessment for those occupations that are particularly complex or difficult to assess. However, they cautioned that such an extension would only be beneficial if an agency had effective performance management practices in place and it used the extra time for the purpose intended.

Formal Procedures Are Required to Dismiss Poor Performing Permanent Employees, but Related Processes Are Time and Resource Intensive

Generally, once an employee has completed a probationary period, if that employee is a poor performer who does not voluntarily leave, an agency is required to follow the procedural requirements under either 5 U.S.C. § 4303 (hereinafter “chapter 43”) or 5 U.S.C. § 7513 (hereinafter “chapter 75”) in order to take an action such as removal.²⁴ Though the process for dismissal under both authorities shares several common steps, some key differences exist. One key difference under chapter 43 is the employee must be given a formal opportunity to improve.

While the law and OPM implementing regulations establish requirements and timeframes for certain steps under chapter 43 dismissal actions, experts representing various agency and employee perspectives told us that the practical implementation of chapter 43 is time consuming and resource intensive. For example, based on the experiences of experts we interviewed, it often takes 50 to 110 days to complete steps associated with the performance improvement period (PIP). Overall, it can take six months to a year (and sometimes significantly longer) to dismiss an

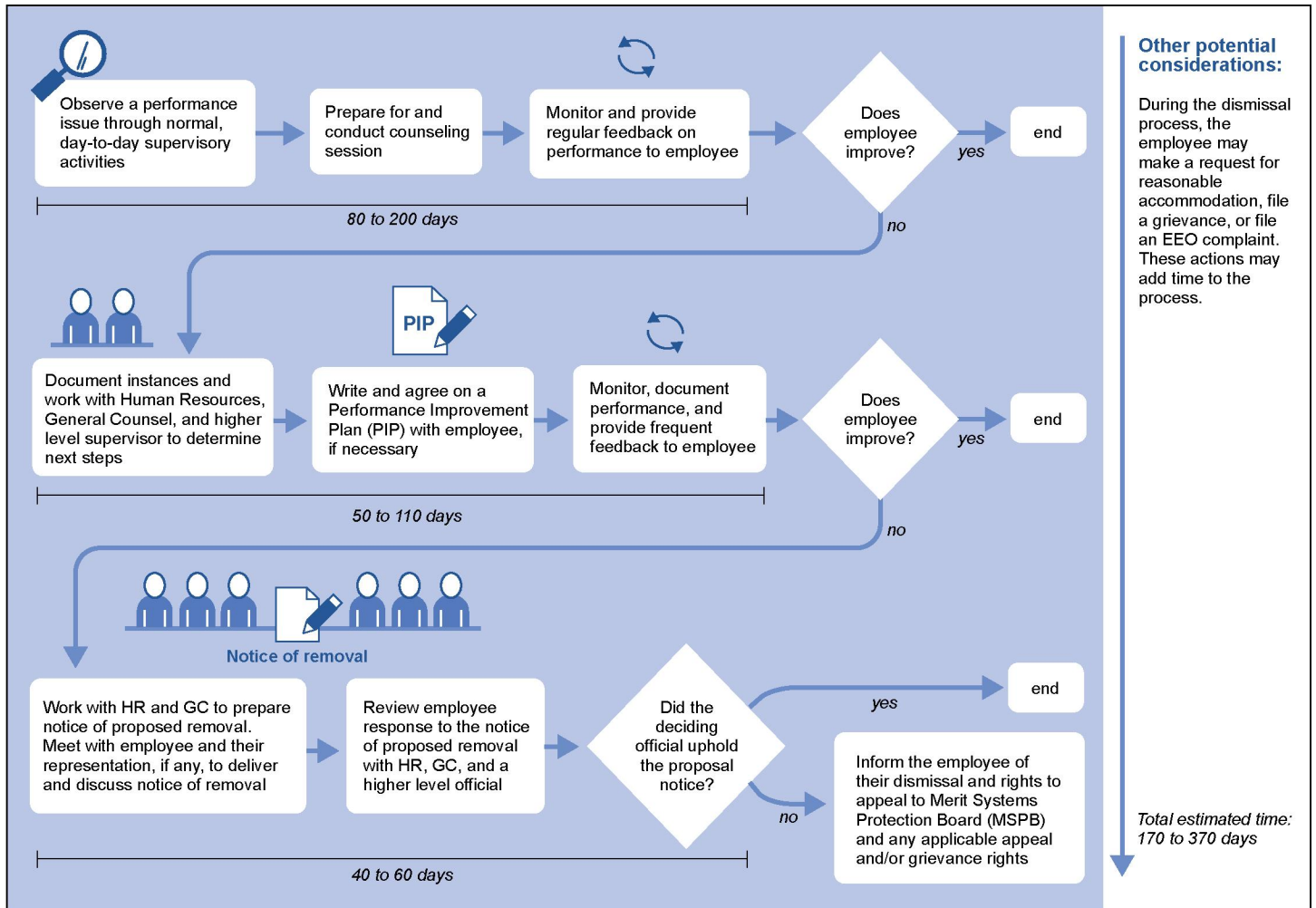
²³For example, as noted previously, the provision establishing coverage of procedural and appeal rights for those removed or demoted under the provisions of chapter 75 of title 5 has been interpreted to extend appeal rights irrespective of the probationary status of that individual due to prior relevant service of that individual.

²⁴While we refer to “poor” performance for purposes of this report, the term set forth under chapter 43 is “unacceptable” performance, which is defined as performance of an employee which fails to meet established performance standards in one or more critical elements of such employee’s position. 5 U.S.C. § 4301(3). References in this report to chapter 43 and 75 process requirements encompass requirements contained in OPM implementing regulations, found at 5 C.F.R. part 432 (for chapter 43) and 5 C.F.R. subpart D of part 752 (for chapter 75).

employee.²⁵ Moreover, once an employee is dismissed from his or her agency, he or she may file an appeal with the MSPB. As we report later, it took the MSPB an average of 243 days in 2013 to adjudicate an appeal from start to finish. Figure 1 illustrates an example of the dismissal process under this procedure. The timeframes cited here are not required by statute or regulation. The length of time to address performance problems can vary based on the facts and circumstances of each situation.

²⁵Under some collective bargaining agreements, a “pre-PIP” opportunity is required. During the pre-PIP, a supervisor is to alert the employee of slipping or poor performance, discuss the deficiencies, agree on actions needed to improve performance, and consider exchanging assignments among colleagues, if feasible, as an opportunity to improve before using a PIP required under chapter 43. According to federal labor union officials we interviewed, the pre-PIP period does not add time to the process, but rather helps to ensure day-to-day performance management activities occur before a PIP is issued.

Figure 1: The Dismissal Process under Chapter 43



Source: GAO analysis of interviews and literature research on the dismissal process under Chapter 43. | GAO-15-191

The other option for taking action—chapter 75—is largely similar to chapter 43, but has no formal improvement period and does not require a specific standard of performance to be established and identified in advance. The burden of proof for sustaining a dismissal under chapter 75 is higher than under chapter 43.

Depending on the circumstances, the differences between the two approaches make one option preferable over the other for supervisors, according to our interviews and literature research. For example, the formal opportunity to improve provided by chapter 43 makes this option

preferable when there is a possibility of the employee improving after receiving additional training or more specific expectations. In contrast, because chapter 75 has no improvement period, it is generally faster and therefore is preferable for agencies when it is unlikely an employee will improve or if the poor performance is in part related to conduct issues. Supervisors, working with agency human resources and legal counsel, have discretion to determine the most appropriate option for dismissing an employee for poor performance. The following table lists examples of circumstances where the use of one authority may be more appropriate than the other.

Table 1: Comparison of Approaches for Addressing Poor Performance – By Legal Authority

chapter 43	chapter 75
Unacceptable performance may be due to a teachable knowledge gap and training, guidance, and/or clearer expectations may help the employee improve.	Performance is unlikely to be improved with additional training, guidance, or clearer expectations, and a good faith effort has been made to help the employee.
There is unacceptable performance in a critical element within the employee’s documented performance standards.	There is unacceptable performance against an ad hoc standard, such as explicit instructions or professional standards established for certain occupations, or a critical element.
Employee demonstrates a willingness to improve.	Conduct or delinquency is contributing to the employee’s poor performance.
	The employee is not performing although has demonstrated the capability of doing so.
	It is necessary to dismiss the employee as quickly as possible. This may be true for occupations where a single failure could result in loss of life, injury, or a breach of national security.
	The employee has a medical condition and cannot perform the essential functions or duties of a job, with or without reasonable accommodation.

Source: GAO analysis of interviews and literature research. | GAO-15-191

Appendix II provides a full comparison of these two legal authorities for dismissing employees for performance.

The process for taking action against a career member of the Senior Executive Service (SES) for a less-than-fully-successful performance rating differs from that for other civil servants.²⁶ Career executives are removed from the SES for poor performance as provided for by 5 U.S.C. §§ 3592 and 4314(b). Agencies are

- required to either reassign, transfer, or remove a senior executive who has been assigned an unsatisfactory performance rating;
- required to remove an executive who has been assigned two performance ratings at less than fully successful within a three year period; and
- required to remove an executive who receives two unsatisfactory ratings within five years.

Unlike dismissals for performance for non-SES civil servants, most career SES members are not removed from the agency, but rather from the SES only, and they remain employed at a lower grade. Career SES members serve a 1 year probationary period upon initial appointment.²⁷ Most career executives removed during the probationary period for performance reasons (and all removed after completing it) are entitled to placement in a GS-15 or equivalent position.²⁸ Removals from the SES for performance reasons may not be appealed to the MSPB. However, non-probationary career executives may request an informal hearing before an official designated by the MSPB.²⁹ Additionally, an executive who believes the removal action was based on discrimination may file a discrimination complaint with their agency. Or, if an executive believes the removal was based on a prohibited personnel practice, such as reprisal for whistleblowing, they may go to the Office of Special Counsel (OSC) to

²⁶Career SES members are individuals with civil service status (permanent) who are appointed competitively to SES positions and serve in positions below the top political appointees in the executive branch of government.

²⁷5 U.S.C. § 3393(d).

²⁸ Guaranteed placement rights after removal from the SES are set forth in 5 U.S.C. §§ 3549. For probationary SES, this right only applies where the executive was appointed into the SES from a civil service position.

²⁹5 U.S.C. § 3592(a).

seek corrective action.³⁰ From 2009-2013, twelve senior executives were removed from the SES for performance reasons.

Employees Facing Dismissal for Performance Reasons Have Certain Protections

In addition to the procedural requirements agencies must adhere to, federal employees have additional protections designed to ensure that they are not subject to arbitrary agency actions and prohibited personnel actions, such as discrimination and reprisal for whistleblowing. In the event that an agency dismisses an employee for performance reasons, that employee may file an appeal of that agency action with the MSPB. During this appeal, an employee has a right to a hearing before an MSPB administrative judge. If the employee or agency is unsatisfied with the administrative judge's initial decision, either may request that the full 3-member board review the matter by filing a petition for review. If the employee is unsatisfied with the final decision of the MSPB, the employee may seek judicial review of that decision, generally with the United States Court of Appeals for the Federal Circuit (Federal Circuit).³¹ In the alternative, an employee who is a member of a collective bargaining unit may instead choose to pursue a grievance under the negotiated grievance procedure, if the appeal has not been excluded from coverage by the collective bargaining agreement. If the matter goes to an arbitrator, judicial review of the arbitration award is also available at the Federal Circuit. Finally, under certain circumstances, judicial review may be sought in United States district court. While these protections are important to ensuring due process, they generally add to the time and resources agencies commit to addressing poor performance, as well as to the overall complexity of the process.

Discrimination complaints and allegations of whistleblowing reprisal are redress options available to employees at any time and are not specific to

³⁰ The Office of Special Counsel is an independent investigative and prosecutorial agency with the primary mission of protecting the employment rights of federal employees and applicants for federal employment.

³¹ 5 U.S.C. § 7703(b)(1) and 28 U.S.C. § 1295(a)(9). Pursuant to the Whistleblower Protection Enhancement Act of 2012, as amended, for a 5-year period of time employees will have the option of seeking review with any court of appeals of competent jurisdiction if challenging the disposition of allegations of whistleblower retaliation.

the dismissal process.³² Allegations of discrimination in dismissal actions may be filed with an agency's Equal Employment Opportunity office, or under the negotiated grievance procedure, if applicable. Allegations of reprisal for whistleblowing can be made with the OSC. Employees may be more likely to consider such redress options when informed of performance problems or of the possibility for dismissal or demotion, according to experts and our literature review. Appendix III provides more information on appeal avenues available to employees who are dismissed or demoted for poor performance under chapters 43 or 75.

Various Considerations Can Reduce Willingness to Deal with Poor Performance

A number of agency supports and constraints may reduce a supervisor's willingness to pursue dismissal or other action against a poor performing employee. According to representatives from organizations we interviewed, supervisors may opt against dismissing a poor performer for a variety of reasons, including

Internal support. Supervisors may be concerned about a lack of internal support from their supervisors or other internal agency offices involved in the dismissal process. Specifically,

- Upper management may view the supervisor as unable to effectively manage employees, particularly considering that most employees have a history of meeting or exceeding expectations in performance ratings. Our analysis found that employees rarely receive performance ratings that indicate a problem with performance. In 2013, about 8,000 of the nearly 2 million federal employees received "unacceptable" or "less than fully successful" performance ratings. According to one expert we interviewed, senior managers who only have knowledge of an employee's work history through past performance ratings may tell a supervisor, "None of the previous supervisors had problems with him. Why do you?"
- An agency's personnel office may lack the capacity to provide guidance or an agency's general counsel or a senior agency official may be inclined settle a matter or not pursue a dismissal action

³²In contrast, private sector employees are considered "at will" and generally can be dismissed for any reason, except prohibited reasons such as discrimination, or where collective bargaining agreements provide otherwise. Private sector employees may initiate an action against their employer alleging employment discrimination by filing a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC).

because of concern over litigation. According to CHCOs we interviewed, agencies are increasingly settling performance-related actions and discrimination complaints with financial awards, rather than litigating the cases. According to the CHCOs, such financial payouts may provide an incentive to file such appeals and claims—even when they are not valid.

Time and resource commitment. As depicted earlier in figure 1, the time commitment for removing an employee under chapter 43 can be substantial. After communicating performance problems to an employee, a supervisor will likely find it necessary to increase the frequency of monitoring and documentation he or she conducts and of feedback sessions he or she provides during the performance improvement period. In turn, this takes time away from other job responsibilities and agency priorities.

Supervisory skills and training. Supervisors may lack experience and training in performance management, as well as lacking understanding of the procedures for taking corrective actions against poor performers. Specifically, supervisors may lack (a) confidence or experience having difficult conversations; (b) skills or training on addressing poor performance, including a basic understanding of the processes under chapters 43 and 75; and (c) knowledge or an understanding of requirements for addressing poor performance under collective bargaining agreements. These factors point to the importance of effective selection, assessment, and development of new supervisors, as well as to the importance of providing refresher training for current supervisors.

Legal concerns. Supervisors who take performance-based actions may need to be involved in providing depositions, witness statements, internal meetings, and meeting with attorneys and union representatives for an extended period of time where an employee seeks an avenue of redress concerning the performance-based action. Supervisors may be concerned about appeals, grievances, or discrimination complaints if the topic of poor performance is broached.

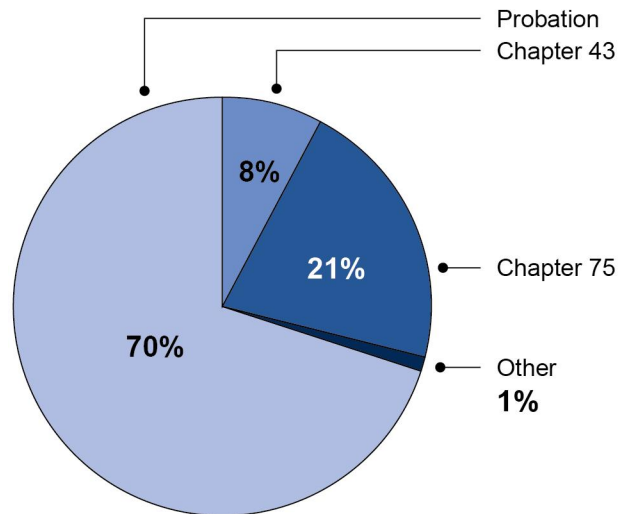
Agencies Dismissed Around 3,500 Employees for Performance in 2013, but the Overall Magnitude of Employees Leaving for Performance Reasons Is Unknown

Performance Dismissals Most Often Occur During the Probationary Period

In 2013, agencies dismissed 3,489 employees for performance or a combination of performance and conduct, representing 0.18 percent of the career permanent workforce.³³ Agencies most often dismissed employees for performance reasons during the probationary period. As noted earlier, dismissing employees during probation is much less time and resource intensive than doing so once they are made permanent and the procedural and appeal provisions of chapter 43 or 75 come into play. As shown in figure 2, dismissals for performance occurred more frequently for employees in probationary periods.

³³Figures in this report do not include dismissals for only conduct reasons.

Figure 2: Performance Dismissals By Legal Authority and Employment Status – 2013

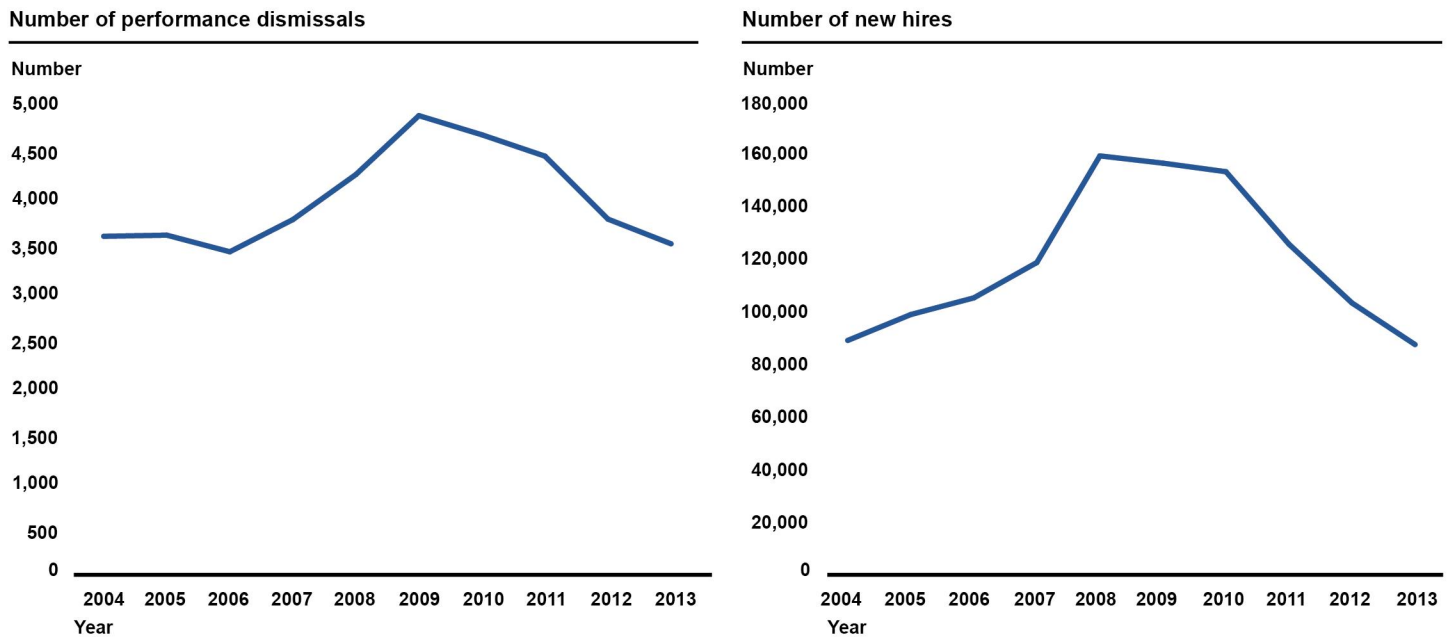


Source: GAO analysis of Enterprise Human Resource Integration (EHRI) data. | GAO-15-191

Over the last ten years (2004-2013), the number of individuals dismissed for performance or a combination of performance and conduct ranged from a low of 3,405 in 2006 to a high of 4,840 in 2009. On average, around 4,000 individuals were dismissed for performance-related reasons annually. The rate of dismissals for individuals in the career permanent workforce (2004-2013) range from a low of 0.18 percent in 2013 to a high of 0.27 percent in 2009.

Trends in performance dismissals since 2004 are associated with fluctuations in the number of probationary employees. Most employee dismissals for performance took place during the probationary period in each year from 2004 to 2013. The general increase in new hires from 2006 through 2010 is associated with the number of probationary dismissals from 2007 through 2011. As hiring and the number of new employees slowed after 2010, so too did the number of dismissals during probation.

Figure 3: Trends in Performance Dismissals and Hiring Fluctuations (Career Permanent Employees) – 2004-2013



Source: GAO analysis of Enterprise Human Resource Integration (EHRI) data. | GAO-15-191

As an alternative to dismissal, agencies may demote or reassign employees for poor performance. Agencies reassigned 652 employees for performance-related reasons in 2013, with nearly all following an unacceptable performance rating. (A reassignment is defined as the change of an employee from one position to another without promotion or change to lower grade, level or band.) According to our interviews and literature review, reassignment is considered appropriate when (1) the employee is willing to improve and does not have conduct or delinquency issues contributing to their performance issues, and (2) the reasons the employee failed in one position is not likely to cause him or her to fail on the next job. There were 168 demotions for performance reasons in 2013, including 58 for an employee’s failure to successfully complete the supervisory or managerial probationary period.

Many Poor Performers Leave Their Agencies Voluntarily, but the Magnitude of Those Leaving for Performance Reasons Is Unknown

As noted above, dismissing employees is and should be a last resort in performance management. Identifying and addressing poor performance “upstream” in the performance management process may result in outcomes that are more desirable than dismissal, most notably improved performance, but also the employee moving to a different position that might be a better fit or voluntarily leaving the agency. The extent to which cases of employee poor performance result in these outcomes is not known.

As mentioned earlier, when the employee cannot perform the work, the employee voluntarily leaving the agency can be the most favorable outcome for both the agency and the employee. Our analysis of OPM data found more than 2,700 cases of employees voluntarily leaving in 2012 after receiving a “less than fully successful” (or lower) performance rating at any point from 2010 to 2012. These cases most likely undercount the number of employees voluntarily leaving for performance reasons because many employees who have performance problems never receive a “less than fully successful” (or lower) performance rating, and performance ratings may be expunged as part of an agreement to voluntarily leave. However, sufficient data does not exist to conclude that employees have voluntarily left federal service due to performance reasons.

Because voluntary retirements or resignations result in the employee leaving without formally having a personnel action taken against him or her, it is not possible to determine from available OPM data the universe of employees voluntarily resigning or retiring for performance-related reasons. However, according to experts we interviewed, such separations happen “all the time.” One CHCO we interviewed estimated that a large majority of his agency’s performance-related separations would be considered voluntary retirements or resignations and other CHCOs agreed that employees with performance issues are more likely to voluntarily leave than go through the dismissal process. While an “unacceptable” performance rating sends a strong signal to the employee that the agency is going to take action for performance reasons, receiving an “unacceptable” performance rating is not necessarily an indicator that an employee will either be formally dismissed or will voluntarily leave. Of the 2,001 employees receiving an “unacceptable” performance rating in 2009, 1,104 (55 percent) remained employed with the same agency in 2013, while 897 (45 percent) are no longer with the agency. Those remaining with the agency may have improved their performance or may have been reassigned within the agency.

Almost Half of All Performance-Related Dismissals under Chapter 43 Were Appealed to the MSPB in 2013; Most Were Settled or Dismissed

While agencies rarely use chapter 43 to dismiss employees, of the 280 employees dismissed under this legal option in 2013, 125 (45 percent) were processed by MSPB.³⁴ As noted above, on average, it took 243 days to complete the appeal process for initial appeals of dismissals that were affirmed.³⁵ In cases where a decision is rendered, the agency's decision to dismiss is usually affirmed. In 2013, 18 cases were affirmed in the agency's favor and 4 were reversed in the employee's favor. Thirty-six cases were dismissed in 2013. Cases may be dismissed for a variety of reasons, including lack of jurisdiction, lack of timeliness, withdrawal by the appellant, or failure to prosecute.

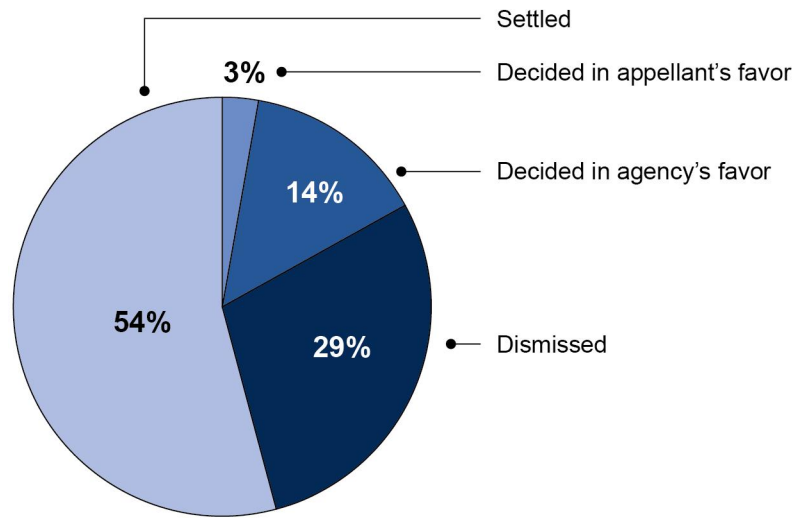
Sixty-seven of the 125 appeals in 2013 were resolved through settlement, a process whereby both the agency and the employee come to a mutual agreement prior to the case being heard or decided by the MSPB. If at all possible, the MSPB encourages settlements between parties. According to government lawyers we interviewed, employees and agencies have a number of potential settlement options available related to cases involving poor performance. They include expunging poor appraisal ratings in return for the employee separating from the agency and waiving further appeal rights, provision of employment references that do not provide a prospective employer with negative information about the employee, agency payment of the employee's attorney's fees, provisions relating to unemployment compensation, confidentiality clauses, resignation agreements, and reassignments.

Figure 4 shows how the MSPB resolved initial dismissal appeals taken under chapter 43 in 2013.

³⁴MSPB data for chapter 75 dismissals do not distinguish between dismissals for performance, for misconduct, or for both. Therefore, we did not analyze dismissals under chapter 75.

³⁵This average does not include cases that were previously dismissed without prejudice: a process whereby a case is initially dismissed and then later heard after an issue has been resolved, or a process relevant to the appeal which has been completed.

Figure 4: MSPB Decisions on Dismissal Appeals under chapter 43 – 2013



Source: GAO analysis of Enterprise Human Resource Integration (EHRI) and Merit Systems Protection Board (MSPB) data. | GAO-15-191

OPM Provides a Range of Tools and Guidance to Address Poor Performance but This Assistance May Not Meet All Agency Needs

Taking action to address poor performance is challenging for agencies, due to time and resource intensity, lack of supervisory skill and training, and other factors (as described earlier). As a result, tools and guidance are needed to help agencies manage employee performance and to navigate dismissal processes.

To meet its strategic goal of enhancing the integrity of the federal workforce, OPM provides guidance, tools, and training to help agencies attain human capital management goals.³⁶ In addition to its regulations, OPM makes a range of different tools and guidance available to help agencies address poor performance through multiple formats, including through its website, webinars, webcasts, in-person training, guidebooks, and through one-on-one assistance and consultation with agencies, according to OPM officials. Appendix IV provides some examples of the tools and guidance OPM developed to help agencies address poor performance.

³⁶Office of Personnel Management, *Recruit, Retain, and Honor: Strategic Plan FY2014-FY2018* (Washington, D.C.: 2014).

Our interviews with individuals who have expertise in performance management issues indicated that improvements could be made in the tools and guidance OPM produces on poor performance to better meet their needs, including the following areas:

- **Improvements in Content.** Multiple experts we spoke with told us the content of OPM’s training and guidance seemed to be written for human resources (HR) officials or lawyers, rather than supervisors. According to one expert, “An average manager will not be able to understand what the guidance means if they don’t have time to continuously go to their HR office for assistance.” According to OPM, its guidance is often written for HR officials charged with assisting supervisors in addressing poor performance. We have recently reported, however, that HR offices often lack the capacity for assisting in performance management-related activities.³⁷ Instead, they are focused on transactional human resource activities such as verifying benefits and processing personnel actions. Because of this, tools and guidance developed for HR officials may not be reaching the supervisors who need them.
- **Improvements in Outreach.** CHCOs and organizations representing federal employees and supervisors told us they were unaware of the tools and guidance OPM produces on the topic of managing poor performance. One group told us that a critical gap in training for managers exists, and that “none of the individuals we work with know about [OPM training or tools].” According to CHCOs we interviewed, some supervisors may lack awareness in part because they lack interest in performance management in general and do not seek out tools. The CHCOs said there is a role for both the agencies and OPM in reinforcing the critical importance of effective performance management amongst supervisors.
- **Improvements in Format.** OPM’s tools and guidance are generally posted online or as hard-copy guide books. Both of these methods cost-effectively disseminate information to a broad audience and can be used by employees when their schedule allows. At the same time, experts we spoke with said addressing poor performance is more effectively taught in a classroom setting, as it is a sensitive topic

³⁷GAO, *Human Capital: Strategies to Help Agencies Meet Their Mission in an Era of Highly Constrained Resources*, [GAO-14-168](#) (Washington, D.C.: May 7, 2014).

where the most practical information is gleaned from fellow class participants. According to one expert, “The topic of dealing with poor performers demands interaction amongst participants.”

OPM told us that developing and promoting tools and guidance can be costly and that resources available for that purpose are highly constrained. OPM has previously acknowledged that it could do more to better assess the tools and guidance it produces. It is also a challenge to decide what topics to address, particularly as there are frequently changes in human capital initiatives or in topic areas that take precedence. Regular meetings with senior OPM officials, use of training evaluation and feedback forms, and informal feedback from the CHCO Council will help to inform OPM of the tools and guidance to provide. However, agencies are not always aware of this material and in some cases it falls short of their needs. Going forward, it will be important for OPM to fully leverage existing information sources (such as survey results) to inform decisions on what material to develop and how best to distribute it.

According to OPM, the Employee Services group will deploy a comprehensive strategic human capital management needs survey that will be distributed to the CHCO Council. The survey will be designed to directly solicit information from human capital professionals about what relevant tools, guidance, and resources will benefit their human capital management processes. This tool is also intended to help OPM with developing/providing suggested tools. Deployment is planned for the summer of 2015.

While these plans are an important step in helping to ensure agencies get the tools and guidance they need, OPM is not fully leveraging information provided by two existing sources to help prioritize the tools and guidance it develops: the 2014 Federal Employee Viewpoint Survey (FEVS) and the Performance Appraisal Assessment Tool (PAAT), a voluntary self-assessment tool agencies can use to assess the strength of their performance appraisal system.

In FEVS, performance management-related questions receive some of the lowest positive scores in the survey, but OPM told us respondents may not have sufficient information to answer the question. These questions cover topics such as the extent to which employees believe their supervisors are effectively addressing poor performers and whether differences in performance are recognized in a meaningful way.

With respect to the PAAT, agencies identified areas of strength and weakness in their performance appraisal programs. For example, the PAAT includes information on topics such as how often supervisors are required to hold feedback sessions with employees, an important avenue for dealing with poor performance. It also includes information about how agencies deal with unacceptable performance, including the number of PIPs, performance-based dismissals, reassignments, and reductions-in-grade. Agencies' responses provide some insight into their own strengths and weaknesses as well as into the topics where additional tools and guidance could be more effectively targeted government-wide. Agencies may submit their PAAT results to OPM.³⁸ However, OPM told us that it was not using these responses to inform the development of resources that would help agencies better address poor performers.

Conclusions

The process for dismissing an employee after the probationary period ends can be complex and lengthy. But many of these process challenges can be avoided or mitigated with effective performance management. Supervisors who take performance management seriously and have the necessary training and support can help poorly performing employees either improve or realize they are not a good fit for the position. We found that a number of employees voluntarily resign after receiving negative performance feedback.

The probationary period for individuals entering the federal service is the ideal time to remove those who cannot do the work required of the position, but this period could be more effectively used by agencies. Given the number of issues agencies can encounter when addressing poor performance after the probationary period ends, improving how the probationary period is used could help agencies more effectively deal with poor performers.

Effectively addressing poor performance has been a long-standing government-wide challenge. OPM has a role in ensuring that agencies have the tools and guidance they need to effectively address poor performance and to maximize the productivity of their workforces. Though OPM already provides a variety of tools, guidance, and training to help agencies address performance management issues, more can be done to

³⁸Ten agencies submitted a PAAT to OPM in 2012.

leverage priority information and to make tools and guidance available for agencies when and where they need it.

Recommendations for Executive Action

To help strengthen the ability of agencies to deal with poor performers, we recommend that the Director of OPM, in conjunction with the CHCO Council and, as appropriate, with key stakeholders such as federal employee labor unions, take the following four actions:

1. To more effectively ensure that agencies have a well-qualified cadre of supervisors capable of effectively addressing poor performance, determine if promising practices at some agencies should be more widely used government-wide. Such practices include (1) extending the supervisory probationary period beyond 1-year to include at least one full employee appraisal cycle; (2) providing detail opportunities or rotational assignments to supervisory candidates prior to promotion, where the candidate can develop and demonstrate supervisory competencies; and (3) using a dual career ladder structure as a way to advance employees who may have particular technical skills and/or education but who are not interested in or inclined to pursue a management or supervisory track.
2. To help ensure supervisors obtain the skills needed to effectively conduct performance management responsibilities, assess the adequacy of leadership training that agencies provide to supervisors.
3. To help supervisors make effective use of the probationary period for new employees
 - educate agencies on the benefits of using automated notifications to notify supervisors that an individual's probationary period is ending and that the supervisor needs to make an affirmative decision or otherwise take appropriate action, and encourage its use to the extent it is appropriate and cost-effective for the agency; and
 - determine whether there are occupations in which—because of the nature of work and complexity—the probationary period should extend beyond 1-year to provide supervisors with sufficient time to assess an individual's performance. If determined to be warranted, initiate the regulatory process to extend existing probationary periods and, where necessary, develop a legislative proposal for congressional action to ensure that formal procedures for taking action against an employee for poor performance (and a

right to appeal such an action) are not afforded until after the completion of any extended probationary period.

4. To help ensure OPM's tools and guidance for dealing with poor performers are cost-effectively meeting agencies' and supervisors' needs, use SHCM survey results (once available), FEVS results, PAAT responses, and other existing information, as relevant, to inform decisions on content and distribution methods. The importance of effective performance management and addressing poor performance may need to be reinforced with agency supervisors so that they more routinely seek out tools and guidance.

Agency Comments and Our Evaluation

We provided a draft of this product to the Director of OPM and Chairman of MSPB for comment. Written comments were provided by OPM's Associate Director for Employee Services, and are reproduced in appendix V. Of our four recommendations, OPM concurred with one recommendation, partially concurred with two recommendations, and partially concurred with part of a third recommendation. OPM did not concur with the first part of this latter recommendation. For those recommendations OPM concurred or partially concurred with, OPM described the steps it planned to take to implement them. OPM and the Executive Director of MSPB also provided technical comments, which we incorporated as appropriate.

OPM concurred with our recommendation to assess the adequacy of leadership training for supervisors. Specifically, OPM noted that it will evaluate how agencies are training new supervisors and provide agencies guidance on evaluating the effectiveness of leadership training.

OPM partially concurred with our recommendation to determine if promising practices at some agencies should be more widely used government-wide. Importantly, OPM agreed to work with the CHCO Council to (1) determine if technical guidance is needed to help agencies more effectively use the supervisory probationary period, (2) explore more government-wide use of rotational assignments, and (3) discuss options for employees to advance without taking on supervisory or managerial duties. In each of these cases, OPM noted that agencies already have authority to take these actions. We acknowledge OPM's point and have clarified the report accordingly. We maintain, however, that OPM can still play a leadership role and encourage agencies to take these steps.

Our recommendation for OPM to take steps to help supervisors make effective use of the probationary period for new employees contained two parts. OPM partially concurred with the part of the recommendation calling on OPM to determine if certain occupations require a probationary period longer than 1-year to allow supervisors sufficient time to assess an individual's performance. In particular, OPM agreed to consult with stakeholders to determine, among other things, if an extension to the probationary period for certain complex occupations is needed and, if necessary, pursue the established Executive Branch deliberation process for suggesting legislative proposals. OPM noted that it has authority to provide for longer probationary periods under certain circumstances and we have modified the recommendation so that it also calls on OPM to initiate the regulatory process to do so if warranted. As stated in our report, however, extending the probationary period and concurrently limiting appeal rights during that time would require legislative action under certain circumstances.

At the same time, OPM did not concur with the part of the recommendation for OPM to determine the benefits and costs of providing automated notifications to supervisors that an individual's probationary period is ending and that the supervisor needs to make an affirmative decision. OPM stated that choosing the best method to ensure that supervisors are aware that the probationary period is ending and appeal rights will accrue is an agency responsibility. We agree.

OPM also wrote that HR systems at all Shared Service Centers have the functionality to notify supervisors when an employee's probationary period is ending. However, as our report notes, even though OPM considers having a tool in place to notify supervisors that a probationary period is ending to be a leading practice, not all agencies have implemented that practice. Accordingly, we have clarified the recommendation so that it calls on OPM to educate agencies on the benefits and availability of automated notifications to alert supervisors.

OPM partially concurred with our recommendation to use the results of various surveys such as the FEVS and other information sources to help determine the extent to which its tools and guidance for dealing with poor performers are cost-effectively meeting agencies' needs. Specifically, OPM said it would use relevant data from these resources to inform decisions about content and distribution methods for the material OPM makes available to agencies. At the same time, OPM noted that the information contained in these surveys and other data sources had

certain limitations and may not always be relevant. We agree and have clarified the recommendation accordingly.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the Director of the Office of Personnel Management, the Chairman of the Merit Systems Protection Board, as well as to the appropriate congressional committees and other interested parties. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report please contact me at (202) 512-2757 or goldenkoffr@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix VI.

Sincerely yours,



Robert Goldenkoff
Director
Strategic Issues

Appendix I: Objectives, Scope, and Methodology

We were asked to examine the rules and trends relating to the review and dismissal of employees for poor performance. Our objectives were to (1) describe and compare avenues for addressing poor performance, including the formal procedures required when dismissing employees for poor performance; (2) describe issues that can affect an agency's response to poor performance; (3) determine trends in dismissals and other agency actions taken for poor performance since 2004; and (4) assess the extent to which OPM provides the policy, guidance, and training that agencies say they need to address poor performance.

To describe and compare avenues for addressing poor performance, including the formal procedures required when dismissing employees for poor performance, we reviewed relevant sections of title 5 of the United States Code (title 5) and Office of Personnel Management (OPM) regulations to describe the process for addressing poor performance in the competitive, excepted¹, and Senior Executive services. We analyzed the process for taking personnel actions for poor performance under chapter 43 and chapter 75 of title 5, including when use of one authority over the other may be preferable in certain circumstances.

To determine how agencies are addressing poor performance and to understand the practical issues various agency employees consider when addressing poor performance, we interviewed OPM officials from the Merit System Accountability and Compliance Office, Office of Employee Services, and other offices that work with agencies to address poor performance; the Merit Systems Protection Board (MSPB) including the Executive Director, representatives from the Office of Regional Operations, the Office of Appeals Counsel, and an administrative judge; selected chief human capital officers (CHCO) chosen for their particular expertise in the issue area as identified through the Executive Director's Office of the CHCO Council and previous GAO work on related topics, the National Treasury Employees Union, American Federation of Government Employees, the Federal Managers Association, individual members of the Federal Employees Lawyers Group, the Partnership for Public Service and the Senior Executives Association. Additionally, we

¹Our discussion of procedural and appeal rights under title 5 applies to those excepted service positions in executive agencies which have not been excluded from these title 5 (and OPM regulation) provisions. Many positions in the excepted service are not covered under title 5 (in whole or in part), including those positions covered under alternative personnel systems.

interviewed selected experts from academia and the private sector, including Dr. Dennis Daley, Professor of Public Administration, North Carolina State University, School of Public and International Affairs; Dr. Ellen Rubin, Assistant Professor at Rockefeller College of Public Affairs & Policy, University at Albany, State University of New York; Stewart Liff, author of *Improving the Performance of Government Employees: A Manager's Guide* (2011) and *The Complete Guide to Hiring and Firing Government Employees* (2010); and Robin Wink, Esq., who teaches a seminar "Managing the Federal Employee: Discipline and Performance Process." Their expertise was determined by a review of their published materials or training they provide on the topics of performance management and addressing poor performance. We also conducted a literature review.

To determine trends in dismissals and other agency actions taken for poor performance since 2004, we analyzed data from OPM's Enterprise Human Resources Integration (EHRI) data warehouse for fiscal years 2004 through 2013, the most recent year available. We analyzed EHRI data starting with fiscal year 2004 because personnel data for the Department of Homeland Security (which was formed in 2003) had stabilized by 2004. Personnel actions, such as separations, demotions, and reassignments are assigned Nature of Action (NOA) and legal authority codes that describe the action and the legal or regulatory authority for the action. We reviewed OPM's "The Guide to Processing Personnel Actions" to determine which NOA/legal authority combinations are associated with performance-related dismissals, demotions, or reassignments, and with conduct-related dismissals and we confirmed these codes with OPM. In some cases, NOA/legal authority combinations could cover both performance and conduct. In these cases, we counted the action as performance-related only so that a) we would most accurately capture the magnitude of actions taken for performance in the government, and b) avoid double counting dismissals. Thus, some cases counted exclusively as a performance action may have elements of conduct as well.

To identify individuals with poor performance who voluntarily retired or resigned before action was taken against them, we counted separation actions for voluntary retirement or resignations and retirements or resignations in lieu of involuntary action where there was a corresponding unacceptable performance rating within the separation year or year prior to separation. To examine attrition patterns for employees who received unacceptable performance ratings, we tracked the status of employees who received an unacceptable performance rating in 2008 to determine

how many were dismissed and when, how many voluntarily left the government and when and how many remained in the government as of 2013. There are some data reliability limitations with the rating field. While ratings generally reflect recent performance, there can be some variation. Not all rating periods are the same across the agencies and they may not align with the fiscal year, there may be lags in agencies' updates of ratings, and some ratings are never updated. Consequently, we looked at recorded ratings for the past three years to develop a somewhat more comprehensive picture of employees' performance ratings. To assess the reliability of EHRI data, we reviewed past GAO assessments of EHRI data, interviewed OPM officials knowledgeable about the data, and conducted electronic testing of EHRI to assess the accuracy and completeness of the data used in our analyses. We reviewed MSPB data and interviewed officials to determine the number of employee appeals for actions based on performance, the outcomes of the cases, and how long it took to resolve those cases. We determined the data used in this report to be sufficiently reliable for our purposes.

To assess the extent to which OPM provides policy, guidance, and training to help agencies address poor performance, we reviewed guidance and tools that OPM provides to agencies to assist them in addressing poor performance. We compared the content of OPM tools and guidance to what CHCOs, key stakeholders, and experts said is needed. We reviewed documentation of guidance and tools that OPM provides to agencies to the challenges articulated by CHCOs, key stakeholders, and experts. We interviewed OPM officials about mechanisms they use to (1) collect information to develop tools and guidance, and (2) collect feedback from agencies about the usefulness of existing guidance and tools. We also reviewed documentation and interviewed OPM officials on its Performance Appraisal Assessment Tool.

We conducted this performance audit from February 2014 through January 2015 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix II: Chapters 43 and 75 Similarities and Differences

Table 2: Chapters 43 and 75 Similarities and Differences

Area of Comparison	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 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	Establishment of Performance Expectations 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. Action must be supported by substantial evidence: 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: 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.
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.	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 unacceptable 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 day advance 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.

**Appendix II: Chapters 43 and 75 Similarities
and Differences**

Area of Comparison	chapter 43	chapter 75
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. Douglas factors are established criteria that supervisors must consider in determining an appropriate penalty to impose to address problems with an employee.
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.	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.

Source: MSPB | GAO-15-191

Appendix III: Appeal of Removal or Demotion Actions

Set forth below are the basic appeal avenues available to employees who are removed or demoted for poor performance pursuant to chapters 43 or 75.¹

In addition to the appeal avenues discussed below, other appeal options are available to employees removed or demoted for poor performance.² For example, while probationary employees are generally unable to appeal a removal or demotion to the Merit Systems Protection Board (MSPB), those in the competitive service may do so if they believe the agency action was based on partisan political reasons or due to the employee's marital status.³ Furthermore, any employee may file an Equal Employment Opportunity (EEO) complaint with his or her agency if the employee believes that the removal or demotion was motivated by unlawful employment discrimination, regardless of whether the employee has due process or appeal rights.⁴ Similarly, any employee who believes his or her demotion or removal was the result of a prohibited personnel

¹The reference to chapter 43 and 75 is a reference to agency actions (e.g. removal or demotion) taken under 5 U.S.C. § 4303 (chapter 43) and 5 U.S.C. § 7513 (chapter 75). Generally, employees covered under the appeal provisions of chapters 43 and 75 are those who have already completed a probationary period. However, in certain circumstances, employees serving a probationary period may also be covered by due process and appeal provisions. For example, where a competitive service employee has already completed 1 year of current continuous service (under other than a temporary appointment limited to 1 year or less), that employee has full procedural and appeal rights under chapter 75 even though serving in a probationary period. Additionally, excepted service employees (except those who are preference eligible) do not have appeal rights under chapter 43 or 75 until they have completed 2 years of current continuous service (in the same or similar position). Our discussion of appeal rights under chapter 43 and 75 applies to those positions in the excepted service that have not been excluded from these provisions of title 5 of the United States Code (and OPM's implementing regulations).

²While we refer to poor performance for purposes of this report, the term set forth under chapter 43 is "unacceptable performance," which is defined as performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position. 5 U.S.C. § 4301(3).

³5 C.F.R. § 315.806(b).

⁴Generally, this process provides for the informal counseling at the employee's agency, filing a formal complaint, investigation of the complaint by the agency (and possible hearing conducted by an Equal Employment Opportunity Commission (EEOC) administrative judge who issues a recommended decision), and issuance of a final agency decision. The employee may appeal the final agency decision to the EEOC, and may also file a civil action in district court for a de novo trial. 29 C.F.R. part 1614.

practice, such as retaliation for whistleblowing, may go to the Office of Special Counsel (OSC) to seek corrective action.⁵

Appeal Avenues: Chapter 43 and 75 Removal or Demotion Actions

Chapters 43 and 75 provide that an employee with appeal rights who wants to contest an agency decision to remove or demote may file an appeal of that agency decision with the MSPB.⁶ If that employee is a member of a collective bargaining unit, the employee also has the option of pursuing a grievance under negotiated grievance procedure if the appeal has not been excluded from coverage by the collective bargaining agreement. The employee may pursue either option, but not both.⁷

Merit Systems Protection Board Appeal

If an employee chooses to appeal his or her removal or demotion to the MSPB, the employee must do so within 30 days after the effective date of the agency action or receipt of the agency's decision (to remove or demote), whichever is later.⁸ An employee who files an appeal with the MSPB has a right to a hearing.⁹

In a performance-based removal or demotion taken under chapter 43, an agency must establish that (1) OPM approved the agency's performance appraisal system,¹⁰ (2) the agency communicated to the employee the performance standards and critical elements of his or her position, (3) the

⁵The Office of the Special Counsel may seek to delay the removal or demotion action pending an OSC investigation if OSC determines there are reasonable grounds to believe that the demotion or removal action is the result of a prohibited personnel practice. 5 U.S.C. § 1214.

⁶5 U.S.C. §4303(e) and § 7513(d).

⁷5 U.S.C. §7121(e)(1); 5 C.F.R. § 432.106(c), 5 C.F.R. § 752.405(b).

⁸5 C.F.R. § 1201.22(b).

⁹5 U.S.C. § 7701(a)(1).

¹⁰While an agency has the burden of proving that its performance appraisal system was approved by OPM, ordinarily the MSPB will presume that OPM has done so. However, the MSPB will require the agency to submit evidence of such approval where the employee alleges there is reason to believe OPM did not approve the agency's system or that the agency's system has undergone significant changes since such approval. *Prichard v. Department of Defense*, 117 M.S.P.R. 88 (2011).

employee's performance standards are valid¹¹ (performance standards are not valid if they do not set forth the minimum level of performance that an employee must achieve to avoid removal for unacceptable performance¹²), (4) the agency warned the employee of the inadequacies of his or her performance during the appraisal period and gave the employee a reasonable opportunity to improve, and (5) the employee's performance remained unacceptable in at least one critical element. *White v. Department of Veterans Affairs*, 120 M.S.P.R. 405 (2013).

In a removal or demotion action taken under chapter 75, an agency must establish that the action will "promote the efficiency of the service."¹³ A specific standard of performance does not need to be established and identified in advance for the employee; rather, an agency must prove that its measurement of the employee's performance was both accurate and reasonable. *Shorey v. Department of the Army*, 77 M.S.P.R. 239 (1998); *Graham v. Department of the Air Force*, 46 M.S.P.R. 227 (1990) (agency contention that "basic medical care" was performance standard for physician was not unreasonable).

While it is within an agency's discretion to take an action under chapter 75 rather than chapter 43, an agency taking an action under chapter 75 may not circumvent chapter 43 by asserting that an employee should have performed better than the standards communicated to the employee. *Lovshin v. Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985), cert.denied, 475 U.S. 1111 (1986), reh. denied, 476 U.S. 1189 (1986).

An employee subject to a removal or demotion action under chapter 75 has no right to a performance improvement period and the failure to afford an employee one is not grounds for reversing the agency action. However, an agency's failure to provide such a period is relevant to the

¹¹Under 5 U.S.C. § 4302(b)(1), an agency is required to establish performance standards which, to the maximum extent feasible, permit the accurate appraisal of performance, based on objective criteria. The fact that performance standards may call for a certain amount of subjective judgment does not render them invalid, especially where the position involves the type of professional judgment which is not subject to a mechanical rating system. *Neal v. Defense Logistics Agency*, 72 M.S.P.R. 158, 161 (1996).

¹²*Henderson v. National Aeronautics and Space Administration*, 116 M.S.P.R. 96 (2011).

¹³5 U.S.C. § 7513(a); 5 C.F.R. § 752.403.

consideration of whether the penalty (removal or demotion) is reasonable; specifically, whether or not the employee was on notice that the deficient performance might be the basis for an adverse action.; *Fairall v. Veterans Administration*, 844 F.2d 775 (Fed. Cir. 1987); *Madison v. Defense Logistics Agency*, 48 M.S.P.R. 234 (1991).

In an initial decision issued by the MSPB administrative judge, a removal or demotion taken under chapter 43 will be sustained if the agency's decision is supported by substantial evidence or, in a case brought under chapter 75, is supported by a preponderance of the evidence.¹⁴ However, even where the burden of proof is met, if the employee shows harmful error in the agency procedure used in arriving at the decision, or that the decision was based on a prohibited personnel practice, the agency decision may not be sustained.¹⁵

The initial decision becomes final 35 days after issuance, unless a party requests the full 3-member board (the Board) review the matter by filing a petition for review.¹⁶ OPM may also file a petition for review but only if OPM believes the opinion is erroneous and will have a substantial impact on civil service law, rule, or regulation.¹⁷ If the Board grants the petition for review (for example, where new and material evidence is available or the decision is based on erroneous interpretation of law¹⁸) the Board may affirm, reverse, or vacate the initial decision (in whole or in part), may

¹⁴5 U.S.C. § 7701(c)(1)(A) and 5 U.S.C. § 7701(c)(1)(B), respectively. Substantial evidence is a lower standard of proof than preponderance of the evidence. 5 C.F.R. § 1201.56(c).

¹⁵5 U.S.C. § 7701(c)(2). Harmful error is that which is likely to have caused the agency to reach a different conclusion from the one it would have reached absent the error and which caused substantial harm or prejudice to the employee's rights. 5 C.F.R. § 1201.56(c)(3).

¹⁶Parties must petition within 30 days after receipt of the decision, although the Board may extend the 30-day period for good cause shown. 5 U.S.C. § 7701(e)(1). A party may also request that the initial decision be vacated if a settlement agreement has been entered into by the parties. 5 C.F.R. § 1201.113(a).

¹⁷5 U.S.C. § 7701(e)(2).

¹⁸5 C.F.R. § 1201.115.

modify the decision, or may send the matter back to the administrative judge for further processing.¹⁹

An employee (but not the agency) may obtain judicial review of a final MSPB decision with the United States Court of Appeals for the Federal Circuit (hereinafter referred to as the Federal Circuit) by filing a petition for review within 60 days of the final Board action.²⁰ Under certain limited circumstances, OPM may also obtain review at the Federal Circuit. However, if OPM did not intervene in the matter before the MSPB, then OPM must first petition the MSPB for a reconsideration of its decision before petitioning the Federal Circuit for review.²¹

The Federal Circuit reviews and sets aside agency action, findings or conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, (2) obtained without procedures required by law, rule or regulation being followed, or (3) unsupported by substantial evidence. 5 U.S.C. § 7703(c).

Negotiated Grievance Procedure

If the employee files a grievance under negotiated grievance procedure, and the parties are not able to resolve the matter, the exclusive representative or the agency may invoke binding arbitration. The employee cannot invoke arbitration.²² An arbitrator is to adhere to the same burdens of proof for sustaining agency actions under chapter 43 or 75 as are required if appealed at the MSPB.²³ Judicial review of an arbitrator award, as with a final MSPB decision, may be obtained at the Federal Circuit. The Federal Circuit review is conducted in the same

¹⁹5 C.F.R. § 1201.117.

²⁰5 U.S.C. § 7703(b)(1) and 28 U.S.C. § 1295(a)(9). Pursuant to the Whistleblower Protection Enhancement Act of 2012, as amended, for a 5-year period of time employees will have the option of seeking review with any court of appeals of competent jurisdiction if challenging the disposition of allegations of whistleblower retaliation. Pub. L. No. 112-199, § 108, 126 Stat. 1465, 1469 (Nov. 27, 2012), amended by the All Circuit Review Extension Act, Pub. L. No. 113-170, 128 Stat. 1894 (Sept. 26, 2014).

²¹5 U.S.C. § 7703(d).

²²5 U.S.C. § 7121(b)(1)(C)(iii).

²³5 U.S.C. § 7121(e)(2). See also, *Cornelius v. Nutt*, 472 U.S. 648, 660-661, (1985) (arbitrator is to apply the same substantive rules as the MSPB).

manner and under the same conditions as if the matter had been decided by the MSPB.²⁴

Appeal Avenues When Discrimination is Alleged

Where an employee with appeal rights under chapter 43 or 75 believes that unlawful discrimination motivated his or her removal or demotion, the employee may choose to file a discrimination complaint with his or her agency (referred to as a “mixed-case complaint”) – or may file an appeal with the MSPB (referred to as a “mixed-case appeal”).²⁵ If the employee is a member of a collective bargaining unit, the employee also has the option of pursuing a grievance alleging discrimination under the negotiated grievance procedure where such appeals have not been expressly excluded from coverage by the collective bargaining agreement. The employee may either pursue a mixed case (complaint or appeal) or a negotiated grievance procedure, but not both.²⁶

Mixed Cases

Where an employee chooses to pursue a mixed-case complaint and has filed a complaint of discrimination,²⁷ an agency has 120 days from the filing of the complaint to issue a final decision on that complaint of discrimination. If the decision is not issued timely, the employee may appeal to the MSPB at any time after the expiration of the 120 days.²⁸ Or, if the employee is dissatisfied with a final agency decision, the employee may appeal to the MSPB within 30 days of receipt of the decision.²⁹ Instead of filing an appeal with the MSPB, the employee also has the

²⁴5 U.S.C. § 7121(f).

²⁵An employee must choose between filing a complaint with his or her agency or filing an appeal with the MSPB, the employee may not do both. 29 C.F.R. § 1614.302.

²⁶5 U.S.C. § 7121(d).

²⁷Prior to filing a complaint of discrimination, an employee must initiate contact with an EEO counselor within 45 days of the date of the matter alleged to be discriminatory. The employee must file a complaint with the agency within 15 days of receipt of the notice of the right to file a complaint (generated at the close of the pre-complaint processing period). 29 C.F.R. §§1614.105 and 1614.106.

²⁸5 U.S.C. § 7702(e)(2); 29 C.F.R. § 1614.302(d), 5 C.F.R. § 1201.154(b)(2).

²⁹5 U.S.C. § 7702(a); 29 C.F.R. § 1614.302(d), 5 C.F.R. § 1201.154(b)(1).

option of filing a civil action in district court.³⁰ Filing an action in district court results in a *de novo* review.³¹

Where an employee chooses to pursue a mixed case appeal, the employee must file with the MSPB within 30 days after the effective date of the removal or demotion action.³²

If the employee appeals to the MSPB—either under a mixed case complaint or a mixed case appeal—the appeal is to be processed in accordance with MSPB’s appellate procedures (including a right to a hearing) and a decision must be rendered by MSPB within 120 days after the appeal is filed.³³ Within 30 days after receiving a final MSPB decision, an employee has the choice of petitioning the U.S. Equal Employment Opportunity Commission (EEOC) to consider the MSPB decision or filing a civil action in district court.³⁴

If the employee petitions the EEOC, the EEOC shall determine within 30 days whether to consider the MSPB decision.³⁵ If the EEOC determines to do so,³⁶ it has 60 days to consider the MSPB record of the proceedings and either (1) concur in the Board decision or (2) issue an EEOC decision which finds that the Board decision incorrectly interpreted applicable discrimination law or that the decision is not supported by the evidence.³⁷

³⁰5 U.S.C. §7702(a) and (e)(1).

³¹In a *de novo* review, a matter is reviewed anew as if it had not been reviewed before. Both the employee and agency get a full review of their positions.

³²5 C.F.R. § 1201.154(a).

³³5 U.S.C. § 7702(a)(1); 5 C.F.R. § 1201.156(a).

³⁴If an employee waives the discrimination issue, the appeal may be filed with the Federal Circuit. 5 U.S.C. §7702(a)(3) and (b)(1); 5 C.F.R. § 1201.157. Where an employee files a civil action in district court, while the discrimination claims are subject to *de novo* review, any non-discrimination claims are reviewed on the record and the MSPB decision on these claims is to be affirmed unless found to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence. *Fogg v. Ashcroft*, 254 F.3d 103, 112 (D.C. Cir. 2001).

³⁵5 U.S.C. § 7702(b)(2).

³⁶If the EEOC determines not to consider the MSPB decision, the employee may file a civil action in district court. 5 U.S.C. § 7702(a)(3)(B).

³⁷5 U.S.C. § 7702(b)(3).

If the EEOC concurs with the MSPB decision, the employee may file a civil action in district court.³⁸

If the EEOC issues its own decision, the matter is then immediately referred back to the MSPB³⁹ which has 30 days to consider the decision. The MSPB may either (1) concur with EEOC's decision⁴⁰ or (2) find that the EEOC decision incorrectly interprets civil service provisions or that the record does not support the EEOC's decision as to such provisions, and reaffirm its initial decision.⁴¹

If the MSPB reaffirms its decision, the matter goes to a special panel which has 45 days in which to issue a final decision.⁴² The employee may file a civil action in district court if dissatisfied with the special panel decision.⁴³

Grievances

Where an employee chooses to pursue a negotiated grievance procedure which results in an arbitration decision, if unsatisfied with the arbitrator's decision the employee (but not the agency) may request, within 35 days of the decision, the MSPB conduct a review of that decision.⁴⁴ The Board may require additional development of the record, through submissions of evidence or a hearing.⁴⁵ If not satisfied with the results of the MSPB review decision, the employee may continue on with the administrative and judicial appeal process provided for mixed case appeals under 5 U.S.C. § 7702, described above.⁴⁶

³⁸5 U.S.C. § 7702(b)(5)(A); 5 C.F.R. § 1201.161(f).

³⁹5 U.S.C. § 7702(b)(5)(B); 29 C.F.R. § 1614.305(e).

⁴⁰If the MSPB concurs, the employee may file a civil action in district court. 5 U.S.C. § 7702(c); 5 C.F.R. § 1201.157, § 1201.162(b).

⁴¹5 U.S.C. § 7702(c); 5 C.F.R. § 1201.162(a). In reaffirming the decision, MSPB may make revisions in the decision, as appropriate.

⁴²5 U.S.C. § 7702(d); 5 C.F.R. § 1201.171, § 1201.173(c). The special panel consists of (1) an individual appointed by the President and confirmed by the Senate, (2) one member of the MSPB, and (3) one member of the EEOC. 5 U.S.C. § 7702(d)(6)(A); 5 C.F.R. § 1201.172.

⁴³5 U.S.C. § 7702(d)(2).

⁴⁴5 U.S.C. § 7121(d); 5 C.F.R. § 1201.155.

⁴⁵5 C.F.R. § 1201.155(e).

⁴⁶5 U.S.C. § 7121(d) and 5 U.S.C. § 7702. At a minimum, an employee must first appeal the arbitrator's decision to the MSPB before seeking judicial review in district court. *American Federation of Government Employees, Local 2052 v. Reno*, 992 F.2d. 331 (D.C. Cir. 1993).

Appendix IV: Examples of Tools and Guidance the Office of Personnel Management Provides to Help Agencies Address Poor Performance

Table 3: Examples of Tools and Guidance the Office of Personnel Management Provides to Help Agencies Address Poor Performance

Tool	Format	Description
Addressing and Resolving Poor Performance, A Guide for Supervisors (February 2013)	Hard copy guide and online at Human Resources University (free)	This guidebook for supervisors describes the legal process for taking action against an employee for poor performance, provides answers to frequently asked questions, and provides samples of documents provided by a supervisor to an employee at different stages in the process of addressing performance problems.
Dealing with Poor Performers	Lecture based (fee for service)	This course provides an overview and tools for dealing with poor performing employees. The course material includes information on communicating performance matters to employees, developing a performance improvement plan, and how to take corrective and legal action when performance continues to decline.
Difficult Conversations	Online (free)	The goal of this course is to provide supervisors with the necessary skills to have the difficult conversation that is inherent when dealing with poor performance and to provide a safe environment to practice delivering difficult conversations.
Merit System Principles and Prohibited Personnel Practices	Online (free)	This course is intended to enhance Merit System Principles awareness and understanding among managers throughout the Federal Government.
Multiple topic areas addressing poor performance	Website	OPM's website provides agencies with guidance on addressing poor performance, including a glossary of terms and concepts used when taking performance based actions, an overview of employee appeal options for performance based actions, and guidance on how to write valid performance standards for employees, among other topics.
Assistance and consultation	Email and telephone	OPM provides assistance in response to inquiries on how to address and resolve poor performance. OPM does not become involved in the details of specific cases but will provide agency HR officials or managers with assistance regarding commonly asked questions that arise during the process.
Performance Appraisal Assessment Tool (PAAT)	Voluntary self-assessment	The PAAT is designed to help agencies develop and manage performance appraisal programs. To participate in the PAAT, agencies answer questions on their appraisal programs and OPM scores agencies on a scale from 1-100. The PAAT has three questions related to poor performance.
The Federal Employee Viewpoint Survey (FEVS)	Electronic survey	The FEVS measures employees' perceptions of whether, and to what extent, conditions characterizing successful organizations are present in their agencies. Agencies are to use this information to make strategic decisions about management. The FEVS includes several questions on performance management and dealing with poor performers.

Source: GAO Review of OPM Tools and Guidance | GAO-15-191

Appendix V: Comments from the Office of Personnel Management



Employee Services

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

JAN 21 2015

JAN 21 2015

JAN 21 2015

Robert Goldenkoff
Director, Strategic Issues
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Goldenkoff:

Thank you for providing the U.S. Office of Personnel Management (OPM) with an opportunity to comment on the Government Accountability Office (GAO) draft report, "FEDERAL WORKFORCE: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance (GAO-15-191)." We appreciate the opportunity to provide you with comments about this report.

Response to Recommendations for Executive Action

Recommendation: To help strengthen the ability of agencies to deal with poor performers, we recommend that the Director of OPM, in conjunction with the Chief Human Capital Officers (CHCO) Council and, as appropriate, key stakeholders such as federal employee labor unions, take the following four actions:

- 1) To more effectively ensure that agencies have a well-qualified cadre of supervisors capable of effectively addressing poor performance, determine if promising practices at some agencies should be more widely used government-wide. Such practices include (1) extending the supervisory probationary period beyond 1-year to include at least one full employee appraisal cycle; (2) providing detail opportunities or rotational assignments to supervisory candidates prior to promotion where the candidate can develop and demonstrate supervisory competencies; and (3) using a dual career ladder structure as a way to advance employees who may have particular technical skills and/or education but who are not interested or inclined to pursue a management or supervisory track.

Response: Partially concur. (1) The authority to determine the length of probationary periods for supervisors and managers is delegated to the head of each agency under 5 CFR 315.905, thus agencies already have authority to provide for longer supervisory probationary periods. OPM has a responsibility, pursuant to 5 U.S.C § 1104(a)(2), to conduct oversight of the manner in which agencies exercise delegations from OPM and can consider this suggestion in exercising that authority. Also, OPM is willing to seek the views of the CHCO Council in assessing whether and how this authority is being used and to offer technical guidance, if appropriate; (2) Providing detail opportunities or rotational assignments to a single supervisory candidate prior to promotion, if not done carefully, could lead to an appearance of pre-selection. However, agencies can already utilize structured leadership development/rotation programs or detail multiple eligible candidates in a way that would prepare or develop a cadre of employees for supervisory or managerial positions. In any case, all candidates should already meet

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**Appendix V: Comments from the Office of
Personnel Management**

qualifications and demonstrate supervisory competencies at the time of selection to a supervisory or managerial position. OPM will engage the CHCO Council and other stakeholders, if appropriate, to discuss this option further; and 3) Many agencies already have team leads and non-supervisory GS-14 and GS-15 positions which provide a means for employees to advance without taking on supervisory or managerial duties. However, OPM will engage the CHCO Council to discuss this option further.

- 2) To help ensure supervisors obtain the skills needed to effectively conduct performance management responsibilities, assess the adequacy of leadership training agencies provide to supervisors.

Response: Concur. OPM will assess what and how agencies are training new supervisors and provide feedback for improving the curriculum. In addition, OPM will continue to provide agencies guidance on evaluating the effectiveness of leadership training.

- 3) To help supervisors make effective use of the probationary period for new employees:
- determine the benefits and costs of notifying supervisors - through automated notifications generated by the payroll system or other mechanism - that an individual's probationary period is ending and that the supervisor needs to make an affirmative decision or otherwise take appropriate action.

Response: Non-concur. Choosing the best method to ensure that supervisors are aware when appeal rights will accrue is an agency responsibility. This recommendation appears to reflect an unsubstantiated assumption that this functionality will exist only in agency payroll systems as opposed to Human Resources (HR) systems. However, OPM has confirmed with all Shared Service Centers that their existing HR systems already contain the functionality to automatically notify supervisors of the end of an individual's probationary period for appropriate management action. It is each agency's decision whether to utilize this functionality. While OPM, through the CHCO Council, can educate agencies on the availability of this functionality, each agency will have to assess whether it finds benefits in utilizing this functionality if they are not already using it. Since this decision is an agency responsibility, OPM respectfully requests this recommendation be deleted from the final report.

- determine if there are occupations where, because of the nature of work and complexity, the probationary period should extend beyond 1-year to provide supervisors with sufficient time to assess an individual's performance. If determined warranted, develop a legislative proposal for congressional action to ensure that formal procedures for taking action against an employee for poor performance and a right to appeal such action are not afforded until after the completion of any extended probationary period.

Response: Partially concur. Under existing authority, OPM already can provide for longer probationary periods under certain circumstances by making changes to existing regulations through the regulatory process. After consultation with all interested stakeholders (e.g. CHCO Council, labor organizations, management associations, etc.) about the many tools already available today to assist supervisors in managing employee performance, OPM will pursue the established Executive Branch deliberation process for suggesting legislative proposals, if necessary and as appropriate.

**Appendix V: Comments from the Office of
Personnel Management**

- 4) To help ensure OPM's tools and guidance for dealing with poor performers are cost-effectively meeting agencies' and supervisors' needs, use the SHCM survey results (once available), FEVS results, PAAT responses, and other existing information to inform decisions on content and distribution methods. The importance of effective performance management and addressing poor performance may need to be reinforced with agency supervisors so they more routinely seek out tools and guidance.

Response: Partially concur. OPM will review this data, and, to the extent that the Strategic Human Capital Management (SHCM) survey results, Federal Employee Viewpoint Survey (FEVS) results, and the Performance Appraisal Assessment Tool (PAAT) responses provide relevant data to inform decisions about content and distribution methods of OPM's tools and guidance for dealing with poor performers, OPM will use the data to inform its decisions about future tools and guidance. For example, while there are questions on accountability and poor performers on the FEVS, these questions are based on employee views and perspectives on whether accountability exists in their organization and aren't necessarily relevant to whether their supervisors have been provided appropriate training and guidance on addressing poor performance. Also, FEVS results do not reflect actions management may have taken to address poor performers of which other employees may not be aware. Other FEVS questions may better inform us regarding improvement of ongoing performance management practices. Use of the SHCM and the PAAT results is anticipated to offer little, if any, relevant data. We do agree that the importance of effective performance management and addressing poor performance needs to be reinforced with supervisors. OPM continues to find ways to help agencies with leadership development – as set forth in 5 CFR 412 – and to successfully manage performance. With regard to training and development, including both leadership and performance management, OPM continues to design policies, guidance, and tools with the objective of identifying Government-wide approaches and solutions to ensure consistency, high-quality, efficiency, and cost-savings.

Technical comments to the draft are enclosed. Unless otherwise noted, the suggested revisions are meant to provide technical accuracy and correct statements attributed to OPM.

Please contact Ms. Janet Barnes, Director, Internal Oversight and Compliance on (202) 606-3207, should your office require additional information.

Again, I extend my thanks to your office for providing this opportunity to update and clarify information in the draft report.

Sincerely,



Mark D. Reinhold
Associate Director

Enclosure

Appendix VI: GAO Contact and Staff Acknowledgments

GAO Contact

Robert Goldenkoff, (202) 512-2757 or goldenkoffr@gao.gov

Staff Acknowledgments

In addition to the individual named above, Tom Gilbert, Assistant Director; Shea Bader, Analyst-in-Charge; Sara Daleski; Jeffrey DeMarco; Karin Fangman; Colleen Marks; Donna Miller; Cristina Norland; and Rebecca Shea made major contributions to this report.

Appendix VII: Accessible Data

Data Table for Figure 3: Trends in Performance Dismissals and Hiring Fluctuations (Career Permanent Employees) – 2004-2013

Year	Number of performance dismissals
2004	3568
2005	3580
2006	3405
2007	3744
2008	4219
2009	4840
2010	4638
2011	4413
2012	3749
2013	3489

Year	Number of new hires
2004	88930
2005	98755
2006	105082
2007	118499
2008	158968
2009	156209
2010	152962
2011	125453
2012	103147
2013	87368

Data Table for Figure 4: MSPB Decisions on Dismissal Appeals under chapter 43 – 2013

Misconduct dismissals	Performance dismissals
3489	2284
3749	2241
4413	2057
4638	2157
4840	1899
4219	1949

Appendix VII: Accessible Data

Misconduct dismissals	Performance dismissals
3744	2272
3405	2423
3580	2287
3568	2114

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