

ARTICLE 10

ACTIONS FOR UNACCEPTABLE PERFORMANCE

Section 10.01. General

The Employer, in taking any action based on unacceptable performance by an employee, will do so in a fair and objective way with particular attention given to avoiding disparate inequitable treatment of employees. The Employer will make every reasonable effort to assist the employee in improving deficient performance and will provide reasonable opportunity for the employee to correct performance problems before initiating any removal or demotion action.

Section 10.02. Notice of Action for Unacceptable Performance/Performance Improvement Plans

- (1) Unacceptable performance is performance which does not meet established "Fully Successful" performance standards in one or more critical elements of the employee's position. Prior to the Employer initiating a performance-based action, the employee will be given an opportunity to improve his or her performance under a Performance Improvement Plan ("PIP"). Actions taken under this Article to place an employee on a PIP shall be supported by substantial evidence in accordance with 5 CFR § 1201.56(c)(1).

- (2) In the event FNCS determines an employee should be placed on a PIP, FNCS shall notify the employee in writing with a notice of action for unacceptable performance, and within seven (7) calendar days thereof, a meeting shall take place between FNCS, NTEU (if requested to attend by the employee), and the employee to discuss the employee's performance. During this meeting, the employee shall receive a PIP that provides the following information and rights:
 - (a) An identification of the critical elements and performance standards for which performance is unacceptable;
 - (b) An identification of FNCS' performance expectations and the specific improvement needed to address the unacceptable performance;
 - (c) A statement that the employee has ninety (90) days in which to bring performance up to an acceptable level;
 - (d) A description of what the Employer will do to assist the employee to improve the unacceptable performance during the opportunity period. This shall include any training which may be provided by the Employer to help the employee meet performance expectations before taking action to remove the employee from his or her position. The Employer shall not unreasonably deny any request for training made by the employee during the opportunity period. Any training provided shall be documented. The employee shall be advised of a schedule of a minimum of four

- (4) meetings to be held between the employee and supervisor to review progress during the ninety-day PIP process. Other forms of assistance may include closer supervision, mentoring or counseling; and,
 - (e) A statement that unless the employee's performance in the critical element(s) improves to and is sustained to an acceptable level, the employee may be reduced in grade or removed.
- (3) Both the notice of action for unacceptable performance and the PIP shall include a written statement that the employee may furnish a copy of the document to NTEU.
- (4) An employee, at his or her option, shall be given the opportunity to respond to the alleged deficiencies contained in the notice of action for unacceptable performance and the PIP within seven (7) calendar days of receipt of the aforementioned documents. The ninety-day PIP period will not commence until the Employer has had the opportunity to consider the employee's response. The employee will receive up to eight (8) hours of duty time for this purpose.

Section 10.03. Notice of Adverse Action

- (1) An employee whose reduction in grade or removal is proposed under this Article is entitled to thirty (30) days advance notice of the proposed action. The notice will contain the following information and employee rights:
- (a) The action being proposed;
 - (b) The critical elements of the employee's position on which the performance is considered unacceptable;
 - (c) The specific instances of unacceptable performance on which the present action is based;
 - (d) The employee's right to be represented by an attorney or other representative;
 - (e) The employee's right to respond, orally and/or in writing, within twenty (20) calendar days, exclusive of the date of receipt of the notice of the adverse action, to the proposed action prior to a decision being made. The reply will be made to the deciding official or his/her designee. Upon request, a reasonable time for an extension may be granted provided the request is made prior to the expiration of the twenty-day reply period. The employee will be granted up to eight (8) hours of duty time to prepare his/her reply to the proposed action. The Employer will consider a written request from the employee for additional duty time to prepare his/her response;
 - (f) The name of the individual to whom the response shall be made;
 - (g) A copy of any information relied upon to support the proposed action.
 - (h) That the thirty (30) day notice period shall begin on the next day following the

date of receipt of the notice of the adverse action; and

- (i) That a determination as to the reduction in grade or removal will be made after the expiration of the notice period.
- (2) If the employee elects to make an oral reply, it will be made to the deciding official or his/her designee, in person, unless agreed otherwise. The employee may submit a written outline of the points covered upon conclusion of the oral reply.
- (3) In reaching a final decision, the Employer may not rely on any alleged deficiency or criticism of the employee's performance which the employee has not been given the opportunity to reply to either orally or in writing. The Employer also agrees to give consideration to any mitigating circumstances before reaching a final decision, including but not limited to an employee's medical condition pursuant to 5 CFR § 432.105(a)(4)(iv). The decision notice will include a statement indicating that the adverse action will be placed in the employee's e-OPF.

Section 10.04. Timeliness of Decision to Retain, Reduce in Grade, or Remove. Notice of Action to Reduce in Grade or Remove.

- (1) The decision to retain, reassign, reduce in grade, or remove the employee shall be made normally within thirty (30) days after the expiration of the notice period. The period may, if necessary, be extended for thirty (30) days.

If the employee's performance substantially improves during the notice period and no action is to be taken, or if a determination is made that the employee shall be reduced in grade or removed, notification will be given to the employee. Such notification shall include the specific reasons for sustaining or canceling the proposed action, including a response to any mitigating circumstances raised by the employee. Pursuant to 5 CFR § 432.105(a)(4)(iv), the Employer shall allow an employee who wishes to raise a medical condition which may have contributed to his or her unacceptable performance to furnish medical documentation of the condition for the Agency's consideration.

- (2) Notification of action to reduce in grade or remove shall include: the instances of unacceptable performance on which the action is based; the concurrence of a higher ranking official other than the official who proposed the action (unless proposed by the Head of the Agency); the effective date of the action, which shall normally be no sooner than two (2) weeks after the date of the decision. The action taken shall, in the case of a reduction in grade or removal, be based only on those instances of unacceptable performance by the employee which occurred during the one (1) year period ending on the date the advance notice was issued in accordance with 5 CFR § 432.105 (b).
- (3) Consideration shall be given to reassigning the employee or reducing the employee's grade before taking action to remove the employee from his or her position.

- (4) An Employee will be given an opportunity to resign or, if eligible, to retire after receiving a notification of action to reduce in grade or remove. In such situations, the employee will be granted an opportunity before the effective date to make a decision and, on request, he/she will be advised of all rights and benefits to which the employee may be entitled, including but not limited to retirement, annuity, or health insurance. The employee will sign a statement indicating such resignation/retirement is voluntary.

Section 10.05. Right to Appeal

- (1) An employee may appeal an action taken pursuant to the Article in accordance with established laws, rules and regulations by filing a grievance under the negotiated grievance procedure or filing an appeal with the Merit Systems Protection Board. An employee may not utilize both procedures but must elect one or the other in writing within the established time limits.
- (2) In filing a grievance with respect to a proposed action for unacceptable performance, the Union may elect to initiate the grievance procedure at the Step 3 level outlined in Section 50.08.
- (3) If the Union elects to appeal an unacceptable performance action by filing a grievance, the Union must give the Employer notice of its decision within thirty (30) calendar days of the employee's receipt of the Employer's final decision. The notice of appeal must be given by certified mail or by hand delivery to the appropriate deciding official. Notice of appeal by certified mail shall be effective when mailed and notice of appeal by hand delivery shall be effective when received.

Section 10.06. Recordkeeping

If an action for unacceptable performance is canceled or overturned, all documentation relative to that action (or proposed action) in the employee's e-OPF will be removed.

Section 10.07. Improvement in Employee Performance's During One-Year Period

If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed and the employee's performance continues to be "Fully Successful" for one (1) year from the date of the advance written notice in accordance with 5 CFR § 432.105(a)(4)(i), any entry or other notation of the unacceptable performance for which action was proposed shall be removed from any Agency record relating to the employee in accordance with 5 CFR § 432.107.

For NTEU:

Matthew Allinson

Matthew Allinson
National Negotiator
NTEU

4/6/2016

Date

For FNCS:

Walter Vick

Walter Vick
Labor Relations Officer
USDA-FNS

4/6/2016

Date