



October 16, 2019

**VIA FEDERAL eRULEMAKING PORTAL**

U.S. Office of Personnel Management  
1900 E Street, N.W.  
Washington, D.C. 20415-1000

**RE: RIN 3206-AN60, Proposed Rule Concerning  
Probation on Initial Appointment to a  
Competitive Position, Performance-Based Reduction  
in Grade and Removal Actions and Adverse Actions**

Dear Sir or Madam:

The National Treasury Employees Union (NTEU) submits these comments in response to the Office of Personnel Management's (OPM) Federal Register notice published on September 17, 2019 (84 Fed. Reg. 48794). In that notice, OPM proposes amendments to its regulations on probationary periods, performance-based reductions in grade and removal actions; and adverse actions. NTEU raises the following concerns about and objections to those proposed regulations.

**I. The Case for Action**

The central premise behind the proposed rule changes, which weaken civil service protections for federal employees, is that it is too hard to fire them. Underlying that premise is the belief that more need to be fired. In support of this notion, OPM states, "Notably, as demonstrated in the Federal Employee Viewpoint Survey, a majority of both employees and managers agree that the performance management system fails to reward the best and address unacceptable performance." OPM does not cite responses to specific FEVS questions that support this statement. In fact, reported responses to two FEVS questions about topics most closely related to the statement do not support it. Responding to the 2018 FEVS, 39.4% of the total respondents, not a majority, either disagreed or strongly disagreed with the following statement (Question 23): "In my



work unit, steps are taken to deal with a poor performer who cannot or will not improve." And in response to question 25, 29.2% disagreed or strongly disagreed with the following statement, "Awards in my work unit depend on how well employees perform their job," while 46.1% agreed or strongly agreed with the statement.

The assertion, based on FEVS responses, that current regulations stand in the way of holding employees accountable for conduct and performance is further undermined by responses to other questions. A large percentage of respondents, 83.1%, strongly agreed or agreed that they were held accountable for achieving results. Only 5.6% disagreed. (Question 16) Another high percentage, 83.8%, felt the overall quality of their work unit's work was good to very good. Only 3.1% felt their unit's work was poor or very poor. (Question 28) These percentages cannot be easily reconciled with the view of 39.4% that poor performers (presumably others, not the respondents themselves) are not held accountable. In general, respondents see themselves and others in their work units as being held accountable and performing well, while perceiving that others are not. As OPM cautioned when publishing the FEVS data in the page titled "Understanding Results," survey results don't explain why employees respond to questions as they do and that is why survey data should be used with other data to assess the state of human capital management. By simplistically citing FEVS data to justify relaxing employees' civil service protections, OPM fails to follow its own advice.

## **II. Data Collection of Adverse Actions**

The adage "you get what you measure" applies here. The burdensome requirement to report for publication data about disciplinary, performance and adverse actions taken against probationers and employees appears intended to serve no purpose other than to encourage agencies to take such actions. Adverse personnel actions should be a last resort, not a primary tool for human resource management. Yet that is the overall, unfounded theme of these proposed regulations: that more federal employees need to be fired more quickly. OPM cites no authoritative data or studies to support this notion. As already discussed, the cited FEVS data is misleadingly characterized. Compounding the harm to the civil service caused



by encouraging agencies to increase adverse actions against employees, collecting and publishing data on actions taken against employees will only discourage the public from pursuing government careers. No reputable private sector employer publishes attrition or termination data for the obvious reason that it would send the message to prospective applicants: "You don't want to work here." Or maybe that's the point.

Instead of collecting data on punitive measures, data should be collected on agency efforts to improve the skills and performance levels of their workforce. Positive outcome data should be collected, such as the number of employees who successfully completed their probationary periods and the number of employees who successfully completed a PIP. Much is invested in recruiting and training employees. If the government wants to portray itself as a welcoming workplace, it should place the emphasis on securing a return on that investment.

**III. NTEU's Objections and Comments on  
Specific Provisions of the Proposed Rule**

**A. 5 C.F.R. 315.803 – Agency Action during Probationary  
Period (general)**

The proposal would add a sentence to this section requiring agencies to notify supervisors 90 and 30 days before an employee's probationary period expires, advising that an "affirmative decision" about an employee's fitness for employment must be made. The requirement is unnecessary and sends the wrong message that it is more important to terminate probationers than assist them with successfully completing their probationary period. Good supervisors know where their subordinates are at in their probationary periods, assessing their progress daily. Micromanaging agencies' managerial practices through government-wide regulations is an overreach.

OPM should also consider the effect of an agency's failure to notify a manager that a subordinate's probationary period is ending in 90 or 30 days, including whether it creates a potential defense for a manager faced with a disciplinary or performance-based action for being a poor manager.

**B. 5 CFR Part 432 - Performance-Based  
Reduction In Grade and Removal Actions**

OPM comments that "... chapter 43 has not worked as well as Congress has intended. In particular, interpretations of chapter 43 have made it difficult for agencies to take actions against unacceptable performers and to have those actions upheld." If Chapter 43 has not worked as Congress intended, it is up to Congress to change it. OPM cannot change the law by issuing contrary regulations. That said, OPM's proposed regulations are confusing, contrary to Chapter 43, as interpreted by the Merit Systems Protection Board (MSPB or Board), and encourage poor performance management practices.

**1. Section 432.104**

OPM proposes to strike the following sentence from Section 432.104:

As part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance.

In its place, OPM proposes to add:

Other than the requirement described in 5 U.S.C. 4302(c)(5), there is no requirement regarding any assistance to be offered or provided by the agency during the opportunity period. The nature of such assistance is not determinative of a reduction in grade or pay, or a removal. No additional performance assistance period or similar informal period shall be provided prior to or in addition to the opportunity period provided under this section.

Subsections 4302(c)(5) and (c)(6) of Title V require agency performance appraisal systems, under regulations prescribed by OPM, to provide for:

assisting employees in improving unacceptable performance;  
and

reassigning, reducing in grade or removing employees who *continue* to have unacceptable performance but *only after* an opportunity to demonstrate acceptable performance."

(Emphasis added.)



Thus, the plain language of subsections (c)(5) and (c)(6) requires assistance to improve unacceptable performance and an opportunity to demonstrate acceptable performance if the poor performance continues, all before taking a performance-based action. This is consistent with OPM's regulations at Part 430.207, concerning performance monitoring. Agencies' performance appraisal systems must provide for ongoing appraisal feedback, including one or more progress reviews each appraisal period and assistance "whenever" performance falls below fully successful but is above unacceptable or "at any time" performance is unacceptable in one or more critical job elements. To the extent that the proposed change eliminates required assistance during the opportunity period, as implied by the proposal to strike the current sentence requiring an offer of assistance and adding the phrase "there is no requirement regarding any assistance to be offered or provided during the opportunity period," the proposal is contrary to section 4302(c)(6)'s requirement for an opportunity to demonstrate acceptable performance.

After reviewing the legislative history of Section 4302, the MSPB concluded in *Sandland v. GSA*, 23 MSPR 583 (1984), that an employee has a "substantive right to an improvement period prior to institution of a performance-based action." Congress intended that employees whose performance is unacceptable be provided encouragement and training and assistance to achieve better performance. *Id.* The opportunity to improve is not a procedural right subject to a harmful error analysis. It is an element of an agency's case which the agency must prove by substantial evidence in any performance action under Chapter 43. *Id.* An employee's right to a meaningful opportunity to improve is one of the most important substantive rights in the entire Chapter 43 performance appraisal framework. *Thompson v. Farm Credit Administration*, 51 MSPR 569 (1991), citing, *Zang v. Defense Investigative Service*, 85 FMSR 5037 (1985).

The proposed regulations minimize the importance of assistance provided during the opportunity period, stating that the nature of assistance is "not determinative" of a performance-based action. To the contrary, Board case law firmly establishes that the nature of the assistance provided during the PIP is indeed determinative of whether an employee has been provided the statutorily required opportunity to



improve and it is necessarily a fact-based inquiry. See, *Thompson v. Farm Credit Administration, supra*, (appellant was not afforded a statutorily required opportunity to improve because his supervisors did not provide promised assistance and their actions reflected a predetermination that he would fail); *Sandland, supra* (appellant's supervisor's actions during PIP undermined his ability to meet performance expectation); *Corbett v. Dep't of Air Force*, 59 MSPR 288 (1993) (appellant was provided required opportunity to improve when supervisor met with her 14 times during PIP and she was provided unlimited access to a trainer). In *Woytak v. Dep't of Army*, 49 MSPR 687 (1991), the Board remanded the appeal to the administrative judge to further develop the record to determining whether the appellant was provided a "meaningful" opportunity to improve. The Board posed specific questions to be addressed about the nature of assistance afforded to the appellant during the PIP: whether performance monitoring included active or "mere passive assistance"; whether the appellant was aware he was expected or required to seek assistance; and, whether a provided job aid was a help or a hindrance.

In addition, the proposed prohibition on providing a "similar informal" assistance period before or after a PIP is confusing, contrary to OPM's requirements that agencies provide improvement assistance whenever performance drops below fully successful, discussed above, and is simply bad performance-management policy. As noted earlier, subsections (c)(5) and (c)(6) expressly contemplate assistance in improving performance before a formal PIP. Moreover, the reference to an informal assistance period will cause confusion. It is unclear whether a manager's assistance of an employee to improve marginal or unacceptable performance before resorting to a formal PIP would constitute an informal assistance period. In any event, such assistance should not be prohibited if the law does not require it.

**2. Section 432.105 - Proposing and Taking Action Based on Unacceptable Performance**

OPM proposes to add the following to Section 432.105(a)(1):

For purposes of this section, the opportunity to demonstrate acceptable performance includes measures taken during the opportunity period *as well as any other measures*



*taken during the appraisal period for purposes of assisting employees pursuant to 5 USC 4302(c)(5). Agencies may satisfy this requirement before or during the opportunity period.*

(Emphasis added.)

Allowing the assistance requirement to be satisfied *before* the opportunity period is nonsensical and is contrary to caselaw interpreting 5 USC 4302(c)(6). As the cases discussed above demonstrate, the nature of the assistance provided is a key component of providing an opportunity to improve under Section 4302(c)(6). To be sure, an agency may rely on pre- and post-PIP performance deficiencies, after successful completion of a PIP, to remove or downgrade an employee, provided the deficiencies occurred within one year preceding the notice or the action or one year after the beginning of the PIP, respectively. *Brown v. Dep't of Veterans Affairs*, 44 MSPR 635 (1990); *Sullivan v. Dep't of the Navy*, 44 MSPR 646 (1990). But in both *Brown* and *Sullivan*, the Board emphasized the critical, statutory requirement that employees be notified of the critical job elements which they are failing and be provided a "meaningful opportunity to demonstrate acceptable performance" in those elements. *Brown*, 44 MSPR at 640, citing *Colgan v. Dep't of Navy*, 85 FMSR 5279 (1985); *Sullivan*, 44 MSPR at 657. And again, whether that requirement is met turns on the nature of the assistance provided during the opportunity period. If otherwise, the opportunity to improve would be a mere procedural right, a proposition flatly rejected in *Sandland* and its progeny.

### 3. Section 432.108 - Settlement Agreements

This proposed subsection parrots Section 5 of Executive Order 13839 and subsequently issued OPM guidance. Purportedly, the new requirement is intended to "promote high standards and integrity and accountability" and to "ensure that agencies can make appropriate and informed decisions regarding an employee's qualification, fitness, and suitability as applicable to future employment." It broadly prohibits amending, modifying or rescinding any type of personnel record, from a written counseling memorandum to a final agency decision to discharge an employee, as a condition of settling any formal or informal complaint.



As a matter of policy, whatever transparency may derive from the proposed regulation is greatly outweighed by the damage that will be done to agencies' and employees' abilities to resolve disputes. Record amendments are a common term of settlement agreements, if not the most common feature of such agreements. In a 2013 report, the Merit Systems Protection Board found that two-thirds of adverse action appeals to the MSPB are settled, and half of those involved clean record agreements, under which an agency changes or removes negative information in exchange for resolving the employee's claims against the agency. Clean Record Settlement Agreements and the Law: A Report to the President and Congress of the U.S., pp. 1-2 (December 2013). Beyond adverse- and performance-based actions appealable to the MSPB, virtually every settlement agreement involving a federal sector personnel action involves amending or removing a personnel record, if for no other reason than every personnel action in the federal government is recorded in some fashion. Barring agencies from resolving any complaints, formal or informal, by agreeing to amend or remove records will exponentially increase the number of disputes that are litigated because a basic ingredient of the dispute, the content of underlying personnel record, cannot be resolved bilaterally. Allowing an agency to amend or rescind a record when the "agency itself" determines the action was illegal or erroneous is hardly a savings. As any practitioner or professional in the field of federal sector employment or labor relations knows, parties loathe to admit fault. That is why so-called non-admissions clauses, under which a party expressly refrains from admitting wrongdoing, are a common feature in employment dispute settlements. Non-admission clauses do not mean there is no evidence of an error or illegal act on an agency's part. The very fact that agencies are amenable to settlement reflects that there is at least some concern about the merits of the challenged action. The proposed restrictions on amending records in settlement agreements completely ignores these realities.

To the extent the proposed records amendment restriction applies to negotiated grievance procedures under Chapter 71 of Title V, it is contrary to law. In enacting Chapter 71, Congress found that collective bargaining "facilitates and encourages the amicable settlements of disputes between employees and their employers concerning conditions of



employment." 5 USC 7101(a)(1)(C). Congress mandated that every collective bargaining agreement contain a negotiated grievance procedure as the exclusive administrative means "for resolving grievances which fall within its coverage." 5 USC 7121(a)(1). Grievance settlements are an extension of the collective bargaining process between the agency and the exclusive representative. See, e.g., *DOD Dependent Schools and OEA*, 50 FLRA 424 (1995) (treating grievance settlement as a collective bargaining agreement for purposes of Section 7114(c)). As discussed, agreements to amend records, coupled with non-admission clauses, are common features of settlement agreements, including grievance settlements. To the extent such clauses are not otherwise prohibited by law, by taking a common term of such agreements off the table, OPM is impermissibly inserting itself into the collective bargaining relationship that Congress intended to exist between the agency and the exclusive representative. And because grievance settlements are an extension of the collective bargaining process, OPM's regulation would unilaterally constrict the scope of collective bargaining by precluding a commonly negotiated remedy. That is plainly unlawful: the executive branch is not empowered to dictate "the 'metes and bounds' of collective bargaining." *NTEU v. Chertoff*, 452 F.3d 839, 860-64 (D.C. Cir. 2006).

Finally, the proposed rule concerning corrective action based on material discovered before a final agency action is flawed. The proposal allows an agency ("the agency may decide") to "cancel or vacate" a personnel action when there is "persuasive evidence" that "casts doubt" on the validity of the action or the agency's ability to "sustain the action in litigation". This standard is confusing and appears to place the burden of proof on the employee facing the action. Agencies bear the burden of proof in Chapter 43 and Chapter 75 by substantial evidence and a preponderance of evidence, respectively. 5 USC 7701(c). If anything, the proposed rule should require that agencies cancel or vacate a proposed action when there is not persuasive evidence to support agencies' allegations in proposed actions.



C. 5 C.F.R. Part 752.

1. Section 752.104, Section 752.203(h), and  
Section 752.407 - Settlement Agreements

These proposed subsections mirror the proposed Section 432.108. NTEU lodges the same objections to these proposed subsections as set forth above for Section 432.108.

2. Section 752.202 and Section 752.204 -  
Standard for Action and Penalty Determination

In its proposed rule, OPM astoundingly claims that progressive discipline and table of penalties "are inimical to good management principles." These concepts are rooted in the illustrative factors set forth in *Douglas vs. Veterans Administration*, 5 MSPR 280 (1981), that agencies must consider to ensure that the penalty imposed is "within the tolerable limits of reasonable" to, in turn, satisfy the requirement that adverse actions promote the efficiency of the service under 5 USC Section 7513(a). These factors, as enumerated in *Douglas*, include: (1) whether an offense was frequently repeated; (3) the employee's past disciplinary record; (6) the consistency of the penalty with those imposed on others for the "same or similar offenses"; (7) the consistency of the penalty with any agency table of penalties; (9) whether the employee had been warned about the conduct in question; and, (12) the adequacy and effectiveness of alternative sanctions to deter the conduct by the employee or others.

OPM is not empowered to regulate away the *Douglas* factors, as its proposed rule would do. Congress entrusted the MSPB, not OPM, with the responsibility for adjudicating adverse action appeals. 5 USC §§ 1204, 7513(d), 7701. Critically, Congress intended for the MSPB to "be independent of the direction and control of the President." S. Rep. No. 95-969 at 28, reprinted in 1978 U.S.C.C.A.N. at 2750. OPM's proposed rule would improperly allow this administration to override the MSPB's longstanding determination of what should be considered in assessing potential employee discipline. Its proposed rule is at odds with *Douglas* Factors 1, 3, 9 and 12, which are progressive discipline considerations. It is also in tension with *Douglas* Factors 6 and 7, which deal with penalty consistency.



Tables of penalties, moreover, are designed to promote penalty consistency. None of the tables developed by agencies with whom NTEU has a relationship are so rigid as to disallow deviations from prescribed penalty ranges when aggravating or mitigating factors, warrant.

Oddly, OPM proposes to formally adopt the "tolerable limits of reasonableness" standard enunciated in *Douglas*, while discarding factors listed as relevant to that standard in the same decision. Codifying the *Douglas* standard for penalty review while repudiating *Douglas* factors that may bear on whether that standard has been met makes no sense.

The proposed standard for comparators at part 752.202(d) and 752.403(d) is inconsistent with MSPB and Federal Circuit case law. The proposed section reads, in part:

An agency should consider appropriate comparators as the agency evaluates a potential disciplinary action. Appropriate comparators are individuals in the same work unit, with the same supervisor who were subjected to the same standards governing discipline.

OPM comments that it is proposing adoption of the "Misskill test", quoting from the Federal Circuit's decision in *Misskill v. Social Security Administration*, 863 F.3d 1379 (Fed. Cir. 2017). A fair reading of MSPB and Federal Circuit cases on comparators demonstrates that appropriate comparators are not that limited. In *Lewis v. Dep't of Veterans Affairs*, 113 MSPR 657 (2010), the Board stated that it would no longer follow past decisions treating the absence of factors like same work unit and same supervisor as outcome determinative for comparison purposes. Citing the Federal Circuit's decision in *Williams v. Social Security Administration*, 586 F.3d 1365 (2009), the Board determined that a more flexible approach was warranted. Referencing the Court's rationale in *Williams*, the Board held:

[T]here must be enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, but we will not have hard and fast rules regarding the 'outcome determinative' nature of these factors.



If an appellant makes this showing, the agency must prove legitimate reasons for the difference in treatment by a preponderance of the evidence. *O'Lague v. Dep't of Veterans Affairs*, 123 MSPR 340 (2016).

Earlier this year, in *Robinson v. Dep't of Veterans Affairs*, 923 F.3d 1004 (Fed. Cir. 2019), the Federal Circuit cited and applied the more flexible standard adopted by the Board in *Lewis*. The flexible standard applied by the Board in *Lewis* and *O'Lague* and followed by the Federal Circuit in *Robinson* is clearly the current and appropriate standard for a disparate penalty analysis. For these reasons, OPM should either abandon the proposed rule or modify it to reflect the proper standard.

3. Section 752.404(b)(1) - Procedures

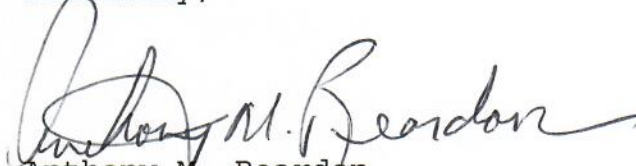
In this subsection, OPM seeks to bar negotiations over notice periods longer than thirty days for proposed agency actions against employees. Instead, OPM would give agencies "sole and exclusive discretion" to determine when advance written notice exceeding thirty days is warranted. Further, to deter agencies from giving more than thirty days' notice, the proposed rule would create a reporting requirement for instances in which agencies elect to do so.

OPM cannot unilaterally take a negotiable topic off the bargaining table, as this subsection would do. *NTEU*, 452 F.3d at 860-64. And it should not, on top of that, chill agencies from providing notice beyond thirty days when warranted through the creation of an onerous reporting requirement.

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Thank you for the opportunity to submit these comments. Please do not hesitate to contact NTEU for elaboration of these views.

Sincerely,

  
Anthony M. Reardon  
National President