A MANAGER’S GUIDE
TO DEALING WITH
UNSATISFACTORY
PERFORMANCE

Labour Relations Centre of Expertise
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INTRODUCTION

This guide has been prepared to provide managers with the knowledge required to effectively deal with employees who are performing at a less than satisfactory level as well as to provide a detailed approach for addressing these types of situations.

The guide will identify different types of behaviour as well as provide a brief description of the performance management process and will assist managers in the identification of performance problems. The guide will describe the steps required to change unsatisfactory performance and provide the options available to managers if an employee's work performance does not improve to a satisfactory level.

Resolving a performance problem is not an easy task, but on-going communication and an objectively planned course of action may alleviate many of the frustrations associated with such a task for both the manager and the employee. The predominant factors of success are the attitude and determination that managers will need to demonstrate when dealing with the employee.

In addition to attitude and determination, there are a number of other factors that have a significant impact on the manager's ability to deal with unsatisfactory performance.

Some of these factors are:

- The degree of support on the part of senior management
- A consistent and fair approach on the part of the manager
- The effectiveness of communication between the manager and the employee
- The extent to which performance expectations and measurement criteria have been communicated and discussed in order to ensure that the manager and the employee have a mutual understanding of the problem(s)
- The availability of qualified resource persons to consult with on performance issues
- The development of a planned approach for dealing with problems
- The consistency and timeliness in dealing with performance problems

If the manager is to successfully deal with performance problems, he or she must devote the necessary time and energy to do so. This will involve developing a logical method of identifying the nature of the performance problem(s) and developing what steps are required to resolve it.

THE LEGAL FRAMEWORK

The Financial Administration Act (FAA) and the Public Service Labour Relations Act (PSLRA) were amended on April 1, 2005 to provide deputy heads with direct authority over, among other things, matters relating to termination and demotion for unsatisfactory performance.

Paragraph 12.(1)(d) of the FAA states that every deputy head may provide for the termination or employment or the demotion of persons employed in the public service whose performance, in the opinion of the deputy head, is unsatisfactory. However, the FAA also provides that any such action must be for cause.
The term “unsatisfactory” is not defined in the legislation. Its applicability would depend upon many factors, such as the nature of the job, the duties, the standards to be met, management’s expectations and perceptions, etc.

Subsection 12.2(1) of the FAA allows for sub-delegation of these authorities.

The exercise of these authorities is also subject to the provisions of subsections 11.1(f) and (g) which state that, in the exercise of its human resources management responsibilities, the Treasury Board may establish policies or issue directives respecting the exercise of the powers granted by the FAA to deputy heads in the core public administration.

The Role of the Public Service Labour Relations Board

Section 230 of the PSLRA states that in rendering a decision regarding an employee’s individual grievance relating to a termination or demotion for unsatisfactory performance, an adjudicator must determine the measures to have been for cause if “the opinion of the deputy head that the employee’s performance was unsatisfactory is determined by the adjudicator to have been reasonable”.

The language of section 230 implies that as long as the adjudicator finds that the opinion of the deputy head was reasonable, the adjudicator must decide that there was cause for the demotion or termination.

TYPES OF BEHAVIOUR THAT IMPACT PERFORMANCE

Employee behaviour can be classified in two groups: culpable and non-culpable. It is incumbent upon the manager to determine the motivation behind employee’s behaviour in order to choose the best approach to correct the behaviour.

Culpable Behaviour

Culpable behaviour describes inappropriate behaviour occurring as a result of deliberate and intentional actions on the part of an employee. For example, an employee deliberately refuses to follow established procedures and in doing so, fails to meet the expected performance standards. Disciplinary measures can be used to correct inappropriate behaviour in instances where the behaviour is culpable. Managers should contact the labour relations advisor for advice and assistance when contemplating disciplinary action arising out of culpable behaviour.

Non-Culpable Behaviour

Non-culpable behaviour describes behaviour for which the employee is not considered to be at fault. Disciplinary measures would not be appropriate in situations where an employee, because of a lack of skill, ability or training, is incapable of meeting a particular production standard or of attaining the quality of work that is expected from him or her. No amount of discipline would correct such a problem. Management should offer training, counselling or other tools applicable to the particular situation in order to correct the problem.
The specific focus of this guide is to assist managers in addressing problems in performance resulting from non-culpable behaviour.

**Incompetence**

It is essential for managers to make the distinction between incompetence and incapacity.

**Incompetence** is an employee’s inability to adequately perform the duties of his or her position. Incompetence and unsatisfactory performance are synonymous. Unsatisfactory performance must be well managed. Managers must provide employees with the tools that are required to allow them to improve their performance. These include elements such as training, coaching and regular feedback. If a decision is made to demote or terminate an employee for unsatisfactory performance, management must be in a position to demonstrate that all efforts were made to assist the employee and that despite these efforts, the employee was still incapable of improving his or her performance.

**Incapacity**

**Incapacity** is an employee’s inability to perform the duties of a position due to a physical or mental disability. Again, as in the case of incompetence, the employee is not at fault, and there is no question of wilfulness. The source of the problem is purely medical as it relates primarily to a physical or mental health problem triggered by illness, accident and sometimes disability that renders the employee unable to carry out his or her work, or a major portion of the work.

An employee’s incapacity to do his or her job in a satisfactory manner is not always obvious. The supervisor’s observations are crucial. If, and when, performance issues are confirmed to be as a result of an incapacity, it will likely trigger a duty to accommodate up to undue hardship.

When it appears that an employee has difficulty performing the duties of the position for medical reasons, the employer must not hesitate to take the steps required to have the worker undergo a medical examination. Such an assessment will determine if the employee is fit for work and if there are limitations that might require accommodation.

It is extremely important to keep in mind that managers are not qualified to make any medical judgement or assessment and therefore should not be providing any opinion to the employee (or anyone else for that matter). If a manager feels that a medical assessment (fitness to work evaluation) of the employee could be of use in determining workplace accommodation, the manager should contact the labour relations advisor for advice and guidance.

**ENCOUNTERING PERFORMANCE PROBLEMS**

It is the manager’s responsibility to ensure that all employees meet performance expectations. In this regard, performance that does not meet expectations should not be ignored or condoned as the impact may be two-fold. Firstly, employees who are performing well and meeting expectations may become demoralized when they realize that they are not treated any
differently than those who are not meeting expectations. Secondly, employees who are performing poorly may become demoralized when they realize that there are problems that have not been addressed. In addition, when performance problems are allowed to continue for years, employees, and adjudicators, will question sudden decisions to address performance problems.

Whenever faced with a potential performance problem, it is vital that the manager discuss the issue with the employee. The purpose of the discussion is to identify areas that require improvement, contributing factors and, in consultation with the employee, develop an action plan to assist the employee in improving performance. The action plan should be prepared as soon as the manager becomes aware that the employee is not meeting performance expectations, regardless of when this occurs during the review period. In addition to the action plan, it is important that the manager documents the specifics of the performance problem by identifying which of the requirements of the position are not being met and how they are not being met. Notwithstanding the above, depending on the circumstances, there may be situations where a formal action plan is not required. For instance, simply bringing a matter to the employee’s attention may be sufficient for the employee to immediately correct the problem.

If a performance deficiency is serious or persists, senior management should be informed of the situation. Unsatisfactory performance is a managerial problem that requires the support of all levels in order to be successfully resolved. In addition to informing senior management, the labour relations advisor should be contacted as he or she can provide advice on the best means of documenting the deficiencies and effectively dealing with performance issues.

**Indicators of Unsatisfactory Performance**

Managers generally agree on the measurable behaviours that ultimately lead them to conclude that an employee is not meeting performance expectations. The kind of elements that would normally be assessed and documented in a performance assessment include:

- Quality
- Quantity
- Accuracy
- Timeliness (deadlines)

There are other behaviours that are less measurable (i.e. more subjective in nature) but which are very recognizable in terms of their impact on the achievement of goals and objectives of the job. These behaviours often signal that an employee has or might develop performance problems. Some of these behaviours include:

- Appearing uncomfortable performing tasks
- Frequent absences
- Avoiding certain tasks
- Convincing others to do tasks
- Avoiding work altogether
- Uncooperative with others
- Displaying a bad attitude towards the work
- Receiving complaints from clients or co-workers
Handing in poor quality work
Consistently missing deadlines

Measuring Unsatisfactory Performance and Initiating Discussions with the Employee

Whenever the manager is not satisfied with how an employee is performing or not satisfied with the manner in which job duties are being performed, the manager, in consultation with the employee, must look into the reasons for the performance deficiencies, determine what must be done to assist the employee in improving his or her performance, provide any necessary support or guidance to achieve a satisfactory performance, and develop an action plan.

Managers who are in the habit of discussing performance on a regular and timely basis with their employees often find it easier to discuss performance weaknesses with them as well. Managers are more successful in turning unsatisfactory performance around when they demonstrate interest and encouragement towards employees and provide guidance and assistance on an ongoing basis. For discussions to be effective, they do not have to be long, formal or documented in detail but rather short and focussed discussions with the purpose of raising an employee’s performance to an acceptable level with minimal, well-timed interventions.

When informal day-to-day discussions are insufficient to correct unsatisfactory performance, a more formal approach will be required. Managers should make it a practice to discuss unsatisfactory performance cases with their immediate supervisors at least on a quarterly basis. In addition, managers should have follow-up discussions with their immediate supervisors with respect to the specifics of individual cases of unsatisfactory performance. The discussions should include an indication of what the problem is as well as what is being done to correct the problem. Such an approach will reinforce the importance of recognizing and dealing with unsatisfactory performance. It will also demonstrate a commitment to the issue since managers would be seen as giving the same priority to performance as to financial and program management.

For resolving persistent performance problems that have not been corrected through informal discussion, a longer-term, more formalized approach is required. In these situations, in addition to an action plan and regular discussions on performance, managers should ensure that regular follow-up meetings take place, after the employee’s performance assessment has been completed. This will serve as a means of tracking and evaluating the effectiveness of measures taken to deal with the performance problem. Following these meetings, senior management should be advised of particular situations so that they may be assured that the problems of unsatisfactory performance are being managed.
PERFORMANCE MANAGEMENT PROCESS

Performance management is for everyone in the workplace because all employees, at every level, need to know how they are doing in order to develop their skills and competencies and reach their full potential. Performance management that successfully encourages the majority of public service employees to develop their skills and competencies, even if only marginally, will significantly improve overall productivity because of the tens of thousands of people involved.

Performance management encompasses a set of activities that clarify what employees are expected to achieve at work and how they are expected to achieve it. These activities include defining performance expectations in terms of work objectives and expected behaviours (i.e., competencies), setting goals, providing feedback, supporting employee learning and development, and documenting performance in the employee's performance agreement.

Performance management is an ongoing process that ensures that employees get the direction, coaching and developmental opportunities they need to continually improve their performance. Because such feedback is conducted on a day-to-day basis, there should be no surprises when an employee's performance is formally assessed.

The new Treasury Board Directive on Performance Management has been introduced for employees in the core public administration to build and maintain trust between employer and employee, and create the conditions that enable all employees to maximize their contributions to the public service and provide world-class service to Canadians.

The directive provides the foundation for a fair, equitable, consistent and rigorous approach to performance management across the core public administration. Its objective is to promote a commitment, shared by managers, employees and their organizations, to sustaining a culture of high performance in the public service. With routine, year-round performance management, federal public service employees will get the direction, feedback and encouragement they need to continually improve their work and contribute to the achievement of business goals.

As managers and supervisors, the directive gives you a clear mandate to engage each and every employee who reports to you on his or her performance on an ongoing basis, and to assess how well each is meeting performance expectations. The directive provides you with a mandatory, structured and methodical approach with which to establish and document performance expectations and results, engage and coach employees, intervene early to address performance problems, target learning and development activities to enable performance improvement, and identify, acknowledge and support the career progression of strong performers. Key requirements under the directive are as follows:

- All managers and supervisors who are responsible for evaluating employee performance must successfully complete specific training in performance management.
- Departments and agencies must establish performance management programs that include the following:
• Annual written performance objectives that reflect business priorities (work objectives), expected behaviours (core competencies), and learning and development plans for all employees;
• A rating scale;
• Mid-year reviews for each employee in the form of informal conversations to review progress in achieving performance expectations;
• Annual written performance assessments for all employees;
• Active monitoring of probationary periods and attestation as to whether employees have passed them;
• Identification of cases of unsatisfactory performance at the earliest opportunity possible, with the development and regular monitoring of action plans to improve performance. If the employee does not achieve the required improvements by the deadlines specified, consequences may involve withholding the employee’s next scheduled pay increment, demotion, or termination of employment; and
• A recognition system that recognizes good performance formally and informally.

All performance management programs must include review panels at senior management and/or executive levels. Key roles and responsibilities of these panels include the following:

➢ Annually reviewing the cases of employees who have surpassed expectations to ensure that:

• A talent management plan has been discuss and, with the employee’s consent, established for the employee that includes opportunities for developmental assignments;
• Consideration has been given for formal or informal recognition of the employee; and
• The abilities and competencies of the employee are considered in human resources plans, including succession plans;

➢ Annually reviewing, or on an as-required basis, cases of employees who have not met expectations to ensure that:

• An action plan has been established for the employee, including milestones and concrete actions;
• The manager/supervisor provides, as required, updates on the implementation of the action plan;
• If the employee’s performance has not improved within the milestones in the action plan, the manager provides plans for demotion, termination, or the withholding of pay increments; and
• All follow-up actions with respect to the employee are recorded.
Reviewing, as necessary, cases where demotion, termination or the withholding of pay increments have been recommended by the employee's manager/supervisor for unsatisfactory performance to ensure that, pursuant to advice from Labour Relations:

- A consistent and fair approach is applied across the department or agency to cases of unsatisfactory performance; and
- There are no other options available to deal with the employee's performance.

All public servants in the core public administration must have a performance agreement in place signed by their manager/supervisor for the beginning of the fiscal year, which for most departments and agencies is April 1. The performance agreement must specify the employee's work objectives for the coming year and be linked to business priorities, identify expected behaviours (i.e., core competencies), and include a learning and development plan.

The performance agreement will provide the basis for annual written performance assessments, which will include a performance rating to be conducted at the end of each fiscal year. In addition, informal performance reviews are to be conducted for each and every employee at least once at mid-year to review accomplishments in relation to performance expectations and to make adjustments to performance agreements, if required.

**Work Description**

Although not the only source, the work description is a key document in identifying the performance requirements of a position. It specifies the functions and duties expected from the employee and serves as a basis for determining the group and level of the position as well as the compensation to which the employee is entitled. The work description is an invaluable tool for the manager, but also for the employee. The more current and complete the work description, the easier it is to identify and support the manager's expectations concerning the performance requirements of the position.

**Competency Profile**

The competency profile will identify the behaviours and skills required to perform tasks linked to the specific goals and objectives.

**Establishing Performance Expectations**

It is the manager’s responsibility to initiate and carry out all aspects of the performance management process. Performance goals and objectives should be clear and measurable in order to properly evaluate whether expectations are being met. The performance management process involves establishing goals, objectives and applicable measurement criteria and recording them. Required learning activities should be defined and an individual learning plan should be completed. Discussions on career interests should also be included at the employee’s request.
Employees are responsible for meeting performance standards and for actively participating in the performance management process.

The manager, in consultation with the employee, should develop performance expectations. Goals and objectives should be specific, measurable, achievable, results-oriented and timely and linked to elements such as:

- The department's mandate and organizational objectives
- The business plans and work plans
- The competency profile
- The work unit's tasks/duties and responsibilities
- The specific tasks/duties and responsibilities of the employee

**Performance Discussion and Assessment**

Once the manager has defined the goals, objectives and performance expectations and has established the measurable criteria, the information must be shared with the employee who occupies the given position. In the context of a performance discussion, sharing of information takes place between a manager and employee at the beginning of each review period and should be part of on-going communications/discussions with the employee throughout the review period.

The purpose of the performance discussion is to ensure that there are no misunderstandings between the manager and the employee and to ensure that both parties know exactly what is expected. It is therefore critical that the manager and employee have the same understanding of the performance expectations of the position and of their importance. Continuous feedback throughout the review period gives the manager an opportunity to recognize and reinforce satisfactory performance, to review the progress of the employee and/or to discuss corrective measures, and to identify any support required for improving the employee's performance. At the end of the performance review period, the manager will formally assess, in writing, the employee's performance.

Written performance assessments will assess and confirm the level of performance based on objectives, expectations and measurement criteria, identify required learning activities, and include a discussion on career interests, as appropriate. Since discussions should have taken place throughout the performance review period, there should be no surprises at this point.

**Virtual Management**

In those instances where employees are engaged in virtual reporting arrangements with their managers, it is imperative that managers continuously review the output of such employees to ensure that unsatisfactory performance issues are identified, addressed and monitored. It is even more important in these types of situations that managers ensure employees have clear objectives, are aware of the objectives, and that the work assigned is measurable.
What is a Manager to Do When They Encounter Performance Problems?

It is a manager’s right and obligation to set performance standards, goals and objectives for the section; not everything that is expected of an individual employee is contained in the work description.

Managers should also understand that the earlier on they contact their labour relations advisor, preferably as soon as they have identified problems, the easier it will be for the manager and the employee. In addition, early contact may also mean a greater chance of success and minimization of mistakes and problems that might otherwise prolong the process.

In dealing with situations of unsatisfactory performance, managers need to be mindful of and adhere to the following principles of fairness that govern the exercise of their authority to demote or terminate the employment of an employee;

- Duty to act in good faith
- Duty to act in a fair and transparent manner
- Duty to fully inform the employee of what is expected of him or her
- Duty to inform the employee that he or she is not meeting the requirements of the position, the nature of the shortfall, evidence of the shortfall and the consequences of continued failure to meet the requirements
- Duty to provide the employee with the opportunity to make the necessary adjustments to meet the requirements
- Duty to provide the employee with assistance in making adjustments
- Duty to explore alternate solutions to termination of employment or demotion

FOUR-STEP PROCESS FOR CHANGING UNSATISFACTORY PERFORMANCE

Changing unsatisfactory performance can be a long, arduous process, or it can be a relatively short and reasonably positive process, depending upon the intentions and reactions of the parties involved. When both parties recognize that a problem exists and are committed to the same goal (i.e. a productive and fully functioning employee), performance improvement can usually be achieved within a reasonable timeframe.

The four-step approach is an effective means of dealing with employees who are experiencing performance problems. However, since each case is unique, the approach will need to be adapted to deal with each individual situation. The process should be undertaken as soon as managers realize that daily informal coaching is not having the intended effect.

**NOTE:** If at any time during the four-step process the manager determines that the employee’s unsatisfactory performance is as a result of culpable behaviour (i.e. misconduct), the labour relations advisor should be contacted to determine whether disciplinary action is warranted.
Step 1: Preparing for Discussions with the Employee

If an employee is not achieving established goals and objectives and therefore not meeting performance expectations, the manager must ascertain what the performance problems are before engaging in discussions with the employee. For this determination to be made, the manager should obtain copies of the employee’s work description, the unit’s work plan, and the performance management assessment containing the goals, objectives and measurement criteria that were discussed with the employee at the outset of the performance review period. These will be invaluable tools to help the manager focus objectively on the performance requirements of the position. It is important when preparing for the meeting to ensure that the facts, along with examples and supporting documentation, can be shown to the employee (see Appendix A for a Checklist for Documenting a Performance File).

The following list outlines some important points that a manager should be considering and questions that could assist the manager during the meeting with the employee:

- What exactly is the problem?
- Examine why the problem has developed
- What situation or event caused the manager to consider the employee’s performance to be unacceptable?
- Why is the manager dissatisfied?
- What is the difference between what is being done and what is supposed to be done?
- Where does the employee need to make improvements?
- What will be the impact if the manager leaves the situation alone and does nothing to put the employee back on track?
- What could be done to correct or improve the performance weaknesses?
- Is there a skill deficiency? Are the employee’s present skills adequate for the desired performance? Has the employee demonstrated in the past that he or she could perform the task in question?
- Has training been provided to assist the employee in overcoming the deficiency?
- How often is the employee required to use the skill?
- Has the employee received regular feedback regarding performance weaknesses?
- Exactly how does the employee find out if things are going well or poorly?
- What is the result of the employee doing things his or her way instead of the way requested?
- Is there anything in the work environment that supports or reinforces the employee’s way of doing things – even though it is not the accepted way?
- Can the employee learn to improve his or her performance? Has the employee mentioned or demonstrated any limitations on learning that should be considered?
- Has the employee identified a physical or psychological condition affecting his or her ability to meet performance expectations that may require some form of accommodation?
Documentation/Confidential File

Management should try to answer all of the previously-noted questions in writing since the answers will address the problem from different perspectives and ensure that all the information is considered before any decisions are made.

Managers should ensure that all of their efforts are well documented and that answers to the questions listed above are noted along with all future notes of discussions or copies of written directions to the employee. It is also imperative that the employee be made aware of all of the documentation in his or her performance file. It is the documentation on this file that will play a vital role should the employee’s performance not improve despite the efforts made and future actions are taken.

Step 2: Meeting with the Employee

This step stresses the importance of properly approaching the employee. The meeting is not intended to be confrontational or negative; it is intended to be helpful and to allow the parties to work together as a team.

At this point, the manager has determined what is the problem, why it is important and in which areas the employee needs to make adjustments. It is now time to meet with the employee in order to obtain his or her perspective and ideas about how to improve the situation.

The purpose of the meeting is to get the employee to open up and discuss his or her perspective of the performance problem. It also serves to let the employee know that the manager is aware of the situation and is prepared to help the employee overcome the performance deficiencies, as well as to inform the employee of the possible repercussions if performance does not improve.

The manager should begin the meeting by explaining that, while certain tasks have been done well by the employee, there have been some deficiencies in performance that do not appear to have been corrected by normal, day-to-day guidance and supervision. Management should explain that a careful review of the situation has been done and that the purpose of the meeting is to discuss the problems identified. The employee should be encouraged to identify the reasons for the problems and the possible solutions. The meeting should be held in a closed office to ensure privacy.

It is important that the manager approach the discussions in a positive way. The tone of the meeting should be one of working together to identify and solve a problem. If the manager and the employee both understand the other person’s point of view, in terms of what is wrong and how it can be fixed, then the chance of resolving the problem will be greatly improved.

The manager should ask the employee questions that would help bring out the information that he or she needs before finalizing an action plan. The following points should be addressed with the employee:

- How does the employee think he or she is doing? Does he or she take pride in his or her performance … as an individual … as part of a work team?
• Does the employee understand that the things noted as deficiencies are required as part of the job?
• If the employee appears to consistently avoid doing the things on the list, why? Does the employee have an explanation for making errors when doing these tasks? Can the employee explain why he or she has difficulty doing the things in question?
• Is there anything in the workplace that is preventing the employee from doing his or her job? Does he or she know when to do what is expected?
• Are there conflicting demands on the employee’s time? Does the employee have any suggestions for correcting performance/eliminating deficiencies?
• Does the employee have any problems or concerns outside the workplace that may be interfering with his or her ability to perform in a fully satisfactory manner? The manager has a responsibility to refer an employee to the Employee Assistance Program (EAP) when he or she is aware that the employee may have personal problems that might affect the employee’s ability to perform the duties of the position. Federal Court of Appeal decision in Clare A-466-91.
• Does the employee realize that there may be serious repercussions if he or she does not do the job properly? What would the employee expect to happen if things continue as they now are? What does the employee see as the impact on his or her colleagues?

The manager should tell the employee that he or she will be reviewing all of the facts, considering the best way to help the employee, and establishing an action plan to help the employee improve the performance weaknesses noted. The manager should also advise the employee that another meeting will be scheduled within a few days to discuss the action plan.

During the meeting, the manager should make notes of the discussion and try as much as possible to record exactly what the employee said in order to avoid a subjective interpretation of the discussion. The record is important because:

• It will demonstrate to the employee that the manager is viewing the matter seriously and that he or she is willing to consider the employee’s opinion on how to correct performance
• It demonstrates to the employee that the manager is committed to supporting the employee throughout the process
• It will be required if efforts to correct performance are not successful

These meetings do not always run smoothly or without some degree of confrontation. Certain employees will ask or even insist that a union representative be present at the meeting. Before agreeing to union representation, the matter should be discussed with the labour relations advisor. While union representation must be allowed in meetings on disciplinary measures, there is no legal or contractual obligation to accept a union representative in a meeting related to performance. However, there may be circumstances where management may want to allow a union representative to attend as an observer and, depending on the issues, management might want to have their labour relations advisor also present. However, it is important to keep in mind that the purpose of such a meeting is to allow discussion and exchange between the manager and the employee and not between other parties.
Step 3: Developing an Action Plan

The information gathered in Steps 1 and 2 should be reviewed and a decision made as to how best to resolve the performance problem(s). It is important to look at the problem(s) as a whole and consider the environment as well as the individual employee. If the employee has disclosed any physical or psychological problems that would inhibit efforts to improve performance, the manager should seek advice from the labour relations advisor or the Employee Assistance Program in order to pursue avenues to assist the employee.

The action plan identifies:

- The performance shortfall(s) and the cause(s)
- The specific action(s) the manager and the employee will undertake to correct the problem
- The measurement criteria
- The person(s) responsible for the action(s)
- The timeframes within which the manager and the employee will complete the activities
- The date on which the manager and the employee will follow up on the results
- The results of the action plan

Questions that can be of assistance in drafting the action plan:

- Are there any job aids that would be helpful (i.e. assigning a mentor or tutor to the employee, acquiring a specific piece of equipment or a specialized computer software package, developing written instructions or checklists)?
- Would the employee respond better to being shown what to do, rather than formal training?
- Would informal, on-the-job training be sufficient?
- If formal training is indicated, what kind of training would be best?
- Is there anything in the work environment that needs to be changed so that the employee has the best possible conditions in which to improve (i.e. improved lighting, ergonomic modifications, reduction of visual or auditory distractions)?
- Does management need to intervene and reduce interruptions such as unnecessary telephone calls or demands from co-workers, or perhaps assist the employee in dealing with competing priorities?
- Are there any solutions that seem inappropriate or impossible to implement?
- What will it cost to go ahead with the solution?
- What will be the value added to proceed?
- Does management believe it will be worthwhile?
- Are there any solutions that appear to be beyond the manager’s resources or authority?
- Which options will provide the best results with the least disruption and cost?
- Which options is the manager best equipped to try?

Once the above questions have been answered, the manager will be ready to develop an action plan designed to change the employee’s performance. Essentially, the manager needs to set
out each aspect of performance that requires change, provide the details for change, and establish a reasonable timeline for the change to occur.

After a draft action plan has been prepared, the manager should meet with the employee and go through the action plan, item by item and step by step. Agreed upon suggestions or observations that may modify the action plan must be incorporated before the action plan is signed off. The labour relations advisor may be consulted at any point in the preparation of an action plan to provide input and support in the process.

The manager should make certain that the employee understands and takes ownership of the action plan. Deadlines should be reasonable and the employee committed to meeting them. The employee should be assured that efforts taken to improve performance will remain confidential and that the employee is supported by the manager. The emphasis is always on bringing performance back in line with performance expectations. The employee should also be provided with confirmation as to when the next meeting will take place to discuss progress.

**Step 4: Following Up**

It is critical to plan and carry out regular follow up on the action plan. Failure to do so may undermine the manager's credibility as an active partner in resolving performance problems and may result in the manager condoning the exact performance problem(s) that he or she is trying to help the employee correct. This in turn weakens the manager's ability to take more serious action if performance does not improve. The manager must follow up regularly on the action plan to ensure that progress is made. If not, it is possible that the process will have to be re-started, which would prove frustrating for the manager, the employee and co-workers. Follow-up discussions are relatively simple to plan and carry out. On a date agreed to in the action plan, a confidential meeting with the employee should take place to discuss each of the items identified for improvement.

The follow-up discussion should include:

- An acknowledgement of progress/objectives achieved
- An identification of objectives not achieved and any remaining deficiencies
- An opportunity for the employee to explain why certain objectives were not met as well as an opportunity for the employee to suggest how these objectives might be achieved
- Direction from the manager and adjustment of the action plan to address the remaining deficiencies

Follow-up discussions should be based on a written report that clearly documents where deficiencies still remain. Essentially, the manager will go through Step 2 again with the employee. At the end of the follow-up discussion, the manager should consider what has been said and adjust the action plan accordingly. If the situation improves, there should be fewer items to be addressed in the action plan covering the next follow-up period. The amended action plan will serve to clearly demonstrate progress to both the manager and the employee.
Steps 2, 3, and 4 are repeated until the employee’s performance has improved to a satisfactory level or until the manager reaches the conclusion that, based on the written record, improvement will not occur.

EXERCISING OPTIONS WHEN PERFORMANCE DOES NOT IMPROVE

Once a determination is made that an employee is not able to perform to the level of the required standards and that the situation is unlikely to improve, it is time for the manager to look at other options.

Before taking action to demote or terminate an employee’s employment, the manager must consider all reasonable alternatives and come to the conclusion that such options are not viable. The duty to explore alternate solutions is an obligation on the part of the manager to ensure an employee’s continued employment at the same or equivalent salary.

In looking at options, the manager will need to have at his or her disposal all relevant employee and vacant position information to assist him or her in determining a reasonable course of action. This information will be used to assist the manager in matching an employee to a position.

The following types of information will assist the manager when looking at options:

- An outline of employee qualifications (i.e. educational background, experience, official language proficiency, knowledge, abilities, personal suitability) and interests
- An employee’s level of security clearance
- An employee’s previous performance assessments
- A list of employment opportunities
- The work description of the position(s) being considered

Fitness to Work Assessment

In situations where a physical or psychological condition may be affecting the employee’s ability to perform his or her duties to a satisfactory performance level, the manager may request, where reasonable grounds exist, that the employee undergo a fitness to work assessment. The manager must explain to the employee the reasons for the request to have a medical examination conducted.

Managers can ask an employee to submit to an evaluation by a Health Canada physician to determine if the employee has any limitation that would prevent him or her from performing at a satisfactory level. Should the employee choose instead to attend his or her own physician, he or she has the right to do so. The employee will then provide the manager with a report from the physician attesting to the employee’s medical fitness as well as to any physical limitations on the part of the employee that the physician may deem relevant. In the event that the information provided by the employee’s physician is unclear or insufficient, the manager may request that Health Canada seek additional information/clarification from the employee’s physician.
It should be noted that legislation precludes Health Canada physicians from disclosing any information relating to the actual injury or illness suffered by the employee. The physicians can only advise that the employee is fit, fit with limitations, or unfit for work.

**Duty to Accommodate**

Every reasonable effort should be made to accommodate an employee who is facing a physical or psychological health problem. There are many ways in which work and the work environment can be adapted to allow for continued employment in these types of situations.

**Employers are obligated to accommodate an employee up to "undue hardship".** Undue hardship refers to the limit of an employer’s ability to accommodate an employee without experiencing an unreasonable amount of difficulty. Employers are expected to exhaust all reasonable possibilities for accommodation before they can claim undue hardship.

Subsection 15(2) of the *Canadian Human Rights Act* states that undue hardship exists when "accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost".

The Supreme Court of Canada has identified other factors that may also be considered:

- The type of work performed
- The size of the workforce
- The interchangeability of job duties
- The financial ability to accommodate
- The impact on a collective agreement
- The impact on employee morale

Refer to *ESDC's Guidelines - Duty to Accommodate in the Workplace – A Shared Responsibility* for more information.

**Consideration of Options When Performance Does Not Improve**

Options fall into four main groupings:

- Management-initiated options requiring employee consent: assignment and deployment
- Employee-initiated options requiring management support: voluntary demotion or medical retirement
- Employee-initiated options: resignation or retirement
- Management-initiated options: involuntary demotion or termination (including termination during the probationary period)

When exercising one of the above options, it is important for managers to make their selection in good faith.
Demotion or Termination of Employment

In dealing with unsatisfactory performance, the manager is embarking on a course of action that may ultimately lead to a demotion or termination of employment that has a significant impact on an employee’s personal and professional life. It is therefore critical that managers exercise the utmost diligence in their efforts to support employees throughout the performance management process.

Canadian Labour Arbitration, Brown and Beatty, states that an employer may exercise its authority to terminate employment for non-culpable deficient work performance "only where it has been established that the employee’s shortcomings are such to undermine the employment relationship and when it is also established that the situation is unlikely to improve”.

The Treasury Board Secretariat has developed a Guideline for Termination or Demotion for Unsatisfactory Performance; Termination or Demotion for Reasons Other Than Breaches of Discipline or Misconduct; and Termination of Employment During Probation. In this Guideline, it is suggested that in making a decision to terminate employment or to demote an employee whose performance is unsatisfactory, the following guiding principles are key:

- The required level of job performance is determined
- The level of performance required is communicated to the employee
- Reasonable levels of supervision and instruction are provided to the employee
- The employee is allowed a reasonable period of time to meet the required level of job performance
- The employee is provided with reasonable warnings about the consequences of his or her continued failure to meet the required level of job performance
- Once the inability to meet the required level of job performance has been established, reasonable alternative employment within the competence of the employee is considered

Employees have the legal right to challenge management’s decision to exercise its authority under paragraph 12.(1)(d) of the FAA. An employee who is demoted or whose employment is terminated under the above authority and who wishes to grieve such a decision may do so by filing a grievance at the final level of the grievance procedure. An employee who is dissatisfied with the final-level grievance response may refer the grievance to the Public Service Labour Relations Board for review by an independent third party.
IMPORTANT DECISIONS ON THIS ISSUE

Edith Cavell 6 L.A.C.(3d) 229, 1982
Stitt vs TBS (Canada Revenue Customs and Excise) 166-2-25981, February 1995
Lundin vs TBS (Statistics Canada) 166-2-26174, January 1996
Habib vs TBS (Veterans Affairs Canada) 166-2-26634, May 1996
Nnagbo vs TBS (Public Works and Government Services Canada) 166-2-30045, January 2001
Morissette vs TBS (Department of Justice) 166-2-34132, February 2006
O’Leary vs. TBS (Department of Indian Affairs and Northern Development) 166-2-35109, January 2007
Raymond vs Deputy Head (Department of Finance) 566-2-2340, February 2010
Plamondon vs Deputy Head (Department of Foreign Affairs and International Trade) 566-2-2858, July 2011
Mazerolle vs. Deputy Head (Department of Citizenship and Immigration) 566-2-3906 and 3907, January 2012
APPENDIX A

CHECKLIST FOR DOCUMENTING A PERFORMANCE FILE

Management should have a comprehensive, well-documented confidential file for every employee.

The documentation on file should:

- Provide a working document outlining performance throughout the course of a given performance review period
- Record objective facts, concerning actual performance, as they occur rather than relying on memory (include dates, times, parties involved in the record of facts)
- Record only job-related behaviour
- Record direct observations rather than relying on hearsay reports from others
- Describe specific behaviour rather than making evaluative statements or describing an employee’s personality
- Record both positive and negative behaviours
- Keep the same level of detail and format of documentation for each employee
- Record on-going discussions that have taken place with employees over the course of a review period
- Be accurate – document facts, not opinions
- Be consistent
- Be congruent with actions taken
- Be shown to and shared with the employee (there should be no surprises)
- Not condemn an employee for one undesirable action
- Record efforts taken to improve performance along with detailed action plans
- Record options investigated when performance does not improve

How much documentation is required?

- Enough to have a third party reach the same conclusion
- Minute details are necessary
- Only those aspects of performance that significantly contribute to or hamper the work effort are appropriate
APPENDIX B

CHECKLIST OF KEY QUESTIONS MANAGERS SHOULD ASK THEMSELVES

The following is a list of questions that managers should ask themselves when an employee is not performing at an expected level:

- Were the goals, objectives, measurement criteria and performance expectations discussed with the employee at the beginning of the performance review period?
- Did the employee clearly understand what was expected of him or her?
- Were proper work instructions given?
- Have performance discussions with the employee taken place on a regular basis?
- What are the performance deficiencies?
- Has the employee been informed of performance deficiencies?
- Were performance deficiencies discussed with the employee in concrete terms?
- Have the reasons for the deficiencies in performance been determined (i.e. culpable vs non-culpable)?
- What attempts have been made to assist the employee in improving performance?
- Has the employee been given the necessary support and guidance to achieve satisfactory performance?
- Has the employee been given adequate time to improve performance?
- Has an action plan been prepared?
- Has appropriate follow up been done?
- Has the performance file been well documented?
- Have all performance discussions been recorded?
- Has the employee been informed in writing of the consequences of continued failure to meet the requirements of the position?
- Has senior management been made aware of employees with performance problems?
- Is the employee capable of meeting performance expectations with assistance? If not, have other viable options been explored?