

## ARTICLE 22

### PERFORMANCE APPRAISALS

#### 22.1. Introduction

The Parties agree that the primary objectives of performance appraisals are to articulate standards for Immigration Judge performance, keep Judges aware of said standards, and improve judicial performance. Nothing in this Article is intended, nor shall be interpreted to infringe upon Judges' authority pursuant to 8 C.F.R. § 1003.10(b) "to exercise their independent judgment and discretion and take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases." The parties recognize further that pursuant to 8 C.F.R. § 1003.0(b)(1)(ii), the Director of EOIR has the authority to "[d]irect the conduct of all EOIR employees to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases; to direct that the adjudication of certain cases be deferred; to regulate the assignment of adjudicators to cases; and to otherwise manage the docket of matters to be decided by... the immigration judges."

#### 22.2. Appraisal Period

The appraisal period for Judges will be two (2) years.

#### 22.3. General Standards of Performance Management:

- a. The Parties agree that transparency, fairness, and thoroughness are important principles in the evaluation of performance. Performance appraisals will be made in a fair and objective manner. Performance standards will be used to assess actual work performance in relation to the performance requirements of the position and will be based on a reasonable and representative sample of the Judge's work.
- b. The Agency has determined that it will use the evaluation process to evaluate and improve a Judges performance and when helpful, will discuss a Judge's strengths and weaknesses.
- c. All performance standards and elements, critical and non-critical, that provide the basis of a Judge's appraisal will be written and included in the Judge's Performance Work Plan (PWP).
- d. The Agency recognizes that pursuant to 5 U.S.C. § 4302, performance standards will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria related to the positions in question.
- e. All aspects of each performance standard, including, if requested, specific examples of what is required to meet each element of each performance standard will be communicated preferably through a face-to-face meeting or tele-video conference with the affected Judge at the time the Judge receives the PWP. Judges will not be held

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accountable or responsible for their elements and standards until they are received by the Judges. Supervisory expectations will be communicated and discussed as needed. If requested, a supervisor will describe what is required to meet each element of each performance standard with specificity and will provide a clear means for a Judge to self-assess whether objectives have been met.

- f. Each standard and each element of each standard included in the PWP will be numbered and/or lettered for identification purposes. The Agency will inform the Judge in writing, at the time the elements and standards are communicated, whether aspects of any elements or standards are to be accorded different weights.
- g. The Agency has determined that only time spent performing work related to a Judge's PWP will be considered in performance appraisals.
- h. When evaluating individual Judge performance with respect to numerical-based performance standards, the Agency will take into account relevant factors that may affect the Judge's ability to meet such performance standards, including:
  - availability of resources;
  - approved leave;
  - changes in the law that substantially increase the time required for adjudication of cases;
  - official duties that do not involve the adjudication of cases;
  - approved official time in accordance with Article 5;
  - that the Judge has been on the bench 24 months or less; and
  - other factors not in the control of the Judge (including, but not limited to, the availability of interpreters, respondents in detained settings, and security).

A Judge's schedule selection pursuant to Article 17 is not a relevant factor when assessing performance.

- i. The Parties agree that a Judge's political affiliation or perceived or actual political ideology will not be considered when rating the Judge.
- j. The Agency will not release an individual performance evaluation rating unless required by law, rule or regulation. To the furthest extent possible, the Agency will ensure that performance evaluations (as well as mid-term progress reviews) remain confidential.
- k. When Judges are detailed or temporarily promoted within EOIR and the assignment is expected to last one hundred-twenty (120) days or more, the Agency will provide the Judges with critical elements and standards as soon as possible (no later than thirty (30) days from the beginning of the assignment). An interim rating must be prepared when the detail or temporary promotion lasts at least 90 days. These ratings will be considered in deriving the Judge's next rating of record.
- l. A Judge who is designated to act as a supervisory Judge must be in a supervisory capacity for at least ninety (90) days before conducting performance appraisals. If the acting supervisor has not been in the position for at least ninety (90) days, the appraisal period will be extended to meet the ninety (90) day requirement.

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- m. It is understood that there is no predetermined distribution of ratings among Judges.

#### 22.4 Communications Regarding Performance

- a. The Agency shall appraise performance on a continuing basis, keep Judges informed of how they are measuring up to performance standards, and provide regular feedback that is constructive and meaningful, including identifying performance strengths and areas for improvement. As part of this process, supervisors may observe and/or listen to judicial proceedings for management purposes. At least one formal progress review will be conducted, normally halfway through the appraisal cycle.
- b. Working rules, policies, and procedures shall be communicated to the Judges before they can be held responsible for performance related to such rules, policies, or procedures. A Judge may request, and the supervisor will provide, a written clarification of a work rule, policy, or procedure. The Agency also may provide appropriate training as it deems necessary.
- c. At the request of the Judge, the Agency will make available on a routine basis reports necessary for the Judge to assess his or her performance based on any numerical standards imposed by the Agency.
- d. In the event the supervisor has concerns about Judge performance, the supervisor should counsel the Judge in relation to his/her performance. The Agency will provide assistance to any employee whose work is below the Satisfactory level to improve his/her performance, including providing advice, identifying and providing supplemental training, and providing additional coaching, monitoring, mentoring, and other developmental activities, as appropriate, to help improve Judge performance. Such counselling and assistance will normally take place when a supervisor notices a decrease in performance.
- e. The supervisor also may write an evaluative recordation to document a performance issue of a Judge. An "evaluative recordation" is a supervisor's written record of a performance deficiency. If a supervisor writes an evaluative recordation, a copy will be furnished to the Judge within a reasonable time following the event which it addresses. Absent extenuating circumstances, the evaluative recordation will be provided to the Judge by the end of the quarter in which it occurs.
- f. If the Agency plans to observe a hearing of a Judge for performance evaluation purposes, the Agency will attempt to notify the Judge in advance if possible. Feedback from the observation will be provided to the Judge as promptly as possible, but in any event normally within one week of the observation.
- g. Whenever performance standards contain an explicit recognition of the possibility of a waiver or excuse, the Agency shall publish to all Judges, at the conclusion of each rating cycle, a list of all known possible bases and reasons which would justify the grant of a waiver.

## 22.5 Mechanics of the Appraisal and its Use

- a. The PWP will be issued at the beginning of each appraisal period, normally within thirty (30) days of the beginning of the appraisal period. Judges will be evaluated based on a comparison of performance with the standards established for the appraisal period. Recognizing that performance standards are subject to change, Judges' performance will be appraised according to the standard that was in effect at the time the work was performed.
- b. Judges will sign and date the PWP for each rating cycle to show that it was received and discussed with them. A Judge's signature on the PWP does not indicate agreement with the Agency's established elements and standards.
- c. Prior to rating the Judge, the supervisor will allow the Judge to provide a list of cases which he or she feels is representative of the quality of his or her legal ability during the rating period and will take these cases into consideration. The Judge may also prepare a written self-appraisal, respond to a performance appraisal, or respond to written interim comments with written comments. The Judge's written comments will be placed in the employee performance folder with the performance appraisal if requested. Upon request, the Agency will provide a Judge with a reasonable amount of time out of court and away from case-related duties to prepare such written comments.
- d. Prior to rating a Judge below Satisfactory in any element, the rating official will give the Judge an opportunity to provide input regarding his/her performance, including any relevant factors that should be considered as described in subsection 22.3.h. of this Article. If the rating official plans to rely on information identified in the review or observation of a specific proceeding when determining his/her rating, the rating official will provide the relevant Alien Registration Number (A number(s)) to the Judge.
- e. The rating official will discuss a Judge's performance appraisal at the time such appraisal is issued to the Judge. A written narrative is encouraged for each rating level but is required for any unsatisfactory evaluation.
- f. A Judge's signature on his or her performance appraisal indicates only that the performance appraisal has been received and not that the Judge agrees with the performance appraisal.
- g. Use of Rating on a Performance Appraisal:
  - i. a rating on a performance appraisal record cannot be used to bar or in any way affect placement on the Reassignment Register under Article 13 of this Agreement.
  - ii. a rating on a performance appraisal record does not in any way impact the advancement of a Judge through the Immigration Judge pay levels.
  - iii. a less than satisfactory rating on a performance appraisal record will

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impact a Judge's eligibility for a special work opportunity, as defined in article 13.3 of this Agreement, only to the extent that the rating is relevant to the specific work opportunity.

- iv. a Judge will be advised each time an appraisal is used in a personnel action.

## 22.6 Consequences of Ratings of Less than Satisfactory Performance: Performance Improvement Plans

### 22.6.1 Addressing Unacceptable Performance

- a. If at any time during the performance appraisal cycle a Judge's performance is determined to be unsatisfactory in one or more critical elements, the Agency will notify the Judge in writing of the critical element(s) in which performance is unsatisfactory and inform the Judge in writing of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position. This written notice will be called a "Performance Improvement Plan" (PIP). The notice will advise the Judge that he/she may request NAIJ representation in this process.
- b. The PIP will also inform the Judge that unless his or her performance in the critical element(s) improves to and is sustained at an acceptable level for at least one year, the Judge may be removed or reassigned.
- c. For each critical element in which the Judge's performance is unsatisfactory, the Agency shall afford him or her a reasonable opportunity of at least ninety (90) days to demonstrate acceptable performance.
- d. As part of the Judge's opportunity to demonstrate acceptable performance, the Agency shall offer assistance in improving unacceptable performance.
- e. The Agency will describe with specificity the actions the Judge must take to bring his or her performance to at least an "Improvement Needed" level. Such description must include a list of the standards to be met from the PWP.
- f. Prior to rating a Judge unsatisfactory, management will consult with the rating official's backup Assistant Chief Immigration Judge, if one has been designated.

### 22.6.2 Administration of the PIP

- a. The Agency will meet with the Judge, preferably in-person, to explain the PIP process and expectations, and to answer any questions. The Judge will be advised in advance of the meeting that he/she may have an Association representative and allowed a reasonable amount of time to get a representative for the meeting if he/she so chooses.
- b. A Judge should be an active participant during the PIP process, including offering

suggestions for specific forms of ameliorative assistance. The PIP process is intended to be an interactive process with the goal of improving a Judge's performance. The process of identifying appropriate forms of ameliorative assistance should include a give-and-take of ideas. The Agency agrees to consider any reasonable request made by a Judge for assistance, including but not limited to CLE's, peer mentoring, observation, and appropriate training. If the Agency denies any written request of the Judge, it will provide a reason in writing. Once the ameliorative assistance to be given to a Judge has been identified, it will be memorialized in writing.

- c. If the Judge so requests, he or she will be provided a reasonable amount of time off the bench away from case processing duties to provide a self-assessment to be attached to the PIP.

## 22.7 Adverse Actions

Adverse Actions based on unsatisfactory performance shall be taken using the procedures provided in Articles 10.4 and 10.5 of the collective bargaining agreement except as provided below.

- a. The Parties recognize that the regulations governing performance-based actions require a final agency decision to be issued within sixty (60) days of the date the Judge is notified of the proposed action. Due to the regulatory time constraints, a Judge shall generally be limited to the twenty (20) day response period provided in Article 10 except:
  - i. when the request for an extension of time is based on the Judge's need to obtain medical information or examination when the Judge has a medical issue relevant to the proposed action;
  - ii. when the Judge has requested to make an oral reply and such reply cannot be arranged within the initial 20 day response period;
  - iii. when the Judge plans to raise the issue of a reasonable accommodation of a handicapping condition in his or her response; or
  - iv. when the Judge would like to be considered for reassignment to a different position.

In sections i, iii and iv above, the Judge shall state in his or her request for an extension the basis for the request.

- b. The Agency's notice of a proposed personnel action to a Judge will include a statement of the Judge's right to an attorney and/or an Association representative.
- c. At the time the Agency issues its notice of proposed action, it shall include a letter written by the Association that outlines the Judge's right to representation and his or her appeal rights. The Association's letter will be approved by the Agency before it is included. The Agency will not reject the letter without reasonable grounds.

## 22.8 Mechanism for Continuing Dialogue on Performance Standards

- a. In the hopes of preventing the need to bargain in the future, and in the recognition that input from the field is helpful to develop and implement standards in an expeditious way, when the Agency plans to revise performance standards, the Agency will provide NAIJ with advance notice of its intent and will meet with NAIJ, at NAIJ's request, to discuss the need and process for revising standards.
- b. Within one week of the meeting, NAIJ may offer and management will consider comments or suggested changes regarding the Agency's numeric performance goals. Any suggested change must include a justification for the proposed change and its impact on docket efficiency and court operations.
- c. The Agency will provide a response to NAIJ's suggested change(s), either in writing or in a meeting, as soon as practicable but before any final decisions are made. The Agency's response will clearly indicate the action(s) that will or will not be taken and the reasons therefor.
- d. These procedures are not required when the Agency decides to relax a numerical performance standard in the Judges' favor.
- e. Nothing in this section is intended to abrogate either parties' rights under labor law.

## 22.9. Surveys

- a. To evaluate the performance of individual Judges to promote judicial self-improvement and enhance the quality of any Judge Corps as a whole, input from sources with personal and current knowledge of a Judge has been found to be valuable and is recommended by professional organizations and scholars in the field.
- b. The Agency will reconstitute the committee to finalize research and development of a survey tool to assess Judge and court performance that will be available to parties appearing before the court, as well as court staff. The Committee will be comprised of one NAIJ designee, one Judge selected by the Agency pursuant to the terms of Article 13.3 (special work opportunities), and up to two Agency representatives as appropriate. The Agency will strive to finalize the survey within six months of the effective date of this article.
- c. The Agency will implement a pilot program to use the surveys within eighteen months of the effective date of this Article.
- d. Information collected from surveys is intended to be used primarily for self-improvement of Judges and improving continuing education programs for Judges.

## 22.10 Miscellaneous matters

- a. To the extent not prohibited by law, the Agency will provide the Association with copies of unsatisfactory performance appraisals, in the most unsanitized manner

allowable by law, simultaneously with their issuance to Judges.

- b. All aspects of the Performance Appraisal Program (PAP) are grievable, to the full extent provided by law, under the terms of the negotiated grievance procedure, previously agreed upon by the parties.
- c. Nothing in this Article is to be construed as a waiver of the Association's right to request additional information under other authorities such as the Freedom of Information Act, Privacy Act, or Civil Service Reform Act.

For the Agency:

Katherine H. Keiley

11-21-17  
Date

For the National Association of Immigration Judges:

Denise Norman Seavin

11-21-17  
Date

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