



## **Overview of EOIR Discipline and Performance Protocols**

March 13, 2021

For immigration judges, the concepts of performance evaluations and discipline are separate but also inextricably bound together. With respect to immigration judge discipline, the discipline system employed by EOIR is obscure and largely unknown to judges.

The EOIR discipline system is significantly flawed. When complaints are made against an immigration judge, the judge is often not made aware of the existence of the complaint in a timely fashion. There is also no transparency or consistency with regard to any sanction imposed, leaving the public and judges themselves distrustful of the system. Some complaints involve legal issues more appropriately resolved through the appeals process and are swiftly dismissed, without even notice to the judge. While intemperate behavior could be categorized as a failure to meet performance standards or misconduct amenable to discipline, there is no clear line as to when those distinctions are made. We recognize there is a delicate balance between personal privacy and public disclosure, but more transparency regarding the process and outcomes is needed.

Separate from the discipline process are judicial performance evaluations. The performance evaluation system has been turned into a mechanism to enforce the political will of the then-current administration on the immigration court and immigration judges. The current system places inappropriate focus on “organizational results,” which EOIR has equated with production quotas and time-based deadlines. *See attached* Performance Appraisal Record for the 2019-2021 rating period. More importantly, the focus on quantity has supplanted quality.

The major flaw in the current evaluation and discipline structure for immigration judges stems from the fact that DOJ considers and treats immigration judges as merely attorney employees and not as judges. This violates the immigration court’s organic statute. By statute, we are attorneys appointed by the Attorney General to serve as judges. Since the language clearly reflects our judicial function once appointed, a traditional judicial model for performance evaluation and discipline is warranted.

The current protocols employed by EOIR stand in stark contrast to how other courts nationwide evaluate judges. The well-respected Institute for the Advancement of the American Legal

System (IAALS) has identified four core principles for a well-constructed judicial performance evaluation program. These core principles are: transparency, fairness, thoroughness and shared expectations. See [Transparent Courthouse®: A Blueprint for Judicial Performance Evaluation | IAALS](#) and [Transparent Courthouse Revisited | IAALS](#),

There is also general agreement that the proper criteria for judicial evaluations are: legal ability, integrity and impartiality, communication skills, professionalism and temperament, and administrative capacity. [ABA Model Rules for Judicial Disciplinary Enforcement](#). Virtually universally, procedures for judicial evaluation utilize surveys of stakeholders and an independent commission composed of judges, lawyers and stakeholder representatives.

The grounds for judicial discipline are also well-agreed upon: any conduct constituting a violation of the judicial code of conduct or applicable ethics codes or a willful violation of a valid order of a higher court or disciplinary authority.

The EOIR performance appraisal structure and discipline criteria do not come close to approximating a neutral and transparent judicial discipline system. DOJ must completely revise the current process to provide transparency and appropriate consequences for violations in fairness to both the public and the judges involved.

Attachments:

- 1) Description of the current complaint process that is administered by EOIR's Office of the Chief Immigration Judge.
- 2) The discipline article of NAIJ's current collective bargaining agreement (Article 10), which explains step-by-step how EOIR is to fairly conduct discipline.
- 3) Sample Performance Appraisal Plan showing the current immigration judge performance standards which immigration judges must meet to be considered satisfactory.
- 4) Collective bargaining agreement (Article 22) governing application of performance appraisal standards.

For further information, contact:

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## Summary of EOIR Procedure for Handling Complaints Concerning EOIR Adjudicators

last updated October 15, 2018

The Executive Office for Immigration Review (EOIR) is responsible for adjudicating immigration cases by conducting immigration court proceedings, appellate reviews, and administrative hearings. EOIR regularly monitors the performance and conduct of its adjudicators through daily supervision by EOIR's three adjudicating components: the Office of the Chief Immigration Judge (OCIJ), the Board of Immigration Appeals (BIA), and the Office of the Chief Administrative Hearing Officer (OCAHO). In instances where concerns regarding the conduct of an immigration judge, board member, or administrative law judge (collectively, adjudicator) arise, EOIR is committed to ensuring that any allegations of judicial misconduct are investigated and resolved in a fair and expeditious manner.

### **Definitions and Summary**

Judicial misconduct is conduct by an adjudicator that may adversely affect the fair, effective, or expeditious administration of the work of EOIR's adjudicating components. A complaint is information that comes to the attention of EOIR suggesting that an EOIR adjudicator may have engaged in judicial misconduct.

Complaints concerning EOIR adjudicators may originate in one of three ways:

1. *Formal Written Complaint.* An individual or group may file a formal written complaint with EOIR's Judicial Conduct and Professionalism Unit (JCPU).<sup>1</sup> Once docketed, formal written complaints shall not be confidential, unless required by law or policy.
2. *Governmental Referral.* An EOIR component, another Department of Justice (DOJ) component, or another U.S. government agency, such as the Department of Homeland Security, may refer information to the JCPU that suggests that an adjudicator may have engaged in judicial misconduct. Except where required by law or agency-wide policy, governmental referrals shall not be confidential.
3. *Information from Any Source.* When information suggesting that an adjudicator may have engaged in judicial misconduct comes to the attention of any EOIR management official, that official shall bring the information to the attention of the JCPU for identification of a complaint. Such information may arise through a variety of channels including, but not limited to, news reports, federal court decisions, or routine reviews of agency proceedings and decisions.

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<sup>1</sup> The contact information for the Judicial Conduct and Professionalism Unit is as follows:

Executive Office for Immigration Review  
attn.: Judicial Conduct and Professionalism Unit  
5107 Leesburg Pike, Suite 2600  
Falls Church, VA 22041  
judicial.conduct@usdoj.gov

Complaints filed directly with an adjudicating component, including those filed with an adjudicator's supervisor, will ordinarily be forwarded to the Judicial Conduct and Professionalism Unit for processing.

## **Requirements and Intake**

### **Formal Written Complaints and Governmental Referrals**

Any group or individual may file a formal written complaint alleging that an EOIR adjudicator engaged in judicial misconduct. The complaint must be sent by email or postal mail to EOIR's Judicial Conduct and Professionalism Unit.<sup>2</sup>

An EOIR component,<sup>3</sup> another DOJ component, or another U.S. government agency may initiate a governmental referral to convey to the JCPU information suggesting that an adjudicator engaged in judicial misconduct.<sup>4</sup>

To qualify as a formal written complaint or a governmental referral, a communication must include:

1. The name of the adjudicator;
2. A statement describing the conduct at issue;
3. The time and place of the conduct, if known;
4. Any associated A-numbers or other information to permit identification of the proceedings in question; and
5. Any witnesses to the conduct.

Formal written complaints must contain adequate contact information for the complainant, such as name, address, telephone number, and email address. Governmental referrals must identify the referring individual and agency.

Formal written complaints and governmental referrals are limited to those involving active EOIR employees currently engaged in adjudicating cases in one of EOIR's adjudicating components.

A formal written complaint or governmental referral is not a means to:

1. Challenge an unfavorable decision;
2. Challenge general misconduct unrelated to an adjudicator's judicial role;
3. Request that an adjudicator withdraw from hearing a case;
4. Express disapproval of or disagreement with the outcome of an adjudicator's decision, unless that outcome reflects alleged judicial misconduct; or
5. Criticize or express political disagreement with established law or policy or an adjudicator's adherence to such law or policy.

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<sup>2</sup> See footnote 1, above, for contact information.

<sup>3</sup>A supervisor should report suspected judicial misconduct of an EOIR adjudicator discovered during the normal course of supervisory duties.

<sup>4</sup>A governmental referral by one EOIR component about an adjudicator in a different EOIR component must be made by the referring component's head or his or her designee.

A formal written complaint or governmental referral should not be filed to harass, threaten, intimidate, or retaliate against an adjudicator.<sup>5</sup>

Upon receiving a formal written complaint concerning an adjudicator from an identifiable complainant, the JCPU will acknowledge receipt of the complaint. For formal written complaints and government referrals, the JCPU will determine whether the alleged conduct, if true, states a claim of judicial misconduct. If not, the JCPU will make a recommendation to the adjudicator's supervisor that the allegations not be docketed as a complaint. If the supervisor concurs, the JCPU will close the matter without docketing it.

### **Information from Any Source**

Information from any source suggesting that an EOIR adjudicator engaged in judicial misconduct, which does not meet the requirements of a formal written complaint or a governmental referral, may be identified and docketed as a complaint by the JCPU. Such information may come to the attention of EOIR through a variety of channels including, but not limited to, news reports, federal court decisions, or routine reviews of agency proceedings and decisions.

The JCPU, in consultation with the adjudicator's supervisor, will make a determination whether information that has come to EOIR's attention suggests that an adjudicator has engaged in judicial misconduct and whether the information warrants being docketed as a complaint.

### **Intra-EOIR Referrals**

An immigration judge may raise issues with the conduct of a board member to the chief immigration judge or his or her designee, who, following an independent assessment, will make a determination whether OCIJ should initiate a governmental referral to the JCPU. Similarly, a board member may raise issues with the conduct of an immigration judge to the chairman or his or her designee, who, following an independent assessment, will make a determination whether the BIA should initiate a governmental referral to the JCPU. If an immigration judge and a board member raise reciprocal issues concerning the same case or matter, the JCPU will coordinate with the component heads to determine whether the allegations warrant being docketed as complaints and to ensure that the allegations are resolved consistently.

### **Docketing**

If the JCPU determines that a formal written complaint, governmental referral, or information received suggests judicial misconduct, it will docket the complaint by assigning a unique number to the complaint and creating an entry for it in EOIR's judicial complaint tracking system.

However, if the formal written complaint, governmental referral, or information received does not state a claim of judicial misconduct, suggests general misconduct that is unrelated to the adjudicator's judicial role, or concerns issues that do not amount to judicial misconduct but that

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<sup>5</sup> EOIR takes very seriously claims of retaliation by its adjudicators against complainants. Similarly, it closely scrutinizes formal written complaints or government referrals that attempt to harass, threaten, intimidate, or retaliate against its adjudicators.

may be appropriate for management action, it will be handled appropriately outside of the judicial complaint process.

### **Agency Investigation**

Once a complaint is docketed, the JCPU will review the complaint and any attachments, together with relevant agency records such as electronic records of proceeding, digital audio recordings, electronic docket entries, and electronic decisions. The JCPU will then forward the complaint, any attachments, and a summary of the JCPU's preliminary fact-gathering to the adjudicator's supervisor for further processing.<sup>6</sup> The Employee Labor Relations Unit (ELR) in EOIR's Office of the General Counsel will receive a copy of this communication.

Unless notification would compromise an ongoing investigation or is contrary to law or agency-wide policy, the supervisor will notify the adjudicator in a timely fashion that a complaint has been docketed concerning him or her, and the adjudicator will be given an opportunity to respond. For governmental referrals, the supervisor will also provide the adjudicator with the identity of the individual and organization making the referral and an identification of the conduct at issue. However, if a docketed complaint is able to be dismissed or concluded without the adjudicator's input and does not result in corrective or disciplinary action, the adjudicator will be informed of the existence of the docketed complaint at the same time he or she is notified that it has been resolved.

If the allegations appear to fall under the jurisdiction of Office of Professional Responsibility (OPR), Office of the Investigator General (OIG), or the Office of the Special Counsel (OSC),<sup>7</sup> EOIR will refer the complaint to those components for further investigation.

As necessary and appropriate, the supervisor or his or her designee will continue the investigation concerning the alleged judicial misconduct. In doing so, the supervisor or designee may review agency records and solicit statements from the complainant and any witnesses. In cases of substantiated complaints, the supervisor, will determine whether and what type of corrective or disciplinary action is warranted and may consult with ELR as appropriate.<sup>8</sup>

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<sup>6</sup> Complaints concerning EOIR adjudicators are typically handled by the adjudicator's direct supervisor. For example, complaints against immigration judges are handled by the appropriate assistant chief immigration judge, complaints against board members are handled by the vice chairman, and complaints against OCAHO administrative law judges are handled by the chief administrative hearing officer. Complaints against component heads who are adjudicators are handled by EOIR's deputy director.

<sup>7</sup> OPR has jurisdiction over Department attorneys concerning allegation of professional misconduct, which includes judicial misconduct. OIG has jurisdiction over allegations of criminal activity, waste, fraud, abuse, and serious administrative misconduct. OSC has jurisdiction over complaints of prohibited personnel practices in the federal government or Hatch Act violations relating to partisan political activity.

<sup>8</sup> Any adverse action taken against an administrative law judge will be done in compliance with 5 C.F.R. § 930.211.

## **Actions and Resolution**

Each docketed complaint will be resolved via one of the following types of actions.

### *Dismissal*

If the supervisor determines that the allegations in a docketed complaint do not constitute judicial misconduct, the complaint will be dismissed. A dismissed complaint may be categorized as frivolous, not substantiated, merits-related, disproven, or fails to state a claim of misconduct.

### *Conclusion*

If the supervisor determines that intervening events, such as the adjudicator's retirement or resignation, make further action unnecessary, or if corrective action has already been taken on the matter, the docketed complaint will be concluded on that ground.

### *Corrective Action*

If the supervisor determines that the conduct implicates an issue that may be appropriate for general training, the supervisor will consult with EOIR's Office of Policy. Any such general training will be developed separate and apart from this complaint process.

If the supervisor determines that non-disciplinary corrective action is appropriate, the supervisor may consult with the ELR to determine the appropriate action. Such action may include counseling the adjudicator orally or in writing, consulting with the Office of Policy to arrange for individualized training, and/or initiating a performance-based action.

### *Disciplinary Action*

If the supervisor determines that disciplinary action is required, the supervisor may consult with ELR regarding the appropriate action. Such action may include a written reprimand, suspension, or removal from federal service.

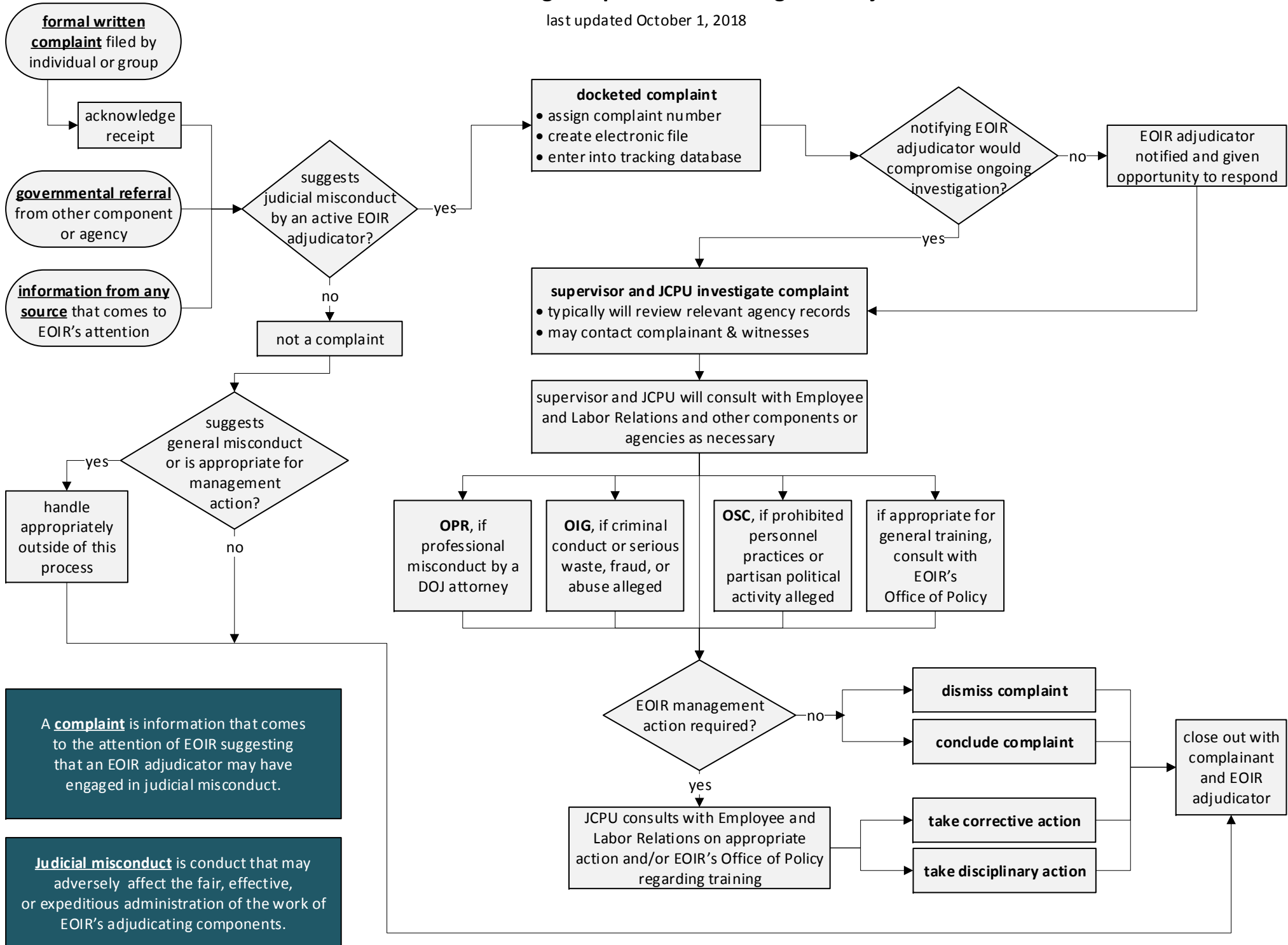
## **Dismissal and Conclusion**

Once a docketed complaint is resolved via a final action, the final action will be recorded and the matter will be marked as closed in EOIR's judicial complaint tracking system. The supervisor will notify the adjudicator once the matter is closed. When an identifiable complainant files a formal written complaint, the JCPU will notify the complainant in writing once the matter is closed. Such notification to the complainant will not violate the privacy rights of the adjudicator.

To promote transparency and accountability, EOIR will periodically publish statistics on its website concerning the number of formal written complaints, government referrals, and reviews of information from any source received, the number of those not docketed as complaints, the number of those docketed as complaints, and the final actions taken on docketed complaints. Such publication will be consistent with the Privacy Act, 5 U.S.C. § 552a.

# Procedure for Handling Complaints Concerning EOIR Adjudicators

last updated October 1, 2018



## ARTICLE 10

### DISCIPLINARY AND ADVERSE ACTIONS

10.1 PURPOSE: Disciplinary and adverse actions will be taken only for such cause as will “promote the efficiency of the service.”

10.2 DEFINITIONS:

- a. Disciplinary action for the purpose of this Article is defined as a formal written reprimand or a suspension from employment for fourteen (14) calendar days or less.
- b. Adverse action for the purpose of this article is defined as removal, or suspension for more than fourteen (14) calendar days or a furlough without pay for thirty (30) calendar days or less.

10.3 APPLICATION OF DISCIPLINARY ACTION:

- a. The parties agree that in imposing discipline, the Agency will abide by the principles of progressive discipline. The parties agree that under the concept of progressive discipline, discipline and adverse actions are used to correct and/or deter future employee misconduct rather than as a form of punishment. The effective use of progressive discipline requires timely application of sanctions to deal with employee misconduct.
- b. The Agency shall apply the principles of *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313 (1981), in setting a penalty for disciplinary and adverse actions.
- c. The parties recognize that circumstances may arise where the timely application of discipline or adverse action may not be possible (including but not limited to, an investigation by the Office of Professional Responsibility or the Office of Inspector General).
- d. The decision and timing of any discipline or adverse action rests with the Agency.
- e. If an Immigration Judge receives a formal counseling or warning, it will usually be reduced to writing and provided to him or her.
- f. In all cases, the Agency will afford the Immigration Judge all procedural and other rights to which the Immigration Judge is

legally entitled.

#### 10.4 REPRESENTATION:

- a. A bargaining unit employee is entitled to self-representation, or Association representation, when responding to a notice of proposed disciplinary or adverse action. When an Immigration Judge chooses to be represented by the Association, the Judge will provide the Agency with written notice of such designation. Upon receipt of such designation, the Agency will coordinate any meetings with the Association representative.
- b. An Immigration Judge has the right to representation by the Association at any examination in connection with an investigation, including an investigation by the Office of Professional Responsibility or the Office of the Inspector General, if the Judge reasonably believes that a disciplinary action may result from the examination and the Judge requests representation.

#### 10.5 PROCEDURES

- a. **DISCIPLINE:** Except in the case of reprimands, the Employer will provide the employee with at least twenty (20) calendar days advance notice of intent to impose discipline. The notice will state the reasons for the proposed action, with sufficient detail to enable the employee to understand the reasons that the action is being proposed. The evidence relied upon to support the action will also be provided at that time. The employee may respond orally and/or in writing within twenty (20) calendar days from receipt of the notice, and may furnish affidavits and other documentary evidence in support of their response. The employee may be granted an extension of the reply period, at the discretion of the deciding official, provided that the employee provides demonstrated and valid reasons requiring such an extension. After receipt of the written and/or oral response, or the termination of the notice period, whichever comes first, the Employer will issue a written decision to the employee which will include a statement of the employee's appeal rights.

**ADVERSE ACTIONS:** the Employer will provide the employee with at least thirty (30) calendar days advance written notice of an adverse action. The notice will state the reasons for the proposed actions, with sufficient detail to enable the employee to understand the reasons the action is being proposed. The evidence relied upon to support the action will also be provided at that time. The employee may respond orally

and/or in writing within twenty (20) calendar days from receipt of the notice, and may furnish affidavits and other documentary evidence in support of their response. The employee may be granted an extension of the reply period, at the discretion of the deciding official, provided that the employee provides demonstrated and valid reasons requiring such an extension. After receipt of the written and/or oral response, or the termination of the notice period, whichever comes first, the Employer will issue a written decision to the employee which will include a statement of the employee's appeal rights.

**CRIME PROVISION:** The above-referenced notice periods do not apply if the crime provision is invoked pursuant to 5 USC § 7513(b)(1).

- b. **APPEAL RIGHTS:** An Immigration Judge against whom any action is taken under this Article may appeal the decision through the negotiated grievance procedure of this Agreement, or file an EEO complaint related to the action, but the Immigration Judge cannot do both. An Immigration Judge against whom an adverse action is taken under this Article is entitled to appeal through a statutory procedure or the negotiated grievance procedure of this Agreement, but not both.

#### 10.6 PAY STATUS

- a. Immigration Judges will remain in a pay status during the notice period, unless the crime provision of 5 U.S.C. section 7513(b)(1) is invoked.
- b. If an Immigration Judge appeals a suspension through the negotiated grievance procedure, the Agency will not require the Immigration Judge to serve the suspension until a grievance decision has been issued. This subsection does not apply to actions in which the crime provision of 5 U.S.C. section 7513(b)(1) is invoked, or to indefinite suspensions.

10.7 **ADMINISTRATIVE TIME:** Immigration Judges are entitled to a reasonable amount of time to prepare a response to proposed discipline or adverse action. Arrangements for use of administrative time must be coordinated with, and approved by, the Immigration Judge's supervisor and are subject to work needs of the court.

#### 10.8 ALTERNATIVE DISCIPLINE

- a. The Agency and Association support the use of alternative approaches to traditional disciplinary actions in certain

circumstances (“Alternative Discipline”). Alternative Discipline may provide the opportunity to address employee misconduct in a more positive manner by offering options to traditional discipline.

- b. The Agency has the discretion to impose the following types of Alternative Discipline in lieu of a traditional suspension action: suspension held in abeyance, paper suspension, weekend suspension, counseling, and/or training classes such as anger management. Nothing in this subsection shall limit the Agency’s authority to counsel or order training for any Immigration Judge under any circumstances.
- c. The Agency and the Immigration Judge may agree to the following examples of Alternative Discipline in lieu of formal suspension action: a last chance agreement, a formal apology, donation of annual leave to a leave transfer recipient, mediation, and/or a permanent reprimand.
- d. Alternative Discipline may be relied on when applying the concept of progressive discipline.
- e. If an Immigration Judge receives an oral or written counseling, the Immigration Judge may submit a written response.
- f. An Immigration Judge may grieve Alternative Discipline imposed under subsection (b) above in the same manner as traditional discipline.

**DISCLOSURE STATEMENT:** This information is personal. It must be appropriately safeguarded from improper disclosure and it should only be made available for review by appropriate management levels having a need to know.

**PART A. EMPLOYEE INFORMATION**

**Name of Employee:** Marks, Dana L.

**Organizational Unit:** EOIR/OCIJ/San Francisco

**Position Title:** Immigration Judge

**Pay Plan, Series:** IJ-905

**Rating Period (from/to):** October 1, 2019 - September 30, 2021

**PART B. ACKNOWLEDGEMENT OF DEVELOPMENT, DISCUSSION AND APPROVAL OF PERFORMANCE PLAN**

Rating Official's Signature	Reviewing Official's Signature	Employee's Signature
Date	Date	Date

**PART C. PROGRESS REVIEW**

Employee's Signature	Rating Official's Signature	Date
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**NOTE:** If the employee's performance falls below Satisfactory on one or more elements at any time during the rating cycle, the supervisor should contact EOIR's Office of General Counsel, Labor/Employee Relations Group.

**PART D. RATING OF RECORD OF INDIVIDUAL RATING ELEMENTS**

N o	Job Elements	Critical or Non- Critical	Weight (of critical element, if weighted) Total must equal 100%	Rating or Point Value	Sub- Total / Total for weighted elements
1	Legal Ability	Critical	N/A		
2	Professionalism	Critical	N/A		
3	Accountability for Organizational Results	Critical	N/A		

**PART E. OVERALL RATING OF RECORD**

	Satisfactory		Improvement Needed		Unsatisfactory
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**PART F. COMMENTS** Rating officials are encouraged to provide substantive comments about the performance of each adjudicative employee. Comments must accompany a rating of Unsatisfactory, and should document with concrete examples the reasons for a rating of Unsatisfactory. Additional sheets may be attached, if necessary.

Progress Review:

Final Evaluation:

**PART G. APPRAISAL TYPE:** SUMMARY \_\_\_\_ INTERIM \_\_\_\_

**PART H. HIGHER LEVEL REVIEW AND APPROVAL**

Rating Official's Signature	Reviewing Official's Signature	Employee's Signature
Date	Date	Date

**NOTE:** If you, as an employee, anticipate contesting any aspect of your rating, you are responsible for contacting EOIR's Office of General Counsel immediately for specific procedures to be followed. Your signature on this form is simply an acknowledgment of receipt, and does not remove your right to file a grievance.

**EOIR PERFORMANCE PLAN**  
**Adjudicative Employees**

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JOB ELEMENTS AND STANDARDS

1. Job Element: Legal Ability

X	Critical		Non-critical
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**Performance Standards:**

**Satisfactory:**

**Performance at this level is satisfactory when the applicable standards stated below are usually achieved in a timely and correct manner.**

1.1 Exhibits knowledge of substantive immigration law, the rules of procedure, and the rules of evidence.

1.2 Renders decisions that are clear and well-reasoned, that cite the applicable law, and that apply the law to the facts.

1.3 Demonstrates legal research skills necessary to make rulings to resolve issues and cases.

**Improvement Needed:**

**Performance at this level exists when most of the standards are achieved at the satisfactory level, but there is an important deficiency - in quality, timeliness, or manner of performance - in one or more factors of this element that requires correction.**

**Unsatisfactory:**

**Performance at this level shows a serious deficiency - in quality, timeliness of work, or manner of performance - in one or more of the factors of this element.**

**EOIR PERFORMANCE PLAN**  
**Adjudicative Employees**

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**2. Job Element: Professionalism**

X	Critical		Non-critical
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**Performance Standards:**

**Satisfactory:**

**Performance at this level is satisfactory when the applicable standards stated below are usually achieved in a timely and correct manner.**

- 2.1 Treats all people in both the courtroom and workplace with appropriate respect.
- 2.2 Acts in a dignified manner, exercising patience and self-control.
- 2.3 Is punctual and prepared for court.
- 2.4 Acts in a fair and impartial manner toward all parties and all others appearing in or before the court.
- 2.5 Appropriately controls the conduct of proceedings during hearings, giving each side a fair opportunity to present their respective cases, while maintaining proper decorum within the court.

**Improvement Needed:**

**Performance at this level exists when most of the factors of the standard are achieved at the satisfactory level, but an important deficiency - in terms of quality, timeliness of work, or manner of performance - is noted in one or more of the factors of this element that requires correction.**

**Unsatisfactory:**

**Performance at this level shows a serious deficiency - in quality, timeliness of work, or manner of performance - in one or more factors of this element.**

## EOIR PERFORMANCE PLAN Adjudicative Employees

### 3. Job Element: Accountability for Organizational Results

X	Critical		Non-critical
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Definition: Exercises effort to ensure the integrity of the organization. Holds self accountable for organizational goals and objectives. Ensures cases are completed in a timely, efficient, and effective manner that meets objectives. Focuses on established organizational goals, results, and attainment of outcomes. Specific goals are attached.

#### **Performance Standards:**

##### **Satisfactory:**

Performance at this level is satisfactory when the applicable standards stated below are achieved in a timely and correct manner.

3.1 Acts consistently with the goals and priorities established by the Agency.  
(See attached goals).

3.2 Makes rulings and decisions in a timely manner, consistent with available resources.

3.3 Manages the immigration judge calendar efficiently, monitoring pending caseload, as needed.

3.4 Cooperates to achieve a productive work environment with other judges, court administrators, and staff members.

3.5 As assigned, performs special assignments and details, including conducting hearings of various types, at times on short notice, based on the needs of the agency.

3.6 Demonstrates appropriate use of courtroom technology.

##### **Unsatisfactory:**

Performance at this level shows a serious deficiency in one or more factors of this element.

Performance Goals  
Immigration Judge

All goals are measured annually, from October 1 to September 30.

***Satisfactory performance:***

**Goal 1: Case Completions:** 700 cases per year.

*and*

**Goal 2: Remand Rate** (including BIA and Circuit Courts): less than 15%.

*and*

The immigration judge meets at least half of the following Benchmarks that are applicable to the judge's work during the rating period, as long as the judge's performance in each applicable Benchmark is above the "Unsatisfactory" performance level.

**Benchmarks:**

**Benchmark 1:** In 85% of non-status detained removal cases, no more than three days elapse from merits hearing to immigration judge case completion.

**Benchmark 2:** In 85% of non-status, non-detained removal cases, no more than 10 days elapse from merits hearing to immigration judges case completion, unless completion is prohibited by statute (e.g. a cap on grants of relief) or completion is delayed due to a need for completion of background checks.

**Benchmark 3:** In 85% of motions matters, no more than 20 days elapse from immigration judge receipt of the motion to adjudication of the motion.

**Benchmark 4:** In 90% of custody redetermination cases, case is completed on the initial scheduled custody redetermination hearing date unless DHS does not produce the alien on the hearing date.

**Benchmark 5:** In 95% of all cases, individual merits hearing is completed on the initial scheduled hearing date, unless, if applicable, DHS does not produce the alien on the hearing date.

**Benchmark 6:** In 100% of credible fear and reasonable fear reviews, case is completed on the initial hearing date unless DHS does not produce the alien on the hearing date.

***Needs improvement:***

**Goal 1: Case Completions:** More than 560 but fewer than 700 cases per year.

*or*

**Goal 2: Remand Rate** (including BIA and Circuit Courts): between 15% and 20%.

*or*

The immigration judge fails to perform to the Satisfactory level in more than half of the applicable Benchmarks, as long as the judge's performance in each applicable Benchmark is above the "Unsatisfactory" performance level.

***Unsatisfactory performance:***

**Goal 1: Case Completions:** fewer than 560 cases per year.

*or*

**Goal 2: Remand Rate** (including BIA and Circuit Courts): greater than 20%.

*or*

The immigration judge's performance in one or more of the following Benchmarks that are applicable to the judge's work during the rating period is Unsatisfactory.

**Unsatisfactory Performance Benchmarks:**

**Benchmark 1:** In greater than 35% of non-status detained removal cases, more than three days elapse from merits hearing to immigration judge case completion.

**Benchmark 2:** In greater than 35% of non-status, non-detained removal cases, more than 10 days elapse from merits hearing to immigration judge case completion, excepting cases where completion is prohibited by statute (e.g. a cap on grants of relief) or completion is delayed due to a need for completion of background checks.

**Benchmark 3:** In greater than 35% of motions matters, more than 20 days elapse from immigration judge receipt of the motion to adjudication of the motion.

**Benchmark 4:** In greater than 30% of custody redetermination cases, case is not completed on the initial scheduled custody redetermination hearing date excluding cases where DHS does not produce the alien on the hearing date.

**Benchmark 5:** In greater than 25% of all cases, individual merits hearing is not completed on the initial scheduled hearing date, excluding cases where DHS does not produce the alien on the hearing date.

**Benchmark 6:** In greater than 20% of credible fear and reasonable reviews, case is not completed on the initial hearing date, excluding cases where DHS does not produce the alien on the hearing date.

**PERFORMANCE PLAN AND APPRAISAL FORM  
FOR EOIR ADJUDICATIVE POSITIONS**

**INSTRUCTIONS FOR DETERMINING THE FINAL SUMMARY RATING**

The summary rating is determined in one of two ways:

- A. When “weighting” is not applied to critical elements, a rating is determined according to the instructions in Block A, “Calculating the Summary Rating (When Critical Elements are not Weighted),” or
- B. When “weights” apply to critical elements, the rating will be derived using the instructions in Block B, “Calculating the Summary Rating When Using “Weighted” Critical Elements.”

**A. Calculating the Summary Rating (When Critical Elements are not Weighted)**

Each element is given a rating (unless the employee has had insufficient opportunity to demonstrate performance on the element). The supervisor will assign individual element ratings as follows:

**Satisfactory.** Performance on an individual critical or other element of the job which completely meets the performance requirements of satisfactory, as established at the beginning of, or modified during, the rating period.

**Improvement Needed.** Performance on an individual critical or other element which falls short of the performance requirements for satisfactory. Performance at this level shows important deficiencies which require correction.

**Unsatisfactory.** Performance on an individual critical or other element which is substantially below the performance requirements for Satisfactory. Performance shows serious deficiencies.

**DETERMINING THE SUMMARY RATING**

The overall rating level assigned may be Satisfactory, Improvement Needed, or Unsatisfactory when the applicable minimum requirements for the level selected are met:

**Satisfactory.** A majority of the critical elements must be rated Satisfactory, no more than one critical element can be rated Improvement Needed and no individual performance element may be rated Unsatisfactory.

**Improvement Needed.** More than one critical element is rated Improvement Needed, (and no critical element is rated Unsatisfactory). Performance is deficient in important aspects of the job and requires improvement.

**Unsatisfactory.** Overall performance is deemed unsatisfactory when performance in one or more critical elements is rated Unsatisfactory.

Example (Critical elements are not weighted):

**PART D. RATING OF RECORD OF INDIVIDUAL RATING ELEMENTS**

No.	Job Elements	Critical or Non-Critical	Weight (of critical element, if weighted) Total must equal 100%	Rating or Point Value	Sub-total / Total for weighted elements
1	Legal Ability	C	N/A	IN	N/A
2	Professionalism	C	N/A	S	N/A
3	Accountability for Organizational Results	C	N/A	S	N/A

**PART E. OVERALL RATING OF RECORD**

x	Satisfactory	Improvement Needed	Unsatisfactory
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### INSTRUCTIONS FOR DETERMINING THE FINAL SUMMARY RATING (continued)

## THE WEIGHTED ELEMENT SYSTEM

Performance on each element will be evaluated and assigned one of the following ratings and corresponding points:

**\*Any individual critical element with a rating of unsatisfactory automatically results in an Unsatisfactory Summary Rating.**

Calculate the sub-totals of each element by multiplying the weight of each element times the rating point value. (WEIGHT x Points)

Add the sub-totals for a TOTAL POINT SCORE.

On the summary Rating Conversion Chart, the total point score will fall within a point range. Use the Summary Rating Conversion Chart to derive the Summary Rating.

Using the total point score, summary ratings are calculated as follows:

Satisfactory.....	250-300 points
Improvement Needed.....	200-249 points
Unsatisfactory.....	0-199 points, OR, <b>Any critical element is rated Unsatisfactory</b>

Example (Critical Elements are Weighted):

#### PART D. RATING OF RECORD OF INDIVIDUAL RATING ELEMENTS

No.	Job Elements	Critical or Non-Critical	Weight (of critical element, if weighted) Total must equal 100%	Rating or Point Value	Sub-total / Total for weighted elements
1	Legal Ability	C	60	2	120
2	Professionalism	C	20	3	60
3	Accountability for Organizational Results	C	20	3	60
			100		240

**PART E. OVERALL RATING OF RECORD**

	Satisfactory	x	Improvement Needed		Unsatisfactory
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## 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 Judge's 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

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.

- 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

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. Reilly

11-21-17  
Date

For the National Association of Immigration Judges:

Denise Norman/Sealin

11-21-17  
Date

Effective Date: December 6, 2017