

PAST PERFORMANCE POLICY

This policy is to be used by OES when considering past performance issues of existing grantees who apply for new OES funding. It has been developed in consultation with OES' advisory groups.

I. GENERAL POLICY

From time to time, OES solicits applications for funding by issuing a Request for Proposal (RFP), and awards funding through a competitive selection process. Oftentimes, applications are received from existing OES recipients.

Recognizing that OES' funds are limited and often highly competitive, and to better meet its fiscal and legal obligations, OES developed this policy in an effort to fairly and consistently address past performance issues of existing recipients in the awarding of new state and federal funding.

This policy is only intended to result in a penalty, if necessary, to existing recipients that have serious performance problems (not minor problems), and is to be utilized only in connection with the RFP process and the awarding of grants for new funding cycles.

Furthermore, while this policy addresses OES' provision of technical assistance to help recipients comply with their grant requirements, this policy is not intended to result in OES regulating the day-to-day internal operations of recipients.

II. PENALTY LEVELS

There are two levels of penalties for serious performance problems:

- Level A: Complete disqualification from RFP process;
- Level B: 10% point reduction of total possible points from an applicant's score

The level that will be applied will depend on the severity and frequency of the performance problems, among other factors, as discussed further below.

III. STANDARD FOR INVOKING THIS POLICY

The standard for invoking either penalty is whether the applicant's compliance with grant terms and conditions falls **significantly** below average – far below the level to be expected of other grantees, and not minor incident(s) of non-compliance with OES policies.

A. Serious Performance Problems That Are Eligible For Consideration

Types of performance problems that would qualify under this policy include, but are not limited to:

1. Significant failure to account for use of funds, mishandling/misuse of funds, fraud or embezzlement, or other material accounting irregularities or violation(s), as documented in an audit report, monitoring report, police report, or other similar objective documentation;
2. Violation(s) of material statutory requirements related to the grant;

3. A willful or grossly negligent violation of a material OES policy, term or condition of the grant, but only after the recipient has been provided:
 - a) technical assistance by OES, including a site visit if necessary, to remedy the violation;
 - b) at least one written notice (per violation); and
 - c) a reasonable opportunity to remedy the violation. Any such notice will be provided to the recipient's executive officer and will specify that failure to remedy the violation may negatively impact the recipient's eligibility for future funding, including disqualification from the next RFP process.

It is not necessary for a criminal conviction to have occurred for OES to consider actions which appear to constitute fraud, embezzlement, mishandling of funds, or other types of statutory violations. OES must only have reliable evidence that this conduct occurred. Moreover, only properly documented performance problems will be considered.

Occasional minor performance issues (even if continual), such as failure to return phone calls, "hostile" attitudes, personality conflicts, slightly late paperwork, and modest accounting irregularities not rising to the level of mishandling of funds or lack of controls are not subject to this policy. However, grantees still are expected to comply in all respects with OES' policies, *Grant Recipient Handbook*, and the terms and conditions of their grant; and these minor performance problems will be addressed by the program specialist, monitor, or other means, as appropriate and irrespective of this policy.

B. Factors Considered

In determining an appropriate penalty, factors to be considered include, but are not limited to:

1. The seriousness of the problem(s);
2. Whether the problem or problems identified were intentional;
3. Whether the problem or problems reveal dishonest behavior by the applicant;
4. Whether the interests of the State or the public were harmed by the problem or problems;
5. Whether the problem or problems were a one-time occurrence or represent an ongoing pattern of behavior;
6. Whether the problem has been documented objectively; and
7. Whether OES has attempted to assist the grantee in remedying the problem.

C. Specific Examples

All performance problems should be considered on a case-by-case basis, with the totality of the circumstances to be considered. The following examples are to be used as guidance, and are not intended to be exhaustive, binding, or in any way restrictive of OES' authority to determine the appropriate penalty in any particular case:

1. OES conducts a monitoring visit of Project Z, and makes the following findings:
 - a) the shelter failed to pay overtime on two occasions;
 - b) three timesheets did not contain a supervisor's approval; and
 - c) the project's doors opened at 9:30 a.m. instead of 9:00 a.m. as stated on its RFP application.

A corrective action plan is developed and the project takes steps to implement the monitoring recommendations. A follow-up with the recipient four months later shows that the monitoring findings have been corrected.

Penalty: None

2. Project A inadvertently has adopted policies that violate the Americans with Disabilities Act. It operates shelter facilities that “cannot accommodate the handicapped.” It has declined services to disabled persons on this basis. OES and/or the Department of Justice alert the grantee that this policy is illegal. Several months later, the project has not changed its policies. Only after OES notifies the project in writing that future funds may not be awarded based on this violation does the project change its policy.

Penalty: Level B

3. During an audit, it is discovered that a year ago an employee of Project V has embezzled \$300 of OES funds. The audit concludes that this occurred in part because of inadequate management controls and supervision by the project. The employee was fired and the case submitted to the district attorney’s office for prosecution. The recipient has implemented new accounting and management policies and procedures, and promises to better supervise its employees. No other problems with the recipient are known.

Penalty: Level B

4. Same facts as in example (2), except that the embezzlement has occurred on multiple occasions, totaling \$20,000.

Penalty: Level A

5. Same example as in (2), except that the embezzlement was a one-time occurrence in the amount of \$5,000 committed by a member of the project’s management (executive officer, financial officer, administrative officer) and/or board member.

Penalty: Level A

6. Project M is habitually late in turning in OES-required progress reports and needs frequent reminders, including repeated letters from OES. The project always complies but is generally viewed as a “pain” to work with because of their frequent tardiness.

Penalty: None

7. Project C engages in racial discrimination in the provision of OES-funded services. It continues to deny services to the public on the basis of race, despite repeated letters from OES.

Penalty: Level A

8. A Project O supervisor sexually harasses her employee, which conduct does not affect the provision of OES-funded services

Penalty: None The appropriate remedy does not involve any OES action.

9. Project Y has agreed to provide victim advocacy services in County X. The project spends \$40,000 on other things and provides no such services, as documented in the monitoring report. However, the project still writes that the services are being provided on its OES reports. OES refers the matter to the district attorney for prosecution, but no additional steps have yet been taken.

Penalty: Level A

IV. PROCESS OF INVOKING THIS POLICY

A. Recommendation Memo

Prior to the commencement of the rating process, either the section chief or branch chief (who is not part of the rating team) of the branch that is conducting the RFP may request a performance penalty.

The section or branch chief must write a memo discussing in detail the performance problems with the

applicant. The memo must be reasonably specific and must identify the basis for invoking a penalty. The memo must be sufficiently supported by dates and details, and recommend the appropriate penalty, either Level A or Level B. This memo, along with all supporting documentation, must be submitted to the Deputy Director of Programs prior to the commencement of the rating process.

Branch chiefs and/or the Deputy Director of Programs must reject memos where the problems identified do not rise to the requisite level of seriousness.

The ratings team will begin rating the applications once the memo has been submitted to the Deputy Director of Programs. **Under no circumstances may raters consider past performance issues during the rating process.**

B. Final Decision

If the Deputy Director of Programs agrees, the memo shall be submitted to the Executive Director, who may choose to:

1. impose the recommended penalty;
2. impose a lesser penalty than the recommended penalty; or
3. not to impose any penalty.

However, under no circumstances will the Executive Director increase the recommended penalty level, or impose any performance penalty without having been recommended to impose one.

A penalty will be applied only after it has been determined that the applicant has scored within the funding range. If the applicant did not score within the funding range, then no penalty is necessary.

V. NOTIFICATION TO THE APPLICANT AND APPEAL OF DECISION

As with all applicants that are denied funding, a letter regarding the denial will be sent by certified mail to applicants denied funding due to past performance problems. The applicant shall be provided with a summary of why the performance problem penalty was invoked. An applicant is entitled to appeal this denial of funding on the same basis as other appeals of denial of funding, pursuant to the Appeals Guidelines. That is, an applicant may appeal on the basis that the "criteria and priorities" included in the RFP, including this Past Performance Policy, were not followed.