

UDC 349.2

DOI <https://doi.org/10.24144/2788-6018.2026.01.2.12>

## ON THE ISSUE OF LIBRARIAN PERFORMANCE REVIEW: LEGAL ASPECT AND CASE LAW REVIEW

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### **Triukhan O.A. On the issue of librarian performance review: legal aspect and case law review.**

The article is devoted to the analysis of problematic legal issues of librarian performance review. It is noted that the legal regulation of performance review is regulated by the Law of Ukraine On Professional Development of Employees No. 4312-VI of January 12, 2012. It is emphasized that employees who pass performance review have the opportunity to establish themselves as qualified, competent and proactive employees, and to ensure career growth. In turn, employers have the opportunity not only to form a talent pool, but also to improve the efficiency and quality of collective work.

It is emphasized that during performance review, a person is considered to be suitable for the position held, until otherwise established by the decision of the Performance Review Board. It is noted that no one can claim and officially define a person as unsuitable for the position held until such a decision is made by the Performance Review Board. Please note that the qualification mismatch is an evaluation category that depends on the specific circumstances of the case. It is emphasized that the decision of the Performance Review Board on unsuitability of an employee for the position held must be justified. It is concluded that performance review should always be carried out within legal framework.

Not only the legal aspects of librarian performance review are studied, but also the case law on this issue. It is noted that there are a number of problems in this area, both legal and organizational. After all, this will allow to avoid adverse consequences for an employer. It is emphasized that the issue of professional competence of the composition of the Performance Review Board is not defined by the above Law. It is proposed to define at the legislative level the concept and clear criteria by which a highly qualified specialist can be identified. A number of scientific publications on this issue have been studied. General conclusions have been made that the current legislation in this area requires reform, and proposals have been made to improve legal regulation in this area, which will allow improving the procedure for employee performance review, in particular, making it more effective.

**Key words:** Constitution of Ukraine, evaluation of employee competencies, employee performance review, professional competence, labor dispute, protection of labor rights, professional development of employees, Performance Review Board, employee proficiency testing.

### **Трюхан О.А. До питання атестації бібліотекарів: правовий аспект та огляд судової практики.**

Стаття присвячена аналізу проблемних правових питань атестації бібліотекарів. Звертається увага, що правове регулювання проведення атестації працівників регулюється Законом України «Про професійний розвиток працівників» від 12.02.2012 року № 4312-VI. Підкреслюється, що працівники, які проходять атестацію, мають можливість не лише зарекомендувати себе як кваліфіковані, компетентні й ініціативні співробітники, але мають можливість забезпечити кар'єрний ріст. У свою чергу роботодавці мають можливість не лише сформувати кадровий резерв, але й підвищити ефективність та якість колективної праці.

Акцентовується увага, що під час атестації особа вважається такою, що відповідає займаній посаді, поки інше не буде встановлено рішенням атестаційної комісії. Зазначається, що ніхто не може стверджувати й офіційно визначати особу такою, що не відповідає займаній посаді, поки щодо неї атестаційною комісією не буде винесено таке рішення. Звертається увага, що невідповідність кваліфікації займаній посаді – це оціночна категорія, яка залежить від конкретних обставин справи. Наголошується, що рішення атестаційної комісії про невідповідність працівника займаній посаді має бути обов'язково обґрунтованим. Сформульовано висновок, що атестація завжди має бути проведена у правовому полі. Адже це дозволить уникнути несприятливих наслідків для роботодавця.

Досліджуються не лише правові аспекти атестації бібліотекарів, а також судова практика з цього питання. Звертається увага, що у даному напрямку існує низка проблем, як правового, так і організаційного характеру. Наголошується, що питання щодо професійної компетенції складу атестаційної комісії вищевказаним законом не визначено. Запропоновано на законодавчому рівні визначити поняття та чіткі критерії, за якими можна ідентифікувати висококваліфікованого фахівця. Досліджена низка наукових публікацій щодо цієї проблематики. Зроблені загальні висновки, що чинне

законодавство у цій сфері потребує реформування, а також надані пропозиції щодо вдосконалення правового регулювання у цій сфері, які дозволять покращити процедуру атестації працівників, зокрема, зроблять її більш ефективною.

**Ключові слова:** Конституція України, оцінка ділових якостей працівника, атестація працівників, професійна компетенція, трудовий спір, захист трудових прав, професійний розвиток працівників, атестаційна комісія, підтвердження кваліфікації працівників.

**Problem statement.** One of the pressing issues in labor law is the development of effective mechanism for evaluating employee performance. After all, now, it is difficult to evaluate employee competencies. In Ukraine, there is such a form of evaluation of employee competencies as performance review, which is aimed not only at compliance of an employee with a certain level of qualification, but also at checking business and professional qualities of each employee. It is worth emphasizing that today, unfortunately, employee performance review is far from perfect and that is why it requires further research in order to eliminate the challenges of its implementation.

**Purpose of the study.** The purpose of the study is to determine theoretical and legal provisions related to the main stages of organizing librarian performance review, to study problematic issues that arise during librarian performance review, and to make proposals for improving legislation in this area.

**Status of problem development.** At different times, the issues of legal regulation of employee performance review have become the subject of research by many scientists, in particular, problems related to personnel performance evaluation and issues of employee performance review have been studied in the works of such scientists as M. Albert, M. Woodcock, L.V. Balabanov, O.A. Hrishnova, H.A. Dmytrenko, H.T. Zavynovska, O.V. Krushelnytska, V.Ya. Burak, K.Ye. Hryb, I.M. Yakushev, K.H. Harbuzuk, N.B. Bolotina, O.V. Stasiv, S. Tishchenkova and others. Without diminishing the importance of scientific works of the above authors, we believe that today there are a number of practical and theoretical problematic issues in this area that require further scientific research.

**Presentation of main material.** First of all, we note that currently employee performance review is given an important place due to the fact that performance review is of great importance not only for employers, but also for employees. After all, the results of performance review serve as a reasonable basis for an employer to make important personnel decisions.

Thus, S. Tishchenkova identifies the following levels (aspects) of understanding employee performance review: 1) performance review – activity; 2) performance review – procedural form of such activity (performance review procedure); 3) performance review – institution of labor law; 4) performance review – labor relations; 5) performance review – legal fact (legal consequences of performance review) [1, p. 137].

Conducting performance review is regulated by the Law of Ukraine On Professional Development of Employees No. 4312-VI of January 12, 2012. The same Law stipulates that employee performance review is a procedure for evaluating compliance of professional level of employees with qualification requirements and job responsibilities, and evaluating their professional level [2]. To this fact, the Supreme Court has repeatedly pointed out that unsuitability of an employee for the position held or the work performed is a documented inability to continue performing work by an employee, provided that such work requires a certain qualification or health condition [3].

It should be noted that performance review will not provide a significant position in the system of working with employees if its results are not confirmed and developed through incentive measures. After all, the guarantee of implementation of recommendations of the Performance Review Board is a prerequisite for achieving all the goals of performance review.

As noted above, one of the ways to identify unsuitability is to conduct employee performance review. Thus, case law confirms that the Supreme Court in case No. 464/1610/18 of January 21, 2020 expressed the position that an employer created a separate regulation on performance review, issued an order on employee performance review, familiarized employees with the topic of performance review, conducted the performance review, based on the results of which an employee was dismissed. The Supreme Court also concluded that the procedure applied by an employer fully complies with the requirements of the law [4].

It is important to emphasize that today, in addition to the Law of Ukraine On Professional Development of Employees No. 4312-VI of January 12, 2012, the procedure for conducting performance review of certain categories of employees is regulated by other legal acts. It is necessary to separately focus on the problematic legal aspects of librarian performance review. It should be noted that a librarian can be a person who has a basic higher education in the relevant field of study (Bachelor, Junior Specialist) without requirements for work experience [5]. Also, the Regulation on a Library of a Secondary School of the Ministry of Education of Ukraine approved by the order of the Ministry of Education of Ukraine No. 139 of May 14, 1999 provides (clause 4.6) that a secondary school librarian must have a special library or pedagogical education [6].

It should be noted that the activities of libraries of structural divisions of educational institutions are based on the regulatory framework of two departments: education and culture. The attention should be paid to the fact that the lack of clear explanations on the application of regulatory documents of the Ministry of Culture of Ukraine in educational institutions leads to the fact that each region and each educational institution interpret regulatory documents at their own discretion. The inconsistency in documents concerns many aspects of the activities of school libraries, the most problematic of which is performance review.

Please note that quite often the mechanisms of teacher performance review were applied to librarian performance review. However, since librarians do not belong to teaching staff, the Regulation on Teacher Performance Review cannot be applied to them. It should be noted that to date, the order of the Ministry of Education and Science of Ukraine No. 1277 of September 10, 2024 approved a new edition of the Regulation on Teacher Performance Review approved by the order of the Ministry of Education and Science of Ukraine No. 805 of September 9, 2022 (entered into force on November 5, 2024).

It is worth noting that librarian performance review is conducted according to the Law of Ukraine On Libraries and Librarianship of January 27, 1995. It is to be noted that librarians are classified as professionals. According to the Regulation on Performance Review of Employees of Enterprises, Institutions, Organizations and Cultural Institutions approved by the order of the Ministry of Culture and Tourism of Ukraine No. 44 of July 16, 2007, librarians (public, school, medical, technical and other libraries of Ukraine) must pass performance review. This Regulation also provides that the main task of performance review is to evaluate professional qualifications and competencies of an employee on the basis of objective and reasonable criteria, based on the results of their work and in order to determine the opportunities for professional and career growth. In turn, it should also be emphasized that clause 5.3 of this Regulation provides that performance review results can be appealed by an employee according to the procedure established by law [7].

It should be noted that according to clause 11 of the General Provisions of the Dictionary of Occupational Titles approved by the order of the Ministry of Labor and Social Policy of Ukraine No. 336 of December 29, 2004, persons who do not have the appropriate education or work experience established by qualification requirements, but have sufficient practical experience and successfully perform the tasks and duties assigned to them in full, may, as an exception, be left in their current position or appointed to the corresponding positions on the recommendation of the Performance Review Board [8]. That is, a librarian who does not have a complete higher education in the relevant field, but has sufficient practical experience and successfully performs the tasks and duties assigned to them, on the recommendation of the Performance Review Board can be recognized as suitable for the position held, provided that the tasks assigned to them are successfully completed.

It should be emphasized that according to the provisions of Part 3 of Article 13 of the Law of Ukraine On Professional Development of Employees of January 12, 2012, the decision on unsuitability for the position held must be justified. The literature draws attention to the fact that one significant problem is unjustified decisions made by the Performance Review Board and which are the basis for appealing to the court. The scientists rightly prove the need to clearly justify and formulate the decision of the Performance Review Board and inform an employee in writing [9, p. 183]. Indeed, if an employer decides to exercise their right to dismiss an employee based on the results of unsatisfactory performance review, they must take into account the validity of the decision of the Performance Review Board under current legislation. Otherwise, such dismissal of an employee will be illegal, and therefore an employee can apply to the court with a demand to declare such dismissal illegal.

The literature also notes that based on the results of consideration of labor disputes in courts regarding illegal dismissal as a result of employee performance review, the courts decide not only on the reinstatement of an employee, but also satisfy the plaintiffs' claims for payment of lost earnings, and in case of employees' claims for compensation for moral damage, the courts decide this issue in favor of employees [10]. Please note that case law also confirms the fact that in practice there are cases when the inability to perform official duties is not proved by proper, sufficient and permissible evidence, and the decision of the Performance Review Board is unjustified. Thus, in December 2015, the librarian filed a lawsuit against Berehove Raion Centralized Library System (hereinafter referred to as BerehoveRCLS) to declare the dismissal order illegal and to cancel it, to reinstate her at work, and to recover her average earnings for the time of forced absenteeism. To support her claims, the plaintiff referred to the fact that on July 15, 2008, she was hired by the defendant as the head of the library, and from June 1, 2010, she was transferred to the position of librarian. On October 6, 2015, another performance review of employees of BerehoveRCLS was conducted, according to the results of which a qualification report was drawn up on her unsuitability for the position held. The plaintiff considers the dismissal order to be illegal and subject to cancellation, since the decision of the Performance Review Board is unjustified, as the Board members did not listen to her report, and did not give reasons for their decision.

Despite the fact that the decision of Berehove Raion Court of Zakarpattia Region of February 29, 2016 dismissed the claim, the plaintiff appealed to the Court of Appeal. At the same time, the Raion Court took into account the inability of the plaintiff to speak the official language. Thus, the decision of the Court of Zakarpattia Region of April 28, 2016 satisfied the plaintiff's appeal. In addition, the Court of Appeal found that

the conclusion of the court of first instance that the plaintiff did not speak Ukrainian was based on assumptions. The decision of the Court of Appeal was motivated by the fact that the defendant had no grounds for dismissing the plaintiff under Clause 2 of Article 40 of the Labor Code of Ukraine, since the issue of possible transfer of the plaintiff to another job was not considered. The unsuitability of the plaintiff for the position held due to insufficient qualifications, her inability to perform official duties were not proved by proper, sufficient and admissible evidence, and the conclusion of the Performance Review Board was unmotivated and unjustified. In addition, the Supreme Court in case No. 297/3092/15-ц of May 30, 2018 expressed the position that the arguments of the cassation appeal that the plaintiff did not know Ukrainian and couldn't therefore perform her official duties were unjustified, since she has held the position of librarian since 2008 and throughout her work there were no questions to her regarding this matter. The statement of the defendant in support of his arguments only indicated that the plaintiff speaks Hungarian, and couldn't be evidence of her ignorance of Ukrainian, as the Court of Appeal correctly noted in its decision. Therefore, the appealed court decision regarding the plaintiff's claims for recognition of the order as illegal and its cancellation, and reinstatement at work meets the requirements of the law and there are no grounds for its cancellation [11].

Analyzing the case law regarding the dismissal of employees in connection with the detected unsuitability for the position held, namely, disagreement of an employee with the results of their performance review with subsequent dismissal, it should be stated that such disputes are mostly resolved by the court, and not always in favor of an employee. Although such case law once again confirms that performance review really allows an employer to learn more about the productivity of each of the employees. Thus, the plaintiff appealed to the court with a claim to declare the dismissal order illegal and to cancel it, to reinstate her at work, and to recover her average earnings for the time of forced absenteeism. The plaintiff justified her claims by the fact that from September 1, 1990 to April 3, 2017, she worked as a librarian at Hlybochok Secondary School. By order No. 08 of April 3, 2017, she was dismissed from the position of librarian according to Clause 2 of Part 1 of Article 40 of the Labor Code of Ukraine due to the detected unsuitability for the position held due to insufficient qualifications. The plaintiff believes that the decision of the Performance Review Board is illegal, since performance review regarding her was conducted in violation of the requirements of the Regulation on School Librarian Performance Review. Taking into account the above, the plaintiff asked to recognize the decision of the Performance Review Board on unsuitability for the position held as illegal and invalid [12]. The principal of Hlybochok Secondary School objected to the claim. Due to the fact that the plaintiff has only a secondary vocational education and graduated from a vocational school in the specialty cutter of women's and children's light dresses, it was found out that according to the order of the principal, in order to continue work as a librarian, the plaintiff needs to obtain an appropriate education, etc. It was established from testimonies of witnesses, namely members of the Performance Review Board, that during the next performance review, it was found out that the plaintiff worked without special education, did not obtain special education during her work as a librarian, did not advanced her qualification level, and did not pass performance review. Please note that the Supreme Court Resolution in case No. 654/941/17 of January 27, 2020 draws attention to the fact that if an employer, when hiring a person, knows about qualification requirements mandatory for performing this work and that a person is unsuitable for the position held due to the lack of special education, but deliberately appoints them, then the fact of absence of an education document cannot be a further reason for dismissing an employee under this clause. In this case, the detected unsuitability may be poor performance; improper performance of job duties due to insufficient qualifications [13].

The decision of Baranivka Raion Court of Zhytomyr Region of October 2, 2017 dismissed the claim. When dismissing the claim, the court of first instance was guided by the provision of Clause 2 of Part 1 of Article 40 of the Labor Code of Ukraine [13]. The Court of Appeal agreed with conclusions of the first instance. The Supreme Court also dismissed the cassation appeal, and left the contested decisions unchanged in the absence of grounds for annulment of court decision [12]. We believe that the activity dimension of the phenomenon of employee performance review should not be underestimated.

**Conclusions.** Based on the study performed, we note that employee performance review is necessary to increase labor productivity, interest of employees in the result of work and organization, and to test knowledge of employees. The professional competence of the Performance Review Board is also quite an interesting issue. It is important to emphasize that the composition of the Performance Review Board must be competent. After all, its task is to objectively evaluate professional qualities of employees, and this requires not only deep knowledge in the relevant field, but also an understanding of the methodology of work, legislation, etc. In our opinion, professional competence is not only skills, knowledge and values, but also approaches and personal qualities that are manifested in the behavior of an employee and contribute to achieving results for the benefit of an organization. It is worth noting that the Law of Ukraine On Professional Development of Employees of January 12, 2012 only states that the Performance Review Board should consist of highly qualified specialists. We fully share the opinion of scientists [9, p. 184], who pay attention to what qualification knowledge, skills, abilities, and work experience such a specialist should have. Unfortunately,

this is not defined by the above Law. We consider it necessary to define at the legislative level the concept and clear criteria by which a highly qualified specialist can be identified. We agree with the opinion of scientists [9, p. 185], who propose to enshrine the concept of a "highly qualified employee" in legislation and to consider such an employee to be one who has a higher education, and at least 5 years of work experience.

Taking into account the above, it can be concluded that based on the results of employee performance review, not only measures are developed to improve working conditions and an information base is created to assess the risk of health loss, but also performance review allows an employer to learn more about the productivity of each employee.

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Дата першого надходження рукопису до видання: 12.01.2026  
Дата прийняття до друку рукопису після рецензування: 26.01.2026  
Дата публікації: 2.02.2026