



ADMINISTRATIVE INSTRUCTION 8

DISCIPLINARY AND ADVERSE ACTIONS

Originating Component: Office of the Deputy Chief Management Officer of the Department of Defense

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Approved by: Barbara Westgate, Director, Washington Headquarters Service

Purpose: In accordance with the authority in DoD Directive 5110.04, this issuance:

- Establishes policy, assigns responsibilities, and assigns procedures for taking disciplinary and adverse actions, in accordance with the authority in Chapters 43 and 75 of Title 5, United States Code (U.S.C.), referred to in this issuance as "Chapter 43" and "Chapter 75."
- Issues an updated Table of Offenses and Penalties.

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SECTION 1: GENERAL ISSUANCE INFORMATION

1.1. APPLICABILITY. This issuance applies to OSD and the Defense Agencies and DoD Field Activities that receive human resource services serviced by Washington Headquarters Services (WHS), as well as any other DoD component receiving human resource services from WHS (referred to collectively in this issuance as “WHS-serviced Components”).

a. This issuance does **not** apply to:

(1) Individuals who are not “employees” pursuant to Sections 7501 of Title 5, U.S.C., with respect to suspensions of 14 days or less.

(2) Individuals who are not “employees” pursuant to Section 7511 of Title 5, U.S.C., with respect to suspensions for more than 14 days and removals.

(3) Defense Civilian Intelligence Personnel System employees hired under Section 1601 of Title 10, U.S.C.

(4) Foreign national employees.

(5) Members of the Senior Executive Service.

(6) Members of the Defense Intelligence Senior Executive Service or Defense Intelligence Senior Level employees.

(7) Reemployed annuitants.

(8) Employees serving under temporary appointments.

(9) Political appointees.

(10) Highly Qualified Experts.

(11) Experts and Consultants.

b. This issuance does **not** apply to the following actions:

(1) Separation of individuals who have conduct issues before entrance on duty.

(2) Furloughs of 30 days or fewer.

(3) Reduction in force actions (including furloughs of more than 30 days).

(4) Reductions in grade under Section 3321(b) of Title 5, U.S.C. of a supervisor or manager who has not completed the required probationary period.

(5) Actions that entitle an employee to grade retention under Part 536 of Title 5, Code of Federal Regulations (CFR) and actions to terminate this entitlement.

- (6) Voluntary actions by an employee.
- (7) Termination of appointments on their termination date and termination of temporary or term promotions.
- (8) Reductions in an employee's rate of pay required by law or regulation.

1.2. POLICY. It is WHS policy that:

- a. Formal disciplinary and adverse actions will be taken to promote the efficiency of the federal service.
- b. Before taking any action under this volume, managers and supervisors will seek advice and assistance from Human Resources Directorate (HRD)/Labor, Management, and Employee Relations (LMER) or their servicing legal advisor (hereafter "HRD/LMER").
- c. Managers and supervisors will continuously monitor and evaluate employees' performance and conduct and take action if the performance or conduct falls below acceptable standards. In consultation with HRD/LMER, managers and supervisors will investigate alleged misconduct as appropriate and will document instances of misconduct and poor performance that they witness.
- d. Managers and supervisors will safeguard knowledge and information regarding proposed or decided disciplinary or adverse actions to ensure the collection, use, maintenance, and distribution of personally identifiable information of federal employees is in accordance with DoD Directive 5400.11 and DoD 5400.11-R.
- e. Managers and supervisors will inform the agency security manager if the cause for actions covered by this instruction could impact the employee's eligibility for access to classified information or compromise national security, as required by DoD 5200.2-R.

SECTION 2: RESPONSIBILITIES

2.1. DIRECTOR, WHS. Under the authority, direction, and control of the Deputy Chief Management Officer of the Department of Defense through the Director for Administration, the Director, WHS, oversees implementation of this issuance.

2.2. DIRECTOR, HRD. Under the authority, direction, and control of the Director, WHS, the Director, HRD:

a. Provides assistance to supervisory and management officials on disciplinary, adverse, and performance-based actions, including the proper processes and procedures to be followed by the managers and supervisors and the appeals process in accordance with the procedures in this volume.

b. Maintains all official records related to activity under this issuance.

SECTION 3: MISCONDUCT-BASED DISCIPLINARY AND ADVERSE ACTIONS

3.1. GENERAL.

a. Informal Disciplinary Action. A traditional informal disciplinary action consists of an oral admonishment, a counseling letter or memorandum, or a written warning, as applicable. Normally, informal disciplinary action is taken by an employee's first-level supervisor. However, any supervisor at least one level of supervision above an employee within his or her chain of command may take an informal disciplinary action.

b. Formal Disciplinary Action. A formal disciplinary action includes a written reprimand, a suspension of any length, or a removal. Formal discipline is made a matter of record in an employee's official personnel file (OPF).

(1) An "adverse action," a subset of formal disciplinary actions, is a formal disciplinary action that includes a suspension for more than 14 days (including indefinite suspensions), a reduction in grade or pay, a removal, or furloughs of 30 days or less. Federal law and regulations prescribe procedures that must be followed when taking an adverse action against a federal civilian employee. Failure to adhere to these procedures may result in the reversal of the action on appeal, without consideration of the merits of the case, or other unfavorable outcomes.

(2) Normally, a first-level supervisor issues written reprimands and proposes suspensions and removals. A supervisor or manager at least one level above the first-level supervisor normally serves as a deciding official for suspensions and removals. However, any supervisor at least one level of supervision above an employee within his or her chain of command may issue a written reprimand and serve as a proposing or deciding official. If appropriate, a Component may designate a supervisor or manager outside the employee's chain of command to perform these functions.

c. Alternative Disciplinary Action. After proposing a formal disciplinary or adverse action and hearing the employee's reply, management may offer an employee the option of participating in alternative discipline, in lieu of traditional discipline. HRD/LMER advises management on how to implement an alternative disciplinary action in such a way that it meets the Merit Systems Protection Board's (MSPB) definition of formal disciplinary action. Examples of alternative disciplinary action include:

(1) Last chance agreements and agreements to hold the penalty in abeyance, provided no additional misconduct occurs within a specified period of time.

(2) Flexibility in the timeline of when a suspension is served (e.g., intermittently).

3.2. PRE-ACTION INVESTIGATION. Before initiating a disciplinary or adverse action, the supervisor may need to investigate an incident to determine the facts and collect evidence.

- a. The investigation, conducted in consultation with HRD/LMER, may include:
 - (1) Bargaining unit status and associated rights.
 - (2) Obtaining signed and dated witness statements.
 - (3) Preparing, signing, and dating a written record summarizing incidents personally observed.
 - (4) Collecting documentation and other evidence related to the misconduct.
 - (5) Documenting, signing, and dating a summary of the employee's oral explanation.
- b. Supervisors, or individuals responsible for conducting the investigation, must forward all of the information and other documentary evidence gathered during the course of the investigation to HRD/LMER.

3.3. WRITTEN REPRIMANDS. The written reprimand:

- a. Describes the specific reasons(s) for the written reprimand in sufficient detail so the employee understands the misconduct.
- b. Contains a statement that further misconduct may result in more severe disciplinary action.
- c. References past attempts to correct the employee's behavior, if any.
- d. Explains that a copy of the written reprimand is placed in the employee's OPF for a period not to exceed 2 years (or the length of time prescribed in the applicable collective bargaining agreement, whichever occurs first). Management officials may direct removal of the written reprimand at an earlier date, if warranted.
- e. Advises the employee of his or her grievance rights in accordance with Administrative Instruction 37 or the applicable collective bargaining agreement, the right to file a complaint with the Office of Special Counsel and the right to file a complaint through the Equal Employment Opportunity process.

3.4. SUSPENSIONS, REMOVALS, AND REDUCTIONS IN GRADE OR PAY.

- a. HRD/LMER will work with management to determine who should serve as proposing and deciding officials, and if applicable, a reply official for the proposed action.
- b. Except as provided in Paragraph 3.8., employees are entitled to at least 10 days' advance written notice before a suspension of 14 days or less and at least 30 days' advance written notice before a suspension of more than 14 days or removal.

c. HRD/LMER will prepare a draft notice of the proposed action. The notice of proposed action will:

(1) Include the specific reasons for the proposed action and include specific examples, where applicable, to include all offenses on which the proposing official is relying in support of the proposed action. The reasons must be described with sufficient specificity and detail to allow the employee to provide an informed reply.

(2) Include the proposed penalty. HRD/LMER will recommend a proposed penalty. Guided by the *Douglas* factors outlined in Section 7, the notice of proposed action will explain the reason for selection of the penalty, including reference to previous counseling, disciplinary action, or other attempts to correct the employee's behavior, if applicable, as well as any aggravating or mitigating factors. The notice will refer to any informal or formal disciplinary action upon which the proposing official is relying to support the proposed action.

(3) Inform the employee of his or her right to reply, orally, in writing, or both to the proposed action within 10 calendar days.

(4) Include the name and contact information for the deciding official and, if applicable, the reply official.

(5) Inform the employee of his or her right to representation by an attorney or other representative, such as a union representative, as appropriate and at no cost to DoD. An employee's choice of representative may be disallowed if the representation would result in a conflict of interest or position. For example, the employee may not be represented by a member of the WHS HRD staff; a DoD Equal Employment Opportunity manager, counselor, investigator, a military or civilian attorney or specialist; or anyone whose service as a representative would result in a conflict or apparent conflict of interest with his or her position or with the priority needs of the DoD.

(6) Inform the employee of his or her right to review and obtain copies of the materials relied on to support the proposed action.

(7) Inform the employee that a request for an extension of the time limit permitted for a reply will be considered by the deciding official and may be approved for good cause.

(8) Inform the employee that a final written decision on the proposed action will be provided as soon as practicable after the employee's reply or after expiration of the time permitted for the reply.

(9) Inform the employee of his or her duty status during the notice period. See Paragraph 5.3.

(10) Inform the employee of the name, telephone number, and e-mail address of the HRD/LMER specialist to whom the employee may present questions about the proposal or the employee's rights.

d. The employee may submit an oral or written reply, or both, to the deciding official or reply official during the specified reply period. This is the employee's opportunity to present for consideration to the deciding official any information that supports the employee's position and to furnish any affidavits and other documentary evidence before a decision is made. The employee may have a representative during an oral reply.

e. The decision must be based on careful consideration of the notice of proposed action, the materials relied on for the proposal, the reply(ies) the employee provides, and any evidence presented by the employee. The deciding official must consider only the facts specified in the notice of proposed action and provided for in the employee's reply(ies), if any. The written notice of decision must:

(1) Indicate whether or not the employee replied and, if so, that his or her reply was considered.

(2) If all or part of the proposed action is sustained, specify the instances of unacceptable conduct or behavior on which the decision is based.

(3) Inform the employee of the penalty, if any, and the effective date of the penalty. The employee should be informed of the reason(s) why the penalty selected is appropriate, as guided by the *Douglas* factors.

(4) Include a statement that the action taken is for such cause as will promote the efficiency of the service.

(5) Be signed and dated by the deciding official.

(6) Be delivered to the employee before the effective date of the action.

(7) Inform the employee of any right to appeal the decision with the MSPB, any right to grieve the decision pursuant to a negotiated grievance procedure, the right to file a complaint with the Office of Special Counsel and the right to file a complaint through the Equal Employment Opportunity process.

3.5. SEPARATION OF INDIVIDUALS WHO ARE SERVING A TRIAL OR PROBATIONARY PERIOD.

a. The requirement that federal employees serve a trial or probationary period provides federal agencies an opportunity to evaluate the individual's conduct and performance after entry on duty to determine if an appointment to government service should become final. During the probationary or trial period, individuals may be discharged with minimal procedural requirements for a deficiency in performance or conduct that occurs after the employee's entrance on duty.

b. Determinations regarding whether an employee is subject to a trial or probationary period requires coordination with HRD/LMER.

c. If the supervisor of an individual serving a trial or probationary period determines the individual's continued employment is not in the best interest of the Federal Government, the supervisor will contact HRD/LMER to initiate a separation action. Although such discharges may be made at any time during the trial or probationary period, it is important to contact HRD/LMER at least 90 days before the end of the probationary period to ensure the action can be effectuated in a timely fashion.

d. The individual must be notified in writing as to why he or she is being separated and the effective date of the action. The notice, at a minimum, will consist of the DoD Component's conclusions as to the inadequacies of the individual's performance or conduct.

3.6. INDEFINITE SUSPENSIONS.

a. General. An employee may be temporarily placed in a non-duty status without pay. Consultation with HRD/LMER is required to determine circumstances in which indefinite suspension is appropriate. Such situations include, but are not limited to, cases when the agency has reasonable cause to believe an employee has committed a crime for which the employee could be imprisoned, pending the completion of the investigation or criminal proceedings.

b. Requirements. Indefinite suspensions taken in accordance with Chapter 75 of Title 5, U.S.C. are imposed only after a proposal, an opportunity for the employee to reply, and a decision issued, just as with any adverse action.

3.7. MANDATORY REMOVAL OF LAW ENFORCEMENT OFFICER (LEO) CONVICTED OF A FELONY.

a. General. In accordance with Section 7371 of Title 5, U.S.C., LEOs who are convicted of a felony must be removed from employment as an LEO on the last day of the first full pay period in which a federal agency receives notice of the felony conviction. Although employees are entitled to due process rights, as outlined in this section, these rights may not delay the mandatory date of removal from an LEO position. This does not preclude the removal of an LEO before a conviction notice date, if the removal is properly effectuated otherwise.

b. Issuance of Proposal. A written notice of proposed removal is issued within 5 calendar days from the date a WHS-serviced Component becomes aware of the felony conviction, regardless of whether the conviction is appealed or is subject to appeal. The proposal includes:

(1) Evidence of the employee's felony conviction.

(2) Notification of the right to representation by an attorney or other representative to assist the employee with his or her reply to the proposed action, at no cost to DoD. The representative may be disallowed as provided in Paragraph 3.4.c.(5).

(3) Notification of the employee's right to reply, orally and in writing, within 7 calendar days from issuance of the proposal and provide affidavits or other documentary evidence in support of the reply.

c. Employee Reply. The only reply that the deciding official making a decision may consider is evidence the employee presents that: he or she is not a law enforcement officer; he or she was not convicted of a felony; or the conviction was overturned on appeal.

d. Issuance of Decision. The employee is entitled to a written decision letter.

e. Requirement to Set Aside Removal Retroactively. If the felony conviction is overturned on appeal, the removal must be set aside retroactively to the date the removal occurred. The employee will receive back pay in accordance with Section 5596 of Title 5, U.S.C. for the period during which the removal was in effect, unless the removal was properly effectuated under law or regulation other than Section 7371 of Title 5, U.S.C.

3.8. CRIME PROVISION. In accordance with Section 7513(b) of Title 5, U.S.C., the “crime provision” allows for a shortened notice period and may be used when a federal agency has reasonable cause to believe an employee has committed a crime for which a sentence of imprisonment may be imposed. In these cases, an employee must provide his or her reply to the proposed action within 7 calendar days.

SECTION 4: PERFORMANCE-BASED ACTIONS

4.1. TYPES OF PERFORMANCE-BASED ACTIONS.

a. Performance-Based Actions Taken in Accordance with Chapter 75. Performance-based actions may be taken in accordance with Chapter 75 of Title 5, U.S.C. using the procedures in this section. Performance-based actions taken in accordance with Chapter 75 are most appropriate under one of the following circumstances:

- (1) The action involves both performance and conduct matters.
- (2) Performance standards are in place, but certain deficiencies are not covered by the standards (e.g., carelessness, laziness).
- (3) It would not be in the DoD's best interest to place an employee on a performance improvement plan (PIP) and provide the opportunity to demonstrate acceptable performance because of concerns such as security or safety.
- (4) Performance standards are in place and an employee has the knowledge, skills, and abilities necessary to perform his or her duties, but is unwilling or is intentionally failing to do so.

b. Performance-based Actions Taken in Accordance with Chapter 43. Performance-based actions may be taken in accordance with Chapter 43 of Title 5, U.S.C. using the procedures in this section. Performance-based actions taken in accordance with Chapter 43 are most appropriate when an employee is performing duties to the best of his or her ability, but is unable to meet the minimum requirements of one or more critical elements of the performance plan for his or her position.

4.2. PERFORMANCE-BASED ADVERSE ACTION.

a. A performance-based adverse action, including removal or reduction in grade or pay, may be taken against an employee at any time during the performance appraisal cycle when performance in one or more critical elements of the job becomes unacceptable.

b. Prior to taking a performance-based adverse action, the employee must be given the opportunity to improve through a performance improvement plan (PIP). In accordance with Part 432.104 of Title 10, U.S.C., the PIP must:

- (1) Notify the employee of the critical element(s) for which performance is unacceptable.
- (2) Inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position.
- (3) Give the employee a reasonable opportunity (i.e., not fewer than 30 calendar days) to demonstrate acceptable performance.

(4) Inform the employee that unless his or her performance in the critical element(s) improves to, and is sustained at, an acceptable level, the employee may be reduced in grade or removed.

(5) Explain what the WHS-serviced Component and rating official will do to assist the employee in improving unacceptable performance.

c. The WHS-serviced Component may propose a reduction in grade or removal if the employee's performance remains unacceptable in one or more of the critical elements. The employee must be given at least 30 days' advance written notice of the proposed action before the performance-based adverse action may be effectuated. The notice must:

(1) Identify specific instances of unacceptable performance upon which the proposed action is based, including the specific critical elements that the employee failed to meet. The reduction in grade or removal may be based upon instances of unacceptable performance which occur within a 1-year period ending on the date of the notice of proposed action.

(2) Reference the PIP and any past counseling or other attempts to correct the employee's performance.

(3) Inform the employee of his or her right to reply orally, in writing, or both to the proposed action within 10 calendar days.

(4) Include the name and contact information of the deciding official.

(5) Inform the employee of his or her right to representation by an attorney or other representative, such as a union representative, as appropriate. As described in Paragraph 3.4.c.(5), the employee's choice of representative may be disallowed.

(6) Inform the employee of his or her right to review and obtain copies of the materials relied upon to support the proposed action.

(7) Inform the employee that a request for an extension of the time limit permitted for a reply will be considered by the deciding official and may be approved for good cause.

(8) Inform the employee that a final written decision on the proposed action will be provided within 30 days after the expiration of the notice period.

(9) Inform the employee of his or her duty status during the notice period (see Paragraph 5.3.).

(10) Inform the employee of the name, telephone number, and e-mail address of the HRD/LMER specialist to whom the employee may present questions about the proposal or the employee's rights.

d. The employee may submit an oral or written response, or both, to the deciding official during the specified reply period. This is the employee's opportunity to present for consideration to the deciding official any information that supports the employee's position and to furnish any

affidavits and other documentary evidence before a decision is made. The employee may have a representative during an oral reply.

e. The decision must be based on careful consideration of the notice of proposed action, the materials relied upon for the proposal, the reply(ies) the employee provides, and any evidence presented by the employee. The deciding official must consider only the facts specified in the notice of proposed action and provided for in the employee's reply(ies), if any. Unless the action was proposed by the head of the agency, a supervisor or manager in a higher-level position than the proposing official must render the decision. The decision must:

(1) Indicate whether or not the employee replied to the proposal and, if so, that his or her reply was considered.

(2) Inform the employee whether or not the deciding official found sufficient evidence to support the proposed action. If there was sufficient evidence to support the proposed action, specify the instances of unacceptable performance by the employee upon which the action is based.

(3) Be signed and dated by the deciding official,

(4) Be delivered to the employee in writing within 30 calendar days after the expiration of the notice period and before its effective date of the action.

(5) Inform the employee of any right to appeal the decision with the MSPB, any right to grieve the decision pursuant to a negotiated grievance procedure, the right to file a complaint with the Office of Special Counsel and the right to file a complaint through the Equal Employment Opportunity process.

f. WHS-serviced Components may not extend the advance notice period for more than 30 days without prior approval from the Office of Personnel Management, except for the following reasons:

(1) To obtain or evaluate medical information when the employee has raised a medical issue in his or her reply to a proposed reduction in grade or removal.

(2) To arrange for the employee's travel to make an oral reply or to arrange for the travel of the deciding or reply official to hear the employee's oral reply.

(3) To consider the employee's reply if an extension to the period for a reply has been granted (e.g., because of the employee's illness or incapacitation).

(4) To consider reasonable accommodation of a disability.

g. If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under Paragraph 4.2.c., any entry or other notation of the unacceptable performance for which the action was proposed must be removed from any WHS-serviced Component record relating to the employee.

SECTION 5: GENERAL PROCEDURES

5.1. RELATED PERSONAL OR MEDICAL ISSUES.

a. Referrals to the EAP (Employee Assistance Program). If a supervisor suspects an employee has a personal or medical problem that may be affecting his or her conduct or performance, the supervisor may encourage the employee to contact the EAP. Contact details for EAP can be obtained by contacting HRD/LMER. The employee's participation in EAP is voluntary and confidential.

b. Employee Assertion of Personal or Medical Problem During Counseling or Reply to Discipline. If an employee cites a personal or medical problem in response to counseling or discipline, management has an obligation to consider the employee's input and should contact HRD/LMER for guidance.

(1) Employees with personal or medical issues are held to the same standards of conduct as other employees.

(2) Reasonable accommodations in the workplace may be available to address an employee's medical condition in accordance with the Rehabilitation Act of 1973.

(3) Employee personal medical issues are to be kept confidential and must not be shared or discussed with anyone, including other supervisors or managers, outside a need-to-know basis.

5.2. RECORDS.

a. Delivery and Recording of the Action. Normally, the official taking the action personally delivers the proposal or decision to the employee and, if possible, obtains written acknowledgment of receipt by the employee. An employee's refusal to sign a delivered action does not affect the processing of the action. Equally, an employee's signature on an action does not necessarily mean the employee agrees with the content of the action. A copy of the issued proposal and decision letter must be provided to HRD/LMER for the case file.

b. Agency Case Files. HRD/LMER maintains the official WHS-serviced Component files on all formal disciplinary and adverse (including performance-based) actions. These files are kept separate from the OPF.

c. OPFs

(1) **Informal Disciplinary Actions.** Documentation of oral admonishments and written warnings are not maintained in the employee's OPF.

(2) **Formal Disciplinary and Adverse Actions.** An appropriate Standard Form 50, "Notification of Personnel Action" authorizing any formal disciplinary or adverse actions

(except written reprimands) is maintained in the OPF. Written reprimands are maintained in the OPF for up to two years.

5.3. STATUS DURING INVESTIGATIONS AND NOTICE PERIODS. Under ordinary circumstances, employees remain in a duty status in their regular positions during investigation of a potential disciplinary action, during adverse action procedures, and during performance-based action procedures. Other options may be appropriate in a given situation (e.g., employee requests voluntary use of leave). In rare circumstances, the employee may be placed in an administrative leave status—a paid, non-duty status—during the notice period. Excused absence is discouraged and is used only in those rare circumstances where retention of the employee in an active duty status during the investigation or notice period may pose a threat to the employee or others; result in loss of or damage to government property; or otherwise jeopardize government interests. Care must be exercised to use the minimum amount of excused absence time necessary in any individual situation. Any determinations to place an employee in an excused absence status must be coordinated with HRD/LMER.

5.4. EMPLOYEE GRIEVANCES AND APPEALS.

a. Grievance of Formal Disciplinary Action (Written Reprimand or Suspension of 14 Days or Less). In accordance with Part 752.203 of Title 5, CFR, disciplinary actions may be grieved through the administrative grievance procedure in accordance with Administrative Instruction 37 or a negotiated grievance procedure, as appropriate.

b. Grievance or Appeal of Adverse Action (Suspension Over 14 Days, Reduction in Grade or Pay, or Removal). In accordance with Section 752.405 of Title 5, CFR, such adverse actions may be appealed to the MSPB.

SECTION 6: TABLE OF OFFENSES AND PENALTIES

6.1. OVERVIEW OF TABLE OF OFFENSES AND PENALTIES. Table 1 is a guide when selecting an appropriate penalty for actionable misconduct. It is not a substitute for supervisory judgment and does not dictate penalties. It only provides supervisors a general framework to consider on a case-by-case basis.

6.2. OFFENSE AND NATURE OF OFFENSE COLUMNS. The offense and nature of offense columns of Table 1 do not provide a complete listing of every possible cause for disciplinary or adverse action. If a specific offense is not listed, the omission does not mean a penalty cannot be imposed. Supervisors should compare a specific incident of misconduct to the offenses described in Table 1 and determine the offense that most closely describes the misconduct. If there is not an offense that best describes the misconduct, HRD/LMER can provide assistance in identifying additional offenses that may more accurately reflect the misconduct.

6.3. PENALTY COLUMNS.

a. The three columns in Table 1 that identify first, second, and third offense penalties establish a range of minimum to maximum punitive measures that may be imposed for a specific type of offense. The penalties range from less severe to more severe as offenses progress from the first through the third offense.

(1) Previous informal disciplinary actions are not counted as previous offenses for the purpose of a penalty selection. To be considered a second or third offense, the subsequent misconduct does not have to be the same or similar to the first type of misconduct. For example, if an employee was previously given a written reprimand for a first offense for being absent without leave (AWOL), and subsequently engages in insubordination, the penalty range would be derived from the second offense column, and the offense would be insubordination.

(2) Additionally, various factors can combine to either enhance or mitigate a penalty selection. For example, the presence of multiple charges would tend to enhance a penalty selection.

b. A supervisor has a choice of the severity of the penalty, ranging from no penalty, imposing informal disciplinary actions or a penalty up to the maximum penalty stated in the range.

(1) When significant aggravating circumstances exist, the penalty range may be exceeded. For example, if Table 1 lists a 14-day suspension as a maximum penalty for an offense, the supervisor may determine no penalty is needed or may issue an oral admonishment, a letter of warning, a reprimand, or a suspension of up to 14 days. Using this same example, the imposed penalty could be greater than a 14-day suspension if significant aggravating circumstances exist.

(2) Deviation from the suggested penalties would require justification in the notice of proposed action and notice of decision. In cases where previous offenses are relied upon to support a more severe penalty, those offenses must be cited in the notice of proposed action.

Table 1. Table of Offenses and Penalties

<u>Offense</u>	<u>Nature of Offense</u>	<u>First Offense Penalty</u>	<u>Second Offense Penalty</u>	<u>Third Offense Penalty</u>
<p>1. AWOL or Failure to Follow Leave Procedures</p>	<p>A. Any absence from the regularly scheduled tour of duty that has not been authorized and for which pay must be denied; e.g., AWOL or any unauthorized absence, unauthorized early departures, unauthorized tardiness, or unauthorized absence from the work site during duty hours.</p> <p>B. AWOL more than 5 days in duration.</p> <p>C. Applicable to LEOs and other weapon carriers only:</p> <p>Failure to assume assigned post in a timely manner. Leaving assigned post without being properly relieved or authorized by a supervisor.</p>	<p>Written reprimand to 5-day suspension</p> <p>14-day suspension to removal</p> <p>Written reprimand to removal</p>	<p>5-day suspension to removal</p> <p>Removal</p> <p>5-day suspension to removal</p>	<p>14-day suspension to removal</p> <p>Removal</p>
<p>2. Failure to Follow Established Leave Procedures</p>	<p>Failure to follow established leave procedures.</p>	<p>Written reprimand to 5-day suspension</p>	<p>1-day suspension to 5-day suspension</p>	<p>14-day suspension to removal</p>
<p>3. Falsification, Fraud, or Misrepresentation</p>	<p>Providing incorrect or inaccurate information; the information was material; the information was knowingly supplied; and the information was supplied with the intention to mislead, deceive, or defraud.</p>	<p>14-day suspension to removal</p>	<p>30-day suspension to removal</p>	<p>Removal</p>

Table 2. Table of Offenses and Penalties, Continued

<u>Offense</u>	<u>Nature of Offense</u>	<u>First Offense Penalty</u>	<u>Second Offense Penalty</u>	<u>Third Offense Penalty</u>
<p>4. Lack of Candor or Truthfulness</p>	<p>A. Providing statement(s) (oral, written, or electronic) that are less than candid, truthful, accurate, or complete.</p> <p>B. Applicable to LEOs and other weapon carriers only:</p> <p>Providing statement(s) (oral, written, or electronic) that are less than candid, truthful, accurate, or complete.</p>	<p>Written reprimand to removal</p> <p>Removal</p>	<p>5-day suspension to removal</p>	<p>14-day suspension to removal</p>
<p>5. Failure or Delay in Carrying Out Written or Oral Regulations, Orders, Rules, Procedures, or Instructions</p>	<p>A. Violation where safety to persons or government property is not compromised.</p> <p>B. Violation where safety to persons, delay, or government property is compromised.</p> <p>C. Applicable to LEOs and other weapon carriers only:</p> <p>1. Failure to properly and timely respond to or answer radio, or other communications, including cell phones, pagers, Blackberries, or other communications equipment when required to have them on and tuned to the appropriate channel.</p> <p>2. Failure to carry department credentials on their persons at all times while carrying a government-issued firearm.</p> <p>3. Failure to provide name and badge number to any person requesting that information while on duty or acting in an official capacity (except when the withholding of this</p>	<p>Written reprimand to 5-day suspension</p> <p>5-day suspension to removal</p> <p>Written reprimand to removal</p> <p>Written reprimand to 14-day suspension</p> <p>Removal</p>	<p>5-day suspension to removal</p> <p>14-day suspension to removal</p> <p>5-day suspension to removal</p> <p>14-day suspension to removal</p>	<p>14-day suspension to removal</p> <p>Removal</p> <p>Removal</p> <p>Removal</p>

Table 2. Table of Offenses and Penalties, Continued

<u>Offense</u>	<u>Nature of Offense</u>	<u>First Offense Penalty</u>	<u>Second Offense Penalty</u>	<u>Third Offense Penalty</u>
	<p>information is necessary for the performance of duty, authorized by a supervisor, or to protect the employees' safety or integrity).</p> <p>4. Failure to obtain written approval before engaging in outside employment and in accordance with established policies and procedures.</p>	<p>Written Reprimand to removal</p>	<p>5-day suspension to removal</p>	<p>Removal</p>
<p>6. Neglect or Careless Work Performance; Inattention to Duty</p>	<p>A. Violation when safety to persons or government property is not compromised.</p> <p>B. Violation when safety to persons or government property is compromised</p>	<p>Written reprimand to 5-day suspension</p> <p>5-day suspension to removal</p>	<p>Written reprimand to 14-day suspension</p> <p>14-day suspension to removal</p>	<p>14-day suspension to removal</p> <p>30-day suspension to removal</p>
<p>7. Failure to Perform Duties while Sleeping on Duty or Exhibiting a Sleep-Like State</p>	<p>A. Violation when the employee occupies a position where safety of personnel or property is not comprised.</p> <p>B. Violation when the employee occupies a position where safety of personnel is compromised.</p>	<p>Written reprimand to 5-day suspension</p> <p>5-day suspension to removal</p>	<p>Written reprimand to 14-day suspension</p> <p>14-day suspension to removal</p>	<p>14-day suspension to removal</p> <p>30-day suspension to removal</p>

Table 2. Table of Offenses and Penalties, Continued

<u>Offense</u>	<u>Nature of Offense</u>	<u>First Offense Penalty</u>	<u>Second Offense Penalty</u>	<u>Third Offense Penalty</u>
8. Insubordination	Willful and intentional refusal to obey an authorized order of a superior, who is either permanently assigned or in an acting capacity, which order the superior or acting supervisor is entitled to have obeyed.	Written reprimand to removal	5-day suspension to removal	14-day suspension to removal
9. Conduct Unbecoming a Federal Employee/Conduct Unbecoming a Supervisor May be based on conduct such as engaging in prohibited outside employment; discourtesy; alcohol and drug offenses; gambling offenses; discrimination, harassment, including sexual harassment, and retaliation (whether or not the conduct rises to the level of being unlawful); committing prohibited personnel practices, violations of the Hatch Act, and retaliation against whistleblowers; ethics violations.	Misconduct that discredits one’s character, reputation, or credibility, or that is not in accordance with standards of conduct.	Written reprimand to removal	14-Day suspension to removal	Removal
10. Discourtesy or Other Inappropriate Conduct	Rude, impolite acts or remarks; disrespectful, inappropriate, offensive or abusive language or gestures; or similar misconduct.	Written reprimand to removal	5 to 14-day suspension to removal	14-day suspension to removal

Table 2. Table of Offenses and Penalties, Continued

<u>Offense</u>	<u>Nature of Offense</u>	<u>First Offense Penalty</u>	<u>Second Offense Penalty</u>	<u>Third Offense Penalty</u>
11. Fighting or Creating a Disturbance	<p>A. Hitting, pushing, or other physical acts against another (without causing injury). Includes threatening another or intending to inflict injury.</p> <p>B. Hitting, pushing, or other physical acts against another (inflicting injury).</p> <p>C. Intimidation, aggressive, harassing, or abusive conduct to others. Includes engaging in dangerous horseplay or rough-housing.</p>	<p>5-day suspension to removal</p> <p>14-day suspension to removal</p> <p>Written reprimand to removal</p>	<p>14-day suspension to removal</p> <p>30-day suspension to removal</p> <p>5-day suspension to removal</p>	<p>30-day suspension to removal</p> <p>Removal</p> <p>14-day suspension to removal</p>
12. Unauthorized Taking, Possession, or Removal of Government Property or of Another Person’s Personal Property	<p>Actual or attempted possession or carrying away of government property or the property of others or collusion with others to commit such acts.</p>	<p>Written reprimand to removal</p>	<p>5-day suspension to removal</p>	<p>14-day suspension to removal</p>
13. Misappropriation or Other Contracting Violations	<p>A. Directing, expecting, or rendering services not covered by unauthorized appropriations.</p> <p>B. Failure to deposit money accruing from lapsed salaries or from unused unauthorized appropriations for salaries into the Treasury.</p> <p>C. Entering into an unauthorized procurement commitment or personal services contract.</p> <p>D. Unauthorized disclosure of proprietary or source selection information regarding a procurement action.</p>	<p>Removal</p> <p>Removal</p> <p>Written reprimand to 14-day suspension</p> <p>14-day suspension to removal</p>	<p>14-day suspension to removal</p> <p>Removal</p>	<p>Removal</p>

Table 2. Table of Offenses and Penalties, Continued

<u>Offense</u>	<u>Nature of Offense</u>	<u>First Offense Penalty</u>	<u>Second Offense Penalty</u>	<u>Third Offense Penalty</u>
14. Failure to Carry, Show or Wear Government-issued Identification or Credentials	<p>A. Failure of civilian employees to carry government-issued identification while on duty or failure to furnish.</p> <p>B. Misuse of official identification or investigative credentials or other DoD identification, including lending identification cards or badges or credentials to others.</p>	Written reprimand to 14-day suspension	14-day suspension to removal	Removal
15. Mishandling Government Information or Documentation	<p>A. Mishandling or failing to safeguard information or documentation that is restricted or otherwise generally prohibited.</p> <p>B. Mishandling or failing to safeguard information or documentation that is classified.</p>	Written reprimand to 3-day suspension Written reprimand to removal	3-day suspension to removal	Removal
16. Misuse or Abuse of Official Government Position	Misuse of positions of authority for other than official purposes.	14-day suspension to removal	Removal	
17. Misuse or Abuse of Government Property	Using government, government-leased, or government-contracted property for other than official purposes.	Written reprimand to removal	14-day suspension to removal	30-day suspension to removal
18. Misuse or Abuse of Government Time, Property, Personnel, Information, Funds, or Leased Services	<p>A. Includes the willful misuse of time, personnel, contractors, equipment, and vehicles, including, but not limited to: computers, email, IT systems, wireless devices and services, faxes, telephones or mail.</p> <p>B. Willful misuse or authorizing the misuse of government vehicles for other than official purposes.</p>	5-day suspension to removal 30-day suspension to removal*	30-day suspension to removal Removal	Removal

Table 2. Table of Offenses and Penalties, Continued

<u>Offense</u>	<u>Nature of Offense</u>	<u>First Offense Penalty</u>	<u>Second Offense Penalty</u>	<u>Third Offense Penalty</u>
	<p>C. Misuse of government-issued credit or travel card, including failure to timely file travel vouchers and failure to pay entire balance after receiving reimbursement; obtaining ATM advances that exceed expenditures; using card for personal expenses or personal travel.</p> <p>D. Applicable to LEOs and other weapon carriers only:</p> <ol style="list-style-type: none"> 1. Misuse of government credentials or position. 2. Unauthorized use of law enforcement, equipment, resources, or application of techniques. 	<p>Written reprimand to Removal</p> <p>Written reprimand to removal</p> <p><i>*Mandatory statutory minimum proposed penalty in accordance with Section 1349 of Title 31, U.S.C.)</i></p>	<p>5-day suspension to 30-day suspension</p> <p>5-day suspension to removal</p>	<p>60-day suspension to removal</p> <p>14-day suspension to removal</p>
19. Loss of or Damage to Government Property	Loss of or damage to government-owned or -leased property, records, or information, including the concealment, removal, mutilation, alteration, or destruction of government property.	Written reprimand to removal	14-day suspension to removal	30-day suspension to removal
20. Improper Use of Weapons, Firearms, or Protective Gear	<p>A. Unauthorized possession of a firearm or other weapon while in or on government-owned or -leased property.</p> <p>B. Applicable to LEOs and other weapon carriers only:</p> <ol style="list-style-type: none"> 1. Failure to properly carry, transport, store, or secure service weapon or firearm. 2. Unauthorized discharge or failure to report unauthorized discharge of service weapon or firearm. 	<p>45-day suspension to removal</p> <p>3-day suspension to removal</p> <p>Written reprimand to removal</p>	<p>Removal</p> <p>14-day suspension to removal</p> <p>14-day suspension to removal</p>	<p>Removal</p> <p>10-day suspension to removal</p>

Table 2. Table of Offenses and Penalties, Continued

<u>Offense</u>	<u>Nature of Offense</u>	<u>First Offense Penalty</u>	<u>Second Offense Penalty</u>	<u>Third Offense Penalty</u>
	<p>3. Possession of unauthorized weapon or firearm on government or government-leased property.</p> <p>4. Possession of an unauthorized firearm while traveling aboard aircraft on official department travel.</p> <p>5. Failure to wear appropriate protective body armor while engaged in field activities while in a duty status.</p>	<p>30-day suspension to removal</p> <p>5-day suspension</p> <p>Written reprimand</p>	<p>Removal</p> <p>14-day suspension to removal</p> <p>5-day suspension to removal</p>	<p>Removal</p> <p>10-day suspension to removal</p>
<p>21. Betting, Gambling, or Promoting Gambling</p>	<p>Conducting or participating in any gambling activity, including operating a gambling device, conducting a lottery or pool, participating in a game for money or property, or selling or purchasing a numbers slip or ticket while on government-owned or -leased property while in a duty status. This does not apply to activities necessitated by an employee’s official duties such as charitable fund-raising or activities that are lawful while on personal time.</p>	<p>Written reprimand to 5-day suspension</p>	<p>14-day suspension to removal</p>	<p>14-day suspension to removal</p>

SECTION 7: COMPARISON OF ADMINISTRATIVE ACTIONS

Table 2 provides a comparison between common administrative actions taken for misconduct, including formal discipline and adverse actions, and actions taken for performance based reasons. Specific information and applicable references related to each type of action are identified for ease of understanding and clarity of application.

Table 3. Comparison of Common Administrative Actions Taken for Cause

	Misconduct-based Actions		Performance-based Actions	
	Formal Discipline	Adverse	In accordance with Chapter 75	In accordance with Chapter 43
	(1) Written reprimand or (2) Suspension for 14 days or less	(1) Suspension over 14 days, (2) Reduction in grade or pay for cause, or (3) Removal	(1) Suspension over 14 days, (2) Reduction in grade or pay for cause, or (3) Removal	(1) Reduction in grade or pay or (2) Removal
References	Subpart A of Part 752 of Title 5, CFR (for suspensions of 14 days or less)	Subpart D of Part 752 of Title 5, CFR	Subpart D of Part 752 of Title 5, CFR	Part 432 of Title 5, CFR
Basis for Action	Misconduct	Misconduct	E.g., the action involves both performance and conduct matters or issues such as security or safety would make a performance improvement period inappropriate.	Failure to meet minimum requirements of critical element in established performance plan.

Table 4. Comparison of Common Administrative Actions Taken for Cause, Continued

	Misconduct-based Actions		Performance-based Actions	
	Formal Discipline	Adverse	In accordance with Chapter 75	In accordance with Chapter 43
Governmental Burden of Proof	<p>Prove offenses in proposal notice by a preponderance of the evidence.</p> <p>Demonstrate that the action will promote the efficiency of the service and that the penalty imposed was reasonable.</p>	<p>Prove offenses in proposal notice by a preponderance of the evidence.</p> <p>Demonstrate that the action will promote the efficiency of the service and that the penalty imposed was reasonable.</p>	<p>Prove offenses in proposal notice by a preponderance of the evidence.</p> <p>Demonstrate that the action will promote the efficiency of the service and that the penalty imposed was reasonable.</p>	<p>Prove unacceptable performance by substantial evidence (lower evidentiary burden than preponderant).</p>
Appeals	Grievance Procedure	MSPB	MSPB	MSPB

SECTION 8: DOUGLAS FACTORS

a. The MSPB, in its *Douglas v. Veterans Administration* decision, established criteria that the deciding official must consider in determining an appropriate penalty to impose for an act of employee misconduct. Each factor should be considered in light of the facts and circumstances presented in the notice of proposed action, supporting documentation, and the employee’s reply. Not all of the *Douglas* factors may be applicable in each individual case.

b. Penalty selection is intended to be progressive and rehabilitative in nature, identifying the action that will be most effective in correcting the employee’s conduct. The disciplinary process may start with an informal action and proceed to more serious formal disciplinary or adverse actions based on repeated or more serious misconduct. Depending on the nature of the offense, however, removal may be appropriate even for a first offense.

c. The deciding official must sustain the action as proposed, reduce the penalty, offer the employee an alternative sanction, or cancel the proposed action in its entirety. The deciding official’s analysis of the *Douglas* factors is considered part of the case file. Table 3 contains the *Douglas* factors a deciding official may consider when reviewing a case for determination.

Table 5. Douglas Factors Considered in Deciding Disciplinary Action

<i>Douglas</i> Factors
1. Nature and seriousness of the offense and its relation to the employee’s duties, position and responsibilities, including whether the offense was intentional, technical, or inadvertent, or was committed maliciously or for gain, or was frequently repeated.
2. Employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.
3. Employee’s past disciplinary record.
4. Employee’s past work record, including length of service, performance on the job, ability to get along with co-workers, and dependability.
5. Effect of the offense on the employee’s ability to perform at a satisfactory level and on the supervisor’s confidence in the employee’s ability to perform assigned duties.
6. Consistency of penalty imposed on other employees for the same or similar offenses.
7. Consistency with the Table of Penalties in Table 1.
8. Notoriety of the offense or its impact on the reputation of the DoD.
9. The clarity with which the employee was on notice of any rules violated in committing the offense, or had been warned about the conduct in question.
10. Potential for employee’s rehabilitation.
11. Mitigating circumstances surrounding the offense, such as unusual job tensions, mental impairment, harassment, or bad faith, malice, or provocation on the part of others.
12. Adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

GLOSSARY

G.1. ACRONYMS.

AWOL	absence without leave
CFR	Code of Federal Regulations
EAP	Employee Assistance Program
HRD	Human Resources Directorate
HRD/LMER	Human Resources Directorate/Labor and Management Employee Relations
LEO	law enforcement officer
LMER	Labor and Management Employee Relations
MSPB	Merit Systems Protection Board
OPF	official personnel folder
PIP	performance improvement plan
U.S.C.	United States Code
WHS	Washington Headquarters Services

G.2. DEFINITIONS. These terms and their definitions are for the purpose of this issuance.

day. A calendar day.

Douglas factors. Factors an agency must consider when determining an appropriate penalty for misconduct when taking an adverse action.

furlough. A temporary non-duty and non-pay status of 30 days or less that results from a lack of work or funds, or for other non-disciplinary reasons. A furlough is an adverse action, in accordance with Part 752 of Title 5, CFR, if it is for a period of 30 calendar days or less and is based on a decision of an appropriately designated management official. Furloughs for more than 30 calendar days are reduction-in-force actions.

indefinite suspension. An adverse action that consists of placing an employee in a temporary, non-duty and non-pay status.

preponderance of the evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more

likely to be true than untrue. The agency is required to prove actions taken in accordance with Part 752 of Title 5, CFR by a preponderance of the evidence.

proposing official. The management official who proposes an adverse action or performance-based adverse action.

substantial evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. “Substantial evidence” is a lower standard of proof than “preponderance of the evidence.” The agency must establish the factors required for a performance-based action under Part 432 of Title 5, CFR by substantial evidence.

suspension. A temporary non-duty and non-pay status for consecutive calendar days.

REFERENCES

Administrative Instruction 37, "Employee Grievances," October 27, 2006
Code of Federal Regulations, Title 5
DoD 5200.2-R, "Personnel Security Program," January 1, 1987, as amended
DoD 5400.11-R, "Department of Defense Privacy Program," May 14, 2007
DoD Directive 5110.04, "Washington Headquarters Services (WHS)," March 27, 2013
DoD Directive 5400.11, "DoD Privacy Program," October 29, 2014
Douglas v. Veterans Administration, 5 M.S.P.R. 280 (MSPB 1981)
United States Code, Title 5
United States Code, Title 10
United States Code, Title 31, Section 1349