

GUIDE TO ADVERSE ACTIONS

Introduction

The Civil Service Reform Act, at 5 USC Chapter 75, provides the legal framework for formally addressing employee misconduct problems.¹ Misconduct includes, but is not limited to, actions violating laws, regulations, and Department policies.

Some examples of actionable misconduct include: violation of criminal statutes; abuse of leave; falsification of travel vouchers, time and attendance records, or other official documents; making false statements; misuse of Government time or property; violation of Standards of Conduct; disruptive behavior; disrespectful conduct; failure to follow instructions; and insubordination.²

An employee may be disciplined only for such cause as will promote the efficiency of the service. This means that the employee's misconduct interferes with the Department's ability to carry out its mission.

Chapter 75 relates specifically to adverse actions, that is, suspensions of 14 days or less, suspensions of 14 days or more, removals, and reductions in grade or pay.³

This short Guide is not intended to be all-inclusive. Applicable laws, rules and regulations may change, and case law further defines the requirements.

Procedural Requirements

Suspensions for 14 days or less require a written notice from the proposing official (generally the first-line supervisor) with specific reasons for the proposal; the right to review the material relied on to support the reasons for the action; a reasonable time within which to answer orally and/or in writing, and to furnish affidavits and other documents in support of the evidence;⁴ the right to be represented; and a written decision by a deciding official (at a higher

¹ OPM has established government-wide standards implementing the provisions of Chapter 75. These are found at 5 CFR Part 752. Moreover, the Department has issued Personnel Management Instructions (PMIs) relating to Discipline (PMI 751-1), Adverse Actions (PMI 752-1), and Courtesy (PMI 735-1).

² In certain instances, the provisions of Chapter 75 can also be used to discipline an employee for unacceptable performance.

³ Informal disciplinary actions outside of Chapter 75 are also available to supervisors. These include counseling, oral and written admonishments, and reprimands. Supervisors should consult PMI 751-1, Discipline, and the Collective Bargaining Agreement (CBA), if applicable, regarding procedures for taking these actions.

⁴ Departmental policy is to provide 7 calendar days for non-bargaining unit employees; the CBA requires 10 working days for bargaining unit employees.

level than the proposing official) specifying reasons for the decision and considering the employee's response.

Removals, reductions in grade or pay, and suspensions for more than 14 days require, in addition to the above requirements, 30 calendar days' advance written notice with specific reasons for the action,⁵ and a reasonable time, but not less than 7 days, to respond to the proposal.

Upon written request, an employee may receive up to 4 hours of official time (up to 8 hours in exceptional circumstances) for preparation of a reply.

If the proposed action is sustained by the deciding official, the action can be effected no sooner than 30 calendar days after the employee's receipt of the written proposal.⁶

Substantive Requirements

Proposing and deciding officials must address three substantive areas in their notifications to an employee. In addition, the deciding official must consider and respond to any arguments or documentary evidence that the employee has provided in response to the proposal.

Establishment of Charged Misconduct

First, the officials must determine, through an appropriate investigation into the allegations at issue,⁷ that misconduct has in fact occurred based on detailed and specific information. Such information may include, as appropriate, the employee's duties; the offense committed, and where, when, and how it occurred; what law, rule, regulation, policy, or standard of conduct was violated; whether the matter was discussed with the employee and, if so, what the employee's explanation was; whether there were any witnesses to the incident.

Where the employee's behavior appears to involve violation(s) of criminal law, the supervisor should refer the matter to the Office of the Inspector General (OIG) for consideration of an investigation.⁸

⁵ Less than 30 days' notice can be given if the Department has reason to believe that the employee has committed a crime for which imprisonment may be imposed.

⁶ If the employee is a bargaining unit employee, the action cannot be effected until the 6th work day after the final decision is issued; if the employee files a grievance, the effective date is stayed until a grievance decision is issued.

⁷ It is important to note that the Privacy Act requires federal agencies, when gathering information that may lead to an adverse determination about an individual, to obtain that information directly from the individual to the greatest extent practicable. See Dong v. Smithsonian, 125 F.3d 877 (D.C. Cir.)

⁸ The OIG may decline to investigate. If the OIG investigates and finds violations of criminal law, it may refer the matter to the U.S. Attorney's Office, which may decide to prosecute or to decline prosecution in lieu of administrative action by the Department.

The facts should be documented, as appropriate, through affidavits, witness statements, investigative reports, police reports, indictments, official records, relevant statutes, regulations, policy statements, and/or handbooks.

Specific reasons for the action should be characterized in terms of (1) a charge, that is a name, label or designation that generally characterizes the misconduct; and (2) a narrative description setting forth the details of the charged misconduct. While it is not mandatory that misconduct be labeled with a charge, the general practice at the Department is that a charge is articulated. The Department must be prepared to prove all of the elements that constitute a charge. There may be several instances or specifications of similar misconduct under a specific charge.

Establishment of Nexus

Second, the proposing official must determine whether there is a nexus between the employee's misconduct and the efficiency of the service. Generally, if the misconduct occurred while the employee was on duty, nexus is presumed. If the misconduct occurred off-duty, nexus must be established.

Determination of Penalty

Finally, the proposing official must determine the appropriate reasonable penalty, applying the 12 factors enumerated in Douglas v. Veterans Administration, 5 M.S.P.B. 313 (1981).⁹

The disciplinary framework for federal employees is based on the concept of progressive discipline, on the rationale that, except in the most egregious cases, adverse actions are intended to be corrective rather than punitive. Thus,

⁹ The 12 "Douglas factors" include: 1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; 3) the employee's past disciplinary record; 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties; 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; 7) consistency of the penalty with an applicable table of penalties; 8) the notoriety of the offense or its impact upon the reputation of the agency; 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; 10) potential for the employee's rehabilitation; 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

a supervisor should generally take only the minimum action necessary to correct the behavior. If the behavior does not improve, then actions should increase in severity.

Appeal Rights

All employees may appeal adverse actions alleged to be discriminatory through the EEO complaint procedures.¹⁰ Bargaining unit employees may appeal such matters through the negotiated grievance procedure.¹¹

Competitive service or preference eligible employees in the excepted service, and certain nonpreference eligible employees in the excepted service, may appeal severe actions such as suspensions exceeding 14 days, removals, or reductions in grade to the Merit Systems Protection Board (MSPB).¹² At the MSPB, the Department must establish by a preponderance of the evidence that the employee engaged in the misconduct of which he/she is accused, that action is warranted for the efficiency of the service, and that the penalty chosen is reasonable. The MSPB has the right to review whether an imposed penalty is the maximum reasonable penalty for a proven offense and is not an abuse of discretion.

General Information

If there is any reason to suspect a physical, mental, or emotional basis for the conduct problem, the supervisor must give the employee the opportunity to raise a medical basis for the problem, refer the employee to the Employee Assistance Program (EAP), rule on requests for reasonable accommodation, if any, and document all of the above.¹³ However, a supervisor should not tell the

¹⁰ The Department has established an Informal Dispute Resolution (IDR) Center as the first step for employee workplace disputes, disagreements, or complaints. The EEO process begins here as well. To initiate the EEO process, an employee must contact the IDR Center within 45 calendar days of the allegedly discriminatory agency action. The IDR Center is located at 490 L'Enfant Plaza, S.W., Suite 2100A, Washington, D.C. 20024; phone: (202) 619-9700; TTY: (202) 619-9731. If informal counseling does not resolve the matter, the employee receives a Notice of Right to File a formal EEO complaint. Complaints are filed with the Equal Employment Opportunity Group (EEOG) within 15 calendar days of receipt of a Notice of Right to File. EEOG is located at 400 Maryland Avenue, S.W., Room 2W240, Washington, D.C. 20202; phone: (202) 401-3560. If an employee files an EEO complaint, investigators under contract with the Department investigate the complaint and prepare a Report of Investigation. After receipt of the Report, an employee has the right to request a hearing before an Equal Employment Opportunity Commission (EEOC) Administrative Judge, or a Final Agency Decision from the Department. If the employee requests a hearing, the EEOC Administrative Judge issues a decision on the merits after the hearing.

¹¹ See Footnote 6, supra.

¹² To determine whether an employee is entitled to appeal rights to the MSPB, a supervisor should consult with the Employee Relations Team to determine the employee's status.

¹³ The EAP is a free and voluntary professional counseling and referral service designed to help employees with problems on and off the job. Before referring an employee to EAP, a supervisor should consult with the Employees Relations Team (ERT) regarding procedures. The EAP's 24-hour phone numbers are: 1-800-222-0364 and 1-888-262-7847 (TTY).

employee that he/she believes that the employee has a given medical condition; a supervisor is not qualified to make such a diagnosis.

Even if an employee has a medical condition that is the cause of the misconduct, the employee may still be disciplined as long as employees who do not have medical conditions would be disciplined in a similar manner for a similar offense.

Pending a decision on a proposal to discipline, the Department cannot send the employee home on enforced leave.¹⁴ The employee can be sent home on paid administrative leave in appropriate circumstances.

In taking actions under Chapter 75, supervisors are to abide by the merit system principles enumerated in 5 USC 2301(b),¹⁵ and refrain from committing any prohibited personnel practices, as outlined in 5 USC 2302(b).¹⁶

Supervisors are encouraged to consult with the Employee Relations Team, Human Resources Group, for technical assistance with conduct problems; and with the Division of Business and Administrative Law, Office of the General Counsel, for advice on legal questions.

¹⁴ There are some specific situations when an employee can be placed on indefinite suspension pending a final decision if criminal misconduct is involved. The supervisor should consult the Employee Relations Team before taking any such action.

¹⁵ The merit system principles state, *inter alia*, that federal employees should be selected through fair and open competition based on ability, knowledge, and skills; receive fair and equitable treatment without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition; receive equal pay for equal work; be retained on the basis of the adequacy of their performance and separated if they cannot or will not improve their performance to meet required standards; be protected against arbitrary action, personal favoritism, coercion for partisan political purposes, and reprisal.

¹⁶ Prohibited personnel practices include, but are not limited to, discriminating for or against any employee or applicant based on race, color, religion, sex, national origin, age, handicap, marital status, or political affiliation; coercing the political activity of any person or taking any action as reprisal for the person's refusal to engage in such political activity; discouraging or obstructing a person from competition for employment; granting a preference or advantage not authorized by law; taking or failing to take action against an employee because the employee has engaged in whistleblowing activity.