



National Capital Region  
Medical Directorate  
**ADMINISTRATIVE INSTRUCTION**



NUMBER 1400.06

APR 17 2015

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PERS

SUBJECT: Civilian Disciplinary and Adverse Actions

References: See Enclosure 1

1. PURPOSE. This Administrative Instruction (AI), based on the authority of References (a) through (c), establishes guidance and the associated procedures for taking civilian disciplinary and adverse actions consistently in accordance with (IAW) References (d) and (f).
  
2. APPLICABILITY. This AI applies to the National Capital Region Medical Directorate (NCR MD), Walter Reed National Military Medical Center to include the DiLorenzo Clinic and the Tri-Service Dental Clinic, Fort Belvoir Community Hospital to include the Dumfries and Fairfax Clinics, and the Joint Pathology Center (JPC). Hereafter, these facilities are collectively referred to as Joint Medical Treatment Facilities (MTFs) and Centers.
  
3. POLICY. It is NCR MD policy that:
  - a. Civilian disciplinary and adverse actions will be taken only for such cause as “will promote the efficiency of the service” to ensure high standards of Government service and maintain public confidence in NCR MD, applicable MTFs, and the JPC. When warranted, civilian disciplinary and adverse actions shall be initiated promptly (References (d) and (e)).
  
  - b. The administration of civilian disciplinary and adverse actions will consistently strive to balance essential management decisions with employee rights established by law, regulation, policy, and/or a collective bargaining agreement. Actions are effected through due process that may include a notice of proposed action, an opportunity to respond to charges, a notice of decision, and access to appellate or grievance procedures. Management carries the obligation to prove the following by a preponderance of the evidence:
    - (1) The reason for the civilian disciplinary or adverse action;
    - (2) That the action promotes the efficiency of the service; and
    - (3) That the penalty is reasonable.

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c. The authority to initiate civilian disciplinary or adverse actions is delegated to the lowest practical level of supervision consistent with good management practices. Normally this authority is placed at the first-level of supervision. Any supervisor at any level of supervision may initiate action consistent with this AI. Decisions to suspend, reduce in grade, or remove shall normally be made by a management official at least one level higher than the supervisor who proposed the action, unless the proposing official is the Director, NCR MD. Prior to initiating or issuing any civilian disciplinary or adverse action, a supervisor shall seek advice and assistance from Civilian Human Resources Center (CHRC) Labor and Management Employee Relations (LMER) to ensure regulatory compliance and consistency of actions across organizations.

d. In deciding whether to take civilian disciplinary or adverse action, there shall be no discrimination against an employee for political beliefs, physical disabilities, gender, sexual orientation, race, religion, color, national origin, or age.

4. RESPONSIBILITIES. See Enclosure 2

5. PROCEDURES. See Enclosure 3 and Appendixes 1 through 13

6. RELEASABILITY. **Cleared for public release.** This AI is available on the Internet from the NCR MD Website at [www.capmed.mil](http://www.capmed.mil).

7. EFFECTIVE DATE. This AI:

a. Is effective immediately.

b. Will expire 10 years from the publication date if it hasn't been reissued or cancelled before this date IAW DoD Instruction 5025.01 (Reference (k)).



R. C. BONO  
RADM, MC, USN  
Director

#### Enclosures

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ENCLOSURE 1REFERENCES

- (a) Deputy Secretary of Defense Action Memorandum, "Implementation of Military Health System Governance Reform," March 11, 2013
- (b) DoD Directive 5136.13, "Defense Health Agency (DHA)," September 30, 2013
- (c) National Capital Region Medical Directorate (NCR MD) Concept of Operations, September 10, 2013
- (d) OSD AI 8, Administrative Instruction Number 8, "Disciplinary and Adverse Action," August 17, 1981
- (e) Title 5, United States Code
- (f) Parts 213, 316, 351, 359, 430, 432, 731, 754, and 752 of Title 5, Code of Federal Regulations
- (g) DoD Directive 5500.7, "Standards of Conduct," August 30, 1993
- (h) Section 1601 of Title 10, United States Code
- (i) JTF CAPMED-I 1426.01, "Civilian Employee Assistance Program," January 11, 2012, as amended
- (j) Section 1349 of Title 31, United States Code
- (k) Section 2071 of Title 18, United States Code
- (l) DoD Instruction 5025.01, "DoD Issuances Program," June 6, 2014, as amended

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ENCLOSURE 2

RESPONSIBILITIES

1. DIRECTOR, NCR MD. The Director, NCR MD or designee will:

a. Ensure that all civilian disciplinary and adverse actions are taken in a timely manner and only for the purpose of promoting the efficiency of the service.

b. Ensure that supervisors are trained to properly carry out their responsibilities and that employees are counseled concerning their rights, privileges, and standards of conduct.

2. CHRC LMER STAFF. The CHRC LMER Staff will:

a. Function as the NCR MD designee for all matters related to advice and assistance provided to managers and employees in carrying out the provisions of this AI.

b. Provide guidance to management officials and prepare periodic reports on the administration of discipline in NCR MD organizations as well as identify issues and recommended improvements for the effective use of discipline in improving efficiency and morale in NCR MD organizations.

c. Provide LMER training to supervisors and managers.

3. MTFs, JPC DIRECTOR, AND PRINCIPAL STAFF DIRECTORS. The MTF, JPC Director, and Principal Staff Directors will:

a. Ensure that employees are advised of their rights according to this AI.

b. Coordinate all formal disciplinary actions with CHRC LMER to ensure conformance with established laws and regulations.

c. Ensure each case is processed promptly and fairly and that discipline is uniformly applied.

4. PROPOSING OFFICIAL. The Proposing Official will:

a. Gather, document, and analyze the facts concerning each potential disciplinary or adverse action.

b. Issue a notice of proposed disciplinary or adverse action in coordination with a CHRC LMER Specialist.

5. DECIDING OFFICIAL. The Deciding Official will:

- a. Review and consider all relevant material regarding a proposed action.
- b. Issue a notice of final decision on a disciplinary or adverse action in coordination with a CHRC LMER Specialist.

6. SUPERVISORS. The Supervisors will:

- a. Conduct themselves so as to set a good example for their subordinate employees.
- b. Communicate their expectations regarding standards of conduct and performance to employees.
- c. Refer employees to the Employee Assistance Program (Reference (i)) as necessary.
- d. Take appropriate informal disciplinary and/or adverse/formal disciplinary action when conduct or performance issues arise in order to promote the efficiency of the service.
- e. Consult with LMER prior to initiating action IAW this Instruction.

7. EMPLOYEES. Employees will:

- a. Conduct themselves both on and off-duty in a way that ensures their conduct does not reflect adversely on their organization.
- b. Follow the work rules and directives provided by their supervisors.
- c. Comply with the standards of conduct prescribed in Reference (g).

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ENCLOSURE 3PROCEDURES1. ADVERSE ACTIONS. Adverse actions are one of the following:

a. Disciplinary. Disciplinary adverse actions may be taken against an employee covered by this AI only for such cause as will promote the efficiency of the service. A just and substantial cause is necessary as a basis for a disciplinary adverse action. The nature of the cause shall be determined on a case-by-case basis.

b. Administrative. Certain kinds of adverse actions are not considered disciplinary and/or punitive in nature, but are administrative actions taken to promote the efficiency of the service (e.g., medical inability to perform the essential functions of a position, reductions in grade or pay as a result of classification actions or reorganization, and furloughs of 30 days or less).

c. Reduction in grade or pay. Reductions in grade or pay are subject to the procedural provisions of paragraph 3.d. of this enclosure, with the exception of reductions based upon unacceptable performance, which are subject to the provisions of section 6 of this enclosure IAW References (e) and (f).

d. Furlough. A furlough is an adverse action according to Part 752 of Reference (f) if it places an employee in a non-duty and non-pay status for a period of 30 calendar days or less and is based on a decision of an appropriately designated management official, generally due to lack of work or funds. Military or similar furloughs required by law or regulation are not actions based on decisions of a management official and are not deemed adverse actions. Furloughs for more than 30 calendar days are reduction-in-force actions.

2. DISCIPLINARY AND REMOVAL ACTIONS: GUIDELINES FOR SELECTING PENALTIES

a. General. When discipline is necessary, a wide variety of penalties may be applicable to the misconduct. In selecting a penalty, all of the specific circumstances of the case shall be taken into account. In deciding what action to take, careful judgment must be used to ensure that the penalty is not out of proportion to the character of the offense, especially a first offense, and to ensure that penalties are imposed with consistency and equity throughout the organization. Past offenses may form the basis for proposing a higher penalty for subsequent offenses. The offenses need not be identical or even similar in nature.

b. Penalty Selection Factors. After reviewing all the evidence, the servicing Human Resources Specialist in LMER will make recommendations regarding the appropriate penalty based upon the nature of the misconduct, the Table of Offenses and Penalties (Appendix 1 of Enclosure 3), and the *Douglas* Factors (Appendix 13 of Enclosure 3). The factors most commonly used in selecting the penalty are listed below in paragraphs 2.b.(1) through 2.b.(12) of

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this enclosure. Not all factors listed will be pertinent in each case. Additionally, the factors may serve as either mitigating or aggravating depending on the specifics of the action.

(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 any applicable agency 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 violated in committing the offense, and whether he or she had been warned about the conduct in question.

(10) The potential for the employee's rehabilitation.

(11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, or mental impairment, or harassment, bad faith, malice, or provocation on the part of others involved in the matter.

(12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

c. Table of Offenses and Penalties. The Table of Offenses and Penalties in Appendix 1 to Enclosure 3 provides guidance on selecting appropriate penalties for typical offenses. Normally a progression of disciplinary measures is applied in an effort to correct an employee's conduct. A first offense normally does not warrant the removal of an employee; however, it may be appropriate depending on the nature of the misconduct. When appropriate penalty other than removal will correct an employee's conduct, a lesser penalty is the proper course of action.

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d. Non-Disciplinary Actions. Oral admonishments or written warnings are usually the first step in constructive discipline. These measures may be used for an offense that does not, by itself, warrant a reprimand or more severe penalty that will, if repeated, warrant formal disciplinary action. In the case of an oral admonishment, the supervisor should make a written informal record of the date of the discussion and the subjects covered. Reference to the admonishment can be cited in any future action as evidence that the employee was on notice of the seriousness of the offense and of possible future disciplinary action. The employee must be advised that an informal record is being kept and that the incident may be cited in future disciplinary action. Non-disciplinary actions cannot be counted as a prior offense when determining a range of penalties under Appendix 1.

e. Formal Disciplinary Actions. Formal disciplinary actions consist of official reprimands, suspensions, and removals. Formal disciplinary action is usually initiated by the immediate supervisor of the employee being disciplined. The final decision for all disciplinary actions rests with the Deciding Official.

(1) Reprimands. A reprimand is official discipline given to an employee in a formal letter for violation of a rule of conduct, law, regulation, official instruction, or particular responsibility. A reprimand also may be given for repeated minor offenses about which the employee is on clear notice that the conduct is unacceptable.

(2) Suspensions. When an employee is suspended, he or she is not allowed to work or earn pay for a specified number of days. Suspension from a pay and duty status for misconduct or delinquency is generally imposed when an employee fails to improve his or her conduct after receiving informal discipline and/or being reprimanded.

(3) Removals. A removal is the strongest action and is usually reserved for the most serious offenses or when other actions have not served to correct the misconduct. The action selected depends on the seriousness of the offense. The amount of notice, right to reply, and appeal rights depend upon the employee's appointment, bargaining unit status, and tenure.

### 3. REQUIREMENTS FOR CIVILIAN DISCIPLINARY AND ADVERSE ACTIONS

a. General. Federal law and regulations mandate procedures which must be followed when taking formal disciplinary or adverse action against an employee. Failure to adhere to these procedures may lead to reversal of an action upon appeal without consideration to the merits of the case. Before initiating a disciplinary or adverse action, the supervisor must investigate the incident and obtain witness statements, as appropriate, and any other documentation relating to the misconduct. This documentation may include a written or oral explanation from the employee. If the supervisor personally witnesses the misconduct, he or she should prepare a memorandum for the record summarizing the incident. All pertinent information gathered during the course of the investigation must be forwarded to LMER for review and preparation of the action.

#### b. Requirements for Official Reprimands

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(1) Issuance of the Reprimand. The supervisory or management official taking the action shall notify the employee in writing of the reprimand. The written notification will:

- (a) Contain the reason specifically and in detail for the reprimand.
- (b) Provide a warning that any recurrence of the misconduct may result in a more severe action.
- (c) If applicable, include reference to any past counseling or other attempts to correct the employee's behavior.
- (d) Contain a statement that a copy of the letter of reprimand will be placed in the employee's official personnel file (OPF) for a period not to exceed 2 years, or not to exceed the date upon which the employee leaves an NCR MD organization, whichever occurs first. Management officials are authorized to request expungement of these documents at an earlier date if desired.
- (e) Advise the employee of grievance rights.
- (f) Coordinate all reprimands with LMER prior to issuance to the employee.

(2) Delivery and Recording of the Reprimand. The official taking the action will personally deliver the reprimand to the employee, if possible, and will obtain written acknowledgment of receipt on a copy of the reprimand for placement in the employee's OPF.

c. Requirements for Suspensions of 14 Days or Less

(1) Coverage. For the purposes of this section, employee means:

- (a) An employee in the competitive service who is not serving a probationary or trial period under an initial appointment, or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less.
- (b) A preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions.
- (c) An employee with competitive status who occupies a position under a Schedule B appointment.

(2) Excluded Employees. This section does not apply to:

- (a) Employees serving a probationary or trial period. Probationary employees should not receive Letters of Reprimand. The probationary period is an extension of the hiring process and supervisors should utilize this period to determine if an employee is fit for continued employment.

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(b) Employees serving with less than 1 year of current continuous service. An employee serving under a temporary appointment pending establishment of a register or a special tenure appointment, or serving as a status quo employee, does not serve a probationary or trial period. During the first year of current continuous employment, however, the employee is not covered by Part 752 of Reference (f).

(c) Employees serving with temporary tenure. In the competitive service, an employee in a temporary appointment with a definite time limitation serves with temporary tenure, and is not covered by Reference (f).

(d) Employees serving under a limited executive assignment.

(e) Reemployed annuitants.

(f) Preference eligible with less than 1 year of current continuous employment in the excepted service.

(g) Employees whose appointment requires Senate confirmation.

(h) Schedule B employees without competitive status.

(i) Employees whose positions have been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character (Schedule C employees).

(j) Employees appointed according to section 1601 of Title 10, United States Code (U.S.C.) (Reference (i)) during a national emergency.

(3) Standards for Issuance of Advance Notice of Proposed Action. Except in emergency situations, the employee must be given at least 15 days advance written notice of the effective date of the proposed suspension. The notice must:

(a) Identify the length of the proposed action and inform the employee of his or duty status during the notice period.

(b) State the basis (i.e., specific misconduct/charges) for the proposed suspension with specificity and sufficient detail to allow the employee to reply to the charge(s).

(c) Inform the employee of his or her right to reply both orally and/or in writing to the proposed action and identify the name of the Deciding Official.

(d) Allow the employee a minimum of 10 calendar days to secure affidavits and/or other documentation, submit a written reply, and respond orally to the proposed action. A reasonable amount of official time shall be provided the employee for purposes of preparing a reply (this is usually hours, not days). The amount of time allowed depends on the facts and circumstances of the proposed action and shall be sufficient to afford the employee an

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opportunity to review the material relied on to support the proposed action, to prepare a reply, and to secure affidavits.

(e) Inform the employee of his or her right to be represented by an attorney (at the employee's own expense) or other representative and the right to review the material supporting the proposed suspension. An employee's choice of representative may be disallowed if such representation would result in a conflict of interest or position.

(f) Indicate that a request for an extension of the time limit allowed for a reply shall be considered if written requests stating the reason(s) for the extension are submitted to the Deciding Official.

(g) Indicate that a final decision on the proposed action will not be made until after the employee's reply, if any, has been considered, or after the time allotted for the employee to reply has expired.

(4) Standards for Issuance of Notice of Final Decision. A written decision shall be provided to the employee at the earliest practical date after the employee's reply, if any, has been received, or after expiration of the time allotted the employee to reply. If, after consideration of the employee's reply to the written notification of the adverse action and applicable *Douglas* Factors (Appendix 13 of Enclosure 3), it is decided that the action is warranted, the notice of final decision must:

(a) Consider only the reasons specified in the notice of proposed action and specify the reasons for the decision, including validity of the charges, any verbal/written reply, Table of Offenses and Penalties (Appendix 1 of Enclosure 3), and applicable *Douglas* Factors (Appendix 13 of Enclosure 3).

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

(c) Inform the employee of his or her grievance rights.

(d) Indicate the length of the suspension. The Deciding Official may lessen, but not increase the length of the suspension proposed.

(e) Be signed by the Deciding Official.

(f) Be delivered to the employee at or before the effective date of the suspension.

d. Requirements for Removals, Suspensions for More than 14 Days, Furlough Without Pay of 30 Days or Less, and Reductions in Grade or Pay

(1) Coverage. For the purposes of this paragraph, employee means:

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(a) An employee in the competitive service who has completed a probationary or trial period.

(b) An employee in the competitive service serving in an appointment that requires no probationary or trial period, and who has completed 1 year of current continuous service in the same or similar positions under other than a temporary appointment limited to 1 year or less.

(c) An employee in the excepted service who is a preference eligible and has completed 1 year of current continuous service in the same or similar positions.

(d) An employee in the excepted service who is a non-preference eligible who has completed 2 years of current continuous service in the same or similar positions under other than a temporary appointment limited to 2 years or less.

(e) An employee with competitive status who occupies a position in Schedule B of Part 213 of Reference (f).

(f) An employee who was in the competitive service at the time his or her position was first listed under Schedule A, B, or C of the excepted service and who still occupies that position.

(2) Excluded Employees. This section does not apply to employees whose positions have been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by the Office of Personnel Management (OPM), for positions that are exempt from competitive service, or by the president or the head of a Federal Agency for positions excepted from competitive service by statute.

(3) Excluded Actions. This section does not apply to:

(a) A suspension or removal of an employee in probationary status or taken in the interest of national security.

(b) A reduction-in-force action.

(c) A reduction in grade of a supervisor or manager who has not completed the probationary period, if such reduction is to the grade held immediately before becoming a supervisor or manager.

(d) A reduction in grade or removal based solely on unacceptable performance.

(e) An involuntary retirement because of disability.

(f) An action that entitles an employee to grade retention and an action to terminate this entitlement.

(g) An action against a reemployed annuitant.

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(h) A reduction of an employee's rate of pay from a rate that is contrary to law or regulation to a rate required or permitted by law or regulation.

(i) An action against a presidential appointee.

(j) An action initiated under the authority of the U.S. Special Counsel.

(k) An action taken as provided by statute that the action from Subchapter II of Chapter 75 of Reference (e).

(l) A voluntary action initiated by the employee.

(m) An action taken or directed by OPM according to Part 731 (suitability) or Part 754 of Reference (f) in the interest of national security.

(n) A termination of appointment prior to or at the conclusion of the term identified as a basic condition of employment.

(o) An action that terminates a temporary promotion within a maximum period of 2 years and returns the employee to the position of record prior to being temporarily promoted, or reassigns or demotes the employee to a different position not at a lower grade or level than the position from which temporarily promoted.

(p) An action that terminates a term promotion at the completion of the project, at a specified period, or at the end of a rotational assignment in excess of 2 years, but not more than 5 years, and that returns the employee to the position from which promoted or to a position of equivalent grade and pay.

(q) Cancellation of a promotion to a position not classified before the promotion.

(r) Placement of an employee serving on an intermittent, part-time, or seasonal basis in a non-duty, nonpaying status IAW conditions established at the time of appointment.

(4) Standards for Issuance of Advance Notice of Proposed Action. The Notice must include the following minimum information:

(a) A minimum of 30 days advance written notice identifying the type of proposed action, identify the level of the penalty, and the employee's duty status during the notice period.

(b) State the basis (i.e., specific misconduct/charges) for the proposed action with specificity and sufficient detail to allow the employee to reply to the charge(s).

(c) Inform the employee of his or her right to reply both orally and/or in writing to the proposed action and identify the name of the Deciding Official.

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(d) Allow the employee a minimum of 10 calendar days to secure affidavits and/or documentation, submit a written reply, and respond orally to the proposed action (unless the action is taken according to the crime provision set forth in subparagraph 3.d.(6) of this enclosure).

(e) Inform the employee of his or her right to be represented by an attorney (at the employee's own expense) or other representative and the right to review the material supporting the proposed action. An employee's choice of representative may be disallowed if such representation would result in a conflict of interest of position.

(f) Indicate that a request for an extension of the time allowed for a reply shall be considered if written requests stating the reasons for the extension are submitted to the Deciding Official.

(g) Indicate that a final decision on the proposed action will not be made until after the employee's reply, if any, has been considered, or after the time allotted for the employee to reply has expired.

(5) Standards for Notice of Final Decision. A written decision shall be provided to the employee at the earliest practical date after the employee's reply, if any, has been received, or after expiration of the time allotted the employee to reply. If, after consideration of the employee's reply to the written notification of the adverse action and applicable *Douglas* Factors (Appendix 13 of Enclosure 3), it is decided that the action is warranted, the notice of final decision must:

(a) Consider only the reasons specified in the notice of proposed action and specify the reasons for the decision, including validity of the charges, Table of Offenses and Penalties (Appendix 1 of Enclosure 3) and applicable *Douglas* Factors (Appendix 13 of Enclosure 3).

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

(c) Inform the employee of his or her grievance and appeal rights.

(d) Be signed by the Deciding Official.

(e) Be delivered to the employee at or before the effective date of the action.

(6) Other Considerations

(a) Crime Provision. The crime provision is used when the agency has reasonable cause to believe that an employee has committed a crime for which a sentence of imprisonment may be imposed. According to this provision, an employee is required to furnish an answer, including affidavits and other documentary evidence, within 7 calendar days. Reasonable cause to believe a crime has been committed is not established by the mere fact either of an arrest or an ongoing agency investigation of possible criminal misconduct. A criminal indictment will

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usually constitute reasonable cause. However, caution must be exercised before proposing an action according to the crime provision.

(b) Status During Notice Period. Under ordinary circumstances, employees will remain in a duty status in their regular positions during the advance notice period. Other options (e.g., voluntary use of leave, reassignment detail) may be appropriate in a given situation. If all other options have been explored and found not feasible, the employee may be excused from duty, without charge to leave or loss of pay, during the notice period (administrative leave). Excused absence for this purpose should be used only in those rare circumstances where retention of the employee in an active duty status during the 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 shall be exercised to use the minimum amount of excused absence necessary in any individual situation.

(c) Personal or Medical Considerations

1. If a supervisor suspects that an employee has a personal or medical problem that is impacting on his or her conduct or performance, the employee shall be encouraged to use the Civilian Employee Assistance Program (CEAP) per Reference (i).

2. If an employee responds to counseling or discipline by asserting a medical condition, the supervisor, in coordination with LMER, should request medical documentation. When received, a DoD physician will review the information and interpret its significance. Following the review, the supervisor, with assistance from LMER, must decide how to proceed to support the assertion. It should be noted that if during the reply the employee asserts that he or she has a medical condition and is seeking a reasonable accommodation, the supervisor must engage the employee in the interaction process, as defined by the Rehabilitation Act. The interactive process should begin immediately and be coordinated through the servicing Equal Employment Opportunity Office (EEO) Office.

(d) Records of civilian disciplinary and adverse actions. LMER shall maintain the official agency files on all civilian disciplinary and adverse actions. These files shall be kept apart from the OPF. If the employee appeals an action to the Merit Systems Protection Board (MSPB), the record shall be furnished to the employee and the MSPB.

#### 4. REQUIREMENTS FOR TRIAL AND PROBATIONARY EMPLOYEES

a. General. The requirement that all career federal employees serve a probationary period of 1 year provides protection against the retention of any person who, in spite of having passed preliminary tests, is found lacking in fitness and capacity for permanent Government service. If an employee fails to demonstrate fully his or her fitness for continued employment, the supervisor must initiate action to separate the employee.

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b. Coverage. An employee in the competitive service who has less than one year of current continuous service other than a temporary appointment limited to one year or less and employees serving in the first year of a Veterans' Recruitment Appointment.

c. Discharge action. When a discharge action is based on deficiencies in performance or conduct after entrance on duty, the employee must be notified in writing of the reason he or she is being terminated, and the effective date of the action. If the reason for the discharge is based on the employee's conduct before employment (pre-appointment reasons), the employee must be provided:

- (1) An advance written notice stating the specific reason for the proposed action.
- (2) A right to reply.
- (3) A reasonable amount of time to submit a written response to the proposal and for furnishing affidavits in support of the response.
- (4) Consideration of any reply.
- (5) A written notice of the final decision at or before the effective date.
- (6) A notice of the right to a procedural review of the action by MSPB.

## 5. REQUIREMENTS FOR EXCEPTED SERVICE EMPLOYEES

a. General. While the rights of employees serving in positions outside the competitive service generally are limited with regard to disciplinary adverse actions, some excepted employees have the same protection as competitive employees because of veteran's preference or prior competitive status.

b. Disciplinary and removal actions. An excepted service employee with limited protection under applicable law and regulation shall be given written notification of the proposed action before the effective date of the action. The written notification shall contain a brief statement of the reasons for the action and specify the effective date of the action.

6. REQUIREMENTS FOR ADVERSE ACTIONS BASED SOLELY ON UNACCEPTABLE PERFORMANCE. This section covers reductions in grade and removals based only on unacceptable performance according to section 4302 of Reference (d).

a. Excluded Employees. This section does not apply to:

- (1) Employees in the competitive service who are serving a probationary or trial period under an initial appointment.

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(2) Employees in the competitive service serving in appointments that require no probationary or trial period and who have not completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less.

(3) Employees in the excepted service who have not completed 1 year of current continuous employment in the same or similar positions.

(4) Reemployed annuitants.

(5) Individuals occupying positions in the excepted service for which employment is not reasonably expected to exceed 120 calendar days in a consecutive 12-month period.

(6) Employees covered IAW the National Security Personnel System.

(7) Employees appointed according to Reference (h) during a national emergency.

b. Excluded Actions. This section does not apply to:

(1) The reduction in grade of a supervisor or manager who has not completed the probationary period according to section 3321(a) (2) of Reference (d), if such a reduction is based on supervisory or managerial performance and the reduction is to the grade held immediately before becoming a supervisor or manager IAW section 3321(b) of Reference (d).

(2) The reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment.

(3) The reduction in grade or removal of an employee in the competitive service serving in an appointment that requires no probationary or trial period or who has not completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less.

(4) The reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

(5) Discharge of an employee in the competitive service who is serving a probationary or trial period under an initial appointment.

(6) An action imposed by the Office of Special Counsel through the MSPB.

(7) An action taken or directed by OPM according to Part 731 (suitability) or Part 754 of Reference (f) in the interest of national security.

(8) An action taken as provided by statute, other than one codified in Reference (d), which accepts the action from the provisions of Reference (d).

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(9) A reduction-in-force governed by Part 351 of Reference (f).

(10) A voluntary action by the employee.

(11) A performance-based action taken according to Part 752 of Reference (f).

(12) An action that terminates a temporary or term promotion and returns the employee to the position of record prior to being temporarily promoted, or to a different position of equivalent grade and pay, if the agency informed the employee that the position was to be of limited duration.

(13) A termination IAW terms specified as conditions of employment at the time the appointment was made.

(14) An involuntary retirement because of disability.

c. Timing of Actions

(1) Prerequisites for Action. An employee may be reduced in grade or removed at any time during the performance appraisal cycle when performance in one or more critical elements of the position becomes unacceptable, but only after the employee has been given an opportunity to improve by placing him or her on a Performance Improvement Plan (PIP). Issuance of a PIP must be coordinated with LMER. The PIP must advise the employee of the critical elements and performance standards in which his or her performance is unsatisfactory and be given a reasonable opportunity to demonstrate improvement. The employee must also be advised of the consequences of failing to improve and the type of assistance to be provided by the supervisor during the PIP. If the employee fails to meet minimally acceptable standards by the end of the PIP, action must be taken to remove, reduce in grade, or reassign the employee.

(2) Limitations on Action. The decision to reduce in grade or remove may be based only on those instances of unacceptable performance that occurred during the 1-year period preceding the date of notice of the proposed action. If, because of improved performance during the notice period, the employee is not reduced in grade or removed, and if his or her performance continues to be acceptable for 1 year from the date of the advance written notice, any entry or other notation of the unacceptable performance for which the action was proposed according to this section shall be removed from any NCR MD record relating to the employee.

d. Standards for Notice of Action. An employee whose reduction in grade or removal is proposed according to this section is entitled to:

(1) A minimum of 30 days' advance written notice that identifies the critical elements of the employee's position and specific instances of unacceptable performance on which the proposed action is based.

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(2) A reasonable time to reply, no less than 10 days, to the advance notice, orally, and/or in writing. A request for additional time to reply to the proposed action shall be considered by the official designated to receive the response.

(3) Representation by an attorney or other representative.

(4) A written decision within 30 days after expiration of the notice period that:

(a) Specifies the instances of unacceptable performance by the employee on which the action to reduce in grade or remove is based and consideration of the employee's reply, if any.

(b) States Deciding Official's determination based on the supporting evidence and employee's reply.

(c) Advises the employee of his or her appeal rights.

**7. REQUIREMENTS FOR ADVERSE ACTIONS BASED ON A COMBINATION OF MISCONDUCT AND UNACCEPTABLE PERFORMANCE.** An action against an employee that is considered a combination of misconduct and unacceptable performance shall be reviewed IAW Part 432 of Reference (f) prior to being processed according to Part 752 of Reference (f). The provisions of section 4302 of Reference (e) shall not be used until a performance appraisal plan is approved.

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APPENDIX 1 TO ENCLOSURE 3OFFENSES AND PENALTIES

1. GENERAL. The Table of Offenses and Penalties (below) is intended for use as a guide to selecting an appropriate penalty for actionable misconduct. This table does not substitute for supervisory judgment and does not dictate penalties. Rather, this table provides a general framework within which supervisors exercise judgment on a case-by-case basis.

2. OFFENSE COLUMN. The “Offense” column is not intended to be an exhaustive listing. No attempt has been made to list every possible cause for disciplinary or adverse action. The fact that a specific offense is not listed does not mean a penalty cannot be imposed. Supervisors should compare a specific misconduct to the offenses described and use a cause of action that most closely describes the misconduct.

3. PENALTY COLUMN

a. The “Penalty” column establishes a range of penalties from minimum to maximum for a specific type of offense. The penalty column is further divided into columns for “First Offense,” “Second Offense,” and “Third Offense.” The penalty range typically becomes more severe as offenses progress from first through third. Previous informal disciplinary actions are not counted as previous offenses for the purpose of penalty selection. To be considered a second or third offense, the subsequent misconduct does not have to be the same or similar as the first type of misconduct. For example, if an employee who previously was formally reprimanded for a first offense of absence without leave (AWOL) subsequently engages in insubordination, the penalty range would be derived from the second offense column for insubordination. Also, 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. When determining the appropriate level of penalty, a supervisor has a choice of severity of action ranging from no penalty, a range of informal disciplinary actions, to the maximum penalty stated in the range. When significant aggravating circumstances exist, the penalty range may be exceeded. For example, if the table shows a 14-day suspension as a maximum penalty, 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 penalty could be greater than a 14-day suspension if there are significant aggravating circumstances. Deviation from the suggested penalties should be justified in the notice of proposed action and notice of decision. Whenever prior offenses are used to support a more severe penalty, those offenses shall be cited in the notice of proposed action. When a series of offenses have been committed and action could not have been taken on each before another was committed, a more severe penalty may be assessed for the combined offenses than would be appropriate for any one single offense.

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<u>Table of Offenses and Penalties</u>			
OFFENSE (CAUSE OF ACTION)	FIRST OFFENSE PENALTY	SECOND OFFENSE PENALTY	THIRD OFFENSE PENALTY
1. <u>Attendance-Related Misconduct</u> . Penalty should correlate to the absence.			
AWOL from the regular scheduled tour of duty. Includes leaving work area without permission.	Reprimand to 5-Day Suspension	5-Day Suspension to Removal	14-Day Suspension to Removal
Failure to follow established procedures to request leave.	Reprimand to 5-Day Suspension	1-Day Suspension to 14-Day Suspension	14-Day Suspension to Removal
Unexcused tardiness.	Reprimand	Reprimand to 5-Day Suspension	5-Day Suspension to Removal
Prolonged or extended period of AWOL.	Reprimand to Removal	5-Day Suspension to Removal	14-Day Suspension to Removal
2. <u>Insubordination</u> . Refusal to obey an order that a superior is entitled to give and have obeyed.	Reprimand to Removal	5-Day Suspension to Removal	14-Day Suspension to Removal
Impertinence, insolence, or disrespectful conduct toward a supervisor.	Reprimand to Removal	5-Day Suspension to Removal	14-Day Suspension to Removal
Delay in carrying out instructions or loafing. Failure or delay in carrying out work assignments or instructions in a reasonable time. Idleness or failure to work on assigned duties.	Reprimand to 5-Day Suspension	5-Day Suspension to 14-Day Suspension	14-Day Suspension to Removal
3. <u>Fighting and/or creating a disturbance in the workplace</u> . Penalties may be enhanced if directed at a supervisor.			
Creating a disturbance causing an adverse impact on morale, production, or discipline. Penalty may be enhanced in relation to the disruption.	Reprimand to 5-Day Suspension	5-14 Day Suspension	14-Day Suspension to Removal
Threatening or attempting to inflict bodily harm.	Reprimand to Removal	14-Day Suspension to Removal	30-Day Suspension to Removal
Hitting, pushing, or other acts against another, causing injury.	30-Day Suspension to Removal	Removal	
Hitting, pushing, or other acts against another, without causing injury.	14-Day Suspension to Removal	30-Day Suspension to Removal	Removal
Intimidating or aggressive conduct.	Reprimand to Removal	14-Day Suspension to Removal	30-Day Suspension to Removal
4. <u>Sleeping on Duty</u>			
Where safety of personnel or property is not endangered.	Reprimand to 5-Day Suspension	Reprimand to 14-Day Suspension	14-Day Suspension to Removal
Where safety of personnel, property or patients is endangered.	Reprimand to Removal	14-Day Suspension to Removal	30-Day Suspension to Removal

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Table of Offenses and Penalties (continued)			
OFFENSE (CAUSE OF ACTION)	FIRST OFFENSE PENALTY	SECOND OFFENSE PENALTY	THIRD OFFENSE PENALTY
<u>5. Discourtesy</u>			
Rude, impolite acts or remarks (non-discriminatory).	Reprimand to 5-Day Suspension	5-Day Suspension to 14-Day Suspension	14-Day Suspension to Removal
Use of offensive or abusive language, gestures, or similar conduct (non-discriminatory).	Reprimand to 14-Day Suspension	14-Day Suspension to Removal	30-Day Suspension to Removal
<u>6. Unauthorized Use, Possession, or Transfer of an Alcoholic Beverage</u>			
Unauthorized use, possession, or transfer of an alcoholic beverage on Government property while in a duty status.	Reprimand to 14-Day Suspension	14-Day Suspension to 30-Day Suspension	30-Day Suspension to Removal
Reporting to work or being under the influence of alcohol that interferes with proper performance of duty. (Removal for a first or subsequent offense may be warranted if personnel or property is endangered.)	Reprimand to Removal	30-Day Suspension to Removal	Removal
<u>7. Unauthorized Use and/or Possession of Illegal Drugs and/or Controlled Substances</u>			
Bringing illegal drugs and/or unauthorized controlled substances to a work area or onto Government property for personal use.	Removal		
Bringing illegal drugs and/or unauthorized controlled substances to a work area or onto Government property for distribution.	Removal		
Reporting to work under the influence of illegal drugs and/or unauthorized controlled substances.	Removal		
Testing positive under the Drug Free Workplace Program, providing an adulterated sample, failing to take a drug test, or failing to comply with testing procedures.	Removal		
<u>8. Gambling</u>			
Participating in an unauthorized gambling activity while on Government property or in a duty status.	Reprimand to 5-Day Suspension	5-Day Suspension to 14-Day Suspension	14-Day Suspension to Removal
Operating, assisting, or promoting an unauthorized gambling activity while on Government property while in a duty status, or while others are in a duty status.	14-Day Suspension to Removal	Removal	
<u>9. False Statements</u>			
Making or providing false statements, misrepresentations, or entitlement fraud. Includes falsifying information on a time card, leave form, travel voucher, or other documents for entitlements.	Reprimand to Removal	30-Day Suspension to Removal	Removal
Making or providing false statements or misrepresentation on documents pertaining to qualifications, or on any other official record.	Reprimand to Removal	30-Day Suspension to Removal	Removal

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Table of Offenses and Penalties (continued)			
OFFENSE (CAUSE OF ACTION)	FIRST OFFENSE PENALTY	SECOND OFFENSE PENALTY	THIRD OFFENSE PENALTY
Making a false or malicious statement against coworkers, supervisors, subordinates, or Government officials.	Reprimand to Removal	30-Day Suspension to Removal	Removal
Misrepresentation, concealing, or withholding of a material fact. Includes perjury, making false sworn statements, and lying to a supervisor.	Reprimand to Removal	30-Day Suspension to Removal	Removal
10. <u>Unauthorized Taking and/or Possession of Others' Property.</u> Actual or attempted taking or carrying away of Government property or the property of others, or collusion with others to commit such acts.			
Where substantial value is not involved.	Reprimand to Removal	5-Day Suspension to Removal	14-Day Suspension to Removal
Where substantial value is involved.	14-Day Suspension to Removal	Removal	
11. <u>Misuse or Abuse of Government Property, Employees, Contractors, or Processes</u>			
Using Government property, employees, or contractors for other than official purposes.	Reprimand to Removal	14-Day Suspension to Removal	Removal
Loss of or damage to Government property, records, or information when the employee is entrusted to safeguard the property as a job requirement (e.g., cashier, warehouse worker, property book officer).	Reprimand to 14-Day Suspension	14-Day Suspension to Removal	30-Day Suspension to Removal
Misuse of Government credentials.	Reprimand to Removal	5-Day Suspension to Removal	14-Day Suspension to Removal
Misuse of any Government-issued charge card (e.g., purchase charge cards, travel charge cards).	Reprimand to Removal	5-Day Suspension to Removal	14-Day Suspension to Removal
Unauthorized use of or failure to appropriately control use of Government Purchase Charge Card as a cardholder (approving official responsible for use or oversight of the card).	Reprimand to Removal	30-Day Suspension to Removal	Removal
Abuse of discretion, malfeasance, misfeasance, or non-feasance.	Reprimand to Removal	14-Day Suspension to Removal	30-Day Suspension to Removal
Misuse of Government computer, network, intranet, Internet, e-mail, etc.	Reprimand to Removal	5-Day Suspension to Removal	14-Day Suspension to Removal
Misuse of a Government vehicle. Willfully using or authorizing the use or misuse of a Government passenger motor vehicle or aircraft for other than official purposes. (See section 1349 of Title 31, U.S.C. (Reference (j))).	Minimum 30-Day Suspension to Removal	60-Day Suspension to Removal	Removal

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Table of Offenses and Penalties (continued)			
OFFENSE (CAUSE OF ACTION)	FIRST OFFENSE PENALTY	SECOND OFFENSE PENALTY	THIRD OFFENSE PENALTY
12. <u>Failure to Follow Written Regulations, Orders, Rules, or Procedures.</u>			
Violation where safety to persons or Government property is not compromised.	Reprimand to 5-Day Suspension	5-Day Suspension to Removal	14-Day Suspension to Removal
Violation where safety to persons or Government property is compromised.	Reprimand to Removal	14-Day Suspension to Removal	Removal
13. <u>Conduct Unbecoming a Federal Employee.</u> Includes off-duty misconduct if nexus is established.			
Immoral, indecent, illegal, or disgraceful conduct.	5-Day Suspension to Removal	14-Day Suspension to Removal	Removal
Soliciting or accepting anything of value or other benefit for financial gain.	14-Day Suspension to Removal	30-Day Suspension to Removal	Removal
14. <u>Refusal to Cooperate or Testify, Interfering and/or Obstructing in Administrative Inquiries or Investigations.</u>			
Refusal to cooperate or testify in an administrative inquiry or investigation.	5-Day Suspension to Removal	14-Day Suspension to Removal	Removal
Interference with, attempting to influence, or attempting to alter testimony of witnesses or participants.	14-Day Suspension to Removal	30-Day Suspension to Removal	Removal
Attempting to impede an investigation or to influence investigating officials.	30-Day Suspension to Removal	Removal	
15. <u>Job Actions.</u> Participating in or promoting a strike, work stoppage, slow down, sick-out, or other action.	Removal		
16. <u>Delinquent Debt.</u> Failure or delay to honor valid debts where the Agency mission or employee performance is affected (e.g., delinquent travel charge card account).	Reprimand to 5- Day Suspension	Reprimand to 14- Day Suspension	14-Day Suspension to Removal
17. <u>Sexual Misconduct.</u> Where sexual misconduct contributes to a hostile work environment, is quid pro quo, or involves deliberate or repeated offensive comments, gestures, or physical contact, removal may be warranted for a first offense.			
Involving a subordinate.	5-Day Suspension to Removal	14-Day Suspension to Removal	30-Day Suspension to Removal
Not involving a subordinate.	Reprimand to 30-Day Suspension	5-Day Suspension to Removal	14-Day Suspension to Removal

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Table of Offenses and Penalties (continued)			
OFFENSE (CAUSE OF ACTION)	FIRST OFFENSE PENALTY	SECOND OFFENSE PENALTY	THIRD OFFENSE PENALTY
18. <u>Discrimination because of Race, Color, Religion, Age, Gender, National Origin, Handicapping Condition, Political Affiliation, or Marital Status.</u> Also, prohibited discriminatory practice in any aspect of employment (e.g., hiring, appraisal, development) and/or failure to prevent or curtail discrimination or prohibited practice of a subordinate when the supervisor knew, or should have known of the discrimination.	Reprimand to Removal	14-Day Suspension to Removal	30-Day Suspension to Removal
19. <u>Reprisal.</u> Intentional interference with or reprisal against an employee for exercising a right to file a grievance, appeal, or file a complaint through established procedures.	Reprimand to Removal	14-Day Suspension to Removal	30-Day Suspension to Removal
20. <u>Failure to Comply with an Order from MSPB.</u> Finding by MSPB of refusal to comply with an order or finding of intentional violation of statute causing issuance of an Office of Special Counsel complaint. (See section 1204(a)(2) of Reference (e.) Immoral, indecent, illegal, or disgraceful conduct.	Reprimand to Removal	30-Day Suspension to Removal	
21. <u>Misappropriation.</u>			
Directing, expecting, or rendering services not covered by appropriations. (See section 3103 of Reference (e.)	Removal		
Failure to deposit into the Treasury, money accruing from lapsed salaries or from unused appropriations for salaries. (See section 5501 of Reference (e.)	Removal		
22. <u>Prohibited Political Activity</u>			
Violation of prohibition against political contributions. (See section 7323 of Reference (e.)	Removal		
Violation of prohibition against campaigning or influencing elections. (See sections 7324 and 7325 of Reference (e.)	Removal		
23. <u>Soliciting.</u> Soliciting contributions for a gift for a superior, making a donation as a gift to superior, accepting a gift from an employee receiving a lower salary. (See section 7351 of Reference (e.)	Reprimand to Removal	5-Day Suspension to Removal	14-Day Suspension to Removal
24. <u>National Security Action.</u> Violations of official security regulations. Actions against National Security. (See section 7532 of Reference (e.)	30-Day Suspension to Removal	Removal	
25. <u>Mutilating or Destroying a Public Record.</u> (See section 2071 of Reference (k.)	Removal		

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APPENDIX 2 TO ENCLOSURE 3GUIDELINES FOR PROPOSING OFFICIALS

1. The Proposing Official will review the notice of proposed action to ensure that all facts are correct and supported by the evidence. Any proposed action and the supporting materials must be coordinated with LMER prior to issuance.
  
2. When issuing the notice of proposed action, the proposing official does not need to discuss the memorandum with the employee. The reason(s) for the proposal are articulated in the memorandum, as are the employee's due process rights, and whom the employee is to contact regarding procedural questions.
  
3. The Proposing Official will:
  - a. Sign and date the memorandum (printed on his or her office letterhead) and make one copy. The original goes to the employee and the copy serves as a receipt acknowledgment copy.
  
  - b. Issue the original to the employee and request the employee to sign and date the receipt acknowledgment copy. If the employee chooses not to sign, the proposing official shall annotate, "Employee refused to sign," and sign and date the annotation.
  
  - c. Make and file a copy of the receipt acknowledgment and send the employee-signed copy to LMER.
  
4. After the proposal notice is issued, the initiative moves to the employee. The employee has the right to:
  - a. Be represented by either an attorney or other representative (with limitations).
  
  - b. An opportunity to present a written and/or verbal reply to the Deciding Official within a specified reply period, usually 10 calendar days. The employee may request an extension to the reply period.
  
  - c. A reasonable amount of official duty time to prepare and present a reply to the Deciding Official.
  
  - d. A copy of the materials relied on to support the proposed action.
  
  - e. A written decision.

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5. Officials involved in disciplinary actions must carefully avoid discussions of the action that might be considered improper ex parte communications that could potentially result in the Agency's decision being reversed by a third party. This includes discussions between proposing and Deciding Officials as well as discussions between an immediate supervisor and his/her chain of command once the action has been initiated. If new information is presented to the Deciding Official, the employee must have an opportunity to respond to this new information.

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APPENDIX 3 TO ENCLOSURE 3GUIDELINES FOR DECIDING OFFICIALS

1. DECIDING OFFICIAL'S DECISION. The Deciding Official must render a decision on a proposed disciplinary action after considering all relevant evidence including the employee's reply and applicable Douglas Factor(s). The Deciding Official shall follow the guidance in this enclosure carefully to prevent procedural errors that might jeopardize the action if it is later reviewed or appealed. When the Deciding Official has made his or her decision, he or she must notify LMER by memorandum, prior to issuance to the employee.

2. EMPLOYEE REPLY

a. The employee may reply to the Deciding Official in person, in writing, or both, and may furnish any evidence he or she wishes to support the reply. The proposal notice gives the employee 10 calendar days from the date he or she received it to reply. He or she may request more time to reply, but the request must be in writing and state the reasons for the request. The Deciding Official must inform the employee and LMER in writing of any decision to extend the reply period. The Deciding Official should call his or her servicing Human Resources Specialist in LMER regarding any questions about granting or denying an extension.

b. In his or her reply, the employee may bring up any evidence or arguments that he or she feels may impact the decision of the Deciding Official. The Deciding Official shall not restrict the employee's reply. During a personal reply, the Deciding Official's role is to listen, not to make an on-the-spot decision, and to ask questions to clarify the employee's assertion(s). Unless the employee brings it up, the Deciding Official shall not ask any questions or make comments about any incidents or events not mentioned in the notice of proposed disciplinary action.

c. The employee may be accompanied by one representative when making a personal reply. The representative may be a relative, friend, co-worker, lawyer, union representative, or other person. A union officer or steward and/or co-worker may only use official time to represent a bargaining unit member.

d. The Deciding Official shall make a written summary of any personal reply, give a copy to the employee, and note the date and time the copy was provided. The employee has two workdays to review the summary and either sign it, attesting to its accuracy, or submit signed, written exceptions to it. If the employee fails to respond in the time allowed, the Deciding Official shall make a note to this effect on the summary.

e. The Deciding Official shall avoid engaging in any improper ex parte communications concerning the proposed disciplinary action. Improper ex parte communications are private, undisclosed communications between agency decision makers and management personnel who are actively involved in the disciplinary action. The Deciding Official shall not discuss any incidents or offenses or previous disciplinary/adverse actions not mentioned in the notice. If

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someone with a vested interest in the outcome of the case provides new information, the Deciding Official must let the employee rebut it before making a decision.

### 3. MAKING THE DECISION

a. The Deciding Official shall review the charge(s) and specification(s), the case file, and any reply from the employee to determine if the charge(s) are supported by a preponderance of the evidence. If supported, the Deciding Official shall then analyze the applicable *Douglas Factor(s)* (See Appendix 13), and the proposed penalty to determine its appropriateness. The Deciding Official may sustain the proposing official's proposal or may mitigate to a lesser penalty. The Deciding Official should take into account relevant factors such as the seriousness of the offense(s), the employee's past work record, the effect of the offense on the employee/employer relationship; the employee's potential for rehabilitation, and the consistency of the proposed penalty to penalties given other employees for similar offenses to determine the appropriateness of the penalty. Other relevant factors to consider when determining if the penalty is appropriate can be found in section 2 of Enclosure 3. The decision shall be issued to the employee in writing.

b. The Deciding Official must base his or her decision on the reasons given in the notice of proposed disciplinary action and on no other reasons. This is a different consideration than that mentioned in paragraph 5.a. of Enclosure 2.

c. The decision must be to sustain, reduce, or cancel the proposed penalty, but not to increase it.

d. The decision must be sent to LMER by memorandum. In the memorandum, the Deciding Official shall state the specific misconduct allegations or charges in the notice that were sustained by the evidence and what penalty, if any, shall be imposed. The decision must reflect the consideration of the applicable *Douglas Factor(s)* to include the weight aggravating factors had in reaching the decision and determining the choice of penalty. The Deciding Official shall include the original of any written reply, his or her summary of any personal reply, and any written exceptions to his or her summary that the employee submitted. The Deciding Official should also state the consideration given to specific elements of the employee's reply. When LMER receives the decision and attachments, LMER shall prepare a notice of decision to the employee for the Deciding Official's signature. The notice of decision shall include the employee's grievance rights. The Deciding Official shall not inform the employee of the decision except by the written notice of decision.

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APPENDIX 4 TO ENCLOSURE 3GUIDELINES FOR DECIDING OFFICIALS WHEN HEARING AN EMPLOYEE'S ORAL RESPONSE

When an employee avails himself or herself of the opportunity to present an oral reply, the Deciding Official will:

1. UNDERSTAND that this is the employee's opportunity to defend himself or herself; consider this in making the decision.
2. NOT DEBATE the issues with the employee, discuss the relative merits of the case, or signal what the outcome might be. The employee will be permitted to expand the discussion into any area he or she believes is relevant. The Deciding Official is there to listen and obtain clarification, if needed. A discussion with the employee is appropriate ONLY if the employee raises exculpatory information, but does not provide detail. In that case, the Deciding Official may ask questions and/or ask for documentation if the employee indicates there is proof of some fact he or she has not yet submitted.
3. DOCUMENT the main points of the employee's presentation. If the employee admits to the offense, denies the facts, is remorseful, or requests mitigation, the Deciding Official shall include these statements in his or her notes. The notes shall capture the type of defense the employee is presenting. The Deciding Official must consider all replies an employee makes, including those outside of the designated time/place for the oral reply. For example, if the employee stops a Deciding Official in the hall and mentions the proposed action, the official shall treat the employee's comments as a formal reply, write a memorandum for record (MFR) summarizing the reply, and reference the MFR in the decision.
4. SAVE his or her notes. He or she will need them if the employee files a grievance or an appeal.
5. IF the employee raises an issue of health (either mental or physical) as an excuse, explanation, or mitigating circumstance, INFORM the employee that it is his or her responsibility to provide medical documentation and to explain how the medical condition caused or is related to the misconduct or unsatisfactory performance and the Deciding Official should confer with a LMER Specialist. If during the reply period the employee asks for a reasonable accommodation in order to correct performance or behavior issues that may be the subject of the adverse action, management must engage the employee in the interaction process to determine if the employee is entitled to a reasonable accommodation.
6. IF the employee raises an allegation of discrimination, REFER the employee to EEO.

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APPENDIX 5 TO ENCLOSURE 3

CHECKLIST FOR DECIDING OFFICIALS

Consult LMER before taking any adverse or disciplinary action.

CHECKLIST FOR DECIDING OFFICIALS – civilian disciplinary and adverse actions

EMPLOYEE'S NAME : \_\_\_\_\_

NATURE and DATE OF PROPOSED ACTION : \_\_\_\_\_

CHECK APPROPRIATE STATEMENTS

\_\_\_\_\_ Employee did not reply.

\_\_\_\_\_ Employee replied in writing (attach the original reply).

\_\_\_\_\_ Employee replied orally (attach your notes and/or a summary of the reply; ensure you annotate the date of the reply). \_\_\_\_\_ Employee alleged discrimination. (Provide details including the date these actions allegedly occurred and the basis; i.e., race, color, religion, sex, national origin, age, or handicapping condition.)

\_\_\_\_\_ I have considered the mitigating and aggravating factors outlined in the Douglas Factors Worksheet attached as Appendix 13 to Enclosure 3. NOTE: Mitigating and aggravating circumstances are not relevant in a performance-based adverse action.

DECISION: After reviewing all of the materials relied on and giving full and impartial consideration to the circumstances surrounding the proposed action and the employee's reply(ies), I have decided to:

\_\_\_\_\_ Cancel the proposed action in its entirety.

\_\_\_\_\_ Sustain the action as proposed.

\_\_\_\_\_ Reduce the penalty to \_\_\_\_\_.

NOTE: Deciding officials cannot impose a more severe penalty than the one proposed. If additional facts come to light or the official feels strongly that a more severe penalty is warranted, the employee must be issued a new proposal and given additional time to reply, and the decision must be made by a higher level official.

\_\_\_\_\_  
NAME/TITLE AND SIGNATURE OF DECIDING OFFICIAL AND DATE

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APPENDIX 6 TO ENCLOSURE 3

SAMPLE CHECKLIST IN DETERMINING APPROPRIATENESS OF PENALTY FOR  
DECIDING OFFICIALS: ANALYSIS OF DOUGLAS FACTORS

**Employee's Name:** \_\_\_\_\_

**Action Proposed and Date of Proposal:** \_\_\_\_\_

**Check one or more of the following:**

- The employee did not reply.
- The employee replied in writing (attached).
- The employee replied orally (Memorandum for Record signed by the employee is attached).

**NOTICE**

As the Deciding Official, you are responsible for considering all relevant Douglas Factors in determining whether the proposed disciplinary action is appropriate.

Your analysis of the Douglas Factors will be considered part of the case file and you could be asked to testify regarding your analysis, should the employee appeal to a third party (MSPB, EEO, etc.).

Be sure to include all information that you relied upon in making your determination regarding the appropriateness of the penalty in this analysis of the Douglas Factors.

**INSTRUCTIONS**

Each of the factors should be considered in light of the facts and circumstances presented in management's proposal letter (and supporting documents) and in the employee's reply.

For each factor, you should annotate whether the factor has been considered as aggravating, mitigating, or has had no impact (was neutral) in your formulation of your final decision.

Write a brief explanation for each factor you determine to be aggravating or mitigating — particularly with respect to those factors you consider "aggravating."

**AGGRAVATING:** to make more severe, intense, serious, worse or grave.

**NEUTRAL:** neither a contributing nor detracting factor; applicable.

**MITIGATING:** to make less severe, intense.

ANALYSIS OF DOUGLAS FACTORS

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1. Nature and seriousness of the offense:

Nature of the offense (BRIEFLY summarize what happened and how it relates to employee's duties, position, and responsibilities):

Seriousness of the offense (Explain how serious the offense is and why (e.g., misconduct was committed intentionally, maliciously, for gain, or is a repeat offense, etc.)):

Aggravating \_\_\_\_\_ Neutral \_\_\_\_\_ Mitigating \_\_\_\_\_

Explanation:

2. Employee's job level and type of employment:

Employee's Title, Series, Grade: \_\_\_\_\_

Is employee a Supervisor? Yes \_\_\_ No \_\_\_

Is employee in a special trust position? Yes \_\_\_ No \_\_\_

Is public contact required by employee's job, and was misconduct related to that contact? (e.g.: rude to customers) Yes \_\_\_ No \_\_\_

Is misconduct directly related to job? (e.g.: supply clerk who steals supplies in his/her care) Yes \_\_\_ No \_\_\_

Aggravating \_\_\_\_\_ Neutral \_\_\_\_\_ Mitigating \_\_\_\_\_

Explanation:

3. Employee's past disciplinary record: [This ONLY includes documented discipline for which the employee received a written proposal notice. An opportunity to respond, and a decision letter; any disciplinary action taken against the employee should have been filed as an official record in the employee's official personnel file. Memorandums of record for the supervisor's personal use do not belong here.]

List all previous disciplinary actions taken, if any:

Action Effected: \_\_\_\_\_ Date: \_\_\_\_\_  
Action Effected: \_\_\_\_\_ Date: \_\_\_\_\_  
Action Effected: \_\_\_\_\_ Date: \_\_\_\_\_

Aggravating \_\_\_\_\_ Neutral \_\_\_\_\_ Mitigating \_\_\_\_\_

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**Explanation:**

**4. Employee's past work record:**

How long has employee been with current organization? \_\_\_\_\_

How long has employee been with federal government? \_\_\_\_\_

Ratings of last three performance appraisals?

Last rating of record \_\_\_\_\_

Year prior rating of record \_\_\_\_\_

Two years prior rating of record \_\_\_\_\_

Is performance currently acceptable? Yes \_\_\_ No \_\_\_

(If no, need to provide documentation of counseling)

Aggravating \_\_\_\_\_

Neutral \_\_\_\_\_

Mitigating \_\_\_\_\_

**Explanation:**

**5. Effect of the offense on the employee's ability to perform his/her job and effect on supervisor's confidence in the employee:**

Did the offense affect:

The employee's ability to do job? Yes \_\_\_ No \_\_\_

(e.g.: If employee was AWOL, he/she could not perform job duties.)

Your confidence in employee's ability to do job? Yes \_\_\_ No \_\_\_

(e.g.: Employee responsible for approving leave, but he/she falsified his/her timecard.)

Your confidence in employee's ability to uphold organizational mission? Yes \_\_\_ No \_\_\_

(e.g.: Pentagon Force Protection Agency's mission is to Protect Pentagon; misconduct was breach in Pentagon security.)

Aggravating \_\_\_\_\_

Neutral \_\_\_\_\_

Mitigating \_\_\_\_\_

**Explanation:**

**6. Consistency of penalty with other employees' penalties for similar offenses:**

[ ] No other employee under your supervision has committed offenses similar to those alleged.

[ ] The penalty is similar to those given to other employees under your supervision.

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[ ] The penalty is NOT consistent with other penalties; however, I feel a more severe or less severe penalty is appropriate. **This must be thoroughly explained.** (CAUTION! Disparate treatment often forms the basis for claims of discrimination.)

Aggravating \_\_\_\_\_ Neutral \_\_\_\_\_ Mitigating \_\_\_\_\_

**Explanation:**

**7. Consistency with Agency's Table of Penalties:** [The table is only a guide, but reasons for departing from it must be rational, well-reasoned, and explained. (CAUTION! Disparate treatment often forms the basis for claims of discrimination.)]

The employee is being charged with \_\_\_\_\_.

[ ] This is a first offense.

[ ] This is a second offense.

[ ] This is a third offense.

Identify the most closely related charge in the table of penalties:

The table of penalties recommends [insert here] for a (circle one): first, second, or third offense of [insert here] \_\_\_\_\_.

Aggravating \_\_\_\_\_ Neutral \_\_\_\_\_ Mitigating \_\_\_\_\_

**Explanation:**

**8. Notoriety of the offense or its impact on the Agency's reputation:** [Adverse publicity or the possibility of adverse publicity outside the Agency that could have a negative impact on the reputation of the Agency or the Agency's mission is a factor that may be considered to enhance a penalty.]

Aggravating \_\_\_\_\_ Neutral \_\_\_\_\_ Mitigating \_\_\_\_\_

**Explanation:**

**9. Clarity of notice to employee of unacceptable conduct:** [Was the employee aware that his/her actions or behavior were inappropriate? How was he/she made aware (meeting, email, policy issuance, prior counseling, prior discipline, etc.)? Should he/she have known without being told? If so, why do you believe he/she should have known better?]

Aggravating \_\_\_\_\_ Neutral \_\_\_\_\_ Mitigating \_\_\_\_\_

**Explanation:**

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**10. Potential for employee's rehabilitation:** [There may be issues raised by the employee in his/her response, which lead you to believe this employee has high potential for rehabilitation. On the other hand, if the misconduct was clearly wrong and the employee should have known better, you may believe the potential for rehabilitation is low. Remorse or lack of remorse is often listed here as a show of rehabilitative potential.]

Aggravating \_\_\_\_\_ Neutral \_\_\_\_\_ Mitigating \_\_\_\_\_

**Explanation:**

**11. Mitigating circumstances:**

The following factors do not excuse the misconduct; however, they may encourage you to reduce (mitigate) the penalty.

The employee:

Was under unusual job stress? Yes \_\_\_ No \_\_\_  
(e.g.: Contributed to employee's insubordination.)

Was experiencing personal problems? Yes \_\_\_ No \_\_\_

Was provoked? Yes \_\_\_ No \_\_\_  
(e.g.: Coworker threatened employee before employee punched coworker.)

Was apologetic? Yes \_\_\_ No \_\_\_

Brought the misconduct to management's attention? Yes \_\_\_ No \_\_\_  
(e.g.: Employee confessed to misuse of government credit card.)

Aggravating \_\_\_\_\_ Neutral \_\_\_\_\_ Mitigating \_\_\_\_\_

**Explanation:**

**12. Adequacy of alternative sanctions to deter misconduct:**

[ ] I believe **no lesser** sanction will deter future misconduct.

[ ] I believe a **lesser** sanction will deter future misconduct.

[ ] I believe an **alternative** sanction is more appropriate.

Aggravating \_\_\_\_\_ Neutral \_\_\_\_\_ Mitigating \_\_\_\_\_

**Explanation:**

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**Decision:** After giving full and impartial consideration to the circumstances surrounding the proposed action, the evidence supporting the proposed action, the employee's reply (if reply provided), and factors above, I have decided to (check one of the following):

- Sustain the action as proposed.
- Reduce the penalty to \_\_\_\_\_.
- Offer the employee an Alternative Sanction (Discuss options with HR).
- Cancel the proposed action in its entirety.

Additional Comments:

I (**print name**) \_\_\_\_\_ certify that all of the information I considered in determining the appropriateness of the proposed penalty has been included in this analysis of the Douglas Factors and that I have considered all relevant Douglas Factors.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

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GLOSSARYPART I. ABBREVIATIONS AND ACRONYMS

AI	Administrative Instruction
AWOL	absence without leave
CEAP	Civilian Employee Assistance Program
CHRC	Civilian Human Resources Center
EEO	Equal Employment Office
FMLA	Family and Medical Leave Act
JPC	Joint Pathology Center
JTF CAPMED	Joint Task Force National Capital Region Medical
LMER	Labor and Management Employee Relations
LWOP	leave without pay
MFR	memorandum for record
MSPB	Merit Systems Protection Board
MTFs	Medical Treatment Facilities
NCR	National Capital Region
NCR MD	National Capital Region Medical Directorate
OPF	Official Personnel File
OPM	Office of Personnel Management
PIP	Performance Improvement Plan
U.S.C.	United States Code

PART II. DEFINITIONS

Unless otherwise noted, the following definitions only apply to this AI.

advance notice. A written notice whose period of time is computed as follows:  
A calendar day is the 24-hour period between 12 midnight of one day and 12 midnight of the next. The day on which the notice is delivered is not counted. Saturday, Sunday, or a legal holiday is never counted as the last day.

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adverse action. A disciplinary or non-disciplinary removal, any suspension from pay and duty status, furlough without pay for 30 days or less, or reduction in grade or pay taken for such cause as will promote the efficiency of the service.

charge. The label or characterization of an offense; the basis of the proposed action and the final decision when the action is disciplinary.

critical element. A component of the employee's job that is of such importance that performance below the minimum standard requires remedial action and may be the basis for reduction in grade, removal, or other corrective action without regard to performance on other components of the job.

day. A calendar day.

Deciding Official. The official who issues a notice of final decision on a disciplinary or adverse action. The Deciding Official shall be of a higher level than the official who proposes the action, unless the proposing official is the Director, NCR MD, and MTFs, or a Center Director.

formal disciplinary action. An action that is made a matter of record for inclusion in the employee's OPF, which ranges from letter of reprimand up to and including removal.

furlough. A temporary non-duty and non-pay status of 30 days or less because of lack of work or funds, or for other non-disciplinary reasons.

informal disciplinary action. An action taken by management to correct minor misconduct or delinquency. Informal disciplinary actions include counseling, oral admonishments, and written warnings and are not made a matter of record in the employee's OPF.

nexus. A reasonable connection of factual relationship between the reason(s) for a disciplinary action and the efficiency of the service.

notice period. The amount of time before the effectuation of date of the proposed action. The day a notice is delivered is not counted. If the last day of a notice period falls on a weekend or holiday, the last day of the notice period becomes the next business day following the weekend or holiday.

oral admonishment. A very specific discussion between a supervisor and employee to address minor misconduct, clarify expectations, and warn of progressively more severe disciplinary action when the intent of the discussion is to correct the misconduct without initiating more serious disciplinary or adverse action. An oral admonishment is an informal disciplinary measure and should be documented with a memorandum for the record.

penalty selection factors. The factors most commonly used in determining the appropriateness of a penalty include, but are not limited to: the seriousness of the offense, the employee's past disciplinary record, consistency with the table of penalties, consistency with penalties imposed on other employees, effect of the offense on the supervisor's confidence in the employee's ability to perform assigned duties, the employee's potential for rehabilitation, length of service, and past disciplinary record. (See section 2 of Enclosure 3 for further detail.)

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preponderance of the evidence. That degree of relevant evidence that a reasonable individual, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. The Agency is required to prove actions taken according to Part 752 of Reference (f) with a preponderance of the evidence.

proposing official. The management official who proposes the adverse/disciplinary action, normally (but not necessarily) the first-line supervisor.

reduction in grade. The involuntary assignment of an employee to a position of lower classification or job-grading level.

removal. An involuntary separation of an employee from employment with an Agency.

reprimand. A formal memorandum issued for employee misconduct. A letter of reprimand is the least severe formal disciplinary action. A copy is placed in the employee's OPF for a set period of time.

suspension. A temporary non-duty and non-pay status for disciplinary or other reasons.

unacceptable performance. Performance of an employee that fails to meet established standards in one or more critical elements of the employee's position.

written warning. A very specific memorandum issued to an employee to address minor misconduct, clarify expectations, and warn of progressively more severe disciplinary action when the intent of issuing the memorandum is to correct the misconduct without initiating more serious formal disciplinary or adverse action. A written warning is an informal disciplinary measure and is considered to be more severe than an oral admonishment.