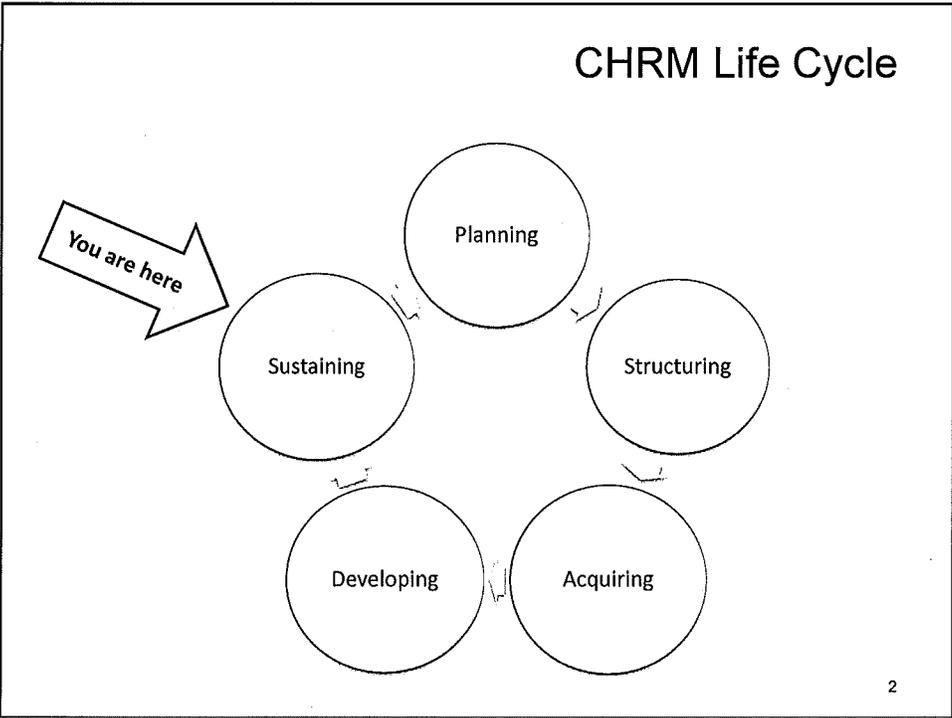


# Module 6 Sustaining Management-Employee Relations

1





## OBJECTIVES

After completion of this lesson, participants will be able to:

1. Describe the various leave programs.
2. Explain the key concepts and principles in the adverse action process.
3. Describe the appropriate steps in resolving performance problems.
4. Describe the various redress processes available to employees and their purpose.

3

## Legal Framework

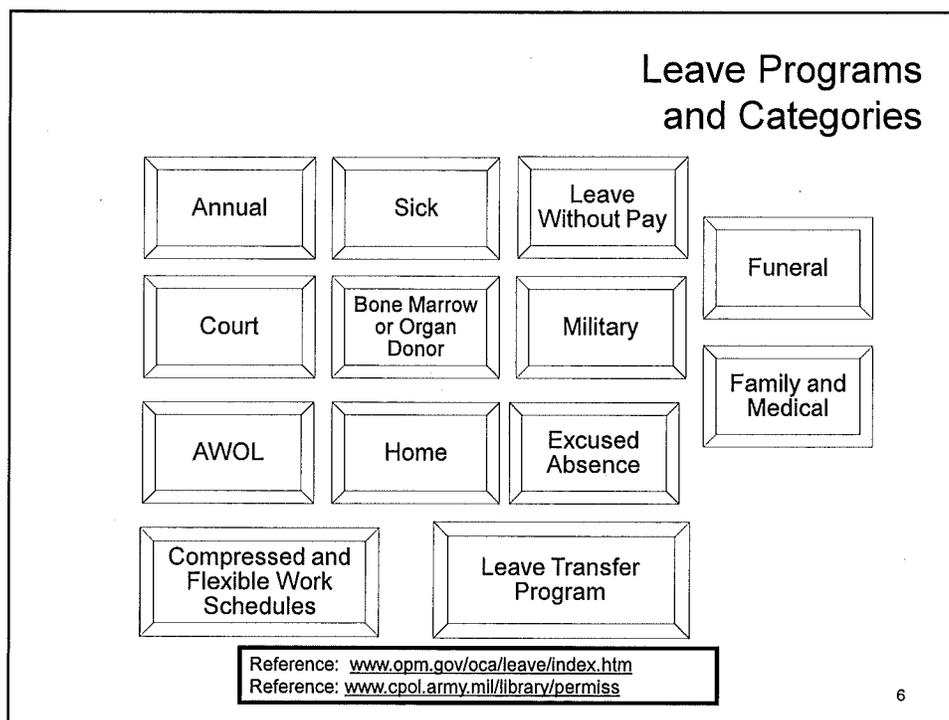
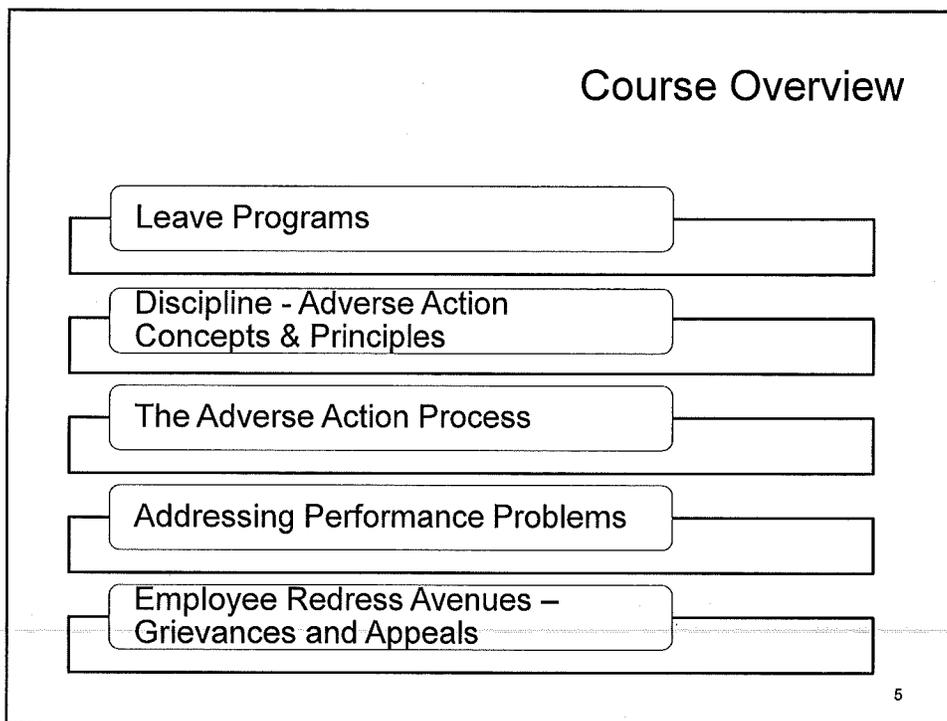
Title 5 - Government  
Organization and Employees

5 CFR Parts 1-699 -  
Administrative Personnel

Department of Defense Civilian  
Personnel Manual (CPM), DoD  
1400.25-M



4



### What should you expect from your employee?

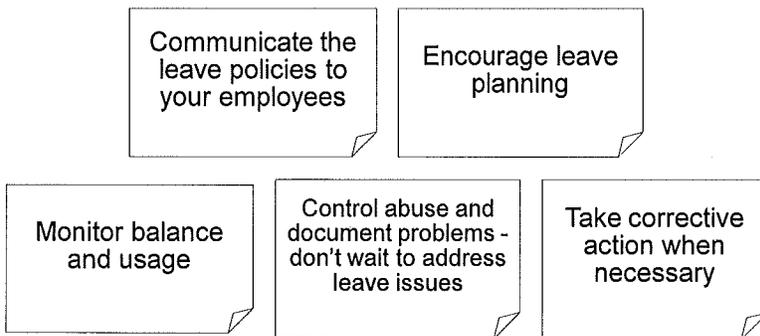
- Know leave procedures and follow them
- Be at work unless they have approved leave
- Ensure they have sufficient leave balance for requested leave
- Plan leave in advance whenever possible
- Bring in a doctor's note or medical documentation as required or when requested by their supervisor



Is it ok for employees to call in and ask their co-worker to tell you that they will not be in?  
What about if they called in but were not able to reach you?

7

### Supervisory Responsibilities



- Properly requested annual leave can only be denied for mission reasons
- Supervisor approves leave (includes acting)

8

## Specific Situations – Leave Issues

- Most frequent disciplinary offenses in the Army are leave related
  - Chronic tardiness
  - Leave abuse
  - Excessive absenteeism
  - Absent without official leave (AWOL)

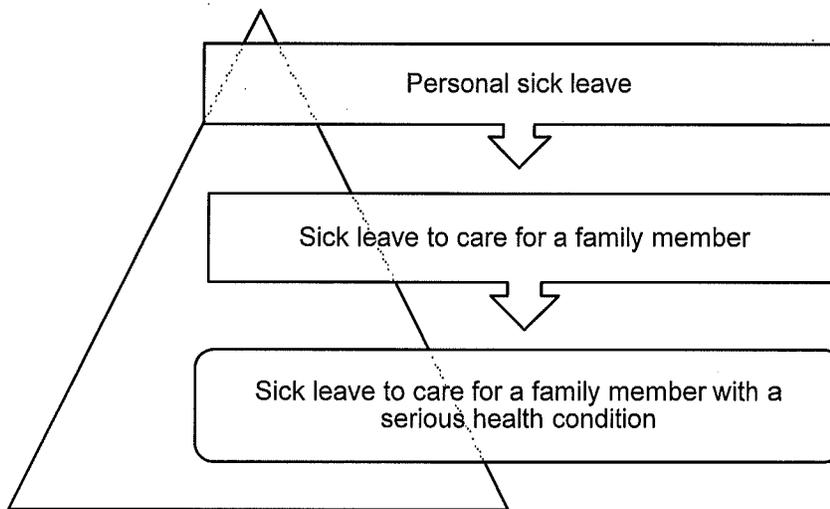


### Two most important actions you can take:

- 1) Establish and enforce the leave requesting procedure
- 2) Confront leave problems early

9

## Types of Sick Leave



10

## Sick Leave Procedures

- Supervisor should establish call-in procedures and make sure all employees are aware of it - reminders!
- Employees responsible for requesting sick leave generally within 2 hours of beginning of shift
  - Always check the Collective Bargaining Agreement



11

## Personal Sick Leave



- Incapacitated to perform duties by
  - Physical or mental illness
  - Injury
  - Pregnancy or childbirth
- Receives treatment for:
  - Medical
  - Dental
  - Optical
- Jeopardizes health of others because of exposure to a communicable disease

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## Sick Leave to Care for a Family Member

□ Up to 104 hours (13 days)  
of sick leave each leave  
year to:

- ✓ Care for family member  
(illness, injury, pregnancy,  
childbirth, and  
medical/dental/optical  
appointments)
- ✓ Attend the funeral of a  
family member



13

## Family Member Definition for Sick Leave

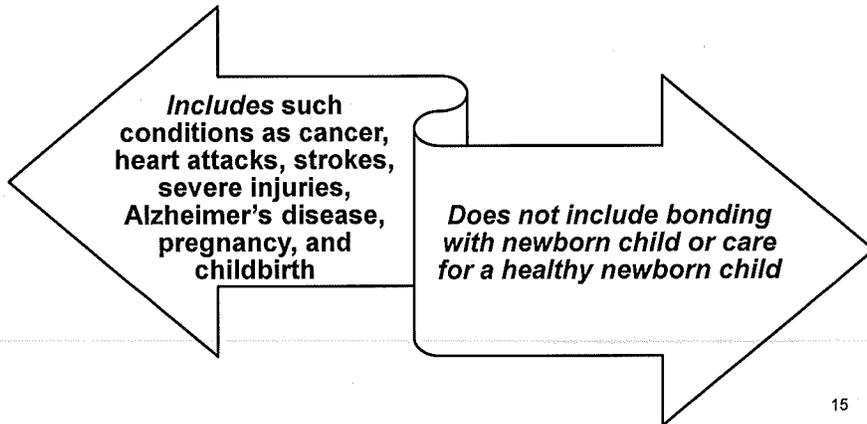
- Spouse and parents thereof
- Children, including adopted children, and spouses thereof
- Parents, and spouses thereof
- Brothers and sisters, and spouses thereof
- Grandparents and grandchildren, and spouses thereof
- Domestic partner and parents thereof, including domestic partners of any individual in paragraphs (2) through (5) of this definition
- Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship

**New definitions do not apply to FMLA!**

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## Serious Health Condition Definition

Definition: Illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider

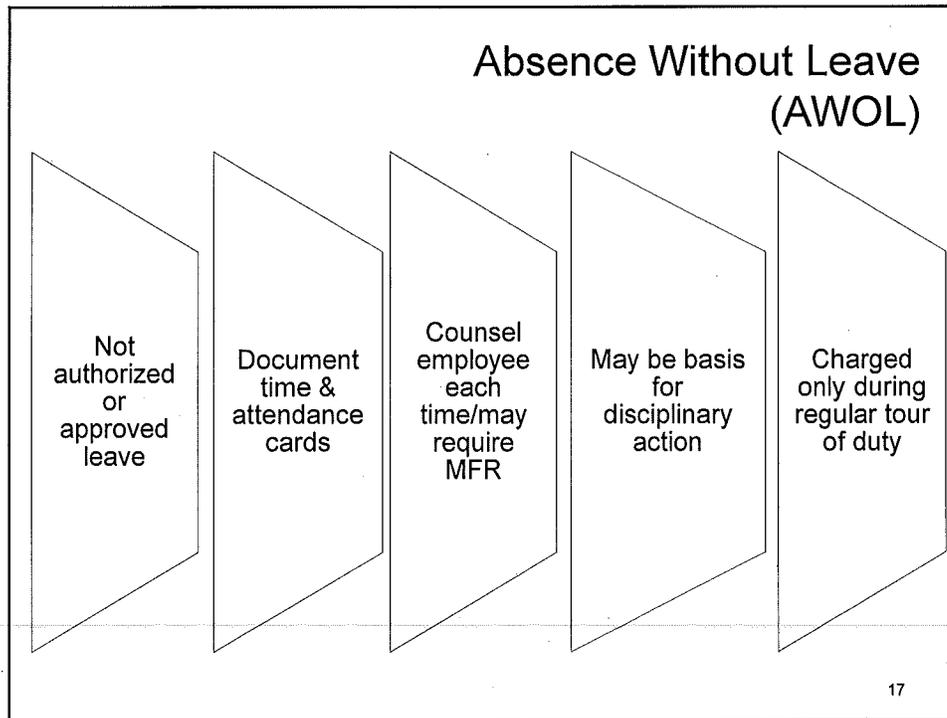


## Sick Leave for Adoption

Authorizes use of sick leave for purposes related to adoption of a child

Includes appointments with adoption agencies, social workers & attorneys, court proceedings and required travel

May include time to bond with the child if required by court or adoption agency




## Military Leave

- For members of Guard and Reserve components
- For active duty and inactive-duty training
- 15 calendar days (120 hours) per fiscal year
- No more than 120 hours may be carried over to next year
- Leave charged in hourly increments, not whole day
- Intervening weekends not charged to military leave
- 22 or 44 days for other circumstances

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## Case Study 1

- Both May Frank and Bea Hummel, your only two processing clerks have requested annual leave for the same afternoon.
- When both employees are off at the same time no one is available to process purchase orders or payment vouchers.

What do you do?

19

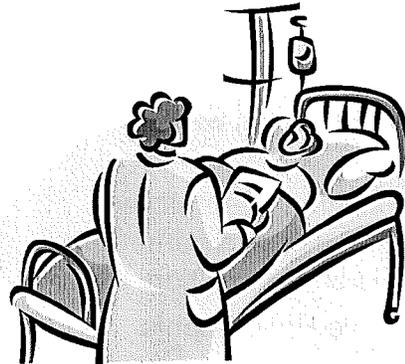
## Case Study 2

- Jerry is one of your team leaders for the branch and he requests to have the afternoon off.
- You ask why.
- Jerry tells you its such a nice day and the Yankees have a home game.
- You tell Jerry that as a team leader he has to set an example and just can't leave during the middle of the day to go watch a ball game...based on the short notice and Jerry's reason, you deny his request.

Is this an adequate reason to deny his annual leave request?

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## Special Situations – Family Medical Leave Act (FMLA)



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## FMLA Employee Eligibility

### Title II FMLA Rules

- Federal Employees
- NAF Employees

### Title I FMLA Rules

- Temporaries (NTE 1 Year)
- Intermittent employees

- Service Requirement -12 Months
  - Doesn't have to be consecutive
  - Military service doesn't count

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## FMLA Leave Entitlement

- Birth & care of newborn child
- Placement of a child with employee for adoption/foster care
- Care of spouse/child/parent with serious health condition
- Serious health condition of employee that makes employee unable to perform the essential duties of his or her position
- Military Family Leave Entitlements



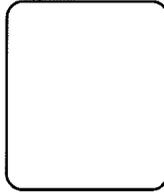
23

## Interaction of Sick Leave and FMLA

- The definition of family member is a little narrower under FMLA
- May use or substitute up to 12 weeks of SL for FMLA if he/she is caring for a spouse, child or parent with a serious health condition
- May then invoke entitlement for an additional 12 weeks of unpaid leave (or paid leave)

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## Important Considerations



### Intermittent or reduced leave schedule

- May be used when medically necessary for serious health condition
- May not be used for birth or adoption/foster care unless agency and employee agree otherwise



### Medical Documentation

- Provide within 15, but NLT 30 days
- 2<sup>nd</sup> opinion at agency's expense
- 3<sup>rd</sup> opinion is final and binding

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## FMLA - Quiz

1. A husband and a wife employed in the same agency are each entitled to 12 weeks of leave under the FMLA for the birth of a child or placement for adoption or foster care. True or False?
2. An employee is entitled to FMLA leave to care for a seriously ill grandparent. True or False?
3. Agencies may require employees to substitute their annual leave for LWOP under the FMLA. True or False?
4. If an agency can prove that an employee's absence would adversely affect mission accomplishment, the agency may deny an employee's request to take FMLA leave under a reduced leave schedule to care for a spouse with a serious health condition. True or False?

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# EXERCISE TIME

## Case Studies



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## Exercise 1

1. Mary Jones call's you early Monday morning requesting leave. She has an established pattern of calling in on Mondays. Mary also has a problem coming to work on time. You have counseled her on several occasions.

When you inform Mary that she has no leave annual (zero balance), she responds by saying, "I have no suspense's due today and I'm caught up with all my work so just put me down for LWOP."

How do you respond?

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## Exercise 2

2. Sammy Heller has been a Supply Clerk in your office for two months, has an enthusiastic attitude and is a competent employee with no history of any leave problems. You notice that Sammy clocks in 20 minutes late on Friday and when you question the tardiness he replies, "I couldn't get moving this morning".

- How would you handle this situation?
- What if Sammy had been in your office for two years instead of two months?
- What if Sammy had been in your office for two years and had a habit of taking long lunches, frequently coming in late, and habitually taking unscheduled leave?

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## Exercise 3

3. Art Wolfe, whose wife is due to give birth in several weeks, requests four weeks paternity leave to be charged to his sick leave, beginning the day his wife goes into the hospital.

His wife also a federal employee, requested 4 weeks for maternity leave.

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## Exercise 4

4. Harry Carpenter has just come to see you and told you in confidence that he has developed a drinking problem, and would like to attend the agency's twice weekly AA meetings. As he has no accrued sick leave, and the meetings take place during Harry's tour of duty, Harry asks you for an hour of LWOP to cover each of the next eight weeks' meetings.

Can you deny Harry's request?

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## Exercise 5

5. Mike Smith's wife calls in and leaves you a voice mail. She let's you know that Mike will be late. When Mike shows up at work two hours late, he hands you his leave request.

Do you approve or disapprove his leave request?

Is not following leave procedures a valid reason for denying leave?

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### Exercise 6

6. James Mercer was absent for 2 days. When he returned, you requested, but he failed to submit a written application for sick leave within the prescribed time. You then charged him AWOL and since this was his third offense, proposed his removal. Your CPAC advises that he had a sick leave balance and that he was legitimately ill on the 2 days in question. Therefore, removal would not be appropriate.

What *would* be an appropriate charge?

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### Exercise 7

7. Marie calls her co-worker Alice to let her know she will be 30 minutes late. When Marie shows up at work, her supervisor, Bobby Knight, confronts Marie at her desk and wants to know where she has been. Handing Bobby her leave slip, Marie responds angrily, "You are so nit-picky. I told Alice to tell you and that should be good enough?!"

Do you approve or disapprove her leave request?

If you approve her request, can you still take disciplinary action?

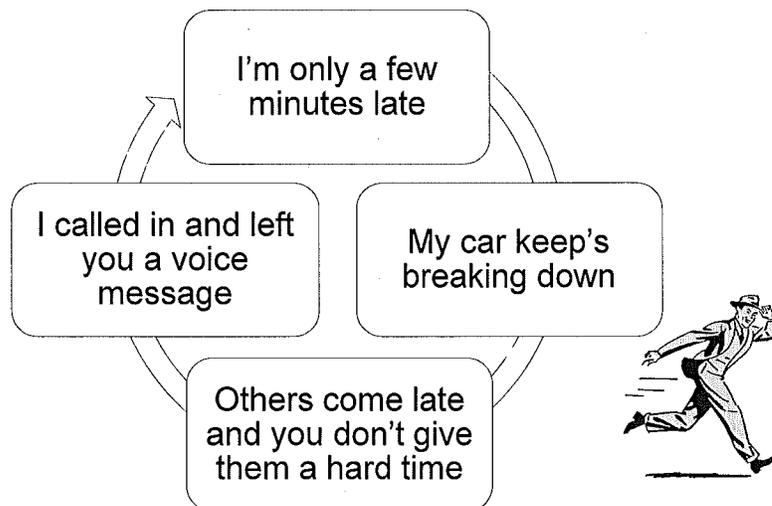
34

## Special Situations – Leave Issues

### Video Presentation: Combating Absenteeism

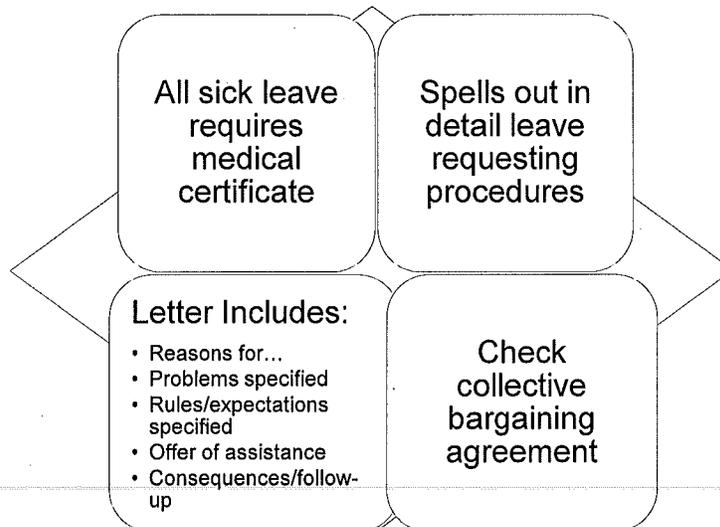
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### Dealing with the “Absent Employee”



36

## Leave Restriction Letter



37

## Discipline - Concepts & Principles

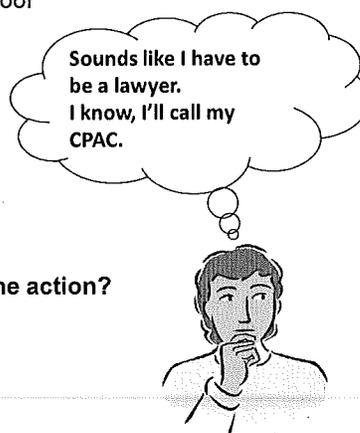
- Timely - Action must be taken promptly to be supportable and meaningful
- Reasonable - Penalty must fit the offense
- Consistent - Similar penalty for similar offense
- Non-discriminatory - Action must be based on the merit's of the case



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## The Adverse Action Process

- ❑ **Is there a basis for adverse action?**
  - Nexus, burden of proof and standard of proof
- ❑ **Have the facts been established?**
  - Conducting the fact-finding investigation
  - Identifying the proper charge
- ❑ **Does the penalty fit the offense?**
  - Range of options
  - Performance or conduct
  - Progressive discipline
  - Table of penalties
  - The Douglas Factors
- ❑ **Has employee been properly informed of the action?**
  - Understanding due process
  - The Proposing & Deciding Official



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## Basis for Action

- ❑ 5 USC, Sec. 7513. Cause and procedure: "...an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service..."
- ❑ Adverse affect on the agency mission means that a reasonable connection or nexus exists between misconduct and:
  - ✓ Employee's ability to perform his/her job
  - ✓ Ability of other employees to perform their jobs
  - ✓ Ability of the agency to perform its mission

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## Efficiency of the Service and Nexus

- ❑ There must be a connection (nexus) between the employee's performance/conduct and its impact on the workplace
- ✓ MSPB cases have demonstrated that performance/conduct does not have to have violated a written regulation



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## Off-Duty Misconduct

- ❑ Must establish a nexus between the incident and the efficiency of the service
- ❑ Nexus may exist if management can show it lost trust and confidence in the employee's ability to perform
- ❑ Nexus may exist if able to prove that the off-duty misconduct conflicts with the mission
- ❑ Nexus may exist if able to demonstrate that management fears for the safety of the employees
- ❑ "Egregious" standard - Depending on the nature and gravity of the situation, a presumption of nexus may arise. The conduct is so heinous, the act speaks for itself.

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# EXERCISE TIME

Nexus or Not?.....

Determine whether a sufficient nexus exists.

Where nexus is found, explain the connection between the misconduct and the efficiency of the service.



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## Exercises

1. In the parking lot of a downtown bar where he had been drinking since leaving work, a security officer discharges four rounds from his service revolver into his stalled auto.
2. According to the police log in a local news-paper, a supply clerk was arrested over the weekend for DUI. The brief paragraph does not mention the individual's employer.
3. The Director of Resources pleads guilty to theft by deception. The plea resulted from a charge of passing bad checks at a local store.

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## Exercises

4. A forklift operator is cited for disorderly conduct by local police following an off-duty altercation with his neighbor in which no one was injured.
5. The chief counsel is involved in a minor auto accident on her way home from work. Police determine she is at fault and issue a citation for failing to yield the right of way.

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## Exercises

6. A heavy mobile equipment mechanic is charged with aggravated assault after seriously injuring his mother in a domestic dispute.
7. With the caption, "This local bureaucrat likes to boogie!," a nude picture of a division chief appears in a pornographic magazine featuring ads for sexual partners. The magazine is sold at local newsstands.
8. Complaints are lodged by the ex-girlfriend of an employee assistance program (EAP) counselor alleging stalking. Both are employees at work on the installation.

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## Exercises

9. During a game of volleyball at the annual employee appreciation day picnic, a budget analyst initiates a shoving and shouting match with her supervisor who is playing on the opposing team.

10. While vacationing in another state, the director of information management is arrested for impersonating a police officer. Although the incident is not reported in the local newspapers, she has two previous convictions for such an offense.

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## What is the Burden of Proof Standard?

- Burden of proof: Obligation to establish - through the introduction of evidence - facts or conclusions that are in controversy
- Standard of proof: Amount or level of proof required to establish a fact or support a determination. Examples of evidentiary standards include:
  - ✓ Evidence beyond a reasonable doubt
  - ✓ Clear and convincing evidence
  - ✓ Preponderance of evidence
  - ✓ Substantial evidence



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## Standard of Proof

- ❑ **Clear and convincing evidence.** The highest standard of evidence required in administrative proceedings
  - ✓ It requires proof sufficient to establish a firm belief as to the authenticity of the facts being alleged
- ❑ **Preponderance of the evidence**
  - ✓ That degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue
- ❑ **Substantial evidence**
  - ✓ That degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as sufficient to support a conclusion even though others might disagree

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## Have the Facts Been Established?

- ❑ What is a fact?
  - ✓ Something that
    - Can be shown to be true, to exist, or to have happened
    - Is based on or concerned with the evidence presented in a legal case
  - ✓ Circumstances of an event, motion, occurrence, or state of affairs, rather than an interpretation of its significance
- ❑ Fact or Inference?



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## The Card Game

### DIRECTIONS:

1. The instructor will read you a story and you will be given time to respond to the statements below.
2. The instructor will only read the story once.
3. No questions are allowed.
4. Answer each question by indicating T or F or ?

T Means the statement is definitely true on the basis of story

F Means it is definitely false

? Means you cannot be certain on the basis of information given

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## Conduct a Fact-Finding Investigation

# WHY INVESTIGATE...?



Purpose of a fact-finding investigation is to find out what really happened by establishing and proving facts

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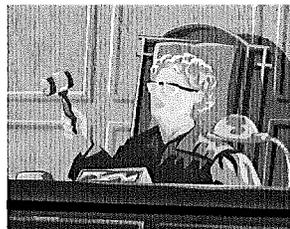
## Conduct a Fact-Finding Investigation (cont)

### ONCE YOU FIND OUT THE FACTS...

- decide whether to discipline
  - whom to discipline
  - for what reason(s)

Two main reasons agencies lose their case:

- Did not prove the facts, or
- Proved the facts, but the penalty did not fit the crime



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## Conduct a Fact-Finding Investigation (cont)

### INVESTIGATING THE INCIDENT...

Remember, purpose is to establish facts

- Get employee's side of the story first whenever possible
- Contact the employee as soon as possible
- Be aware of
  - ✓ Right to representation (Weingarten)
  - ✓ Privacy Act concerns



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## Conduct a Fact-Finding Investigation (cont)

### Next step is to:

- Interview anyone who witnessed or could have witnessed the incident
- Be sure to talk to all, even those who say nothing happened
- Get something in writing from witnesses

55

## Conduct a Fact-Finding Investigation (cont)

### BE SURE TO DOCUMENT YOUR FINDINGS!

- Describe the incident/discussion in detail:
  - ✓ Date & time
  - ✓ Place
  - ✓ Witnesses
  - ✓ Behavior
  - ✓ Tell it like it is

- What about that “super secret” supervisory folder?



56

## Progressive Discipline

- Approach to modifying undesirable employee behavior through the use of a range of disciplinary consequences
  - ✓ Applied depending upon nature and history of employee's misconduct
- Series of increasingly serious responses to repeat problems by employees
- Intent is to correct the conduct



Continuum of severity

5  
7

## Table of Penalties

- Consult the "Table of Penalties"
  - ✓ Provides list of offenses & suggested penalties
  - ✓ Good reference for charges



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## The Douglas Factors

- Nature and seriousness of the offense
- Employee's job level, type of employment
- Employee's past disciplinary record
- Employee's past work record
- Effect of the upon the employee's ability to perform satisfactorily
- Consistency of penalty for similar offenses of other employees
- Consistency of penalty with agency's table of penalty
- Notoriety of offense, impact on agency reputation
- Employee warned or clearly aware of rules
- Potential for rehabilitation
- Mitigating circumstances
- Adequacy, effectiveness of alternative sanctions to deter future misconduct

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## Applying the Douglas Factors

- Balancing act – Penalty needs to be fair, reasonable and consistent
- MSPB did not assign weight to the factors
- Not all factors apply to every case
- Deciding officials must consider the relevant factors and decide if they mitigate or aggravate the penalty selection
- Douglas Factors are subsumed in one question: Did the agency take the least possible sanction that will adequately protect its legitimate interest?



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## Does the Penalty Fit the Offense

To determine the proper penalty, keep the following guiding principle in mind:  
“Like penalties  
for like offenses  
in like circumstances”



61

# EXERCISE TIME



## Disciplinary Actions

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## Case Study 1

Two employees are involved in a shouting match using inappropriate language and conduct. You speak with both of them and each says the other started it and accuse the other of making the inappropriate remarks. To get a handle on what happened you conduct a fact finding investigation. Since Mary's cubicle is right between the two and she was present at the time of the shouting match. You call Mary into your office to discuss what happened. You don't get to far when she tells you that she really does not want to get involved.

What do you do?

What if Mary say's that she will cooperate but you can't tell anyone?

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## Case Study 2

As a supervisor who takes her responsibility serious, Mary is getting concerned about Pete's use of the internet. He comes in early and stay's late quite often. She is well aware of the office gossip that Pete is having affairs. However, the gossip that Pete is using the internet and email to find women and set up his "affairs" really bothers Mary. When Pete calls in sick one day, Mary asks her computer person to unlock Pete's computer.

What do you think of Mary's request?

Is it ok to access Pete's computer while he is out and search for supporting evidence?

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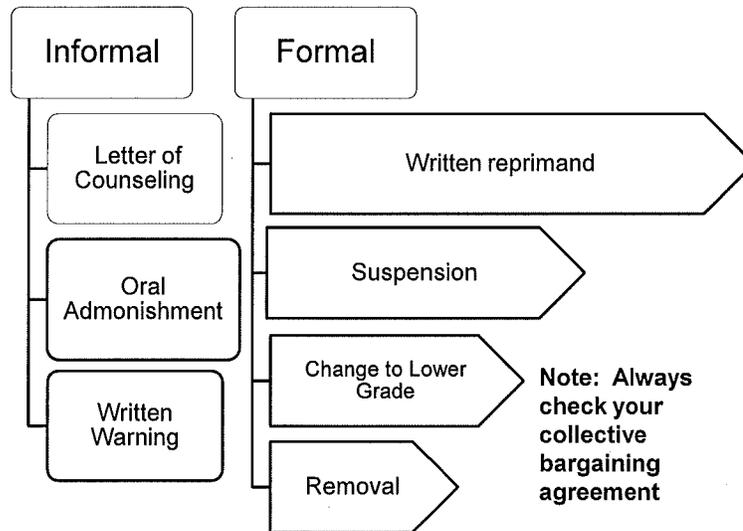
### Case Study 3

Scott Smith, an attorney for Tom Jones, calls you to let you know that Tom was arrested for alleged shoplifting in a nearby department store an hour ago. Mr. Smith requests several hours of annual leave for Tom in order to cover the time that it will take to arrange for his release on bail.

Do you approve the leave?

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### Range of Options



66

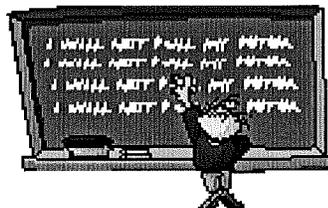
## Specific Situations – Probationary Employee

- Probationary period is a management tool
  - ✓ Monitor probationary employees closely
    - May terminate at any time for almost any performance deficiency or misconduct with limited rights
  - ✓ Effect termination in a timely fashion
  - ✓ Coordinate termination with HR
  - ✓ Deal with pre-appointment issues
- Supervisory probationary period

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## The Letter of Reprimand

- First formal action
- Goes into employee's OPF
- No proposal or decision letter
  - ✓ Always check your collective bargaining agreement



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## The Letter of Reprimand (cont)

- Coordinate with your HR Advisor
- Letter should contain:

-Description of offense(s)  
-Retention in OPF (1 yr. - 3 yr.)  
-Recount former instances  
-Warning of more severe action  
-Advice of EAP  
-Grievance rights (AR 690-700, Ch 751)

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## Proposing the Action

- The Proposal Letter (for reductions in grade, suspensions and removals)
  - ✓ Properly framed charges
  - ✓ Proposed penalty
  - ✓ Specific facts
  - ✓ 30 day notice



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## Proposing Official

- Most often, 1st line supervisor is the proposing official
- Supervisor determines facts & need for action
- Coordinate with the HR Advisor
- Issue proposal letter (document and support the aggravating factors)
- Other considerations:
  - ✓ Employee Assistance Program (EAP) statement



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## Deciding Official

- Provides impartial review of adverse action
- Consider all relevant Douglas Factors
- Must consider mitigating factors
- Receive and consider employee's response
- Only consider the facts & charge(s) documented in the proposal letter
- Renders final written decision in a timely manner



If action is reviewed by a 3rd party, it is the deciding official usually called to testify not the proposing official

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## Content of the Decision

- Reference to proposal
- Nature of employee reply
- Consideration given to employee reply decision
- Effective date of resulting action
- Rights to grieve or appeal (if applicable)



The decision letter does not have to specifically list each *Douglas* Factor and how it applies to the case. However, documentation that the Douglas Factors have been considered is critical!

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## Employee Due Process

- Reasonable advance notice including statement of the specific facts in support of the proposed action
- Opportunity to review the materials relied upon, including the governing regulations
- Opportunity to reply
- Right to representation
- Written notice of decision
- Opportunity to grieve, appeal or file an EEO complaint



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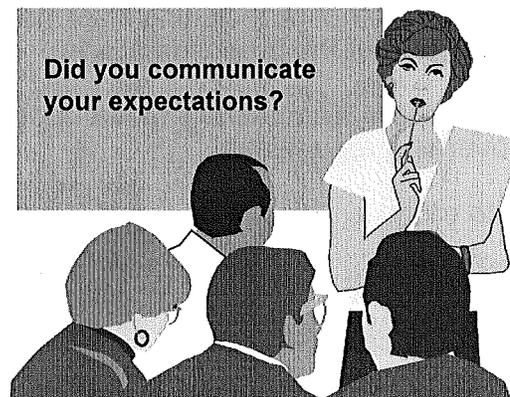
## Discussion Questions

1. Reckoning period
  - For how long can you hold a formal action against an employee?
  - 6 months? 1 year? 3 years? 5 years? 10 years? Forever?
2. Penalty enhancement
  - How do you move from a first offense, to second offense, to the third offense?
3. Can you still reference a letter of reprimand that expired?



75

## Specific Situations – Unacceptable Performance



76

## Dealing with Unacceptable Performance

STEP 1: Setting and communicating the performance expectations

STEP 2: Provide an Opportunity to Improve period (PIP)

STEP 3: If no improvement, take the action



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### Step 1 –Communicating Expectations

#### Performance Plan must:

- ✓ Consist of objectives/responsibilities (specific duties of the job) and standards(how the supervisor is going to measure how well the employee performs those objectives/responsibilities)
- ✓ Communicate in counseling sessions, written instructions, in the PIP or in any manner calculated to apprise the employee of the requirements against which the employee will be measured

#### The midpoint discussion needs to be documented by initialing on the performance plan.

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## Step 2 – Provide an Opportunity to Improve (PIP)

- Employee has the right to a reasonable opportunity to improve (normally 60-120 days)
- PIP required by AR 690–400 for unsuccessful performance
- PIP identifies consequences of continued failure
- Relate deficiencies to job objectives and expectations, and the required actions to improve to the successful level

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## Step 2 – Provide an Opportunity to Improve (PIP)

- PIP notices should define assistance which will be provided:
  - ✓ Performance coaching and counseling
  - ✓ On-the-job training or formal training
  - ✓ Closer supervision
  - ✓ If employee improves, must sustain improvement for one year from beginning of PIP or face action without additional PIP (unless failure is on an objective that the PIP didn't cover)

80

### Step 3 – Proposed Action and Due Process

- ❑ Advance Written Notice (Proposal) :
  - ✓ 30 Day notice of proposed action
  - ✓ Specific instances of unacceptable performance of critical elements/objectives
  - ✓ Only instances which occurred in 12 months preceding date of notice
  - ✓ Right to Representation (designated in writing)
  - ✓ Right to reply orally and/or in writing

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### Step 3 – Proposed Action and Due Process

- ❑ Written Decision Notice :
  - ✓ Within 30 days after expiration of notice period
  - ✓ Specific instances of unacceptable performance
  - ✓ Concurrence by higher level official
  - ✓ Must consider employee's reply
  - ✓ Consider any improvement during notice period
  - ✓ State effective date
  - ✓ Provide grievance or appeal rights

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## Employee Redress Avenues - Grievances and Appeals



83

## Redress Avenues & Independent Agencies

- ▶ Agency administrative grievance systems for disputes not covered by a collective bargaining agreement
- ▶ Negotiated grievance procedure for disputes covered by a collective bargaining agreement
- ▶ Merit Systems Protection Board (MSPB): Significant personnel actions
- ▶ Equal Employment Opportunity Commission (EEOC): Discrimination claims
- ▶ Office of Special Counsel (OSC): Whistleblower, Hatch Act and Prohibited Personnel Practices
- ▶ Federal Labor Relations Authority (FLRA): Various labor-management issues such as negotiability disputes
- ▶ Alternative Dispute Resolution (ADR)

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## Grievance Definition

- ❑ Any employment matter may be grieved under the AGS (SC771.4.2.2.)
  - ✓ Involves a matter of personal concern
  - ✓ Must be subject to control of management
  - ✓ Requested personal relief is available



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## The Grievance Process

- ❑ Negotiated Grievance Procedure
  - ✓ Covers bargaining unit employees
  - ✓ Grievance means any complaint:
    - By any employee or the labor union concerning any matter relating to the employment of the employee
    - By any labor organization concerning any matter relating to the employment of the employee
    - By any employee, labor organization, or agency concerning the effect of interpretation or a claim of breach of a collective bargaining agreement or violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.
- ❑ The Administrative Grievance Procedure

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## Administrative Grievance Procedure – Purpose

To provide a fair, equitable and timely  
forum for review and resolution of  
employment-related matters



8  
7

## Administrative Grievance Procedure

- ❑ Informal problem solving step:
  - ✓ Employee presents grievance informally to supervisor within 15 calendar days of event creating dissatisfaction or when employee became aware of dissatisfaction
  - ✓ Management responds within 15 calendar days
  - ✓ If employee is not satisfied, management informs employee of available grievance/appeal procedures

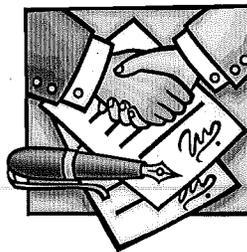
88

## Administrative Grievance Procedure

### □ Formal grievance

- ✓ If employee is not satisfied with informal decision, may file a written grievance within 15 calendar days of receipt of informal decision
- ✓ Deciding official may resolve using alternative dispute resolution technique:

- mediation
- fact-finding
- settlement conference
- arbitration



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## Administrative Grievance Procedure

### □ Formal grievance

- ✓ Deciding official issues a final and binding written decision within 60 days of receipt of grievance
- ✓ To higher level if cancelled or no decision in 90 days



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## Alternative Dispute Resolution

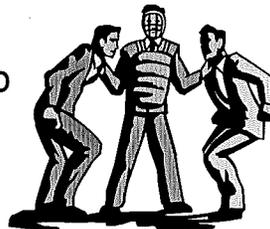
“Any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and the use of ombuds, or any combination thereof.”

--Administrative Dispute Resolution Act of 1996

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## Alternative Dispute Resolution

- “It is Army policy to encourage the use of ADR whenever appropriate, the goal being to resolve disputes at the earliest stage feasible, by the fastest and least expensive method possible, and at the lowest possible organizational level.”
- Always consider as an alternative when appropriate
- Preserves the relationship
- Less costly than litigation



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## ADR – What is it?

### Key elements of ADR

- ✓ Neutral third party (e.g., mediator)
- ✓ Self-determination of the parties as to outcome
- ✓ Confidentiality
- ✓ One or more “issue(s) in controversy
- ✓ Not limited to the “legal” issues of the case
- ✓ Usually pursues an “interest-based” approach to develop options for resolution

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## Supervisor’s Role in Mediation

### If involved in mediation—

- ✓ Prepare for the mediation - know the case
- ✓ Set aside time for mediation without distraction
- ✓ Identify the *interests* and think of ways to satisfy them
- ✓ Mediate in good faith--keep an open mind
  - Doesn't mean you have to settle!
- ✓ Know the limits of your authority
- ✓ Be specific in the settlement agreement

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## Non-Grievable Actions

- Under Administrative Grievance System:
  - ✓ DOD regulation contains 14 specific exclusions
  - ✓ Component can request other exclusions from DOD through OPM

DoD 1400.25-M, Subchapter 771

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## Merit Systems Protection Board (MSPB)

- Independent Government Agency
- Operates like a court
- Ensures actions taken against employees are based on Merit Principles
- Adjudicates employee appeals
- Regional offices



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## Judicial Review & The MSPB

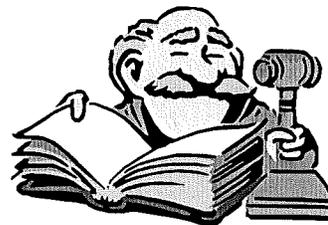
- The Board will not order a more serious penalty than that imposed by the agency
- The MSPB's job is to decide whether the agency's choice of penalty is reasonable, not to impose what it believes is the most reasonable penalty
- The Board reviews the penalty to determine whether the agency considered all the relevant factors and exercised its discretion within tolerable limits of reasonableness



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## Appeal Process

- Employee is in receipt of a decision notice of an appealable action
- Employee files petition for appeal
- Settlement discussions
- Hearing (at discretion of appellant)
  - ✓ Yes: Discovery
  - ✓ No: Judge issues decision
- Decision by Administrative Judge



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## Appealable Actions

- Suspension exceeding 14 days
- Reductions in grade or pay
- Removals
- Furloughs of 30 days or less
- Denials of within-grade increases
- RIF
- OPM suitability determinations
- OPM determinations on retirement matters
- Denials of restoration of reemployment rights
- Terminations of probationary employees under limited circumstances

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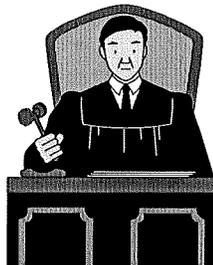
## Discussion Questions

- ◆ What if the employee contends that the appealable action involved discrimination? Can the employee also file an EEO complaint at the same time?
- ◆ Can bargaining unit employees appeal through the MSPB or must they use the negotiated grievance procedure?
- ◆ A military reservist is denied reemployment upon properly requesting restoration after an 18 month deployment. Can they appeal to the MSPB?

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## Discussion Question

- ◆ What about “double jeopardy”?
- ◆ Legal term: A second prosecution for an offense after the defendant has already been tried for or acquitted thereof
- ◆ Prohibited by the 5<sup>th</sup> Amendment of the Constitution; *not relevant* for administrative actions.



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## Management-Employee Relations Review

1. Describe the various leave programs.
2. Explain the key concepts and principles in the adverse action process.
3. Describe the appropriate steps in resolving performance problems.
4. Describe the various redress processes available to employees and their purpose.

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# Questions?



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# HR for Supervisors: Management-Employee Relations Handbook



<b>Table of Contents</b>	<b>Page</b>
I. Army Regulation on Discipline (AR 690-700, Chapter 751).....	2
II. Table of Penalties.....	9
III. Douglas Factors.....	23

## **AR 690-700, Chapter 751 Discipline**

### SUBCHAPTER 1. General Provisions

- 1-1. Agency Responsibility for Discipline
- 1-2. Applicability
- 1-3. Choosing Among Disciplinary Actions
- 1-4. Determining Appropriate Penalties

### SUBCHAPTER 2. Specific Disciplinary Situations

- 2-1. Fraud, Theft, and Intentionally Dishonest Conduct
- 2-2. Unauthorized Absence

### SUBCHAPTER 3. Written Reprimands

- 3-1. General
- 3-2. Formal Written Reprimand
- 3-3. Withdrawal of Reprimand

APPENDIX A. Memorandum for Director of the Army Staff dated 22 March 1985, subject: Need for Strong Disciplinary Measures to Help Combat Fraud, Waste and Abuse

\*This is a self-contained chapter. It does not follow the paragraphing of FPM chapter 751.

#### **Subchapter 1. General Provisions**

##### **1-1. AGENCY RESPONSIBILITY FOR DISCIPLINE**

The broad objective of discipline is to motivate employees to conform to acceptable standards of conduct and to prevent prohibited activities. Discipline is a part of the daily responsibility of supervisors and not merely the action taken at times when an employee deviates from acceptable forms of conduct. The supervisor's most effective means of maintaining discipline is through the promotion of cooperation, of sustained good working relationships, and of the self-discipline and responsible performance expected of mature employees.

##### **1-2. APPLICABILITY**

Probationary employees and those serving trial periods are excluded from the provisions of this chapter. See FPM chapter 315, subchapter 8, for guidance on offenses committed by these types of employees.

##### **1-3. CHOOSING AMONG DISCIPLINARY ACTIONS**

Disciplinary actions fall into two categories: informal disciplinary actions (oral admonishments and written warnings) and formal disciplinary actions (letters of reprimand, suspensions, involuntary reductions in grade or pay, and removal). Similarly, employee conduct requiring discipline falls into two categories: behavioral offenses for which progressive discipline aimed at correcting the behavior is appropriate and offenses relating to violation of regulations or laws for which punitive sanctions are required. Disciplinary action should be taken for the purpose of either correcting offending employee behavior and problem situations or for the purpose of imposing punishment necessary to maintain discipline and morale among other employees.

a. **Informal disciplinary actions.** Informal disciplinary actions are taken by the supervisor on his/her own initiative in situations of a minor nature involving unacceptable behavior. Oral admonitions and written warnings are normally the first steps in progressive discipline for behavioral offenses and they should be documented (e.g., on the SF 7-B (Employee Record)). \*\* In taking an informal disciplinary action, the supervisor will advise the employee of the specific infraction or breach of conduct and exactly when and where it occurred. The employee should be allowed to explain his or her side of the incident. The supervisor will then advise the employee that continued violations will result in formal disciplinary action.

b. **Formal disciplinary actions.**

(1) Formal disciplinary actions consist of writ-ten reprimands, suspensions, involuntary reductions in grade or pay and removals. Formal disciplinary actions are initiated by supervisors, with advice and assistance on appropriate penalties and other pertinent concerns from the servicing civilian personnel office (CPO). The CPO staff will assure appropriate oral or written coordination with the Labor Counselor on all formal disciplinary actions.

(2) At the time a notice of proposed formal disciplinary action is issued, the HR staff will notify the deciding official of his or her role. (There is no proposal issued for a letter of reprimand unless specified by your collective bargaining contract). The deciding official will be advised (either by a personal briefing or through an information paper) of procedural and legal requirements in formal disciplinary actions including the requirement to remain impartial and objective. The advice to the deciding official will be the joint responsibility of the Employee Relations Specialist and the Labor Counselor. The advice should be tailored to the discipline proposed and should advise the decider of applicable case law so that he or she can make an informed and judicious decision. At this stage, the advice, if in writing, should not include "privileged" information such as an assessment of the evidence or any recommendation as to penalty.

(3) Decision notices should contain information demonstrating that the deciding official has considered all of the information available, both aggravating and mitigating. Such notices should also explain what weight was given to the aggravating factors in reaching the final decision, and reflect the deliberation of such official concerning the reasons for arriving at the judgment that the employee did or did not commit the offenses charged. \*\* Decision notices must be reviewed by the CPO staff and the Labor Counselor prior to delivery to the employee to ensure that the decision is procedurally sound and legally supportable. In the event that the decision notice cannot be delivered to the employee in person because of absence, notice may be delivered by mail. In such cases, proof of mailing should be established.

#### **1-4. DETERMINING APPROPRIATE PENALTIES**

a. Disciplinary actions under 5 USC 7503 and 7513 must not be arbitrary or capricious; the penalty selected must not be clearly excessive in relation to the offense and to prior practice, and must not otherwise be unreasonable.

b. Table 1-1 sets forth a range of discretionary penalties which the Department of the Army views as a *general guide* to supervisors in administering discipline to employees for particular offenses. In taking such disciplinary actions, supervisors should ensure that comparable disciplinary actions are taken for comparable offenses. The table of penalties is not meant to be an exhaustive listing of all offenses. Appropriate penalties for unlisted offenses may be derived by comparing the nature and seriousness of the offense to those listed in the table. \* \* While the table is provided only as a guide, experience indicates that the reasons for any deviation from the suggested penalties should be fully explained in the notice of proposed disciplinary action. The employee relations staff and the Labor Counselor will be consulted regarding the reasonableness of a penalty.

c. The use of a particular penalty is not mandatory simply because it is listed in the table. Selection of an appropriate penalty involves a responsible balancing of the relevant factors in the individual case. For example, since supervisors have a special responsibility for the success of the Army's mission, and their conduct/performance should be an example to other employees, infractions committed by supervisors may call for a more serious penalty than for similar infractions committed by non-supervisors.

Also, even for offenses where removal is not listed for a first offense, removal for a first infraction may be assessed for an aggravated offense or multiple offenses. Similarly, removal is not required unless the penalty is mandatory by law (see references to the U.S. Code in the remarks column). Oral admonishments and written warnings are not considered formal disciplinary actions for the purpose of determining a first, second, or third offense. However, informal discipline may be considered when determining an appropriate penalty. A prior offense *of any type* may form the basis for proposing an enhanced penalty.

Thus, a documented first offense of insubordination followed by a charge of fighting could trigger the "SECOND OFFENSE" identified in the table of penalties. In assessing penalties, consideration should be given to the "freshness" of the previous offense in relation to the current infraction. Aggravating factors on which the agency intends to rely for imposition of an enhanced penalty, such as a prior disciplinary record, offense by a supervisor, or the egregiousness of the offense, should be included in the notice of proposed discipline so that the employee will have an opportunity to respond to those factors.

d. In selecting an appropriate penalty, the deciding official should distinguish between misconduct for which progressive discipline aimed at correcting behavior is warranted and misconduct warranting punitive discipline. In general, for progressive discipline the deciding official should select the least stringent penalty thought necessary to get the employee's attention and motivate him/her to improve behavior. For punitive discipline, the deciding official should select the strongest penalty warranted to preclude repeated acts of misconduct by the employee concerned and to deter such misconduct by others. The table of penalties is divided into two sections. Offenses in section A are normally considered behavioral offenses whereas offenses in section B are offenses warranting punitive discipline.

## **Subchapter 2. Specific Disciplinary Situations**

## **2-1. FRAUD, THEFT, AND INTENTIONALLY DISHONEST CONDUCT**

a. It is the policy of the Army that any civilian employee found to have engaged in theft, fraud, or other intentionally dishonest conduct against the Army will be considered for removal from the Federal service. Any lesser penalty will require justifiable mitigating circumstances. It is the duty of all supervisors to ensure that this policy is implemented. This strong disciplinary posture is a necessary element in the Army's campaign against fraud, waste, and abuse. See appendix A for the complete text of this policy statement.

b. All circumstances surrounding an incident of fraud, theft, or intentionally dishonest conduct, and the employee's position should be taken into consideration to determine the most appropriate penalty. When justifiable mitigating circumstances exist, a penalty less than removal may be imposed.

## **2-2. UNAUTHORIZED ABSENCE**

Managers will notify the supporting counterintelligence (CI) element according to AR 381-20, when an employee:

a. Has an unexplained absence for more than 24 hours, and contact with that employee has been unsuccessful; and

b. Has had recent access to national defense information classified Secret or higher, or Communications Security (COMSEC) information, the unauthorized disclosure of which would result in serious or exceptionally grave danger to the United States.

## **Subchapter 3. Written Reprimands**

### **3-1. GENERAL**

Written reprimands are made by management officials for the purpose of correcting an employee's conduct, attitude, or work habits, in order to maintain efficiency, discipline, and morale in the civilian work force. All references to written reprimands pertain to formal written reprimands within the meaning of this chapter.

### **3-2. FORMAL WRITTEN REPRIMAND**

a. **Consideration of formal written reprimand.** A formal written reprimand is appropriate when more stringent disciplinary action other than an oral admonishment is warranted and the circumstances justify the inclusion of a record of the action in the employee's official personnel folder.

b. **Supervisory procedures before initiation of reprimand.** When a supervisor considers that a written reprimand is required to correct misconduct on the part of a subordinate employee, the supervisor will obtain all available information concerning the alleged misconduct. The supervisor may, at his or her election, discuss the incident with the employee to ensure that all relevant facts are known and to afford the employee an opportunity to explain the basis for his or her actions. Since disciplinary action could result from this interview,

supervisors are cautioned that employees may be entitled to union representation during the interview according to 5 USC 7114(a)(2)(B). Supervisors should contact the civilian personnel office (labor relations specialist) to determine appropriate procedures. When a supervisor has elected to interview the employee, the supervisor has the option of discontinuing his or her examination at any time and obtaining the information through other resources. If, during the interview, the employee presents an acceptable explanation for his or her conduct and the supervisor decides discipline is not warranted, the matter will be closed and the employee so advised. If discipline is to be initiated, the supervisor should prepare a memorandum for record of the meeting. When all necessary information is otherwise available and discussion of the misconduct with the employee would be unproductive in the supervisor's opinion, discipline may be initiated without an interview.

**c. Preparation of formal written reprimands.** The civilian personnel office should be consulted to assure that the letter of reprimand is consistent with governing regulations and local disciplinary policy and practices before delivery to the employee. As a minimum, the letter of reprimand should contain-

- (1) A sufficiently detailed description of the violation, infraction, conduct, or offense for which the employee is being reprimanded to enable the employee to fully understand the charges against him or her. Such specifics as the time, place, date, and a description of the incident giving rise to the disciplinary action should be included.
- (2) A statement that the reprimand will be made a matter of record and incorporated in the employee's official personnel folder. The statement will give the specific period of time (which may not exceed 3 years) that the disciplinary action will remain a matter of record. (See FPM Suppl 293-31, para S4-5g (2)(b).)
- (3) A summary of previous offenses if the reprimand follows prior offenses and is considered progressive discipline. Additionally, if the employee has failed to take any remedial action previously directed, that fact should be included. At this point, it may be appropriate to assess whether or not a reprimand is the best form of action to be taken.
- (4) A warning that future misconduct may result in more severe disciplinary action. This warning will be included in all letters of reprimand.
- (5) Advice, if appropriate, regarding services or assistance (such as the Employee Assistance Program) available to the employee to help overcome the deficiency and avoid future recurrences. The employee will be informed regarding any specific action required on his or her part.
- (6) Information on the appropriate grievance channel the employee may use to contest the reprimand.

### **3-3. WITHDRAWAL OF REPRIMAND**

a. A formal written reprimand is not permanent in nature and will be withdrawn from the official personnel folder-

- (1) Upon expiration of the period specified in the letter of reprimand, or
- (2) Upon departure of the employee from the Department of the Army, or
- (3) Upon determination through an appropriate adjudicatory procedure or by an appropriate management official of the involved activity that *the* reprimand is unwarranted and must be withdrawn, or
- (4) Upon a determination by the initiating supervisor that the employee has sufficiently corrected his or her behavior and the letter of reprimand has served its purpose.

b. At the time a reprimand is withdrawn from the official personnel folder, a review should be made of personnel and supervisory records and files, and all *references to* the reprimand removed unless c below applies.

c. When a reprimand has been cited or relied upon in another disciplinary action, all evidence of the reprimand will not be expunged. A copy of the reprimand will be retained in the adverse action file for the purpose of documenting the employee's disciplinary record.

**APPENDIX A**

Memorandum for Director of the Army Staff  
DEPARTMENT OF THE ARMY  
WASHINGTON, D.C.

**22 March 1985**

**MEMORANDUM FOR DIRECTOR OF THE ARMY STAFF**

**SUBJECT: Need for Strong Disciplinary Measures to Help Combat Fraud, Waste and Abuse**

It is essential that strong and effective measures be applied, consistent with applicable law and regulation, to those individuals who are found to have engaged in theft, fraud, or other intentionally dishonest conduct against the Army.

Service members who engage in this type of misconduct are already subject to punishment under applicable provisions of the Uniform Code of Military Justice and to adverse personnel actions.

Effective with the promulgation of Army Regulation 690-700, Chapter 751, it is the policy of the Army that any civilian employee found to have engaged in theft, fraud, or other intentionally dishonest conduct against the Army will be considered for removal from the federal service. Any lesser penalty will require justifiable mitigating circumstances. It is the duty of all supervisors to ensure that this policy is implemented.

This strong disciplinary posture is a necessary element in the Army's campaign against fraud, waste, and abuse. The vast majority of our civilian employees are honest, hard working, and fully aware of their fiduciary responsibilities to the public. We must assure that they are not required to tolerate or work with those who will not live up to this public trust. This policy should be given the widest possible dissemination throughout the Army.

**JOHN A. WICKHAM, JR.** John. Marsh, Jr.  
General, United States Army Secretary of the Army  
Chief of Staff

**AR 690-700; Chapter 751**  
**Table 1-1: Table of Penalties for Various Offenses**

The following Table of Penalties is found in AR 690-700, Chapter 751. A Table of Penalties is a list of the infractions committed most frequently by agency employees, along with a suggested range of penalties for each. The penalties are graduated in severity based on whether an employee has no previous record of misconduct, has a single previous incident of documented misconduct, has two previous incidents of documented misconduct, etc. More serious types of misconduct have a more serious suggested penalty or range of penalties for a first offense than less serious types.

A Table of Penalties, as stated previously, contains a suggested range of penalties. It is a guide to discipline, not a rigid standard. Deviations are allowable for a variety of reasons. For example, when an employee is being charged with multiple offenses at the same time, it may be appropriate to exceed the maximum suggested penalty for all of the individual offenses. Again, when an employee has repeatedly committed the same offense, even though the employee is being charged with the offense for the first time, it may be appropriate to exceed the maximum suggested penalty. When the offense the employee committed is especially serious, compared to normal degree of the stated offense, there may be a basis for exceeding the maximum suggested penalty. On the other hand, there may be occasions when it may be appropriate to assess a penalty below the minimum suggested for the particular offense. In either event, when assessing a penalty outside the suggested range, there should be a reasonable explanation to distinguish why the penalty is outside the norm, a reason that can be explained to third parties in the event of a review.

- A. Behavioral Offenses for Which Progressive Discipline is Appropriate
- B. Offenses Warranting Punitive Discipline
- C. Penalties Applying to Civilian Marine Personnel (Excluding Harbor Craft Employees)

Note: C is not included. See your HR Advisor.

**A. BEHAVIORAL OFFENSES FOR WHICH PROGRESSIVE DISCIPLINE IS APPROPRIATE**

OFFENSE	NATURE OF OFFENSE	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE	REMARKS
1. Insubordination	Refusal to obey orders, defiance of authority.	Written reprimand to	5 day suspension to removal	Removal	

2. Fighting/ Creating a Disturbance*	a. Creating a disturbance resulting in an adverse effect on morale, production, or maintenance of proper discipline.	removal  Written reprimand to 5 day suspension	5 to 10 day suspension	10 day suspension to removal	*Penalty may be exceeded if work is severely disrupted.
	b. Threatening or attempting to inflict bodily harm without bodily contact.	Written reprimand to 14 day suspension	14 day suspension to removal	30 day suspension to removal	*Penalty may be exceeded based on such factors as type of threat, provocation, extent of injuries, whether actions were defensive or aggressive in nature, or whether actions were directed at a supervisor.
	c. Hitting, pushing or other acts against another without causing injury.	Written reprimand to 30 day suspension	30 day suspension to removal	Removal	
	d. Hitting; pushing or other acts against another causing injury.	Written reprimand to removal	Removal		
3. Sleeping on duty	a. Where safety of personnel or property is not endangered.	Written reprimand to 1 day suspension	1 to 5 day suspension	5 day suspension to removal	
	b. Where safety of personnel or property is endangered.	1 day suspension to removal	Removal		
4. Loafing; delay in carrying out instructions	a. Idleness or failure to work on assigned duties.	Written reprimand to 3 day suspension	1-5 day suspension	5 day suspension to removal	
	b. Delay in carrying out or failure to carry out instructions within the time required.	Written reprimand to 3 day suspension	1-5 day suspension	5 day suspension to removal	

5. Attendance related offenses	<p>a. Any absence from the regularly scheduled tour of duty which has not been authorized and/or for which pay must be denied (AWOL) or any absence from management directed additional hours of duty (Unauthorized Absence). Includes leaving the work site without permission</p> <p>b. Failure to follow established leave procedures</p> <p>c. Unexcused tardiness</p>	Written reprimand to 5 day suspension	1-14 day suspension	5 day suspension to removal	Penalty depends on length of absences. Removal may be appropriate for 1st or 2nd offenses if the absence is prolonged
		Written reprimand to 5 day suspension	1-5 day suspension	5 day suspension to removal	
		Written reprimand to 1 day suspension	1 to 3 day suspension	1 to 5 day suspension. Habitual tardiness warrants removal	Includes delay in reporting at the scheduled starting time, returning from lunch or break periods, and returning after leaving work station on official business. Penalty depends on length and frequency of tardiness.
6. Unauthorized use of alcohol, drugs or controlled substances	a. Unauthorized possession or transfer of alcoholic beverages while on government premises or in a duty status.	Written reprimand to 5 day suspension	5-14 day suspension	14 day suspension to removal	Penalty may be exceeded when aggravating circumstance are present. See AR 600-85.

<p>b. Unauthorized use of alcoholic beverages while on government premises or in a duty status.</p>	<p>Written reprimand to 14 day suspension</p>	<p>14-30 day suspension</p>	<p>30 day suspension to removal</p>
<p>c. Reporting to work or being on duty while under the influence of alcohol, a drug or a controlled substance to a degree which would interfere with proper performance of duty, would be a menace to safety, or would be prejudicial to the maintenance of discipline. See para. 13 for other drug related offenses.</p>	<p>Written reprimand to 30 day suspension. Removal may be warranted if the safety of personnel or property is endangered.</p>	<p>14 day suspension to removal</p>	<p>Removal</p>
<p>7. Discourtesy</p> <p>a. Discourtesy, e.g., rude, unmannerly, impolite acts or remarks (non-discriminatory).</p>	<p>Written reprimand to 1 day suspension</p>	<p>1 to 5 day suspension</p>	<p>3-10 day suspension</p> <p>Penalty for fourth offense within 1 year may be 14 day suspension to removal. Penalty may be exceeded if discourtesy or similar conduct was directed to a supervisor.</p>
<p>b. Use of abusive or offensive language, gestures, or similar conduct (non-discriminatory)</p>	<p>Written reprimand to 10 day suspension</p>	<p>5 day suspension to removal</p>	<p>30 day suspension to removal</p>
<p>8. Gambling</p> <p>a. Participating in an unauthorized gambling</p>	<p>Written reprimand to 1</p>	<p>1-5 day suspension</p>	<p>5-30 day suspension</p> <p>See AR 600-50</p>

activity while on  
Government premises or  
in a duty status.

day suspension

b. Operating, assisting or  
promoting an unauthorized  
gambling activity while on  
Government premises or  
in a duty status or while  
others involved are in a  
duty status.

Removal

9. Indebtedness Failure to honor valid  
debts where agency  
mission or employee  
performances are affected.

Written  
reprimand

Written reprimand  
to 1 day  
suspension

Written  
reprimand to 5  
day  
suspension

See AR 690-700, chap.  
735, app E. There must  
be a clear nexus  
between efficiency of the  
service and the debt  
complaint.

## B. OFFENSES WARRANTING PUNITIVE DISCIPLINE

**OFFENSE**      **NATURE OF OFFENSE**      **FIRST OFFENSE**

**SECOND OFFENSE**

**THIRD OFFENSE**

**REMARKS**

10. False  
Statements

a. False statements,  
misrepresentation, or  
fraud in entitlements,  
includes falsifying  
information on a time card,  
leave form, travel voucher,  
or other document  
pertaining to entitlements.

Written  
reprimand to  
removal

30 day suspension  
to removal

Removal

See para. 2-  
1. Removal  
is warranted  
for a first  
offense.

b. False statements or misrepresentations on an SF 171, or other documents pertaining to qualifications, or on any official record not otherwise enumerated.

Written reprimand to removal

14 day suspension to removal

30 day suspension to removal

See para. 2-1. Removal is warranted when selection was based on falsified SF 171 where falsification was intentional (i.e., not an omission or where intent can be proven), or where the employee occupies a fiduciary position.

c. Knowingly making false or malicious statements against co-workers, supervisors, subordinates, or government officials with the effect of harming or destroying the reputation, authority, or official standing of that individual or an organization.

Written reprimand to removal

Removal

d. Deliberate misrepresentation, exaggeration, concealment, withholding of a material fact. Includes perjury, making false sworn statements, and lying to a supervisor.

Written reprimand to removal

5 day suspension to removal

10 day suspension to removal

11. Stealing

Stealing, actual or attempted, unauthorized possession of government property or property of others, or collusion with others to commit such acts.

14 day suspension to removal

Removal

See para. 2-1. Penalty depends on such factors as the value or the property or amounts of employee time involved, and the nature of the position held by the offending employee which may dictate a higher standard of conduct.

12. Misuse or abuse of Government Property

a. Using Government property or Federal employees in a duty status for other than official purposes.

Written reprimand to removal

1 day suspension to removal

14 day suspension to removal

See AR 600-50. Penalty depends on such factors as the value of the property or amounts of employee time involved, and the nature of the position held by the offending employee which may dictate a higher standard of conduct.

b. Loss of or damage to government property, records or information when an employee is entrusted in safeguarding Government property as an absolute requirement of the job (e.g., cashier, warehouse worker, property book officer)

Written reprimand to 14 day suspension

Written reprimand to removal

14 day suspension to removal

<p>c. Willfully using or authorizing the use of a government passenger motor vehicle or aircraft for other than official purposes.</p>	<p>30 day suspension to removal</p>	<p>Removal</p>	<p>See 31 USC 1349. Penalty cannot be mitigated to less than 30 days.</p>
<p>d. Misuse of Government credentials</p>	<p>Written reprimand to removal</p>	<p>5 day suspension to removal</p>	<p>14 day suspension to removal</p>
<p>e. Intentionally mutilating or destroying a public record.</p>	<p>Removal</p>	<p>Removal</p>	<p>18 USC 2071</p>
<p>13. Unauthorized use or possession of a controlled substance</p>	<p>a. Introduction of a controlled substance to a work area or government installation for personal use</p>	<p>3 day suspension to removal</p>	<p>Removal</p>
<p>b. Introduction of a controlled substance to a work area or government installation in amounts sufficient for distribution or distribution of a controlled substance on a government installation</p>	<p>Removal</p>	<p>Removal</p>	<p>Removal</p>
<p>14. Failure to observe written regulations, orders, rules, or procedures</p>	<p>a. Violation of administrative rules or regulations where safety to persons or property is not endangered.</p>	<p>Written reprimand to 1 day suspension</p>	<p>1-14 day suspension to removal</p>

<p>b. Violation of administrative rules or regulations where safety to persons or property is endangered</p>	<p>Written reprimand to removal</p>	<p>30 day suspension to removal</p>	<p>Removal</p>
<p>c. Violations of official security regulations. Action against National Security</p>			
<p>(1) Where restricted information is not compromised and breach is unintentional</p>	<p>Written reprimand to 5 day suspension</p>	<p>1-14 day suspension</p>	<p>5 day suspension to removal</p>
<p>(2) Where restricted information is compromised and breach is unintentional</p>	<p>Written reprimand to removal</p>	<p>30 day suspension to removal</p>	<p>Removal</p>
<p>(3) Deliberate violation</p>	<p>30 day suspension to removal</p>		<p>Removal</p>
<p>15. Discrimination because of race, color, religion, age, sex, national origin, political affiliation or handicap, or marital status</p>	<p>Written reprimand to Removal</p>		<p>Appropriate penalty depends on the facts in a given case weighed against DA policy that discrimination is prohibited.</p>
<p>Prohibited discriminatory practice in any aspect of employment (e.g., employment, appraisal, development, advancement or treatment of employees). Includes failure to prevent or curtail discrimination of a subordinate when the supervisor knew or should have known of the</p>			

discrimination.

<p>16. Sexual Harassment. Influencing, offering to influence, or threatening the career, pay, job, or work assignments of another person in exchange for sexual favors OR deliberate or repeated offensive comments, gestures or physical contact of a sexual nature.</p>	<p>a. Involving a subordinate b. Not involving a subordinate</p>	<p>1 day suspension to removal Written reprimand to 30 day suspension</p>	<p>10 day suspension to removal 5 day suspension to removal</p>	<p>30 day suspension to removal 10 day suspension to removal</p>	<p>Appropriate penalty depends on the fact situation in a given case weighed against DA policy that sexual harassment will not be tolerated. Where conduct created a hostile or offensive work environment, removal is warranted for a first offense.</p>
<p>17. Constitutional Violation</p>	<p>Violation of employee's constitutional rights (i.e., freedom of speech/association/religion.)</p>	<p>Written reprimand to removal</p>	<p>5 day suspension to removal</p>	<p>30 day suspension to removal</p>	
<p>18. Conduct Unbecoming a Federal Employee</p>	<p>a. Immoral, indecent, or disgraceful conduct</p>	<p>1 day suspension to removal</p>	<p>Removal</p>	<p>Includes off-duty conduct if nexus is</p>	

established.

b. Solicitation of or accepting anything of monetary value from person who is seeking contracts or other business or financial gain	10 day suspension to removal	Removal	
19. Refusal to testify; interference or obstruction			
a. Refusal to testify or cooperate in a properly authorized inquiry or investigation	1 day suspension to removal	5 day suspension to removal	Removal
b. Interference with attempting to influence, or attempting to alter testimony of witnesses or participants.	5 day suspension to removal	10 day suspension to removal	Removal
c. Attempting to impede investigation or to influence investigating officials.	10 day suspension to removal	30 day suspension to removal	Removal
20. Political Activity			
a. Violation of prohibition against soliciting political contributions.	Removal		5 USC 7323, 7324 and 7325
b. Violation of prohibition against campaigning or influencing elections.	30 day suspension to removal	Removal	
21. Misappropriation			
a. Directing, expecting or rendering services not covered by appropriations	Removal		5 USC 3103

Removal

b. Failure to deposit into the Treasury money accruing from lapsed salaries or from unused appropriations from salaries.

22. Job Actions

Removal

Participating in or promoting a strike, work stoppage, slow down, sick out or other job actions.

23. Reprisal

Written reprimand to removal

a. Intentional interference with an employee's exercise of, or reprisal against an employee for exercising a right to grieve, appeal or file a complaint through established procedures.

5 day suspension to removal  
30 day suspension to removal

Written reprimand to removal

b. Reprisal against an employee for providing information to an Inspector General, MSPB Office of Special Counsel, EEOC or USACARA investigator, or for testifying in an official proceeding.

5 day suspension to removal  
30 day suspension to removal

<p>c. Intentional interference with an employee's exercise of, or reprisal against an employee for exercising a right provided under 5 USC 7101 et seq (governing Federal Labor-Management Relations).</p>	<p>Written reprimand to removal</p>	<p>5 day suspension to removal</p>	<p>30 day suspension to removal</p>
<p>d. Finding by MSPB of refusal to comply with MSPB order or finding of intentional violation of statute causing issuance of a special counsel complaint.</p>	<p>Written reprimand to removal</p>	<p>Removal</p>	<p>5 USC 1206(g)(1) and 1207(b)</p>

## The Douglas Factors

The Merit Systems Protection Board in its landmark decision, *Douglas vs. Veterans Administration*, 5 MSPR 280, established criteria that supervisors must consider in determining an appropriate penalty to impose for an act of employee misconduct. These twelve factors are commonly referred to as "Douglas Factors". The following relevant factors must be considered in determining the severity of the discipline:

- (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 supervisors' confidence in the employee's work 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 that were violated in committing the offense, or 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, 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 is responsible for ensuring that a disciplinary penalty is fair and reasonable. If a penalty is disproportionate to the alleged violation or is unreasonable, it is subject to being

reduced or reversed even if the charges would otherwise be sustained. These factors provide valuable assistance to supervisors in making a penalty determination.

Some of these twelve factors may not be pertinent in a particular case. Some factors may weigh in the employee's favor while other factors may constitute aggravating circumstances that support a harsher penalty. However, it is critical to balance the relevant factors in each individual case and choose a reasonable penalty.

There is no requirement in law, regulation or in "Douglas" that the written agency decisions or proposals contain specific, detailed information demonstrating that an agency has considered all of the pertinent mitigating factors in a given case. However, the case file must contain a Douglas Factor analysis. It is always better for the Agency to do its own mitigating analysis than to leave it to a third party. In regards to any aggravating factors which may be relied upon to impose an enhanced penalty, these aggravating factors must be included in the proposal notice. This is especially true for prior disciplinary actions. It is only fair to allow the employee to respond to these aggravating factors before a decision is made. Consideration of aggravating factors not communicated to the employee is dangerous and may result in a procedural error and reversal of the disciplinary action.

### **Factor 1 – Seriousness of the Offense**

The reason why this factor is first is simple - it is the most important. In determining the appropriate penalty, a supervisor should consider primarily the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities. This Douglas Factor provides some guidance in determining the seriousness of an offense.

In evaluating the seriousness of the misconduct, an offense is more severe if it was intentional rather than inadvertent and if it was frequently repeated rather than being an isolated incident. Misconduct is also considered more severe if it is done maliciously or for personal gain.

The agency's table of penalties provides some distinction regarding the severity of the misconduct. For example, sleeping on duty is a serious offense. However, it is considered more serious as provided in our table of penalties where safety of personnel or property is endangered. Moreover, the seriousness of the offense is increased if the employee is involved in what might be described as "pre-meditated" sleeping on duty. What does that mean? If you discover an employee sleeping away from his/her duty station with the lights off, pillow in hand and blanket over body, this intentional action is much more egregious than an employee who just cannot keep his/her eyes open and falls asleep while on position.

There are other examples in the table of penalties that provide guidance in determining the seriousness of misconduct. Misconduct of a sexual nature is a serious offense. However, the severity is increased when the misconduct involves physical touching or promising benefits in exchange for sexual favors in comparison to telling a sexual joke or making a sexual remark inappropriate to the workplace. Sexual jokes are more serious if made

directly to an employee rather than if overheard by an employee. The misconduct is even more grievous if the jokes were repeated after the offender was told that the behavior was offensive.

The relationship of the misconduct to the employee's job duties is another important consideration in determining the seriousness of an offense. Falsification of government documents is a serious offense because it relates to an employee's reliability, veracity, trustworthiness, and ethical conduct. The misconduct is more serious if it relates "to the heart" of an employee's duties and responsibilities. For example, if a Time and Attendance (T&A) Clerk was falsifying his/her time and attendance records and it resulted in more pay or less leave used, this misconduct is very serious. The fact that accurate time and attendance records are a critical element of the employee's position, coupled with the fact that the misconduct resulted in personal gain, increases the gravity of this offense. The misconduct would be considered even more serious if the falsification was not an isolated incident, but reflected falsification over several pay periods.

The supervisor deciding the appropriate penalty is in the best position to determine the seriousness of the offense and how the misconduct relates to the employees duties, position, and responsibilities. Remember, an offense is more serious if it is intentional, frequently repeated, or committed maliciously, or for personal gain.

## **Factor 2 – The Employee's Position**

This factor recognizes a relationship between the employee's position and the misconduct. Factors considered are the employee's job level and the type of employment which may include a supervisory or fiduciary role, contacts with the public, and prominence of the position.

It is a well-recognized principle that a supervisor occupies a position of trust and responsibility and is held to a higher standard of conduct than non-supervisory employees. When misconduct occurs by a supervisor it is considered more serious. An employee's supervisory status must be considered in determining the penalty for other offenses as well.

Higher ethical standards are not limited to supervisory positions. Employees who hold law enforcement or security positions are also held to higher ethical standards. Employees of the Internal Revenue Service are held to a higher standard of compliance with Federal tax laws. Employees who exercise discretion in regulating, contracting or otherwise conducting government business with private companies are subject to stricter limits in the areas of gifts, gratuities, and conflicting financial interests regarding the companies with which they conduct official business.

An employee's contacts with the public as well as the prominence of his/her position are additional considerations which should be evaluated in relationship with the misconduct. And we must not forget the important element of safety in many of our positions and any misconduct must be weighed against this critical agency mission.

To summarize, the relationship between the employee's misconduct and the employee's position is an important consideration which must be analyzed as part of the penalty determination.

### **Factor 3 - Prior Discipline**

The Douglas criteria are sometimes referred to generally as mitigating factors. The consideration of past discipline, however, is an aggravating factor, i.e. mitigation in reverse.

In order to use prior discipline as a basis to enhance a current penalty, three criteria must be met. First, the employee must have been informed of the action in writing; second, the employee must have been given an opportunity to dispute the action by having it reviewed, on the merits, by an authority different from the one that took the action; and third, the action must be a matter of record.

Once you've determined that a prior disciplinary action meets the requirements to be available for use, you will need to decide how much weight to give it. There are two major factors to consider here, temporal proximity (i.e. how recently did the prior discipline occur?) and the similarity of the offense. If the employee was disciplined 6 months ago for essentially the same misconduct as the current offense, a good argument can be made that an extra firm penalty is needed this time to achieve the desired change in behavior. On the other hand, if it's been many years since the prior discipline, it is much more difficult to make a convincing case for an enhanced penalty. We also must be mindful of labor agreements that might contain time limits for considering prior discipline.

The same sort of assessment is needed concerning similarity of the offense. Persistent repetition of similar misconduct is more directly relevant to supporting a more severe disciplinary action. The first time an employee is formally disciplined is considered a first offense on the Table of Penalties. Continued misconduct involving subsequent violations of rules and regulations may be considered under the second and third offense columns, even if the misconduct is different from the previous offense(s). However, good judgment must be used to weigh prior discipline when choosing an appropriate penalty to correct the situation.

If prior discipline is going to be used as an aggravating factor, it must be cited in the proposed notice. Non-disciplinary sanctions such as counseling and non-disciplinary instructional material may be relied upon for imposing an enhance penalty and need to be cited as well in the proposed notice.

### **Factor 4: Length of Service and Prior Work Record**

This factor is especially likely to prompt mitigation. An employee's length of service and prior work record must be evaluated and be balanced against the seriousness of the offense. An employee with many years of exemplary service and numerous commendations may deserve to have his/her penalty mitigated. However, the seriousness of the offense and an evaluation of other Douglas Factors may outweigh an employee's

positive work record. It is interesting to note that third parties have rejected the argument that long service supports a stiff penalty since the employee arguable should have "known better." So, if someone is thinking about that rationale – forget it!

An interesting dilemma sometimes occurs when an agency justifies a penalty in part due to what it believes is an employee's past poor performance, but the employee's appraisals demonstrate good or excellent performance. In this case, third parties favor relying upon official appraisals and agency contentions to the contrary are provided little weight in determining the reasonableness of the penalty. This is just one more example of the importance of documentation and communication of performance to employees.

**Factor 5 – Erosion of Supervisory Confidence - The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties.**

The analysis of this factor involves much more than a supervisor's statement that he/she has lost confidence in the employee. Specific evidence/testimony as to why an employee can no longer be trusted is critical. Conclusionary and vague statements do not hold much weight with third parties. It is critical for the agency to articulate a relationship between the misconduct and the employee's position and responsibilities. We need to specifically state why there is an erosion of supervisory confidence. A supervisor cannot just say it; he/she has to prove it.

There is a clear inter-relationship between this factor and Factor 2 – Employee's Position. For example, misconduct by a supervisor will undermine his/her ability to require subordinates to adhere to agency policies and regulations. A Time and Attendance (T&A) clerk falsifying T&A's or the theft of property by an employee entrusted with custody and control of the property, are just two examples in which the misconduct would severely erode supervisory confidence.

**Factor 6 – Disparate Treatment - Consistency of Penalty with that Imposed on Other Employees.**

This factor is one of the more technically difficult to apply. One of the basic tenets of the administration of "just cause" is the even-handed application of discipline. However, the principle of "like penalties for like offenses" does not require perfect consistency. On the surface, many incidents of misconduct may seem to be similar. However, a thorough investigation and evaluation may lead to a determination that the misconduct was not substantially similar. And even if the circumstances surrounding the misconduct incident may be substantially similar, the penalty imposed may be different based upon an independent evaluation of the other Douglas Factors.

Third parties look at these consistency factors differently. The Merit System Protection Board (MSPB) views "similarly situated" employees as employees working in the same unit and for the same supervisor. Arbitrators tend to look at the "equitable" nature of labor agreements and focus on the importance of treating employees the same.

Remember that consistency of penalty with that imposed on other employees is only one Douglas Factor to apply. However, if the penalty is different for a similar incident of misconduct, specific reasons for the difference in penalty must be articulated.

### **Factor 7 – Consistency with Agency Penalty Guide**

Don't force misconduct into a listed offense unless it accurately fits. Similar offenses can be used to guide penalty selection. Deviation from the guide is allowed but going beyond or outside the penalty recommended in the table will be closely scrutinized. However, it may be appropriate based upon the facts of a specific case and/or application of other Douglas Factors to impose either a lesser or greater penalty as circumstances dictate. However, remember what they use to say on TV's *Hill Street Blues*, "Let's be careful out there!"

### **Factor 8 – Notoriety and Impact on the Agency's Reputation**

The notoriety of an offense or its impact on the reputation on the Agency is usually directly related to the seriousness of the misconduct and/or prominence of the employee's position.

This factor is one of the least significant of the Douglas Factors and is usually considered as aggravating. There are certain standards of behavior and conduct expected of Army employees by our external and internal customers. When these expectations are not met as a result of an employee's misconduct, the reputation of the Army may be tarnished. In these circumstances, appropriate analysis of this factor may result in considering a more severe penalty.

### **Factor 9 - Clarity of Notice**

How well the Agency informed an employee of the rule that was violated is a factor that may have to be considered in determining the penalty. Breaking an obscure rule will be viewed less harshly than breaking one that is well publicized, and particularly one on which the employee was given specific notice. Non-disciplinary counseling and letters of expectations are methods to communicate what are the requirements of conduct in the workplace.

Supervisors are required to encourage employees to review the Standards of Conduct, and are required to ensure that employees under their supervision review, at least once, the Government-wide Ethical Standards.

Briefings and/or training on the Standards of Conduct to employees can be of assistance in evaluating this factor. Communication of the consequences of an employee's misconduct will also be useful in considering the clarity of notice.

### **Factor – 10 Potential for Rehabilitation**

Potential for rehabilitation can be both an aggravating or mitigating factor. An employee with a significant disciplinary record most likely would have poor potential for rehabilitation.

However, an employee with no prior disciplinary record, good prior performance and job dedication would probably have good potential for rehabilitation.

An employee's recognition of a personal problem that may negatively affect conduct weighs favorably in determining an employee's potential for rehabilitation. Willingness to seek counseling assistance through an Employee Assistance Program or any self-help activity to deal, for example, with an anger management problem or a family situation which is negatively affecting attendance are good indicators of a potential for rehabilitation. Simply put, recognizing one has a problem and doing something about it, are factors which may influence mitigation.

Mitigation means sometimes "you have to say you are sorry." Apologizing for misconduct usually helps. Recognizing a mistake and taking responsibility for one's misconduct are factors that are clearly mitigating. An employee's admission of wrongdoing on his/her own also constitutes a mitigating factor and the earlier the better for possible mitigation. There is no guarantee the truth will set an employee free, but it may result in reducing a penalty.

Admitting wrongdoing, showing remorse and contrition, and getting assistance to deal with the misconduct are just several elements which may result in mitigation. Conversely, an employee who never apologized, never admitted an error, is not remorseful, is unrepentant, and has been uncooperative, should not expect much mitigation under this factor.

#### **Factor 11 - Mitigating Circumstances**

Unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in an incident are mitigating circumstances which should be reviewed.

Personal problems, which may place an employee under considerable stress, may be significant to warrant mitigation. The death of a spouse and a serious illness of family member are "life-shaking" events are examples of such stressors. Specific evidence should be presented how the misconduct was directly related to the personal problems and the subsequent stress.

Evidence that an employee's medical condition played a part in the charged conduct is ordinarily entitled to considerable weight as a significant mitigating factor. An employee who falls asleep in the workplace after taking medication should not have this behavior excused but the use of medication may be a reason for considering mitigation. However, an employee's medical condition may not be sufficient in some cases to outweigh egregious acts of misconduct.

Provocation may be considered in certain incidents, for example a fight in the workplace. An employee who may have been provoked to fight may be due some mitigating consideration for the misconduct than the aggressor.

#### **Factor 12 - Adequacy and Effectiveness of Alternative Sanctions**

What needs to be done to deter the conduct in the future by the employee or others? This factor is listed last because this consideration should occur after a thorough analysis of all the other Douglas Factors. Remember, there is only one absolute penalty which can be given without a Douglas analysis – the 30-day suspension required under law for misuse of a government vehicle. All other penalty determinations should undergo thorough reasoning under the Douglas Factors. It is important to note a case was recently lost in another government agency when the deciding official stated the Agency's zero tolerance policy on workplace violence required him to remove the employee from governmental service.

The feasibility of other alternative sanctions can be greatly limited by other Douglas Factors. For example, an employee who has a significant disciplinary record and shows limited potential for rehabilitation should expect the worse. However, demotion to a non-supervisory position instead of a removal may be the appropriate penalty for a supervisor who failed to discharge his/her required supervisory responsibilities but had a good record in non-supervisory positions.

The deciding official must be prepared to support a penalty and communicate why it is the appropriate penalty. Remember, making an example of an employee is not an appropriate result of the disciplinary process. Applying these factors in determining the appropriate penalty is the objective.