



**Employee &
Labor Relations
Guide Book**

September
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U.S. Department of Agriculture



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1 Forward -

The Employee & Labor Relations Guide Book is meant to assist managers in dealing with those problem situations that arise in the workplace. Before taking any action, the manager should consult with his or her servicing Employee & Labor Relations Specialist.



2 Performance and Conduct:

Introduction/Overview:

Correcting Employees' Performance and Conduct

What is the purpose of discipline? Why do I have to carry it out?

These are questions every supervisor has asked at one time or another, and they have clear and businesslike answers.



In an environment where all workers were highly motivated, trustworthy, capable, congenial and selfless, disciplinary action would perhaps be unnecessary. However, it's an imperfect world. Though most employees conform to rules and regulations and give a full day's work for their pay of their own accord, there still remain those few who do not, cannot or will not. This small fraction of employees requires closer supervision and, sometimes, corrective measures to ensure they do not stray over the boundary into unacceptable conduct.

Corrective action is noted by all, not just those immediately concerned. Actions taken fairly, rapidly and correctly serve as examples to others who might be tempted to test the boundaries of acceptable behavior. Such actions reinforce the good habits of those who are not conduct problems. The reputation and integrity of the Federal service as a whole depends on public trust, on the taxpayers' perception that Government workers *do* conform to businesslike rules and *are* accountable for their performance and conduct. If this trust is betrayed, if taxpayers lose confidence in the integrity and ability of Federal workers, the Government will cease to function.

This is why discipline is sometimes necessary. And, in order to avoid the perception that such discipline is merely imposed from above, it must come from the concerned supervisor who knows the problems and has the best chance of correcting them at the lowest level. It is a difficult job, which only those most concerned are properly equipped to do. It is the exercise of disciplinary authority over other employees which distinguishes supervisory responsibility from the lesser responsibilities connected with just getting the job done.

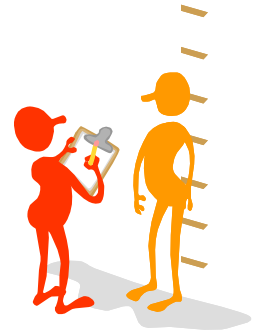


2 Performance and Conduct (Continued):

Introduction/Overview (Continued):

Actions Based on Unacceptable Performance

When performance problems are identified, counseling regarding the deficiencies should begin with the goal of aiding the employee to bring performance back up to an acceptable level. Before effective counseling can begin, you have to analyze the performance problem. In other words, you must determine if it is a "can't do" or a "won't do" situation.



➤ Can't do

If the employee lacks the skill or specific knowledge required or is no longer able to do the job, you have a "can't do" problem and need to determine the following:

- Did the employee do the job in the past?
- Does the employee have the potential to perform at a fully successful level?
- Has the employee forgotten how to do certain tasks?
- How often is the skill or knowledge used?

Possible alternatives in "can't do" situations include providing the employee with written instructions, assigning an on-the-job coach, providing additional formal training, restructuring the job temporarily or increasing supervision. If the situation results from physical or other limitations, reassignment to a different type of work may resolve the problem. In some instances, you may want to make the employee aware of the Employee Assistance Program. If the situation is the result of an employee's selection for a position beyond his or her ability, reassignment may be an alternative.

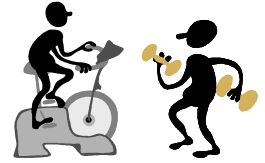
➤ Won't do

If the employee has attitude problems, lacks motivation, or has external obstacles to performing, you may have a "won't do" situation and should consider the following:

- Does the employee find nonperformance rewarding because more attention is received for negative behavior than for positive behavior?
- Does the employee seem unconcerned about performing acceptably?
- Does the employee lack motivation because the job is repetitive and no longer challenging?



2 Performance and Conduct (Continued):



Introduction/Overview (Continued):

The solutions to "won't do" problems are often more complex and difficult. If the failure to perform is willful or intentional, a disciplinary action may be more appropriate than a performance-based action. If a personality conflict exists, reassignment may be an alternative. If the problem is a general distrust of authority figures, reassignment would not solve the real problem.

Motivational problems may be solved by changing a work assignment or by restructuring the way the work is accomplished. If the employee is having personal problems, advise the employee of the Employee Assistance Program. While you are expected to consider corrective solutions such as those listed, you are not expected to tolerate "won't do" situations that result in gross negligence, insubordination, or morale problems.



Dealing With Unacceptable Performance

The reasons for unacceptable performance are as varied as the number of employees with performance problems. Each case must be analyzed to determine the best approach to assist that employee to perform acceptably. Communicating with the employee is most important. Discussion of the performance deficiencies must be timely and rational, with clear direction given by you and assurance that the expectations are understood by the employee.

Your day-to-day efforts to help the employee improve performance deficiencies should be noted as well as the employee's failure to perform acceptably, if that is the case. Those significant patterns or indications of unacceptable performance must be shared with the employee. These significant patterns include relevant samples of an employee's work which are indicative of the employee's poor performance.

The objective when dealing with a case of unacceptable performance continues to be to assist and encourage the employee to improve to an acceptable level so that the mission of the service can be accomplished. However, if day-to-day efforts do not correct the unacceptable performance within a reasonable period of time, a formal counseling session establishing a formal opportunity to improve should be given.



Removals and Reductions-In-Grade For Unacceptable Performance

If after taking steps to deal with an employee with performance problems (counseling, close supervision, training if needed, etc.), the employee continues to produce unacceptable work in at least one critical element of the job, it may be appropriate to take a formal action based on unacceptable performance under Part 432 of 5 CFR. An employee may be reduced in grade or removed at any time during the performance appraisal cycle if the performance in any one or more critical elements of the job becomes unacceptable, but only after having been given an opportunity to improve.

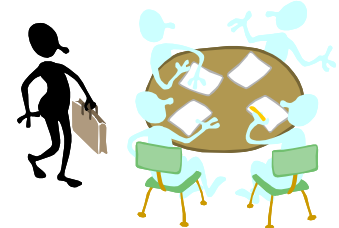


2 Performance and Conduct (Continued):

A. Performance Based Actions (Statutory 5 CFR 432) 1/

Consult Your Human Resources Office Before Beginning This Formal Procedure

Establishing an opportunity period requires a formal counseling session documented in an "Opportunity To Improve (OTI)." The length of the opportunity period depends on the employee's job; the period can vary but should not be less than 90 days. This process requires specific documentation of the unacceptable performance.



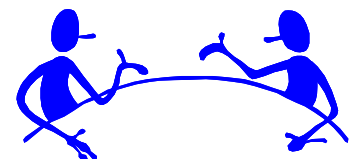
The overall development of a performance-based action is of primary importance in preparing the action. The preparation should begin with an assurance that the employee with the performance problem is fully aware of what is required. While this requirement may legally be met with the receipt by the employee of the critical elements/performance standards, expectations concerning specific assignments should also be documented. For example, if the problem concerns timeliness, counseling documentation should clearly show that the employee was fully aware of what the time expectations were. A case is stronger when it can be shown that the employee was given specific directions as to what was expected on a specific assignment.

Management decides what is expected on a specific assignment and management decides what is important in an assignment. Your records should clearly show how management directed an assignment to be completed. Otherwise, managers may be second-guessed by third parties as to what should have been done on an assignment.

After it has been shown that the employee was fully aware of the expectations, it must be shown that there is a repetition or pattern of failure to such a degree that an element was not being performed successfully. A performance deficiency may represent unacceptable performance in more than one critical element. In such a case it would be best to zero in on the critical element that best exemplifies the relationship of failure to the accomplishment of the job.

Formal Counseling and Opportunity to Improve Letter

The formal counseling session is very important in that it serves as the foundation for all future action. Therefore, thorough preparation is vital. Employee/Labor Relations Specialists should be involved in your preparations.

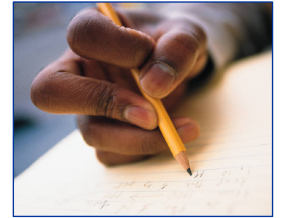


1/ 5 CFR 432 applies only to Federal employees. However, the basic principles in handling performance-related issues are applicable to county office employees, although final appeal procedures under 5 CFR 432 do not apply.



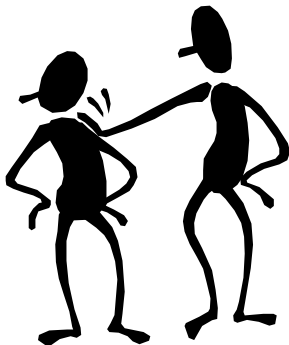
2 Performance and Conduct (Continued):

A. Performance Based Actions (Statutory 5 CFR 432) (Continued)



During the counseling session, or shortly thereafter, a letter must be given to the employee to establish the formal opportunity period to improve to the fully successful level. The letter must contain the following:

- The critical element(s) and performance standard(s) in which the employee's performance is unacceptable and the exact nature of the deficiencies. Examples of unacceptable performance must be included.
- The improvements expected. Provide practical advice on how the employee can meet the critical elements, such as references to use and improved work habits.
- The fact that failure to become acceptable in one or more critical elements may result in a proposal to separate the employee from the position or agency.
- The specific period of time in which the employee will be given the opportunity to demonstrate acceptable performance. Consideration should be given to complexity of duties, length of experience in position, prior performance record and training.
- The fact that you are committed to work with the employee. List what efforts you will make to help the employee. (You must follow through on commitments made.)



Other elements that may be included in the OTI letter are: reference to previous counseling sessions, past efforts made to assist the employee to improve, your availability to answer the employee's questions, reassurance that the employee is not marked for failure and commitment to a real opportunity for improvement.



Even though the process is now formalized, the objective is still to assist and encourage the employee to improve to an acceptable level so that the mission of the Agency can be accomplished.



2 Performance and Conduct (Continued):

A. Performance Based Actions (Statutory 5 CFR 432) (Continued)

Sample Opportunity to Improve (OTI) Letter

	
<p>United States Department of Agriculture</p> <p>Farm and Foreign Agricultural Services</p> <p>Insert Organizational Entity Name and Address, as applicable</p>	<p>TO: (Employee)</p> <p>FROM: (Supervisor)</p> <p>SUBJECT: Performance Improvement Plan</p>
Background	This is to inform you that your performance is unacceptable in [#] critical element(s) of your position. The critical element(s) and the performance standard(s) for each element that was discussed and examples of your unacceptable performance follow.
Critical element	[Title of critical element]
Standard	[State the performance standard in its entirety.]
Examples	[Should be concise, direct and easy to understand. Should include information on what the employee did or did not do with reference to specific dates, places, cases, etc., and what the employee should have done. Should reference required procedures, counseling or instructions previously given.]
Critical element	[List each critical element, standard and examples of the unacceptable performance separately.]
Examples	
Assistance	[Include advice or guidance as to what must be done to bring the performance up to an acceptable level. This could include such things as how time would best be spent (prioritizing and planning), suggested sources of assistance and information, ways or techniques of performing work, formal or informal training planned, etc. Describe what supervisory assistance and support management will provide the employee; i.e., specific work reviews and/or counseling sessions planned, etc.]
	If you are experiencing difficulties which fall under the purview of the Employee Assistance Program, you should contact an Employee Assistance Counselor at 888-290-4327. In the meantime, I will continue to hold you responsible for your performance.
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2 Performance and Conduct (Continued):

A. Performance Based Actions (Statutory 5 CFR 432) (Continued)

Sample Opportunity to Improve (OTI) Letter

Page 2

Action required	Beginning on the date you receive this letter, you will be given ninety (90) calendar days during which you will have the opportunity to demonstrate that you can perform at the fully successful level with respect to the above critical element(s) and performance standard(s). To obtain a fully successful level of performance you must meet all of the performance standards listed in the critical element(s) above.
Evaluation	At the end of the ninety (90) calendar day period, I will evaluate your work and make a determination whether your performance during the period has reached the level required for retention in your position. You will be informed soon thereafter of whatever further action is to be taken.
Failure to improve	Your failure to improve to the fully successful level may result in either a proposal to remove you from the service or reduce you in grade.
Questions	If you have any questions on this matter, feel free to contact me. I am available to answer your questions and to assist you in improving your performance during this period.

Or

Form AD-435D, Opportunity to Improve (see next page)



2 Performance and Conduct (Continued):

A. Performance Based Actions (Statutory 5 CFR 432) (Continued)

Form AD-435D, Opportunity to Improve, Page 1

<p>This form is available electronically. AD-435D (08-28-08)</p> <p>U.S. DEPARTMENT OF AGRICULTURE Farm Service Agency Foreign Agricultural Service Risk Management Agency</p> <p>OPPORTUNITY TO IMPROVE</p> <p><i>This form documents a plan for required performance improvement when performance does not meet expectations (i.e., the "Fully Successful" level) in a critical element. It lists specific examples of the specific deficiencies and the required improvements to bring performance to the "Fully Successful" level. Additional clarifying information, if provided, must be specified in, or attached to, this plan.</i></p>		
2. EMPLOYEE'S NAME	3. POSITION	4. ORGANIZATION
5. COMMENCING DATE	6. ENDING DATE	7. PLAN DURATION (No. of Days)
<p>PART A – IMPROVEMENT PLAN</p> <p>8. CRITICAL IMPROVEMENT</p>		<p>9. DEFICIENCY(IES) CITE SPECIFICS</p>
		<p>10. REQUIRED IMPROVEMENT</p>

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or part of an individual's income is derived from any public assistance program. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD). To file a complaint of discrimination, write to USDA, Director, Office of Civil Rights, 1400 Independence Avenue, SW, Washington, DC 20250-9410, or call (800) 795-3272 (voice) or (202) 720-6392 (TDD). USDA is an equal opportunity provider and employer.



2 Performance and Conduct (Continued):

A. Performance Based Actions (Statutory 5 CFR 432) (Continued)

Form AD-435D, Opportunity to Improve, Page 2

Page 2 of 3

AD-435D (08-28-08)
PART A - IMPROVEMENT PLAN (continued)
 11. SUPPORT TO BE PROVIDED EMPLOYEE (Indicate the support to be provided by the Supervisor or Rating Official (e.g., training, equipment, etc.) and the frequency of discussion.)

12. REGULATORY REQUIREMENTS

- During this opportunity to improve (OTI), you will be expected to perform all the elements of the performance work plan. You must independently perform these duties at least at the "Fully Successful" level.
- Upon completion of the OTI, you will be re-evaluated on the element(s) identified in this plan and informed of your performance in relation to your performance work plan.
- If you have achieved the results expected/required, the OTI is concluded and you must maintain this level of performance for one year commencing from the date of the OTI.
- If at any time during this one-year period your performance falls below the Fully Successful level in any of the elements specified in this plan, appropriate remedial action will be proposed. This may include, but is not limited to, a downgrade to a different position or removal from your position.
- If at the end of this OTI you have not achieved the results expected/required, it will be necessary to determine an appropriate remedial action to propose as mentioned above.
- If a definite decision cannot be made at the end of this OTI regarding your progress, the OTI may be extended. If this occurs, you will be notified in writing.
- Areas in which you think you need additional training will be considered. The scope and level of such training provided will be determined based on how much and what kind of training has already been provided and what is customary for your position duties and grade level. If you believe additional training is needed, submit a written request to me within ten (10) days listing specific training needs.
- Questions regarding this improvement plan, your work assignments, or the level of performance expected from you, should be directed to me.

NOTE: Experience indicates that, at times, performance problems can be the result of personal situations. While this may not be the case, it may be helpful to consider all the factors contributing to your performance problems. If you feel this may be the case, we encourage you to contact your Employee Assistance Program (EAP) at _____ . You may contact the program personally, or if you prefer, an appointment can be made for you. All information you provide is strictly confidential, unless you specifically authorize its release.

13. PLAN ESTABLISHMENT SIGNATURES (Sign when improvement plan is established)

EMPLOYEE SIGNATURE	DATE (MM-DD-YYYY)	SUPERVISOR/RATING OFFICIAL SIGNATURE	DATE (MM-DD-YYYY)
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DISTRIBUTION (Plan Establishment)

Original – Rating Official
 Copy - Employee
 Copy – Reviewing Official
 Copy – Human Resources



2 Performance and Conduct (Continued):

A. Performance Based Actions (Statutory 5 CFR 432) (Continued)

Form AD-435D, Opportunity to Improve, Page 3

Page 3 of 3

AD-435D (08-28-08)

PART B - FOLLOW-UP REVIEW AND DISCUSSION

Follow-up No.	1	2	3	4	5
Meeting Date					
Employee Initials					
Supervisor Initials					

PART C - FINAL REVIEW

Employee has achieved the required improvement(s) described in this OTI, OR

Employee has not achieved the required improvement(s) described in this OTI. The employee continues to have problems in the areas described below:

14. REVIEW CERTIFICATION

Employee Signature	Date (MM-DD-YYYY)
Supervisor/Rating Official Signature	Date (MM-DD-YYYY)
Reviewing Official Signature	Date (MM-DD-YYYY)

DISTRIBUTION (Plan Establishment)



Original – Human Resources Copy - Employee Copy – Supervisor/Rating Official Copy – Reviewing Official



2 Performance and Conduct (Continued):

A. Performance Based Actions (Statutory 5 CFR 432) (Continued)

Sample Letter Informing Employee of Improved Performance

	
United States Department of Agriculture	TO: (Employee)
	FROM: (Supervisor)
Farm and Foreign Agricultural Services	SUBJECT: Performance Improvement
Insert Organizational Entity Name and Address, as applicable	Background On [insert date], you were notified in writing that your performance was unacceptable in the following critical element(s). You were also informed that you would be given an opportunity to demonstrate fully successful performance.
	Critical element [State title of critical element.]
Improved performance	Based on my evaluation of your performance in the aforementioned critical element(s), I am pleased to inform you that your performance has reached the level required for retention in your position. Accordingly, no further action will be taken at this time to remove you from the service or to reduce you in grade for your unacceptable performance.
Future	Your performance, of course, must continue to be acceptable. In accordance with the Code of Federal Regulations, if your performance again becomes unacceptable before [calendar date that is one year after the date on which the initial opportunity period began], I may recommend your removal or reduction in grade without affording you an additional opportunity to improve your performance. I, therefore, encourage you to continue your efforts.
Questions	Please let me know if you have any questions concerning this matter.
	
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2 Performance and Conduct (Continued):

A. Performance Based Actions (Statutory 5 CFR 432) (Continued)

Considerations at the End of the Opportunity to Improve Period

At the end of the specified period a determination must be made as to whether sufficient improvement has been made and, if not, what the course of action will be. Consequently, careful documentation of performance during this period is very important. In effect, the OTI becomes a shortened evaluation period. It is the performance in the cited unacceptable critical element(s) that will be evaluated in making a determination as to the course of action at the end of the OTI.

If an employee's overall performance in the cited unacceptable critical element(s) becomes results achieved during the OTI, the employee will be so notified in writing.

If an employee's performance once again deteriorates (within one year of the OTI being issued) the OTI action may be taken to reassign, remove or demote the employee without providing him/her with an additional opportunity.

If at the end of the opportunity period, it is determined that the employee's performance has improved but still is less than results achieved, consideration may be given to extending the opportunity period. If so, a notice should be given to the employee which acknowledges the improvement, identifies what is needed to become results achieved, and specifies the period of time for which the opportunity has been extended.

Proposing a Removal or Reduction-In-Grade For Unacceptable Performance

If an employee's performance remains unacceptable during the OTI, a determination must be made as to whether a proposed reduction-in-grade or removal is appropriate. You are not precluded from considering alternatives such as reassignment to another position, voluntary reduction-in-grade or voluntary retirement. The manager's recommendation for appropriate action is requested by memorandum to the Employee/Labor Relations Branch/Section through channels. All proposals and decision letters are written by the Employee and Labor Relations Specialist.

The requirements for a proposed reduction-in-grade or removal are set forth in law. As noted previously, complete documentation of the unacceptable performance is essential in preparing a performance-based action.

In proposing a removal or reduction-in-grade for unacceptable performance, the notice must include the critical element(s) and performance standard(s) that are unacceptable. The instances of unacceptable performance cited must have occurred in the rating period for which the proposal letter is issued. It is essential that instances of unacceptable performance which occurred during the OTI be included.



2 Performance and Conduct (Continued):

A. Performance Based Actions (Statutory 5 CFR 432) (Continued)

In the proposal, the employee is given a 30-day advance notice period during which the employee has a reasonable time in which to answer orally or in writing. A reasonable period of time is considered 15 days from receipt of the proposed action letter. An employee may request an extension of time within this period to submit an oral or written reply.

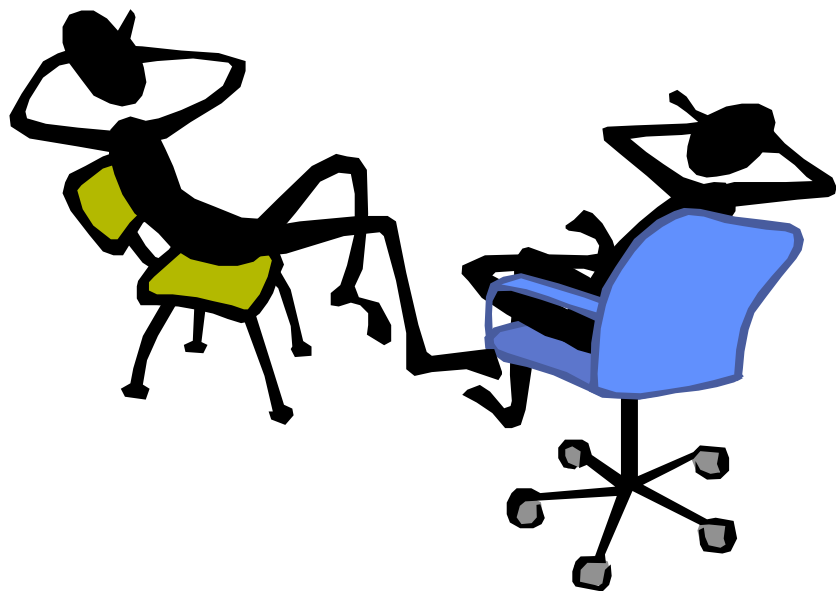
The decision on the proposed action **MUST** be issued to the employee within 30 days after expiration of the advance-notice period. This time limit is stated in 5 U.S.C. 4303(c)(1) and must be complied with.

County Employees

The procedures for taking a performance-based action for county employees are contained in National Handbook 22-PM. A county employee will receive a letter advising him or her of the removal or downgrade and the reasons for the action. The letter will state what appeal rights the county employee has. The effective date of the action must be set 14 days after the employee receives the letter. With the approval of Deputy Administrator for Field Operations (DAFO), administrative leave may be granted for this 14-day period if the employee's presence in the office may affect efficient operations.

Denial of a Within-Grade Increase

If an employee's within-grade increase is coming due and the employee is not performing at an acceptable level of competence - that is, at a fully successful level - certain procedures must be followed to deny the step increase. Counseling regarding the unacceptable or marginal performance should have been ongoing.





2 Performance and Conduct (Continued):

A. Performance Based Actions (Statutory 5 CFR 432) (Continued)

Notice of Denial of a Within-Grade Increase

A decision to deny a within-grade increase should be communicated to the employee prior to the effective date of the within-grade increase. The written notice should include:

- A statement informing the employee of the reason(s) for the denial – with reference to specific critical element(s) and performance standard(s) – and that the within-grade is being denied.
- A statement that, if performance improves to a fully successful level, the within-grade will be granted effective the first day of the pay period following its approval and certification.
- A statement that the employee may make a written request for reconsideration and that it is due within 15 calendar days from the date of receipt of the denial letter.
- A statement that the employee has the right to contest the negative determination, both personally and in writing, as well as the right to be represented by an attorney or other representative.

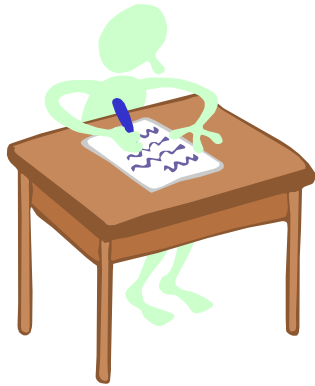




2 Performance and Conduct (Continued):

A. Performance Based Actions (Statutory 5 CFR 432) (Continued)

Reconsideration



An employee may request reconsideration of a within-grade denial by filing such a request in writing within 15 calendar days of receipt of the denial.

A final decision, to grant or deny the within-grade increase must be made promptly and in writing.

If the reconsideration is favorable to the employee, the within-grade is granted retroactively. If the reconsideration affirms the denial, the written decision should include the reasons for the decision and the employee's right of appeal.

Employees may appeal to the Merit Systems Protection Board the denial of their within-grade increase.

Procedural requirements for actions based on unacceptable performance must be followed to ensure that the action is ultimately successful and at the same time all the legal rights guaranteed to the employee are protected. While the procedural requirements are complex, you are not expected to become an expert in all of them. Your Employee and Labor Relations Specialist will provide the expert advice and assistance that you will need.

NOTE: County employees do not have reconsideration rights or appeal rights to MSPB on performance or conduct-based actions.

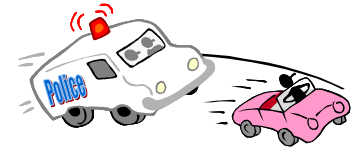


2 Performance and Conduct (Continued):

B. Misconduct Based Actions (Statutory 5 CFR 752)

Conduct and Discipline

Discipline is necessary for the orderly and efficient administration of the Agency and accomplishment of the Agency's mission.



Discipline is achieved by the promulgation of rules and enforcement of those rules by appropriate disciplinary or nondisciplinary actions.



The purpose of discipline is to correct: not punish

The appropriate disciplinary action is the least severe action which will correct the misconduct. Generally, the more serious the misconduct, the more severe the disciplinary action. Consistency in taking disciplinary action is a primary objective. Disparate treatment (treating similarly situated employees differently) may indicate an improper action and may be grounds for a third party to reverse a disciplinary action. However, mitigating and aggravating factors must also be considered.

Responsibility



Supervisors are responsible for making employees aware of work and office requirements and for maintaining discipline within the span of their authority. When violations occur, supervisors must:

- Document the occurrence
- Refer the matter to the Office of Inspector General (OIG) when appropriate
- Recommend or take appropriate action depending on the authority they've been delegated.

The Employee/Labor Relations Branch/Section is responsible for advising and assisting supervisors in their efforts to maintain discipline and for ensuring that actions taken are in accordance with the law and regulations.

Employees are responsible for compliance with the various work requirements issued to them, including the Rules of Conduct. In addition, they are responsible for reporting misconduct either to OIG (criminal conduct and violations of the rules of conduct) or to their supervisors.



2 Performance and Conduct (Continued):

B. Misconduct Based Actions (Statutory 5 CFR 752) 1/ (Continued)

Types of Misconduct

How disciplinary cases develop depends on the type of misconduct. The two basic types of misconduct are:



1. **Criminal Acts** – Report of such misconduct must be made directly to OIG. OIG may then investigate, interview the employee, and produce a report of investigation which will be forwarded to management for a determination as to what, if any, disciplinary action might be appropriate. OIG may be asked to do additional investigating if more information is needed in order to properly adjudicate the case. As a general rule, reports of investigation are referred to first level managers for an initial recommendation.
2. **Administrative Disciplinary Matter** – Managers are generally able to deal with administrative matters without the assistance of professional investigators. However, sometimes management may request that the Employee/Labor Relations Branch/Section conduct an administrative misconduct investigation. Typical administrative matters include such things as:

- Tardiness, AWOL, or leave abuse
- Use of intoxicants or being intoxicated on duty
- Insubordination
- Fighting
- Indebtedness



Taking Appropriate Action

Before proposing or taking any action, one must determine whether the available evidence that can be provided to the employee can support any of the following actions:



1. **An adverse action** (removal, demotion, or suspension of more than 14 calendar days) must be supported by a “preponderance of the evidence,” which is evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue.
2. **A disciplinary action** (1 to 14 day suspension, reprimand) must also be supported by preponderance of the evidence.

1/ 5 CFR 752 applies only to Federal employees. However, the basic principles on handling misconduct based actions are applicable to county office employees, although appeal procedures do not apply.



2 Performance and Conduct (Continued):

B. Misconduct Based Actions (Statutory 5 CFR 752) (Continued)

Types of Action

1. **A clearance letter** is appropriate if the evidence establishes the innocence of the employee or clearly fails to support the allegation.
2. **A closed without action letter or cautionary letter** is appropriate if the evidence is inconclusive, or if it is determined that a disciplinary action is not warranted, but the employee should be cautioned about certain conduct.
3. **A letter of reprimand** is the least severe form of disciplinary action. It is appropriate for the first offense, or, in line with the concept of progressive discipline, for repetition of a relatively minor offense. The action should make it clear that failure to correct the misconduct could result in more serious action, up to and including removal from the service. A copy of the reprimand is filed in the employee's Official Personnel Folder for a period of 2 years.





2 Performance and Conduct (Continued):

B. Misconduct Based Actions (Statutory 5 CFR 752) (Continued)

4. **A suspension** is the involuntary placement of an employee who is otherwise ready, willing and able to work in a non-duty, non-pay status. It is used to correct serious or repeated misconduct. It is an appropriate disciplinary measure when less severe actions fail to correct an employee's conduct or when the gravity of the offense warrants stringent corrective action. A suspension of more than 14 days (which is classified as an adverse action and can be appealed to the Merit System Protection Board) is rarely taken except for offenses with a minimum 30-day suspension, such as Hatch Act violations or misuse of a government vehicle.
5. **A reduction-in-grade or pay (demotion)** is used as a disciplinary action only in unusual situations. One example is to change a manager to a lower grade non-supervisory position when the employee's misconduct would damage or impair his or her effectiveness as a manager.
6. **A removal** is taken when employee conduct is sufficiently serious to warrant termination of the employment relationship; in other words, when it is not possible to "correct" the misconduct by disciplinary action. Some examples are serious violations of criminal statutes, corruption, substantive conflict of interest, material breach of integrity, physical assault or acts which cause or threaten to cause serious damage to the service and its public image, or repeated incidents of relatively minor misconduct which progressive discipline has failed to correct.
7. Occasionally, when an employee is involved in criminal conduct and the agency either does not have enough evidence to take a removal action, an **indefinite suspension** can be effected as a temporary measure. This action can be taken when it is established that there is "reasonable cause to believe a crime has been committed," such as from an indictment or preliminary investigation.



2 Performance and Conduct (Continued):

B. Misconduct Based Actions (Statutory 5 CFR 752) (Continued)

Factors to Consider

The Merit Systems Protection Board has held that any decision on adverse actions must be based on all factors relevant to a specific employee and a specific conduct situation. These are the “Douglas” factors. All factors may not be relevant to all cases. Factors may be mitigating or aggravating. The following factors should be considered minimum:



- The nature and seriousness of the offense and its relation to the employee’s position; whether or not the offense was intentional, malicious, or for gain; whether or not it was repeated.
- The employee’s position (including supervisory or fiduciary role), contacts with the public, etc.
- The employee’s past disciplinary record.
- The employee’s past work record, length of service, performance, dependability, etc.
- The impact of the offense on the employee’s ability to perform satisfactorily and its effect on his or her manager’s confidence in the employee.
- Consistency of the penalty with those imposed upon other employees for the same or similar offenses.
- Consistency of the penalty with any applicable agency table of penalties.
- The notoriety of the offense or its impact on the reputation of the service.
- The clarity with which the employee was on notice of the rule violated.
- The employee’s potential for rehabilitation.
- Circumstances such as unusual job tensions, personal problems, mental impairment, harassment, provocation, etc.
- The availability of alternative sanctions to deter such conduct in the future on the part of the employee or others.

In addition to mitigating and aggravating factors, factual disputes apparent from the evidence and the employee’s replies must be considered and addressed in making a final decision.



2 Performance and Conduct (Continued):

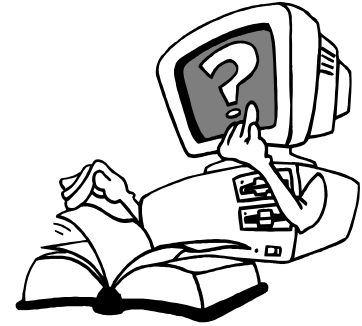
B. Misconduct Based Actions (Statutory 5 CFR 752) (Continued)

Procedures

Suspensions and adverse actions require a two-step procedure with a proposal and decision.

The employee has a right to:

- Be represented
- Reply orally and in writing to the proposed action
- The information relied on in proposing the action
- Remain in duty status during the advance notice period (except in unusual circumstances).



Actions should be taken expeditiously. Long delays in taking actions may indicate to a third party that disciplinary action was not really required.

Reprimands and suspensions of 14 days or less may be grieved through the agency grievance system. Adverse actions may be appealed to the Merit Systems Protection Board. Employees may also have the right to contest actions through the discrimination complaints procedure.

Specific rights of employees and obligations of management are contained in the Code of Federal Regulations. It is important that these be complied with. Otherwise, the action may be reversed on the grounds that an error harmful to the employee has occurred.

NOTE: Federal and county employees now use the same two-step process for disciplinary/adverse actions.



2 Performance and Conduct (Continued):

B. Misconduct Based Actions (Statutory 5 CFR 752) (Continued)

Special Situations

Off-duty Misconduct: When misconduct has occurred off-duty, the agency must demonstrate the connection between the misconduct and the efficiency of the service (the nexus). This is stated in a proposal letter or a letter of reprimand. The nexus can be based on such things as publicity or notoriety, concern for safety of employees or taxpayers, lack of confidence caused by demonstrated dishonesty, etc.

Emergency Situation: If an employee's continued presence on the job may pose a threat to the employee or others, result in loss of or damage to government property, or otherwise jeopardize legitimate government interests, the agency may assign the employee to other duties; place the employee on leave with his or her consent; place the employee on involuntary leave when the employee is not "ready, willing, and able to work;" invoke the crime provision (which allows a shortened notice period) if there is reasonable cause to believe that a crime has been committed, or place the employee in a paid, non-duty status for all or part of the advance notice period.

Leave Problems: In dealing with tardiness and leave abuse, it is vitally important to implement the concept of progressive discipline. Minor violations should be dealt with by counseling, with discipline reserved for very serious infractions or repeated misconduct. A leave restriction letter is not a disciplinary action, but it can be a very useful tool for emphasizing management's concerns with a leave problem and for solving that problem. It is strongly suggested that you consult with your servicing Employee and Labor Relations Specialist prior to issuing such a letter. It is important to remember that, except in unusual circumstances, approved leave (including approved leave without pay) cannot be used to support a disciplinary action. Accordingly, if it appears that a disciplinary action may be necessary, unauthorized absences should always be charged to AWOL. It is also important to note that leave without pay is, in most cases, discretionary with management.

Probationary Employees: If a problem is evident during an employee's probationary period, serious consideration should be given to taking prompt action since fewer procedures and restricted appeal rights are in effect for actions during the probationary period. Accordingly, it is good practice to make this decision as far in advance of the expiration of the probationary period as possible.



2 Performance and Conduct (Continued):

B. Misconduct Based Actions (Statutory 5 CFR 752) (Continued)

The probationary period is regarded as a final and highly significant step in the examining process. It provides the final indispensable test, that of actual performance on the job, which no preliminary testing methods can approach in validity. During the probationary period, the employee's conduct and performance in the actual duties of his/her position may be observed, and he/she may be separated from the service without undue formality if circumstances warrant. Thus, the probationary period, properly employed, provides protection against retention of any person who, in spite of having passed preliminary tests, is found in actual practice to be lacking in fitness, and capacity to acquire fitness, for permanent Government service.

If it becomes apparent, after full and fair trial, that the employee's conduct, general character traits, or capacity do not fit him or her for satisfactory service, the supervisor shall initiate action to separate the employee. This kind of action should be taken as soon as these facts become apparent, and should, in any event, be taken in sufficient time for the employee to be notified, prior to the expiration of the probationary period, that he or she will not be retained.





2 Performance and Conduct (Continued):

B. Misconduct Based Actions (Continued)

County Misconduct Procedures

Procedures may be found in Handbook 22-PM, County Office Personnel Management.

County Appeal Procedures

**Notification, Decision and Appeal Process
Suspensions of 14 Calendar Days or Less^{1/}
County Office Employees and Committees**

Persons Affected	Proposing Official(s)	To Whom Reply is Made	Deciding Official(s)	To Whom Appeal of Final Decision Addressed
Permanent County Office Employee	CED	COC	COC	STC
	COC	STC	STC	DAFO
	STC	STC	STC	DAFO
CED	COC	STC	STC	DAFO
	STC	STC	STC	DAFO
COC	STC	STC	STC	DAFO

^{1/} DAFO may issue proposal notices and decision letters in all cases. All DAFO final reviews of suspensions of 14 calendar days or less are on the record. There is no right to a hearing in these cases.



2 Performance and Conduct (Continued):

B. Misconduct Based Actions (Continued)

**Notification, Decision and Appeal Process
Suspensions of More Than 14 Calendar Days and Removals^{1/}
County Office Employees and Committees**

Persons Affected	Proposing Official(s)	To Whom Reply is Made	Deciding Official(s)	Review	Appeal ^{2/}
Permanent County Office Employee	CED	COC	COC	STC	DAFO
	COC	STC	STC	----	DAFO
	STC	STC	STC	----	DAFO
CED	COC	STC	STC	----	DAFO
	STC	STC	STC	----	DAFO
COC	STC	STC	STC	----	DAFO

^{1/} DAFO may issue proposal notices and decision letters in all cases.

^{2/} There is a right to a hearing before DAFO if requested by appellant.



2 Performance and Conduct (Continued):

C. Employee Responsibilities and Conduct (Departmental Regulation 4070-735-001 dated October 4, 2007)

1. PURPOSE

The purpose of this directive is to set forth the Department of Agriculture's (USDA) policies, procedures, and standards on employee responsibilities and conduct. Although it specifically addresses many ethics and conduct requirements, it is not intended to cover all possible situations.

2. REFERENCES

This directive must be used in conjunction with:

- a. 5 United States Code (USC), Chapter 73, Suitability, Security, and Conduct;
- b. Executive Orders 12674 and 12731, Principles of Ethical Conduct for Government Officers and Employees;
- c. 5 Code of Federal Regulations (CFR), part 735, Employee Responsibilities and Conduct;
- d. [5 CFR, part 2635](#), Standards of Ethical Conduct for Employees of the Executive Branch (hereinafter referred to as "*Standards*"); and
- e. [5 CFR, part 8301](#), Supplemental Standards of Ethical Conduct for Employees of the Department of Agriculture (hereinafter referred to as "*USDA Supplement*"). Employees shall adhere to these and other related standards, policies, and regulations promulgated by USDA and its agencies.

3. SPECIAL INSTRUCTIONS

This directive supersedes Personnel Bulletin Number 735-1, Employee Responsibilities and Conduct, dated November 12, 1996, as extended by memorandum dated December 18, 1998.



2 Performance and Conduct (Continued):

C. Employee Responsibilities and Conduct (Departmental Regulation 4070-735-001 dated October 4, 2007) (Continued)

4. POLICY

It is USDA's policy that its employees:

- a. Maintain high standards of honesty, integrity, and impartiality;
- b. Adhere to the rules set forth in this directive, as well as all directives referenced in section 2 of this directive;
- c. Comply with lawful supervisory direction; and
- d. Comply with work-related laws, regulations, and policies.

5. DEFINITIONS

For the purpose of this directive, the following terms are defined as set forth below:

- a. Agency. An organizational unit of the Department, other than a staff office as defined below, whose head reports to an Under Secretary.
- b. Ethics Advisor (EA). Employees within the USDA Office of Ethics (OE) responsible for providing ethics advice and guidance.
- c. Deputy Ethics Official (DEO). An employee delegated the authority by the Designated Agency Ethics Official under Office of Ethics Issuance 02-2, to administer ethics program functions within an agency or staff office.
- d. Designated Agency Ethics Official (DAEO). The employee designated by the Secretary to manage the USDA Ethics Program in accordance with 5 CFR § 2638.203.



2 Performance and Conduct (Continued):

C. Employee Responsibilities and Conduct (Departmental Regulation 4070-735-001 dated October 4, 2007) (Continued)

- e. Personally Identifiable Information. Any information about an individual maintained by an agency, including, but not limited to, financial transactions, medical history, or criminal history, and information which can be used to distinguish or trace an individual's identity, such as their name, social security number, date and place of birth, mother's maiden name, biometric records, etc. including any other personal information which is linked or linkable to an individual.
- f. Office of Ethics (OE). Office within USDA Departmental Administration responsible for administering ethics regulations and statutes governing employee conduct; conducting public confidential financial disclosure reporting programs; developing and implementing supplemental ethics policies; providing advice and assistance to USDA employees; training employees on all ethics statutes, regulations, and policies.
- g. Staff Office. A Departmental administrative office whose head reports to the Secretary.
- h. Staff Office Head. The head of a staff office or an official who has been delegated the authority to act for the head of the staff office in the matter concerned.
- i. Supervisor. An employee having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees; or having responsibility to direct them, adjust their grievances, or effectively recommend such action if, in connection with the foregoing, the exercise of authority is not of a merely routine or clerical nature but requires the use of independent judgment.



2 Performance and Conduct (Continued):

C. Employee Responsibilities and Conduct (Departmental Regulation 4070-735-001 dated October 4, 2007) (Continued)

6. ABBREVIATIONS

AWOL – Absence Without Leave
CFR – Code of Federal Regulations
DAEO – Designated Agency Ethics Official
DEO – Deputy Ethics Official
EA – Ethics Advisor
GSA – General Services Administration
MSPB – Merit Systems Protection Board
OE – Office of Ethics
OPM – Office of Personnel Management
OSC – Office of Special Counsel
PII – Personally Identifiable Information
USC – United States Code
USDA – Department of Agriculture

7. RESPONSIBILITIES

- a. Agency and Staff Office Heads are responsible for:
 - (1) Ensuring that every current employee is provided with a current copy of this directive within 90 days of its issuance; and
 - (2) Ensuring that every new employee is furnished a copy of this directive at the time of appointment.
- b. Supervisors are responsible for:
 - (1) Maintaining high standards of ethical conduct. They must become familiar with and comply with the requirements in this directive, the *Standards*, and the *USDA Supplement*; and
 - (2) Responding to employee questions on matters covered by this directive, the *Standards*, and the *USDA Supplement*, and/or referring employee ethics questions to the USDA Office of Ethics or an appropriate EA.



2 Performance and Conduct (Continued):

C. Employee Responsibilities and Conduct (Departmental Regulation 4070-735-001 dated October 4, 2007) (Continued)

8. DELEGATION OF AUTHORITY

Unless otherwise stated, any authorities delegated in this directive may be redelegated to a level of management that has the experience and/or training to administer the authority.

9. EMPLOYEE NOTIFICATION

The employee notifications set forth in section 7(a) of this directive may be provided either electronically or by hard copy. In conjunction with receiving a copy of this directive, every employee must be provided information on where to direct questions regarding its content.

10. SUPPLEMENTATION

Agencies and staff offices may supplement this directive with prior approval of the Director, Office of Human Capital Management. Supplemental regulations issued by agencies or staff offices may not conflict with, but may expand upon and be more restrictive than, the contents of this directive. Agencies and staff offices must provide copies of any supplemental regulations to employees as required in sections 7(a) and 9 of this directive.

11. PROHIBITED ACTIVITIES

Employees are prohibited from:

- a. Engaging in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government at any time;



2 Performance and Conduct (Continued):

C. Employee Responsibilities and Conduct (Departmental Regulation 4070-735-001 dated October 4, 2007) (Continued)

- b. Conducting or participating in any gambling activity including the operation of a gambling device, conducting a lottery or pool, a game for money or property, or selling or purchasing a numbers slip or ticket while on Government-owned or Government-leased property or while on duty for the Government. This does not preclude:
 - (1) Activities necessitated by an employee's official duties; or
 - (2) Fundraising permitted under section 7 of Executive Order 12353 and similar agency-approved authorities;
- c. Engaging in teaching, lecturing, or writing, as part of their official duties performed at or for any educational institution or other organization that discriminates because of race, creed, color, sex, religion, age, national origin, physical or mental disability, or sexual orientation in the admission or subsequent treatment of students;
- d. Engaging in teaching, lecturing, or writing, with or without compensation, to prepare a person or class of persons for an examination administered by the Office of Personnel Management (OPM) or the Board of Examiners for the Foreign Service that depends on information obtained as a result of the employee's government employment. This does not preclude such teaching, **lecturing, or writing if:**
 - (1) **Prior written authorization is obtained from the Director of OPM, or his or her designee, or by the Director General of the Foreign Service or his or her designee, as applicable. Employees should seek advice from OE concerning the application of the restrictions on compensated teaching, speaking, and writing under the *Standards* (5 CFR §2635.807) and the requirement to seek prior USDA approval for outside employment under the *USDA Supplement*, even when authorization has been obtained; or**



2 Performance and Conduct (Continued):

C. Employee Responsibilities and Conduct (Departmental Regulation 4070-735-001 dated October 4, 2007) (Continued)

- (2) The information upon which the preparation is based has been made available to the general public or will be made available to the general public on request;
- e. Using an intoxicating substance on Government-owned or Government-leased property (except when authorized by the Office of Operations for the Washington, D.C. complex; the Agency Head in field locations owned by USDA; or the Agency Head in field locations leased by USDA or controlled by the General Services Administration (GSA), upon concurrence by the lessor or the appropriate GSA official in accordance with policy contained in Departmental Regulation 1630-001), “Use of Alcoholic Beverages and Narcotics in USDA Occupied Space”, or transporting or using an intoxicating substance in a Government-owned or leased vehicle;
- f. Harassing employees by word or action, or knowingly making false accusations against employees;
- g. Monitoring telephone conversations, recording telephone conversations by device, or authorizing or permitting others under their administrative control to monitor telephone conversations or record telephone conversations by device, except:
 - (1) As authorized by the Inspector General or his or her designee, with the prior consent of one party to a telephone conversation and when necessary in a criminal investigation;
 - (2) When all parties agree in advance; or
 - (3) In the context of a telephone call center or similar operations. In such situations, supervisors may monitor or record telephone conversations for the purpose of evaluating performance of employees with proper notice to all parties to the communication;



2 Performance and Conduct (Continued):

C. Employee Responsibilities and Conduct (Departmental Regulation 4070-735-001 dated October 4, 2007) (Continued)

- h. Utilizing any device to monitor or record non-telephone conversations, except:
 - (1) As authorized by the Inspector General or his or her designee, with the prior consent of one party to a non-telephone conversation and when necessary in a criminal investigation;
 - (2) When all parties agree in advance; or
 - (3) When in the context of telephone call center or similar operation. In such situations, supervisors may monitor or record telephone conversations for the purpose of evaluating performance of employees with proper notice to all parties to the communication;

- i. Soliciting for the sale of any article, or selling any article, including but not limited to candy or other items for schools or charities, kitchenware or other home furnishings, paper products, cosmetic products; or any other items whatsoever, in person or by distributing or posting literature, advertising material, or any other graphic matter, in or on Government-owned or leased property, or property occupied by USDA, unless authorized by law or regulation;

- j. Engaging in sexual misconduct including, but not limited to, unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment;

- k. Failing to take appropriate action on complaints or proven acts of sexual harassment (this applies to supervisor or managers who know or should have known of those acts);

- l. Displaying discourteous conduct or disrespect to a coworker, another Federal employee, or a member of the public when acting in an official capacity;



2 Performance and Conduct (Continued):

C. Employee Responsibilities and Conduct (Departmental Regulation 4070-735-001 dated October 4, 2007) (Continued)

- m. Failing to wear or use specified safety equipment, or failing to report obvious unsafe conditions while on official duty; and/or
- n. Making threats against other employees, members of the public, or Government property.

12. ATTENDANCE AND LEAVE

- a. Every employee must observe designated duty hours and be punctual in reporting for work and returning from lunch periods. Tardiness can result in employees being placed in a non-pay status for unauthorized absence; i.e., absence without leave (AWOL).
- b. Every employee must normally obtain advance authorization for any absence from duty. Approval of leave is a discretionary matter reserved to the supervisor. The use of leave is not a right afforded to an employee, but is conditioned on the needs of USDA service. Where absence from duty results from illness or an emergency, an employee is required to notify his or her supervisor or other appropriate person as soon as possible. When an employee fails to properly notify his or her supervisor, the absence may be charged as AWOL.
- c. Leave is administered in accordance with 5 CFR § 630 and applicable USDA, agency, and staff office policies.

13. SALE OF PERSONAL PROPERTY

- a. Personal property offered for sale by USDA may be purchased by employees only when the sale of such property is based upon competitive bids.



2 Performance and Conduct (Continued):

C. Employee Responsibilities and Conduct (Departmental Regulation 4070-735-001 dated October 4, 2007) (Continued)

b. No purchase may be made by an employee who:

- (1) Was formerly accountable for the property;
- (2) Formerly used the property; or
- (3) Was in any way connected with its condemnation, declaration as excess, or sale.

The above prohibitions do not apply in the following situations:

- (1) Surplus perishable products may be sold to employees at the best price obtainable in quantities not exceeding the needs of their immediate households;
- (2) Surplus Government property may be sold to employees when it is being sold to the general public; and
- (3) Special clothing and other articles or personal equipment purchased for the exclusive use of and fitted to an individual employee may, when not otherwise usable by USDA and in all respects are surplus to the needs of the Government, be sold to such employees at the best price obtainable in the event of their separation from USDA or permanent assignment to duties not requiring such clothing or equipment.

14. USE OF GOVERNMENT VEHICLES

- a. Every employee is prohibited, unless specifically authorized by the agency in accordance with Departmental Regulation 5400-5, "Use of Government Vehicles for Home to Work", from storing Government-owned or Government-leased motor vehicles at or near their private residence or at other unauthorized locations including, but not limited to, homes of relatives or friends, or from using such vehicles for transportation between their residence and place of employment.
- b. No employee shall use Government-owned or Government-leased vehicles to transport unauthorized passengers.



2 Performance and Conduct (Continued):

C. Employee Responsibilities and Conduct (Departmental Regulation 4070-735-001 dated October 4, 2007) (Continued)

- c. Every employee is required to wear seat belts whenever riding as an operator or as a passenger in a truck, automobile, or other passenger vehicle in the performance of official duties or while on official time.
- d. Unless authorized to do so in the performance of official duties, every employee is prohibited from using Government-owned or Government-leased vehicles to transport firearms or explosives.

15. FOREIGN ASSIGNMENTS

An employee serving on foreign assignment must fully comply with Department of State's regulations governing the post to which he or she is assigned.

16. COMPUTERS AND TELECOMMUNICATIONS EQUIPMENT

- a. Unless an employee has specific authorization, he or she is prohibited from accessing any USDA or Federal government electronic, laser, or magnetic system of storing information, or computer software, not expressly identified for public or general access. This prohibition includes, but is not limited to computers of all types, floppy diskettes, compact or laser discs, and magnetic tapes. Employees without specific authorization may be subject to disciplinary or adverse action regardless of whether they use, damage, or make alterations to the stored information.
- b. Every employee must adhere to the requirements of Departmental Manual [3525-000](#), "Internet and E-Mail Security" and other policies and regulations involving the use of information technology, telecommunications resources, and equipment owned and leased by USDA. Every employee must comply with acceptable use policies for telecommunication equipment as contained in Departmental Regulation [3300-001](#), "Telecommunications and Internet Services and Use", and in Departmental Regulation [1710-001](#), "Interception and Monitoring of Conversations."



2 Performance and Conduct (Continued):

C. Employee Responsibilities and Conduct (Departmental Regulation 4070-735-001 dated October 4, 2007) (Continued)

17. PERSONALLY IDENTIFIABLE INFORMATION

- a. Every employee who has access to personally identifiable information (PII) of other employees, contractors, or the general public through the course of his or her employment at USDA is required to safeguard and protect such information from unauthorized disclosure.
- b. Every employee is required to immediately report any known or suspected breach of the PII safeguards or policies, or actual unauthorized disclosure of PII to his or her supervisor.

18. RETALIATION AND REPRISAL

No employee may retaliate against another, by word or action, for filing complaints about safety problems, for filing grievances under either the negotiated or administrative grievance system, for filing complaints of discrimination, for assisting the investigators of USDA, or for engaging in any other protected activity.

19. REPORTING MISCONDUCT

- a. Every employee is required to report actions by other employees that they know, or have a reasonable basis to believe, are violations of law or regulation. A report may be made to the USDA Office of Inspector General, the employee's supervisor, or any appropriate USDA management official.
- b. Violations include, but are not limited to:
 - (1) Fraud, waste, and abuse of Government resources;
 - (2) Criminal activity of any kind;
 - (3) Violations of Federal personnel rules;



2 Performance and Conduct (Continued):

C. Employee Responsibilities and Conduct (Departmental Regulation 4070-735-001 dated October 4, 2007) (Continued)

- (4) Sexual harassment;
- (5) Prohibited personnel practices; and
- (6) Violations of this directive, the *Standards*, or the *USDA Supplement*.

20. MISCELLANEOUS CONDUCT PROVISIONS

- a. Fiscal Responsibility. Any money, property, or other item of value received by or coming into the custody of an employee in connection with the discharge of his or her duties must be accounted for, deposited, appropriately secured, properly maintained, or otherwise disposed of in accordance with established procedures. Fiscal responsibility includes the proper use of Government-issued credit cards and the timely payment of claims.
- b. Cooperation with Oversight Agencies. Every employee is required under Subchapter A., Part 5, Regulations, Investigation, and Enforcement (Rule V) to provide OPM, the Merit Systems Protection Board (MSPB), and the Office of Special Counsel (OSC), and their authorized representatives, all information and testimony in regard to matters arising under laws, rules, and regulations administered by OPM, MSPB, and OSC, the disclosure of which is not otherwise prohibited by law or regulation.
- c. Cooperation with USDA Investigations. Every employee is required to provide all information he or she possesses to authorized representatives of USDA when called upon, if the inquiry relates to official matters and the information is obtained in the course of employment or as a result of relationships incident to such employment. Such activities include participating in interviews requested by authorized representatives of USDA and furnishing signed, sworn/affirmed statements to the authorized representatives. Failure to respond to requests for information, including the furnishing of signed sworn/affirmed statements in a timely manner, or failure to appear as a witness in official proceedings may result in disciplinary action. (Nothing set forth herein shall be deemed to infringe upon an employee's right to invoke the protection of the Fifth Amendment to the United States Constitution with respect to self-incrimination in a criminal investigation or for



2 Performance and Conduct (Continued):

C. Employee Responsibilities and Conduct (Departmental Regulation 4070-735-001 dated October 4, 2007) (Continued)

a bargaining unit employee to request union representation in accordance with his or her rights under 5 USC §7114 (a)(2)(B) – Weingarten Rights.)

- d. Details, Reassignments and Transfers. Supervisors have the authority to transfer, detail, and reassign an employee whenever necessary to meet operational needs, subject to applicable regulations and collective bargaining agreement provisions. Every employee has an obligation to accept a transfer, detail, or reassignment. Failure to accept a transfer, detail, or reassignment may result in an adverse action including separation of the employee.
- e. Firearms and Weapons. In accordance with [18 USC §930](#) and its exceptions, every employee is prohibited from knowingly possessing or causing the presence of a firearm or other dangerous weapons in a Federal facility (i.e. a building or part thereof, owned, or leased by the Federal government, where Federal employees are regularly present for the purpose of performing their official duties), or in a Federal court facility.
- f. Prohibited Personnel Practices. Every employee who has the authority to take, direct others to take, recommend, or approve any personnel action (Prohibited Personnel Practices, [5 USC §2302 \(b\)](#)), is prohibited from:
 - (1) Discriminating on the basis of race, color, religion, sex, age, national origin, disability, marital status, or political affiliation;
 - (2) Soliciting or considering employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics;
 - (3) Coercing the political activity of any person;
 - (4) Deceiving or willfully obstructing any person from competing for employment;



2 Performance and Conduct (Continued):

C. Employee Responsibilities and Conduct (Departmental Regulation 4070-735-001 dated October 4, 2007) (Continued)

- (5) Influencing any person to withdraw from job competition for the purpose of improving or injuring the prospects of any other person for employment;
- (6) Granting any preference or advantage not authorized by law, rule, or regulation to improve or injure the prospects of any particular person for employment;
- (7) Engaging in nepotism (hiring, promoting, or advancing relatives);
- (8) Taking reprisal for whistleblowing;
- (9) Taking reprisal for the exercise of an appeal right;
- (10) Discriminating based on personal conduct which does not adversely affect the performance of the employee, applicant, or others;
- (11) Violating veteran's preference requirements; or
- (12) Violating any law, rule, or regulation implementing or directly concerning merit system principles.

21. DISCIPLINARY OR ADVERSE ACTION

- a. A violation of any of the responsibilities and conduct standards contained in this directive may be cause for disciplinary or adverse action.
- b. Disciplinary or adverse action shall be effected in accordance with applicable law and regulations.



2 Performance and Conduct (Continued):

D. USDA Guide for Disciplinary Penalties (Department Personnel Manual Chapter 751, Appendix A dated May 1994)

The purpose of this Guide is to assist those responsible for disciplining employees in selecting appropriate penalties. While the Guide does not cover every possible offense, it does provide the more common types of offenses and the penalties usually assessed. Opportunities for the appropriate use of *alternative discipline* (see DPM Chapter 751 - Subchapter 4) may also be considered. Consistent with DPM Chapter 751 Subchapter 4, alternative discipline is available in appropriate circumstances in all cases, except when the penalty to be proposed is removal from the service or dictated by statute. Alternative discipline may also be considered when mitigating circumstances serve to reduce a proposed penalty of removal to a lesser penalty, including a suspension of letter of reprimand.

Although each case must be evaluated on its own merits, the Guide does provide a framework to assure consistent application of disciplinary penalties throughout the Department.

Before proposing or deciding on a particular penalty, agency officials should consider all the pertinent factors, including:

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 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 the USDA Guide for Disciplinary Penalties;
8. The notoriety of the offense or its impact upon the reputation of the agency;
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10. Potential for the employee's rehabilitation;
11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Not all of these factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the employee's favor while others may not or may even constitute aggravating circumstances. Selection of an appropriate penalty must thus involve a responsible balancing of the relevant factors in the individual case.



2 Performance and Conduct (Continued):

D. USDA Guide for Disciplinary Penalties (Department Personnel Manual Chapter 751, Appendix A dated May 1994) (Continued)

USDA GUIDE FOR DISCIPLINARY PENALTIES		
TYPE OF MISCONDUCT	PENALTY FOR FIRST OFFENSE	PENALTY FOR SUBSEQUENT OFFENSE
1. FISCAL IRREGULARITIES (Penalty depends on the monetary value, position held, personal benefit, and/or other pertinent factors.)		
a. Submission of (or causing or allowing the submission of) falsely stated time logs, leave forms, travel or purchase vouchers, payroll, loan, or other fiscal document(s).	Letter of Reprimand to Removal, if for administrative convenience or to avoid following required procedures.	Removal
	14-Day Suspension, if it results in personal benefit to another.	Removal
	Removal, if it results in personal benefit.	
b. Unauthorized and/or improper use of property, Government or other funds, or any other thing of value coming into an employee's custody as a result of employment.	14-Day Suspension to Removal	Removal
c. Failure to properly account for or make proper distribution of any property, Government or other funds, or any other thing of value coming into an employee's custody as a result of employment.	Letter of Reprimand to Removal	Removal
d. Concealment of (or failing to report) missing, lost, or misappropriated funds, or other fiscal irregularities.	Letter of Reprimand to Removal	14-Day Suspension to Removal
2. FALSE STATEMENT(S)/INCORRECT OFFICIAL DOCUMENTS (False statements or entries in connection with fiscal matters and documents are covered in 1. above.)		
a. Deliberate falsification of an application for employment (SF-171), or other personal history record by omission or by making a false entry. Note: If an incorrect or inaccurate entry or statement is determined to be unintentional, other (non-disciplinary) action should be taken.	Removal, if it would have adversely affected selection for appointment or promotion.	
	Letter of Reprimand to 14-Day Suspension, if it would not have adversely affected selection for appointment or promotion.	14-Day Suspension to Removal



2 Performance and Conduct (Continued):

D. USDA Guide for Disciplinary Penalties (Department Personnel Manual Chapter 751, Appendix A dated May 1994) (Continued)

USDA GUIDE FOR DISCIPLINARY PENALTIES		
TYPE OF MISCONDUCT	PENALTY FOR FIRST OFFENSE	PENALTY FOR SUBSEQUENT OFFENSE
b. Misrepresentation, falsification, or concealment of material facts or documents in connection with an official matter, including an investigation.	Letter of Reprimand to Removal	Removal
c. Knowingly and willfully making an incorrect entry on an official document or approving an incorrect official document.	Letter of Reprimand to Removal	14-Day Suspension to Removal
3. CONDUCT PREJUDICIAL TO THE BEST INTERESTS OF THE SERVICE		
a. Conduct which causes the employee to be indicted or charged with a criminal offense which is related directly to the duties of the employee's position or the mission of the Agency and for which a sentence of imprisonment may be imposed.	Indefinite Suspension (Unit the outcome of the legal action is known and/or until the completion of appropriate administrative action.)	
b. Conduct which causes the employee to be convicted of a criminal charge which is related directly to the duties of the employee's position or the mission of the Agency.	Removal	
c. Off duty conduct which adversely affects the employee's job performance or trustworthiness, or adversely affects the ability of the Agency to accomplish its mission.	Letter of Reprimand to Removal	Removal
d. Infamous or notoriously disgraceful conduct.	Removal	
e. Concealing, removing, mutilating, altering or destroying Government records.	Letter of Reprimand to Removal	14-Day Suspension to Removal
f. Malicious or intentional damage or loss of Government-owned or Government-leased property.	Letter of Reprimand to Removal	14-Day Suspension to Removal
g. Using public office for private gain.	14-Day Suspension to Removal	Removal
h. Unethical or improper use of official authority or credentials.	Letter of Reprimand to Removal	Removal
i. Unauthorized disclosure or use of (or failure to safeguard) information protected by the Privacy Act or other official, sensitive, or confidential information.	Letter of Reprimand to Removal	Removal



2 Performance and Conduct (Continued):

D. USDA Guide for Disciplinary Penalties (Department Personnel Manual Chapter 751, Appendix A dated May 1994) (Continued)

USDA GUIDE FOR DISCIPLINARY PENALTIES		
TYPE OF MISCONDUCT	PENALTY FOR FIRST OFFENSE	PENALTY FOR SUBSEQUENT OFFENSE
j. Having a direct or indirect financial interest that an employee could reasonably expect to be in conflict or appear to be in conflict with his or her official duties and responsibilities. (When a conflict of financial interest occurs that is inadvertent and that could not be reasonably anticipated by the employee, the situation would normally be handled by divestiture or recusation rather than disciplinary action.)	Letter of Reprimand to Removal	Removal
k. Engaging in outside employment or other activities without required prior approval.	Letter of Reprimand to 5-Day Suspension	14-Day Suspension to Removal
l. Improperly soliciting or accepting, directly or indirectly, a gift from any individual or establishment seeking or having a contractual or business relationship with the Department.	5-Day Suspension to Removal	Removal
m. Improperly soliciting a contribution from another employee for a gift to a official superior, making a donation as a gift to an official superior, or accepting a gift from an employee receiving less pay.	Letter of Reprimand to Removal	Removal
n. Borrowing money from a subordinate employee, securing a subordinate's endorsement on a loan, or otherwise having a subordinate assume the financial responsibility of a superior.	Letter of Reprimand to Removal	Removal
o. Use of (or authorizing the use of) employees, or Government owned, leased or provided property, facilities, services or credit cards, for inappropriate or non-official purposes.	Letter of Reprimand to Removal	5-Day Suspension to Removal
p. Willful use of (or authorizing the use of) any Government-owned or Government-leased passenger vehicles or aircraft for other than official purposes.	30-Day Suspension to Removal [31 U.S.C. 1349(b) mandates a <u>minimum</u> penalty of a one month suspension for unofficial use of Government passenger carrying vehicles or aircraft.]	Removal



2 Performance and Conduct (Continued):

D. USDA Guide for Disciplinary Penalties (Department Personnel Manual Chapter 751, Appendix A dated May 1994) (Continued)

USDA GUIDE FOR DISCIPLINARY PENALTIES		
TYPE OF MISCONDUCT	PENALTY FOR FIRST OFFENSE	PENALTY FOR SUBSEQUENT OFFENSE
q. Use of (or authorizing the use of) other Government-owned or Government-leased vehicles such as trucks, aircraft, boats or other motor vehicles for other than official purposes.	30-Day Suspension to Removal	Removal
r. Carrying of unauthorized passengers in Government-owned or Government-leased vehicles such as trucks, aircraft, boats or other motor vehicles for other than official purposes.	Letter of Reprimand to 14-Day Suspension	14-Day Suspension to Removal
s. Unauthorized use, removal or possession of a thing of value belonging to another employee or private citizen.	Letter of Reprimand to Removal	Removal
t. Fighting, threatening, attempting to inflict or inflicting bodily harm while on Government premises and/or when in a duty status.	5-Day Suspension to Removal	14-Day Suspension to Removal
u. Use of abusive, offensive, unprofessional, distracting, or incitory (goading) language, gestures, or other conduct; quarreling,; creating a disturbance or disruption; or horseplay.	Letter of Reprimand to 14-Day Suspension	5-Day Suspension to Removal
v. Use of slanderous, malicious, derogatory, discourteous, or otherwise inappropriate language, gestures, or other conduct toward employees, supervisors, or the public.	Letter of Reprimand to Removal	5-Day Suspension to Removal
w. Failure to pay just debts in a timely and proper manner.	Letter of Reprimand to 14-Day Suspension	1-Day Suspension to Removal
x. Gambling on duty or in work areas.	Letter of Reprimand to Removal	Removal
y. Participating in a strike, work stoppage, slowdown, sickout, or similar activity.	Removal	
4. FAILURE/REFUSAL TO FOLLOW INSTRUCTION		
a. Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions.	Letter of Reprimand to 14-Day Suspension	5-Day Suspension to Removal
b. Deliberate or malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions.	Letter of Reprimand to Removal	14-Day Suspension to Removal



2 Performance and Conduct (Continued):

D. USDA Guide for Disciplinary Penalties (Department Personnel Manual Chapter 751, Appendix A dated May 1994) (Continued)

USDA GUIDE FOR DISCIPLINARY PENALTIES		
TYPE OF MISCONDUCT	PENALTY FOR FIRST OFFENSE	PENALTY FOR SUBSEQUENT OFFENSE
c. Refusal to provide information to authorized representatives of the Department or other Government Agencies when called upon, when the inquiry relates to official matters and the information is obtained in the course of employment or as the result of relationships incident to such employment.	Letter of Reprimand to Removal	Removal
d. Failure to report for duty as detailed, transferred, or reassigned.	Removal	
e. Failure to submit required statements of financial interests and outside employment.	Letter of Reprimand to 3-Day Suspension	5-Day Suspension to Removal
5. NEGLECT OF DUTY		
Careless/negligent work, loafing, sleeping on duty, wasting time, conducting personal business while on duty.	Letter of Reprimand to Removal	5-Day Suspension to Removal
6. ATTENDANCE-RELATED OFFENSES (Penalty will depend on the circumstances, including length, frequency, and nature of position. To support disciplinary action, tardiness and unauthorized absences from the work place must be charged to AWOL on the employee's Time and Attendance Report.)		
a. Unexcused tardiness, including delay in: (1) reporting at the scheduled starting time, (2) returning from lunch or break periods, and (3) returning from an authorized absence from the work station.	Letter of Reprimand to 1-Day Suspension	5-Day Suspension to Removal
b. Unauthorized absence, including leaving the work-station without permission or before the end of the workday. [Time periods at right refer to the accumulated total amount of AWOL for each offense (i.e., disciplinary action proposed) rather than for each instance or occurrence of unauthorized absence. For example, if an employee is AWOL on three separate occasions and the total amount of AWOL shown on the T&As is more than 8 hours but less than 5 workdays, the proposed penalty for a first offense would normally be a suspension of from 1 to 14 days.]	Absences of 8 Hours or Less	
	Letter of Reprimand to 5-Day Suspension	5-Day Suspension to Removal
	Absences of More Than 8 Hours But Less Than 5 Workdays	
	1-Day Suspension to 14-Day Suspension	14-Day Suspension to Removal
	Absences of 5 Workdays or More	
	14-Day Suspension to Removal	Removal



2 Performance and Conduct (Continued):

D. USDA Guide for Disciplinary Penalties (Department Personnel Manual Chapter 751, Appendix A dated May 1994) (Continued)

USDA GUIDE FOR DISCIPLINARY PENALTIES		
TYPE OF MISCONDUCT	PENALTY FOR FIRST OFFENSE	PENALTY FOR SUBSEQUENT OFFENSE
7. INTOXICANTS - Alcohol and Spirits (Agencies must assure the requirements of alcohol abuse programs are met before taking action.)		
a. Unauthorized use of intoxicants while on duty, on Government property or Government-controlled property or premises where official duties are performed.	Letter of Reprimand to 14-Day Suspension	30-Day Suspension to Removal
b. Reporting to or being on duty while under the influence of intoxicants.	Letter of Reprimand to 30-Day Suspension	30-Day Suspension to Removal
c. Operating a Government-owned or Government-leased vehicle (or privately-owned vehicle on official business) while under the influence of intoxicants.	Removal [If a penalty of less than removal is determined to be appropriate, agencies should (at a minimum) suspend the employee's official driving privileges for a period of one year.]	
8. ILLEGAL DRUGS/DRUG PARAPHERNALIA/CONTROLLED SUBSTANCES [See DPM Supplement 792-3, Subchapter 8. USDA will <u>not</u> initiate disciplinary action when an employee – (1) Voluntarily admits drug use to appropriate supervisors or management officials before being identified through other means. (2) Obtains and completes counseling and rehabilitation through Employee Counseling Services Program (ECSP). (3) Thereafter refrains from illegal drug use. In <u>all</u> other circumstances, agencies must make appropriate referrals to the ECSP <u>and</u> initiate appropriate disciplinary action.]		
a. Possession of an illegal drug, drug paraphernalia, or unauthorized controlled substance while on duty, on Government property or Government-controlled property, or on premises where official duties are performed.	5-Day Suspension to Removal	Removal
b. Use of an illegal drug or unauthorized controlled substance while on duty, on Government property or Government-controlled property, or on premises where official duties are performed.	14-Day Suspension to Removal	Removal
c. Reporting to or being on duty while under the influence of an illegal drug or unauthorized controlled substance.	14-Day Suspension to Removal	Removal
d. Sale or distribution of an illegal drug or controlled substance.	Removal	



2 Performance and Conduct (Continued):

D. USDA Guide for Disciplinary Penalties (Department Personnel Manual Chapter 751, Appendix A dated May 1994) (Continued)

USDA GUIDE FOR DISCIPLINARY PENALTIES		
TYPE FOR MISCONDUCT	PENALTY FOR FIRST OFFENSE	PENALTY FOR SUBSEQUENT OFFENSE
e. Operating a Government-owned or Government-leased vehicle (or privately-owned vehicle on official business) while under the influence of an illegal drug.	Removal	
f. Interfering with, or refusing or failing to submit to a properly ordered or authorized drug test, including substituting, adulterating, or otherwise tampering with a urine sample.	Removal	
g. Use of an illegal drug or unauthorized controlled substance during non-duty hours and on non-work premises.	Letter of Reprimand to Removal	Removal
9. PROHIBITED POLITICAL ACTIVITY		
Engaging in the types of political activity prohibited by law or by Office of Personnel Management regulations.	Letter of Reprimand to Removal	14-Day Suspension to Removal
10. SAFETY AND HEALTH VIOLATIONS (Penalty should take into consideration whether danger to persons or property is involved.)		
a. Failure to report an accident and/or injury as required.	Letter of Reprimand to 14-Day Suspension	14-Day Suspension to Removal
b. Failure or refusal to wear/use required protective equipment (e.g., seat belts, earplugs, eye protection, etc.).	Letter of Reprimand to 14-Day Suspension	14-Day Suspension to Removal
c. Operation of a Government-owned or Government-leased vehicle (or privately-owned vehicle while on official business) without an appropriate State driver's license.	5-Day Suspension to Removal	Removal
d. Failure or refusal to observe and/or enforce Safety and Health regulations or to perform duties in a safe manner.	Letter of Reprimand to Removal	5-Day Suspension to Removal



2 Performance and Conduct (Continued):

D. USDA Guide for Disciplinary Penalties (Department Personnel Manual Chapter 751, Appendix A dated May 1994) (Continued)

USDA GUIDE FOR DISCIPLINARY PENALTIES		
TYPE FOR MISCONDUCT	PENALTY FOR FIRST OFFENSE	PENALTY FOR SUBSEQUENT OFFENSE
11. DISCRIMINATORY PRACTICES (Penalty should take into consideration whether violation is willful/deliberate, or careless/negligent.)		
a. Acting or failing to act on an official matter (including a personnel action) in a manner which improperly takes into consideration an individual's political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition. [This includes discrimination for or against any employee or applicant for employment prohibited by 42 U.S.C. 2000e-16; 29 U.S.C. 631 or 633a; 29 U.S.C. 206(d); 29 U.S.C. 791; or any other law, rule, or regulation.]	5-Day Suspension to Removal	Removal
b. Any reprisal or retaliation action against an individual involved in the EEO complaint process.	5-Day Suspension to Removal	Removal
c. Use of remarks which relate to and insult or denigrate an individual's race, color, religion, national origin, sex, marital status, age, or handicapping condition.	Letter of Reprimand to 30-Day Suspension	14-Day Suspension to Removal
d. Negligence or insensitivity to an individual's race, color, religion, national origin, sex, marital status, age, or handicapping condition which is determined to be discriminatory and where there is no other finding of overt discrimination.	Letter of Reprimand to 5-Day Suspension	5-Day Suspension to Removal
e. Failure to take appropriate action regarding allegations or findings of discriminatory practices.	5-Day Suspension to Removal	Removal
12. SEXUAL MISCONDUCT		
a. Actual or attempted sexual assault (e.g., rape)	Removal	
b. Inappropriate and/or unwelcome touching or other physical contact.	14-Day Suspension to Removal	30-Day Suspension to Removal
c. Pressure for (or official action based on) sexual favors, including taking action favorable to an employee because of the granting of a sexual favor or denying an action favorable to an employee because of the withholding of a sexual favor.	30-Day Suspension to Removal	Removal
d. Inappropriate and/or unwelcome teasing, jokes, actions, gestures, display of visual material of a sexual nature or remarks of a sexual nature.	Letter of Reprimand to 30-Day Suspension	14-Day Suspension to Removal



2 Performance and Conduct (Continued):

D. USDA Guide for Disciplinary Penalties (Department Personnel Manual Chapter 751, Appendix A dated May 1994) (Continued)

USDA GUIDE FOR DISCIPLINARY PENALTIES		
TYPE FOR MISCONDUCT	PENALTY FOR FIRST OFFENSE	PENALTY FOR SUBSEQUENT OFFENSE
13. PROHIBITED PERSONNEL PRACTICES (Not elsewhere covered.)		
Abuse of authority and commission of a prohibited personnel practice covered by 5 U.S.C. 2302.	Letter of Reprimand to Removal	Removal



3 Administrative Grievance Process (15-PM, Part 5)

The Administrative Grievance system applies to all Federal non-bargaining unit employees of Farm and Foreign Agricultural Services, FFAS, and to all bargaining unit employees **not** covered by a negotiated grievance procedure.



Subject Matter Covered:

The Administrative Grievance System applies to any matter of concern or dissatisfaction relating to the employment of an employee that is subject to the control of management, including but no limited to:

- Improper application of or failure to follow rules and regulations
- Unfair treatment
- Prohibited personnel practices covered by the EEO complaint system (Exception: discrimination based on race, religion, national origin, gender, age disability and sexual orientation)
- Working conditions
- Performance appraisals (Exception: A summary rating of Results Achieved)
- Non-selection for training
- Suspension from duty without pay for 14 calendar days or less and letters of reprimand or warning
- Changes in assignments, including details and reassignments
- Allegations of partisan political discrimination
- Separation of an employee during a probationary period for reasons of misconduct.

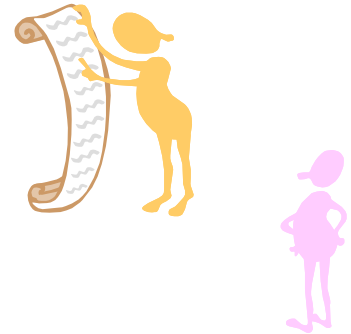
Subject Matter NOT Covered:

- Matters appealable to EEOC, MSPB, OPM, the Federal Labor Relations Authority or the Comptroller General
- Adverse action, except suspension of 14 calendar days or less
- Denial of within-grade salary increase
- Position classification action
- Allegation of complaint of discrimination or sexual harassment
- Reduction-in-force action
- Violation of re-employment priority rights
- Violation of re-employment or reinstatement rights
- Violation of military restoration rights
- Salary-retention decision
- Fitness-for-duty examination
- Life insurance decision
- Health benefits decision



3 Administrative Grievance Process (15-PM, Part 5) (Continued)

- Non-selection for promotion or lateral reassignment from a group of properly ranked and certified candidates or failure to receive a noncompetitive promotion
- A preliminary warning notice of an action that, if effected, would be covered or excluded from coverage under the grievance system
- An action that:
 - Terminates a temporary or term promotion
 - Returns the employee to either of the following:
 - The position from which the employee was temporarily promoted
 - A different position, **not** lower in grade, where the employee is informed in advance that the promotion is only temporary
 - Return of an officer or employee from SES to the General Schedule during the 1-year period of probation or for less than fully successful executive performance
 - The substance of the critical elements and performance standards of an employees position
 - Performance appraisal for a member of SES according the 5 U.S.C. 4312 (d).
 - Return of an employee from an initial appointment as a supervisor or manager to a nonsupervisory or nonmanagerial position for failure to satisfactorily complete the probation period
 - Termination of a probationer for unsatisfactory performance or conduct
 - Reassignment of an SES employee after the employee receives an unsatisfactory rating
 - Granting or failure to grant, accepting or failure to accept an employee performance award or a quality salary increase and adopting or failure to adopt an employee suggestion
 - The termination of an SES career appointee during probation for unsatisfactory performance
 - Actions taken according to terms of a formal agreement voluntarily entered into by an employee are **not** grievable.



Timeframes:

An employee shall present an **informal** grievance within 15 calendar days after either the following:

- The date of the act or occurrence that is the basis for the grievance
- The date he or she became aware of the act or occurrence

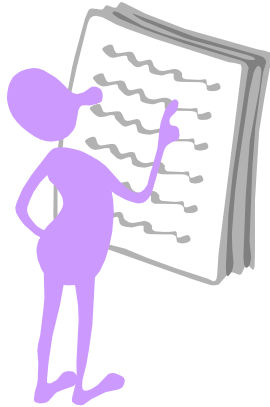


NOTE: The informal grievance should be addressed whether or not it is presented within the timeframe, although it may be rejected as a formal grievance.



3 Administrative Grievance Process (15-PM, Part 5) (Continued)

A formal grievance must be filed within 10 calendar days after receiving either of the following:



- The memorandum closing the informal process
- notification of the 10-calendar-day timeframe.

If the grievance is **not** resolved to the satisfaction of the employee, the employee may request factfinding within 10 calendar days after receiving the proposed disposition. The Agency will promptly refer one (1) copy of the grievance file containing all documents considered by the Agency and the grievant's request to the Director, Appeals & Grievance Staff, for assignment to the grievance examiner.

The complete processing of a grievance shall not exceed 90 calendar days. The 90-day period begins on the date that the employee definitively indicates that an informal grievance is being initiated. The completion of processing means one of the following:

- rejection of the grievance
- cancellation of the grievance
- resolution of the grievance to the satisfaction of the grievant
- issuance of a proposed disposition on the grievance that included the employee's rights to request further review by a Departmental grievance examiner.

Labor Management Obligations

Employees covered by a negotiated grievance process would follow the negotiated grievance process procedures.



3 Administrative Grievance Process (15-PM, Part 5) (Continued)

Par. 51

Part 5 FFAS Administrative Grievance System

51 Administrative Grievance System Policies

A Reasonable Consideration

Employee access to responsible administrative officials for discussing individual problems affecting their status and welfare is essential to good personnel administration. Problems affecting their status and welfare shall receive prompt and reasonable consideration.

B Grievance Rights

Employees may grieve any aspect of their working environment and working relationships with supervisors that is subject to management control and the implementation of personnel policies.

Employees shall be free from restraints, interference, coercion, discrimination, or reprisal in connection with a grievance filed under this part.

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3 Administrative Grievance Process (15-PM, Part 5) (Continued)

52 Administrative Grievance System Overview

Par. 52

A Purpose

This Part provides FFAS procedure for filing and considering employee grievances. The Administrative Grievance System gives employees an opportunity to present and seek resolution of workplace disputes and complaints.

B References and Authority

The following references provide additional guidance:

- 5 CFR Part 771
- DR 4070-711.

C Delegations of Authority

Authority to resolve a grievance is delegated to the lowest level individual that can make a decision on the matter being resolved.



3 Administrative Grievance Process (15-PM, Part 5) (Continued)

53 Administrative Grievance Coverage

Par. 53

A Employees Covered

The Administrative Grievance System applies to the following:

- nonbargaining unit employees
- bargaining unit employees **not** covered by a negotiated grievance procedure.

B Employees Not Covered

The Administrative Grievance System does **not** apply to the following:

- applicants for employment
- bargaining unit employees covered by a negotiated grievance procedure
- former employees, **except** where otherwise indicated
- U.S. Foreign Service members covered under the Foreign Service Grievance System as defined by the Foreign Service Act of 1980
- non-Federal County Office employees covered under the County Office grievance system according to 22-PM.

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3 Administrative Grievance Process (15-PM, Part 5) (Continued)

53 Administrative Grievance Coverage (Continued)

Par. 53

C Subject Matter Covered

The Administrative Grievance System applies to any matter of concern or dissatisfaction about the employment of an employee that is subject to the control of management, including but **not** limited to the following:

- improperly applying or failing to follow rules and regulations
- unfair treatment
- prohibited personnel practices **not** covered by the EEO or Merit Systems Protection Board systems
- working conditions

Exception: Discrimination based on race, color, religion, national origin, gender, age, disability, marital status, political affiliation, and sexual orientation.

- performance appraisals
- nonselection for training
- suspension from duty without pay for 14 calendar days or less
- letters of reprimand or warning
- changes in assignments, including details and reassignments
- denials of official time in connection with a performance, disciplinary or adverse actions, or an administrative grievance.

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3 Administrative Grievance Process (15-PM, Part 5) (Continued)

53 Administrative Grievance Coverage (Continued)

Par. 53

D Subject Matter Not Covered

The Administrative Grievance System does **not** apply to the following:

- separation of employees serving under Schedules A through C appointments
- content of published Agency procedures and policy
- matters appealable to EEOC, MSPB, OPM, the Federal Labor Relations Authority, or the Comptroller General

Note: Such matters include, but are **not** limited to:

- suspension of more than 14 calendar days
- denial of a within-grade salary increase
- position classification action
- allegation or complaint of discrimination or unlawful harassment
- RIF action
- violation of re-employment priority rights
- violation of re-employment or reinstatement rights
- violation of military restoration rights
- salary-retention decision
- fitness-for-duty examination
- life insurance decision
- health benefits decision
- removal because of declining a directed reassignment
- suitability adjudications.

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3 Administrative Grievance Process (15-PM, Part 5) (Continued)

53 Administrative Grievance Coverage (Continued)

Par. 53

D Subject Matter Not Covered (Continued)

- nonselection for promotion or lateral reassignment from a group of properly ranked and certified candidates
- failure to receive a noncompetitive promotion
- preliminary or proposed notice of a performance, disciplinary, or adverse action
- actions that do either of the following:
 - terminate a temporary or term promotion
 - return the employee to either of the following:
 - the position from which the employee was temporarily promoted
 - a different position, **not** lower in grade, where the employee is informed in advance that the promotion is only temporary
- return of an officer or employee from SES to GS during the 1-year probation period or for less than fully successful executive performance
- the substance of the critical elements and performance standards of an employee's position
- termination of an employee serving in a probationary or trial period

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15-PM (Rev. 1) Amend. 1

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3 Administrative Grievance Process (15-PM, Part 5) (Continued)

53 Administrative Grievance Coverage (Continued)

Par. 53

D Subject Matter Not Covered (Continued)

- performance appraisal of a member of SES according to 5 U.S.C. 4312(d)
- return of an employee from an initial appointment as a supervisor/manager to a nonsupervisory/nonmanagerial position for failure to satisfactorily complete the probationary period
- reassignment of an SES employee after the employee receives an unsatisfactory rating
- granting or failing to grant an employee performance or recognition award or a quality step increase
- adopting or failing to adopt an employee suggestion
- terminating an SES career appointee during probation for unsatisfactory performance
- actions taken according to terms of a formal agreement voluntarily entered into by an employee.

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15-PM (Rev. 1) Amend. 1

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3 Administrative Grievance Process (15-PM, Part 5) (Continued)

54 General Procedural Provisions

Par. 54

A Choosing a Representative

Employees are entitled to be accompanied, represented, and advised at any stage of a grievance by a representative of their choice who has been designated in writing.

The representative chosen by an employee may be disallowed for any of the following reasons:

- representative has a conflict of interest or conflict of position
- representative is required for other work to meet priority needs of the Agency
- selection would create unreasonable costs for the Government.

If representatives are disallowed, employees may **directly** request review of the disallowance by writing to the USDA, Office of Human Capital Management at the following address; the USDA, Office of Human Capital Management will make a final decision in the matter:

USDA, OFFICE OF HUMAN CAPITAL MANAGEMENT
1400 INDEPENDENCE AVE SW
STOP 9611
WASHINGTON DC 20250-9611.

Note: Disallowance of a representative reviews **must** be requested within 7 calendar days of the receipt of notice of disallowance.

B Granting Official Time

The grievant and his or her representative shall be granted a reasonable amount of official time, **not** to exceed 8 total hours, to prepare and present the informal and formal grievance.

The reasonable amount of official time shall be determined at the discretion of the grievant's supervisor. Employees, with supervisory approval, may use annual leave to supplement the use of official time, or instead of using official time.

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3 Administrative Grievance Process (15-PM, Part 5) (Continued)

54 **General Procedural Provisions (Continued)**

Par. 54

C Resolving or Withdrawing the Grievance

Nothing shall prohibit reasonable attempts by supervisors/managers to resolve, at any time, a grievance that is being processed. Informal resolutions are encouraged at any stage of the process. The employee may withdraw the formal grievance at any stage of the process by notifying, in writing, the official who is considering the grievance. Any successful resolution or withdrawal of the grievance shall be in writing and communicated to the official who is considering the grievance.

D Requesting the ADR Process

An employee may request the ADR process be used to resolve grievances before filing a grievance or in connection with the administrative grievance process. Employees should *--contact their ADR Program office for information on the ADR process. Parties may agree--* to extend the deadlines herein with respect to any matter pursued through ADR processes.

E Rejecting EEO Complaints and MSPB, Federal Labor Relations Authority, or OPM Appeals

To avoid dual processing, a dispute over a matter for which an employee has either of the following will be rejected under the Administrative Grievance System:

- an entitlement to file an appeal
- a formal challenge in some other forum.

The grievance may be reinstated if the grievance issues are **not** addressed during the appeal process or any other forum.

The official considering the formal grievance shall:

- inform the grievant that the grievance is being rejected
- return the grievance to the grievant.



3 Administrative Grievance Process (15-PM, Part 5) (Continued)

54 General Procedural Provisions (Continued)

Par. 54

F Canceling or Rejecting Grievances

A **formal** grievance may be canceled or rejected at any step of the grievance process by the considering official if any of the following occur:

- no relief can be granted because of the separation of the grievant
- relief requested by the grievant is granted
- matter is raised in another forum in addition to the Administrative Grievance System
- any other action or circumstances results in there being no other basis for other retroactive relief or monetary reward.

The cancellation or rejection of a grievance **must**:

- be communicated to the grievant, in writing, within 90 calendar days of the initiation of an informal grievance
- advise the grievant of the right to have the cancellation or rejection reviewed by the USDA, Office of Human Capital Management; this review should be requested within 10 calendar days after receipt of rejection according to subparagraph 57 A.

A copy of the cancellation or rejection will be included in the grievance file.

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3 Administrative Grievance Process (15-PM, Part 5) (Continued)

54 General Procedural Provisions (Continued)

Par. 54

G Freedom From Reprisal

Grievants and their representatives shall be free from restraint, coercion, intimidation, or reprisal in presenting a grievance. Allegations of these actions may, at the option of the grievant, be handled according to the either of the following:

- added immediately to the grievance being presented for review
- submitted **directly** to the USDA, Office of Human Capital Management.

H Requesting Payment of Attorney Fees

Employees may request payment of attorney fees in cases where back pay is awarded and the employee's representative otherwise meets the requirements for attorney fees as provided in 5 CFR Part 550. Fees are **not** payable under **any** other circumstances.

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3 Administrative Grievance Process (15-PM, Part 5) (Continued)

55 Informal Grievance Procedure

Par. 55

A Submitting an Informal Grievance

An employee shall present a matter as an informal grievance to the lowest level individual who can make a decision on the matter being grieved. If this individual is unknown to the employee, the grievance shall be submitted to the employee's immediate supervisor.

B Identifying an Informal Grievance

An informal grievance may be presented either orally or in writing. A written explanation should **not** be required from the employee. However, in presenting a grievance, it is the employee's responsibility to clearly identify **all** of the following:

- matter of concern
- corrective action sought
- that he or she is initiating the grievance process.

If the informal grievance is presented orally, the receiving supervisor should document the grievance, in writing, and provide a copy to the grievant.

C Timeframe for Presentation

An employee **must** present an informal grievance within 15 calendar days after the later of either of the following:

- date of the act or event that is the basis for the grievance
- date the employee became aware of the act or event.

Note: A grievance can **never** be presented more than 6 months after the act or event in question.



3 Administrative Grievance Process (15-PM, Part 5) (Continued)

55 Informal Grievance Procedure (Continued)

Par. 55

D Resolving the Informal Grievance

Use the following steps to resolve informal grievance actions.

Step	Action
1	In consultation with the servicing Employee and Labor Relations office, the individual receiving the informal grievance shall determine whether he or she has the authority to resolve the grievance. If the individual does not have the authority to resolve the grievance, the individual shall forward the grievance to the proper level where the grievance can be resolved and inform the grievant of this action.
2	In consultation with the servicing Employee and Labor Relations office, the official who has the authority to resolve the informal grievance shall make a determination as to whether it is possible to resolve the informal grievance.
3	The informal grievance process must be completed by issuing a memorandum or resolution of the grievance within 20 calendar days after its initial presentation. Note: If this deadline is not met, the employee may file a formal grievance.
4	If the informal grievance cannot be resolved, the official who is considering the grievance shall prepare a memorandum to the grievant that includes all the following: <ul style="list-style-type: none">• grievance issues• attempts to resolve the grievance issues• termination of the informal grievance process• right to file a formal grievance• that a formal grievance may be filed with the supervisor of the official who considered the informal grievance (second-level supervisor)• 10 calendar day timeframe in which a formal grievance should be filed after terminating the informal grievance process• that the grievant may, according to subparagraph 57 A, elevate the grievance to the USDA, Office of Human Capital Management at 1400 Independence Ave, SW, STOP 9611, Washington, DC, 20250-9611, if the grievance process is not completed within 90 calendar days after initiating the informal grievance.

Note: An informal grievance should be addressed whether or **not** it is presented within the timeframes contained in subparagraph C, although it may be rejected as a formal grievance based on timeframes grounds.

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3 Administrative Grievance Process (15-PM, Part 5) (Continued)

55 Informal Grievance Procedure (Continued)

Par. 55

E Waiving the Informal Process

If an employee has received a suspension of between 1 and 14 calendar days, the informal process is waived and an employee shall file a formal grievance. The formal grievance should be filed within 15 calendar days of the effective date of the suspension with the supervisor of the deciding official on the disciplinary action.

The grievant shall follow the formal grievance procedures contained in subparagraphs 56 A and B.



3 Administrative Grievance Process (15-PM, Part 5) (Continued)

56 Formal Grievance Procedure

Par. 56

A Filing a Formal Grievance

A formal administrative grievance must be filed in writing. To be acceptable as a formal grievance, the formal grievance **must** contain **all** of the following:

- signature of the employee or the designated representative
- subject of the grievance
- corrective action being sought.

The formal grievance shall be filed with the supervisor of the official who considered or should have considered the informal grievance (second-level supervisor).

B Timeframe for Filing

A formal grievance **must** be filed within 10 calendar days after the earlier of either of the following:

- receipt of the memorandum closing the informal process
- passage of 20 calendar days from presentation of the informal grievance, if no memorandum or resolution is issued closing the informal process.



3 Administrative Grievance Process (15-PM, Part 5) (Continued)

56 Formal Grievance Procedure (Continued)

Par. 56

C Acceptance or Rejection of a Formal Grievance

The second-level supervisor shall send a copy of the formal grievance to the staff of the servicing Employee and Labor Relations office within 5 calendar days after receiving the formal grievance.

Upon receipt of the formal grievance, and in consultation with the servicing Employee and Labor Relations office, the second-level supervisor shall inform the employee of either of the following:

- formal grievance has been accepted for consideration
- formal grievance has been rejected because of 1 or more of the following:
 - informal or formal grievance was untimely filed
 - grievance concerns a matter excluded from coverage
 - grievance does **not** meet a requirement for processing
 - grievance includes a matter **not** presented as a part of the informal grievance, **except** as specified in subparagraph 54 G
 - grievance was filed by an employee excluded from coverage.

Notice of rejection of the formal grievance **must** advise the grievant that, within 10 calendar days after receipt of the notice of rejection, according to subparagraph 57 A, the employee may request a review of the rejection by the USDA, Office of Human Capital Management, in writing to the following address:

USDA, OFFICE OF HUMAN CAPITAL MANAGEMENT
1400 INDEPENDENCE AVE SW
STOP 9611
WASHINGTON DC 20250-9611.



3 Administrative Grievance Process (15-PM, Part 5) (Continued)

56 Formal Grievance Procedure (Continued)

Par. 56

D Grievance Review

If a formal grievance is accepted, a representative will be designated to review and attempt to resolve the grievance. This representative will normally be a staff member of the servicing Employee and Labor Relations office. After review, a proposed disposition of the formal grievance will be issued to the grievant. The proposed disposition should include the following:

- reasons for any determination on the grievance
- specific corrective actions, if any, that are to be implemented
- notice to the grievant that new issues may **not** be raised as a part of the grievance at this time, **except** as stated in subparagraph 54 G
- notice to the grievant of the following:
 - right to request a final decision by the Agency Administrator without further factfinding, if the matter has **not** been resolved to the employee's satisfaction **or** the right to further review by a grievance examiner, if the matter has **not** been resolved to the employee's satisfaction
 - 10 calendar day timeframe to request a final decision or further review
 - need to indicate **all** of the following in the request for a final decision or further review:
 - which matters are unresolved
 - corrective action being sought
 - any additional arguments and evidence the grievant wants to have considered, **except** that new issues may **not** be raised

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3 Administrative Grievance Process (15-PM, Part 5) (Continued)

56 Formal Grievance Procedure (Continued)

Par. 56

D Grievance Review (Continued)

- Agency's intention to close out the grievance with no further action if the employee does **not** submit a request for further review or a final decision within the 10 calendar day allotted timeframe
- proposed disposition will become the Agency's final decision on the grievance
- all requests for a final decision or further review should be forwarded to the attention of the following:

FSA, HRD, Employee and Labor Relations Branch Chief
STOP 0591
1400 INDEPENDENCE AVE SW
WASHINGTON DC 20250
FAX: 202-205-3781.

E Grievance File Availability

All of the material and information on which the proposed disposition is based shall be provided to the grievant or an authorized representative, along with the proposed disposition, if **not** provided previously.



3 Administrative Grievance Process (15-PM, Part 5) (Continued)

57 **Final Decision and Further Review Rights and Procedures**

Par. 57

A Right to Further Review or Final Decision

If the grievance is **not** resolved to the satisfaction of the employee, the employee may, within 10 calendar days of receiving the proposed disposition, request either of the following:

- a final decision by the Agency Administrator
- further review by a grievance examiner.

The request from the employee shall include all of the following:

- matter or issues over which there remains disagreement
- corrective action being sought
- any evidence available to the employee to support the continued request for corrective action
- the selection of either a final decision by the Agency Administrator **or** further review by a grievance examiner.

The request may **not** contain or address issues **not** presented in the formal grievance, **except** as specified in subparagraph 54 G.

B Final Decision by Agency Administrator

If a grievant requests a final decision, the Agency Administrator will issue a final decision to the grievant within 30 calendar days of receipt of the request for a final decision.

The Agency Administrator's final decision shall be based solely on the contents of the grievance file and any additional evidence presented by the grievant according to subparagraph A.



3 Administrative Grievance Process (15-PM, Part 5) (Continued)

57 Final Decision and Further Review Rights and Procedures (Continued)

Par. 57

C Further Review by a Grievance Examiner

If the grievant requests further review, the Agency will promptly forward 1 copy of the grievance file containing **all** documents considered by the Agency and the grievant's request, to USDA, Office of Human Capital Management for assignment to a grievance examiner. The referral by the Agency shall provide the following:

- merits of any additional arguments or evidence presented by the grievant
- certification that the grievant has received a copy of all documents in the grievance file
- an index of the grievance file.

The USDA, Office of Human Capital Management will appoint a grievance examiner. The grievance examiner is responsible for the following:

- conducting any inquiry necessary to resolve any disputes as to facts
- developing a sufficient basis on which to recommend a decision.

At the discretion of the grievance examiner, the inquiry may include, but is **not** necessarily limited to, any of the following:

- group meetings
- hearings
- personal interviews
- review of the records and documents
- written inquiries.

The grievance examiner will:

- ensure that the employee or designated representative is given an opportunity to review and comment on all the information on which a recommended decision will be based
- send the grievant and the Agency Administrator a recommended decision that contains:
 - a report of findings of fact
 - an analysis of the issues
 - a recommendation of a decision based on the grievance, including any corrective action that may be necessary.



3 Administrative Grievance Process (15-PM, Part 5) (Continued)

57 **Final Decision and Further Review Rights and Procedures (Continued)**

Par. 57

D Agency Administrator's Decision After Further Review

Within 20 calendar days after the receipt of a recommended decision from the grievance examiner, the Agency Administrator may do any of the following:

- accept the grievance examiner's recommendation as the final decision on the grievance
- grant more relief to the grievant than recommended by the grievance examiner
- appeal the grievance examiner's recommendation to the USDA, Office of Human Capital Management, when the recommended decision can be shown to be any of the following:
 - contrary to law, rule, regulation, or published Agency policy
 - supported by less than substantial evidence
 - a precedent of such wide and detrimental impact on the Agency that further review is necessary.

Note: The USDA, Office of Human Capital Management will render the Department's final decision on the grievance after ensuring that the grievant has had an opportunity to review and comment on the Agency's appeal.

The decision made by the Agency Administrator or USDA, Office of Human Capital Management, is final.

If the Agency Administrator fails to take 1 of the actions specified in this subparagraph within the allotted 20-calendar-day time period, the grievance examiner's recommended decision shall become final.

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3 Administrative Grievance Process (15-PM, Part 5) (Continued)

58 Timeframe for Decisions on Grievances

Par. 58

A Completion of Processing

The complete processing of an administrative grievance shall **not** exceed 90 calendar days. The 90-calendar-day period begins on the date that the employee definitively indicates that an informal grievance is being initiated. An administrative grievance is deemed to be completed if 1 of the following has occurred:

- grievance was rejected
- grievance was canceled
- grievance was resolved to the satisfaction of the grievant
- proposed disposition was issued on the grievance that includes the employee's right to request further review by a Departmental grievance examiner or a final decision by the Agency Administrator.

B Grievance Process Not Completed

If the 90-calendar-day processing period is exceeded by the Agency, the employee may request, according to subparagraph 57 A, that the grievance be assigned to a grievance examiner by the USDA, Office of Human Capital Management. The grievance examiner shall proceed according to subparagraphs 57 C and D.

59, 60 (Reserved)



3 Administrative Grievance Process (Continued)

A. Grievance System for County Employees (Handbook 22-PM)

The Grievance system for county employees is found in 22-PM, Part 10.5. The grievance system applies to all current county employees under permanent and temporary appointments.

A State Grievance Board in each State administers the county office employee grievance system. The Board consists of 4 members, each of whom serve a 2-year term. Term begins January 1. One Board member is selected from each of the following job titles and classifications: 1) State office employee familiar with administrative processes shall be the Chairperson, 2) County Executive Director (CED), 3) County office program assistant and 4) County Office Committee (COC) member. The State Executive Director (SED) and the president of the State NASCOE affiliate shall select Board members and alternates as mutually agreed upon.

The grievance system applies to any concern or dissatisfaction that involves the employment of a covered employee, subject to State or County Office management's control, which is not covered by another form of appeals or complaint process. The system applies to, but is not limited to the following:

- Working conditions
- Improper application of or not following rules and regulations
- Unfair treatment
- Performance ratings, not including warnings to improve performance
- Nonselection for training opportunities
- Letters of reprimand

The grievance system does NOT apply to:

- Involuntary separations, such as poor performance, misconduct or RIFS
- Allegations of discrimination
- Classification and pay plans
- Nonselection for promotion, or withholding of a promotion
- Any action affecting another person. Action grieved must be personal to the aggrieved party
- Selections to the COT program
- The content or enforcement of published agency procedures and policy
- The substance of the elements and standards of an employee



3 Administrative Grievance Process (Continued)

A. Grievance System for County Employees (Continued)

- The granting or failing to grant an award or the decision to adopt or not adopt a suggestion
- The receiving or failing to receive a performance award or QSI
- The termination of a probationary employee
- A salary offset determination
- A preliminary warning notice of an action which, if effected, would be covered or excluded from coverage under the grievance system
- Notice of performance improvement period
- Disciplinary suspension of 14 calendar days or less
- Matters appealable to the Comptroller General
- Placement or nonplacement of names on STC certificate of eligible candidates for CED positions

All grievances shall be presented in writing within 15 days of the action grieved or 15 days of becoming aware of an action which is grievable and filed with the Chairperson, State Grievance Board. The grievance must be signed by the grievant, clearly and concisely state the subject of the grievance, and specify the corrective action being sought.

Upon receipt of a grievance, the Chairperson shall review the grievance and within 15 days inform the grievant of the acceptance or rejection of the grievance. A grievance may be rejected if: 1) untimely filed, 2) a matter excluded from coverage or 3) not meeting a requirement for processing.

A grievance rejected as not meeting a requirement for processing may be resubmitted after deficiencies are corrected. The grievant must resubmit the grievance within 15 days of receiving notice of deficiencies. A grievance rejected as untimely or as a matter excluded from coverage may be appealed to DAFO. The appeal must be filed with 15 days of receipt of the rejection notice.

After accepting a grievance, the Chairperson shall notify the grievant of the date, time and place where the Board will receive evidence about the grievance. The notice shall be given at least 10 days before the scheduled hearing date. All hearings must be scheduled within 30 days after accepting the grievance as properly filed.

The grievant may withdraw the grievance at any time for any reason by notifying the Chairperson.

The grievant shall notify the Chairperson if he or she does not want a hearing. The decision of the Board shall then be only on the written record.



3 Administrative Grievance Process (Continued)

A. Grievance System for County Employees (Continued)

The grievant and any employee representative shall be:

- granted a reasonable period of time (not to exceed 8 hours) to prepare for the hearing.
- A reasonable period of official time to present their grievance or response to the Board
- Official travel expenses for any approved appearance before the Board.

The Board shall conduct any inquiry necessary to resolve any disputes as to facts and to develop sufficient basis on which to recommend a decision. The Board hearing is not a trial-type hearing but is a fact-finding inquiry. The Board shall determine which witnesses are to be called from those proposed by the grievant or other parties. The Board may call its own witnesses. Cross examination of witnesses by the grievant or other parties shall not be allowed. Only Board members may ask questions of witnesses.

The Board shall send the SED a written recommended decision that contains: 1) a report of its findings of fact, 2) an analysis of the issues, 3) a determination on the grievance, including any corrective action that may be necessary, 4) a statement of the rationale for the determination, and 5) the hearing record or transcript. If the SED is involved in the grievance the recommended decision will be sent to the Deputy Administrator for Field Operation (DAFO).

Within 15 days after receiving the recommended decision the SED shall accept, reject or modify the recommended decision and issue a final decision on the grievance to the grievant and the person or persons against whom the grievance was filed.

The SED's or DAFO's final decision shall not be subject to further administrative review unless it differs from the Board's recommended decision. If the SED's decision differs the grievant may request final review by the DAFO. Any request for review by the grievant must be filed in writing within 15 days of receiving the final decision.



4 Appeal Procedures (MSPB & EEO)

Merit Systems Protection Board Procedures (MSPB)

www.MSPB.GOV



1. What is the Merit Systems Protection Board (MSBP)?

It is an independent agency in the Executive branch of the Federal Government that serves as the guardian of the Federal merit systems. The Board is comprised of three members who are appointed by the president and confirmed by the Senate. They serve overlapping, non-renewable 7-year terms. The Board is bipartisan. No more than two of its members may be from the same political party. The Board's headquarters are in Washington, D.C. with regional and field offices in major cities.

2. What kinds of actions may be appealed to the Board?

Under the Civil Service Reform Act (CSRA), the majority of the cases are appeals of agency adverse actions – removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less. Other types of actions that may be appealed to the Board include: performance-based removals or reductions in grade, denials of within grade salary increases, reduction-in-force actions, OPM suitability determinations, OPM employment practices, OPM determinations in retirement matters, denials of restoration or reemployment rights, and terminations of probationary employees under certain circumstances.

3. What if an action isn't appealable to the Board?

Some actions that are not appealable to the Board may be appealable to OPM or may be covered by an agency grievance procedure.

If the employee is a member of a bargaining unit, actions under a negotiated grievance procedure may be grieved in accordance with that procedure.

If a personnel action (whether appealable to the Board or not) is taken or about to be taken as a result of a prohibited personnel practice, the employee may file a complaint with the Office of Special Counsel, asking the Special Counsel to seek corrective action from the Board on his or her behalf.

4. Who may appeal an adverse action to the Board?

Employees in the competitive service who have completed a 1-year probationary or trial period;

Veteran's preference-eligible employees with at least one year of continuous employment in the same or similar positions outside the competitive service;



4 Appeal Procedures (MSPB & EEO) (Continued)

Postal Service supervisors and managers, and Postal Service employees engaged in personnel work (other than those in nonconfidential clerical positions), who have completed one year or current continuous service in the same or similar positions; and

Excepted service employees, other than preference-eligibles, who are not serving a probationary or trail period and who have completed two years of current continuous service in the same or similar positions in an agency.

5. Do agencies have to advise employees of their right to appeal personnel actions to the Board?

When an agency takes an appealable action against an employee, the agency must provide the employee with: 1) a notice of the time limits for appealing to the Board, 2) the address of the appropriate Board regional or filed office for filing the appeal, 3) a copy or access to a copy of the Board's regulations, 4) a copy of the Board's appeal form, and 5) a notice of any rights concerning the agency or a negotiated grievance procedure.

6. Does the Board hear appeals from employees who are covered by a negotiated grievance procedure?

If an employee is a member of a bargaining unit that is represented by a union or an association, the bargaining agreement may have a negotiated grievance procedure available to the employee. Many times, the grievance procedure will cover personnel actions that by law may otherwise be appealed to the Board. If a bargaining unit employee is covered by such a "broad scope" grievance procedure, then the employee has a choice between filing either a grievance with the agency or an appeal with the Board, but may not do both.

7. Does the Board hear complaints of discrimination?

Generally, yes, if the personnel action can be appealed. In an employee alleges discrimination in connection with most actions that are otherwise appealable to the Board, the Board has jurisdiction over the matter. Discrimination allegations that do not involve actions within the Board's jurisdiction may be pursued through the employing agency and the Equal Employment Opportunity Commission (EEOC).

8. How does an employee file an appeal?

An employee must file an appeal in writing with the Board's regional or filed office serving the area where the employee's duty station was located when the action was taken.



4 Appeal Procedures (MSPB & EEO) (Continued)

An appeal must be filed within 30 calendar days from the effective date of the action, if any, or within 30 calendar days after the date of receipt of the agency's decision, whichever is later. If the 30th day falls on a Saturday, Sunday, or Federal holiday, the filing deadline is extended to the next work day.

If the employee and the agency mutually agree in writing to submit the dispute to an alternative dispute resolution (ADR) process, the 30-day filing time limit is automatically extended to 60 days.

Appeals may be filed by mail, by facsimile, by commercial overnight delivery, or by hand delivery. The date of filing by mail is considered to be the postmark date. The date of facsimile is the date of the facsimile. The date of filing by commercial overnight delivery is the date you deliver the appeal to the commercial overnight delivery service.

9. Does the appeal have to be in a particular format?

Although an appeal may be in any format, it must be in writing and contain all of the information specified in the Board's regulations. An appeal must be signed by the employee (hereafter Appellant) and his or her representative if one has been designated.

10. May the agency respond to the appeal?

An agency has the right to respond to an appeal but must do so within 20 calendar days of the date of the Board's order acknowledging receipt of the appeal.

11. Who decides the appeal?

When a Board regional or field office receives an appeal, the case is assigned to an administrative judge (AJ) in that office. The AJ will issue a decision after considering all of the relevant evidence in the case.

12. Are hearings held on all appeals?

Once it is established that the appeal is timely filed and the Board has jurisdiction, the Appellant has a right to a hearing on the merits of his or her case. The Appellant may present evidence, including the testimony of witnesses, at the hearing. However, the Appellant may waive the right to a hearing and choose instead to have the appeal decided on the basis of the written record, which will include all pleadings, documents, and other materials filed in the proceeding. Sometimes hearings are conducted by telephone or video conferencing rather than in person.



4 Appeal Procedures (MSPB & EEO) (Continued)



13. Who has the burden of proof?

The Agency: The agency has the burden of proving that it was justified in taking the action. If the agency meets its burden of proof, the Board must decide in the favor of the agency, unless you show that there was “harmful error” in the agency’s procedures, that the agency decision was based on a prohibited personnel practice, or that the decision was not in accordance with the law.

The Appellant: The Appellant has the burden of proving that his or her appeal is within the Board’s jurisdiction and that it was timely filed. The Appellant also has the burden of proving and “affirmative defenses” that are raised, for example, discrimination or reprisal for whistleblowing. The Appellant also has the burden of proof in retirement cases.

14. Is the decision issued by the AJ final?

The initial decision of the AJ will become the final decision of the Board 35 days after the date of the decision unless a party files a petition for review with the 3-member Board in Washington with 35 calendar days of the date of the initial decision. A petition for review by the MSPB must be filed within 35 days after the date the initial decision is issued or within 30 days after the date the Appellant received the initial decision, whichever is later.

15. How does the Board decide whether to grant a petition for review?

The Board may grant a petition for review when it is established that there is new significant evidence that was not available when the record was closed, or that the AJ’s decision is based on an erroneous interpretation of law or regulations. The Board’s decision on a petition for review constitutes final administrative action.

16. If the initial decision is in the Appellant’s favor, and the agency (or another party) files a petition for review, does the Appellant have to wait for relief until the Board issues a decision?

If the Appellant is the prevailing party, the agency will grant any relief provided in the initial decision pending the outcome of any petition for review. However, “interim relief” will not be granted if the AJ determines that it is not appropriate. If the decision requires the Appellant return to work, the agency does not have to take this action if it determines that such a return would be unduly disruptive. However, it still has to restore the Appellant to pay and benefits status. The granting of interim relief does not require the payment of back pay or attorney fees.



4 Appeal Procedures (MSPB & EEO) (Continued)

17. What actions may an AJ take on appeals?

The initial decision of the AJ may dismiss the appeal if the matter is not within the Board's jurisdiction or if the appeal was not filed within the required time limit and good cause for the untimely filing is not shown. Appeals that are not dismissed may be settled voluntarily by the parties. If the parties wish to have the settlement agreement enforceable by the Board, they must ask the AJ to enter the agreement into the record. In appeals that are decided on the merits (not dismissed or settled), the decision of the AJ may affirm the agency's action, reverse the action, or – in certain cases- mitigate (modify) the penalty imposed by the agency.

18. What actions may the Board take on petitions for review?

The Board may dismiss a petition if it determines that the matter is not within the Board's jurisdiction or if the petition was not filed within the required time limit and good cause for the untimely filing is not shown. The Board may deny a petition if it does not meet the criteria for review. If the Board grants a petition, its final decision may affirm or reverse the initial decision of the AJ in whole or in part. The Board may also modify the decision of the AJ, vacate it or remand (send back) the case to the AJ for further processing.

19. What appeals are there from a final decision by the Board?

The Appellant may request court review. Once an initial decision of an AJ has become final, or the Board has issued a final decision on a petition for review, the Appellant may seek review of the final decision by the U.S. Court of Appeals for the Federal Circuit. The court must receive the Appellant's request for review within 60 days of receipt of the Board's final decision. The court normally will not waive this time limit and filings that do not meet the deadline will be dismissed.

In cases involving allegations of discrimination, the Appellant may seek review of the final Board decision by the Equal Employment Opportunity Commission (EEOC) or may file a civil action in an appropriate U.S. district court within 30 days of receipt of the decision.



4 Appeal Procedures (MSPB & EEO) (Continued)

20. What happens if an Appellant appeals a case involving an allegation of discrimination to the EEOC?

In a case appealable to the Board that involves an allegation of discrimination (a “mixed case”); you may ask the EEOC to review the Board’s final decision on the discrimination issue. If the EEOC disagrees with the Board’s decision on the discrimination issue, the case is returned to the Board. If the Board does not adopt the EEOC decision, then the case is referred to a Special Panel made up of a Chairman appointed by the President, one member of the Board, and one EEOC commissioner. The Special Panel issues the final decision in the case, which then may be appealed to an appropriate U.S. district court.

21. Do the procedures described above apply to all appeals to MSPB?

Some laws that authorize appeals to MSPB include procedural requirements that differ from the general procedures described above. Such laws may require that you first exhaust the procedures of another agency before filing with MSPB, and the time limits for filing differ from those discussed above. Also, because the basis for an appeal to MSPB is an alleged violation of one of these laws, agencies are not expected to advise employees of an alleged violation and a right to appeal to MSPB. Laws with different procedural requirements include the following:

- Whistleblower Protection Act of 1989 (Public Law No. 101-12) – This law authorizes an appeal to MSPB if an employee alleges that he or she was subject to an agency action that was taken or threatened (or is about to be taken or threatened) because of certain legal disclosures of information, commonly known as whistleblowing. Unless the matter is directly appealable to the Board under law, rule, or regulation, the employee must first file a complaint with the Office of Special Counsel and exhaust the procedures of that office.
- Presidential and Executive Office Accountability Act (Public Law No. 104-331) – This law authorizes appeals to MSPB by employees that allege violations of certain workplace laws, including the Family and Medical Leave Act and the Fair Labor Standards Act. The employee must first exhaust a mandatory period of counseling and mediation with the agency. Any subsequent appeal to MSPB must be filed no earlier than the 30th day and no later than the 90th day after receiving notice of the end of the mandatory period of counseling and mediation.



4 Appeal Procedures (MSPB & EEO) (Continued)

- Uniformed Services Employment and Reemployment Rights Act (USERRA) (Public Law No. 103-353) – This law authorizes an appeal to MSPB based on an agency’s alleged violation of an employee’s employment or reemployment rights following the employee’s service in a uniformed service (including discrimination based on such service or on the employee’s status as a veteran). The employee has the option of appealing directly to MSPB or filing a complaint with the Department of Labor’s Veteran’s Employment and Training Service (DOL/VETS). If an employee files with DOL/VETS, he or she must first exhaust that agency’s procedure and may appeal to MSPB later if DOL/VETS cannot resolve the matter.
- Veterans Employment Opportunities Act (VEOA) (Public Law No. 105-339) – This law authorizes an appeal to MSPB based on an agency’s alleged violation of any law or regulation relating to veteran’s preference. The employee must first file a complaint with DOL/VETS and allow that agency 60 days to resolve the matter. If DOL/VETS advises the employee that it has been unable to resolve the matter, an appeal to MSPB must be filed within 15 days after the date the employee receives the DOL/VETS notice.



4 Appeal Procedures (MSPB & EEO) (Continued)



Federal EEO Complaint Process www.EEO.GOV

1. Contact EEO Counselor

Persons who believe they have been discriminated against must contact an agency EEO counselor prior to filing a formal complaint of discrimination. The person must initiate counselor contact with 45 days of the matter alleged to be discriminatory. **29 CFR Section 1614.105(a) (1)**

This time limit shall be extended where the aggrieved person shows that: he or she was not notified of the time limits and was not otherwise aware of them; he or she did not and reasonably should not have known that the discriminatory matter occurred; despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits. **29 CFR 1614.105(a) (2).**

2. EEO Counseling

EEO counselors provide information to the aggrieved individual concerning how the federal sector EEO process works, including time frames and appeal procedures, and attempt to informally resolve the matter. At the initial counseling session, counselors must advise individuals in writing of their rights and responsibilities in the EEO process, including the right to request a hearing before an EEOC Administrative Judge or an immediate final decision from the agency following its investigation of the complaint. Individuals must be informed of their right to elect between pursuing the matter in the EEO process under part 1614 and a grievance procedure (where available) or the Merit Systems Protection Board appeal process (where applicable). The counselor must also inform the individuals of their right to proceed directly to court in a lawsuit under the Age Discrimination in Employment Act, of their duty to mitigate damages, and that only claims raised in pre-complaint counseling may be alleged in a subsequent complaint filed with the agency. **29 CFR Section 1614.105(b) (1).**

Counseling must be completed within 30 days of the date the aggrieved person contacted the agency's EEO office to request counseling. If the matter is not resolved in that time period, the counselor must inform the individual in writing of the right to file a discrimination complaint. This notice (Notice of Final Interview) must inform the individual that a complaint must be filed within 15 days of receipt of the notice, identify the agency official with whom the complaint must be filed, and of the individual's duty to inform the agency if he or she is represented. **29 CFR Section 1614.105(d).**



4 Appeal Procedures (MSPB & EEO) (Continued)

The 30-day counseling period may be extended for an additional 60 days: 1) where the individual agrees to such extension in writing; or 2) where the aggrieved person chooses to participate in an ADR procedure. If the claim is not resolved before the 90th day, the Notice of Final Interview described above must be issued to the individual.

29 CFR Sections 1614.105(e), (f)

When a complaint is filed the EEO counselor must submit a written report to the agency's EEO office concerning the issues discussed and the actions taken during the counseling. **29 CFR Section 1614.105(c)**

3. Formal complaints of discrimination

A formal complaint must be filed within 15 days of receipt of the Notice of Final Interview. The complaint must be a signed statement from the complainant or the complainant's attorney, containing the telephone number and addresses of the parties and must describe generally the action or practice which forms the basis of the complaint. **29 CFR Section 1614.106**

A complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. After requesting a hearing, a complainant may file a motion with the AJ to amend a complaint to include issues or claims like or related to those raised in the complaint.

The agency must acknowledge receipt of the complaint in writing and inform the complainant of the date on which the complaint was filed, of the address of the EEOC office where a request for a hearing should be sent, that the complainant has the right to appeal the agency's final action or dismissal of a complaint, and that the agency must investigate the complaint within 180 days of the filing date. The agency's acknowledgement must also advise the complainant that when a complaint has been amended, the agency must complete the investigation within the earlier of: 1) 180 days after the last amendment to the complaint; or 2) 360 days after the filing of the original complaint. A complainant may request a hearing from an EEOC AJ on the consolidated complaints any time after 180 days from the date of the first filed complaint. **29 CFR Section 1614.106(e)**



4 Appeal Procedures (MSPB & EEO) (Continued)

4. Dismissal of Complaints

Prior to a request for a hearing, in lieu of accepting a complaint for investigation an agency may dismiss an entire complaint for any of the following reasons: 1) failure to state a claim, or stating the same claim that is pending or has been decided by the agency or the EEOC; 2) failure to comply with the time limits; 3) filing a complaint on a matter that has not been brought to the attention of an EEO counselor and which is not like or related to the matters counseled; 4) filing a complaint which is the basis of a pending civil action, or which was the basis of a civil action already decided by a court; 5) where the complainant has already elected to pursue the matter through either the negotiated grievance procedure or in an appeal to the Merit Systems Protection Board; 6) where the matter is moot or merely alleges a proposal to take a personnel action; 7) where the complainant cannot be located; 8) where the complainant fails to respond to a request to provide relevant information; 9) where the complaint alleges dissatisfaction with the processing of a previously filed complaint; 10) where the complaint is part of a clear pattern of misuse of the EEO process for purposes other than the prevention and elimination of employment discrimination. **29 CFR Section 1614.107**

If an agency believes that some, but not all, of the claims in a complaint should be dismissed for the above reasons, it must notify the complainant in writing of the rationale for this determination, identify the allegations which will not be investigated, and place a copy of this notice in the investigation file. This determination shall be reviewable by an EEOC AJ if a hearing is requested on the remainder of the complaint, but is not appealable until final action is taken by the agency on the remainder of the complaint. **29 CFR Section 1614.107 (b)**

5. Investigations

Investigations are conducted by the agency. The agency must develop an impartial and appropriate factual record upon which to make findings on the claims raised by the complaint. An appropriate factual record is defined in the regulations as one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred. **29 CFR 1614.108(b)**

The investigation must be completed within 180 days from the filing of the complaint. A copy of the investigative file must be provided to the complainant, along with a notification that, within 30 days of receipt of the file, the complainant has the right to request a hearing and a decision from an EEOC AJ or may request an immediate final decision from the agency. **29 CFR Section 1614.108(f)**



4 Appeal Procedures (MSPB & EEO) (Continued)

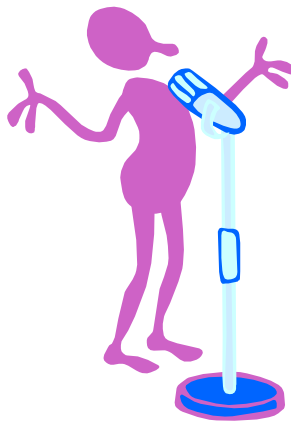
An agency may make an offer of resolution to a complainant who is represented by an attorney at any time after the filing of a complaint, but not later than the date an AJ is appointed to conduct a hearing. An agency may make an offer of resolution to a complainant, represented by an attorney or not, after the parties have received notice that an AJ has been appointed to conduct a hearing, but not later than 30 days prior to a hearing.

Such offer of resolution must be in writing and include a notice of explaining the possible consequences of failing to accept the offer. If the complainant fails to accept the offer within 30 days of receipt, and the relief awarded in the final decision on the complaint is not more favorable than the offer, then the complainant shall not receive payment from the agency for attorney's fees or costs incurred after the expiration of the 30-day acceptance period. **29 CFR 1614.109(c)**

6. Hearings

Requests for hearing must be sent by the complainant to the EEOC office indicated in the agency's acknowledgment letter, with a copy to the agency's EEO office. Within 15 days of receipt of the request for a hearing, the agency must provide a copy of the complaint file to the EEOC. The EEOC will then appoint an AJ to conduct a hearing. **29 CFR Section 1614.108(g)**

An EEOC AJ may dismiss a complaint for any of the reasons set out above under Dismissals. **29 CFR Section 1614.109(b)**



Prior to the hearing, the parties may conduct discovery. The purpose of discovery is to enable a party to obtain relevant information for the preparation of the party's case. Each party initially bears their own costs for discovery, unless the AJ requires the agency to bear the costs for the complainant to obtain depositions or any other discovery because the agency has failed to complete its investigation in a timely manner or has failed to adequately investigate the allegations. Agencies provide for the attendance of all federal employees approved as witnesses by the AJ. Hearings are considered part of the investigative process, and are closed to the public. The AJ conducts the hearing and receives relevant information or documents as evidence. The hearing is recorded and the agency is responsible for paying for the transcripts of the hearing. Rules of evidence are not strictly applied to the proceedings. If the AJ determines that some or all facts are not in genuine dispute, he or she may limit the scope of the hearing or issue a decision without a hearing (summary judgment).



4 Appeal Procedures (MSPB & EEO) (Continued)

The AJ must conduct the hearing and issue a decision on the complaint within 180 days of receipt by the AJ of the complaint file from the agency. The AJ will send copies of the hearing record, the transcript and the decision to the parties. If an agency does not issue a final order within 40 days of receipt of the AJ's decision, then the decision becomes the final action by the agency in the matter. **29 CFR 1614.109(i)**

7. Final Action by Agencies

When an AJ has issued a decision (either a dismissal, a summary judgment decision or a decision following a hearing), the agency must take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the AJ's decision.

The final order must notify the complainant whether or not the agency will fully implement the decision of the AJ, and shall contain notice of the complainant's right to appeal to the EEOC or to file a civil action. If the final order does not fully implement the decision of the AJ, the agency must simultaneously file an appeal with the EEOC and attach a copy of the appeal to the final order. **29 CFR Section 1614.110 (a)**

When an AJ has not issued a decision (i.e., when an agency dismisses an entire complaint under 1614.107, receives a request for an immediate final decision or does not receive a reply to the notice providing the complainant the right to either request a hearing or an immediate final decision), the agency must take final action by issuing a final decision. The agency's final decision will consist of findings by the agency on the merits of each issue in the complaint. Where the agency has not processed certain allegations in the complaint for procedural reasons set out in 29 CFR 1614.107, it must provide the rationale for its decision not to process the allegations. The agency's decision must be issued within 60 days of receiving notification that the complainant has requested an immediate final decision. The agency's decision must contain notice of the complainant's right to appeal to the EEOC, or to file a civil action in federal court. **29 CFR Section 1614.110(b)**

8. Appeals to the EEOC

Several types of appeals may be brought to the EEOC. A complainant may appeal an agency's final action or dismissal of a complaint within 30 days of receipt. **29 CFR Sections 1614.401(a), 1614.402(a)**

A grievant may appeal the final decision of the agency, arbitrator or the FLRA on a grievance when an issue of employment discrimination was raised in the grievance procedure. **29 CFR Section 1614.401(d)**



4 Appeal Procedures (MSPB & EEO) (Continued)

If the agency's initial action and order do not fully implement the AJ's decision, the agency must appeal to the EEOC.

29 CFR Section 1614.110(a); 29 CFR Section 1614.401(b)

A complainant may appeal to the EEOC for a determination as to whether the agency has complied with the terms of a settlement agreement or decision.

29 CFR Section 1614.504(b)

If the complaint is a class action, the class agent or the agency may appeal an AJ's decision accepting or dismissing all or part of the class complaint. A class agent may appeal a final decision on a class complaint. A class member may appeal a final decision on an individual claim for relief pursuant to a finding of class-wide discrimination. Finally, both the class agent or the agency may appeal from an AJ decision on the adequacy of a proposed settlement of a class action.

29 CFR Section 1614.401(c)

Appeals must be filed with the EEOC's Office of Federal Operations (OFO). Any statement or brief on behalf of a complainant in support of an appeal must be submitted to OFO within 30 days of filing the notice of appeal. Any statement or brief on behalf of the agency in support of its appeal must be filed within 20 days of filing the notice of appeal. An agency must submit the complaint file to OFO within 30 days of initial notification that the complainant has filed an appeal or within 30 days of submission of an appeal by the agency. Any statement or brief in opposition to an appeal must be submitted to OFO and served on the opposing party within 30 days of receipt of the statement or brief supporting the appeal, or, if no statement or brief supporting the appeal has been filed, within 60 days of receipt of the appeal.

29 CFR Section 1614.403

The EEOC has the authority to draw adverse inferences against a party failing to comply with its appeal procedures or requests for information.

29 CFR Section 1614.404(c)

The decision on an appeal from an agency's final action is based on a de novo review, except that the review of the factual findings in a decision by an AJ is based on a substantial evidence standard of review. **29 CFR Section 1614.405(a)**

A party may request that the EEOC reconsider its decision within 30 days of receipt of the Commission's decision. Such requests are not a second appeal, and will be granted only when the previous EEOC decision involved a clearly erroneous interpretation of material fact or law; or when the decision will have a substantial impact on the policies, practices or operations of the agency. **29 CFR Section 1614.405(b)**



4 Appeal Procedures (MSPB & EEO) (Continued)

The EEOC's decision will be based on a preponderance of the evidence. The decision will also inform the complainant of his or her right to file a civil action.

9. Civil Actions

Prior to filing a civil action under Title VII of the Civil rights Act of 1964 or the Rehabilitation Act of 1973, a federal sector complainant must first exhaust the administrative process set out at 29 CFR Part 1614. "Exhaustion" for the purposes of filing a civil action may occur at different stages of the process. The regulations provide that civil actions may be filed in an appropriate federal court: 1) within 90 days of receipt of the final action where no administrative appeal has been filed; 2) after 180 days from the date of filing a complaint if an administrative appeal has not been filed and final action has not been taken; 3) within 90 days of receipt of the EEOC's final decision on an appeal; or 4) after 180 days from the filing of an appeal with the EEOC if there has been no final decision by the EEOC. **29 CFR Section 1614.408**

Under the Age Discrimination in Employment Act (ADEA), a complainant may proceed directly to federal court after giving the EEOC notice of intent to sue. **29 CFR Section 1614.201**

An ADEA complainant who initiates the administrative process in 29 CFR Part 1614 may also file a civil action within time frames noted above. **29 CFR Section 1614.408**

10. Class Complaints

Class complaints of discrimination are processed differently than individual complaints. **29 CFR Section 1614.204**

The employee or applicant who wishes to file a class complaint must first seek counseling and be counseled, just like an individual complaint. However, once counseling is completed the class complaint is not investigated by the agency. Rather, the complaint is forwarded to the nearest EEOC Field or District Office, where an EEOC AJ is appointed to make decision as to whether to accept or dismiss the class complaint. The AJ examines the class to determine whether it meets the class certification requirements of numerosity, commonality, typicality and adequacy of representation. The AJ may issue a decision dismissing the class because it fails to meet any of these class certification requirement, as well as for any of the reasons for dismissal discussed above for individual complaints.



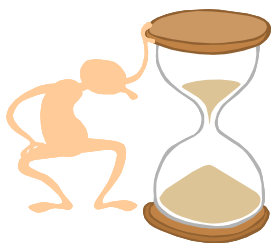
4 Appeal Procedures (MSPB & EEO) (Continued)

A class complaint may begin as an individual complaint of discrimination. At a certain point, it may become evident that there are many more individuals than the complainant affected by the issues raised in the individual complaint. EEOC's regulations provide that a complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claims raised in an individual complaint. **29 CFR 1614.204(b)**

The AJ transmits his or her decision to accept or dismiss a class complaint to the class agent and the agency. The agency must then take final action by issuing a final order within 40 days of receipt of the AJ's decision. The final order must notify the agent whether or not the agency will implement the decision of the AJ. If the agency's final order does not implement the AJ's decision, the agency must simultaneously appeal the AJ's decision to the EEOC's OFO. A copy of the agency's appeal must be appended to the agency's final order. **29 CFR Section 1614.204(d) (7)**

A dismissal of a class complaint shall inform the class agent either that the complaint is being filed on that date as an individual complaint and processed accordingly, or that the complaint is also dismissed as an individual complaint for one of the reasons for dismissal (section 4 above). In addition, a dismissal must inform the class agent of the right to appeal to the EEOC's OFO or to file a civil action in federal court.

When a class complaint is accepted, the agency must use reasonable means to notify the class members of the acceptance of the class complaint, a description of the issues accepted as part of the complaint, an explanation of the binding nature of the final decision or resolution on the class members, and the name, address and telephone number of the class representative. **29 CFR Section 1614.204(e)**. In lieu of an



investigation by the agency, an EEOC AJ develops the record through discovery and a hearing. The AJ then issues a recommended decision to the agency. Within 60 days of receipt of the AJ's recommended decision on the merits of the class complaint, the agency must issue a final decision which either accepts, rejects or modifies the AJ's recommended decision. If the agency fails to issue such a decision within that timeframe, the AJ's recommended decision becomes the agency's final decision in the class complaint.

When discrimination is found in the final decision and a class member believes that he or she is entitled to relief, the class member may file a written claim with the agency within 30 days of receipt of notification by the agency of its final decision. The EEOC AJ retains jurisdiction over the complaint in order to resolve disputed claims by class members. The claim for relief must contain a specific showing that the complainant is a class member entitled to relief. The EEOC's regulations provide that, when a finding of discrimination against a class has been made, there is a presumption of



4 Appeal Procedures (MSPB & EEO) (Continued)

discrimination as to each member of the class. The agency must show by clear and convincing evidence that any class member is not entitled to relief. The agency must issue a final decision on each individual claim for relief within 90 days of filing. Such decision may be appealed to the EEOC's OFO, or a civil action may be filed in federal court. **29 CFR Section 1614.204(i) (3)**

A class complaint may be resolved at any time by agreement between the agency and the class agent. Notice of such resolution must be provided to all class members, and reviewed and approved by an EEOC AJ. If the AJ finds that the proposed resolution is not fair to the class as a whole, the AJ will issue a decision vacating the agreement, and may replace the class agent with some other eligible class member to further process the class complaint. Such decision may be appealed to the EEOC. If the AJ finds that the resolution is fair to the class as a whole, the resolution is binding on all class members. **29 CFR Section 1614.204(g)**

11. Grievances

Persons covered by collective bargaining agreements which permit allegations of discrimination to be raised in the grievance procedure, and who wish to file a complaint or grievance on an allegation of employment discrimination, must elect to proceed either under the procedures of 29 CFR Part 1614 or the negotiated grievance procedures, but not both. **29 CFR Section 1614.301(a)**



An election to proceed under Part 1614 is made by the filing of a formal complaint, and an election to proceed under the negotiated grievance procedures is made by filing a grievance. Participation in the pre-complaint (informal) procedures of Part 1614 is not an election of the 1614 procedures.

12. Mixed Case Complaints

Some employment actions which may be the subject of a discrimination complaint under Part 1614 may also be appealed to the Merit Systems Protection Board (MSPB). In such cases, the employee must elect to proceed with a complaint as a "mixed case complaint" under Part 1614, or a "mixed case appeal" before the MSPB. Whichever is filed first is considered an election to proceed in that forum. **29 CFR Section 1614.302**

Mixed case complaints are processed similarly to other complaints of discrimination, with the following notable exceptions: 1) the agency has only 120 days from the date of the filing of the mixed case complaint to issue a final decision, and the complainant may appeal the matter to the MSPB or file a civil action any time thereafter; 2) the



4 Appeal Procedures (MSPB & EEO) (Continued)

complainant must appeal the agency's decision to the MSPB, not the EEOC, within 30 days of receipt of the agency's decision.; 3) at the completion of the investigation the complainant does not have the right to request a hearing before an EEOC AJ, and the agency must issue a decision within 45 days. **29 CFR Section 1614.302(d)**

Individuals who have filed either a mixed case complaint or a mixed case appeal, and who have received a final decision from the MSPB, may petition the EEOC to review the MSPB final decision.

In contrast to non-mixed matters, individuals who wish to file a civil action in mixed-case matters must file within 30 days (not 90) of receipt of: 1) the agency's final decision; 2) the MSPB's final decision; or 3) the EEOC's decision on a petition to review. Alternatively, a civil action may be filed after 120 days from the date of filing the mixed case complaint with the agency or the mixed case appeal with the MSPB if there has been no final decision on the complaint or appeal, or 180 days after filing a petition to review with the EEOC if there has been no decision by the EEOC on the petition. **29 CFR 1614.310**

NOTE: County employees have no appeal rights to MSPB, only to EEOC.



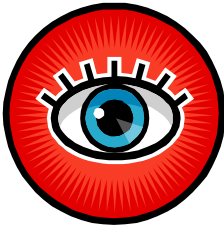
5 Workplace Violence, Prevention & Response Program



Workplace Violence Prevention and Response (WVP&R) Program

Workplace violence is a critical, complex problem facing Federal agencies and the private sector. The risk of violence, harm to others and/or self, can arise internally from any level of the workforce or externally from customers, contractors, vendors and/or others. FFAS management, employees, unions, and employee associations, where applicable, can work to increase safety by recognizing and reporting acts or threats of violence, intimidation, harassment and other behavior that causes fear for personal safety and/or disruption in the workplace. The goals of FFAS are early recognition, reporting, assessing, and developing appropriate response plans, by the appropriate parties, to prevent or reduce and manage the risk of workplace violence.

Employee Awareness



The risk of workplace violence can be reduced through employee awareness of the following:

- What is violence?
- What are indicators of an increase possibility of violent behavior?
- What is a violence emergency that requires immediate assistance?
- What may appear to be a non-emergency that should not be ignored?

Recognizing Violence

Violence encompasses acts or threats of physical violence against persons or property. It also includes acts of intimidation, harassment, or other inappropriate behavior that causes fear for personal safety and/or disruption in the workplace. Recognizing that violence is a process, as well as an act, can reduce the risk of becoming a victim. Violence is often the culmination of long-developing and identifiable problems, conflicts and failure. The risk of violent behavior can increase when a set of conditions and factors are present. These include, but are not limited to, the following:



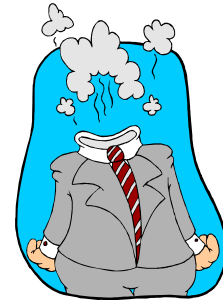
- The individual's behavior, personality, and thinking style
- Life stressors impacting the individual
- A triggering event or condition that leads the individual to see violence as an option or solution
- A setting that facilitates or permits the violence, or at least does not attempt to stop it from occurring.



5 Workplace Violence, Prevention & Response Program (Continued)

Recognizing Risk Factors

Risk factors are indicators that point to an increased possibility of violent behavior. A number of risk factors can be present without automatically indicating a potential for violence. To plan and implement an appropriate response, risk factors must be evaluated on their own merits, within the context and totality of a situation.



The FBI's National Center for the Analysis of Violent Crime has identified the following as indicators of increased risk:

- Direct or veiled threats of harm
- Intimidating, belligerent, harassing, bullying or other inappropriate and aggressive behavior
- Numerous conflicts with supervisors and other employees
- Bringing and/or brandishing a weapon in the workplace, making inappropriate references to guns and/or exhibiting a fascination with a weapon
- Making statements that show a fascination with incidents of workplace violence, that indicate approval of using violence to resolve a problem, or that indicate identification with perpetrators of workplace homicides
- Making statements that indicate desperation over family, financial or other personal problems to the point of contemplating suicide
- Engaging in drugs/alcohol
- Exhibiting extreme changes in behavior

NOTE: A list of risk factors compiled by FFAS may be accessed at <http://www.fsa.usda.gov/FSA/hrdapp?area=home&subject=wpsv&topic=vpr-rf>





5 Workplace Violence, Prevention & Response Program (Continued)

Preparing for an Emergency

Managers and supervisors are responsible for the following:



- Verifying which local law enforcement agency is responsible for responding to an emergency, for example, the sheriff's or police department, or the Federal Protective Service (FPS)
- Providing emergency contact telephone numbers to employees
- Ensuring that an emergency evacuation plan is in place
- Communicating the evacuation plan to all employees
- Conducting periodic drills.

Employees, in turn, are responsible for becoming familiar with the evacuation plan. However, the reality is that human behavior is unpredictable, and the dynamics of every violent situation are different. Depending on the circumstances, following an established evacuation plan may increase risk to safety. Instead, it may be necessary to find another way to escape to a safe area.

IMPORTANT: Offices are encouraged to hold discussions about the physical layout of the worksite and options for increasing safety, such as installing a duress alarm or implementing controlled access to the office.

In a situation with **angry or hostile customer or coworker:**

- Stay calm and listen attentively
- Maintain eye contact
- Be courteous and patient
- Keep the situation in your control



In a situation with a person **shouting, swearing and threatening:**

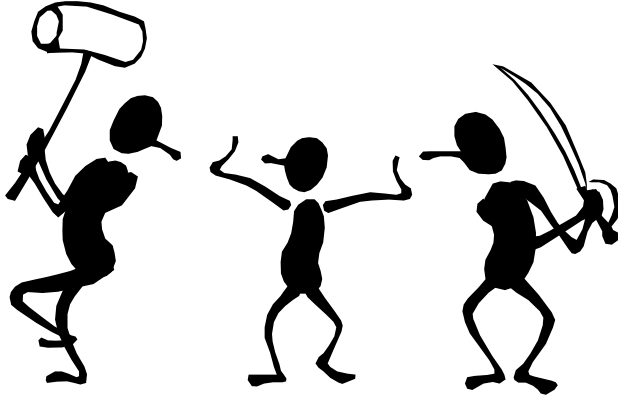


- Signal a coworker or supervisor that you need help (use a prearranged code word or duress alarm system)
- Do not make any calls yourself
- Have someone call local security or law enforcement personnel (FPS, or sheriff's or police department, depending on the jurisdiction).



5 Workplace Violence, Prevention & Response Program (Continued)

In a situation with someone threatening you with a gun, knife or other weapon:



- Stay calm and quietly signal for help (use a prearranged code word or duress alarm system)
- Maintain eye contact
- Stall for time
- Keep talking but follow instructions from the person who has the weapon
- Do not risk harm to yourself or others
- Never try to grab a weapon
- Watch for a safe chance to escape to a safe area.

NOTE: The above guidance is provided by the Federal Protective Service.

Recognizing a non-emergency that should not be ignored

In a non-emergency, employees may observe behavior that causes apprehension or fear for personal safety, but no immediate harm or risk to safety is apparent. It is best for employees to act on the side of safety and discuss their concerns with a supervisor or the contact of their choice.



6 Labor Relations Information:

A. Collective Bargaining Agreements (Descriptions) For Federal Employees



AREA	UNION	EFFECTIVE DATE	DESCRIPTION
ARKANSAS	AFGE Local 108 - CBA	November 5, 1991 Three-year duration	<ul style="list-style-type: none"> • Automatic renewal in one year intervals • All professional and non-professional FSA employees located in the State of Arkansas (statutory exclusions)
COLORADO	AFGE Local 3499 - CBA	May 14, 1981 Three-year duration	<ul style="list-style-type: none"> • Automatic renewal in three-year intervals • All permanent and temporary (expected to be employed over 90 days) non-professional FSA employees located in Colorado (statutory exclusions)
KANSAS	AFGE Local 3354 - CBA	January 1, 2003 Three-year duration	<ul style="list-style-type: none"> • Remains in effect until a new mutually-agreed upon agreement is ratified • All federal permanent and temporary (expected to be employed over 90 days) non-professional FSA employees located in Kansas (statutory exclusions)
KANSAS CITY, MISSOURI	NTEU Chapter 264 - CBA	December 1, 2002 Five-year duration	<ul style="list-style-type: none"> • Automatic renewal in one year intervals • Unit description-all professional and non-professional FSA employees located in KC metropolitan area (statutory exclusions)



6 Labor Relations Information (Continued):

A. Collective Bargaining Agreements (Descriptions) (Continued)

AREA	UNION	EFFECTIVE DATE	DESCRIPTION
KANSAS CITY, MISSOURI – RISK MANAGEMENT AGENCY	NFFE Local 858 – CBA	September 20, 1990 Three-year duration	<ul style="list-style-type: none"> • Automatic renewal in two-year intervals • All professional and non-professional General Schedule (GS) and Wage Grade (WG) employees in permanent full-time positions and permanent part-time positions and all temporary full-time and part-time employees (expected to be employed over 90 days) non-professional FSA employees located in the KC metropolitan area (statutory exclusions)
MISSISSIPPI	AFGE Local 1031 – CBA	September 2000	<ul style="list-style-type: none"> • Either party may reopen • All non-professional FSA employees located in the State of Mississippi (statutory exclusions)
MONTANA	AFGE Local 1585 – CBA	February 2006 Three-year duration	<ul style="list-style-type: none"> • Automatic renewal in one-year intervals • All professional and non-professional FSA employees located in the State of Montana (statutory exclusions)
NEW JERSEY	AFGE Local 2831 – CBA	June 15, 1987 Three-year duration	<ul style="list-style-type: none"> • Automatic renewal in one-year intervals • All professional and non-professional and temporary (employment is one year or more) FSA employees located in the State of New Jersey (statutory exclusions)
NEW MEXICO	AFGE Local 1019 – CBA	October 1, 1997	<ul style="list-style-type: none"> • Remains in effect until a new mutually-agreed upon agreement is ratified • All non-professional General Schedule (GS) and Wage Grade (WG) federal employees, employed by USDA, FSA, New Mexico



6 Labor Relations Information (Continued):

A. Collective Bargaining Agreements (Descriptions) (Continued)

AREA	UNION	EFFECTIVE DATE	DESCRIPTION
NEW YORK	AFGE Local 2831 – CBA	July 15, 2003 Three-year duration	<ul style="list-style-type: none"> • Automatic renewal in one year intervals • All FSA employees located in the State of New York (statutory exclusions)
NORTH DAKOTA	AFGE Local 888 – CBA	April 19, 2000	<ul style="list-style-type: none"> • Duration will remain in effect until superseded by a term negotiated agreement or reopened by mutual agreement between the parties • All General Schedule federal employees of the USDA, FSA, North Dakota (statutory exclusions)
OKLAHOMA	AFGE Local 3354 – CBA	January 8, 2001 Three-year duration	<ul style="list-style-type: none"> • Automatic renewal in one year intervals • All professional and non-professional FSA employees located in the State of Oklahoma (statutory exclusions)
PUERTO RICO	AFGE Local 0055 – CBA	July 23, 1998 Three-year duration	<ul style="list-style-type: none"> • Automatic renewal in one year intervals • All non-professional FSA employees located in Puerto Rico (statutory exclusions)
ST. LOUIS, MISSOURI	AFGE Local 3354 – CBA	February 1, 1993 Five-year duration	<ul style="list-style-type: none"> • Automatic renewal in one year intervals • All permanent and temporary non-professional FSA employees located in St. Louis, Missouri (statutory exclusions)
TEXAS	AFGE Local 571 – CBA	Three-year duration	<ul style="list-style-type: none"> • Automatic renewal in one year intervals • All FSA employees located in Texas (statutory exclusions)
WASHINGTON, D.C.	AFSCME Local 3925 – CBA	January 30, 2008 Four-year duration	<ul style="list-style-type: none"> • Automatic renewal in increments of one year intervals • All FSA employees located in the Washington, D.C. metropolitan area (statutory exclusions)



6 Labor Relations Information (Continued):

A. Collective Bargaining Agreements (Descriptions) (Continued)

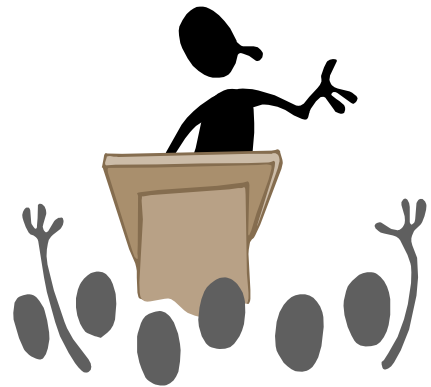
AREA	UNION	EFFECTIVE DATE	DESCRIPTION
WASHINGTON, D.C.	AFSCME Local 3976 – CBA	September 1, 2005 Four-year duration	<ul style="list-style-type: none"> • Automatic renewal in increments of one year intervals • All professional and non-professional employees employed by USDA, Foreign Agricultural Service (FAS) in the Washington, D.C. metropolitan area (statutory exclusions)
WASHINGTON, D.C.	AFSA/FAS – CBA	February 6, 2003 Four-year duration	<ul style="list-style-type: none"> • Automatic renewal in increments of one year intervals • All Foreign Service employees employed by FAS worldwide (statutory exclusions)

B. Negotiations (Questions and Answers)

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Q. What is the "duty to bargain?"

The duty to bargain concerns when and whether parties are obliged to negotiate under the Statute. Absent any limitations that the parties voluntarily place on when or how they will engage in negotiations, there are three basic situations that trigger the statutory duty to bargain: (1) term negotiations for a contract at the level of exclusive recognition; (2) midterm union initiated bargaining during the term of an agreement or union initiated bargaining after expiration of a contract; and (3) in response to a management change during the term of a contract or after a contract expires.



Q. What are term negotiations?

The Statute provides that parties to an exclusive bargaining relationship are required to negotiate a collective bargaining agreement upon request of either party at the level of exclusive recognition. These are term negotiations.





6 Labor Relations Information (Continued):

B. Negotiations (Questions and Answers) (Continued)

Q. What is union initiated midterm bargaining?

The Authority has adhered to the view of the D.C. Circuit that the duty to bargain in good faith imposed by the Statute requires an agency to bargain during the term of a collective bargaining agreement on negotiable union initiated proposals concerning matters that are not "covered by" the collective bargaining agreement, unless the union has waived its right to bargain.

Q. What is change bargaining?

Prior to implementing a change in a condition of employment of bargaining unit employees, an agency is required to provide the exclusive representative with notice and an opportunity to bargain over those aspects of the change that are within the scope of bargaining under the Statute. When an agency exercises a reserved management right and the substance of the decision is not itself subject to negotiation, the agency is nonetheless obligated to bargain over the procedures to implement that decision and appropriate arrangements for unit employees adversely affected by that decision, but only if the resulting changes have more than a de minimis effect on conditions of employment. Where an agency institutes a change in conditions of employment and the change is itself substantively negotiable, the agency must negotiate over the decision to make the change, rather than just procedures and appropriate arrangements.

Q. What is the duty to bargain in good faith?

The Statute requires the parties to bargain in good faith. This requires the parties to meet and negotiate for the purpose of arriving at a collective bargaining agreement. The parties have the mutual obligation to select authorized representatives who meet at reasonable times and bargain to reach agreement with respect to the conditions of employment affecting bargaining unit employees. If requested by either party, the parties are required to execute a written document incorporating any collective bargaining agreement reached. The parties must demonstrate a sincere resolve to reach a collective bargaining agreement.

Q. What is the "scope of bargaining?"

The scope of bargaining concerns what parties are required to negotiate under the Statute. Only matters that involve conditions of employment of bargaining unit employees are required to be bargained.

Q. What are "conditions of employment?"

Conditions of employment generally refer to those personnel policies, practices, and other matters, whether established by rule, regulation, or otherwise, which affect working conditions.



6 Labor Relations Information (Continued):

B. Negotiations (Questions and Answers) (Continued)

Q. Does the scope of bargaining depend on the size of the bargaining unit or the level of recognition within the agency?

Generally no. For example, the scope of bargaining for a new contract for a unit composed of 10 employees is identical to the scope of bargaining for a new contract covering 60,000 employees. Once the statutory duty to bargain is triggered, the scope of that bargaining remains a constant. Similarly, a level of management above the level of exclusive recognition may not lawfully limit the scope of bargaining at the level of exclusive recognition. Although higher levels of management may make management decisions binding on management at a lower level within the organization, higher level management may not lawfully remove matters from the bargaining table that are otherwise within the scope of bargaining merely by instructing the lower level that they have no discretion to bargain over certain matters.

Q. What is negotiability?

The concept of negotiability concerns whether a party is required to bargain over a particular matter. If a proposal is nonnegotiable, a party is not required by the Statute to engage in collective bargaining over that proposal. Thus, the concept of negotiability has little relationship to the merit of the proposal. If the matter is negotiable, it is within the scope of bargaining. Of course, as noted above, even negotiable matters are not required to be bargained unless there is a corresponding duty to bargain.

Q. How do Regional Offices become involved in negotiability disputes?

Often, issues relating to whether a proposal is negotiable arise in the context of an unfair labor practice charge alleging a unilateral change in a condition of employment without fulfilling the statutory duty to bargain. In those situations, the Regions work with the parties to reach either a substantive resolution of the dispute or an agreement to return to the bargaining table. In so doing, the Regions often are involved in assisting the parties in developing proposals that are negotiable under the Statute. However, if an agency implements a change in a condition of employment in the face of a negotiable proposal timely submitted by a union, the implementation is an unfair labor practice.



6 Labor Relations Information (Continued):

B. Negotiations (Questions and Answers) (Continued)

Q. Should a party submit bargaining proposals prior to filing an unfair labor practice charge or a negotiability appeal?

Yes. In the General Counsel's view, parties would be better served if the party seeking to negotiate formulates negotiable proposals to present to the other party rather than only filing an unfair labor practice charge or negotiability appeal. Only then will the other party be able to evaluate if the proposal is negotiable, rather than relying on a general position that a topic is nonnegotiable. For example, it is possible that the agency never intended to refuse to bargain over any particular proposal but merely set forth its view that the decision which triggered the request to bargain was the exercise of a management right. Similarly, to obtain a negotiability determination by the Authority, a union needs to present an actual proposal to the agency.

Q. Is it important to know the rules of negotiability to bargain successfully in the Federal sector?

Yes. Although many parties bargain by utilizing "pre-decisional involvement" and interest-based methods, most parties at some occasion find themselves drafting proposals and dealing with the legal doctrine of negotiability. The parties need to understand these legal rules in order to obtain the maximum benefit from the scope of bargaining under the Statute.

Q. What is a "permissive" subject of bargaining?

A permissive subject of bargaining is a matter outside the scope of bargaining. Bargaining is not required, but it is not prohibited. Examples of permissive subjects of bargaining are proposals that directly implicate supervisors' conditions of employment and matters that place limitations on the exercise of a statutory right.

Q. Are parties allowed to bargain over matters which are not conditions of employment?

Yes. Parties are fully empowered to bargain over, and to choose to agree to, a contract proposal that does not concern a condition of employment, such as procedures for applying for supervisory positions or competitive areas, because such proposals address permissive subjects of bargaining. Once an agency and a union agree to such a proposal, it is enforceable provided that it is otherwise consistent with the Statute. Once such matters are included in a collective bargaining agreement, the provisions are not subject to section 7114(c) agency head disapproval simply because they do not involve a condition of employment. Although bargaining is not required and a party cannot insist to impasse on such matters, bargaining is not prohibited.





6 Labor Relations Information (Continued):

B. Negotiations (Questions and Answers) (Continued)

Q. Are parties allowed to bargain over limitations on their statutory rights?

Yes. Parties are not required to negotiate limits or conditions on the exercise of their statutory rights, but they are not precluded from doing so if they deem it in their best interest. It is not unlawful for either party in collective bargaining to make proposals which limit or condition the exercise of statutory rights. For example, there is no duty to bargain below the level of exclusive recognition, but the parties may choose to bargain over certain matters at local levels. Again, once an agency and a union agree to such a permissive proposal, it is enforceable provided that it is otherwise consistent with the Statute.

Q. Is bargaining precluded over a matter just because a matter is addressed in a law or government-wide regulation?

No. The Statute does not totally preclude bargaining over matters addressed in law or government-wide regulation. Rather, as long as a proposal does not conflict with the law or government-wide regulation, and the law or government-wide regulation does not divest the agency of discretion over the matter addressed in the proposal, the matter may be subject to negotiations.

Q. What are management rights?

The management rights clause in the Statute, section 7106(a)(1) and (2), sets forth those matters which are outside the scope of bargaining. These subjects are commonly referred to as prohibited subjects of bargaining.

Q. What are elective subjects of bargaining?

Elective subjects of bargaining, also referred to as permissive, are set forth in section 7106(b)(1) of the Statute. Parties may, but are not required to, bargain over section 7106(b)(1) matters. Should an agency and union agree upon a section 7106(b)(1) subject, similar to a matter that is not a condition of employment, that contract clause may not be disapproved under section 7114(c) agency head review and is enforceable in arbitration.





6 Labor Relations Information (Continued):

B. Negotiations (Questions and Answers) (Continued)

Q. What is an appropriate arrangement?

Appropriate arrangements are exceptions to management's exercise of its reserved rights. A proposal that directly affects a section 7106(a) or (b)(1) management right may nonetheless be negotiable if it qualifies as an appropriate arrangement. The exercise of management rights are "[s]ubject to subsection (b)" of section 7106. Proposals that qualify as procedures and appropriate arrangements under section 7106(b)(2) and (3) of the Statute are within the scope of bargaining, even though they may limit some of management's discretion in exercising its section 7106 rights. Similarly, the management rights set forth in section 7106(b)(1) of the Statute are outside the mandatory scope of bargaining, although management may elect to bargain over these elective subjects. Again, even if management elects not to bargain section 7106(b)(1) rights, appropriate arrangements and procedures concerning those elective rights are within the scope of bargaining.

Q. Should a party understand the legal tests for determining whether a proposal is an appropriate arrangement before drafting such a proposal?

Yes. Many disputes over whether a proposal is negotiable or not center initially around whether the proposal interferes with a management right (section 7106(a) or (b)(1)), and if it does, whether the proposal constitutes an appropriate arrangement. In the General Counsel's view, parties may not be gaining the entire benefits of the Statute if they do not focus on creating appropriate arrangement proposals.

Q. When must parties bargain over appropriate arrangements?

Prior to bargaining over negotiable proposals there must be a statutory duty to bargain. Once there is such a duty to bargain, however, the scope of that bargaining remains constant. Thus, during term negotiations, all proposals within the scope of bargaining under the Statute are bargainable. Similarly, during union initiated bargaining during the term or after the expiration of a contract, proposals that are within the Statute's scope of bargaining are subject to bargaining, absent other contractual constraints. When management makes a change in a condition of employment, the duty to bargain over appropriate arrangements is triggered if the change has more than a de minimis impact on employees' working conditions. This test triggers the duty to bargain and does not determine whether a particular proposal is within the scope of bargaining under the Statute.





6 Labor Relations Information (Continued):

B. Negotiations (Questions and Answers) (Continued)

Q. What is the legal test for an appropriate arrangement?

In determining whether a proposal is within the duty to bargain under section 7106(b)(3), the Authority initially determines whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right. An arrangement must seek to mitigate adverse effects flowing from the exercise of a protected management right. Further, the claimed arrangement must also be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of a management's right. If the proposal is an arrangement, the Authority then determines whether it is appropriate, or whether it is inappropriate because it excessively interferes with a management right. In doing so, the Authority weighs the benefits afforded to employees under the arrangement against the intrusion on the exercise of management's right.

Q. How can parties develop negotiable appropriate arrangement proposals?

Proper attention in developing proposals in response to the exercise of a management right and during the course of bargaining by both parties allows the parties to develop meaningful negotiable proposals and affords the parties the opportunity to actually bargain over the issue instead of arguing over what they will bargain about. The concept of negotiability only means that there is bargaining over the proposal, not that either party must agree to the proposal. Unfortunately, a few parties spend more time and effort arguing over whether they should be bargaining rather than actually bargaining over the matter at issue. To assist the Regions when working with parties to avoid negotiability disputes and to concentrate their efforts on effectuating collective bargaining rather than arguing over whether there should be bargaining, the Guidance presents and develops the following process:

- (a) identify the management right being exercised;
- (b) identify the adverse affect;
- (c) identify the adversely affected employees; and
- (d) develop meaningful proposals that are appropriate.



6 Labor Relations Information (Continued):

B. Negotiations (Questions and Answers) (Continued)

Q. When will the repudiation of a contract clause concerning a section 7106(a) management right be an unfair labor practice?

Disputes over the interpretation and application of an existing contract clause sometimes lead an agency to repudiate that clause based on its belief that the clause affects a section 7106(a) management right. In these circumstances, if the contract clause was an arrangement when negotiated, the Authority will enforce that clause unless it "abrogates" a section 7106(a) management right. Under this legal analysis, even though the clause may have been nonnegotiable at the time of bargaining, i.e., although an arrangement, the clause excessively interfered with a management right, once it has been negotiated into a contract that has survived section 7114(c) agency head review, the applicable legal test changes from excessive interference to abrogation.

Q. What are section 7106(b)(2) procedures?

Procedures which management officials of the agency observe in exercising any authority under section 7106(a)(1), (a)(2) and (b)(1) are negotiable. However, unlike appropriate arrangements, the Authority has held that proposals on procedures cannot "directly interfere" with a management right. The current legal test for identifying procedures has been questioned. This presents an opportunity for a party to develop a test case to present to the Authority to obtain an understanding of the meaning of procedures under section 7106(b)(2) of the Statute.

Q. How can parties avoid negotiability disputes?

Proper utilization of a pre-decisional process and the use of an interest-based problem-solving approach to statutory collective bargaining could avoid negotiability disputes. The Guidance offers other suggestions on how the parties may further discuss the dispute in an attempt to return to the process of collective bargaining:

- (a) draft proposals clearly and plainly;
- (b) do not confuse the concept of negotiability with the merits of the proposal;
- (c) unions should curtail bargaining based on a dispute over negotiability only as a last resort;
- (d) determine whether the agency believes the entire proposal or just a portion or phrase of the proposal is nonnegotiable;
- (e) explore why the agency believes the proposal is nonnegotiable;
- (f) discuss the purpose of the proposal; and
- (g) ensure there is agreement on the meaning of the proposal and an understanding why the agency believes the proposal to be nonnegotiable before exploring litigation alternatives.





6 Labor Relations Information (Continued):

C. Formal Discussions and Representational Rights (Questions and Answers) www.FLRA.gov

Q. What is the purpose of the formal discussion right?



The Statute grants a union the right to be represented at a formal discussion in order to represent the institutional interests of the exclusive representative. The intent is that the union's presence and participation will enable the meeting to be successful and productive by, for example, asking questions to clarify the matters being discussed and avoiding misunderstandings.

Q. What are the elements of a formal discussion?

In order for the section 7114(a)(2)(A) formal discussion right to exist, there must be: (1) a discussion; (2) which is formal in nature; (3) between at least one or more agency representatives and one or more unit employees or their representatives; (4) concerning any grievance or personnel policy or practices or other general condition of employment.

Q. Does there have to be an actual dialogue or debate between agency officials and employees for a discussion to occur?

No. A meeting is synonymous with a discussion so a meeting for the sole purpose of making a statement or announcement, rather than to engender dialogue, is a formal discussion.

Q. What makes a discussion formal?

The Authority examines the purpose and nature of a discussion, as well as the manner in which the meeting was arranged and conducted to determine whether a discussion is formal in nature. Formality is distinguished from impromptu, on the job discussions, and discussions involving one employee and a supervisor about such matters as performance.

Q. What are some of the factors the Authority examines to decide formality?



Some of the factors the Authority examines are: (1) the status of the individual who held the discussion; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meetings for the discussions were called; (5) how long the discussions lasted; (6) whether a formal agenda was established for the discussions; and (7) the manner in which the discussions were conducted.



6 Labor Relations Information (Continued):

C. Formal Discussions and Representational Rights (Questions and Answers) (Continued)

Q. Who must participate for there to be a formal discussion?

A representative of the agency must participate in a meeting with unit employees to trigger a union representational right

Q. What has to be the subject matter to be a formal discussion?

To be a formal discussion, the meeting must concern either "any personnel policy or practices or other general condition of employment" or a "grievance."

Q. What is "any personnel policy or practices or other general condition of employment"?

"Any personnel policy or practices" are general rules applicable to agency personnel. A "general condition of employment" concerns conditions of employment affecting unit employees generally.

Q. What is a "grievance" for purposes of formal discussions?

The term "grievance" for formal discussion purposes is defined in the section 7103(a)(9) broad statutory definition. Thus, the initial, informal stages of a grievance procedure and statutory appeals have been found to be grievances for formal discussion purposes.

Q. Does an actual grievance have to be filed?

No. To be considered a "grievance" for purposes of a formal discussion, the matter does not have to be subject to the negotiated grievance procedure.

Q. Can a meeting in progress change into a formal discussion?

Yes. A meeting that does not begin as a formal discussion, may nonetheless develop into or become a formal discussion once all of the elements have been met.

Q. Is a potential grievance sufficient to trigger the formal discussion right?

There are differing views. One view is that a potential grievance is sufficient to trigger the formal discussion right. The other is that to be a grievance for formal discussion purposes, there is a need to be either a meeting that takes place where a final decision has been made by the agency, a statutory procedure has been invoked, or an informal or formal negotiated grievance has been filed.



6 Labor Relations Information (Continued):

C. Formal Discussions and Representational Rights (Questions and Answers) (Continued)

Q. What type of notice of the meeting has to be given by the agency to the union?

The Statute requires prior notification so that the union has the opportunity to choose its own representative. Thus, "actual representation" at the meeting is not sufficient if the union did not have sufficient notice to choose its own representative. However, where a union official receives "actual notice" of a meeting, but does not receive "formal notice" as a union representative, the Authority determines whether that receipt was sufficient to establish that the union had an opportunity to designate a representative of its own choosing and to be represented.

Q. To what extent can a union representative participate at the meeting?

The right to be represented encompasses the opportunity to speak, comment and make statements, although it does not extend to taking charge of, usurping or disrupting the meeting.

Q. What is the remedy for a formal discussion unfair labor practice?

In addition to a traditional cease and desist order and a remedial posting, the Authority affirmatively orders the agency to provide prior notice to the union and the opportunity to be represented at any formal discussions. A nontraditional remedy for a formal discussion violation is to re-hold the meeting to enable the union to ask questions and make comments as if it had been given notice of the meeting and an opportunity to actively participate, as required by the Statute or to convene a meeting among the unit employees who attended the formal discussion on duty time at the same location and for the same time period to allow the union to respond to the discussion at the meeting and answer employee questions about the subject matter.

Q. What are the roles of the parties at a formal discussion?

An agency representative's role is to conduct the meeting and accomplish its purpose, whether it is to merely impart information to employees, give guidance or instructions, or obtain employee feedback on work-related issues. The union's role is to actively participate on behalf of the unit employees and present, as appropriate, its institutional perspective.



6 Labor Relations Information (Continued):

C. Formal Discussions and Representational Rights (Questions and Answers) (Continued)

Q. What are some strategies to avoid formal discussion conflict?

These are some suggested strategies to implement the formal discussion right without creating conflict:

- a. The union designates certain officials to receive notice of formal discussions.
- b. Should a union learn of a scheduled formal discussion, whether or not the union believes the notice was proper, the union should inquire of the agency, rather than not attend and claim lack of notice.
- c. The parties can engage in a constructive dialogue in an attempt to accommodate their respective interests when the union claims that the representative of choice is unavailable for the scheduled date of the meeting.
- d. Agencies share with their union counterpart information that will enable the union to be an effective participant at the meeting to ensure a successful meeting.
- e. The parties jointly decide how they will implement the formal discussion right, such as developing a protocol so that disputes about the degree, timing and character of the union's participation does not become an issue for disagreement, conflict and litigation, overshadowing the importance of the subject matter of the meeting.
- f. An agency during the meeting makes it clear that it is aware of its responsibilities under the Statute and contract and intends to fulfill those obligations with respect to the subject matter.
- g. The parties agree to a useful pre-arrangement regarding notice, sharing information and participation at routinely scheduled formal discussion meetings.
- h. The parties agree upon a protocol to identify factors to guide them on how notice is given and meetings are scheduled.

Q. What constitutes a bypass of the exclusive representative?

In certain situations, an agency must deal only with the union that exclusively represents the bargaining unit employees. The agency may not deal with the employees directly, even if the agency offers the union an opportunity to be present and to actively participate. Rather, the union can insist that the agency only deal with it. The failure of an agency to deal only with the union under these circumstances is a bypass and an unfair labor practice.



6 Labor Relations Information (Continued):

C. Formal Discussions and Representational Rights (Questions and Answers) (Continued)

Q. What are some examples of when the agency must deal only with the union?

One example is a meeting over a grievance under the parties' negotiated grievance procedure. Another is when an agency deals with employees over matters, such as a new parking policy, that should be bargained with the union or when an agency is bargaining with a union but then starts to deal with the employees over the same matter.

Q. What are some strategies to avoid bypass situations?

It is sometimes difficult for parties to distinguish an agency's unlawful bypass of an exclusive representative from a lawful agency communication or a meeting with unit employees. One strategy is simply to refrain from meeting alone with any employee involved in a grievance filed under the negotiated agreement. Also, an agency should keep the union informed of its intentions to communicate with unit employees over conditions of employment. Many times, a bypass allegation accompanies situations where a union is not given the opportunity to be present at a formal discussion.

Q. What is the right to representation in a grievance filed under the negotiated grievance procedure?

When a union files a grievance on behalf of an employee, the agency is required to deal only with the union over all matters pertaining to that grievance. Any dealing with the employee in the absence of the union would be a bypass of the union, as well as a formal discussion violation. If an employee elects to file a grievance on his/her own behalf, the union would not be the representative of the employee for purposes of the grievance, but still must be afforded the opportunity to be present during the processing of the grievance.

Q. What are some strategies to avoid disputes over representation at grievances?

An agency should avoid meeting alone with any grievant who has filed a grievance under the negotiated grievance procedure, whether the grievance was filed by the union on behalf of the employee, or whether the employee filed the grievance and elected to represent him/herself or have the union as a representative. Similarly, once an agency has recognized the union as a representative in a dispute between a unit employee and the agency, the agency should not deal alone with the employee.



6 Labor Relations Information (Continued):

C. Formal Discussions and Representational Rights (Questions and Answers) (Continued)

Q. How is a right to representation created by contract?

Parties may negotiate the right to representation into their contract. The parties are free to identify those situations and conditions where union representation is appropriate. As a contract right and not a statutory right, any dispute over the implementation or breach of the right constitutes a grievance and not an unfair labor practice, unless the breach qualifies as a repudiation.

Q. How else can contracts concern the right to representation?

The parties may also define in their contract how they will exercise and implement their statutory rights, such as the manner in which notice will be given for formal discussions. As with contract rights establishing a right to representation, any dispute over whether a party has complied with a particular contract provision concerning how a statutory right would be exercised would be a grievance and not an unfair labor practice, unless it is a repudiation. However, if a party charges that the other has not complied with a statutory right (rather than the particular contract provision), the contract provision that limits or defines the implementation of that statutory right may be a defense to the unfair labor practice allegation.

Q. How is a right to representation created by practice?

Parties also may create a right to representation through a practice. Under these circumstances, that representational practice may not be modified by either party without fulfilling the statutory bargaining obligation, as is required before any other established condition of employment may be changed.

Q. What are some strategies to avoid disputes over representation rights created by contract and past practices?

Any contract rights to representation should be as clear as possible, with a joint bargaining history and examples to guide the employees, union officials, and managers. Similarly, contract language implementing a statutory right or which place some sort of limitation on existing statutory rights should be equally clear. The parties should understand that they are creating contractual rights and obligations and that, absent a repudiation, any unresolved dispute is a grievance and not an unfair labor practice.



6 Labor Relations Information (Continued):

D. Weingarten Rights (Questions and Answers)

Q. What are Weingarten Rights?

Section 7114(a) (2) (B) states: (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation.

Q. What elements must be present to be subject to Weingarten Rights?

The following four elements must be present:

- 1) An examination of an employee in connection with an investigation. To be an investigatory examination, the meeting must involve the questioning of an employee as part of an inquiry to ascertain facts.
- 2) The examination is conducted by an agency representative. An agency representative includes supervisors, managers, personnel specialists, internal agency auditors and inspectors general.
- 3) The employee reasonably believes disciplinary action against him or her may result.
- 4) The employee requests representation. The union's entitlement to be present occurs only at the employee's request. If the employee does not request union representation, management may hold the meeting without notifying the union.

The exception to this would be if the negotiated contract required management to notify the union regardless if the employee has made a request.

Q. What can a union representative do at a Weingarten meeting?

- 1) The union representative may consult with the employee prior to the start of the meeting in order to get a general understanding of the circumstances and consult with the employee during the meeting.
- 2) The union representative may object to questions asked by the supervisor, suggest alternative or add additional questions, suggest others who have knowledge of the facts.
- 3) Review with the employee any documents that the management representative shows to the employee.



6 Labor Relations Information (Continued):

D. Weingarten Rights (Questions and Answers) (Continued)

Q. What can't the union representative do at a Weingarten meeting?

- 1) Answer the questions for the employee.
- 2) Prohibit the supervisor from asking questions or requiring the supervisor to ask any question.
- 3) Unduly delay or disrupt the meeting by conferring with the employee about every question.
- 4) Require the supervisor to hand over documents or other information about the incident.

If a supervisor involved in an investigative meeting is unsure about the behavior of the union representative, he or she may end the meeting to get advice from the Employee and Labor Relations Specialist.



6 Labor Relations Information (Continued):

E. Union Information Requests

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In IRS, KC, the Authority set forth its new analytical approach to determine whether information is "necessary" under section 7114(b)(4) of the Statute. The Authority adopted the "particularized need" standard for determining the necessity of all requested information, concluding that it will apply the same approach in deciding whether information is necessary, regardless of the type of documents requested.

In defining the term "particularized need", however, the Authority did not require the "heightened level of 'need' for disclosure of intramanagement guidance that a union must establish to outweigh the countervailing agency interests" identified by the D.C. Circuit in National Labor Relations Board v. FLRA, 952 F. 2d 523 (D.C. Cir. 1992) (NLRB v. FLRA). Rather, the Authority noted that the D.C. Circuit had used the phrase "particularized need" in varying contexts, causing "confusion." The term "particularized need" was originally introduced by the D.C. Circuit when analyzing requests for intra management guidance in NLRB v. FLRA, but later was applied by the court regardless of the type of documents or countervailing interests at issue. When the Authority adopted the NLRB v. FLRA approach in National Park Service, National Capital Region, United States Park Police, 48 FLRA No. 127, 48 FLRA 1151 (1993), "the Authority did not address this apparent distinction." IRS, KC, at p.667. The Authority has now clarified the matter by deciding to use the term "particularized need" consistent with its use by the D.C. Circuit in later decisions, such as United States Department of Veterans Affairs, Washington, D.C. v. FLRA, 1 F.3d 19 (D.C. Cir. 1993) and United States Department of Justice, Bureau of Prisons, Allenwood Prison Camp, Montgomery, Pennsylvania v. FLRA, 988 F. 2d 1267 (D.C. Cir. 1993).

Under this interpretation, a union requesting information under section 7114(b)(4) of the Statute must establish a particularized need for requested information "by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information and the connection between those uses and the union's representational responsibilities under the Statute." IRS, KC, at p. 669. The Authority noted that this requirement "will not be satisfied merely by showing that requested information is or would be relevant or useful to a union." "Instead, a union must establish that requested information is 'required in order for the union adequately to represent its members.'" IRS, KC, at p. 669-670.



6 Labor Relations Information (Continued):

E. Union Information Requests (Continued)

In addition to satisfying the particularized need standard in order to trigger the statutory duty to furnish the requested information, the union request must contain sufficient particularity to allow an agency to make a decision upon the request. The Authority now requires that "[t]he union is responsible for articulating and explaining its interests in disclosure of the information.

Satisfying this burden requires more than a conclusory or bare assertion. Among other things, a request for information must be sufficient to permit an agency to make a reasoned judgment as to whether the information must be disclosed under the Statute." IRS, KC, at p. 669-670. As to specificity, the Authority will not require the request to "be so specific as, for example, to require a union to reveal its strategies or compromise the identity of potential grievants who wish anonymity." "Moreover, the degree of specificity required of a union must take into account the fact that, in many cases, ... a union may not be aware of the contents of a requested document." IRS, KC, at p. 669-670.

With respect to an agency's defense to furnishing information, the Authority found that there is no presumptive anti-disclosure interests in non-intramangement guidance information. Rather, "[a]n agency denying a request for information under section 7114(b)(4) must assert and establish any countervailing anti-disclosure interests." "Like a union, an agency may not satisfy its burden by making conclusory or bare assertions; its burden extends beyond simply saying 'no'." IRS, KC, at p. 669-670.

Where parties are unable to agree on whether or to what extent requested information must be provided, the Authority stated that an unfair labor practice will be found if a union has established a particularized need for the requested information as discussed above and either: (1) the agency has not established a countervailing interest; or (2) the agency's established countervailing interest does not outweigh the union's demonstration of particularized need. Of course, the requesting union must also establish that the other elements in section 7114(b)(4) have been met.



6 Labor Relations Information (Continued):

E. Union Information Requests (Continued)

Particularized Need Standard

To establish a particularized need for requested information, the union must establish that the requested information is actually required for the union to fulfill its representational responsibilities as the exclusive representative. The assertions of need advanced by the union must demonstrate that the information requested is required for the union to adequately represent unit employees. Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Dallas, Texas, 51 FLRA No. 49 (1995). This requires the Regions when investigating a refusal to furnish requested information to discover with specificity:

1. Exactly why did the union need the requested information;
2. What would the union have used the requested information for if it had been furnished; and
3. How would that use of the information relate to the union's role as the exclusive representative.

Absent discovery of evidence that establishes that the requested information was required in order for the union to adequately represent its members; i.e., absent the establishment of a particularized need, the unfair labor practice charge should be dismissed, absent withdrawal, consistent with the Office of the General Counsel Quality of Unfair Labor Practice Investigations Policy and Scope of Investigations Policy.





6 Labor Relations Information (Continued):

E. Union Information Requests (Continued)

Sufficiency of Union Request for Information

Even if a charging party labor organization presents evidence of a particularized need for information not furnished, the Region must still ascertain whether the union's request for that information was sufficient so as to trigger an agency's statutory duty to furnish data.

A valid request requires that the union must articulate and explain to the agency its interests in the disclosure of the information. This requires the Regions when investigating a refusal to furnish requested information to discover with specificity:

1. Was the request specific enough to permit the agency to make a reasoned judgment as to whether the information must be disclosed under the Statute;
2. Did the Union articulate and explain its interests in disclosure of the information; and
3. Did the union respond properly to any agency requests for further clarification as to why the union needed the information; the purpose for which the union would use the information; and how that use relates to the union's representation of the unit employees, without revealing the union's strategies or compromising the identity of a potential grievant who wishes anonymity

The Regions should investigate whether requests for information meet this test, just as the Regions in unilateral change cases investigate requests to bargain and in investigatory examination cases investigate requests for representation. A request may be oral, as well as written, or a combination of oral and written communications.. The Authority will not consider reasons supporting a request which are advanced for the first time by the General Counsel after issuance of a complaint rather than by the union in its request to the agency. U.S. Department of Veterans Affairs, Regional Office, St. Petersburg, Florida, 51 FLRA 47 (1995). Thus, a valid request is an essential element of any violation of section 7114(b)(4) of the Statute. Absent a finding by the Region that the request was sufficient so as to permit the agency to make such a reasoned judgment, the unfair labor practice charge should be dismissed, absent withdrawal, consistent with the Office of the General Counsel Quality of Unfair Labor Practice Investigations Policy and Scope of Investigations Policy.



6 Labor Relations Information (Continued):

E. Union Information Requests (Continued)

Agency Anti-Disclosure Interests

If a requesting union has established a particularized need based on a sufficient request for information under section 7114(b)(4), an agency may establish a countervailing interest in the disclosure of that information. When investigating a refusal to furnish information based on an agency's assertion of a countervailing anti-disclosure interest, the Region must ascertain:

1. Whether the agency informed the union in response to the request that it was asserting a countervailing anti-disclosure interest; and
2. Whether the agency has established such an anti-disclosure interest.

Personal Identifiers

Part 2 of this memorandum discusses, among other things, whether the release of personal identifiers (such as names, social security numbers or other information identifying a particular employee) renders the disclosure of that information contrary to the Privacy Act. However, in addition to Privacy Act restrictions on releasing personal identifiers, the Authority rarely finds any particularized need for the release of personal identifiers under section 7114(b)(4)(B) of the Statute.

In U.S. Department of Labor, Washington, D.C., 51 FLRA No. 41 (1995) (DOL), the Authority found that the union did not satisfy its burden of demonstrating that the requested information was required to adequately represent its members. The Authority held that the union had not established with the requisite specificity a need for the requested records. In addition, the Authority specifically stated that the union did not identify why it needed the name-identified documents.

It appears that the Authority will require the same degree of specificity when personal identifiers are requested; i.e., why the union needs the names or personal identifiers, the specific uses to which the union will put the personal identifiers and the connection between those uses and the union's representational responsibilities - as it requires when substantive information in documents is requested. Thus, when investigating unfair labor practice charges which concern a request for personal identifiers in documents, the Regions should apply the same particularized need analysis independently to the personal identifiers as it applies to the substance in the requested documents. For example, it is possible that the Authority could find a particularized need for the contents of documents but could find no particularized need for the same documents with personal identifiers. Similarly, the Authority requires that a particularized need be established for the time period covered by the requested documents. For example, there may be



6 Labor Relations Information (Continued):

E. Union Information Requests (Continued)

a particularized need for certain documents for a certain time period (such as one year) but no particularized need for those same types of documents for a greater time period (such as five years, as in DOL).

Also in DOL, the Authority held that an Administrative Law Judge cannot order the release of sanitized documents if the union requested only unsanitized documents and the complaint only alleged the refusal to provide unsanitized documents. An agency must have the opportunity to fully and fairly litigate the issue whether sanitized information should have been furnished.

Thus, when drafting information complaints, the Regions should ensure that all information complaints specifically plead whether the alleged violation is the failure to furnish sanitized or unsanitized documents. If the complaint alleges only unsanitized, consistent with DOL, the Region should not argue in the alternative the failure to furnish sanitized documents. If the union requested either sanitized or unsanitized and the agency refused both requests, the complaint should separately allege both refusals. Note, however, that a prerequisite to pleading a failure to furnish both unsanitized and sanitized documents is a sufficient union request for both types of documents.

Regional Office Decision Making Process

When an unfair labor practice charge is filed alleging a violation of section 7114(b)(4), the necessity of the requested information is in dispute and the parties are unable with the Region's assistance to agree on whether or to what extent requested information must be provided, the Region should follow the following decisional process:

Insufficient request or particularized need not established - If the investigation does not establish both a sufficient union request and a particularized need for the information, in addition to the other elements of section 7114(b)(4), the Region should dismiss the unfair labor practice charge, absent withdrawal, consistent with the Office of the General Counsel Quality of Unfair Labor Practice Investigations Policy and Scope of Investigations Policy.

No countervailing anti-disclosure interest - If a union has made a sufficient request and has established a particularized need, and the other elements in section 7114(b)(4) have been met, and if there is no assertion and establishment of countervailing anti-disclosure interests, absent settlement, complaint should issue consistent with the Office of the General Counsel Settlement Policy.



6 Labor Relations Information (Continued):

E. Union Information Requests (Continued)

Particularized need and countervailing anti-disclosure interests both established - If a sufficient request, a particularized need, and the other elements in section 7114(b)(4) are established, as well as countervailing interests, the Region should balance the needs and interests of the parties and determine whether the union's needs for the information outweigh the agency's interests against disclosure. In IRS, KC, the Authority also stated that it "expects the parties to consider, as we will in determining whether and/or how disclosure is required, alternative forms or means of disclosure that may satisfy both a union's information needs and an agency's interests in information." IRS, KC, at p. 671. Thus, in my view, a union's good faith and reasonable attempt to accommodate an agency's anti-disclosure interest and an agency's good faith and reasonable attempt to accommodate a union's need for information are factors which must be considered in determining whether a complaint, absent settlement, will issue alleging a violation of section 7114(b)(4) of the Statute. For example, an agency's reasonable offer of accommodation, rejected by a union, may constitute a valid response to an information request, resulting in dismissal of a charge, if the Region is unable to assist the parties in resolving their information dispute as discussed in Part 3 of this memorandum. Similarly, a union's reasonable offer to accept sanitized information, rejected by an agency, may result in issuance of an unfair labor practice complaint if the Region is unable to assist the parties in resolving their information dispute.

Agency failure to articulate its reasons for nondisclosure to the union - In situations where the Region finds a sufficient request and a particularized need for requested information, as well as satisfaction of the other elements in section 7114(b)(4), and the agency has refused to articulate to the union its reasons for nondisclosure or has refused to discuss with the union alternative methods to meet both its own and the union's interests, any complaint which issues alleging the failure to provide the information should also allege an independent bad faith bargaining unfair labor practice in violation of section 7116(a)(5) of the Statute. Similarly, even if the Region determines that there is no statutory requirement to furnish requested information, an agency refusal to articulate to the union its reasons for nondisclosure or a refusal to discuss with the union alternative methods to meet both its own and the union's interests should be alleged to be an independent bad faith bargaining unfair labor practice in violation of section 7116(a)(5) of the Statute. As a remedy the Region should seek an order requiring the agency to engage in such communication for future requests, but should not require disclosure of the information.





6 Labor Relations Information (Continued):

E. Union Information Requests (Continued)

PART 2 - THE PRIVACY ACT

SECTION 1 - THE RULE ESTABLISHED IN FAA, Westbury.

FOIA Exemption 6

In FAA, the Authority set forth the analytical approach to assess an agency's claims that disclosure of information requested under section 7114(b)(4) of the Statute would constitute a clearly unwarranted invasion of personal privacy within the meaning of FOIA Exemption 6 and, therefore, is prohibited from disclosure by the Privacy Act.⁽²⁾ The Authority concluded that an agency asserting that the Privacy Act bars disclosure is required to demonstrate: (1) that the information sought is contained in a "system of records" within the meaning of the Privacy Act; (2) that disclosure would implicate employee privacy interests; and (3) the nature and significance of those privacy interests. If an agency in an unfair labor practice proceeding makes the requisite showings, the Authority found that the burden then shifts to the General Counsel to: (1) identify a public interest cognizable under the FOIA; and (2) demonstrate how disclosure will serve that public interest.

The Authority explained that the only relevant public interest to be considered under the FOIA is the extent to which the requested disclosure would shed light on the agency's performance of its statutory duties, or otherwise inform citizens concerning the activities of the Government. In particular, the Authority held that the public interest in collective bargaining that is embodied in the Statute, or specific to a union in fulfilling its obligations under the Statute, will no longer be considered in analyzing the application of Exemption 6 of the FOIA.

If both the public interest cognizable under the FOIA and privacy interests are established, the Authority will balance the privacy interests of employees against the public interest in disclosure. If the balance leads to the conclusion that the privacy interests are greater than the public interest at stake, the requested disclosure would constitute a clearly unwarranted invasion of personal privacy under FOIA Exemption 6 and, therefore, that disclosure would be prohibited by law (the Privacy Act) under section 7114(b)(4) of the Statute. Accordingly, the agency would not be required to furnish the information, unless disclosure was permitted under another exception to the Privacy Act. If the public interest in disclosure is greater than the privacy interests that disclosure would be required under the FOIA (since it does not fall within FOIA Exemption 6). Since disclosure under the FOIA is an exception to the Privacy Act, disclosure of the information would not be prohibited by the Privacy Act.



6 Labor Relations Information (Continued):

E. Union Information Requests (Continued)

Routine Use

In U.S. Department of Transportation, Federal Aviation Administration, Little Rock, Arkansas, 51 FLRA No. 24 (1995) (FAA, Little Rock), the Authority addressed the routine use in the OPM/GOVT-2 system of records. This system of records covers most personnel related matters. OPM's routine use statement governing that system of records, identified as routine use "e," provides that records may be disclosed "to officials of labor organizations recognized under 5 U.S.C. chapter 71 when relevant and necessary to their duties of exclusive representation." 57 Fed. Reg. 35710 (1992). Accordingly, when requested information is contained in OPM/GOVT-2, it must be determined whether the requested information is "relevant and necessary" within the meaning of routine use "e."

The Authority had previously in National Treasury Employees Union and U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C., 46 FLRA No. 22, 46 FLRA 234, 243 (1992), adopted and applied OPM's interpretation of the routine use contained in FPM Letter 711-164 (September 17, 1992). In FAA, Little Rock, the Authority stated that it would continue to apply OPM's interpretation of the terms "relevant and necessary" for purposes of applying routine use "e" to all cases arising from conduct prior to the December 31, 1994 expiration of the FPM Letter.

As to those pending cases arising from conduct prior to December 31, 1994, the FPM Letter contains two requirements that a union must satisfy in order to establish that disclosure of requested information is consistent with routine use "e": (1) the information must be "relevant" to the express purpose for which it is sought, meaning that the nature of the information must bear a traceable, logical, and significant connection to the purpose to be served; and (2) the information must be "necessary," meaning that there are no adequate alternative means or sources for satisfying the union's informational needs. In clarifying this second requirement, the FPM Letter explains that it is to be determined on a case-by-case basis; the union "must show that it has a particularized need for the information in a form that identifies specific individuals, and that its information needs cannot be satisfied through less intrusive means, such as by releasing records with personally-identifying information deleted."

Based on OPM's interpretation of its routine use, the "relevance" of requested information must be shown for any requested information, including those portions of the information which identify particular individuals. It also must be established to trigger routine use "e" that the union has a particularized need for the information in a form that identifies specific individuals and that the union's interests in the information cannot be satisfied by any less intrusive means which does not identify particular individuals, such as deleting personally identifying information.



6 Labor Relations Information (Continued):

E. Union Information Requests (Continued)

Note the different approaches used in determining whether there is a particularized need for information under section 7114(b)(4) of the Statute and whether information is "necessary and relevant" within the meaning of the OPM routine use statements. Necessity under the Statute is determined under the IRS, KC particularized need standard, while "necessary and relevance" is determined consistent with the FPM letter.

The Authority also stated in footnote 10 in FAA, Little Rock that "[t]he consequence, if any, of the abolishment of the FPM Letter in cases arising after December 31, 1994, is not at issue in this case." Should a situation arise concerning a request for information after December 31, 1994: where the Region has determined a particularized need under IRS, KC exists for personally identifying information; the FOIA exception is determined not to be applicable; and OPM/GOVT-2 is the controlling system of records, the Region should submit the case for advice to determine whether the OPM routine use is applicable. Similarly, any information cases concerning whether another routine use is applicable should be discussed with the Office of the General Counsel prior to taking dispositive action.

SECTION 2 - INVESTIGATING WHETHER THE PRIVACY ACT BARS DISCLOSURE OF THE REQUESTED INFORMATION

The Regional Offices must ascertain whether the requested information is barred from disclosure by the Privacy Act. When investigating unfair labor practice charges alleging a refusal to supply information under section 7114(b)(4) of the Statute, the Regions should initially inquire whether the requested information is contained in a "system of records" under the Privacy Act, and if so, whether the information is disclosable either under: the FOIA (usually analyzing Exemption 6); a routine use for that system of records; or some other Exception to the Privacy Act.

The prohibition against disclosing information prohibited from disclosure by law is a statutory prohibition which cannot be waived by an agency. In pleading unfair labor practice complaints alleging violations of section 7114(b)(4) of the Statute, the Regions allege that the information which is the subject of the complaint is not barred from disclosure by law. Thus, even if not specifically raised by the agency in response to the union's request or during the investigation, the Regions should investigate and determine whether the Privacy Act bars disclosure of the requested information.



6 Labor Relations Information (Continued):

E. Union Information Requests (Continued)

This requires the Regions when investigating a refusal to furnish requested information to determine:

1. Whether the requested information is contained within a system of records under the Privacy Act;
2. If so, whether disclosure of that information would implicate privacy interests;
3. If so, the nature and significance of those privacy interests;
4. If there are employee privacy interests, whether there is a public interest in the requested information cognizable under the FOIA; and
5. If so, how disclosure of the information requested will serve that public interest.

Personal Identifiers

In cases subsequent to FAA, Westbury which concern requests for information containing personal identifiers, such as United States Air Force Headquarters, 442nd Fighter Wing (AFRES), Richards-Gebaur Air Force Base, Missouri, 50 FLRA No. 66, 50 FLRA 455, 460-61 (1995) (Richards-Gebaur AFB), the Authority has yet to find any support to establish that the release of personal identifiers enhances any public interest which has been articulated in the documents. Rather, the Authority consistently has found, as most recently in Department of Transportation, Federal Aviation Administration, Fort Worth, Texas, 51 FLRA No. 31 (1995), that "the public interest that would be served by disclosure of the requested information also could be substantially, if not equally, served by the disclosure of sanitized information which does not identify individual employees by name or other identifying information." In addition, the Authority has held that when requested documents concern only one name-identified employee, "it is not possible to redact the documents to protect the identity whose privacy is at stake." The fact that the "employees' identity is known to the Union does not lessen [the employee's] privacy interests." U.S. Department of Justice, Federal Correctional Facility, El Reno, Oklahoma, 51 FLRA No. 52 (1995).

Please contact the Office of the General Counsel prior to issuing complaint in any case where a requested document is contained in a system of records and the information request encompasses personal identifiers.



6 Labor Relations Information (Continued):

E. Union Information Requests (Continued)

Regional Office Decision Making Process

When an unfair labor practice charge is filed alleging a violation of section 7114(b)(4), the Privacy Act is implicated and the parties are unable with the Region's assistance to agree on whether or to what extent requested information must be provided, the Regions should be guided by this decisional process:

Not contained in a system of records under the Privacy Act - If the requested information is not contained in a system of records under the Privacy Act, the Privacy Act is not a bar to disclosure and, if the other elements of section 7114(b)(4) are met, the Regions should issue an unfair labor practice complaint, absent settlement, consistent with the Office of the General Counsel Settlement Policy.

Contained in a system of records but no FOIA public interest in disclosure or applicable routine use - If the requested information is contained in a system of records and the investigation does not reveal any cognizable public interest under the FOIA or any applicable routine use, the charge should be dismissed, absent withdrawal, consistent with the Office of the General Counsel Quality of Unfair Labor Practice Investigations Policy and Scope of Investigations Policy.

Contained in a system of records and FOIA public interest established - If the requested information is contained in a system of records and the investigation reveals a cognizable public interest under the FOIA, the Regions should balance the privacy interest of employees against the public interest in disclosure. If the public interest in disclosure outweighs the employee privacy interests, the information is disclosable under the FOIA and thus, as an exception to the Privacy Act, that law does not bar disclosure. If the balance tips in favor of the employee privacy interests, the FOIA Exemption is triggered and the information is not releasable under the FOIA. As such, the Privacy Act exception is not triggered and the Privacy Act bars disclosure. The Regions should then dismiss the charge, absent withdrawal, consistent with the Office of the General Counsel Quality of Unfair Labor Practice Investigations Policy and Scope of Investigations Policy. Please contact the Office of the General Counsel prior to issuing complaint in a case where a requested document is contained in a system of records and the Region concludes that a routine use is applicable.



6 Labor Relations Information (Continued):

E. Union Information Requests (Continued)

Agency failure to articulate its privacy interests to the union - In situations where the Region finds a sufficient request and a particularized need for requested information, as well as satisfaction of the other elements in section 7114(b)(4), and the agency has refused to communicate to the union that it is relying on the Privacy Act as a bar and has failed to explain to the union its privacy interests, any complaint which issues should allege an independent bad faith bargaining unfair labor practice in violation of section 7116(a)(5) of the Statute. Similarly, even if the Region determines that there is no statutory requirement to furnish requested information because disclosure is barred by the Privacy Act, an agency refusal to articulate to the union its reliance on the Privacy Act and to explain to the union its privacy interests, should be alleged to be an independent bad faith bargaining unfair labor practice in violation of section 7116(a)(5) of the Statute. As a remedy the Region should seek an order requiring the agency to engage in such communication for future requests, but should not require disclosure of the information.

Parties Can Use an Interest Based Approach to Resolve Information Disputes Prior to the Filing an Unfair Labor Practice Charge

The Regions should also encourage the parties to utilize an interest based approach to resolve themselves disputes over information requests prior to the filing of an unfair labor practice charge. The parties may follow these steps in resolving any dispute or the disclosure of information:

1. **Identify the particular information which is the subject of the disputed request.** Both parties should have the same understanding of exactly what information the union is requesting; including whether personal identifiers are to be included or may be deleted and the time period covered by the request.



2. **The union should articulate exactly why it needs the requested information.** The union should explain exactly how the union intends to use the requested information and how that use of the information relates to the union's role as the exclusive representative. This explanation should extend to each different type of information requested, as well as for the time period(s) covered by the request and the need for personal identifiers, if applicable.



6 Labor Relations Information (Continued):

E. Union Information Requests (Continued)



3. **The agency should articulate exactly what concerns it has about disclosing the information.** The agency should explain exactly what are its countervailing anti-disclosure interests; i.e., what concerns does the agency have in disclosing the information.
4. **The parties should then brainstorm alternatives as to how the union may obtain the information it requires while accommodating the agency's anti-disclosure interests.** The parties should explore alternative forms or means of disclosure. Again, the parties should focus not on whether the union has a statutory right to certain information in the format requested, but rather what information does the union require to adequately represent its members and how can that information be furnished to accommodate competing agency anti-disclosure interests.
5. **If the requested information is contained in a system of records under the Privacy Act, the union should explain how disclosure of the requested information, including any personal identifiers and the time period encompassed by the request, would shed light on the agency's performance of its statutory duties or otherwise inform citizens of the activities of the Government.**
6. **The agency should then explain the employee privacy interests in the information which are behind the agency's concerns in disclosing the information.**
7. **If the agency's concerns relate to the identification of particular employees the parties should jointly explore alternative ways to release the information without those personal identifiers.** For example, the agency could delete the personal identifiers and code the documents in a manner that allows for the grouping of the documents by category which does not identify individuals and which allows for later identification of the documents if further more targeted information is needed.

Footnotes Follow:

1/ Section 7114(b)(4) of the Statute provides that the obligation to bargain in good faith includes the obligation:

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.



6 Labor Relations Information (Continued):

E. Union Information Requests (Continued)

2/ The Privacy Act regulates the disclosure of any information contained in an agency "record" within a "system of records," as those terms are defined in the Privacy Act, that is retrieved by reference to an individual's name or some other personal identifier. 5 U.S.C. 552a(1),(4), (5). With certain enumerated exceptions, the Privacy Act prohibits the disclosure of personal information about Federal employees without their consent. Section (b)(2) of the Privacy Act provides that the prohibition against disclosure is not applicable if disclosure of the requested information would be required under the Freedom of Information Act, 5 U.S.C. 552 (FOIA). Exemption (b)(6) of the FOIA (Exemption 6) provides, in turn, that information contained in "personnel and medical files and similar files" may be withheld if disclosure of the information would result in a "clearly unwarranted invasion of personal privacy [.]" 5 U.S.C. 552(b)(6). If such an invasion would result, then disclosure is not required by the FOIA. In addition to the exception relating to the FOIA, Exception (b)(3) of the Privacy Act permits disclosure of information "for a routine use as defined in subsection (a)(7) of this section ..." 5 U.S.C. 552a(b)(3). Subsection (a)(7), in turn, defines routine use as "the use of such record for a purpose which is compatible with the purpose for which it was collected[.]"

