



DEPARTMENT OF THE NAVY  
OFFICE OF THE SECRETARY  
1000 NAVY PENTAGON  
WASHINGTON DC 20350-1000

SECNAVINST 12752.1A  
ASN (M&RA)/OCHR  
3 May 16

SECNAV INSTRUCTION 12752.1A

From: Secretary of the Navy

Subj: DISCIPLINARY ACTIONS

Ref: (a) 5 CFR Part 752  
(b) 5 U.S.C. Chapter 71  
(c) SECNAVINST 12711.2  
(d) 5 U.S.C. Chapter 75  
(e) 5 U.S.C. Chapter 43  
(f) 5 CFR Part 432  
(g) 5 CFR Part 792  
(h) 5 CFR Part 731  
(i) 5 CFR Part 315  
(j) 5 CFR Part 531  
(k) DoD Directive 1400.25 of 25 November 1996  
(l) DoD Directive 5500.07 of 29 November 2007

Encl: (1) Definitions and Acronyms  
(2) Action  
(3) Schedule of Offenses and Recommended Remedies

1. Purpose. To establish and implement policy, assign responsibilities, and prescribe procedures under references (a) through (l), for disciplinary actions in the Department of the Navy (DON).
2. Cancellation. SECNAVINST 12752.1 and DON Civilian Human Resources Manual (CHRM), Subchapter 752 (Dec 2003).
3. Definitions. See enclosure (1).
4. Applicability. This instruction applies to all career and career-conditional DON employees, except those in Defense Civilian Intelligence Personnel System positions, as outlined in references (a) through (l).
5. Policy. It is Secretary of the Navy (SECNAV) policy that discipline shall be used as a managerial tool to correct deficiencies in employee conduct and performance in a manner consistent with this instruction and references (a) through (l).

Discipline should not be punitive; it should serve as a deterrent to unacceptable conduct or performance and for correction of other situations that interfere with effective and efficient operations. In order to ensure high standards of government service and maintain public confidence in the DON, disciplinary actions and those performance-based actions initiated under the authority of reference (a) may be taken only for such cause as will promote the efficiency of the service.

a. Officials are encouraged to consider, when appropriate, the use of alternate discipline, such as last chance agreements and Alternative Dispute Resolution (ADR) to enhance communication and seek positive resolution of issues that might otherwise give rise to disciplinary actions and disputes related thereto.

b. Alternate Discipline Systems must be consistent with these policies and must meet requirements for due process and progressive discipline.

## 6. Responsibilities

a. The Assistant Secretary of the Navy (Manpower and Reserve Affairs). Issues disciplinary actions policy and delegates authority in the DON as appropriate.

b. The General Counsel of the Navy. In support of management prerogatives and human resources professionals' responsibilities, the General Counsel provides legal advice and services in the area of Civilian Personnel and Labor Law, and supervises the provision of legal services to DON commands, organizations, and activities by attorneys within the Office of the General Counsel (OGC).

c. The Deputy Assistant Secretary of the Navy (Civilian Human Resources) (DASN (CHR)). Manages and directs the disciplinary actions program in the DON.

d. The Department of the Navy/Assistant for Administration, the Chief of Naval Operations, and the Commandant of the Marine Corps. Assures that this policy is implemented within their respective organizations.

e. The Director, Office of Civilian Human Resources (OCHR). Interprets changing statutory and regulatory guidance as it is received and prepares implementing guidance as applicable. Ensures OCHR professional and legal staff review and approval of all agency Petitions For Review (PFR) to the Merit Systems Protection Board (MSPB). Such professional and legal staff may, at their discretion, assume authority and/or responsibility for preparing any such agency PFR.

7. Action. See enclosure (2).

8. Schedule of Offenses and Recommended Remedies. See enclosure (3).

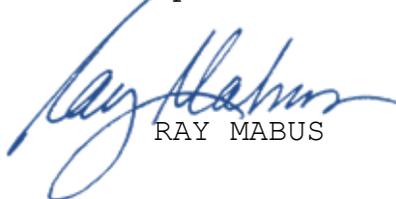
9. Records Management. Records created as a result of this instruction, regardless of media and format, shall be managed per SECNAV Manual 5210.1 of January 2012.

10. Forms. The following forms can be found on the U.S. Merit Systems Protection Board website:

<http://www.mspb.gov/appeals/forms.htm>

a. Merit Systems Protection Board (MSPB) Appeal Form 185 (5/13).

b. Merit Systems Protection Board (MSPB) Appeal Form 185 (5/13), Part 4, Designation of Representative.



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## DEFINITIONS AND ACRONYMS

### DEFINITIONS

1. Activity. A field installation, headquarters command, or office.
2. Adverse action. Term generally used in reference to an appealable disciplinary action, i.e., suspension of 15 days or more, removal, reduction in grade or pay, or furlough for 30 days or less.
3. Alternative Discipline Systems (ADS). ADSs seek to maintain good order and discipline within the work environment through a process that: (1) focuses on the work-related problems caused by an employee's conduct; and (2) creates an environment in which an employee can acknowledge and correct the problem without the adversarial confrontations or impact normally associated with traditional discipline systems. MSPB case law indicates that ADS must be structured to meet the requirements of progressive discipline. This includes: documenting in writing prior offenses and/or counseling; placing the employee on notice that it intends to rely on the record of those actions in assessing future penalties; and, when using prior offenses to enhance a penalty, citing the previous actions and/or counseling in proposal letters thereby allowing employees to dispute their validity. Within the DON, ADS may be established as an alternative to formal discipline under the requirements of this instruction. Before ADS may be used, the activity must first establish a written plan that is consistent with the requirements for due process and progressive discipline established in this instruction.
4. Appropriate penalty or reasonable remedy. These terms are used interchangeably to refer to the corrective action determined to be appropriate after consideration of the facts of the case, the employee's response, and relevant "Douglas Factors" contained in Appendix A.
5. Appealable action. A removal; suspension for more than 14 days, including an indefinite suspension; a reduction in grade or pay; or a furlough of 30 days or less.

6. Burden and degree of proof. In making a decision on a proposed action, there are different degrees of proof required for different types of actions. This degree of proof is the same level as required to support cases before the MSPB. Pursuant to 5 CFR 1201.56, the primary degrees of proof are:

a. Substantial evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence and applies to performance based actions taken under 5 U.S.C. § 4303.

b. Preponderance of the evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. This standard of proof applies to conduct or performance actions taken under 5 U.S.C. § 7502.

7. Condition of employment. A matter essential and necessary to the employment relationship, e.g., licensure, certification, eligibility, appointability, etc.

8. Current continuous employment. A period of employment or service immediately preceding an action under 5 CFR § 752 in the same or similar positions without a break in Federal civilian employment of a workday.

9. Day. Calendar day.

10. Disability. With respect to an individual, disability means (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment (29 CFR 1630.2(g)). The terms *disability* and *qualified individual with a disability* (see definition below) do not include individuals currently engaging in the illegal use of drugs when the activity acts on the basis of such use. For a complete listing of exceptions read 29 CFR 1630.3.

11. Disciplinary action. Action taken by a supervisor or manager to correct employee misconduct or other situations that interfere with effective operations. Such action is not intended to be punitive, but it serves as a deterrent to unacceptable conduct or behavior, promotes high standards of government service, and maintains public confidence in the DON. Disciplinary action may only be taken for such cause as will promote the efficiency of the service.

12. Drugs. A controlled substance included in Schedules I - V established by section 202 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (84 Stat 1256), as updated and republished under the provisions of that Act.

13. Drug paraphernalia. Equipment, products, or materials used, intended for use, or designed for use in injecting, ingesting, or otherwise introducing drugs into the human body in violation of law.

14. Employee. An individual who for:

a. Grievable actions (5 CFR 752.201(b)):

(1) Is in the competitive service (5 CFR 212) and has completed a probationary or trial period.

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

(3) Has competitive status and occupies a position in Schedule B of 5 CFR 213.

(4) Was in the competitive service at the time his or her position was first listed under Schedule A, B, or C of the excepted service (5 CFR 213) and still occupies that position.

b. Appealable actions (5 CFR 752.401 or 315.804):

(1) Is in the competitive service and has completed a probationary or trial period under an initial appointment.

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

(3) Is a preference eligible in the excepted service, as defined at 5 U.S.C. 2103, and has completed 1 year of current continuous service in the same or similar positions.

(4) Is a non-preference eligible in the excepted service who is not serving a probationary or trial period under an initial appointment pending conversion to competitive service or who has completed 2 years of current continuous service in the same or similar position under other than a temporary appointment limited to 2 years or less.

(5) Has competitive status and occupies a position in Schedule B of 5 CFR 213.

(6) Occupies a Pathways position in Schedule D of 5 CFR 213, provided that such individual has completed a probationary or trial period pending conversion to the competitive service or has completed 2 years of current continuous service in the same or similar positions in an executive agency under other than a temporary appointment limited to 2 years or less.

(7) Was in the competitive service at the time his or her position was first listed under Schedule A, B, or C of the excepted service (5 CFR 213) and still occupies that position.

(8) Is any non-probationary Senior Executive Service (SES) career appointee or any limited term or limited emergency SES appointee covered under 5 CFR 752.601(c).

(9) Is a probationer who is terminated for unsatisfactory performance or conduct under 5 CFR 315.804 and who is alleging discrimination based on partisan political reasons or marital status or that the termination was not effected per procedural requirements of that section. Allegations of discrimination because of race, color, religion, sex, national origin, age, or disability as defined in 29 CFR 1613.702(a) may only be appealed to MSPB if such discrimination is raised in addition to one of the above issues.

15. Furlough. Temporary status without duties and pay because of lack of work or funds or for other non-disciplinary reasons.

16. Grade. A level of classification under a position classification system.

17. Grievable action. A letter of reprimand or requirement or a suspension of 14 days or less.

18. Harmful error. Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights. MSPB will not take cognizance of errors not alleged by appellants to be harmful.

19. Illegal (or unlawful) use or possession of a drug. Use or possession of a drug without a valid medical prescription for the use of that drug or controlled substance for which use or possession violates law or regulation.

20. Indefinite suspension. The placing of an employee in a temporary status without duties and pay pending investigation, inquiry, or further agency action. The indefinite suspension continues for an indeterminate period of time and ends with the occurrence of the condition(s) set forth in the notice of action that may include the completion of any subsequent administrative action. Indefinite suspensions based on security clearance or position sensitivity investigation and/or adjudication, are subject to Department of Defense (DoD) regulations, codified at 32 CFR § 154.56(b)(4), which provide in relevant part, "no unfavorable administrative action shall be taken under the authority of this part unless the person concerned has been given an opportunity to appeal to a higher level of authority designated by the Component concerned", i.e., Personnel Security Appeals Board. Therefore, care should be taken to conform to DoD regulation when pursuing indefinite suspension based on security clearance or position sensitivity investigation and/or adjudication.

21. Letter of caution. A non-disciplinary written notification issued by a superior to an employee concerning unacceptable conduct and warning the employee that a disciplinary action may be imposed unless the conduct improves.

22. Letter of reprimand. A written disciplinary action issued by a superior to an employee based on specific unacceptable conduct deficiencies temporarily retained in the Official Personnel File (OPF) for no more than 2 years.

23. Letter of requirement. A written notification (order) issued by a superior to an employee concerning conduct deficiencies, such as sick leave abuse or tardiness, which sets forth requirements and procedures to be followed by the employee to avoid a future disciplinary action for similar deficient conduct.

24. Naval activity or Marine Corps commands. Activities included on the Standard Navy Distribution List, OPNAV NOTICE 5400, Enclosure (4), at echelon 2 and below.

25. Nexus. The connection or link between the misconduct and the employee's or activity's performance that establishes that the adverse action will promote the efficiency of the service (See paragraph 1g of enclosure (3) for further discussion).

26. Non-contestable action. An oral admonishment or a letter of caution. These actions are not recorded in an employee's OPF. While not grievable under SECNAVINST 12771.2 (dated 30 July 2010), they may be grievable under the provisions of a Negotiated Grievance Procedure (NGP) for employees in an exclusively recognized bargaining unit.

27. Oral admonishment. An oral notification given by a superior to an employee concerning conduct deficiencies and warning the employee that a disciplinary action or letter of requirement may be imposed for continued deficiencies.

28. Pay. The rate of basic wage or salary fixed by law or administrative action for the position held by an employee, i.e., the rate of pay before any deductions and exclusive of additional pay of any kind.

29. Preponderance of the evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue (5 CFR § 1201.56(c)(2)). This is a higher burden of proof than substantial evidence and it is the level that applies when an appealable action is proposed under 5 CFR § 752 or this instruction. Compare this definition with "substantial evidence."

30. Qualified individual with disabilities. With respect to employment, an individual with disabilities who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of self or others and who, depending upon the type of appointing authority being used:

a. Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or

b. Meets the criteria for appointment under one of the special appointing authorities for individuals with disabilities.

31. Reasonable accommodation. Reasonable accommodation is accommodation to the known physical or mental limitations of an employee who is a qualified individual with disabilities that will not impose an undue hardship on the operations of the agency's program. Reasonable accommodation can include, but is not limited to, making facilities readily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, provision of readers and interpreters, reassignment of a non-probationary employee, and other actions (29 CFR 1614.203). Reasonable accommodation may also include: referral to the Civilian Employee Assistance Program (CEAP) for diagnostic counseling and referral for treatment or rehabilitation or other assistance; granting of leave for treatment, rehabilitation or assistance; and a reasonable opportunity to demonstrate an acceptable level of performance or conduct. A decision to provide reasonable accommodation does not preclude concurrent disciplinary action.

32. Removal. Involuntary separation of an employee from the Federal service except when taken as a reduction-in force action.

33. Safe harbor. A provision of the Drug-Free Workplace Program (DFWP) that gives an employee a one-time opportunity to voluntarily identify himself or herself as a user of illegal drugs, to willingly undertake counseling and, as necessary, rehabilitation. Safe harbor insulates the employee from discipline for these admitted, but otherwise unknown, past acts of illegal drug use. It does not protect the employee from discipline for admitting to drug trafficking or other drug-related offenses. Additionally, it does not insulate the employee from removal based on loss of security clearance, loss of access to classified information, or loss of eligibility to occupy a sensitive position.

34. Similar positions. Positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbent could be interchanged between the positions without significant training or undue interruption of the work.

35. Substantial evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree (5 CFR 1201.56(c)(1)). This is a lower standard of proof than preponderance of evidence. This is the level that applies when the action is proposed under 5 U.S.C. 3592(a)(3), 4303 or 5335 (these actions are not covered in this subchapter). Compare this definition with "preponderance of the evidence."

36. Suspension. Placing an employee in a temporary status without duties and pay for disciplinary reasons, including pending inquiry. Also see "indefinite suspension."

37. Trafficking (drugs). Unlawful manufacture, distribution, sale or transfer of drugs, and/or the unlawful possession of drugs with the intent to distribute, sell, or transfer.

**ACRONYMS**

ADR	- Alternative Dispute Resolution
ADS	- Alternative Discipline System
ASN	- Assistant Secretary of the Navy
CFR	- Code of Federal Regulations
CHR	- Civilian Human Resources
CHRM	- Civilian Human Resources Manual
DASN	- Deputy Assistant Secretary of the Navy
DON	- Department of the Navy
EEO	- Equal Employment Opportunity
HRO	- Human Resources Office
M&RA	- Manpower and Reserve Affairs
MSPB	- Merit Systems Protection Board
MSPR	- Merit Systems Protection Report
NGP	- Negotiated Grievance Procedure
OCHR	- Office of Civilian Human Resources
OPF	- Official Personnel Folder
OPM	- Office of Personnel Management
PFR	- Petitions for Review
SECNAV	- Secretary of the Navy
SES	- Senior Executive Service
U.S.C.	- United States Code

**ACTION**

1. Directors of OCHR Operations Centers. Ensure that the policies and procedures in disciplinary action matters are in compliance with this instruction by:

a. Providing advice, guidance, and training to Human Resources Offices (HROs) staffs on disciplinary actions, including preparation of PFR in MSPB cases.

b. Receiving, reviewing, analyzing and maintaining PFRs for purposes of gathering best practices and determining training needs.

c. Taking action to promptly correct disciplinary action errors and ensuring disciplinary action decisions directed by the DON, DoD, and/or Office of Personnel Management (OPM) are implemented without delay.

2. Heads of Major Commands

a. Ensure subordinate commands and activities comply with statutes, regulations, policies, and guidance from higher level authorities, e.g., DASN (CHR), DoD, and OPM.

b. Implement delegation of disciplinary program authority per this instruction.

c. Ensure that subordinate activities are provided or aligned with sufficient resources to ensure effective disciplinary program management.

3. Directors of Human Resource Centers (DCHRs)

a. Serve as the principal HR advisor and technical authority within the command on civilian HR issues.

b. Conduct periodic assessments of disciplinary programs at subordinate activities to evaluate their effectiveness.

4. Directors of HROs

a. Comply with technical authority and guidance provided by the DCHR.

b. Serve as the principal advisor and technical authority to activity heads, managers, and supervisors in disciplinary action matters.

c. Ensure that appropriate training on disciplinary actions is provided to all individuals taking disciplinary actions.

5. Activity Heads and Commanders, or their Designees

a. Ensure coverage of their civilian employees under the policies and procedures of this instruction and any applicable and related OCHR authorities and guidance. This may be done either as an instruction issued by an activity or command, or through coverage under an appropriate instruction issued by a servicing HRO. This instruction may be supplemented by an activity or command policy statement and delegation of authority or within the scope of a Collective Bargaining Agreement (CBA) as long as language contained therein does not adversely impact management rights as established under the authority of reference (b). Such guidance should encourage the use of workplace ADR services to enhance communication and seek collaborative resolution of concerns when possible.

b. Ensure that all employees are apprised of this policy, including associated implementing guidance.

c. Propose and decide disciplinary or adverse actions under this instruction. Authority to take disciplinary actions per this instruction may be delegated in writing to subordinate managers and supervisors to the extent deemed appropriate. This authority may be withdrawn and re-delegated (in writing) as deemed necessary. To correct an error of fact or judgment, a proposed disciplinary or adverse action may be canceled or modified as long as due process rights are afforded to the employee.

d. Ensure that applicable standards of conduct information, as prescribed in the Joint Ethics Regulation, is available to all civilian employees for their review.

e. Continually discharge their obligations under reference (b), to fulfill any requirement of collective bargaining prior to implementation; adhere to the provisions of applicable CBAs related to disciplinary actions per reference (c).

f. Ensure that disciplinary actions are not taken against employees as reprisal or retaliation for engaging in activities protected under law or regulation.

g. Ensure that persons appointed to represent the activity or command in any disciplinary matter or appeals are properly trained and competent, as determined by OCHR, Policy and Programs.

h. Conduct periodic self-assessments regarding use of disciplinary action.

i. Encourage agency representatives to seek advice and guidance from their servicing OCHR Operations Center for cases going before the MSPB. In addition, ensure agency representatives send a copy of any response to a PFR to their servicing OCHR Operations Center at the same time it is filed with the MSPB. Ensure all proposed agency PFRs are coordinated in advance with OCHR, Policy and Programs and OCHR Office of Counsel. No agency PFR shall be filed with the MSPB without the express consent of these OCHR offices. After acquiring consent, ensure agency representatives send a copy of any agency PFR to the OCHR offices identified herein and to their servicing OCHR Operations Center at the same time it is filed with the MSPB.

6. Agency Representatives. Represent the DON in third-party proceedings and shall:

a. Serve as DON representative, ensuring appropriate coordination with DON officials on all issues pertaining to matters appealed to the MSPB.

b. Ensure DON's position on matters appealed to the MSPB is supported by objective evidence.

c. Draft or review proposed settlement agreements.

d. Advise DON officials regarding proposed terms of settlements.

e. Respond to PFRs filed by appellants and file reply briefs on behalf of DON.

f. Send a copy of any response to a PFR to their servicing OCHR Operations Center at the same time it is filed with the MSPB, and a copy of any agency PFR to OCHR offices identified in paragraph 5i above and the servicing Operations Center after appropriate coordination with the Director, OCHR.

g. Send requests to file agency PFRs to the OCHR offices as provided for in paragraph 5i above.

7. Managers and Supervisors

a. Implement and execute disciplinary actions at the local command level.

b. Ensure that disciplinary actions are accomplished following applicable DON, DoD, and OPM guidance and criteria when exercising delegated disciplinary program authority.

c. Shall set a good example by their personal conduct.

8. Actions Covered. All appealable, grievable and non-contestable actions as defined in enclosure (1), that are not excluded in paragraph 9 of this enclosure or by a CBA.

9. Actions Not Covered

a. A suspension of 14 days or less of a reemployed annuitant (5 CFR 752.201(c) (4), 752.401(d) (4), and 752.601(d)).

b. An action imposed by the MSPB under the authority of 5 U.S.C. 1206 (5 CFR 752.401(b) (1)).

c. A reduction in grade of a supervisor or manager who has not completed the probationary period under 5 U.S.C. 3321(a) (2) if such a reduction is to the grade held immediately before becoming a supervisor or manager (5 CFR 752.401(b) (2)).

d. A reduction-in-force action under 5 U.S.C. 3502 (5 CFR 752.401(b) (3)).

e. A performance-based reduction in grade or removal actions taken solely under procedures of 5 U.S.C. 4303 and 5 CFR 432 (5 CFR 752.401(b) (4)).

- f. A suspension or removal taken in the interests of national security under 5 U.S.C. 7531 and/or 7532 (5 CFR 752.201(c)(2) and 752.401(b)(6)).
- g. An action taken under a provision of statute, other than one codified in 5 U.S.C., which exempts the action from subchapter I and/or II of 5 U.S.C. 75 (5 CFR 752.201(c)(3) and 752.401(b)(7)).
- h. An action that entitles an employee to grade retention under 5 CFR 536, and an action to terminate this entitlement (5 CFR 752.401(b)(8)).
- i. A voluntary action by the employee (5 CFR 752.401(b)(9)).
- j. An action taken or directed by the OPM under 5 CFR 731 or 754 (5 CFR 752.401(b)(10)).
- k. A termination of appointment on the expiration date specified as a basic condition of employment at the time the appointment was made (5 CFR 752.401(b)(11)).
- l. An action that terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different position of equivalent grade and pay, if the employee was informed that it was to be of limited duration (5 CFR 752.401(b)(12)).
- m. A cancellation of a promotion to a position not classified prior to the promotion (5 CFR 752.401(b)(13)).
- n. A placement of an employee serving on an intermittent or seasonal basis in a temporary non-duty, non-pay status per conditions established at the time of appointment (5 CFR 752.401(b)(14)).
- o. A reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation (5 CFR 752.401(b)(15)).
- p. A separation for suitability reasons taken under 5 CFR 731 (5 CFR 731.203(c)).

q. A reduction in grade of an employee who is given grade retention under 10 U.S.C. 1586.

r. A separation for performance or conduct during probation under 5 CFR 315.804.

s. A separation during probation/trial period in whole or in part for pre-appointment reasons are handled per 5 CFR 315.805.

t. A denial of a within-grade increase (5 CFR 531, Subpart D).

u. A removal or reduction in force action from a SES position taken under 5 U.S.C. 3595.

10. Non-contestable Actions. Oral admonishments and letters of caution are not grievable under the administrative grievance procedure (reference (c)) and are not appealable to the MSPB under 5 CFR 1201. (Note: In some cases, such actions may be grievable under the provisions of a NGP for employees in an exclusively recognized bargaining unit). Neither an oral admonishment nor a letter of caution will be counted as a prior offense in determining a range of remedies under enclosure (3). However, they may be considered in determining that the employee was clearly on notice that the behavior was inappropriate and in determining an appropriate remedy within the range for any subsequent offense should an offense later occur. A letter of caution must state:

a. The reason(s) for issuance.

b. That the action is neither grievable nor appealable to MSPB under 5 CFR 752.301 or 752.401. Activities/commands should review their CBAs to determine if such actions may be grievable under a NGP and if so the letter should so state.

c. That a letter of caution will not be made a matter of record in the employee's OPF.

d. That further infractions of a disciplinary offense could lead to more severe corrective action.

11. Grievable Actions. Includes letters of requirement, letters of reprimand, and suspensions of 14 days or less.

a. A letter of requirement must state:

- (1) The reason(s) for issuance.
- (2) The specific requirement(s) the employee must meet.
- (3) That failure to meet a requirement may lead to disciplinary action.
- (4) The length of time a requirement is in effect.
- (5) The employee's right to file a grievance under reference (c) or a NGP, as appropriate.
- (6) That it will not be made a matter of record in the employee's OPF.
- (7) That it will not be counted as a prior offense when determining a range of remedies under enclosure (3), but may be considered in determining an appropriate remedy should an offense subsequently occur.

b. A letter of reprimand must state:

- (1) The reason(s) for issuance.
- (2) The employee's right to file a grievance under a NGP or administrative grievance procedure, as appropriate.
- (3) The length of time (not less than 1, nor more than 2, years or as determined by the local instruction) that it will be retained in the employee's OPF, and during which time it may be counted as a prior offense for determining a range of remedies under enclosure (3) (As with a letter of requirement or a non-contestable action, the letter of reprimand may continue to be considered when determining an appropriate remedy for a subsequent offense).

c. A suspension of 14 days or less entitles the affected employee to an advance written notice that includes:

(1) The specific reason(s) for the proposed action and any aggravating factors considered in proposing this corrective action (5 CFR 752.203(b)).

(2) The right to be represented by an attorney or other representative (5 CFR 752.203(d)).

(3) The right to review, or have a representative review, the material relied on to support the reason(s) for action given in the notice of proposed suspension (5 CFR 752.203(b)).

(4) The reasonable amount of time (not less than 24 consecutive hours, if the employee is otherwise in an official duty status) that the employee is allowed to answer orally and/or in writing, and to secure and furnish affidavits and other documentary evidence in support of the answer, including medical documentation (as defined in 5 CFR 339) to support any medical condition alleged to have caused the reason(s) for the proposed action (5 CFR 752.203(c)).

d. A written decision must:

(1) Consider only the reason(s) for the action specified in the advance written notice (5 CFR 752.203(e)).

(2) Consider any answer the employee and/or the employee's representative made to a designated official, medical or other documentation furnished under paragraph 11c(4), and any entitlement to reasonable accommodation under the provisions of the Rehabilitation Act. (Additional information on reasonable accommodation may be found in CHRM Subchapter 1606 (Processing Requests for Reasonable Accommodation) and CHRM Subchapter 792 (Civilian DFWP in the Department of the Navy) and 29 CFR 1614.203 (5 CFR 752.203(e))).

(3) Specify the reason(s) for the decision, considering appropriate "Douglas Factors" in enclosure (3), Appendix A, (*Douglas v. VA 5 MSPR 280*, 5 MSPB 313(1981)).

(4) Be signed by an official in a higher level position than the official who proposed the action, unless the activity head/commander delegates (in writing) otherwise in a specific case. Typically, the employee's first level supervisor issues

the notice of proposed action, and the second level supervisor issues the decision. However, if the activity head/commander issued the advance notice, he or she may also issue the decision.

(5) Specify the employee's right to file a grievance under a NGP or administrative grievance, as appropriate (5 CFR 752.203(f)).

(6) Be delivered to the employee on or before the effective date of the suspension (5 CFR 752.203(e)).

e. Extensions of reply time.

(1) An employee given an advance notice may request additional time to respond orally and/or in writing.

(2) The official designated to accept the oral or written reply will make the decision to grant or deny such an extension.

12. Appealable Actions. An activity may take an adverse action, including a performance-based adverse action, under adverse action procedures only for such cause as will promote the efficiency of the service. An activity may not take an adverse action on the basis of any reason prohibited by 5 U.S.C. 2302 (5 CFR 752.403).

a. Appealable actions (removal, suspension for more than 14 days, or indefinite suspension, reduction in grade or pay, or furlough for 30 days or less) entitle the affected employee to:

(1) At least 30 days advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed (refer to paragraph 12d below) or for furlough without pay due to unforeseeable circumstances (5 CFR 752.404(d)). When the employee's whereabouts is unknown, the activity must show that it took 'intelligent and diligent' steps to serve the notice in order to avoid a finding of harmful procedural error (See *Wright v. Dept. of Navy*, 16 MSPR 408(1983)). In such instances, activities should send the notice via both certified and regular mail to the last known address that the employee provided to the activity. The written notice must include:

(a) The specific reason(s) for the proposed action.

1. If the action is a furlough, the notice must state the reason(s) for the furlough, and the basis for selecting the employee if all individuals in the employee's competitive level are not being furloughed (5 CFR 752.404(b)(1) and (2)).

2. If the action is for other than furlough, then consider relevant factors, including prior discipline used in determining the appropriate penalty to propose and any aggravating factors relied upon. In relying on past misconduct to enhance a penalty, the misconduct must be referenced in enough detail to permit an informed reply (See *Westmoreland v. VA*, 83 MSPR 625(1999)).

(b) The name and title of the official designated to hear an oral reply and/or receive a written reply. The official so designated must have authority to either make or recommend a final decision on the proposed action (5 CFR 752.404(c)(2)).

(c) The right to be represented by an attorney or other representative (5 CFR 752.404(e)).

(d) The right to a reasonable amount of official time to review, or have a representative review, the material relied upon to support the reason(s) given in the notice and to prepare an answer and to secure affidavits, if the employee is otherwise in an active duty status (5 CFR 752.404(c)(1)).

(e) A reasonable amount of time (not less than 7 days) to answer orally and/or in writing and to furnish affidavits and other documentary evidence in support of the answer, including medical documentation (as defined in 5 CFR 339.104), to support any medical condition alleged to have contributed to the reason(s) for the proposed action (5 CFR 752.404(c)(3) and 752.404(d)(1)).

(2) A written decision at the earliest practicable date that (5 U.S.C. 7513 and 5 CFR 752.301):

(a) Considers only the reason(s) specified in the advance written notice (5 CFR 752.404(g)).

(b) Considers any answer the employee and/or the employee's representative made to a designated official, any medical or other documentation furnished under paragraph 12a(1)(e) above, any entitlement to reasonable accommodation under the Rehabilitation Act, CHRM Subchapter 792 (Civilian DFWP in the Department of the Navy), 29 CFR 1614.203, and the recommendation of the designated official (where applicable). If medical issues are raised by the employee, provide information on applying for disability retirement with an offer to assist the employee in that effort (5 CFR 752.404(f)).

(c) Specifies the reason(s) for the decision, considering appropriate "Douglas Factors" in enclosure (3), Appendix A (5 CFR 752.404(g) and *Douglas v. VA*, 5 MSPR 280, 5 MSPB 313(1981)).

(d) Is signed by an official in a higher level position than the official who proposed the action, unless the activity head/commander issued the advance notice, in which case the activity head/commander may issue the written decision.

(e) Specifies the employee's right to appeal to the MSPB and, when applicable, to file a grievance under a NGP, but not both (5 CFR 752.405).

(f) Provides the time limits and address for filing an appeal to the MSPB, a copy or access to a copy of the MSPB regulations found in 5 CFR 1201 and 1209, a copy or access to a copy of the MSPB Appeal Form (MSPB Form 185), and specifies the time limits for filing a grievance under the NGP, if applicable. Current MSPB regulations and appeal form can be downloaded from the MSPB website at <http://www.mspb.gov> (5 CFR 752.405, 5 CFR 1201.21).

(g) Is delivered to the employee on or before the effective date of the action (5 CFR 752.404(g)).

b. Hearings. Deciding officials may, on a case-by-case basis, grant an SES member a hearing with examination of witnesses in place of or in addition to the opportunity for written and oral reply (5 CFR 752.604 (c)(2)). Hearings for other employees are not authorized.

c. Duty status during the notice period. It is recommended that information about the employee's duty status be included in any notice of proposed action. Under ordinary circumstances, employees will remain in a duty status in their regular positions during the advance notice period. In those rare circumstances where it is determined that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the activity may elect one or a combination of alternatives, including (5 CFR 752.404(b)(3)):

(1) Assigning employee to other duties, i.e., reassignment, detail, where he or she is not a threat to safety, the agency mission, or to Government property.

(2) Exploring leave flexibilities including approving employee's voluntary request to take sick, annual, or leave without pay or charging "absent without leave" if the employee has absented himself or herself from the worksite without requesting leave (NOTE: If available evidence supports a conclusion that an employee is incapacitated for normal work, the enforced sick leave procedures described in CHRM Subchapter 630 may be used).

(3) Shortening the notice period when the "crime provision" can be invoked.

(4) Placing employee in a paid, non-duty status for such time as is necessary to effect the action. If all other options have been explored and found not feasible, an activity head/commander, or his or her designee, may excuse an employee from duty, without charge to leave or loss of pay, during the notice period of that employee's removal or indefinite suspension effected under this subchapter. Excused absence for this purpose should be used only in those rare circumstances where the retention of the employee in an official duty status during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize Government interests (5 CFR 752.404(b)(3)). Care should be exercised to use the minimum amount of excused absence necessary in any individual situation.

d. Shortened notice period. Under 5 CFR 752.404(b) (3) (iii), 752.404(d) (1), and 752.604(d) (the "crime provision"), the notice period required in paragraph 12a(1) may be shortened when there is reasonable cause to believe that an employee has committed a crime for which a sentence of imprisonment may be imposed. Judicial action is not required. Activities/commands may effect such an action, including an indefinite suspension, in less than 30 days following the issuance of the advance written notice. In such cases, employees intending to make a reply may be required to furnish an answer to the proposed action within such time as under the circumstance would be reasonable, but not less than 7 days; this includes any affidavits or other documentary evidence in support of the answer. When the circumstances require immediate action, an activity/command may place the employee in a nonduty status with pay for such time, not to exceed 10 days, as is necessary to effect the action.

e. Extensions of reply time. An employee given an advance notice may request additional time to respond orally and/or in writing. The official designated to accept the response will make the decision to grant or deny such a request.

f. Medical examinations. After reviewing medical documentation supplied by the employee in reply to a proposed action, the activity/command may, if authorized, require a medical examination or, at its option, offer a medical examination following the procedures in 5 CFR 339 (5 CFR 752.404 (f)) or 29 CFR 1630.14(c), as applicable.

g. Disability Retirement. When the Civil Service Retirement System employee has 5 years or more of civilian service, or the Federal Employees Retirement System employee has 18 months or more of civilian service, and asserts or documents impairment or disability, the activity/command shall provide information to him/her concerning disability retirement with an offer to assist the employee in that effort. An employee's application for disability retirement shall not preclude or delay any other appropriate personnel action (5 CFR 752.404(h)).

13. Performance-Based Actions. Performance-based actions may be effected using CHRM, Subchapter 432 or this instruction. Before initiating a performance-based disciplinary action, an

activity/command should consider the differences between the requirements of the two authorities, as applicable, to the potential action.

14. SES Actions

a. Suspensions of SES employees for 14 days or less are prohibited (5 CFR 752.601(b)(1)).

b. Suspension of SES employees for more than 14 days, and removal of such employees from Federal Civilian service, may only be taken for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function (5 U.S.C. 7543(a), (5 CFR 752.603(a), 5 CFR 752.604). Procedures applicable to such actions are described in paragraph 12 above.

15. Disallowance of an Employee's Choice of Representative

a. Activity heads/commanders may disallow an employee's choice of representative if such representation would result in a conflict of interest or position, conflict with priority needs of the activity/command, or would give rise to unreasonable cost to the Government. The terms of any applicable CBA govern representation for bargaining unit employees (5 CFR 752.203(d), 752.404(e), and 752.604(e)).

b. Activity heads/commanders may delegate in writing the authority to make a determination to disallow the choice of an employee's representative to an appropriate level no lower than the level of the official designated to make the final written decision.

c. Activity/command instructions shall establish an expedited process for resolving an employee's disagreement with a determination to disallow a choice of representative. At a minimum, the review process shall require the final decision to be made by an official at a level higher than the one who made the disputed determination unless the determination was made by the activity head/commander. In such cases, the activity head/commander's determination to disallow a choice of representative is final.

16. Records for Suspension, Removals, Reductions in Grade or Pay, or Furloughs for 30 Days or Less (5 CFR 752.203(g), 752.406, and 752.606)

- a. As applicable, the record shall contain copies of:
- (1) The advance written notice of proposed action.
  - (2) The employee's written answer, if any.
  - (3) A written summary of the employee's oral reply, if an oral reply was made.
  - (4) The reason(s) for and written notice of decision.
  - (5) Any order effecting the action.
  - (6) Any evidence and supporting material.
  - (7) The Notification of Personnel Action, Standard Form (SF) 50, effecting the decision.

b. If an employee appeals to the MSPB, the record shall be furnished to the employee and to the MSPB as directed in the MSPB's Acknowledgement Order.

c. Records required by this instruction shall be retained and disposed as described in SECNAVINST 5210.8D. Records that may be required for further administrative or judicial litigation may be retained until no longer necessary (SECNAVINST 5210.8D).

d. If the employee appeals to the MSPB, the record shall be furnished to the MSPB and to the employee upon his or her request (5 CFR 752.406 and 752.606).

17. Action. Commands, activities, and individuals with responsibilities shall take necessary actions to implement the provisions outlined in this instruction.

**SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES**

1. Instructions for use of this schedule:

a. This schedule is a guide. Discipline is not punitive in nature, is expected to be progressive for subsequent offenses, and normally falls within the range shown in this enclosure or those established in an Alternative Discipline System. The remedy shall be the minimum that, in the judgment of the deciding official, can reasonably be expected to correct the affected employee and maintain discipline and morale among other employees. Mitigating or aggravating factors can justify a remedy outside the range cited herein. For example, remedies greater than those shown can be appropriate when the facts of an aggravated offense, frequent infractions, or simultaneous multiple offenses are established. When sufficient mitigating factors exist, remedies lesser than those shown include informal actions such as counseling, oral admonishments, and letters of caution/requirement.

b. Consistent with DON policy in this instruction, the schedule generally provides for a range of remedies, e.g., Reprimand to Removal, to provide management with flexibility in correcting conduct deficiencies. Selection of a reasonable remedy from such a broad range should be made with good judgment, including consideration of any appropriate "Douglas Factors" (see Appendix A of this enclosure). Excessive, arbitrary, or capricious remedies and remedies selected without consideration of mitigating factors may be reversed by third parties if challenged.

c. Some of the offenses listed in this schedule combine several offenses in one statement connected by the word "or." Use only the portion of the statement of offense that accurately describes the employee's conduct; leave out all parts that do not apply. In choosing a charge, it may be better to describe the offense rather than select a charge from the schedule that does not accurately describe the offense, and then refer to similar offenses in the schedule when selecting the remedy.

d. The schedule does not cover every possible offense. When specifying an offense not listed in the schedule, be careful when using terms such as "theft" or "fraud," which

require establishing the element of intent and should only be used when the element of intent can be proven. Management officials should contact their servicing HRO or legal counsel for assistance in framing appropriate charges.

e. Due to the nature of their positions, offenses by supervisors or managers may warrant more severe remedies than the same offense committed by a non-supervisory employee.

f. All disciplinary actions are to be taken following the provisions of law.

g. All adverse action cases, whether based on off-duty or on-duty misconduct, require establishment of a nexus or link between the conduct and its effect upon the efficiency of the service. Nexus is normally assumed when the misconduct is sustained in on-duty misconduct cases. In taking adverse actions for off-duty misconduct, the deciding official must show, by preponderant evidence, that the adverse action will promote the efficiency of the service by establishing a nexus between the off-duty misconduct and the employee's or activity's performance. The activity should not rely on a presumption of nexus but should make its strongest possible argument and introduce evidence showing the relationship between the misconduct and the employee's or activity's performance. The MSPB generally recognizes three independent means by which an agency may show a nexus linking an employee's off-duty misconduct with the efficiency of the service: (1) a rebuttable presumption of nexus that may arise in certain egregious circumstances based on the nature and gravity of the misconduct; (2) a showing by preponderant evidence that the misconduct affects the employee's or co-workers' job performance, or management's trust and confidence in the employee's job performance; and (3) a showing by preponderant evidence that the misconduct interfered with or adversely affected the agency's mission. Actual impairment need not be shown, but the agency can establish that the off-duty misconduct is "directly opposed to the agency's mission." Some of the means for showing nexus include but are not limited to establishing: the probability that off-duty misconduct could happen at work; the misconduct caused such notoriety it has affected the activity's ability to accomplish its mission; and/or the misconduct impacted the work of the supervisor or other employees in the work area.

h. Servicing HROs provide advice and assistance with issues such as establishing the required nexus between off-duty misconduct and the efficiency of the service, appropriate wording of the charge(s), application of mitigating factors, consistency of remedies, etc., based on current case law. Activity heads/commanders, managers, and supervisors delegated authority to propose and/or decide disciplinary actions shall take advantage of such assistance to ensure conformance with this instruction.

## 2. Past Offenses

a. When used to select a range of remedies or remedy, a past offense must be described in sufficient detail to enable the employee to understand and respond to it. Past offenses may be used in determining a range of remedies or remedy when:

(1) The employee was disciplined in writing;

(2) The employee was provided the opportunity to dispute the action to a higher level; and

(3) The action was made a matter of record in the employee's OPF.

b. Any past offense may form the basis for proposing a remedy from the next higher range of remedies for a subsequent offense. The offenses need not be identical or similar (See *Lewis v. Dept. of Air Force*, 51 MSPR 475, 484(1991)).

c. In its decision in *U.S. Postal Service v. Gregory*, 102 FMSR 7004, No. 00-758 (S. Ct.), (*USPS v. Gregory*, 122 S. Ct. 431 (2001)), the Supreme Court held that the Board may independently review prior disciplinary actions which are pending in grievance proceedings in order to determine the reasonableness of the penalty under appeal. It is advised to carefully examine any prior disciplinary actions that are being challenged if they are a factor in determining the reasonableness of the penalty.

d. The following actions may not be counted as past offenses for determining a range of remedies (however, actions discussed in (1) and (2) of this paragraph may be considered in determining an appropriate remedy within a range for any subsequent offense):

(1) Oral admonishments and letters of caution or requirement.

(2) Letters of reprimand dated more than 2 years before the date of any advance written notice required under this instruction.

(3) Actions using 752 procedures that are not disciplinary in nature, i.e., reductions in grade or pay not effected for disciplinary reasons.

3. Other Statutory and Regulatory Offenses. For information concerning other offenses for which employees may be disciplined by removal, fine, or imprisonment, including offenses which require minimum mandatory remedies (such as misuse of government vehicles, Hatch Act violations, and giving gifts to superiors), see 5 CFR 734, 735, and 2635, and reference (k).

4. Drug and Alcohol Abuse Offenses. Any employee who engages in misconduct involving drugs and/or alcohol shall be disciplined according to this enclosure, except when covered under safe harbor as defined in enclosure (1). The range of remedies is broad for the various drug abuse first offenses. To determine the appropriate corrective action, the "Douglas Factors" (Appendix A of this enclosure) must be considered. In doing so, recognize that some positions are so sensitive that the conduct affects the employee's or his or her co-workers' job performance or negatively impacts management's trust and confidence in the employee's job performance. Thus, while counseling is always offered, a higher penalty than the minimum is appropriate in such cases.

5. Reasonable Accommodation. Guidance on providing reasonable accommodation is found at the U.S. Equal Employment Opportunity Commission web site (<http://www.eeoc.gov>) entitled Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (ADA). Also check with Office of Counsel to ensure this guidance is applied in a manner consistent with DON policy.

a. Under the Rehabilitation Act Amendments of 1992, the standards applied under Title I of the ADA are applicable to Federal employees. Section 104(c)(4) of the ADA permits a

covered employer to hold employees who have drug and alcohol problems to the same qualification standards for employment or job performance and behavior as other employees, even if any unsatisfactory performance or behavior is related to the employee's alcoholism (42 U.S.C. 12114(c)(4)).

(1) An agency is not required to offer an alcoholic employee who engages in misconduct a firm choice between treatment and discharge. While the ADA requires employers to consider other forms of reasonable accommodation for employees with alcoholism, for example, a flexible schedule or leave to accommodate an employee's treatment, employers do not have to excuse the violation of uniformly applied conduct or job performance standards by offering firm choice as a form of reasonable accommodation (See *Johnson v. Dept. of Interior*, EEOC 03940100(1996)).

(2) An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity, and may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability (See *Walsh v. USPS*, 74 MSPR 627(1997), *Diaz v. VA*, EEOC Appeal No. 0120093341 (July 14, 2011)).

(3) An individual who is currently engaging in the illegal use of drugs, when the agency acts on the basis of such use, is excluded from the definition of "individual with disabilities" per 29 CFR § 1614.203(h).

(4) An employee who traffics in drugs will be subject to remedies as provided for in this enclosure. This type of misconduct does not normally entitle an employee to reasonable accommodation.

b. Undue hardship on an activity/command. 29 CFR 1614.203 provides that reasonable accommodation is not required when it would impose an undue hardship on the operation of the program of the employee's activity/command. Undue hardship must be based on an individualized assessment of current circumstances that show a specific reasonable accommodation would cause significant difficulty or expense.

c. Conduct that takes an employee outside the protection of the Rehabilitation Act. Similar to paragraph 5b above, there are "...certain acts of misconduct which when committed by an employee who is an alcoholic or drug addict, take that employee outside the scope of the protecting legislation because the misconduct renders that person not a 'qualified' individual with disabilities." Egregious or notorious misconduct that hampers an employee's ability to perform his or her duties or to represent the agency, or which strikes at the core of the job or the agency's mission, can, standing alone, disqualify a Federal employee from his or her position (See *Hougens v. USPS*, 38 MSPR 135(1988)).

6. Domestic Violence. Individuals whose positions include duties, activities, or responsibilities such as selling or disposing of firearms and ammunition; or receiving, possessing, shipping, or transporting any firearm or ammunition in or affecting interstate or foreign commerce are in covered positions subject to the mandatory requirements of the Gun Control Act of 1968 (18 U.S.C. 922(d)(9) and (g)(9)). Employees who have been convicted of a "misdemeanor crime of domestic violence" may not be retained in a covered position. As a matter of DoD policy, a conviction for an offense meeting the definition of a "felony crime of domestic violence" on or after the Under Secretary of Defense memorandum of November 27, 2002 shall also be considered a qualifying conviction and the employee may not be retained in a covered position. Options may include redesigning the position so that it is no longer a covered position, reassigning an employee with a qualifying conviction, or taking an adverse action, e.g., a reduction in grade or removal. Adverse actions taken as a result of the requirement to remove convicted employees from covered positions must be taken under the provisions of this instruction and the requirements of the Under Secretary of Defense memorandum of November 27, 2002.

7. Definitions and Acronyms. See enclosure (1).

8. The "Douglas Factors". See Appendix A of this enclosure.

**SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES**

<b>ALCOHOL ABUSE</b>	<b>FIRST OFFENSE</b>	<b>SECOND OFFENSE</b>	<b>THIRD OFFENSE</b>
Unauthorized possession, sale, or transfer of alcohol on duty or on a military ship, aircraft, submarine, activity, or command	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
* Use of, or being under the influence of alcohol on duty or on a military ship, aircraft, submarine, activity, or command	14-day suspension to removal	30-day suspension to removal	Removal
<b>ATTENDANCE</b>	<b>FIRST OFFENSE</b>	<b>SECOND OFFENSE</b>	<b>THIRD OFFENSE</b>
Excessive unauthorized absence (more than 5 consecutive workdays)	Reprimand to removal	10-day suspension to removal	Removal
Leaving job to which assigned or leaving DON premises at any time during working hours without proper authorization	Reprimand to 5-day suspension	Reprimand to 10-day suspension	Reprimand to removal
Unauthorized absence of 5 or less scheduled workdays or assigned overtime	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
Unexcused tardiness	Reprimand	Reprimand to 5-day suspension	Reprimand to removal

<b>CONDITIONS OF EMPLOYMENT</b>	<b>FIRST OFFENSE</b>	<b>SECOND OFFENSE</b>	<b>THIRD OFFENSE</b>
** Failure to obtain or maintain eligibility for security clearance; access to classified information; or eligibility to occupy a sensitive position	Removal		
Failure (or delay) to obtain or maintain certification or license	Reprimand to Removal	5-day suspension to removal	14-day suspension to removal
<b>DISCRIMINATION</b>	<b>FIRST OFFENSE</b>	<b>SECOND OFFENSE</b>	<b>THIRD OFFENSE</b>
Discrimination against an employee or applicant based on race, color, religion, sex, disability, national origin, or age, or any reprisal or retaliation action against a complainant, representative, witness, or other person involved in the EEO complaint process	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
Discrimination based on sexual orientation	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
Sexual harassment	Reprimand to removal	14-day suspension to removal	30-day suspension to removal

<b>DRUG ABUSE</b>	<b>FIRST OFFENSE</b>	<b>SECOND OFFENSE</b>	<b>THIRD OFFENSE</b>
*** Unlawful use, being under the influence, or possession of drugs or drug paraphernalia on or off duty	14-day suspension to removal	Removal	
**** Unlawful use, being under the influence, or possession of drugs or drug paraphernalia on a military ship, aircraft, or submarine	30-day suspension to removal	Removal	
Refusal to obtain counseling and rehabilitation after having been found to use drugs illegally	Reprimand to removal	Removal	
Unlawful distribution, sale, or transfer of drugs or drug paraphernalia on or off duty	Removal		
<b>DRUG TESTING</b>	<b>FIRST OFFENSE</b>	<b>SECOND OFFENSE</b>	<b>THIRD OFFENSE</b>
Refusal to provide a urine sample when required	14-day suspension to removal	Removal	
Failure to appear for testing when directed, without a deferral	Reprimand to removal	Removal	

Substituting, adulterating, or otherwise tampering with a urine sample, testing equipment, or related paraphernalia	14-day suspension to removal	Removal	
<b>MISCELLANEOUS OFFENSES</b>	<b>FIRST OFFENSE</b>	<b>SECOND OFFENSE</b>	<b>THIRD OFFENSE</b>
Betting, gambling, or the promotion thereof on duty or on DON premises	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
Careless workmanship resulting in delay in production or spoilage or waste of materials	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
Criminal, dishonest, infamous, or notoriously disgraceful conduct	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
Disobedience to constituted authorities; deliberate refusal or failure or delay in carrying out any proper order, work assignment, or instruction; insubordination, including failure to follow local or higher level policy	Reprimand to removal	5-day suspension to removal	10-day suspension to removal

Discourteous conduct to the public supported by a supervisor's report of four such instances within any 1-year period or any other pattern of discourteous conduct	Reprimand to 14-day suspension	1-day suspension to 14-day suspension	14-day suspension to removal
Excessive discourteous conduct to the public within any 1-year period or any other pattern of discourteous conduct	1-day suspension to 14-day suspension	7-day suspension to 30-day suspension	14-day suspension to removal
Disrespectful conduct, use of insulting, abusive, or obscene language to or about other personnel	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
Falsification (or aiding or assisting in falsification) of time and attendance records or claims against the government	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
Attempted or actual falsification, misstatement or concealment of material fact in connection with any official record	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
False testimony or refusal to testify in an inquiry, investigation, or other official proceeding	Reprimand to removal	14-day suspension to removal	30-day suspension to removal

Loafing, wasting time, inattention to duty or sleeping on duty	Reprimand to 5-day suspension	5-day suspension to removal	10-day suspension to removal
Making threats to other employees or supervisor; fighting; engaging in dangerous horseplay	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
<b>MISUSE OR UNAUTHORIZED USE</b>	<b>FIRST OFFENSE</b>	<b>SECOND OFFENSE</b>	<b>THIRD OFFENSE</b>
***** Misuse of a Government Owned Vehicle (GOV)	Reprimand to removal	30-day suspension to removal	Removal
***** Unauthorized possession, use, loss, theft or damage to Government property or the property of others	See comment at end of table		
Misuse of Government equipment, e.g., unauthorized use of electronic mail, internet, phones, or facsimile equipment	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
Misuse of Government sponsored travel charge card, e.g., use for unauthorized personal expenses, failure to pay charge card bill in a timely manner, or failure to use card for authorized expenses arising from official travel	Reprimand to removal	5-day suspension to removal	10-day suspension to removal

Unauthorized use of or failure to appropriately monitor use of Government purchase card	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
<b>PROHIBITED PERSONNEL PRACTICE</b>	<b>FIRST OFFENSE</b>	<b>SECOND OFFENSE</b>	<b>THIRD OFFENSE</b>
Committing a prohibited personnel practice (see 5 U.S.C. 2302)	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
<b>SAFETY</b>	<b>FIRST OFFENSE</b>	<b>SECOND OFFENSE</b>	<b>THIRD OFFENSE</b>
Failure to observe posted smoking prohibitions	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
Failure to use protective clothing or equipment	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
<b>VIOLATION OF SAFETY OR TRAFFIC REGULATIONS ON DUTY OR ON AN INSTALLATION (ON OR OFF DUTY): SEE BELOW</b>			
Causing injury to self or others or damage to property or endangering the safety of self or others	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
No injury or property damage; not endangering the safety of self or others	Reprimand to 5-day suspension	Reprimand to 10-day suspension	Reprimand to removal

<b>TEXTING, OPERATING GPS DEVICE, OR USING PHONE WITHOUT HANDS-FREE DEVICE WHILE DRIVING (ON BASE, OR OFF BASE WHILE ON DUTY IN A GOV: SEE BELOW</b>			
Causing injury to self or others or damage to property or endangering the safety of self or others	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
No injury or property damage; not endangering the safety of self or others	Reprimand to 5-day suspension	Reprimand to 10-day suspension	Reprimand to removal
<b>SECURITY</b>	<b>FIRST OFFENSE</b>	<b>SECOND OFFENSE</b>	<b>THIRD OFFENSE</b>
<b>FAILURE TO SAFEGUARD CLASSIFIED MATERIAL: SEE BELOW</b>			
Security compromised	Reprimand to removal	14-day suspension to removal	Removal
Security not compromised	Reprimand to 5-day suspension	Reprimand to 14-day suspension	30-day suspension to removal

<b>UNAUTHORIZED DISCLOSURE OR USE OF PROTECTED MATERIAL</b>	<b>FIRST OFFENSE</b>	<b>SECOND OFFENSE</b>	<b>THIRD OFFENSE</b>
Unauthorized disclosure or use of information or other protected material, e.g., records covered by the Privacy Act, records under 42 CFR 2 (CEAP), or records under 45 CFR 164 (Health Insurance Portability and Accountability Act) for health care providers	Reprimand to removal	14-day suspension to removal	30-day suspension to removal

\* See paragraphs 4 and 5 of this enclosure.

\*\* Indefinite suspensions based on security clearance or position sensitivity investigation and/or adjudication, are subject to DoD regulations, policies, and directives. Consult applicable regulations or higher authority, as appropriate.

\*\*\* See paragraphs 4 and 5 of this enclosure.

\*\*\*\* Mandatory referral to CEAP is required. For additional guidance see paragraphs 4 and 5 of this enclosure.

\*\*\*\*\* 31 U.S.C. § 1349(b) requires a minimum suspension of 30 calendar days even for the first offense, if the vehicle misuse was willful, i.e., employee acted either with knowledge that the intended use would be characterized as unofficial or with reckless disregard of whether such use was unofficial.

\*\*\*\*\* Under *Miguel v. Depart. of Army*, 727 F.2d 1081 (Fed. Cir. 1984), the Federal Circuit held that activities must consider the value of items stolen when determining a penalty for "unauthorized possession" or "theft" of government property. In the absence of aggravating factors, a removal based on *de minimis* theft will likely result in mitigation of the penalty, even when the activity can show that the employee was on notice that discipline, including removal, could result from theft of government property.

**SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES**

**APPENDIX A - FACTORS TO BE CONSIDERED IN SELECTING  
THE APPROPRIATE ADVERSE ACTION  
(THE "DOUGLAS FACTORS")**

In *Douglas v. VA*, 5 MSPR 280, 5 MSPB 313(1981), the MSPB set out guidelines (or factors) that agencies should consider in selecting an appropriate penalty. Factors include:

1. The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional, technical or inadvertent, 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 any applicable agency table of penalties.
8. The notoriety of the offense or its impact upon the reputation of the agency.
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.
10. 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.

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

**\*\*NOTE:** Not all of these factors apply in every case. In an individual case, some of the pertinent factors will weigh in the employee's favor (mitigating circumstances); others may not or may even constitute aggravating circumstances. The deciding official should make notes about the factors as they are considered. Selection of an appropriate penalty involves a responsible balancing of the relevant factors in the individual case. All aggravating factors, such as prior disciplinary record, relied upon to enhance the penalty should be included in the advance notice of charges so that the employee has a fair opportunity to respond to those alleged factors before the deciding official. The decision notice should explain what weight was given to those factors