



CHIEF OF THE NATIONAL GUARD BUREAU INSTRUCTION

NGB-J1-TCP
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NATIONAL GUARD TECHNICIAN AND CIVILIAN PERSONNEL DISCIPLINE AND ADVERSE ACTION PROGRAM

References: See Enclosure J.

1. Purpose.

a. This instruction is composed of several volumes, each containing its own purpose. The purpose of the overall instruction is to establish policy and assign responsibilities for the National Guard (NG) Technician and Civilian Personnel Policy Division (TCP) in accordance with (IAW) references a through d.

b. Volume. This volume provides policy and procedures for the NG Technician and Civilian Personnel Discipline and Adverse Action Program IAW references e through j.

2. Cancellation. This instruction rescinds and replaces Technician Personnel Regulation 752, 27 August 2010, "Discipline and Adverse Action."

3. Applicability. This instruction:

a. Applies to the NG of the 54 States, Territories, and District of Columbia, hereafter referred to collectively as "States," and to all NG employees. The term "NG employees" throughout this volume is defined IAW references a, b, and c as Title 32 military technician (dual status) excepted service employees and Title 5 NG excepted or competitive service employees within the States.

b. Does not apply to the civilian employees of the Office of the Chief of the National Guard Bureau, National Guard Bureau Joint Staff, Air National Guard Directorate, and Army National Guard Directorate.

4. Policy. It is National Guard Bureau (NGB) policy to provide due process IAW with merit systems principles for affected NG employees under this instruction. Merit system principles call for holding Federal employees accountable for performance and conduct.

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a. Merit systems principles state that employees should maintain high standards of integrity, conduct, and concern for the public interest and that the Federal workforce should be used efficiently and effectively. They further state that employees should be retained based on the adequacy of their performance, inadequate performance should be corrected, and employees who cannot or will not improve their performance to meet required standards should be separated. Failure to address unacceptable performance and misconduct undermines morale, burdens good performers with subpar colleagues, and inhibits the ability of executive agencies to accomplish their missions.

b. This instruction enhances the ability of supervisors to promote mission readiness and accountability consistent with merit system principles while simultaneously recognizing employees' procedural rights and protections.

c. Grandfather provisioning is made for administrative actions initiated prior to the effective date of this instruction. Such actions will continue to be processed consistent with the procedures and requirements of the Discipline and Adverse Action Program when the action was initiated IAW references i and k unless such actions conflict with current law.

5. Definitions. See Glossary.

6. Responsibilities. See Enclosure A.

7. Summary of Changes. This is the initial publication of CNGBI 1400.25, Volume 752.

8. Releasability. This instruction is approved for public release; distribution is unlimited. It is available at <<https://www.ngbpmc.ng.mil/>>.

9. Effective Date. This instruction is effective upon publication and must be revised, reissued, cancelled, or certified current every five years.



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Enclosures:

- A -- Responsibilities
- B -- Staff Functions
- C -- Non-disciplinary Actions
- D -- Categories of Adverse Actions and Appeal Rights
- E -- Proposed Action Letter
- F -- Letter of Recommendation for Agency Decision
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ENCLOSURE A

RESPONSIBILITIES

1. Manpower and Personnel Directorate (NGB-J1). NGB-J1 will provide the Chief of the National Guard Bureau with oversight of NG human resource technician and civilian employee program development, staffing, and implementation of policies, plans, and programs concerning employment.
2. NGB-J1 Technician and Civilian Personnel Policy Division (NGB-J1-TCP). NGB-J1-TCP will develop, coordinate, and maintain procedures for conduct management, discipline, and adverse actions of the NGB-J1-TCP.
3. The Adjutants General (TAGs) and the Commanding General of the District of Columbia (CG). TAGs and the CG will:
 - a. Establish procedures to ensure due process for employees affected by this instruction.
 - b. Consider the recommended discipline or adverse action and issue the agency decision in adverse actions. TAG or the CG may delegate responsibility for issuing the agency decision to an appropriate official within the National Guard, including the reviewing official.
 - c. If appropriate, provide the employee the right to file an appeal to the Merit Systems Protection Board (MSPB) or to file a grievance.
 - d. Be considered the head of the agency in any administrative action.
 - e. Whenever reasonable in view of the particular circumstances, endeavor to exclude from the application of any grievance procedures negotiated under section 7121 of reference e any dispute concerning decisions to remove any employee from Federal service for misconduct or unacceptable performance. This responsibility follows from TAG's or the CG's role as "agency head." Each agency shall commit the time and resources necessary to achieve this goal and to fulfill its obligation to bargain in good faith. Furthermore, jurisdictional defenses for National Guard technicians employed under reference b should never be waived, and any waiver of TAG statutory authority must be coordinated with the Human Resources Officer (HROs) and Judge Advocate General and approved by TAG. The amendment to subparagraph 5 of paragraph f in reference b authorizes appeals beyond TAG to the MSPB and Equal Employment Opportunity Commission only in limited circumstances.

ENCLOSURE B

STAFF FUNCTIONS

1. Staff Judge Advocate. The Staff Judge Advocate may:
 - a. Advise The Adjutant General (TAG) or the Commanding General of the District of Columbia (CG) in disciplinary cases including adverse actions and MSPB hearings.
 - b. Provide legal guidance and direction to all managers and supervisors on disciplinary responsibilities, rights, and obligations.
 - c. Defend any administrative complaint, grievance, claim, or action.
2. State Human Resources Officers (HROs). State HROs may:
 - a. Provide procedural guidance and direction to all managers and supervisors on disciplinary responsibilities, rights, and obligations.
 - b. Assist supervisors and managers with the procedural aspects of an action before issuing a proposed adverse action or original decision.
 - c. Provide necessary training to managers and supervisors on the Discipline and Adverse Action Program.
 - d. Advise TAG or the CG in disciplinary cases including adverse actions.
 - e. Provide general and procedural guidance and case information to the affected employee(s).
 - f. Consult with the State Judge Advocate Office for legal advice on adverse actions, Douglas Factors, and proposed penalties.
 - g. Ensure commanders or security professionals report derogatory information promptly (typically within 72 hours) to the appropriate adjudication facility through the Joint Personnel Adjudication System and assist commanders in determining whether the derogatory information warrants the suspension of access to classified information.
3. Managers and Supervisors. Managers and supervisors may:
 - a. Maintain an office or shop atmosphere conducive to good employee-management relations.
 - b. Practice and maintain discipline to reduce the need for formal discipline or adverse actions.

c. Ensure employees understand their duties and work practices, safety, and security requirements.

d. Ensure any disciplinary action taken is justified by facts and circumstances and is consistent with agency policy, precedent, and any applicable collective bargaining agreement.

e. Investigate allegations of misconduct.

f. Promptly report derogatory information about an individual with national security eligibility (regardless of whether that individual has access to classified information) to the appropriate security professional or commander of the National Guard organization to which the employee is assigned when such information relevant to the adjudicative guidelines is developed or otherwise becomes available.

4. Proposing Official. This is the initiator of the proposed action and is usually someone in the employee's supervisory chain (normally the employee's first-line supervisor). The proposing official:

a. Develops the facts (by a preponderance of the evidence) that constitute cause for the adverse action in consultation with the HRO and Staff Judge Advocate.

b. Identifies the cause, specifications, and penalty for the proposed action(s).

c. Completes the Douglas Factors Worksheet (Figure 7) and explains the rationale for all aggravating factors. Consult with the servicing HRO and Judge Advocate as needed.

d. Informs the employee of his or her Weingarten rights, if required, to be represented by the union when three conditions apply:

(1) The employee is examined in an investigation conducted by one or more representatives.

(2) The employee reasonably believes disciplinary action against him or her may result.

(3) The employee requests a union representative.

5. Reviewing Official. The reviewing official may:

a. Review the proposed action and is normally the next-level supervisor or management official who conducts an administrative review of the proposed adverse action.

b. Consult with the HRO and the Staff Judge Advocate for legal advice on the proposed adverse action, Douglas Factors, and proposed penalty.

c. Possibly complete an additional analysis of the Douglas Factors. If the reviewing official considers and relies upon new evidence not previously provided to the employee, the employee must be provided with the new evidence and given a reasonable opportunity to reply.

d. Prepare a recommendation to TAG or the CG (or designee) for the agency decision, or issue the agency decision if TAG or the CG has so delegated this responsibility.

6. Employee. The employee is responsible for maintaining professional conduct and courtesy in the workplace and for cooperating with the adverse action administrative and investigative process IAW reference q. Acknowledging the receipt of a notice of misconduct does not imply agreement with the charged misconduct.

ENCLOSURE C

NONDISCIPLINARY ACTIONS

1. Nondisciplinary Actions. A nondisciplinary action is appropriate when (1) the misconduct is minor, (2) cessation or non-repetition of the misconduct is a satisfactory resolution of the matter, and (3) supervisors and deciding officials are not required to use progressive discipline. The penalty for an instance of misconduct should be tailored to the facts and circumstances. Each employee's work performance and disciplinary history are unique, and disciplinary action should be calibrated to the specific facts and circumstances of each individual employee's situation. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time, particularly where the employees are in different work units or chains of supervision and agencies are not prohibited from removing an employee simply because the agency did not remove a different employee for comparable misconduct. Nonetheless, employees should be treated equitably, so agencies should consider appropriate comparators as they evaluate potential disciplinary actions. When taking disciplinary action, supervisors have the discretion to take into account an employee's disciplinary record and past work record, including all past misconduct (not only similar past misconduct).

a. Counseling. Where nondisciplinary action is appropriate, counseling may be suitable in the first instance. Counseling is oral and not recorded in the Supervisor's Work Folder on the electronic Supervisor's Employee Brief for the employee.

b. Admonition. If the minor misconduct continues or is repeated after counseling but nondisciplinary action is still appropriate, admonition is warranted. Supervisors and deciding officials are not required to issue an admonition before proposing adverse action. The penalty for an instance of misconduct should be tailored to the facts and circumstances. The admonition is written in the Supervisor's Work Folder on the electronic Supervisor's Employee Brief for the employee. The employee must be allowed to write his or her reply to the facts and reasons stated by the supervisor on the brief. If the employee replies orally, the supervisor will write a short summary of the reply. The supervisor will state the date on which the admonition and reply will be expunged, absent continuation or repetition of the minor misconduct.

2. Letter of Reprimand. A letter of reprimand is a disciplinary action but does not constitute an adverse action. It may be used when counseling or admonition is ineffective or when the nature of the offense warrants a more serious and formal action.

a. Procedures. A letter of reprimand is issued by a person in the employee's supervisory chain. The first-line supervisor will receive a copy of the letter of reprimand if it is issued by a supervisor other than the first-line supervisor. The issuing supervisor must determine by a preponderance of the evidence that the facts supporting the issuance of the letter of reprimand are substantiated. This might, but does not always, require a formal or informal investigation. The letter of reprimand will be cleared for procedural accuracy through the Human Resources Officer. All letters of reprimand must at a minimum include the following:

(1) A description of the violation, offense, or action (referred to as the cause) in sufficient detail to show why the letter of reprimand is being issued.

(2) The timeframe that the letter of reprimand will remain in effect in the employee's electronic Official Personnel Folder, typically one to three years. Circumstances or the applicable collective bargaining agreement may require a different timeframe. Detail the circumstances that require other timeframes in writing.

b. Repeated Behavior. Repetition of the same offense may warrant more severe disciplinary action, as indicated in the table of penalties (Enclosure I).

c. Grievances. All letters of reprimand are subject to grievance procedures, unless excluded by local bargaining agreements. All bargaining unit employees must use the negotiated grievance procedure if applicable. IAW with TAG or CG responsibilities, TAG, the CG, (or designee) will endeavor to exclude from the application of any grievance procedures negotiated under section 7121 of Title 5, U.S. Code, any dispute concerning decisions to remove any employee from Federal service for misconduct or unacceptable performance. All non-bargaining unit employees must use the State administrative grievance procedure.

d. Use in Adverse Actions. Letters of reprimand may be used as evidence of a previous offense in adverse action proceedings only if the adverse action is commenced before the letter of reprimand has expired. However, expired letters of reprimand may always be used as impeachment evidence to call into question the credibility of the individual when relevant, or in the case of similar misconduct to demonstrate that the employee knew, or should have known, that the alleged misconduct was improper. Letters of reprimand remain in effect for the time stated in the letter. Letters of reprimand that have expired cannot be used as evidence of a previous offense in determining the potential penalty in an adverse action.

ENCLOSURE D

CATEGORIES OF ADVERSE ACTIONS AND APPEAL RIGHTS

1. Actions That Constitute an Adverse Action. Examples of adverse actions are suspension without pay, a reduction to a lower grade, or removal from employment.

1. Actions based on classification or job grading determinations.
2. Reduction in force and furlough actions IAW reference n.
3. Mandatory retirements.
4. Denial of within-grade increases.
5. Reduction of an employee's rate of pay from rates that are contrary to law or regulation.
6. Termination or reduction of entitlements that affect employee pay but do not involve any loss of base pay (for example, night differential, environmental pay, hazard pay).
7. Actions that entitle an employee to pay or grade retentions or actions to terminate such entitlements.
8. Terminations of temporary appointments or terminations of temporary promotions or details.

Figure 1. Examples of Actions Not Covered in This Instruction

2. Categories of Adverse Actions. There are two categories of adverse actions:

a. Category 1 adverse actions are suspensions of 14 days or less.

b. Category 2 adverse actions include:

(1) Removal.

(2) Suspension for more than 14 days. Suspension should not be a substitute for removal in circumstances in which removal would be appropriate. There is no legal requirement to counsel, admonish, reprimand, or suspend an employee before proposing to remove that employee.

(3) A reduction in grade.

(4) A reduction in pay.

(5) A furlough of 30 days or less (is considered an adverse action in regulation but not covered in this instruction).

3. Adverse Action Package. An adverse action package contains the following items (see the enclosures for additional details):

- a. Proposed action letter (mandatory).
- b. Employee's response.
- c. Reviewing official's letter of recommendation to TAG or the CG.
- d. Witness statements.
- e. Decision letter (mandatory).

4. Adverse Actions Appeals. Adverse actions, regardless of category, are administratively processed to TAG, the CG, (or designee) for an agency decision. TAG, the CG, (or designee) will issue the agency decision and inform the employee of any right he or she has to seek further review.

a. MSPB appeals may not apply when TAG, the CG, (or designee) issues the agency decision for Category 1 adverse actions. TAG, the CG, (or designee) will:

- (1) Issue the agency decision.
- (2) Inform the employee of his or her right to:

(a) Use the negotiated grievance procedures, if applicable, for bargaining unit employees or;

(b) Use the administrative grievance procedure, if applicable, for non-bargaining unit employees.

(c) Request an administrative hearing, if applicable, through the NG Hearing Examiner program.

b. In Category 2 adverse actions, TAG or the CG (or designee) will:

- (1) Issue the agency decision.
- (2) Inform the employee of the right to:

(a) Appeal to the MSPB within 30 calendar days of 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 or;

(b) Use the negotiated grievance procedures, if applicable, for bargaining unit employees or;

(c) Use the administrative grievance procedure, if applicable, for non-bargaining unit employees.

5. Negotiated Process Review. A locally negotiated process review that does not end in binding arbitration may be substituted at the State level.

6. Canceling and Restarting Adverse Actions. Adverse actions are administrative actions, not criminal actions, and are not subject to “double jeopardy” rules. At any time, an adverse action may be cancelled, changed, or restarted. If an adverse action is cancelled for purposes of starting it over, the employee affected by the adverse action must be made whole (returned to the position the employee would have been in prior to the action). This may include returning the employee to a previously held position, restoring leave, and restoring back pay. All references to the initial action, including cancellation, must be removed from the employee’s files.

ENCLOSURE E

PROPOSED ACTION LETTER

1. Proposed Action Letter. The proposed action letter is the first official document produced in the adverse action proceeding and must include the items in Figures 2 and 3:

1. Cause for the action being taken.
2. Penalty being proposed.
3. Statement indicating the right to interview witnesses that agree to be interviewed voluntarily, and to review, copy, or receive the materials (documents, recordings, emails, reports of investigations, etc.) relevant to the cause for the action.
4. Statement indicating the NG employee's right to reply.
5. Statement providing potential appeal avenues if proposed action is sustained.
6. Deciding official's contact information.

Figure 2. Proposed Action Statement Contents

a. Cause. The cause is the reason that the adverse action is being proposed.

(1) Stating the cause by listing an offense from the Table of Penalties for Various Offenses (Enclosure I), is not sufficient. Enough additional facts must be included in the proposed action letter to allow the employee to know the details (who, what, when, and where) of the offense that the employee is charged with. All separate causes should be combined in the same action. For example, absent without leave (AWOL) and misuse of a government vehicle may be combined. However, different levels of the same offense, such as AWOL and unexcused tardiness, should not be combined.

(2) If an employee is arrested for, indicted for, or convicted of a criminal offense, the arrest, indictment, or conviction should not be used as the cause. The conduct that led to the arrest, indictment, or conviction can be used as cause for the adverse action. Conduct occurring away from the workplace or outside of the employee's duty day may be the basis for cause if there is a nexus between the conduct and the efficiency of the Service. Where a nexus is alleged, it should be explained in the cause portion of the letter and reviewed by the Staff Judge Advocate for legal sufficiency.

(3) The standard of proof for a criminal conviction is “beyond a reasonable doubt”; this standard does not apply to administrative adverse actions. The standard of proof for upholding an administrative adverse action is “preponderance of the evidence.” There may be sufficient evidence to support an adverse action even if the facts are insufficient for a criminal conviction. Proposing officials need not, and generally should not, wait for a criminal conviction before proposing adverse action, but must speak to the Staff Judge Advocate and HRO before taking any action. In some criminal cases, an indefinite suspension may be appropriate while the criminal action is being adjudicated.

b. Proposed Penalty. The proposed penalty must be stated completely, and an explanation for selecting it must be briefly stated. Penalties must be similar for offenses with like circumstances. The Table of Penalties for Various Offenses (Enclosure I) provides a general guide for common offenses. Variation from the proposed penalties is permissible. When circumstances require variation, those circumstances must be detailed so the employee can respond. When a removal is proposed, the proposed action letter will also constitute the 30-day advance notice of removal. However, no penalty will be imposed until TAG or the CG (or designee) issues the agency decision.

c. Douglas Factors Consideration. The proposing official will complete a Douglas Factors Analysis Worksheet (Enclosure F, Figure 7) and explain the rationale for all aggravating factors in consultation with the servicing Staff Judge Advocate and HRO.

d. The Right to Review Material and Interview Witnesses. The employee or the employee’s representative is entitled to review, copy, or receive materials relevant to the proposed action letter; this includes having witnesses identified and the right to interview witnesses with their consent. These materials may be provided as copies. If these materials are not available at the original time of review, the time for the employee’s response does not start until the materials are made available to the employee or the employee’s representative. Documents in the public domain may be used if the employee or the employee’s representative has access to the material. Material that cannot be made public, such as classified material, should not normally be used as the basis for an adverse action.

e. The Right to Reply. The employee must be informed of his or her right to reply to the proposed adverse action letter through a written submission(s), orally, or by both methods. The employee also must be informed of the timeframe for making the reply.

(1) Timeframes will be specified in calendar days, a minimum of seven days will be afforded for the employee to reply, and the employee will be informed of the process for requesting extensions. Employers must provide a

reasonable amount of excused absence for the employee (or his or her representative) to prepare a reply. At a minimum, this is four hours. More excused absence time may be appropriate depending upon the complexity of the allegation(s), number of witnesses, and circumstances. The employee or his or her representative should articulate the reason for an extension in writing and in sufficient detail for the individual receiving the request to make an informed decision. The individual receiving the request may ask for clarification of the request for an extension when appropriate.

(2) The employee (or his or her representative) may reply in writing, orally, or by both methods. Witnesses will not be called during the reply portion of an adverse action. Voluntary statements or documents may be submitted as part of any reply. More than one reply by the employee may be submitted during the replying stage, such as when new information comes to light during the employee's initial reply. A reply is not required, and no adverse inference may be drawn from the fact that the employee did not submit a reply.

f. HRO Technical Assistance. The employee must be provided with the name and contact information of a member of the Human Resources Office for procedural assistance. The Human Resources Office member cannot provide representation for the employee concerning the merits of the case but may provide procedural advice.

Heading: [Name, Date, etc.]

Subject: Proposed Action Letter

1. This is notification that I propose to [suspend and/or change to lower grade or remove] you from your position as [title and grade of position]. The cause for this action is [a complete explanation of the cause or offense, including the following: who, what, when and where. (Include all separate charges such as absent without leave [AWOL] and misuse of a government vehicle, but not offenses of different severity for the same action such as AWOL, failure to follow leave procedures, and unexcused tardiness.)]
2. I propose to [suspend you for (number of days), reduce you to (grade, step), or remove you from your National Guard employment]. [(In removal cases add) This letter constitutes your 30-day notice of removal.]
3. The witnesses known to me are [names and positions]. You are entitled to interview them and any other National Guard employee(s) or military members who may have relevant information if they are willing to be interviewed. You may arrange interviews on your own or with my assistance. I have enclosed all documents that I have relied upon for your use. OR: You may review and copy the documents I have relied upon by making arrangements with [name] at [location]. [NOTE: the period for the employee to reply does not start until the supporting documents are made available to the employee.]
4. You have the right to reply to this proposed action letter orally, in writing, or by both methods to [name, address, and contact information], who will receive your reply(s) and issue the original decision letter after the period for reply has ended. You will be granted

[amount of time, hours, or days] of excused absence to prepare your reply. Arrange for the use of this time with your immediate supervisor.

5. If this proposal is sustained, you may have appeal rights through various processes including but not limited to [Include appropriate “from” (Merit Systems Protection Board (MSPB), Office of Special Counsel (OSC), Equal Employment Opportunity Commission (EEOC), or grievance)]. Each of these options have potential limitations for their processes. If you have questions regarding these options, you may contact the [Agency Contact].

6. The Human Resources Office has been consulted on the issuance of this letter and [name and contact information] of the HRO is available to answer your procedural questions. This HRO member is not your representative.

7. After the period for your reply has ended, the deciding official will issue the original decision letter. If you require more time to reply, you must request an extension from the deciding official in writing, provide the reasons for the extension, and provide the period of time for your requested extension. This request must be received by the deciding official before the end of the reply period. The deciding official may grant all, a portion, or none of this extension request.

8. [Optional] [Provide employee assistance information.]

Signature block

I [Name _____], have received this letter of proposed action this [number] day of [Month, year]. My signing below is not agreement with the content, only acknowledgement that I have received a copy of the letter.

[National Guard employee’s name]

Figure 3. Sample Proposed Action Letter

g. The Reviewing Official. The employee will be given the reviewing official’s contact information. This individual must be higher in position than the supervisor who proposed the adverse action, but need not be in the employee’s chain of command. The reviewing official must be reasonably available during the period for reply and any extensions. The reviewing official’s contact information, including work address, telephone numbers, and email address, will be provided to the employee.

h. Employee Assistance Program. If it appears that a personal drug or alcohol abuse problem may have contributed to the cause for the adverse action, employee assistance program information should be provided to the employee. You may not order a command-directed mental health evaluation for a civilian employee. Consult with the HRO and Judge Advocate before offering treatment.

ENCLOSURE F

LETTER OF RECOMMENDATION FOR AGENCY DECISION

1. General. The reviewing official named in the proposed action letter must make a recommendation to TAG or the CG for the agency decision. The adverse action letter of recommendation will be prepared with assistance from the Judge Advocate and/or the HRO. The adverse action letter of recommendation contains the content outlined in Figures 4 and 5:

1. The recommendation in specific terms. For example, write, "I am recommending that you be [removed from employment], [suspend you for (number of) calendar days], [reprimanded]."
2. The specific reasons for the recommendation. Include:
 - a. Only the reasons specified in the notice of proposed action.
 - b. A reference to the proposed notice and which reasons you have sustained.
 - c. If proposed orally, the reasons for the recommendation in enough detail to document the basis for the action.
 - d. The employee's past disciplinary record, but only if it was relied on in proposing the action and included in the notice.
3. The proposed effective date of an adverse action. For suspensions, include the first and last day of the suspension and the date and time the employee is to return to duty.
4. The expiration date for a reprimand if that is the recommendation. [For example, "This reprimand will be filed in your official personnel folder and noted on the automated Supervisor's Employee Brief (generated from the Defense Civilian Personnel Data System) with appointment action or as required from 2 years from the date of the decision."] Tell the employee when the reprimand will be destroyed and when the reference to it on the Supervisor's Employee Brief will be deleted.
5. Information about an employee's right to a grievance procedure, if applicable.
6. The signature of the reviewing official.

Figure 4. Adverse Action Letter of Recommendation Contents

2. Reviewing Official's Statement. The Reviewing Official may recommend to TAG or the CG:

- Uphold the proposed action.
- Select a less-severe penalty.
- Take no action at all.

a. If a suspension is recommended, the number of days should be clearly stated.

b. If a change to a lower grade or reduction in pay is recommended, the grade and step must be specified.

c. A last-chance agreement (LCA) may also be proposed for TAG's or the CG's consideration in lieu of termination when appropriate. Employees may waive their right of appeal in exchange for a last-chance opportunity to retain employment. The proposed LCA terms must be clear, concise, and detailed in a standard LCA approved by the National Guard (NG) prior to TAG or CG review. The LCA can include a mitigated penalty (such as a 30-day suspension without pay in lieu of removal).

(1) The duration of an LCA is typically one to two years. If "actionable misconduct" occurs within the period, the employee is subject to the terms of the LCA, and the employee can be removed without further notice or process.

(2) There is no requirement for the State NG to equally apply an opportunity for an LCA to all employees pending removal for the same misconduct. Higher-performing employees are prime candidates for an LCA provided the allegations are not egregious (such as sexual assault, workplace violence, child pornography, or embezzlement). The reviewing official should express concurrence or non-concurrence with an explanation, if appropriate.

(3) If an LCA is recommended, parties must obtain HRO technical review and Judge Advocate legal review prior to TAG or CG consideration. If approved, an LCA ends the adverse action and appellate review processes. Only an arbitrator or judge can decide whether an employee violated the terms of the LCA in an appeal or grievance. If the third party finds that the employee breached the terms of the agreement, the termination stands.

(4) LCAs are not generally appropriate for trial or probationary employees.

(5) State NGs will not agree to erase, remove, alter, or withhold from another agency any information that evidence reasonably indicates is true about a civilian employee's performance or conduct, and that is stated in that employee's official personnel records (including an employee's Official Personnel Folder and Employee Performance File) as part of, or as a condition

to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action.

3. The Effective Date. Recommend the date that the action will take effect. The effective date may not be before the date of the agency decision letter. If the recommended action is removal, the removal cannot be effective on a date sooner than 30 days after the date of the proposed action letter.

4. Reference to the Employee's Replies. The reviewing official's recommendation will refer to all replies received from the employee. If an oral reply is received, the recommendation must provide a brief description of the issue or issues raised in the reply. When referencing replies, the recommendation will note all issues raised in the replies and indicate whether the issues were resolved. If no reply is received, this fact will be noted. No adverse inference may be made from the fact that no reply has been received.

5. Provide the Reasons for the Recommendation. The recommendation will explain which causes in the proposed action letter were sustained and which causes were not sustained. All Douglas Factors (see Appendix A to Enclosure F, Figure 6), that apply to resolution of each cause will be noted. When the recommended penalty in the proposed adverse action letter is to be imposed, an explanation of why such penalty is appropriate will be included. Any modification of the penalty from that included in the proposed action letter will be explained.

6. Provide Human Resource Office Assistance Information. Provide contact information for the member of the Human Resource Office who can provide technical and procedural assistance.

Heading: [Name, Date, etc.]

Subject: Adverse Action Letter of Recommendation for Agency Decision

1. On [date], [rank or title] [First Name Last Name] proposed that you be removed from National Guard employment. I have decided that there is [cause for your removal, or cause for taking adverse action, but with some lesser specified penalty, or no cause for taking adverse action], and am recommending that [see previous].
2. I am recommending this action will be effective on [date]. [Note: Removals cannot be effective sooner than the next workday after 30 days from the proposed action letter.]
3. I have considered your reply(s) on [date(s)]. In your reply(s), you raised the following points or issues [summarize the substance of the employee's reply(s)].
4. I recommend this action because [describe the reasons that support the imposition of whatever adverse action was imposed. The reasons for finding each cause must be detailed, and the reasons for not finding the issues raised in the employee's reply(s) and any Douglas Factors applied to the action should be included.]
5. The Human Resources Office has been consulted on the issuance of this letter and [name and contact information] of the Human Resources Office is available to answer your procedural questions on your appeal rights. This person is not your representative.

6. You may request an oral presentation. An oral presentation involves a review by [The Adjutant General or the Commanding General of the District of Columbia] of all pertinent records, including your reply(s) and any documents submitted with your appeal. Your request must be postmarked not later than 20 days after the date of this letter, or emailed to the Human Resources Office not later than 20 days from the date of this letter. The decision to hear an oral presentation is within the discretion of [The Adjutant General or the Commanding General of the District of Columbia] and is not a matter of right.

7. If you wish to request an extension of the above period, such request is directed to [The Adjutant General or the Commanding General of the District of Columbia], must be received within the 20-day period, and must include the reasons for the request. [The Adjutant General or the Commanding General of the District of Columbia] will decide whether the request for an extension will be granted.

[Signature block]

I, [Name _____], have received this recommendation letter this [number] day of [Month, year]. My signing below is not agreement with the content, only an acknowledgement that I have received a copy of the action.

[Employee's name]

Figure 5. Sample Letter of Recommendation for Agency Decision

APPENDIX A TO ENCLOSURE F

THE DOUGLAS FACTORS

1. Douglas Factors. In determining the appropriate remedy, management must observe the principle of “like penalties for like offenses in like circumstances.” This means penalties will be applied as consistently as possible. Management must establish that the penalty selected does not clearly exceed the limits of reasonableness. A well-known MSPB case (*Douglas v. Veterans Administration*) addressed this issue in detail. A number of Factors that management should weigh in deciding an appropriate course of action are listed in Figure 6 (Douglas Factors) and Figure 7 (Douglas Factors Analysis Worksheet).

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 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. Note: To be considered, any past disciplinary action must have been a past action at the time the most recent conduct occurred.
4. The employee’s past work record, including the length of service, performance on the job, ability to get along with fellow workers, and dependability.
5. The effect of the offense on the employee’s ability to perform his or her job at a satisfactory level and its effect on the supervisor’s confidence in the employee’s ability to perform assigned duties.
6. The consistency of the penalty with those imposed on other employees for the same or similar offenses.
7. The consistency of the penalty with National Guard Bureau guidance regarding disciplinary actions.
8. The notoriety of the offense and its impact on the reputation of the agency.
9. The clarity with which the employee was on notice of any rules violated in committing the offense or any warning about the conduct in question.
10. The potential for the employee’s rehabilitation.
11. The mitigating circumstances surrounding the offense, such as unusual job tensions, personal problems, mental impairment, harassment or bad faith, malice, provocation on the part of others involved in the matter, or deployment-induced or combat-related stress.
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Figure 6. Douglas Factors

DOUGLAS FACTORS ANALYSIS WORKSHEET

Determining Appropriateness of Penalty Checklist for Deciding Officials

Employee's Name: _____

Action Proposed and Date of Proposal: _____

Check one or more of the following:

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

NOTICE

As the deciding official, you are responsible for considering all relevant Douglas Factors (listed below) in determining whether the proposed disciplinary action is appropriate.

Your analysis of the Douglas Factors will be considered part of the case file, and you could be asked to testify regarding your analysis, should the employee appeal the decision.

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

INSTRUCTIONS

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

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

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

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

Neutral: Neither a contributing nor detracting factor.

Mitigating: to make less severe, intense.

DOUGLAS FACTORS ANALYSIS WORKSHEET

ANALYSIS OF DOUGLAS FACTORS

1. Nature and seriousness of the offense.

Nature of the offense (briefly summarize what happened):

Seriousness of the offense (explain how serious and why so serious):

Aggravating Neutral Mitigating

Explanation:

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

a. Employee's Title, Series, and Grade:

b. Is the employee a supervisor? Yes No

c. Is the employee in a position of special trust? Yes No

d. Is the misconduct related to public contact required by the job?
[For example, rude to customers.] Yes No

e. Is the misconduct directly related to the job?
[For example, supply clerk who steals supplies in his or her care.] Yes No

Aggravating Neutral Mitigating

Explanation:

DOUGLAS FACTORS ANALYSIS WORKSHEET

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

List all previous disciplinary actions considered:

Action effected: _____ Date: _____

Action effected: _____ Date: _____

Action effected: _____ Date: _____

Aggravating Neutral Mitigating

Explanation:

4. Employee's past work record.

a. How long has the employee been with the current organization? _____

b. How long has the employee been with the Federal government? _____

c. Ratings of last three performance appraisals.
Last rating of record _____
Year prior rating of record _____
Two years prior rating of record _____

d. Is current performance acceptable? Yes No

[If no, provide documentation of counseling.]

Aggravating Neutral Mitigating

Explanation:

DOUGLAS FACTORS ANALYSIS WORKSHEET

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

Did the offense affect:

a. The employee's ability to do the job? [For example, an employee cannot perform job duties if AWOL.] Yes No

b. Your confidence in the employee's ability to do job? [For example, the employee is responsible for approving leave but lied on a timecard.] Yes No

c. Your confidence in the employee's ability to uphold the organization's mission? [For example, a supply specialist stealing supplies.] Yes No

Aggravating Neutral Mitigating

Explanation:

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

No other employee under my supervision has committed offenses similar to those alleged. Does the union representative have any historical data regarding similar offenses?

The penalty is similar to those given to other employees under m supervision.

The penalty is NOT consistent with other penalties; however, I believe that a more severe or less severe penalty is appropriate. [This must be explained thoroughly because different treatment often forms the basis for claims of discrimination.]

Aggravating Neutral Mitigating

Explanation:

DOUGLAS FACTORS ANALYSIS WORKSHEET

7. Consistency with agency's Table of Penalties. [The table is only a guide; and reasons for departing from it must be rational, well reasoned, and explained because . CAUTION! disparate treatment often forms the basis for claims of discrimination.]

The employee is being charged with _____.

- This is a first offense.
- This is a second offense.
- This is a third offense.

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

The table of penalties recommends _____
for a [circle one] first, second, or third offense of _____.

- Aggravating
- Neutral
- Mitigating

Explanation:

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

- Aggravating
- Neutral
- Mitigating

Explanation:

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

- Aggravating
- Neutral
- Mitigating

Explanation:

DOUGLAS FACTORS ANALYSIS WORKSHEET

10. Potential for employee's rehabilitation. [In his or her reply, the employee may make points that lead you to believe that this employee has the potential for rehabilitation. On the other hand, if the misconduct was clearly wrong and the employee should have known better, you may believe the potential for rehabilitation is low. Remorse or lack of remorse is often listed here as showing of rehabilitative potential.]

Aggravating Neutral Mitigating

Explanation:

11. Mitigating circumstances.

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

a. Was under unusual job stress? Yes No

[For example, stress contributed to the employee's insubordination.]

b. Was experiencing personal problems? Yes No

c. Was provoked? Yes No

[For example, a coworker threatened the employee before the employee punched the coworker.]

d. Was apologetic? Yes No

e. Brought the misconduct to management's attention? Yes No

[For example, the employee confessed the misuse of a Government Travel Card.]

Aggravating Neutral Mitigating

Explanation:

DOUGLAS FACTORS ANALYSIS WORKSHEET	
12. Adequacy of alternative sanctions to deter misconduct.	
<input type="checkbox"/> I believe no lesser sanction will deter future misconduct.	
<input type="checkbox"/> I believe a lesser sanction will deter future misconduct.	
<input type="checkbox"/> I believe an alternative sanction is more appropriate.	
<input type="checkbox"/> Aggravating <input type="checkbox"/> Neutral <input type="checkbox"/> Mitigating	
Explanation:	
Decision: After giving full and impartial consideration to the circumstances surrounding the proposed action, the evidence supporting the proposed action, the employee's reply (if a reply was provided), and the factors above, I have decided to [check one]:	
<input type="checkbox"/> Sustain the action as proposed.	
<input type="checkbox"/> Reduce the penalty to _____.	
<input type="checkbox"/> Offer the employee an alternative sanction [discuss options with Human Resources].	
<input type="checkbox"/> Cancel the proposed action in its entirety.	
Additional comments:	
I [print name] _____ certify that all of the information I considered in determining the appropriateness of the proposed penalty has been included in this analysis of the Douglas Factors and that I have considered all relevant Douglas Factors.	
Date	
Signature	
Page 7 of 7	

Figure 7. Sample Douglas Factors Analysis Worksheet

2. Past Discipline or Adverse Action. Management must ensure that previous disciplinary actions or adverse actions used in determining a sanction are past actions (in effect) at the time the employee committed the unacceptable conduct. Otherwise, TAG or the CG (or designee) will have to find consideration of it improper and not rely on it.

3. Relevant Factors. Some factors may not apply to a given case, and relevant factors must be considered. Bear in mind, however, certain offenses (for example, drug trafficking) carry mandatory penalties.

ENCLOSURE G

AGENCY DECISION

1. Decision Authority. Development of TAG's or the CG's decision is the final National Guard internal review process prior to imposing an adverse action. TAG or the CG may elect to delegate to a State National Guard official(s) the authority to make the agency decision. See Figure 8, "Elements of an Agency Decision Letter," for guidance on preparing a decision letter.
2. Review Process and Procedures. TAGs, the CG, (or designee) will consider the merits of the case prior to issuing the agency decision. The adverse action case file will be provided to the employee or the employee's representative as soon as available, but never less than 10 calendar days before presentation to TAG or the CG (or designee).
3. Agency Decision Criteria. The agency decision will be based on the following:
 - a. Did the employee do what he or she is charged with?
 - b. Will some discipline, based on the proven misconduct, promote the efficiency of the service?
 - c. Is the penalty reasonable?
4. Decision. TAG or the CG may sustain, reduce, or dismiss the penalty or enter into a last-chance agreement. A decision letter will provide any appropriate explanation for the decision.
5. Last Chance Agreements (LCAs). On occasion it may be desirable to enter into an LCA rather than immediately remove an employee from his or her position. This determination is at the sole discretion of TAG or the CG (or designee). LCAs hold removals in abeyance under certain conditions. Figures 11, 12, and 13 list the conditions that must be part of the LCA.
6. Right to File a Grievance. Information about an employee's right to file a grievance, if applicable, or an appeal to the MSPB, if applicable, must be provided. The information must include the address of the MSPB office for filing the appeal and the time limits for appealing to the MSPB.
7. Filing an Appeal. An employee must file an appeal with the MSPB IAW reference 1 within 30 days of receiving TAG's final decision on an adverse action, or the effective date of the adverse action, whichever is later.

8. MSPB Form. The employee must be given a copy of MSPB Form 185, “U.S. Merit Systems Protection Board Appeal Form,” if applicable, and a copy, or access to a copy, of the MSPB regulations.

1. The decision in specific terms. For example, “I have decided to [(remove you) (suspend you for ____ calendar days) (reprimand you), (etc.)].”
2. The specific reasons for the decision. Include:
 - a. Only the reasons specified in the notice of proposed action.
 - b. A reference to the proposed notice and the reason(s) you have sustained.
 - c. If proposed orally, the reasons for the decision in enough detail to document the basis for the action.
 - d. The employee’s past disciplinary record, but only if it was relied on in proposing the action and included in the notice.
3. The effective date of an adverse action. For suspensions, include the first and last day of the suspension and the date and time the employee is to return to duty.
4. If mitigated to a reprimand, the expiration date of a reprimand. [For example, “This reprimand will be filed in your official personnel folder and noted on the automated Supervisor’s Employee Brief (generated by the Defense Civilian Personnel Data System (DCPDS) with appointment action or as required) for 2 years from the date of this decision.”] Tell employees when the reprimand will be destroyed and when the reference to it on the Supervisor’s Employee Brief will be deleted.
5. Information about an employee’s right to a grievance procedure, if applicable.
6. Information about an employee’s right to appeal to the MSPB, if applicable, including the address of the applicable MSPB office for filing the appeal and the time limits for appealing to the MSPB.
7. Information about any other potential appeal rights including but not limited to EEOC and/or OSC.
8. An employee must file an appeal with the MSPB IAW reference k within 30 days of receiving TAG’s or the CG’s agency decision on an adverse action, or the effective date of the adverse action, whichever is later.

9. A copy of MSPB Form 185, if applicable, and a copy, or access to a copy, of the MSPB regulations.
10. TAG's or the CG's signature.
11. The decision date. Date the decision before delivering it to the employee.

Figure 8. Elements of an Agency Decision Letter

ENCLOSURE H

MISCELLANEOUS PROVISIONS

1. Employee's Representative. An employee who is the subject of an adverse action may choose any individual (other than a Human Resources Officer or Judge Advocate) as a representative or IAW applicable collective bargaining agreements. The Trial Defense Service (TDS)/Area Defense Counsel (ADC) representation does not extend to a civilian adverse action when the employee has a military TDS or ADC Judge Advocate appointed for related military discipline or administrative action. The National Guard (NG) does not provide civilian employees with TDS/ADC defense counsel. All representatives will be designated in writing with a statement of understanding that is substantially the same as that in Figure 9. Any changes of representation will be provided in writing.

I, [Name and duty position], appoint [name and contact information] to act as my representative in this adverse action proceeding. All notices or letters provided to me will also be provided to my representative. Notices or letters received by either of us will be binding on both of us.	
_____ [Printed name of employee]	_____ [Signature of employee]
I, [<u>Name and contact information</u>], agree to represent [<u>name of employee</u>]. I agree to represent him or her and to receive notices, documents, and letters on his or her behalf. I am familiar with the adverse action regulation and with applicable appeal procedures. I understand that my actions will be binding on him or her in this action. I understand that my representation will continue until revoked in writing.	
_____ [Printed name of representative]	_____ [Signature of representative]

Figure 9. Sample Letters of Representation

2. Delivery of Documents. The preferred method of delivery of documents is personal delivery with receipt of delivery noted on the retained copy of the delivered document. The acknowledgement of a document is only an admission that the document was received and does not constitute agreement with the contents of the received document. Documents received by or provided to the designated representative will be deemed to be received by the employee. If personal delivery cannot be accomplished, delivery may be accomplished by mail or email. Delivery by mail should be certified, return receipt requested. Delivery by mail is effective on the date signed for. An employee is responsible for keeping the employer informed of his or her current home address for purposes of receiving the proposal, decision, and related correspondence.

3. Correspondence is presumed to have been delivered to the addressee when properly addressed and sent to the employee's last known address by postal or commercial delivery. While such a presumption may be overcome under the circumstances of a particular case, an employee may not avoid service of a properly addressed and mailed proposal or decision nor by intentional or negligent conduct frustrate actual service. The employee may also be deemed to have received the agency's decision if it was received by a designated representative or by a person of suitable age and discretion residing with the employee. Figure 10 illustrates the application of this rule:

1. An employee who fails to pick up mail delivered to his or her post office box may be deemed to have received the agency decision.
2. An employee who lives alone and did not receive his or her mail while in the hospital may overcome the presumption of actual receipt, whereas if the employee is incarcerated, and the proposing official is aware of this fact, delivery should be sent both to the home of record and the jail or prison (by regular mail). For incarcerated individuals, before mailing the notice please contact the jail or prison for institution-specific limitations (for example, some jails and prisons do not allow letters with paperclips, staples, or self-addressed stamped envelopes) or in-person delivery requirements (visiting hours).
3. An employee may be deemed to have received an agency adverse action proposal or decision received by his or her roommate, spouse, teenage child, etc. An employee is deemed to have received an adverse action proposal or a final decision if he or she demonstrates actual knowledge of receipt (for example, by calling the Human Resources Officer or proposing official to request clarification). All correspondence and communications should be documented.
4. Delivery by email is effective on the date the email is marked read by the employee's email account.

Figure 10. Examples of Delivery of Documents

4. Counting of Days. Follow-on actions must take place within a certain number of days. The day of the delivery is not counted. The first day of the specified time period is the next calendar day after delivery. All calendar days are then counted, provided that the last day of the period cannot be a non-work day. If the period ends on a non-work day, the follow-on action must be completed by close of business on the next scheduled work day. Five days are added from the postmark date to an employee's deadline for responding to a document served on the employee by regular mail.

a. If an employee receives a proposed notice of removal that is effective on 01 July, the seven-day period for filing a response starts on 02 July. The

04 July holiday counts as one of the seven days. The filing ordinarily would be timely only if it is made by 08 July. If 08 July is a Saturday, however, the last day for replying would be Monday, 10 July.

b. If the proposing official serves a notice of removal by regular mail and it is postmarked 01 October, the employee's response is due seven days after receipt of the notice of removal. If the employee receives the notice on 06 October, the reply deadline is 13 October (unless that is a non-work day) due to the five days added for transmission of the regular mail.

5. Requests for Extension of Time Limits. All requests for an extension of time limits will be made to the reviewing official. Requests must be in writing or by email. The facts and reasons supporting the need for the extension must be included in the request. The reviewing official may grant the request, and initial requests for short extensions should be granted routinely even if unsupported by stated facts and reasons. A written or email response will be made to each request for an extension, either granting an extension to a certain date or, if denying the request, stating the reason(s) why the extension was denied. Due process should be swift but fair.

6. Harmful Error. A harmful error is an administrative or procedural error that may have caused management to reach a conclusion different than the one it reached, or an error that substantially diminishes the employee's ability to prepare and present a defense to the proposed adverse action. The employee must allege a harmful error(s) immediately upon discovery. The burden of proof for showing that an error was a harmful error is on the employee. If an alleged harmful error is not raised immediately after it is known, the harmful error is deemed waived. "Immediately" means by a separate communication or in the next scheduled response, such as the employee's reply.

7. Corrective Actions. If an administrative or procedural error occurs but can be corrected to prevent or eliminate harm, the correction must be made. This may be done by issuing a new letter, allowing additional reply or response time, or other such action, as long as it may be clearly shown that the action, as corrected, afforded the employee all the due process the employee is entitled to receive.

8. Notice Leave. When removal is proposed where the continued presence of the employee may have an adverse impact on the mission, cause a safety concern, or unduly disrupt the work area, the employee may be granted notice leave IAW reference 1. Notice leave is paid leave. The default should be that an employee who is being investigated or against whom an adverse action has been proposed will remain in a duty status in his or her regular position, or be placed on a detail during the investigation or notice period. The agency may also consider requiring an employee who is otherwise telework eligible and who is currently (or recently has been) participating in the agency telework program to telework. However, an employee may be placed on notice leave in instances

after proposing adverse action when there is a determination that the employee's continued presence on the job during the notice period may pose a threat to the employee or others, result in loss of or damage to government property, or jeopardize legitimate government concerns.

a. Notice leave is not an adverse action and should be coordinated with the Human Resources Officer and Judge Advocate before being implemented.

b. If an employee is granted notice leave, arrangements must be made with the employee or the employee's representative for the preparation of the reply, or appeal or both. This must include access to documents and witnesses who voluntarily wish to meet with the employee or the employee's representative.

9. Trial or Probationer Terminations. Termination is authorized at any time during the two-year trial or probationary period or the one-year trial or probationary period for preference-eligible employees. In these cases, the employee is entitled to a written notice only, with a general conclusion about deficiencies.

a. A trial or probationary period termination does not provide the affected employee with the right to an appeal.

b. A 30-day notice is not required for termination of trial or probationary employees.

10. Drug or Alcohol Use. If drug or alcohol use is cited as a defense or contributing factor for an employee's misconduct, the misconduct will be dealt with separately from the drug or alcohol use. Employees will be referred to a health care provider or the Employee Assistance Program for drug or alcohol counseling. The misconduct will be treated in the same manner that all such misconduct is dealt with, and a similar penalty for a similar offense will be imposed. If the penalty imposed is removal, the date of the proposed removal may be adjusted to allow the employee to obtain medical or substance abuse treatment services as recommended by a health care professional or other substance abuse treatment authority.

11. Additional Rules. Adverse action taken pursuant to this instruction does not preclude military discipline or administrative action for the same or related misconduct when appropriate. This is not double jeopardy, and the actions are separate and distinct. For example, fraudulent use of a Government Travel Card or illegal drug use could have far-reaching impact and could result in adverse action against the individual as an NG employee, non-judicial sanctioning from a military entity, and discharge from military service as well as possible loss of security clearance. Any and all actions should be pursued in a timely manner by leadership IAW applicable laws and regulations.

1. The continued good behavior of the employee with no repeat of a like offense or one of similar severity.
2. The continued good performance of the employee.
3. A written admission by the employee that he or she did commit the offense that he or she was accused of committing.
4. The offense would justify the employee's removal.
5. How long this last-chance agreement will remain in effect (not more than two years).
6. If the employee violates this last-chance agreement during the period that it remains in effect, his or her removal can be effective immediately with no right to appeal.
7. Any such last-chance agreement must be in writing and signed by the original decision maker or the final appeal authority, the employee, and the employee's representative (if applicable).

Figure 11. Conditions for a Last-Chance Agreement

12. Stay of Imposition of Penalties Other than Removal. On occasion, it may be desirable to not impose a penalty based upon justice or the needs of the organization. Where an original decision has been issued and no appeal is pending, or where the final appeal authority has made a determination on an appeal, a penalty may be directed but not imposed based upon certain conditions. If the employee meets the conditions of the stay, the penalty is not imposed. Figure 12 lists the conditions that must be a part of a stay of imposition of a penalty.

1. The continued good behavior of the employee with no repeat of a like offense or one of similar severity.
2. The continued good performance of the employee.
3. The period of time that the stay of imposition will remain in effect (not more than one year).
4. Acknowledgment by the employee that a violation of this stay of imposition will result in the immediate imposition of the penalty previously imposed.
5. Acknowledgment by the employee that the new offense that constituted a breach of the stay of imposition will be the subject of an entirely separate adverse action.

Figure 12. Conditions for Stay of Imposition

Heading

Subject: Last Chance Agreement

1. This is a Last Chance Agreement (LCA) between the [State] National Guard and [name of employee]. On [date], the [State] National Guard proposed [name of employee]'s removal from [his or her] position. The proposal notice, which was issued by the first-level supervisor, [name of employee's supervisor], proposed [his or her] removal on the basis of [describe the reasons for removal] [unacceptable performance]. The reviewing official has recommended the reason(s) identified in the notice be sustained and recommended the penalty of removal.

2. However, as an alternative to removal, this LCA provides one last chance for [name of employee] to demonstrate that [he or she] can fulfill all of the conditions of employment. Therefore, the [State] National Guard, mindful of its rights to terminate [name of employee], agrees to place the Decision to Remove in abeyance in exchange for the following:

a. Employee acknowledges that the agency has evidence that, if not rebutted, is sufficient to prove [the charged misconduct] [unacceptable performance] and waives [his or her] right to seek to rebut the evidence.

b. Employee agrees to [not engage in future misconduct] [enter a 120-day performance evaluation established by the supervisor starting the day this agreement is executed].

c. Employee understands that [he or she] is expected to perform [his or her] duties at the fully successful or higher level.

3. In the event the removal is reinstated, employee agrees to waive all appeal rights to The Adjutant General of the [State or Territory National Guard, or the Commanding General of the District of Columbia National Guard] to the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, and any grievance or arbitration process concerning any action reinstating the removal being held in abeyance, the terms and conditions of this Agreement, or other discipline taken with a [one-year] [two-year] probationary period beginning at the time this Agreement was signed.

4. By accepting this LCA, [name of employee] freely and voluntarily waives [his or her] right to personal recovery, including compensatory damages in any action brought against the United States, the [State Name or Territory Name or District of Columbia], the National Guard, or their agents, concerning any action reinstating the removal action being held in abeyance, and performance-based actions taken within the [one-year] [two-year] probationary period, as well as any alleged breach of terms of this Agreement.

[Name of employee] further agrees not to initiate a lawsuit and waives all rights to personal recovery, including but not limited to compensatory damages, in any lawsuit brought against the Agency by either [name of employee] or the Equal Employment Opportunity Commission, or other type of equal employment opportunity complaint or any other civil and criminal litigation in any court or other administrative forum, for all acts, events, and circumstances out of or connected to events that brought this LCA, including, but not limited to actions brought under Title VII of the Civil Rights Acts of 1964 and 1991, as amended; the Rehabilitation Act of 1973, as amended; or any Federal or State regulation.

5. This agreement provides that no monies, including attorney fees, will be paid by either side unless specifically set forth in this LCA.

6. Violation of the LCA: The parties, both management and the employee, agree that if management determines this LCA has been violated, the only issue to be determined is whether there has been a violation. The penalty is not at issue.

7. This LCA will remain in force for the entire period specified above, or be in force for more than 120 days of the performance evaluation, whichever is later, and shall not lapse or become void because of change in employee position by the employee.

Employee

Employee Representative

Final Appeal Authority (TAG or the CG or Designee)

HRO Representative

[Name (Signature Block)
Rank, Agency
Position]

Figure 13. Sample Last Chance Agreement

I, [name of employee], understand that I have lost my employment with the [State, Territory, or the District of Columbia] National Guard. I understand this last-chance agreement (LCA) means that I am being given one more chance and only this one chance to prove I can keep my job. I understand that I have one more chance to be a productive employee exhibiting fully successful duty performance.

I understand that this means that if I fail to perform my duties at a fully successful level of performance or if I engage in misconduct, I will be subject to being removed (by having this removal reinstated). I am signing this LCA of my own free will.

Signed:

_____ Date: _____

Employee

Figure 14. LCA Statement of Understanding

ENCLOSURE I

TABLE OF PENALTIES FOR VARIOUS OFFENSES

1. Table of Penalties Guide. Table 1 is a guide and is not all-inclusive. The penalties are graduated in severity based on whether the alleged offense is the first, second, or third offense. Conduct that was the subject of counseling or admonishment is not an offense for purposes of this table. For example, if an employee was counseled for unexcused tardiness and admonished for a second instance of unexcused tardiness, and management then decides to take disciplinary action for a third instance of unexcused tardiness, this third instance is the first offense for purposes of this table. More serious types of misconduct have a more serious suggested penalty or range of penalties for a first offense than less serious types of first offenses.

2. Table 1 provides suggested penalties and should not be applied inflexibly so as to impair consideration of factors relevant to the individual case. Supervisors and deciding officials are not required to counsel or issue an admonition or letter of reprimand before proposing an adverse action. The penalty for an instance of misconduct should be tailored to the facts and circumstances.

Item	Nature of Offense	Subcategory	First Offense	Second Offense	Third Offense	Notes
1a	Attendance-related offenses	Unexcused tardiness	Letter of reprimand	Letter of reprimand to 1-day suspension	2-day to 5-day suspension to removal	1
1b		Failure to follow established leave procedures	Letter of reprimand to 1-day suspension	1-day to 5-day suspension	5-day suspension to removal	
1c		Absent without leave (AWOL) (includes leaving work site without permission)	Letter of reprimand to 1-day suspension	1-day to 15-day suspension	5-day suspension to removal	2
2a	Failure to observe written regulations or rules	Violation where safety to persons or property is not involved	Letter of reprimand to 1-day suspension	1-day to 15-day suspension	2-day suspension to removal	3
2b		Violation where safety to persons or property is involved	Letter of reprimand to removal	30-day suspension to removal	Removal	3

Item	Nature of Offense	Subcategory	First Offense	Second Offense	Third Offense	Notes
3a	Breach of security regulations or practices	Classified information is not compromised and breach is unintentional	Letter of reprimand to 5-day suspension	1-day to 15-day suspension	2-day suspension to removal	
3b		Classified information is not compromised and breach is intentional	Letter of reprimand to removal	30-day suspension to removal	Removal	
3c		Classified information is compromised and breach is unintentional	Letter of reprimand to removal	2-day suspension to removal	30-day suspension to removal	
3d		Classified information is compromised and it is a deliberate violation	30-day suspension to removal	Removal		
4a	Alcohol-related offenses	Unauthorized use of alcoholic beverages while on Government premises or in a duty status	Letter of reprimand to 15-day suspension	15-day to 30-day suspension to removal	30-day suspension to removal	4
4b		Sale or transfer of alcoholic beverage on Government premises or while any person involved is in a duty status	Letter of reprimand to 15-day suspension	15-day to 30-day suspension to removal	30-day suspension to removal	4
4c		Reporting to or being on duty while under the influence of alcohol to a degree which interferes with proper performance of duty, is a menace to safety, or is prejudicial to the maintenance of discipline	Letter of reprimand to removal	15-day suspension to removal	Removal	4
5a	Drug-related offenses	Introduction of an unlawfully possessed controlled substance to a work area or Government installation for personal use	30-day suspension to removal	Removal		4

Item	Nature of Offense	Subcategory	First Offense	Second Offense	Third Offense	Notes
5b		Reporting to or being on duty while under the influence of unlawfully used drugs to a degree that interferes with proper performance of duty, is a menace to safety, or is prejudicial to the maintenance of discipline	Letter of reprimand to removal	Removal		4
5c		Introduction of a controlled substance to a work area or Government installation with the intent to unlawfully distribute it	30-day suspension to removal	Removal		4
6a	False statements	Deliberate misrepresentation, exaggeration, falsification, concealment, or withholding of a material fact	Letter of reprimand to removal	1-day suspension to removal	15-day suspension to removal	7
6b		Making false or unfounded statements against coworkers, supervisors, subordinates, or Government officials that tend to damage the reputation or undermine the authority of those concerned	Letter of reprimand to removal	30-day suspension to removal	Removal	
6c		False statements, misrepresentation, or fraud in entitlements, time card, leave form, or travel voucher	Letter of reprimand to removal	30-day suspension to removal	Removal	5
6d		False statements or misrepresentation on documents pertaining to qualifications or on another official record	Letter of reprimand to removal	Removal		6

Item	Nature of Offense	Subcategory	First Offense	Second Offense	Third Offense	Notes
7a	Refusal to testify; interference or obstruction	Refusal or willful failure to testify or cooperate in a properly authorized inquiry or investigation	3-day suspension to removal	5-day suspension to removal	Removal	
7b		Interference with or attempting to influence or attempting to alter testimony of witnesses or participants	5-day suspension to removal	30-day suspension to removal	Removal	
7c		Attempting to impede an inquiry or investigation or to influence investigating officials	10-day suspension to removal	30-day suspension to removal	Removal	
8	Insubordination	Refusal to obey lawful orders, defiance of authority	Letter of reprimand to removal	5-day suspension to removal	Removal	
9a	Fighting; creating a disturbance	Creating a disturbance resulting in an adverse effect on morale, production, or maintenance of proper discipline	Letter of reprimand to 15-day suspension	5-day suspension to removal	Removal	8
9b		Threatening or attempting to inflict bodily harm	Letter of reprimand to removal	15-day suspension to removal	30-day suspension to removal	8 and 19
9c		Hitting, pushing, or other acts against another without causing injury	Letter of reprimand to 90-day suspension	30-day suspension to removal	Removal	8 and 19
9d		Hitting, pushing, or other acts against another causing injury	30-day suspension to removal	Removal		8
10a	Discourtesy	Rude, unmannerly, or impolite acts or remarks (non-discriminatory)	Letter of reprimand to 15-day suspension	Letter of reprimand to 30-day suspension	1-day to 90-day suspension	9
10b		Use of insulting, abusive, offensive, or obscene language, gestures, or similar conduct (non-discriminatory)	Letter of reprimand to 30-day suspension	5-day suspension to removal	30-day suspension to removal	9

Item	Nature of Offense	Subcategory	First Offense	Second Offense	Third Offense	Notes
11	Stealing	Stealing (actual or attempted); unauthorized possession of Government property or property of others; or collusion with others to commit such acts	Letter of reprimand to removal	Removal		10
12a	Misuse or abuse of Government property or personnel	Negligent loss of, destruction of, or damage to Government property	Letter of reprimand to 15-day suspension	Letter of reprimand to removal	15-day suspension to removal	10
12b		Loss of or damage to Government property, records, or information when an employee is entrusted with safeguarding Government property as a requirement of the job	Letter of reprimand to 90-day suspension	Letter of reprimand to removal	15-day suspension to removal	10
12c		Using Government property or personnel in duty status for other than official purposes	Letter of reprimand to removal	1-day suspension to removal	15-day suspension to removal	10
12d		Misuse of Government credentials	Letter of reprimand to removal	5-day suspension to removal	15-day suspension to removal	
12e		Willful use or authorizing use of a Government vehicle or aircraft for other than an official purpose	30-day suspension to removal	Removal		11
12f		Intentionally mutilating or destroying a public record	30-day suspension to removal	Removal		12
13a	Sleeping on duty	Where no danger to persons or property is involved	Letter of reprimand to 15-day suspension	Letter of reprimand to 90-day suspension	15-day suspension to removal	
13b		Where danger to persons or property is involved	Letter of reprimand to removal	15-day suspension to removal	30-day suspension to removal	
14a	Loafing; delay in carrying out instructions; dereliction of duty	Idleness or failure to work on assigned duties	Letter of reprimand to 3-day suspension	Letter of reprimand to 15-day suspension	15-day suspension to removal	

Item	Nature of Offense	Subcategory	First Offense	Second Offense	Third Offense	Notes
14b		Delay or failure to carry out instructions within the time required	Letter of reprimand to 15-day suspension	3-day suspension to removal	15-day suspension to removal	
14c		Dereliction of duty	Letter of reprimand to removal	5-day suspension to removal	Removal	
15a	Gambling	Participating in an unauthorized gambling activity on Government premises or in a duty status	Letter of reprimand	1-day to 15-day suspension	15-day to 30-day suspension	
15b		Operating, assisting or promoting unauthorized gambling activity on Government premises while in duty status or while others are in a duty status	15-day suspension to removal	Removal		
16	Prohibited job actions	Participating in or promoting a strike, work stoppage, slow-down, sick-out, or other prohibited job action	30-day suspension to removal	Removal		
17	Indebtedness	Failure to honor just financial obligations in a proper and timely manner	Letter of reprimand	Letter of reprimand	Letter of reprimand	13
18a	Sexual harassment	Not involving a subordinate	Letter of reprimand to removal	15-day suspension to removal	30-day suspension to removal	14
18b		Involving a subordinate	14-day suspension to removal	60-day suspension to removal	90-day suspension to removal	14
19	Discrimination because of race, color, religion, age, sex, national origin, political affiliation, handicap, or marital status	Prohibited discriminatory practice in any aspect of employment, including failure to prevent or curtail discrimination of a subordinate when the supervisor knew or should have known of the discrimination	14-day suspension to removal	30-day suspension to removal	Removal	15

Item	Nature of Offense	Subcategory	First Offense	Second Offense	Third Offense	Notes
20a	Reprisal	Intentional interference against exercising the right of, or reprisal against an employee for, exercising a right to grieve, appeal, or file a complaint through established procedures	14-day suspension to removal	30-day suspension to removal	Removal	
20b		Intentional interference with the right to exercise, or reprisal against an employee for exercising, a right under reference e	Letter of reprimand to removal	5-day suspension to removal	Removal	
20c		Intentional reprisal against an employee for providing information to the Inspector General or Equal Employment Opportunity Commission or National Guard Bureau investigator or for testifying in an official proceeding	30-day suspension to removal	Removal		
21	Constitutional violation	Violation of constitutional rights, such as freedom of speech, association, or religion	Letter of reprimand to removal	15-day suspension to removal	30-day suspension to removal	
22a	Political activity	Violation of prohibition against soliciting political contributions	Removal			
22b		Violation of prohibition against campaigning or influencing elections	30-day suspension to removal	Removal		
23	Misappropriation	Directing or rendering without a supervisor's direction services known not to be covered by appropriations	30-day suspension to removal	Removal		
24a	Misuse of a Government charge card (travel or purchase)	Deliberate or negligent travel card misuse, abuse, delinquency, or fraud	Letter of reprimand to removal	5-day suspension to removal	10-day suspension to removal	

Item	Nature of Offense	Subcategory	First Offense	Second Offense	Third Offense	Notes
24b		Purchase card use for a deliberate or negligent illegal, improper, or incorrect purchase	Letter of reprimand to removal	14-day suspension to removal	30-day suspension to removal	
25a	Conduct unbecoming a National Guard Bureau employee	Immoral, indecent, or disgraceful conduct	1-day suspension to removal	Removal		
25b		Solicitation of or accepting anything of monetary value from a person seeking contracts or other financial gain	10-day suspension to removal	Removal		16
26a	Uniform wear	Failure to wear uniform while performing duties as a military technician (dual status)	Letter of reprimand to 30-day suspension	Letter of reprimand to 90-day suspension	15-day to removal	17
26b		Failure to wear uniform properly	Letter of reprimand to 30-day suspension	Letter of reprimand to 90-day suspension	15-day to removal	17
27	Misuse of Government communication systems and equipment	Intentionally using Government communication systems for other unauthorized purposes	Letter of reprimand to 30-day suspension	Letter of reprimand to 90-day suspension	15-day suspension to removal	18

NOTES	
1. This includes delay in reporting at the scheduled starting time, returning from lunch or break periods, and returning after leaving the workstation on official business. The penalty depends on the length and frequency of tardiness. The fourth offense may typically warrant five-day suspension to removal.	
2. These penalties generally do not apply to AWOL based on tardiness of one hour or less. If an employee is AWOL, it is appropriate that the time be recorded as AWOL and later changed to an approved leave category only when the approving authority determines that extenuating circumstances were such that the absence is improperly charged to AWOL. This offense includes leaving the workstation without permission. The penalty depends on the length and frequency of absences. Removal may be appropriate for a first or second offense if the absence is prolonged.	
3. "Persons" includes "self." The penalty depends on the seriousness of the injury or potential injury and the extent or potential extent of damages to property. Using the Employee Assistance Program (EAP) and "reasonable accommodation" for assistance will not normally stop management from carrying out an adverse action.	
4. Using the EAP and "reasonable accommodation" for assistance will not normally stop management from carrying out an adverse action.	

5. This offense includes falsifying information on a time card, leave form, travel voucher, or other document pertaining to an entitlement.
6. Removal is warranted when selection was based on a falsified résumé or credentials, where falsification was intentional, or where the employee occupies a position with fiduciary responsibilities.
7. This offense includes perjury, making false sworn statements, and lying to the supervisor.
8. Lawful self-defense or defense of another is not an offense. The penalty may be exceeded based on such factors as type of threat, provocation, extent of injuries, whether actions were defensive (but in excess of lawful self-defense or defense of another) or aggressive, or whether actions were directed at a supervisor.
9. The penalty for the fourth offense within one year may be a 14-day suspension to removal. The penalty may be exceeded if discourtesy or similar conduct was directed to a supervisor.
10. The penalty depends on such factors as the value of the property or the amounts of employee time involved and the nature of the position held by the offending employee, which may dictate a higher standard of conduct.
11. The penalty cannot be mitigated to less than a 30-day suspension, IAW reference o.
12. The penalty dictated by reference p.
13. There must be a clear nexus between efficiency of the Service and debt complaint.
14. The appropriate penalty for sexual harassment depends on the facts in a given case weighed against National Guard policy that sexual harassment will not be tolerated. If the conduct creates a hostile or offensive work environment, consideration of removal is warranted for a first offense. Consult with the Human Resources Officer and servicing Judge Advocate.
15. Includes failure to prevent or curtail discrimination against a subordinate when the supervisor knew or should have known of the discrimination. The appropriate penalty depends on the facts given in a case weighed against National Guard policy that discrimination is prohibited.
16. Exceptions to this general prohibition of accepting gratuities are contained in reference q.
17. IAW references b, r, and s.
18. Communications systems are the telephone, facsimile machine, pager, email, Internet, cellular phone, personal digital assistant, video camera, tape recorder, or other commercial information systems paid for by the Government.
19. Metz Factors -- Management must weigh the evidence to determine whether a "threat" has actually occurred. Evidence of an employee's intent in making a statement can show that the statement was or was not a threat. Rumors, or fear based on rumors, cannot suffice to prove that an employee threatened anyone. Management should not, however, disregard subjective evidence of fear or intent. Objective evidence typically bears the heaviest weight. Consult with the Human Resources Officer and servicing Judge Advocate.
20. Figure 15 lists the five Metz Factors that provide a framework to weigh the evidence fairly, and all must be considered.

Table 1. Table of Notes to Penalties for Various Offenses

1. Listener's reactions.
2. Listener's apprehension of harm.
3. Speaker's intent.

4. Any conditional nature of the statements.
5. Attendant circumstances.

Figure 15. Metz Factors

ENCLOSURE J

REFERENCES

PART I. REQUIRED

- a. Chief of the National Guard Bureau (CNGB) Instruction 1400.25A, 10 October 2017, “National Guard Technician and Civilian Personnel Program”
- b. Title 32 United States Code (U.S.C.), “National Guard,” Chapter 7, “Service, Supply, and Procurement,” Section 709, “Technicians: Employment, Use, Status”
- c. 10 U.S.C. § 10508, “National Guard Bureau: General Provisions”
- d. DoD Directive 5105.77, 30 October 2015, “National Guard Bureau (NGB),” Incorporating Change 1, 10 October 2017
- e. 5 U.S.C. Chapter 71, “Labor-Management Relations”
- f. 5 U.S.C. Chapter 75, “Adverse Actions”
- g. CNGB Memorandum, 06 February 2017, “Designation of The Adjutants General to Appoint, Employ, and Administer National Guard Employees”
- h. Public Law (P.L.) 114-328, “National Defense Authorization Act for Fiscal Year 2017”
- i. P.L. 114-92, “National Defense Authorization Act for Fiscal Year 2016,” Section 1053, “Management of Military Technicians”
- j. 5 Code of Federal Regulations (CFR) Part 752, “Adverse Actions”
- k. 5 CFR Chapter 2, “Merit Systems Protection Board,” Part 1201, “Practices and Procedures”
- l. 5 U.S.C. § 6329a, “Administrative Leave”
- m. 5 CFR Subchapter B, “Civil Service Regulations,” § 432.102, “Coverage”
- n. DoD Instruction 1400.25, 08 August 2019, “Civilian Personnel Management,” Volume 351, “DoD Civilian Personnel Management System: Coordination and Clearance Requirements for Personnel Reductions, Closures of Installations and Reductions of Contract Operations in the United States”
- o. 31 U.S.C. § 1349, “Adverse Personnel Actions”

- p. 18 U.S.C. § 2071, “Concealment, Removal, or Mutilation Generally”
- q. DoD Directive 5500.07, 29 November 2007, “Standards of Conduct”
- r. Department of the Army Pamphlet 670-1, 25 May 2017, “Guide to Wear and Appearance of Army Uniforms and Insignia”
- s. Air Force Instruction 36-2903, 07 February 2020, “Dress and Personal Appearance of Air Force Personnel”
- t. Director of National Intelligence Memorandum ES 2014-00674, 25 October 2014, “Adherence to Federal Laws Prohibiting Marijuana Use”
- u. Executive Order (E.O.) 12968, 02 August 1995, “Access to Classified Information”
- v. E.O. 13526, 29 December 2009, “Classified National Security Information”
- w. DoD Instruction 5200.02, 21 March 2014, “DoD Personnel Security Program (PSP),” Incorporating Change 2, Effective 11 May 2018
- x. E.O. 10450, 27 May 1953, “Security Requirements for Government Employment,” Amended 05 August 1954

PART II. RELATED

- y. E.O. 12564, 15 September 1986, “Drug-Free Federal Workplace”
- z. E.O. 13467, 30 June 2008 “Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information”
- aa. DoD Instruction 1400.25, 01 December 1996, “DoD Civilian Personnel Management System,” updated 22 August 2018
- bb. Chief of the National Guard Bureau (CNGB) Instruction 1400.25A, Vol 715, 29 June 2020 , “National Guard Technician and Civilian Personnel Voluntary and Non-Disciplinary Actions Program”
- cc. Chief of the National Guard Bureau (CNGB) Instruction 1400.25A, Vol 753, 29 June 2020, “National Guard Technician and Civilian Personnel Adverse Action Appeals and Hearing Examiner Program”

GLOSSARY

PART I. ACRONYMS

AWOL	Absent Without Leave
CFR	Code of Federal Regulations
CG	Commanding General of the District of Columbia
CNGBI	Chief of the National Guard Bureau Instruction
DCPDS	Defense Civilian Personnel Data System
EEOC	Equal Employment Opportunity Commission
HRO	Human Resources Officer
IAW	In accordance with
JA	Judge Advocate
LCA	Last Chance Agreement
MSPB	Merit Systems Protection Board
NG	National Guard
NGB	National Guard Bureau
NGB-J1	Manpower and Personnel Directorate
NGB-J1-TCP	Technician and Civilian Personnel Policy Division
OSC	Office of Special Counsel
TAG	The Adjutant General

PART II. DEFINITIONS

Absent Without Leave -- Absent from duty not authorized by the proper leave-approving official.

Adjudicative Guidelines -- Federal guidelines established for determining eligibility for access to classified information.

Administrative Grievances -- Individual or group complaints regarding work conditions, employment decisions, etc.

Adverse Action -- An official personnel action, usually taken for disciplinary reasons, that adversely affects an employee and is of a severity that a suspension, reduction in grade or status, or removal is warranted.

Cause -- The reason that the adverse action is being proposed.

Classified Information -- The Department of Defense Dictionary, Joint Publication 1-02, defines classified information as “Official information that has been determined to require, in the interests of national security, protection against unauthorized disclosure and has been so designated.”

Collective Bargaining Agreement -- A written agreement between the agency and a labor organization, usually for a definite term, defining conditions of

employment, rights of employees and labor organizations, and procedures to be followed in settling disputes or handling issues that arise during the life of the agreement.

Controlled Substance -- Any drug, material, or other chemical compound identified and listed in reference x or applicable Service guidance.

Days -- Calendar days.

Derogatory Information -- Information that reflects on the integrity or character of an individual, or circumstances suggesting that a person's ability to safeguard national security information may be impaired, that a person's access to classified or sensitive information clearly may not be in the best interest of national security, or that a person's activity may be in conflict with the personnel security standards or adjudicative guidelines.

Disciplinary Action -- Letter of reprimand or adverse action.

Douglas Factors -- Factors that management must weigh in deciding an appropriate course of action observing the principle of "like penalties for like offenses in like circumstances"

Grievance -- A request by an employee, or by a group of employees acting as individuals, for personal relief in a matter of concern or dissatisfaction that is subject to the control of agency management and related to their employment.

Illegal Drug -- A controlled substance included in Schedule I or II, as defined by reference t, or applicable Service guidance. Because a State law may decriminalize a certain drug does not mean it is legal for Federal adverse action purposes. Misuse of prescription medication is illegal drug use.

Indefinite Suspension -- Placing an employee in a temporary status without duties and pay, and pending investigation, inquiry, or further agency action.

Investigation -- Examination of charges against an employee or any defense raised by the employee using this instruction or any other investigation procedure.

Joint Personnel Adjudication System -- The Department of Defense system of record for personnel security adjudication, clearance, verification, and history, plus any successor Department of Defense personnel security system of record.

Letter of Reprimand -- A disciplinary action without an adverse action connected to it.

Metz Factors -- Named for the case *Metz v. Department of the Treasury*, these are a means for evaluating whether a threat has actually occurred, based on

the listener's reactions, the listener's apprehension of harm, the speaker's intent, any conditional nature of the remarks, and the circumstances surrounding the incident.

Misconduct -- An employee's failure to comply with a regulation, rule, requirement, order, or instruction.

National Guard Employees -- Title 32 military technician (dual status) excepted service employees and Title 5 National Guard excepted or competitive service employees within the States, Territories, and the District of Columbia in accordance with references a, b, and c.

National Security Duties -- Work performed by individuals working for or on behalf of the Federal Government that concerns protection of the United States from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, or preservation of the military strength of the United States, including duties that require eligibility for access to classified information in accordance with references u, v, w, and x.

National Security Eligibility -- The status that results from a formal determination by an adjudication facility that a person meets the personnel security requirements for access to classified information or to occupy a national security position or a position requiring the performance of national security duties.

National Security Information -- Information that has been determined to require protection against unauthorized disclosure in accordance with reference v and is so marked when in documentary form.

National Security Position -- Any position in a department or agency, the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on national security.

Negotiated Grievance -- Employees who are covered by a collective bargaining agreement may exercise their right to file a negotiated grievance. A grievance is a complaint of an employee or labor organization concerning a claimed violation or misapplication of the collective bargaining agreement or any law, rule, or regulations affecting conditions of employment.

Nexus -- A connection or link between conduct occurring away from the workplace or outside of the employee's duty day and the employee workforce. Where a nexus is alleged, it must be fully explained in the cause portion of the letter. There must be a clear nexus between efficiency of the service and the debt complaint.

Nondisciplinary Action -- Communication from a supervisor requiring an employee to stop or to not repeat misconduct that is an offense stated in Enclosure I, Table of Penalties for Various Offenses.

Preponderance of 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. A supervisor issuing a letter of reprimand must determine by a preponderance of the evidence that the facts supporting the issuance of the letter of reprimand are substantiated. Prior to serving a proposed action letter, a supervisor must develop the facts by a preponderance of the evidence that constitute cause for the adverse action.

Probation -- In this instruction, “probation,” “probationary period,” and “probationary employee” relate to the requirements in reference f, subpart 7511, paragraphs (b) and (c), and their subparagraphs.

Procedural Advice -- Technical assistance provided by a Human Resources Officer, usually the Labor Relations Specialist, to assist an employee with procedures regarding the adverse action process.

Range of Penalties -- Penalties graduated in severity based on whether the alleged offense is the first, second, or third and possibly depending on mitigating or aggravating factors impacting relative degrees of culpability (for example, employee A improperly appropriates \$5 from a coworker’s wallet without permission to buy lunch and is given a short suspension, whereas employee B takes without permission \$1000 without permission from unit morale funds to pay for a family vacation and is removed at the first offense).

Referral -- Notification of commanders, security officers, and a Consolidated Adjudication Facility when relevant and material derogatory information concerning an individual who has been granted national security eligibility is developed or otherwise becomes available to any Department of Defense element.

Reportable Behavior -- Acts by persons with favorable national security eligibility determinations that may not be consistent with the interests of national security.

Security Clearance -- A personnel security determination by a competent authority that an individual is eligible for access to national security information, under the standards of this manual. Also called a clearance. The individual must have both eligibility and access to have a security clearance. Eligibility is granted by the central adjudication facilities, and the access is granted by the individual agencies.

Security Professional -- U.S. Government military or civilian personnel (including security managers and special security officers) whose duties involve managing or processing personnel security actions relating to the Department of Defense Personnel Security Program.

Sensitive Position -- The Department of Defense Instruction 1400.25 defines this as “a position the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security.”

Sexual Harassment -- Influencing, offering to influence, or threatening the career, pay, job, or work assignment of another person in exchange for sexual favors; or deliberate or repeated offensive comments, gestures, or physical contact of a sexual nature.

Supervisor -- In accordance with reference e, an individual employed full-time by an agency and having authority to hire, direct, assign, promote, reward, transfer, furlough, lay off, recall, suspend, discipline, or remove employees; adjust their grievances; or effectively recommend such action. The performance of one or more of these duties qualifies an employee as a “supervisor” for labor relations purposes and excludes the employee from the bargaining unit.

Weingarten Rights -- The rights of a bargaining unit employee to have union representation.