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# Chapter 1

## Reporting Misconduct

### Introduction

All employees of the Internal Revenue Service (IRS) should report any situation they feel constitutes misconduct or inappropriate behavior that impacts an employee or threatens the integrity or professionalism of the Service. This includes fraud, waste, and abuse. Employees can report alleged misconduct as outlined below directly to the Treasury Inspector General for Tax Administration (TIGTA) or through their supervisor. In addition, all employees who report misconduct to the TIGTA are protected from reprisal for doing so. As a supervisor or manager you are responsible for ensuring that all allegations you receive are promptly reported to TIGTA. (See 31 CFR § 0.107)

### What should be reported?

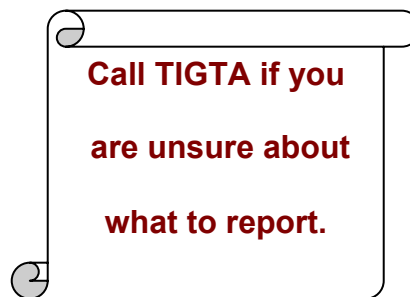
- Mismanagement or violations of law, rules, or regulations by IRS employees or contractors.

### What must be reported?

- All possible criminal violations by any IRS employee and/or contractor.

### What does not have to be reported?

- Less serious forms of misconduct such as tardiness, unexcused absences, insubordination, poor quality work products, and minor personality conflicts not involving harassment. These and similar situations are more appropriately addressed immediately by managers and supervisors in collaboration with their servicing Labor/Employee Relations Specialist.



### Confidentiality

Many people who provide information during an official investigation believe their identity and information will be held in strict confidence. This is not necessarily so. There is no right to confidentiality. Even the Inspector General Act of 1978 does not provide absolute confidentiality – even to the complainant.

## Reporting procedures

In the past there were different rules and places for reporting various types of misconduct. Now employees simply **call** or **write** TIGTA. The person making the report should be prepared to provide the following information:

- Nature of the incident
- Whether personally observed
- Persons involved - witnesses
- Background issues and related information

Anyone filing a report will receive a **tracking number** that will identify the **allegation(s)** throughout the investigation process.

You can submit a complaint by these methods:

- By **E-Mail**: [hq.irs.gov/IRSHOTLINE](mailto:hq.irs.gov/IRSHOTLINE)
- By **Phone**:  
Call toll-free: **1-800-366-4484**
- By **Fax**: **(202) 927-7018**
- By **Mail**:  
**Treasury Inspector General for Tax  
Administration Hotline  
PO Box 589  
Ben Franklin Station  
Washington, DC 20044-0589**

## *For Supervisors*

As a supervisor, your responsibility goes beyond merely reporting the misconduct - you must take steps, where possible, to stop the misconduct or to prevent the misconduct in the future and ensure that the employee(s) involved understand that the behavior is unacceptable.

Your employee must clearly understand that your **initial discussion about misconduct**, prior to the completion of an investigation or inquiry, **is not discipline**. Tell the employee that a decision concerning possible discipline will not be made until *after the pertinent facts are gathered and considered*.

This is important because employees cannot be disciplined twice for the same offense, and they may sometimes misinterpret *any formal or informal* discussion about the misconduct to be a type of discipline.

# Chapter 2

## Addressing/Investigating Allegations

### Introduction

Allegations of misconduct or inappropriate behavior come from a variety of sources. Some must be reported to and investigated by the TIGTA; some come from system generated reports (UNAX, Internet misuse, Telecommunications Asset Tool (TAT)) and may be investigated by Modernization, Information Technology & Security Services (MITS) Division; employee tax cases go directly to the Employee Tax Compliance Branch (ETC) for initial analysis and investigation and may then go through Labor Relations (LR) to management for additional fact-finding; some come through the EEO complaint system and are investigated by the EEO Complaints Center; some are management generated and do not require reporting to TIGTA.

The source of an allegation of misconduct and the nature of the alleged misconduct play a large part in determining who conducts the initial review of the allegations and who will investigate the alleged misconduct.

### Investigation examples

TIGTA may make a determination to 'card' the case and conduct a formal investigation. Each allegation received by TIGTA is analyzed to determine appropriate investigative action. All reports concerning threats, assaults, and bribery attempts require immediate response. Allegations of employee misconduct and those concerning taxpayer protection and rights also receive high priority status. Findings are documented in a Report of Investigation (ROI).

Allegations of possible criminal misconduct are also investigated by TIGTA. Investigations that substantiate sufficient evidence of criminal violations are referred to the Department of Justice or local authorities for prosecution. If the Assistant US Attorney declines prosecution, TIGTA may continue to investigate or refer the allegations to management for appropriate administrative action.

The ETC may close the case or do further investigation and fact-finding or refer the case to management through the Labor Relations office (see Appendix A-2 for further information concerning the Employee Tax Compliance Program).

MITS may close the case or refer the case to TIGTA for further investigation.

In 1203 cases, the Board of Employee Professional Responsibility (BEPR) may close the case or refer it for further investigation (see Appendix A-1 for further information concerning the IRS Restructuring and Reform Act of 1998, Section 1203).

For certain minor administrative infractions such as those mentioned in Chapter 1, management may feel that no further investigation is warranted since they already have or can obtain sufficient facts. In such cases they should consult with their servicing Labor/Employee Relations advisor and initiate whatever formal or informal disciplinary action, if any, they deem appropriate.

### Referral procedures:

Formal Reports of Investigation (ROI), ETC cases, 1203 cases, etc. are downloaded into the Automated Labor and Employee Relations Tracking System (ALERTS) and routed through the

Centralized Investigation Receipt and Control Unit (CIRCU) to the servicing LR office. Cases initiated and investigated by management are logged into ALERTS by the servicing LR office. The LR office does appropriate research and provides this information, the case file, and other pertinent guidance to managers so they can make informed and appropriate decisions concerning appropriate discipline.

TIGTA may inform management that they will not be conducting a formal investigation and may refer the matter back to management for administrative investigation and action. In this case, management should contact their servicing LR office for further guidance and instructions.

## **Employee rights and responsibilities during an investigation**

Employees are entitled to different rights depending on whether the investigative interview involves possible criminal misconduct or administrative misconduct (non-criminal).

At the beginning of an interview, the employee is informed as to whether or not the interview is related to **possible criminal misconduct**. If it is, the employee receives a specific written notice that outlines **Miranda, Beckwith, and Kalkines rights** in accordance with Article 5 of the National Agreement between IRS and NTEU. Employees must **receive these rights in writing** to afford them an opportunity to ask questions at the onset of the interview. Employees must be given and must sign the appropriate employee notification form(s) [Form 8111 for notification of the right to Union representation; Form 5228 for the right to remain silent and the right to the advice of counsel; Form 8112 for the rights and obligations in administrative interviews; Form 9142 for third party interviews; and Form 12036 for a waiver of the right to remain silent and of the right to advice of counsel (non-custody).] These forms are contained in the National Agreement, Exhibits 5-1 to 5-6.

*In all investigative interviews (both criminal and non-criminal):*

- *Employees must answer all questions fully and truthfully.*
- *False statements (including false denials) may subject the employee to disciplinary action in addition to disciplinary action for the misconduct being investigated.*
- *Employees always have the right to consult with an attorney, but the attorney cannot be present during questioning except in cases involving criminal matters.*
- *Bargaining unit employees have the right to union representation at the interview (a union representative cannot tell an employee how to answer any questions or answer for the employee – see Article 5 of the National Agreement for more details).*
- *There is no right to remain silent or right to avoid self-incrimination – except in **criminal** investigations.*

**For further information go to:**

31 CFR §0.207 at [http://152.220.84.226/rules\\_regs.htm](http://152.220.84.226/rules_regs.htm)

**For further guidance on “how to conduct an investigatory interview” go to the**

National Agreement Resource Center (NARC) at  
<http://shr.web.irs.gov/workfce/na/index.htm>

# Chapter 3

## The Discipline Process

### Introduction

Thus far you have learned how investigations are started, who conducts them, what rights employees have during investigations, and how results of investigations are channeled back to you for action. Action refers to you making a decision concerning discipline. In some instances you may conclude that no discipline is required because, for example, the employee was vindicated as a result of the investigation. In others you may conclude that a reminder or counseling is the best course of action. In yet others, you may conclude that discipline is required to both correct the offending behavior and to send the correct message to other employees. In situations involving the most serious of violations you may decide to initiate action to remove (a.k.a., “fire”) the employee. This Chapter will guide you through the discipline process so that you understand and properly carry out your responsibilities.

### Major Categories

Discipline can be broken into two major categories based on the nature and seriousness of the misconduct.

#### Lesser Discipline for Less Serious Misconduct

- Admonishment
- Letter of Reprimand
- Suspensions of 14 days or less

#### Adverse Actions for Serious Misconduct

- Suspensions of more than 14 days
- Reductions in pay and/or grade
- Removal

**NOTE:** Probationary employees are not covered by the procedures outlined in this chapter. A probationary employee who does not meet acceptable standards of conduct or performance is typically terminated after receiving a written notice stating the reasons. The reason for this abbreviated process is that the probationary period (generally the first year of employment) is considered to be an extension of the hiring process during which the Service determines if the employee is qualified or fit for continued employment.

**NOTE:** Section 1203 misconduct cases are handled somewhat differently. Consult the RRA '98 Section 1203 All Employee Guide at <http://publish.no.irs.gov/docs/pdf/27823f02.pdf> for more specific information on that process.

### General Principles of Discipline (Q&A)

1. Q. Does everyone receive the same level of proposed discipline for the same misconduct?

- A. Although there should be general consistency in proposing like penalties for like offenses, there are also several factors that the proposing official must consider and which could result in differences in penalties:
- whether this is the first time the employee engaged in misconduct;
  - the nature of the employee’s position;
  - degree of public trust; and
  - the consequences of the misconduct, etc.

### Example 1:

- The misconduct is fighting. Two **employees** engage in a physical fight in the workplace. Depending on additional facts and circumstances such as whether either employee was injured or the degree of disruption in the workplace as a result of the fight, the employees could receive a penalty ranging from a Letter of Reprimand to a 14 day suspension. Also, one employee could receive a harsher penalty than the other because, for example, he/she was the instigator or because of a previous disciplinary record.

### Example 2:

- On the other hand, if a **supervisor** was one of the employees involved in the fight, that misconduct would be viewed as significantly more serious and would likely result in a more severe penalty for the supervisor. There are several reasons for this, to include the supervisor's responsibility to maintain discipline, set an example of good conduct for the rest of the work force, and to ensure a safe working environment. Supervisors are normally held to a higher standard than non-supervisory employees.

2. Q. *Is the first offense always treated more lightly than subsequent offenses?*

A. In most cases, the penalty for the first offense is less severe than for subsequent offenses. However, for instances of serious misconduct that directly impact the ability to carry out the mission of the Service, an employee's removal from the Service may be proposed, even if the employee has no past disciplinary record.

3. Q. *Why doesn't an employee receive a proposal prior to issuance of an Admonishment or a Letter of Reprimand?*

A. Admonishments or Letters of Reprimand are one of the least severe forms of formal discipline. Because they neither affect an employee's pay status nor become part of the **permanent** record, a proposal is not necessary.

### For Supervisor

Disciplinary penalties are imposed to correct behavior and to teach the employee and others that such actions or behaviors are inappropriate for an IRS employee and will not be tolerated. Discipline is usually progressive in nature and therefore subsequent misconduct is treated with increasing severity, *even if it is a different type of misconduct*. For example, an employee receives a Letter of Reprimand for unauthorized absence, and six months later is found to have engaged in insubordination. The insubordination is considered to be a subsequent offense and subject to a more severe penalty, even though it is unrelated to the initial misconduct of unauthorized absence. Please review the Guide to Penalty Determinations, IRM 6.751.12, Exhibit 6 – Document #11500.

## Overview of Process

### Proposal Notice

This is the **advance notice** to an employee about disciplinary or adverse action that is being **proposed**. It contains specific information about what the employee did wrong, the regulations, policies and/or procedures that have been violated, and the specific discipline being proposed. The manager involved in this stage of the process is commonly referred to as the “Proposing Official”.

### Employee Reply

The oral and/or written **reply** is the employee’s opportunity to present his/her side of the story. The employee can do this in person, in writing, or both, and with representation.

### Final Decision

This is a notice to the employee that communicates the final decision on the action which was proposed. The person who makes this decision is referred to as the Deciding Official and is at a higher level in the organization than the supervisor who proposed the action. The Deciding Official must first, after consideration of all the facts and available evidence in the matter, make a determination on whether or not the employee committed the misconduct as charged. In reaching a decision on an appropriate penalty for sustained misconduct, this official takes into account a number of factors including the employee’s prior work and disciplinary record, the information in the oral/written reply, and any other pertinent factors (discussed more thoroughly at the end of this Chapter.) The Deciding Official can sustain the original proposal action, reduce the penalty, or impose no penalty. The Deciding Official cannot impose a penalty greater than the one which was proposed.

**Important:** Any disciplinary or adverse action proposed or taken against a bargaining unit employee will be consistent with the procedures outlined in the National Agreement in Articles 38 and 39.

### For Supervisors

Supervisors and managers are responsible for familiarizing themselves with the procedures outlined in Articles 38 and 39 of the National Agreement, with IRM 6.751 and 6.752, and with the Plain Talk about Ethics and Conduct (Document 12011). You must contact your servicing Labor and Employee Relations Specialist prior to issuing a disciplinary or adverse action. The LR Specialist will ensure that the correct procedures are followed and provide advice and assistance.

## Proposal Notice (Q&A)

### 1. Q: *What is a proposal?*

A: The proposal notice is a preliminary letter that advises the employee that discipline is being proposed and contains the specific charge(s) and specifications related to the misconduct and provides specifics about the charge(s).

### 2. Q: *Who issues the proposal?*

A: If the proposal is for a suspension for disciplinary action the immediate supervisor in the employee's chain of command issues the proposal.

If the proposal is for an adverse action, a second level supervisor issues the proposal.

### 3. Q: *How does the proposing official arrive at an appropriate proposal of disciplinary action (penalty)?*

A: Proposing the Penalty –

**First** – the proposing official reviews all available information about the misconduct. This can be documents that reflect what happened such as time and attendance records operational records, a Report of Investigation (ROI), or affidavits or other similar documents prepared by witnesses.

**Next** - the proposing official consults with the servicing LR specialist. Together they review the Guide to Penalty Determinations (found in the Exhibits to IRM 6.751), ALERTS research on similar cases, and any other pertinent information. The LR specialist consults with General Legal Services (GLS) if legal advice/assistance is needed at this stage.

### 4. Q: *What is the Guide to Penalty Determinations?*

A: The Guide to Penalty Determinations is an IRS publication designed to help supervisors and managers in administering discipline in a fair and consistent manner. Specifically, it:

- Serves as a **guide** to managers and supervisors in assessing the appropriate penalties for common types of misconduct.
- Provides a range of penalties for first and subsequent offenses.
- Does not cover every possible offense.
- Does not relieve managers and supervisors of their responsibility to exercise good judgment when applying the Guide to disciplinary situations.

Note: To review the Guide, go to: <http://publish.no.irs.gov/DOCS/PDF/32178F01.pdf>

## For Supervisors

The proposing official will also take into account the employee's record of prior formal discipline, if any, when considering the appropriate proposed penalty. Typically, the LR Specialist will research this issue and provide the proposing official with the necessary information for consideration. This information is also included in the letter to the employee that proposes the disciplinary or adverse action.

Your servicing L/ER Specialist uses various research tools to formulate his/her recommendation to you regarding penalty selection. One of these tools is the ALERTS database that tracks all disciplinary and adverse actions in the IRS.

### 5. Q: What's included in a proposal letter?

A: The following items must be included in a proposal:

- **The charge(s)** – the rule(s), policies, or procedures alleged to have been violated. (Examples: Failure to follow instructions, insubordinations, theft of Government property, falsification of travel voucher.)
- **The specifications** - How, when, and where the employee is alleged to have committed the misconduct (Example: At about 2:15 p.m. on August 5, 2003, I verbally instructed you to give me a status report on Project X by the end of the day. This conversation took place in my office. You stated you had other things to do and you would give me the report if you had time. I told you this was your number one priority for the day and that I must have the report by 4 p.m. You left the room in a huff, slamming the door on the way out. You did not provide the report as directed. I looked for you at 4 p.m. and you had already departed for the day).
- **The proposed penalty** – specific disciplinary or adverse action proposed. (Example: I proposed to suspend you from duty without pay for a period of 3 workdays.)
- **Aggravating factors** considered in assessing the penalty level by applying the factors listed in the exhibits to IRM 6.751.1. Those factors are commonly referred to as the Douglas Factors.
- **Nexus statement** - In accordance with Article 38, Section 6 of the National Agreement, if the case involves off-duty misconduct, a nexus statement will be included. The statement will describe why and how the off-duty misconduct connects to the efficiency of the Service
- **Entitlement for employee to reply** – to tell his/her side of the story orally and/or in writing and provide any favorable information such as long-standing service or lack of a past disciplinary record.
- **How much time before the proposed action if effected, is implemented.** In any proposed action the decision is not reached until after receipt of the employee's written or oral reply. If the employee chooses not to reply, the decision on the proposed action will not be rendered until after the period of time allowed for the reply has expired. For adverse actions, applicable laws mandate that a decision cannot be effected for at least 30 days from the date of the proposed action (a shorter notice period can be used if the misconduct falls under the crime provision). For example: The proposed action will not be effected earlier than 30 calendar days from the date you receive this notice.

• **Employee entitlement to representation –**

-**Non-bargaining unit employee** - this individual, chosen by the employee, can be an attorney or other representative. The representative provides advice to the employee and is authorized to act in the employee's interests in all aspects of the disciplinary process (IRM 6.771.1.11 discusses representation under the Employee Grievance Process.

-**Bargaining unit employee** – this individual has the same right to representation as above plus the right to select the union as his/her representative (one (1) steward may attend). However, if the employee chooses a private attorney or someone other than the union to represent him or her, the union is still entitled to attend all the meetings held between management and the employee concerning the grievance.

• **Employee entitlement to review the materials relied upon to propose the action**

– Upon request this material is compiled in a file and is provided to the employee or representative (Article 38, Section 3A). Following issuance of the proposal notice the file is provided to the Deciding Official. Most often the material includes statements or affidavits from individuals and other pertinent documentary evidence. The employee/representative may also request all documents pertaining to the investigation of the employee that were available to the proposing official (Article 38, Section 3B).

• **Employee entitlement to a reasonable amount of official time** (time on the job) to review the material and to prepare a response. Generally the notice will specify how much official time is allotted and who should be contacted to obtain permission to use it. Refer disputes involving bargaining unit employees to the Official Time Coordinator (OTC).

(Example: You may use 8 hours of official duty time to review the material contained in the case file and prepare a reply. Use of official time should be coordinated with your immediate supervisor prior to its use.)

**NOTE:** *The issuance of a notice of proposed action does not change the employee's pay status; he or she will remain in a duty and pay status and is expected to report to work unless directed otherwise. However, in some cases, management may decide that an employee's presence in the workplace poses a threat to people or property or jeopardizes the interests of the IRS. In those cases, an employee's status may be changed to limited duty or non-duty, with pay, depending on the circumstances*

## **Employee Reply (Q&A)**

The right to reply to a proposed action is an important part of the employee's right to due process.

1. **Q: What is the purpose of an employee reply to a proposed action?**

A: The employee's reply, either provided orally or in writing, or both, is the employee's chance to tell his/her side of the story. An employee may also include information that he/she wants the Deciding Official to consider in reaching a decision such as longevity of service and a past good work record. For example, an employee may admit guilt, but make a plea for a reduced penalty.

2. *Q: What's the point of an employee replying to a proposed action if an investigation or inquiry into the matter is already completed?*

A: The reply may offer any explanation circumstances or reasoning behind an employee's actions that may or may not have been captured in the investigation or inquiry. The employee's reply is one of the significant factors that a Deciding Official takes into consideration when determining whether the employee committed the misconduct as charged. The reply is also considered in reaching an appropriate penalty for sustained misconduct and whether the penalty should remain as originally proposed or be reduced.

Employees may bring up mitigating circumstances (e.g., financial, family problems, addiction to alcohol) that may impact the Deciding Official's decision of the nature or level of discipline imposed.

3. *Q: Is an employee required to reply to a proposed action?*

A: No.

4. *Q: Who receives the reply?*

A: The Proposing Official, designated in the notice of proposed action will receive the written reply. In many cases the Proposing Official may also hear any oral reply personally. However, in some cases the Deciding Official may appoint an Oral Reply Officer to hear the reply.

5. *Q: Who attends an oral reply?*

A: The oral reply is attended by the Proposing Official or the Oral Reply Officer (designated by the Deciding Official); the employee, the employee's representative, if any; the Labor/Employee Relations Specialist; and the court reporter.

6. *Q: How is the oral reply documented?*

A. In accordance with Article 39, Section 2D of the National Agreement, in cases of proposed adverse action, if the employee elects to make an oral reply, the Employer will prepare a verbatim transcript of the oral reply and will provide a copy to the employee or designated representative. The same requirement does not apply to disciplinary actions (see Article 38 Section 5).

7. *Q: How much time does an employee have to prepare a reply once the proposal is received?*

A: This information will be outlined in the notice of proposed action. Generally an employee will have fifteen (15) calendar days to submit a reply. Also, an employee may request additional time from the Proposing Official to prepare a reply. The request must provide an explanation as to why the extension is necessary.

8. *Q: What should I do if an employee requests what I think is an unreasonable extension to reply?*

A. Consult with your servicing LR specialist before making a decision.

9. Q: *Can an employee prepare his/her reply during normal duty hours?*

A: Yes, an employee is given a reasonable amount of official time to review any materials relied upon to propose the action and to prepare a reply. However, the employee must request the use of official time in advance from his/her supervisor.

10. Q. *What if an employee's requests additional time beyond that which they were authorized in the proposal letter? Should I approve it?*

A. As with the answer to question 7, you should consult with your servicing LR specialist before making a decision. Each response should be based on the specific facts and circumstances presented. Disputes involving bargaining unit employees may be referred to the appropriate OTC.

11. Q: *Does an employee receive a response to the reply from the Deciding Official?*

A: Yes. The consideration given to the reply by the Deciding Official is included in the Final Decision (next section).

### ***Final Decision (Q&A)***

1. Q: *What is the final decision letter?*

A: The letter that communicates the Deciding Official's decision on a proposed disciplinary or adverse action to the affected employee.

2. Q: *Who is the Deciding Official?*

A: The Deciding Official is the individual in the employee's chain of command who is authorized by the Service's Delegations of Authority (IRM 1.2.2) to make decisions on proposed disciplinary and adverse actions.

3. Q: *How does the Deciding Official determine if the misconduct occurred as charged?*

A: After receipt of any replies, or after the reply period has passed, the LR Specialist is responsible for preparing a statement of case (SOC) for the deciding official. The information included with the SOC includes all supporting documents including ALERTS research, the proposal letter, evidence relied upon, and any oral and/or written replies. Upon receipt of this information, the LR Specialist discusses the statement of case and replies (if any) with the deciding official. With that information in hand, the Deciding Official decides if the misconduct occurred as charged.

4. Q: *How does the Deciding Official determine if the penalty is appropriate for the charge(s) of misconduct that he/she has determined to be supported by the evidence?*

A: Along with any pertinent information in the employee's reply and other regulatory or statutory requirements, what has become known as the "Douglas Factors," based on a landmark decision of the Merit Systems Protection Board (MSPB), must be considered. Those factors are:

- The nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- The employee's past disciplinary record;
- The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties;
- Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- Consistency of the penalty with the applicable Agency Table of Penalties;
- The notoriety of the offense or its impact upon the reputation of the Agency;
- The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- The employee's potential for rehabilitation;
- Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter; and
- The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

*Some of these factors may work in favor of the employee and some may not. It is the job of the Deciding Official to carefully consider each factor, identify those that are relevant, and then use judgment in arriving at a balanced decision. There is no magic formula in arriving at penalty decisions. Questions concerning how to arrive at a balanced decision should be discussed with servicing LR Specialists.*

**5. Q: What information is contained in the final decision letter?**

**A:** The final decision letter will contain the following information:

- The charge(s) that the Deciding Official determined to be supported by the evidence (the sustained charges).
- Factual disputes.
- The relevant factors (one of which is the employee's reply) that were considered in the Deciding Official's selection of an appropriate penalty.
- What penalty will be imposed (can be less than the proposed penalty, but cannot be more severe than the proposed penalty).
- When the penalty will be imposed.
- The rights to challenge the decision.
- How to invoke those rights (including filing deadlines) and who to contact for procedural questions.

### ***For Supervisors***

It is important to be able to document when an employee received a proposal and/or decision letter. Normally, the supervisor will deliver the letter personally to the employee and will ask the employee to sign a statement that he/she received the letter. The supervisor should explain that the employee's signature merely acknowledges receipt of the letter, not agreement with its contents. If the employee refuses to sign the receipt acknowledgement statement, the supervisor should sign a statement indicating that the employee refused to sign for receipt, but that he/she was given a copy of the letter on a specific date. Immediately contact your servicing Labor/Employee Relations Specialist if any other problems arise in the delivery of proposal or decision letters.

# Chapter 4

## Employee Rights to Appeal

Employees have several avenues to address their dissatisfaction or disagreement with any formal disciplinary action that they feel is arbitrarily taken against them.

Which forums are available depend on the severity of the discipline and the bargaining unit status of the employee. The charts below outline the methods of redress for non-bargaining units employees (e.g., supervisors) and for bargaining unit employees.

### ***Non-Bargaining Unit Employees***

<b><u>IF THE ACTION IS:</u></b>	<b><u>METHOD OF APPEAL IS:</u></b>
Letter of Reprimand.....	IRS Agency Grievance Procedure
Suspension of 14 days or less.....	IRS Agency Grievance Procedure
Suspension of more than 14 days.....	Merit Systems Protection Board
Reduction in pay and grade.....	Merit Systems Protection Board
Removal.....	Merit Systems Protection Board

Note: The IRS Grievance Procedure, titled the Internal Revenue Employee Grievance System, can be found in IRM 6.771.1.

### ***Bargaining Unit Employees***

*(See National Agreement for more detailed information)*

<b><u>IF THE ACTION IS:</u></b>	<b><u>METHOD OF APPEAL IS:</u></b>
Letter of Reprimand.....	Negotiated Grievance Procedure
Suspension of 14 days or less .....	Negotiated Grievance Procedure
Suspension of more than 14 days.....	Merit Systems Protection Board or Negotiated Grievance Procedure
Reduction in pay and grade.....	Merit Systems Protection Board or Negotiated Grievance Procedure
Removal.....	Merit Systems Protection Board or Negotiated Grievance Procedure

**All employees** have the right to challenge any disciplinary action through the Equal Employment Opportunity (EEO) complaint process if they feel the action taken was for discriminatory reasons.

## ***More about Employee Appeals***

The previous page outlines the avenues of appeal available to IRS employees to formally dispute disciplinary actions. Within each, the procedure for challenging an action carries a distinct label/term. **Grievance** is the term used in the Negotiated Grievance Procedure, and **Agency Grievance** is the term used in the Agency Grievance Procedure while **Appeal** is the term used when requesting review by the MSPB. The final step in the Negotiated Grievance Procedure is called **arbitration**.

*1. Q: Are the time frames for filing under these various procedures the same, and where does an employee find that kind of information?*

A: The time limits vary depending on which forum is utilized. But, as was stated in Chapter 3, all time limits and filing procedures will be outlined in the final decision letter that imposes the disciplinary action.

*2. Q: Can an employee file under more than one procedure?*

A: No, employees must elect or follow a single procedure. The laws, regulations, and the National Agreement that established the grievance procedures state that where an employee might have a choice of forums, the employee must select only one to challenge or dispute a disciplinary action. For example, a bargaining unit employee may not file a grievance over a 15-day suspension and later try to appeal the same action to the MSPB.

*3. Q: Are employees entitled to representation when filing any challenge to a disciplinary action?*

A: Yes, the employee may represent him or herself or may choose an individual to serve as his/her representative. The representative may be an attorney, a union representative (for bargaining unit employees), a co-worker, or any individual whose service as a representative would not cause a conflict of interest and/or position or unreasonable expense to the Internal Revenue Service.

*4. Q: Who makes the decision on a grievance under the Agency Grievance Procedure? What kinds of decisions might this person make?*

A: The manager who makes decisions on a grievance related to a disciplinary action is an individual who is at a higher level than the Deciding Official in the disciplinary action, and who was not involved in any aspect of it. This manager has the authority to uphold the disciplinary action, reduce the penalty, or cancel the action entirely, based on his/her independent review of all the facts in the case.

5. Q: *What is the Merit Systems Protection Board?*

A: The MSPB is an independent agency whose main function is to hear and decide employee appeals of adverse actions. Each employee appeal will be assigned to an MSPB **Administrative Judge**, who will issue a decision after considering all the relevant evidence in the case. The initial decision may **dismiss** the appeal if the matter is not within MSPB's jurisdiction or if the appeal was not filed within the required time limits, and good cause for the untimely filing is not shown. In appeals that are decided on the merits (not dismissed or settled), the decision of the Administrative Judge may **affirm** the IRS action, **reverse** the action, or **mitigate** (change) the penalty imposed by the IRS. If the employee or the Service is dissatisfied with the initial decision of the Administrative Judge, either may file a **petition for review** with the **3-member Board** in Washington, DC.

6. Q: *What about arbitration for bargaining unit employees?*

A: Arbitration is the final step in the Negotiated Grievance Procedure and can be invoked if the parties, at earlier steps in the process, have failed to satisfactorily resolve the grievance. However, the union alone can choose to go to arbitration on behalf of a bargaining unit employee; the employee cannot invoke arbitration on his/her own authority. An **arbitrator** is an independent individual outside the IRS with expertise in labor law. He/she is chosen through a process outlined in the National Agreement, and has much the same authority as an Administrative Judge in an MSPB appeal to uphold or reverse the disciplinary action or reduce the penalty.

**For Supervisors**

Bargaining unit employees who have received a decision to suspend them for 4-14 days may elect to appeal that decision through the Negotiated Grievance Procedures. (Article 38, Section 7) Alternatively, NTEU can appeal the decision to suspend the employee through the expedited arbitration procedure. In accordance with Article 38, Section 7B suspensions of between 4-14 calendar days will be stayed if certain grievance actions are taken by the employee/union.

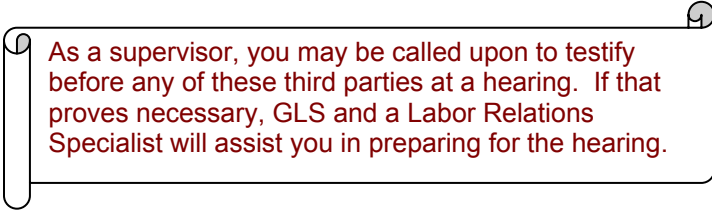
These procedures do not apply to Letters of Reprimand, suspensions of 15 days or more, reductions in pay or grade, or removal decisions. Contact your servicing LR Specialist for advice and assistance and check with Article 38, Section 7.

7. Q: *How does the Equal Employment Opportunity (EEO) process fit into disputes over disciplinary actions?*

A: An employee who believes that the disciplinary action was based on race, sex, color, religion, disability, age, national origin, and/or reprisal, may challenge the action through the EEO process governed by 29 CFR 1614 for EEO complaints *by first* contacting a EEO Counselor. If the informal process does not result in resolution of the complaint, the employee can *file a formal complaint*, which is then investigated by the Treasury Regional Complaint Center. After completion of the investigation, the employee is notified of the results and informed of his/her right to request an agency *hearing* presided over by an **Administrative Law Judge** from the Equal Employment Opportunity Commission (EEOC).

The employee also has the right to raise the matter under the negotiated grievance procedure under the National Agreement, but may not file a complaint under both systems (see Article 41, Section 2D).

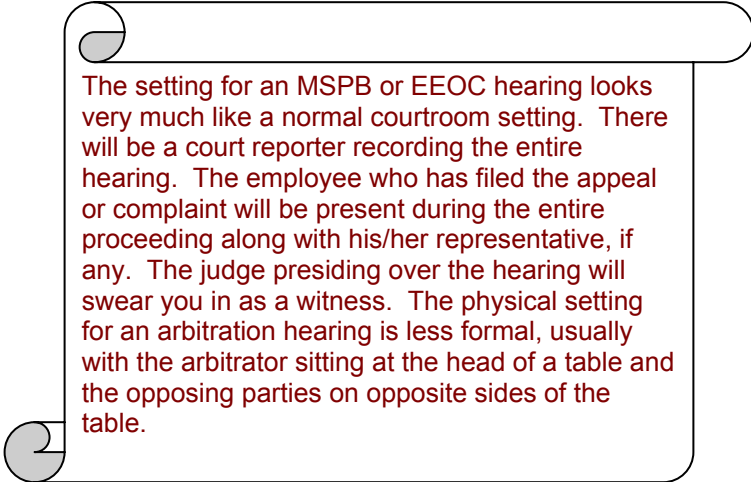
### ***For Supervisors***



As a supervisor, you may be called upon to testify before any of these third parties at a hearing. If that proves necessary, GLS and a Labor Relations Specialist will assist you in preparing for the hearing.

If the discrimination complaint involves an adverse action (e.g., suspensions of more than 14 days to removal), an employee can file a complaint through the EEO process as described above **or** appeal the adverse action through MSPB. If the employee elects to appeal to MSPB and is dissatisfied with MSPB's final decision, he/she can seek review of that decision by the EEOC.

### ***For Supervisors***



The setting for an MSPB or EEOC hearing looks very much like a normal courtroom setting. There will be a court reporter recording the entire hearing. The employee who has filed the appeal or complaint will be present during the entire proceeding along with his/her representative, if any. The judge presiding over the hearing will swear you in as a witness. The physical setting for an arbitration hearing is less formal, usually with the arbitrator sitting at the head of a table and the opposing parties on opposite sides of the table.

# All the Right Steps...

## Chapter 5

### An Introduction and Knowledge Check

In Chapters 1 through 4 we outlined the entire discipline process from the employee's perspective while *highlighting* information that you need about the process in your role as a **supervisor or manager** -- whether reporting misconduct, cooperating with investigators and fact finders, using the Guide to Penalty Determinations, receiving employee replies, or determining if charges should be sustained and then arriving at an appropriate penalty.

Now, in *All the Right Steps* (Chapters 5-10), the focus is on core supervisory guidance and discussion about *preventing and/or addressing* specific types of misconduct or inappropriate behavior.

As an IRS supervisor, you have a *tremendous influence* on your employees and their work. As their link in the management chain, your employees look to you for information, for what is expected of them, and for praise or criticism. Because your words and actions are so influential with your employees, you set the climate and culture for your organization.

You further reinforce for your employees what is important to completing the mission of the Agency when you *communicate* what you expect in terms of behavior and performance, *train and teach* them, *recognize* them, and *address misconduct and performance deficiencies* when necessary -- all the while accomplishing the operational side of your job.

There are exceptional demands and requirements placed on you in your role as a supervisor. When you are dealing with inappropriate behavior or misconduct you need the right information and tools to take timely and effective action. *All the Right Steps* continues your orientation on discipline and other related topics you should be familiar with (Internet Policy, reasonable accommodation, and dealing with union officials.)

At the end of this chapter, you will find a short quiz that you can use to check your knowledge about some common misconduct problems facing supervisors. Try your hand at this.

In Chapter 6, *Managing Leave and Attendance* and Chapter 7, *Other Common Problems Facing Supervisors*, we discuss conduct issues in enough detail to help you avoid *missteps* in the complex world of rules, regulations, and case law governing conduct and discipline. It is not possible to include information on every conceivable situation, so information on where to obtain further advice and assistance is provided. Also, don't forget that you should always consult the National Agreement for detailed provisions relating to bargaining unit employees.

Chapter 8 provides useful information on *Outside Employment*.

Chapter 9, *Doing the Right Thing*, provides you with an appreciation of reasonable accommodation issues and their relationship to discipline. This chapter also outlines employees' protected rights and discusses reprisal as it relates to discipline. Finally, discipline

cases are reviewed to glean advice about avoiding potential discipline pitfalls -- lessons learned the hard way.

Chapter 10, *Meeting with the Union*, answers the more frequently asked questions regarding when you must invite the union to attend formal meetings or discussions and union and employee rights during investigations.

Chapter 11, *Your Labor Relations Specialist*, discusses the scope and timing of advice that is readily available to you prior to and throughout the discipline process.

*Appendix 1 and 2 provides information on RRA '98 Section 1203, and Employee Tax Compliance (ETC.)*

In Appendix 3 we discuss IRS internet policy and manager's responsibilities regarding enforcement.

There is no question that supervision, particularly in the area of dealing with conduct or inappropriate behavior issues, requires considerable effort and time -- and that the most effective supervisors consistently:

- Use their experience and judgment
- Address problems rather than ignore them
- Hold candid discussions with their employees
- Treat employees considerately and consistently
- Ask for advice and assistance when they need it

## NOTE

Throughout the supervisor's section, the phrase "**initiate disciplinary action**" is used when discussing necessary actions to take in specific misconduct situations. *This phrase will mean different things to different supervisors depending on whether you are delegated the authority to propose or decide formal disciplinary actions.*

**Reminder:** Discussion with your servicing LR Specialist is required prior to taking disciplinary action.

## Check Your Knowledge on Common Problems Facing Supervisors

The questions which follow cover the most common types of conduct issues that face supervisors and managers. The answers to the questions are on page 29 and will be covered in more depth in Chapters 6 and 7.

***Please take a moment to answer these questions before you go on to read the following sections:***

*1. Can a new father, under the provisions of the Family Medical Leave Act, use 12 weeks of sick leave for the routine care of his newborn infant?*

Yes or No

*2. Are Absent Without Leave (AWOL) and Leave without Pay (LWOP) the same thing?*

Yes or No

*3. You have an employee who is frequently late for work and who always seems to have an excuse (bad traffic, bus was late, etc.). What is the most effective way to handle the situation the next time the employee is tardy?*

- a. Administratively excuse (up to 59 minutes) the tardiness because her reason seems valid.
- b. Place the employee on annual leave.
- c. Discuss the issue with the employee and make it clear that future instances of unexcused tardiness could result in the time being charged to AWOL and could also result in disciplinary action.
- d. Place the employee on AWOL.

*4. Is placing an employee on AWOL a disciplinary action?*

Yes or No

*5. You sent your employee an e-mail message asking him to go to a meeting in your place on a particular date and time. Although the employee didn't speak to you at all concerning your message, you know he received it because you receipted it. He didn't attend the meeting, and when you asked him why, he said he didn't go because you had given him another, higher priority assignment that he needed to complete. Was the employee insubordinate when he didn't attend the meeting?*

Yes or No

6. *You have an employee who appears to have difficulty following many of your supervisory instructions, particularly those related to the employee's daily work assignments. You tried various methods of conveying your instructions (in writing, verbally, and as a direct order) with clear objectives and due dates. Nothing seems to work. The employee continues to miss deadlines and turn in work that is incorrect and must be redone. What should you do?*
- Discuss your observations with the employee and get feedback from him/her about any need for on-the-job or formal training.
  - Initiate appropriate disciplinary action for insubordination.
  - Initiate appropriate disciplinary action for failure to follow proper supervisory instructions.
  - Suggest that the employee look for another job.
  - Place the employee on a Performance Improvement Plan (PIP)
7. *You have an employee whom you have overheard use profanities routinely in his verbal communications to co-workers. You have not observed the use of such language among your other employees and no one has said anything to you about it. You should:*
- Do nothing, because no one has complained and it isn't a problem.
  - Send a memo to all your employees reminding them that use of profanities in the workplace is not appropriate.
  - Pull the employee aside and tell him that his use of such language is inappropriate and you expect it to discontinue immediately.
8. *During a discussion around the water cooler, several employees hear and see their co-worker, John, say he feels like getting his old rifle out of the attic and shooting you, his supervisor, because you are such a jerk. John appears upset, is loud, and goes into detail for his reasons for intensely disliking you. The employees shrug their shoulders, walk away and the workday continues. Several days later one of the employees who overheard this discussion mentioned to you in passing that John seemed upset. When you asked why, you were informed of the water cooler conversation. What should you do next?*
- Call the police.
  - Call the Employee Assistance Program and TIGTA.
  - Nothing
  - Discuss the action you should take with your supervisor and report the incident to TIGTA.
9. *An employee does not report to work as scheduled and does not contact you to request leave -- this situation continues for 3 days. When the employee returns to work she states that she just didn't feel well, but has no explanation as to why she didn't contact you. You deny her request for leave, charge her AWOL, and initiate disciplinary action. A short time later the employee comes to you and admits that she is an alcoholic and was drunk during her absence. She further states that she has returned to her AA meetings and counseling for her alcoholism. Should you continue to initiate disciplinary action against her for the three (3) days of AWOL?*

Yes or No

**See next page for answers**

## Answers to Knowledge Check

1. **No**, routine care of a newborn does not meet the regulatory criteria for the use of sick leave and the Family Medical Leave Act (FMLA) does not supercede those regulations. In this case the father could invoke his entitlement under the FMLA to take unpaid leave (leave without pay) or substitute annual leave for up to 12 weeks to care for his newborn child. See pages 29 and 30.
2. **No**, AWOL is *unexcused* absence without pay and LWOP is *excused* absence without pay. This distinction becomes important when considering disciplinary action for leave-related issues. See page 33.
3. **c**. In this question, “b” is the only absolutely wrong answer because a supervisor cannot unilaterally place an employee on any form of approved leave. Both “a” and “d” are within a supervisor’s authority to implement, but “c” is the best answer because it illustrates the concept of ensuring that employees clearly understand supervisory expectations before initiating actions designed to correct behavior. See pages 34 and 35.
4. **No**, AWOL simply describes a non-pay status whereby the employee was absent from duty without supervisory approval. However, because management has a right to expect employees to report for duty when scheduled or obtain supervisory approval for any absence from duty, an incident of AWOL can be the basis for initiating a disciplinary action for unauthorized absence from duty. See pages 32 and 33.

**(Reminder:** Article 32 Section 9 of the National Agreement requires that a manager will notify the employee in writing as soon as it is determined that AWOL will be charged.)

5. **No**, although the instruction was clear and understandable, it was not expressed as an order, one of the required elements in proving an insubordination charge. While the employee was not insubordinate, this does not preclude you from imposing discipline for “failure to follow instructions.” See page 39.
6. **A, C or E**. You already tried various methods of communicating your concerns with the employee. That didn’t work. Placing the employee on a performance improvement plan is the logical next step. Alternatively, you may opt to address the matter as a disciplinary issue and charge the employee with failure to follow instructions.
7. **c**. Communication is key. While “b” is certainly a form of communication, supervisors should direct their communication to the appropriate audience – in the example here, only one person was engaging in the unprofessional behavior, not the entire office. Answer “a” might be tempting to supervisors, but the “no one is complaining” defense fails to firmly set the expected standard of behavior. See page 41.
8. **b**. This is an example where covering all the bases is in everyone’s best interests because you don’t necessarily have the expertise to evaluate the situation on your own. The EAP can assist you in evaluating the employee’s actions, as well as assisting the employee in finding ways to deal with his/her anger in a more appropriate manner. To protect you and other employees against what may be a warning of a dangerous action TIGTA should be contacted immediately to ensure that an appropriate inquiry into the matter is expeditiously conducted. Answer “d” is certainly a good idea, but should be done in conjunction with contacting EAP. See pages 44 and 45.
9. **Yes**, employees with disabilities can and should be held to the same conduct standards as non-disabled employees. See pages 48, 49, and 60.



## Chapter 6

### Managing Leave and Attendance

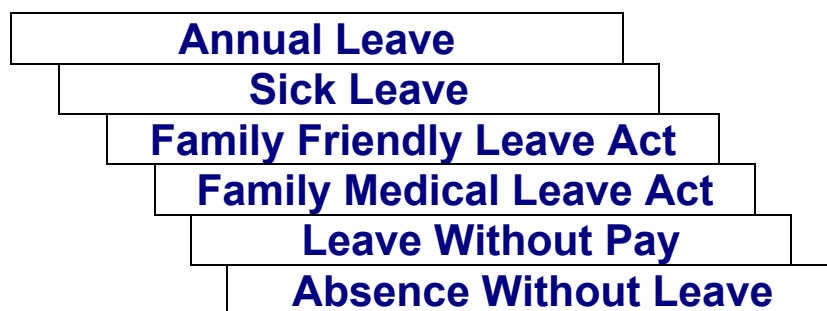
As a supervisor, you may be faced with issues and problems related to leave, tardiness, and attendance.

This section outlines your responsibilities related to managing leave, summarizes the rules on the most common types of leave, and provides advice to assist you in performing your role in correcting leave and attendance problems.

#### Your Responsibilities in Managing Leave

- Making *determinations* on granting or denying leave – scheduling vacations and other leave to ensure that required work is accomplished.
- *Being accountable* for time and attendance records.
- *Communicating with* employees about leave matters by explaining upfront the rules for requesting leave.
- *Identifying and taking corrective action* when employees abuse or are suspected of abusing leave.

#### Common Types of Leave



## Annual Leave

Annual Leave is an absence from work with pay that requires management approval. Although normally used for vacations, employees may request/use annual leave anytime they are absent from work, including for illness.

Annual leave is earned in one (1) hour increments and may be taken in fifteen (15) minute increments.

Employees should submit a completed form SF-71, Application for Leave as far in advance as possible. **[Note: SF-71, Application for Leave, is not a mandatory form.]** Employees are entitled to use earned annual leave, but supervisors have the authority to determine when annual leave is authorized.

Employees are encouraged to save their annual leave to cover both planned and unplanned absences. However, there will be times when an employee requests *advanced annual leave*. When this occurs, you must remember that the granting of advanced annual leave is at management's discretion and you, as the manager, must ensure that the following criteria are met:

- The employee has completed his/her probationary or trial period;
- The employee has served more than ninety (90) days in his/her current appointment;
- The employee is eligible to earn annual leave;
- The employee has not requested more advanced annual leave than would be earned during the remainder of the leave year or for the remainder of the period during which the employee will be employed; and
- The employee is not on a leave restriction letter or has not been the subject of a leave related action covered by Article 38, or any action covered by Articles 39 and/or 40, of the National Agreement within the last 12 months.

### Three Rules Govern Earned Annual Leave

- ◆ Employees have a **right** to use all accumulated annual leave,  
  
*but –*
- ◆ Management approves requests for leave in advance of leave use except in certain emergency situations.
- ◆ Requests for Annual Leave may be denied based on workload interruption or mission requirements. If leave is not properly requested, denial may be appropriate.

You can find additional information on Annual Leave in the National Agreement - Article 32, IRM 6.600.1.8.4 – Absence and Leave, Leave Administration and Work Scheduling, the Time and Leave Handbook (Document 11103), and in the Employee Personnel Resource Guide (Document 9669).

## Sick Leave

Sick leave is an absence from work with pay. It is earned in one (1) hour increments and may be taken in fifteen (15) minute increments. Employees should request sick leave as far in advance as possible using locally established procedures.

Sick leave requested by an employee will be granted as provided by 5 CFR 630.401 when the employee:

- *Is incapacitated by physical or mental illness, injury, pregnancy, or childbirth;*
- *Receives medical, dental, or optical examination or treatment;*
- *Would jeopardize the health of others, as determined by health authorities or a health care provider, by the employee's presence on the job because of exposure to a communicable disease;*
- *Provides care for a family member with a serious health condition.*
- *Makes funeral arrangements for or attends the funeral of a family member;*
- *Provides care for a family member who is incapacitated by any of the conditions described above, or who receives medical, dental, or optical examination or treatment; or*
- *Must be absent for purposes of any activity necessary to allow the adoption of a child to proceed. However, sick leave is inappropriate for the purposes of bonding with an adopted child, just as it is for bonding with a newborn for biological or foster parents.*

Employees should be encouraged to save their sick leave to cover both planned and unplanned absences. However, there may be times when an employee requests *advanced sick leave*. For managers with bargaining unit employees, when this occurs you must remember that in accordance with Article 34, Section 5 of the National Agreement the following criteria must be met:

- The employee is eligible to earn sick leave;
- The employee's request does not exceed thirty (30) work days;
- There is no reason to believe the employee will not return to work after having used the leave;
- The employee has provided acceptable medical documentation of the need for advanced sick leave;
- The employee has a serious disability or ailment (consideration of this factor should not be interpreted as restrictive as "serious health condition" under the Family and Medical Leave Act; 5 CFR 630.1202 and Article 33), or for purposes relating to the adoption of a child; and
- The employee is not subject to the restriction of Article 34, Subsection 3C, and even if all of the conditions above have been met, the Employer may deny advanced sick leave to probationary employees.

You can find additional information on Sick Leave in the National Agreement - Article 34, IRM 6.600.1 – Absence and Leave, Leave Administration and Work Scheduling, the Time and Leave Handbook (Document 11103), and in the Employee Personnel Resource Guide (Document 9669).

**A Word of Caution:** Don't allow your employees to fall into the habit of calling in to a secretary, co-worker, or leaving a voice mail message to report an absence and request leave. All requests for leave should be made directly to you, the supervisor. If you are not at your desk when an employee calls, your employees should be instructed to leave a message with a telephone number where he/she can be reached.

### **Note**

An employee's certification as to the reason for the absence is sufficient to permit approval of the request for sick leave for most short-term absences due to illness. However, if the absence exceeds three (3) consecutive workdays, you may require a medical certificate from your employee's health care provider before approving the request for sick leave. If you require such a certificate and the employee does not provide it, you may disapprove the sick leave.

## **Sick Leave for Family Care and Bereavement Purposes**

Under the OPM's regulations contained in 5 CFR § 630, employees may use a *limited amount* of sick leave (up to thirteen (13) days a year for full-time employees if the employee maintains a balance of at least eighty (80) hours) to:

- Care for sick family members, including taking them for routine medical appointments
- Make arrangements for and attend the funeral of family members
- Make arrangements for the adoption of a child

Q. Who is a family member under FFLA?

A. A family member is the employee's:

- Spouse and his/her parents
- Children (including adopted children) and their spouses
- Parents
- Brothers and sisters and their spouses
- Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship

Q: Can I, as the supervisor, advance sick leave to an employee for FFLA purposes?

A: The thirteen (13) days (104 hours) of sick leave available for family care and bereavement purposes is divided into two parts:

(1) All employees are entitled to use a total of forty (40) hours (5 days) of sick leave for family care or bereavement purposes. *This 40 hour entitlement, or any portion thereof, may be advanced to the employee, if eligible.*

(2) Employees who wish to take more than five (5) days (40 hours) for these purposes may use up to eight (8) additional days (64 hours) but only to the extent that their sick leave balance does not fall below eighty (80) hours. *Employees may not be advanced sick leave in order to meet this eighty (80) hour requirement.* For a part-time employee, the sick leave balance must not fall below an amount equal to twice the average number of hours in the employee's scheduled tour of duty each week.

For more information on sick leave for family care and bereavement purposes, contact your servicing LR Specialist.

## **Sick Leave to Care for a Family Member with a Serious Health Condition**

A full-time employee may use a total of twelve (12) weeks (480 hours) of sick leave in a leave year if they maintain an eighty (80)-hour sick leave balance (no hours may be advanced to meet the 80-hour balance). The twelve (12) weeks must be reduced by any time used for family care or bereavement purposes. An employee is entitled to a total of twelve (12) weeks of sick leave a year for all family care purposes.

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves: Inpatient care in a hospital, hospice, or residential medical care facility, or continued treatment by a health-care provider in connection with the condition, whether on an inpatient or outpatient basis. The term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief.

**Q:** Who is considered to be a family member for these purposes?

**A:** The definition of family member is the same as stated above in "Sick Leave for Family Care and Bereavement".

## **Leave Without Pay (LWOP)**

Leave without Pay (LWOP) is a temporary non-pay status and absence from duty that has been requested in advance and approved by the supervisor. Most often employees request LWOP when they have insufficient paid leave to cover the period of absence.

LWOP may only be taken in one (1) hour increments, unless a quarter hour increment, or multiple thereof, is required to account for a whole hour.

Employees do not have an *entitlement under the law* to LWOP, with three (3) exceptions:

1. A disabled veteran who is in need of medical treatment that is verified by medical documentation from a health care provider or a medical authority.
2. Employees who serve in the military when the period of service interrupts employment with the employer.

3. Employee invoking his/her entitlement under FMLA for up to twelve (12) weeks of unpaid leave.
4. An employee receiving worker's compensation payments from the Department of Labor.

Supervisors with bargaining unit employees should consult the National Agreement for more specific procedures covering approval of LWOP. As is true for both annual and sick leave, the employee must request LWOP – the supervisor cannot unilaterally place an employee on LWOP.

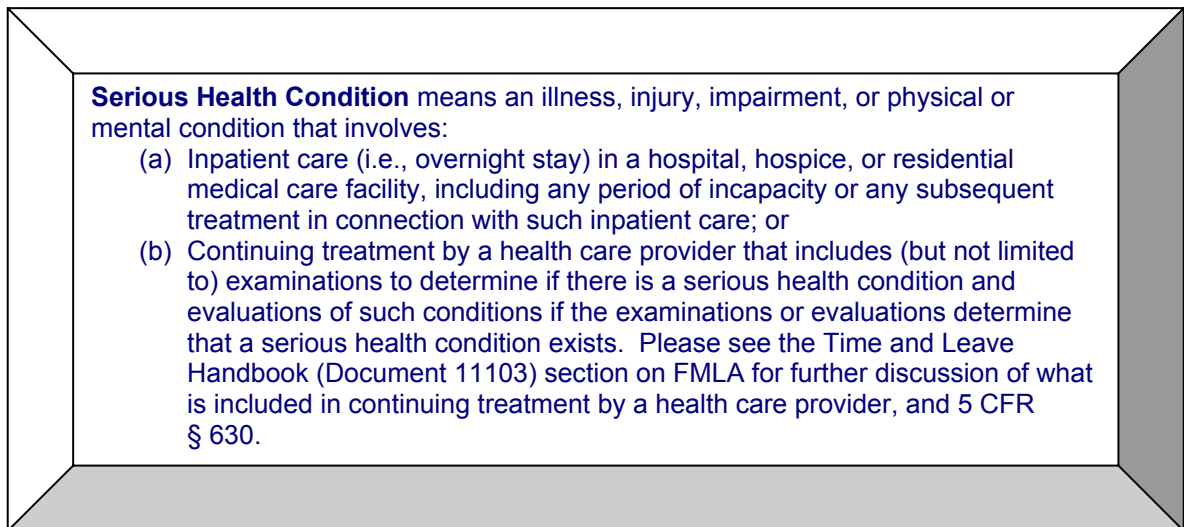
Q: Can an employee request LWOP in lieu of annual or sick leave, and can I as the supervisor approve it?

A: Yes.

## Family Medical Leave Act (FMLA)

Provides employees with an entitlement of up to twelve (12) work weeks of unpaid leave (LWOP) during any 12-month period for the following situations:

- Birth of a child and subsequent care of the newborn
- Placement of a child with employee for adoption or foster care
- Care of employee's spouse, daughter, son, or parent who is seriously ill
- Serious health condition of the employee that makes the employee unable to perform the essential functions of his/her position.



The FMLA entitlement is *in addition to earned sick and annual leave or compensatory time*, but the employee can choose to substitute earned sick and annual leave for unpaid leave. Employees must provide medical certification of a serious condition not less than thirty (30) days in advance, or as soon as practicable. If it's not possible for the employee to provide medical certification in advance of the FMLA leave, you should still grant the leave and advise the employee that he/she must provide the documentation within a reasonable period of time, not to exceed 30 days.

Employees who are requesting Family Medical Leave must submit SF-9611, Application for Leave under FMLA, to their manager.

The FMLA definition of family member is much stricter than for use of Sick Leave for Family Care or Bereavement and Sick Leave to Care for a Family Member with a Serious Health Condition. Under the FMLA, employees may only invoke this entitlement to care for a spouse, son, daughter, parent, or due to the serious health condition of the employee.

## NOTE

You cannot just “put an employee on leave,” whether it is sick, annual, or LWOP. All approved leave categories require a 2-step process – the employee must request leave and then you act on the request by approving or denying the leave. Charging an employee AWOL is the only exception to this 2-step process.

## Absence without Leave (AWOL)

AWOL is a non-pay status for any absence from duty not officially and properly authorized. A charge of AWOL on a Time and Attendance record is not a disciplinary action. However, it can form the basis for future disciplinary actions. If the supervisor takes no further steps, the only consequence to the employee is a loss of pay for the number of hours charged as AWOL. Keep in mind that a charge of AWOL can be grieved under either the agency grievance procedure for non-bargaining unit employees or the National Agreement for bargaining unit employees. AWOL is charged in 15-minute increments.

Employees are expected to be at work on time unless they have requested leave and received approval for that leave. When an employee is *absent, has no leave scheduled, and does not contact his/her supervisor within the first hour of the beginning of the workday to request leave*, he/she may be charged AWOL.

When a manager determines that an employee will be charged AWOL, the employee will be notified in writing as soon as possible, but no later than the end of the pay period in question (see Article 32, Section 9 and Exhibit 32-1 of the National Agreement).

Charging AWOL *depends on the circumstances of the situation:*

- If the employee returns to work with a valid reason for both the absence and the failure to contact you, you should consider approving leave for the period of absence on a retroactive basis.

**Example 1** – During the early morning hours, your employee is notified his son has been involved in a serious car accident and has been rushed to the hospital for emergency surgery. The employee hurries to the hospital and stays there all day – he is so distraught that he neglects to contact you. The next day he returns to work and tells you what happened. *No misconduct occurred in this case (emergency).*

*This is an area where you need to exercise your own judgment based on the specific situation.*

to

**Example 2** – Your employee does not report for work and does not contact you. Upon her return, you ask her for an explanation. She states that her 12-year old daughter was sick and her telephone was out of order. While her reason for requesting leave is valid, she had no explanation as to why she couldn't use a neighbor's telephone or a pay telephone to contact you. Because the employee failed to follow proper leave request procedures, you could deny her request for leave, place her on AWOL, and inform the employee of your decision. You could also approve the leave and counsel or admonish the employee and advise that future instances of failing to follow proper leave procedures will be handled more seriously and could result in a charge of AWOL, discipline, or both. Your goal should be simple: to fix the problem.

**Q:** Are AWOL and LWOP the same thing?

**A.** No, not at all. The major difference between the categories is that AWOL is **unexcused** absence and LWOP is **excused** absence. Both, of course, are absences without pay. This difference is important when considering disciplinary action. You should not discipline an employee for using LWOP which you approved. On the other hand, instances of AWOL may support disciplinary action ranging from a Letter of Reprimand to Removal, depending on how long the employee was AWOL and whether it was a first or subsequent offense. At your option, you may even decide that some action short of a Reprimand, such as an admonishment or counseling, would be adequate to correct the situation. These decisions are best made by you because you know your employees better than anyone else.

## Correcting Leave and Attendance Problems

### Tardiness

While tardiness may not seem as serious as other types of attendance problems, frequent instances of tardiness may present significant problems for the office and also may be an indicator of a personal problem being experienced by the employee. If your discussion with the employee indicates that may be the case, advising the employee of the services offered through the EAP would be advisable.

For absences under 1 hour, you have 3 options:

- 1. Administratively excuse the absence. Supervisors have the authority to excuse instances of tardiness of up to 1 hour administrative time (the "59-minute" rule), or**
- 2. Ask the employee to request leave and tell him or her that you will approve it, or**
- 3. Place the employee on AWOL.**

As a general rule, the first short period of tardiness should not be charged as AWOL. Rather, warn the employee that he/she will be placed on AWOL if the tardiness reoccurs and document your discussion. On the next tardiness without a valid excuse, you may charge the employee AWOL. In most cases the loss of pay due to AWOL is enough incentive to motivate an employee to correct the behavior. If that doesn't prove to be the case, do not hesitate to initiate disciplinary action for additional unauthorized absences.

Q: What is a valid excuse for repeated instances of tardiness?

A: Employees who are frequently tardy usually have what they hope you will consider valid excuses. What appears to be a legitimate excuse does not always excuse tardiness. The employee has an obligation to *come to work on time regardless of his or her personal problems*. The employee is responsible for purchasing alarm clocks that work, hiring reliable childcare, and arranging for adequate transportation. Although all supervisors should tolerate *occasional* problems in employees' lives, you are not required to accommodate an employee's consistent failure to arrive at work on time.

**With Tardiness --- Remember**

- Management has the right to *set hours of work*
- Employees have the responsibility to *report to work on time*
- Communicating your expectations concerning tardiness is key to preventing *occasional* tardiness from turning into a habit of *repeated* tardiness

## Leave Abuse

Sometimes an employee's *pattern of leave use* becomes a problem for the organization and for you. As a manager or supervisor you have a right to expect employees to be available to perform the work of your organization. When they are not available due to excessive use of leave the organization suffers. The challenge for you is to identify the problem early and fix it. Let's start with identifying the problem by being aware of and monitoring symptoms.

### Symptoms of leave abuse... (What to look for)

- ◆ Pattern of unscheduled leave, such as absences on Fridays, Mondays, or days before or after holidays, or when the employee is scheduled for an assignment he or she doesn't like or during periods of high workload
- ◆ Low leave balances, particularly when considering the employee's years of service
- ◆ Use of leave as soon as it is accrued

**It is important for you to deal with leave abuse as soon as you are aware of it.  
It won't improve by itself!**

The sooner the issue is confronted, the greater the likelihood that the employee will correct the problem without the necessity for disciplinary action. You should engage in a discussion with your employee soon after you suspect leave is being abused.

### **Communicating about leave abuse with your employee...**

**Advise** your employee about:

- *Your concerns* regarding his/her pattern of attendance. Using a calendar, show the days when unplanned absences were taken. Explain the impact these absences had on completing work or on other employees. Many employees will “shape up” once they know you are concerned and are watching.
- *Expected improvement* in attendance and that continued use of unplanned leave may result in your placing him/her on “leave restrictions”.
- *Options for resolving problems* (no requirement to do this) contributing to the poor attendance such as unreliable childcare or transportation, but make sure the employee understands that it is his/her responsibility to resolve any problems.

**Warn** the employee that you will not automatically approve leave in the future. Knowing the consequences of one’s behavior can be a powerful motivator.

- *Alert* the employee that if leave is *disapproved* and he/she does not report for work on time, he/she will be carried in an AWOL status, which could result in disciplinary action.
- *Advise* the employee that if a personal problem is contributing to the poor attendance, he/she should contact the EAP at 1-800-977-7631 or TDD: 1-800-327-0801.

**Document** this conversation in writing, provide a copy to the employee, and place a copy in the employee’s drop file. This step, while not required, is highly recommended because it “memorializes” the discussion and reinforces the supervisory expectations. The copy need not be a formal memorandum – it can simply be a copy of your notes of the conversation.

**Q:** If leave abuse problems persist, what are the next steps?

**A:** Issuance of a letter of leave restriction – a LR Specialist will provide assistance in writing this letter. A leave restriction letter:

- Requires that the employee submit acceptable medical documentation from his/her personal physician for each and every hour of leave that the employee requests due to illness.
- Documents in writing the process the employee needs to follow in order to obtain approved sick leave.
- Outlines the consequences of failure to follow the written procedures (AWOL and possible disciplinary action.)

*After you’ve issued the letter*, continue monitoring the employee’s attendance –

- Verify that the employee followed correct procedures in each instance of requesting sick leave.

- Don't approve leave when it will cause hardship to the mission.
- If the employee's attendance is improving, let him/her know.
- Place the employee on AWOL if he/she doesn't follow established procedures.
- Initiate disciplinary action (within the scope of your authority) for unauthorized absence, based on any AWOL and/or failure to follow established leave procedures.

### Note

Failure to consistently enforce the leave restriction letter will invariably compound the problem. First, the employee will assume that you are not serious about your intentions to enforce the requirements and the employee will likely revert to the previous excessive leave usage. Second, if the leave abuse continues and you do not **consistently** enforce the requirements, you may not be able to support a case for a disciplinary action.

## Initiating Disciplinary Action

As we've discussed throughout this section on "Your Role in Correcting Leave and Attendance Problems," charging AWOL is a key step before initiating disciplinary action for unauthorized absence. The range of penalties for unauthorized absence depends on the length of the unauthorized absence, and of course, whether it is a first or subsequent offense. The penalties for first offenses can range from a Letter of Reprimand to a 14-day suspension to a removal. As discussed earlier, in some situations you may decide counseling or an admonishment would be adequate to address the matter. That is your call as a supervisor.

## Excessive Unauthorized Absences

Occasionally, an employee simply *chooses not to report to work over an extended period of time* during which you charge AWOL.

In such cases, proposing the employee's removal for excessive unauthorized absence may be appropriate. However, prior to the initiation of the proposed removal you must send him/her a letter directing a return to work by a specific date. This letter will also advise that failure to report as directed will be grounds for initiating a removal action. This letter must be coordinated with your servicing LR Specialist to ensure it is technically correct and will not undermine or weaken any subsequent removal action.

**In cases of extended unauthorized absence, a letter directing the employee to return to duty is an important precursor to formal disciplinary action, but it is not a disciplinary action in itself. Supervisors have the authority to issue such a letter.**

## Misrepresenting the Facts When Requesting Leave

Occasionally an employee will request sick leave and subsequently, you will discover that he/she has no entitlement to the leave, e.g., the employee was not sick. In such cases disciplinary action may be appropriate, even where there is no prior history of leave abuse.

**Example --** An employee calls in on a beautiful Friday morning saying that he has the stomach flu and cannot possibly come to work. You approve the sick leave. Later, while driving to a duty location, you see the employee playing golf on a course that you pass. In this circumstance you should confront the employee following his return to duty to obtain his side of the story. If you are not satisfied with his explanation (e.g., he is one of identical triplets), you should deny leave, place him on AWOL, and take steps to initiate disciplinary action.

# CHAPTER 7

## Other Common Problems Facing Supervisors

### Insubordination/Failure to Follow Supervisor's Instructions

Insubordination and failure to follow a supervisor's instructions are **serious** forms of misconduct because they undermine supervisory authority. Employees must obey lawful orders from management officials in his/her chain of command. Employees are not obligated to follow orders they deem unlawful, but in making such a decision may be subject to disciplinary action.

*You need to know that if an employee is displeased with your instructions or order, he/she is expected, except in unusual circumstances, to **comply first and grieve later**. An example of an unusual circumstance is when following an order or instruction would reasonably result in serious injury or death, which would make the order unlawful.*

Insubordination and failure to follow a supervisor's instructions are related forms of misconduct, but differ from each other in several important ways. If the employee fails to comply with your instructions in a particular situation, **insubordination** is the appropriate charge if **three elements** are present:

- 1) **The matter was expressed as an order.** While it is suitable and appropriate to issue day-to-day instructions in language such as: "Would you mind going over to Admin to pick up a package for me," or "It would be helpful if you had this assignment back to me by Thursday," such language does not meet the definition of an order. When employees do not respond to your usual method of issuing instructions, you need to make it clear that their compliance is not discretionary by saying: "I am directing you to..." or "I order you to..." Be sure to put the directive in writing. This will be important documentation to keep on file.
- 2) **The instruction to the employee was clear and understandable.** Sometimes, this element can be problematic. Did your written or oral communication to an employee clearly convey what you intended, or did you make mental assumptions that might have impacted the employee's ability to follow through? Even though you may have understood the intent or your order, you may want to reenact what you said in your mind and ask yourself if a reasonable person would have understood it exactly as you intended. Consider the possibility that your order may have been vague or subject to more than one interpretation. The key is to be honest with yourself.

- 3) **The refusal to obey the order was deliberate.** In some situations the deliberateness will be obvious (e.g., "I told you I'm not going to serve as project leader and for all I care you can do it yourself."), while in others it may be less obvious and difficult to prove because the refusal must be conscious, intentional, and willful and not the result of laziness, incompetence, or poor time management.

If the matter wasn't expressed as an order, but it was still a clear instruction to the employee, or if the element of deliberate refusal cannot be shown, the appropriate charge would be **"failure to follow proper supervisory instructions."**

As you might expect, the penalty range for insubordination is greater than for failure to follow proper supervisory instructions. But, both charges are considered to be misconduct that strikes at the heart of the employee-supervisor relationship, and should not be tolerated.

## **Negligence or Delay in Completing Assignments**

A close cousin to insubordination and failure to follow proper supervisory instructions is the situation where an employee carries out an assignment grudgingly, deliberately does the work improperly, or delays completion beyond a reasonable time. Once again, this is misconduct that supervisors need to address as soon as the conduct occurs. An example of a charge that falls in this category of offenses is "delay in carrying out a work assignment." The penalty range for such a charge is a Letter of Reprimand to a 3-day suspension for a first offense. (See Document 11500, Guide to Penalty Determinations.)

You have several options when dealing with the spectrum of misconduct related to following supervisory instructions. Which option you select, as is the case with most employee relations issues, will be driven by specific facts and circumstances tempered by your use of sound judgment. Don't hesitate to contact your servicing Labor Relations Specialist for assistance.

## **When Failure to Follow Instructions Becomes a Performance Issue**

As stated previously, insubordination and failure to follow instructions are usually considered to be conduct issues rather than performance issues. However, the line between conduct and performance can blur in some cases. Ask yourself the following questions to help make the distinction:

- Does the situation involve a general failure to perform rather than a single instance?
- Is the failure to follow instructions connected to one of the employee's core competencies within the critical performance areas?
- Does it appear to you that the situation is that the employee can't do the work, rather than a situation where he/she won't do the work?

If you answered "yes" to one or more of these questions, it may be more appropriate to place the employee in a period of opportunity to demonstrate acceptable performance (see <http://publish.no.irs.gov/IRM/P06/PDF/33014G02.pdf>) rather than taking action under the discipline process. It is important that you contact your servicing Labor Relations Specialist for

advice and assistance as soon as you suspect that you are dealing with a performance issue and not a conduct issue because of significant differences in the procedures and rules for handling performance issues. You should be aware that you have some latitude and room for judgment when deciding if you want to address a particular situation as a conduct or performance problem. For example, there is nothing in law or regulation which prevents you from using conduct and discipline procedures to address a performance problem. You may want to ask your servicing LR specialist to describe the pro and cons of using performance or conduct procedures.

## Disruptive Conduct

Disruptive conduct at work can take many forms. Some are very minor, while others are very serious. However, you should deal with all types of disruptive conduct in a timely and consistent manner.

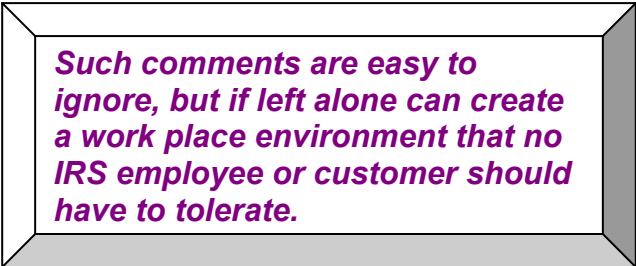
If minor disruptive comments or acts by an employee are ignored, the behavior may escalate and create more serious conflict throughout the workforce, and in extreme cases contribute to or cause physical violence. Your challenge is to solve the problem when it is small failure to deal with disruptions **can lead to:**

- **Reduction in productivity and morale** as employees grouse and gripe among themselves.
- **High attrition** as employees seek to escape a troubled work environment.
- **Escalation** to violence.
- **Complaints** by customers
- **EEO complaints and/or grievances** against you for not correcting the problem.

## Inappropriate Remarks

A variety of remarks or comments made by employees are inappropriate in the workplace. These comments can include:

- **Demeaning remarks to individuals or groups** because of race, national origin, religion, sex, age, color, disabling conditions, sexual orientations, etc. These types of remarks are the most serious and should result in immediate corrective action by you.
- **Vulgar language and profanities**
- **Rude remarks** to taxpayers and co-workers.
- **Expressions of disgust** concerning taxpayers, co-workers, superiors, and subordinates.



*Such comments are easy to ignore, but if left alone can create a work place environment that no IRS employee or customer should have to tolerate.*

**You** are the role model for your employees and should set the example through your own behavior. If **you** use language that is rude, vulgar, demeaning, or disgusting, *you are engaging in misconduct*, and your employees will consider the behavior acceptable and may engage in it as well. In addition, you run the risk of losing good employees who will look for other jobs where they do not have to tolerate such language/behavior.

**This is one area where your example is crucial.**

Q: Should I immediately correct my subordinates when they engage in this type of conduct?

A: Yes, when you hear an employee use inappropriate language or learn of such a remark being made, you should --

- 1) **Call the employee aside** and, in private, engage the employee in a discussion that clearly makes the point that such language is inappropriate and will not be tolerated.
- 2) **Warn** the employee that disciplinary action may result once any inquiry into the matter is completed. The penalty for the use of inappropriate language or disruptive conduct ranges from a Letter of Reprimand to a 5-day suspension.
- 3) **Document** your discussion with the employee in writing and give a copy to him/her.

## Personality Conflicts

As a supervisor, it is your responsibility to be aware of personality conflicts and to take necessary action if they become disruptive or otherwise have a negative impact on the organization. Your goal should be to create and maintain a climate where everyone treats each other with respect and dignity.

It is not unusual in any workplace for some employees to not get along with others. They may come from varied backgrounds with different standards and work ethics, or have contrasting (or too similar) personality styles. This can contribute to conflicts that can interfere with getting work done and can escalate into much more serious problems if you do not resolve them in the early stages.

Q: What are some symptoms of personality conflicts?

A: Typical symptoms are:

- Employee complaints that a fellow employee is a jerk, lazy, creepy, nasty, or mean.
- Sulking behavior.
- Complaints about specific behavior that seems to annoy one or more employees.
- Loud and cross conversations between employees.
- Requests for you to take sides in personal disputes.
- One employee frequently finding fault with another employee's performance when it's basically none of their business
- Employees avoiding interaction with each other even though such interaction is necessary for successful performance (e.g., avoiding coordination).

When you determine a personality conflict crossed the line and has become disruptive, you need to be careful that you do not appear to be taking the side of one or the other of the employees, even if one of the employees is clearly in the wrong. Doing so may worsen the problem. You need to work with them to open their lines of communication, assist them in developing a solution that resolves the problem, and identify *how their own behavior* may be contributing to the problem. Traditional disciplinary action is unlikely to resolve this problem by *itself, although in some situations discipline may nonetheless be necessary. Be guided by your judgment and/or seek advice from your servicing Labor Relations Specialist.*

Oftentimes the parties to a personality conflict do not realize how their actions contribute to the problem. As their supervisor, you need to help them understand each other's perspectives and the impact they are having on each other.

Q: What should I do to resolve the problem?

A: You may want to consider mediating the dispute between the involved individuals, or you may choose to first speak with them individually with the understanding that any solutions will be worked out jointly.

### ***More about mediating the dispute...***

- **Allow ample time** for this discussion -- without interruptions.
- **Advise the employees of your observations** and the impact of their behavior.
- **Ask each employee what the problem is** from his/her perspective. When the employee pauses, paraphrase what he/she has told you and ask whether this is what was meant.
- **Ask the first employee if there are any more concerns. Give the other employee the same opportunity to voice concerns.** If one of the employees is reluctant to participate, ask further questions.

### ***Working towards a solution...***

After each employee has given his/her side of the story (while together or privately with you), have them brainstorm alternatives for resolving this problem. Make sure that the solution is something that you and other employees can live with. **Write down what each of them and you agree to do.** Have them sign a summary of the action plan and hold them accountable to it. Most importantly, let them know you appreciate the fact that **they** solved the problem.

***Services of a Trained Mediator*** may be used in any situation, to include those that appear to be simple. The supervisor should be the judge on a case-by-case basis and ask: "should I mediate this one or is the likelihood of a permanent fix better with a trained mediator."

## Threats

Any communicated intent, whether verbal or physical, to inflict physical or other harm to a person or property is a **threat**. However, it is important to distinguish between idle talk, jokes, and **genuine threats**. Based on case law, an actual threat occurs when threatening remarks are accompanied by behaviors that a reasonable person would consider intent to carry through with the threat, and the listener perceives the statement as a threat.

### Evaluate the Threat:

- *Listener's reaction and apprehension of harm*
- *Speaker's intent*
- *Any conditional nature of the statements*
- *Circumstances surrounding the threat*

If the listener is not concerned by the remarks, believes that the speaker was blowing off steam, or otherwise takes no action to protect himself or herself or others from the threat, the actions may not meet the "threat" threshold developed in case law. The speaker's intent can be somewhat determined from the actions accompanying the threatening statement. Was he/she angry? Loud? Glaring? Were hand gestures used such as punching, chopping, stabbing, or shooting motions? Does he/she have the capability to follow through on the threat? Is he/she stalking or following the other person?

**Example 1** – You just informed an employee that you were going to propose a suspension based on inappropriate behavior. The employee told you, "You're going to pay for this!" While this sounds like a threat, a subsequent investigation concluded that the employee meant he was going to file multiple grievances and complaints. That being so, there was no threat and disciplinary action would not be appropriate.

**Example 2** - Same scenario as example 1 but this time as the employee said, "You're going to pay for this," he gestured as if he were slitting his throat. This type of conduct could and should result in immediate action, including discipline.

Whether "threatening" comments meet the *legal* definition of a threat is not the only issue. It can be very difficult to differentiate between "blowing off steam" and what may be a warning of more violent behavior to come. For this reason, **do not ignore any threatening language or behaviors**. They should be handled in the same manner as inappropriate remarks as discussed earlier in the chapter. In addition, report any incidents to TIGTA and call EAP for assistance.

Q: What should I do when in my judgment, the threat is real?

A: **Take immediate action** to protect your employees and yourself. **Notify** appropriate security personnel. **Talk to the threatening person** calmly and stall for time while maintaining eye contact and listening attentively to his/her concerns. Be patient and courteous while not making any sudden moves. **Remove** the employee from the work place and place him/her on

excused absence at least for the remainder of the day on which the incident occurred.

**Document** what you observed or know about the incident, and **report it to TIGTA**. Contact your servicing Labor Relations office for guidance regarding initiation of appropriate disciplinary action.

At the conclusion of any inquiry or investigation into the matter, appropriate disciplinary action should be initiated. The Guide to Penalty Determinations will give you the range of penalties for a first offense of making a threat and for disruptive and/or inappropriate behavior. Note that even if the investigation concludes that all the elements of a threat were not present, disciplinary action may still be appropriate for a lesser charge such as inappropriate behavior.

### ***More about Serious Threats...***

If the employee is threatening you or others with a gun, knife, or other weapon, follow his/her instructions. Do not try to grab the weapon. Watch for an opportunity for all to escape to a safe area. At the first possible opportunity, call the police and then notify higher level management. In addition, report the incident to TIGTA.

It may also be appropriate to keep the employee away from the work site not only immediately following the incident, but also during the subsequent investigation or inquiry. You cannot force an employee to take annual leave, sick leave, or LWOP, but you can and should strongly suggest they do so. If he/she requests it, you may approve the leave. If the employee does not request leave, you may consider granting excused absence without charge to the leave. Excused absence without charge to leave should generally be for brief periods of time. If concerns about safety warrant extended absence from the work area, consider temporary reassignment, alternate work site, or indefinite suspension. Consult your servicing Labor Relations Specialist, security personnel for your work site, and higher level managers in determining appropriate actions to take.

You also will want to refer the threatening employee to the EAP, who can be reached by calling 1-800-977-7631 or TDD: 1-800-327-0801. Assistance from the EAP for the employees who witnessed or were the target of the threats should also be requested.

#### **You Should –**

- **Try to calm** the situation – speak calmly, but firmly.
- **Notify** higher level management and the proper authorities (police, FPS).
- **Consider** whether you want to keep a violent employee away from the work place.
- **Document** what you observed or know about the incident, and report the incident to TIGTA.
- **Initiate** appropriate disciplinary action.

## ***Fighting***

Physical altercations between employees are very serious offenses. Such fights can include fist fights, slapping, biting, stabbing, throwing objects at each other, or other violent acts.

See the Guide for Penalty Determinations for the range of penalties for fighting or any other violent act. Contact your servicing Labor Relations Office for guidance regarding initiation of appropriate disciplinary action.

## Note

**The keys to dealing with any form of disruptive conduct in the workplace are:**

- *Ensuring that your employees understand your expectations and the consequences regarding inappropriate remarks, fighting, and threats*
- *Taking immediate action to stop the behavior if it occurs*
- *Initiating appropriate disciplinary action*

## Alcohol and Drug Use

There is a critical concept for supervisors to understand when dealing with employees who may have substance abuse problems, and that is, **you are to hold them to the same standards for conduct and performance** as other employees

## Recognizing and Dealing with Symptoms of Alcohol or Drug Abuse

As a supervisor, you observe your employee's behavior and performance in the work place every day. When that behavior is unacceptable or changed in a negative way and begins to impact the workplace, you must take action.

You may believe that something is bothering the employee, but even if you suspect alcohol and/or drugs are the problem, you are *not a doctor and are not expected to diagnose* the reason for the employee's behavior. You may observe:

- Attendance problems
- Sleeping on the job
- Unsafe working practices
- Appearing to be "under the influence" of alcohol or drugs
- Threats or fights
- Making inappropriate remarks, etc.

**While these are just examples, as a rule, you should –**

- **Advise** the employee that you suspect he/she has a problem that may be interfering with conduct and/or performance. Tell the employee that you don't know what the problem is and that you are not trying to make a diagnosis; that you have simply observed the effect of the problem.

- **Refer** the employee to the Employee Assistance Program (EAP) which can be reached at **1-800-977-7631** or **TDD: 1-800-327-0801**. You will need to explain that EAP can deal with a multitude of personal issues that may be affecting the employee and:
  - *The service is confidential*
  - *It is free*
  - *The employee will be afforded reasonable time to use EAP services.*
  - *It can help smooth out life's "speed bumps" both on and off the job*

Seeking assistance from EAP is voluntary on the employee's part; you cannot force an employee to use EAP services. However, it is still important for you to make and document the referral, regardless of whether or not the employee takes advantage of it.

- **Initiate** appropriate disciplinary action for the misconduct, just as you would for any other employee.

## Dealing with On-Duty Alcohol Use

If you have evidence that an employee is under the influence of alcohol while on duty, (smell alcohol on his/her breath, observe staggering, slurring of words), you have a responsibility to take the following actions:

- **Notify** Security or Federal Protective Services (FPS).
- **Confiscate** any service weapons, if the employee is in a position that requires him/her to carry a weapon. Enlist the assistance of another supervisor or manager to serve as back-up, and isolate the employee from other personnel.
- **Advise** the employee that if he/she is not ready, willing, and able to work, he/she must leave the work place. You can then ask the employee what type of leave he/she prefers to take (annual, sick, or LWOP); if he/she doesn't make a request, place the employee on AWOL for the remainder of the day and contact your servicing LR Specialist for additional guidance.
- **Inform** the employee that he/she is expected to report for work on the next regularly scheduled work day, and,
- **Arrange** for transportation for the employee to his/her home – do not allow the employee to drive. Use the Emergency Contact number on file to have someone pick the employee up.

### ***When the employee returns to work:***

- **Obtain advice** from your servicing Labor Relations Specialist and the Employee Assistance Program (EAP).
- **Initiate** appropriate disciplinary action after any inquiry or investigation is completed.

- **Provide** the employee with a memorandum referring him/her to EAP, and call EAP to make a management referral.
- **Advise** him/her that you will approve the leave needed for treatment and that you will cooperate with any treatment program prescribed by a competent medical practitioner to the extent possible based on workload and legal requirements.

## **If the Employee's Behavior Does Not Change**

Frequently an employee with alcohol related problems does not recognize or refuses to admit there is a problem and therefore does not seek assistance, but rather continues to exhibit unacceptable conduct or performance or both.

As the supervisor, you need to continue initiating appropriate disciplinary action for further instances of misconduct, advising the employee that the misconduct may serve as a basis for increasingly severe disciplinary action, up to and including removal. At the same time, you need to continue referring the employee to EAP, documenting each referral in writing.

***Initiate increasingly severe disciplinary actions for subsequent acts of misconduct just as you would for other employees without an alcohol problem. Many times, an employee with alcohol problems will only admit to a problem and seek help once they understand that his/her job is on the line.***

## Reasonable Accommodation Issues for Employees with Alcohol Related Problems

Both the Federal courts and the Merit Systems Protection Board have stated that alcoholism is an impairment within the meaning of the Vocational Rehabilitation Act of 1973 which prohibits Federal agencies from discriminating against “qualified disabled individuals,” a term that will be discussed in greater detail later in Chapter 9. The Act requires that agencies provide reasonable accommodation to these disabled individuals.

However, the reasonable accommodation for alcoholism is unique – the accommodation that the Internal Revenue Service must make for an employee with alcohol related problems is to provide him/her with an *opportunity to rehabilitate*. To accommodate the employee with alcohol related problems does not mean that you, as the supervisor, must excuse misconduct that is caused by alcoholism. Rather, it is your *affirmative responsibility* to give the person a chance (generally only one) to enter treatment and recover – that process begins with your referral of the employee to EAP.

*At the same time*, you should initiate appropriate progressive disciplinary action for any misconduct. However, in cases where the employee has committed misconduct that by its very nature strikes at the heart of the employee’s job or the IRS mission (e.g., accepting a bribe), removal is appropriate even if the employee has not been offered an opportunity to rehabilitate.

Again, you are not a doctor and are not expected to diagnose medical problems or evaluate treatment programs – that’s the job of a physician or the EAP. Your job is to refer (repeatedly, if necessary) the employee to EAP and, at the same time, hold the employee to the same performance and conduct standards as any other employee by reporting misconduct and taking appropriate disciplinary action.

### Note

**Many supervisors feel uneasy and uncomfortable when faced with what are clearly very personal employee issues. But, remember a simple rule in dealing with employees who have alcohol problems – you can never go wrong by doing too much, but doing too little could have life-altering consequences to the employee and possibly to others.**

## Reasonable Suspicion Drug Testing

Under the Drug Free Workplace Program, employees may be required to appear for urine specimen collection if a **reasonable suspicion** exists that he/she has used illegal drugs. Although reasonable suspicion testing does not require certainty, mere “hunches” are not enough to meet this standard contact your servicing LR Specialist for assistance.

Q: What standards apply to reasonable suspicion testing?

- A: 1. Observable phenomena, such as direct observation of drug use or possession and/or the physical symptoms of being under the influence of a drug;
2. A pattern of abnormal conduct or erratic behavior;
3. Arrest or conviction for a drug-related offense, or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use or trafficking; or
4. Newly acquired evidence that the employee tampered with a previous drug test.

Q: What steps should a supervisor take if one of his/her employees tests positive on a drug test?

A: The supervisor should:

- Remove the Service-issued firearm from any employee who is authorized to carry weapons;
- Temporarily move the employee out of a Testing Designated Position, and;
- Report the positive drug test to TIGTA.

Q: What should I do if one of my employees refuses to take an authorized drug test?

A: You should immediately report the incident to TIGTA, who will conduct an investigation into the matter. Employees who refuse to take an authorized drug test can expect to receive the same proposal for disciplinary action that they would have if they tested positive for illegal drugs; namely a proposed removal. Contact your servicing Labor Relations office for guidance regarding initiation of appropriate disciplinary action.

# Chapter 8

## Outside Employment

### Introduction

Internal Revenue Service employees are allowed to engage in outside employment and business activities, whether performed outside official hours of duty or while in an approved leave status, after obtaining written approval. Compliance with relevant statutes and regulations is required.

Following are general rules to follow when completing or reviewing Form 7995, Outside Employment or Business Activity Request:

- a. The outside activity must conform to general ethical requirements as set forth in the Office of Government Ethics (OGE) Standards.
- b. The outside activity may not conflict with the employee's official duties. Such a conflict exists if:
  - the activity is prohibited by statute or supplemental agency regulation; or
  - it would require the employee's disqualification from matters so central or critical to the performance of his/her official duties that the employee's ability to perform those duties would be materially impaired.
- c. The outside activity (unless otherwise permitted) may not deal directly with any tax related matters.
- d. The outside activity may not result in the improper use of government property, including non-public official information obtained in connection with the employee's government duties or position.
- e. Official time may not be used to pursue the outside activity.
- f. The outside activity may not impact on the effectiveness of the employee on the job (e.g., working an 8 hour night shift).
- g. The employee must not advertise his/her employment with the Service to generate business.
- h. If the outside activity is prohibited, the employee may not do it indirectly, that is in the name of, or through family members.

Please visit [EthicsLink](#) on the IRWeb to review the OGE Standards, Treasury Supplemental Standards of Ethical Conduct, and Treasury Employee Rules of Conduct for additional information on outside employment, including specifically prohibited activities.

### PERMITTED ACTIVITIES

An employee may engage in outside employment or business activities that meet the following requirements:

- they do not conflict with official duties; and
- they are in compliance with all applicable OGE Standards, Treasury Supplemental Standards, Treasury Employee Rules of Conduct, and all other statutory and regulatory requirements.

Managers should remember that whether or not compensation is involved is usually not relevant to issues of outside employment. Examples of instances in which compensation is relevant include: (a) teaching, speaking, or writing on matters related to the employee's official duties; and (b) the preparation of tax returns.

**NOTE**

If it is prohibited by regulation or statute; or requires the employee's disqualification from matters critical to the performance of his/her official duties it is a **CONFLICT OF INTEREST.**

## **Restricted Activities**

### **Legal Employment or Practice:**

Certain activities have developed a variety of more detailed rules in assessing whether or not the outside employment can be approved, and managers should be aware of them. These are sometimes referred to as "restricted activities." Outside legal activities may be approved with the provision that employees may not advertise nor be affiliated with a firm and the activity is not remotely involved in tax law. Examples of activities not considered to be involved with tax law include adoptions, title searches, law clerkships, and legal services to immediate family.

Note: It is forbidden to engage in legal activities involving Federal, State, or local tax matters, or any matter in which the United States is a party or has a direct and substantial interest.

Note: When requested for the purpose of performing *pro bono* work, leave shall be liberally granted consistent with established leave policies.

### **Bookkeeping and Accounting**

Employees may be authorized to engage in the full range of bookkeeping activities, provided such activity does not involve or influence tax determinations.

Employees may be authorized to engage in bookkeeping and accounting activities that involve or influence a tax determination only in the following situations:

1. Where an employee, whose official duties could not influence a tax determination or collection, wishes to keep the books for a firm owned or run by his/her immediate family and the prospects are remote for a conflict of interest;
2. Where the activity is for a civic, religious, educational, or charitable nonprofit organization and is unpaid; and
3. Where the employee has been given permission to otherwise engage in a business with a spouse.

## Teaching, Speaking and Writing:

Employees generally may not receive compensation from any source other than the Government for teaching, speaking, or writing that is related to his/her official duties. Such activities relate to official duties when:

- the activity is undertaken as part of official duties;
- the invitation to teach, speak, or write is extended primarily because of the employee's official duties;
- the invitation to teach, speak, or write is extended primarily because of the employee's official position rather than because of expertise on the subject matter;
- the invitation or offer of compensation is extended by someone whose interests may be affected substantially by how your official duties are performed;
- the activity draws substantially on non-public information; or
- in general, the subject of the activity deals significantly with agency programs, operations, or policies; or, current assignments.

**Major Exception:** An employee may accept compensation for teaching a course with multiple presentations if the course is part of a regularly established curriculum of qualifying institutions (see 5 CFR 2635.807(a)(3)).

**Definition:** Compensation - generally includes any form of consideration or income. (See 5 CFR § 2635(a)(2)(iii))

### **Exception:**

For employees other than "covered non-career employees," the definition of "compensation does **not** include transportation, lodging, or meal expenses for teaching, speaking, or writing related to official duties.

Employees other than "covered non-career employees" might be allowed to accept compensation for teaching, speaking, or writing on material within his/her area of expertise based on his/her educational background and experience even though it deals with a subject within the authority of the Internal Revenue Service. Employees should carefully review 5 CFR § 2635.807(a)(2)(i) and the 'Note' following section 5 CFR § 2635.807(a)(2)(i)(E) for examples of how this regulation is applied.

**Definition:** Covered non-career employee is an employee in a position classified above GS-15 of the General Schedule, or in the case of a position not under the General Schedule, an employee whose rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 and who is appointed to an Executive Schedule position. (See 5 CFR § 2636.303(a) for additional examples.

Employees generally may not use their official title or position to identify themselves in connection with their teaching, speaking, or writing or to promote any book, seminar, program or similar undertaking.

**Exception:**

An employee's official title or position may be used:

- (1) as one of several biographical details, provided it is given no more prominence than other biographical details; and
- (2) in connection with an article published in a scientific or professional journal, provided it is accompanied by a disclaimer. (See 5 CFR § 2635.807(b).)

**Activities not Requiring Approval**

Permission is not required to engage in outside activities that are not considered to be employment or business activities. The following are examples of activities that do not require prior approval:

- a. Membership and services (including holding of office) in civic, scout, religious, educational, fraternal, social, community, veteran, and charitable organizations, including corporations where such office or services do not entail the management of a business type activity such as the direct operation or a commercial type clubhouse.
- b. Unpaid bookkeeping, preparation of tax returns and other forms required by the Service, and the maintenance of other records for civic, religious, educational, and charitable non-profit organizations which are exempt from Federal income tax.
- c. Services as a Notary Public.
- d. Minor services and odd jobs for friends, relatives, or neighbors.
- e. Furnishing advice and assistance in the preparation of tax returns where no fee or other consideration is accepted.

**Applying for Permission**

Employees must obtain written approval before engaging in any outside employment or business activity whether or not they are paid for the work. An employee can obtain approval by submitting Form 7995, Outside Employment or Business Activity Request, to his/her manager. However, permission is not needed to engage in outside activities that are not considered to be employment or business activities.

Approval or disapproval of the employee's request should be made within 10 work days from receipt of the employee's fully completed Form 7995. [ If a response is not provided to a bargaining unit employee within the period prescribed, the request will be considered denied and the employee may proceed to the streamlined grievance process (see Article 6 of the National Agreement.)]

You (the supervisor) should make 4 copies of the Form 7995, to be distributed as follows:

1. the original will be given to the employee as a notice of the decision.
2. the 2<sup>nd</sup> and 3<sup>rd</sup> copies will be forwarded to the servicing Labor Relations office – one will be forwarded to TPC to be placed in the employees OPF; and one will be kept in the Master File that is kept in the Labor Relations office;
3. the 4<sup>th</sup> copy will be placed in the employee's EPF.

If the employee changes positions or post of duty, which results in a change of managers, he/she must submit a new Form 7995 and indicate in item #6 that he/she has an approved outside employment request in his/her previous location/position. The employee should ask the manager for the file copy of the previously approved form. He/she should write "VOID" across the face of the form, sign and date it. This copy should then be forwarded to Labor Relations.

**Exception:** Seasonal employees in a non-duty status may engage in outside employment or business activities without prior written permission. However, seasonal employees may not ever engage in prohibited outside activities. Upon returning to duty status, seasonal employees must submit a written request for permission, using Form 7995, if they wish to continue the outside employment.

## APPEALS

The denial of an employee's request to engage in outside employment or business activity is appealable by the affected employee pursuant to IRM 6.771.1 Internal Revenue Employee Grievance System, for bargaining unit employees, or in accordance with the streamlined negotiated grievance procedures in Article 6 and Article 41, Section 17 of the National Agreement.

The employee with a denied outside employment request may choose to submit a Form 8558, Request for Deputy Ethics Official opinion, in lieu of a grievance. The procedures for seeking a DEO opinion are as follows:

1. Employee submits a completed Form 8558, the disapproved Form 7995, and relevant background material for your review and comment.
2. After reviewing the employee's DEO request, attach your comments, if any, sign and date Form 8557 (Routing and Transmittal Slip for DEO Request) to the DEO package and forward the material up the management chain to the Approving Official, usually the head of office. If assistance is needed, contact your servicing Labor Relations Office.

3. The Approving Official should review the package and provide additional comments if necessary, sign or initial the Form 8557, and forward the entire package to the servicing Labor Relations Office.
4. The Labor Relations Office will review the package to ensure completion and forward the package through the Workforce Relations Division (SHR) to the DEO.
5. The DEO will provide written advice to the employee and will copy you, the Labor Relations Specialist assigned to the case, and the Director, Workforce Relations Division (SHR).

## RESPONSIBILITIES

The servicing Labor Relations Office is responsible for reviewing any Outside Employment Requests that management feels may conflict with the employee's official duties. Labor Relations will also request formal opinions from the Deputy Ethics Official (DEO) (General Legal Services) when a request complies with the general rules.

**NOTE:** The duties of the DEO include providing Service employees with counseling regarding interpretation or application of the OGE Standards of Ethical Conduct, Treasury Supplemental Standards of Ethical Conduct, Treasury Employee Rules of Conduct, related statutes or regulations, and conflict of interest questions. Employees desiring to avail themselves of the DEOs services regarding matters of immediate or future personal interest or involving prospective employment, may contact General Legal Services.

# CHAPTER 9

## Doing the Right Thing

### Reasonable Accommodation

#### Americans with Disabilities and Rehabilitation Acts

Although the topic of reasonable accommodation is not necessarily related to discipline or misconduct, some discussion of it is included in this guide because of the key role a supervisor plays in clarifying what their employees with disabilities need and identifying the appropriate reasonable accommodation to meet that need. It is also important that supervisors understand their responsibilities under the Americans with Disabilities Act of 1990 (ADA) to avoid situations where the Internal Revenue Service could be liable for failure to make reasonable accommodations for our employees with disabilities. However, this is a complex subject, and supervisors should not hesitate to contact their servicing Labor Relations Specialist or Equal Employment Opportunity Specialist for advice and assistance.

*The phrase "reasonable accommodation" is not a new one to Federal employees or managers, as the Rehabilitation Act of 1973, which applies to all Federal agencies, introduced the concept. But ADA expanded coverage to disabled employees in the private sector, and enlarged upon what is considered to be "reasonable accommodation" of employees with disabilities.*

The Rehabilitation Act and the ADA require an employer to provide reasonable accommodation to *otherwise qualified individuals with disabilities* who are employees or applicants for employment, unless doing so would cause *undue hardship*. A *reasonable accommodation* depends on the job requirements and is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. Before further explaining the concept of reasonable accommodation, there are several important terms to define:

• **Reasonable accommodation** is a term that Congress defined only through examples of changes or modifications to be made, or items to be provided to a qualified individual with a disability. There are a number of possible reasonable accommodations that the IRS, as a Federal employer, may have to provide in connection to modifications to the work environment or adjustments in how and when a job is performed. These include, for example:

- **Making existing facilities accessible**
- **Acquiring or modifying equipment**
- **Providing qualified readers or interpreters**
- **Job restructuring**
- **Modification of work schedules**

•An **"otherwise qualified employee"** with a disability (that affects one or more major life activities such as walking, seeing, hearing, speaking, caring for oneself, breathing, and learning) is one who, *with or without reasonable accommodation*, can perform the essential functions of his/her position.

•**Undue hardship** means significant difficulty or expense and focuses on the circumstances of the employer in relationship to the cost or difficulty of providing a specific accommodation. A simple statement that the accommodation is too expensive does not provide undue hardship. An employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship.

The statutory definition of reasonable accommodation does not set limits, financial or otherwise, on how far an employer must go to make changes to a job or work environment.

## More about Reasonable Accommodation

Q: How must an employee request a reasonable accommodation?

A: When an employee decides to request reasonable accommodation, the individual must let you as the supervisor know that he/she needs an adjustment or change at work for a reason related to a medical condition. Remember, the employee may use simple language and may not even know to mention the ADA or use the phrase "reasonable accommodation." It just requires the use of common sense on your part.

**Example A:** An employee tells you, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing." Although this is a statement, and not a request, you should be alerted that the employee is saying to you that he/she has a work place requirement that needs an adjustment (work schedule) due to a medical condition. Therefore, this may be a request for reasonable accommodation. Even if this is only expected to be a temporary situation, it is good management practice to work with the employee on possible adjustments to the work schedule during the period of treatment.

**Example B:** An employee tells you that he would like a new chair because his present one is uncomfortable. Although this is a request for a change at work, the employee does not link his need for a new chair to a medical condition. So, standing alone his statement is insufficient to put you on notice that he is requesting reasonable accommodation. However, you should ask the employee if he has a medical problem that the current chair exacerbates. If so, then you could explore the issue of reasonable accommodation. Keep reading!

Q: Is the supervisor required to provide the change that is requested by the employee?

A: While an individual with a disability may request a change because of a medical condition, **this request does not necessarily mean that you are required to provide the change. A request for reasonable accommodation is the first step in an informal, interactive process** between you and the employee.

Managers/Supervisors are not doctors and they cannot determine whether reasonable accommodation is required without some assistance and the local EEOC territory offices is the appropriate office to contact. Normally, when an employee requests a reasonable accommodation and medical documentation is required, a copy of the employee's Position Description

(PD) should be furnished to the health provider. Based on the PD and his/her medical opinion of the employee's disability, the health provider can suggest what would be best for the employee (i.e., an ergonomic chair, lower key board, etc.). A copy of the medical documentation, a release signed by the employee, authorizing our contract doctor, Dr. Presant, to contact the health provider if he should have any questions, along with a copy of the PD is sent for his evaluation and confirmation or denial of the request. Based on his medical opinion, he will give his recommendation whether management should approve or deny the request. More information can be obtained from the AWSS website, EEO and Diversity [not Field Services] under Reasonable Accommodations (see Employee and Management responsibility in the Reasonable Accommodation Process).

**Q: What must the supervisor do after receiving a request for reasonable accommodation?**

**A:** You and the employee should communicate to clarify what the employee needs and identify the appropriate reasonable accommodation. The exact nature of the dialogue will vary. At this point in the process, you should, if you have not already done so, contact your servicing Labor Relations Specialist or EEO Specialist for advice and assistance. In many instances, you may need to ask questions concerning the nature of the disability and the employee's functional limitations in order to identify an effective accommodation. While the employee with a disability does not have to specify a precise accommodation, he/she does need to describe the problems posed by workplace requirement or condition.

**Q: May a supervisor ask an employee for documentation when the individual requests reasonable accommodation?**

**A:** Yes, you should ask the individual to provide reasonable documentation from his/her treating health care professional that outlines his/her disability and functional limitations. This documentation will establish if the employee has a disability covered by the ADA and will provide information concerning what you can do to accommodate the disability.

Managers/Supervisors are not doctors and they cannot determine whether reasonable accommodation is required without some assistance. The local EEOD territory offices is the appropriate office to contact. Normally, when an employee requests a reasonable accommodation and medical documentation is required, a copy of the employee's PD should be furnished to the health provider. Based on the PD and his/her medical opinion of the employee's disability, the health provider can suggest what would be best for the employee (i.e., an ergonomic chair, lower key board, etc.). A copy of the medical documentation, a release signed by the employee, authorizing our contract doctor, Dr. Presant, to contact the health provider if he should have any questions, along with a copy of the PD is sent for his evaluation and confirmation or denial of the request. Based on his medical opinion, he will give his recommendation whether management should approve or deny the request. More information can be obtained from the AWSS website, EEO and Diversity [not Field Services] under Reasonable Accommodations (see Employee and Management responsibility in the Reasonable Accommodation Process).

**Q: Is the supervisor required to provide the reasonable accommodation that the employee wants?**

**A:** The effectiveness of the accommodation is the main issue here, not the employee's desires. You may choose among reasonable accommodations as long as the chosen accommodation is effective, **and** enables the employee to successfully perform the essential functions of

his/her position. Thus, as part of the interactive process, you may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace requirement or condition that is affecting the employee with a disability.

In some cases, what the employee wants for a reasonable accommodation will not be what his/her treating health care professional feels is effective, given the disabling condition. In these circumstances, you should follow the health care professional's recommendations while considering the impact of the accommodation on accomplishing the essential parts of the job.

If there are two possible reasonable accommodations that are effective, and one costs more or is more burdensome than the other, you may choose the less expensive or burdensome accommodation, as long as it is effective.

**Q: What should the supervisor say when other employees ask him/her why a particular employee is receiving special treatment?**

**A:** You may not disclose that an employee is receiving reasonable accommodation because this usually amounts to a disclosure that the individual has a disability. The ADA specifically prohibits the disclosure of medical information except in certain limited situations, which do not include disclosure to coworkers. In addition, the Privacy Act also prohibits disclosure of this kind of information to coworkers, and an employee can sue you in civil court for Privacy Act violations.

You should remind any employees asking questions about why a coworker is receiving what is perceived as "different" or "special" treatment by emphasizing the IRS policy of assisting an employee who encounters difficulties in the workplace. It may also be helpful to point out that many of the workplace issues encountered by employees are personal, and you, as the supervisor, must respect employee privacy.

## **Discipline and Reasonable Accommodation**

When discipline and reasonable accommodation issues coincide, it is usually after an employee has received a proposal for disciplinary action and in reply, states that he or she has a previously undisclosed disability that caused him/her to commit the misconduct.

**Q: Can discipline be imposed on an employee whose disability is or appears to be related to misconduct?**

**A:** Yes, you never have to excuse any violations of uniformly applied conduct rules and can discipline an employee with a disability for engaging in misconduct if you would impose the same discipline on an employee without a disability.

**Q: Must a reasonable accommodation be provided to an employee with a disability who commits misconduct?**

**A:** Assuming that the misconduct is not so egregious that the employee will be separated from the Service, the fact that an employee faces discipline or adverse action does not affect his/her rights to reasonable accommodation. If the employee is an otherwise qualified employee with a disability, requests reasonable accommodation, the accommodation is appropriate to the condition, and the accommodation does not pose an undue hardship, then the manager should provide an appropriate reasonable accommodation, just as for any other employee. However,

because reasonable accommodation is always prospective, excusing past misconduct is not a reasonable accommodation.

In most cases, simply reducing or eliminating the penalty is not an appropriate or effective reasonable accommodation, where a disabling condition was truly a determining factor in the misconduct. For example, you have an employee who has engaged in disruptive behavior as a result of a psychiatric condition. Simply reducing the proposed disciplinary penalty would not have any impact on his/her ability to meet the expected conduct standard in the future, but granting leave in order for the employee to seek treatment might and therefore may be an effective accommodation.

While reducing or eliminating a penalty is not a reasonable accommodation, it is necessary to consider whether or not a disabling condition constitutes a mitigating factor in accordance with the normal analysis of the Douglas factors, which were discussed in Chapter 3.

## **NOTE**

**The key points to remember in this section are:**

- **Communicate** with an employee who is requesting a change in working conditions as a result of a medical condition.
- **Contact** the EEO Office or your servicing Labor Relations Specialist for advice and assistance as soon as it becomes apparent that you are dealing with reasonable accommodation issues.

## **Protected Activities**

### **What are Protected Activities?**

Up to this point, this Guide has discussed employee conduct where disciplinary action may be appropriate. Now, the discussion will be centered on outlining employee activities that are **protected from disciplinary action**. In this context, “protection” generally means that management may not take an action against an employee in reprisal for engaging in a protected activity. Reprisal will be discussed in the next section.

The types of employee activity that are **protected** are:

- *Appeals, grievances, EEO complaints, worker's compensation claims* – Protection applies not only to the employee who filed the petition or claim, but to witnesses, EEO counselors, and anyone else involved in the action.
- *Union activity* -- Labor law protects employees from reprisal for forming and joining unions and from serving as a union representative.
- *Whistle blowing* -- Is the disclosure of information that an employee reasonably believes is a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to

public health and safety. Such a disclosure can be made to the Office of Special Counsel, or to the Treasure Inspector General for Tax Administration (TIGTA). Disclosure can also be made to any other organization or individual, such as the media or a congressional committee, provided that the disclosure is not specifically prohibited by law, and the information does not have to be kept secret in the interest of national defense or the conduct of foreign affairs.

- *Free Speech* -- Management has the right to limit employee speech on the job and even, in some cases, off the job. For example, disrespectful conduct, threats, and verbal abuse of others are not protected against disciplinary action by the First Amendment. The courts have used the First Amendment to protect employee speech only if it was about matters of "general public interest." Disparaging comments about agency officials are usually not protected, especially when the employee's motive is vindictiveness. But these distinctions are not always easy ones, so be careful in initiating disciplinary actions where the substance of the charge concerns expressions of employee opinion.

***This subject is a complicated one -- if you, as a supervisor, encounter one of these situations, you should immediately contact your servicing Labor Relations Specialist or General Legal Services for advice and assistance.***

## Reprisal

The word "reprisal" refers to an action (including a disciplinary action) taken as retaliation against an employee engaged in some form of protected activity, such as filing an administrative grievance or a discrimination complaint. Many allegations of reprisal occur after a disciplinary action has been taken for some unrelated cause. However, the employee usually believes or at least alleges that the stated reason for taking disciplinary action is an excuse to punish him/her for engaging in the protected activity. Management must then be able to show that either the activity was ***not protected, or that*** they would have taken the same disciplinary action even if the employee had not engaged in the protected activity.

Reprisal is usually proven in one of three ways:

- *Timing of the disciplinary action.* For example, an employee used abusive language towards a supervisor. A short time later, the employee was not selected for a promotion by the supervisor and initiated a discrimination complaint over the non-selection. The day after the supervisor was contacted by an EEO counselor, (and 2 months after the abusive language incident), the supervisor initiated disciplinary action for the incident. Although the discipline would normally be appropriate, the timing could be construed to suggest that the supervisor wasn't planning on doing anything about the incident and only took action as retaliation for the employee having filed a discrimination complaint.

- *Too harsh penalties for minor charges of misconduct.* Using the previous example, let's assume that the supervisor can successfully explain the timing of the disciplinary action allegation and decides that the proposed penalty for the employee's use of abusive language should be a 30-day suspension. The Guide to Penalty Determinations recommends a Letter of Reprimand to a 5-day suspension for this type of misconduct. Once again, management must be prepared to submit evidence to a third party official to show that the penalty selected was not motivated by reprisal for engaging in the protected activity of filing an EEO complaint.
- *Disparate treatment.* Generally, MSPB administrative judges and other third parties who review employee challenges to adverse actions would compare the employee who has engaged in protected activity and committed a particular offense with an employee who committed the same offense, but did not engage in protected activity. For example, a disciplinary action for failing to properly follow leave procedures is normally appropriate. But, if an employee disciplined for that offense alleged reprisal for whistle blowing, and can show that others, who had not filed complaints, committed the same offense and were not disciplined, a third party could likely find reprisal and reverse the action.

## NOTE

The key theme throughout this section is **consistency**. Supervisors and managers need to be consistent and *timely* when applying and enforcing the rules and regulations for *all* employees under their supervision in *all* relevant situations.

With all that said, **do not let the protected activity of an employee deter you, as a supervisor, from holding him/her to the same rules and standards of behavior as any other employee.** Participation in protected activity doesn't shield the employee against discipline for unrelated misconduct. And nothing will destroy a supervisor's credibility faster than having two sets of rules -- one for people who file complaints and one for people who don't. Simply keep in mind that when you are enforcing rules against employees who engage in protected activity, your actions will come under very close scrutiny -- **seek advice and assistance** from your servicing Labor Relations Specialist or General Legal Services **before** you take any action.

## Potential Pitfalls

This Guide has covered the rules of conduct, the discipline process, and some specific information for supervisors in dealing with the more common types of employee misconduct. Here is some information to help you avoid some of the common pitfalls or mistakes that supervisors make in handling matters of misconduct.

### Saving It Up

**Case A:** A supervisor discovers that an employee whose starting time was 8:00 am arrived an hour late at 9:00 am, but signed the time sheet as arriving on time. The supervisor said nothing to the employee, but had other coworkers watch for when the employee signed in. He then determined that over the next six weeks, the employee did the same thing, adding up to over 19 hours of time that he said he worked, but did not. At that point, the supervisor initiated disciplinary action for the first time, and felt that the employee, who had no prior disciplinary record, should receive a proposal for removal. He received a Letter of Reprimand.

**Case B:** Over a six-month period, an employee (with no prior disciplinary record) is tardy over 40 times without any acceptable reasons and was charged AWOL for each occurrence, after being warned about the tardiness. The case file contained documentation of numerous counseling sessions about the importance of coming to work on time. The tardiness did not improve. At the end of the six months (as well as at the end of his rope) the supervisor finally initiated disciplinary action, and was incensed that the employee only received a Letter of Reprimand instead of an adverse action.

**Discussion:** Why didn't the misconduct in each case warrant an adverse action? On the surface, each disciplinary action seems solid. The facts can be proven, there is a connection or nexus between the misconduct and the mission of the Service, and both employees committed the misconduct numerous times. But, remember what we discussed in Chapter 3 - **the purpose of discipline is to correct behavior.** In both cases, the supervisor made no attempt to correct the misconduct when it first occurred with less serious formal disciplinary action -- the supervisor watched the misconduct continue, mistakenly thinking that he/she could "save it all up" and then initiate an adverse action.

But, you may say, the supervisor in the second case counseled the employee -- that surely is an attempt to correct the misconduct. Yes, counseling is an informal action designed to stop inappropriate behavior, but more severe formal action should follow when it becomes apparent that counseling isn't correcting the behavior. To keep repeating the rules without following through with formal disciplinary action when the misconduct continues may give the employee the message that you aren't really serious. The supervisor in this example did all the right things, but didn't follow through with progressively more severe disciplinary action for the AWOL *as it occurred*.

Additionally, neither employee had a prior disciplinary record (remember -- discussing expectations or explaining the rules is not formal discipline). This is an important point when dealing with less serious misconduct.

**The lesson to be learned:** Do not try to solve a conduct problem by saving up minor acts of misconduct and then expecting to initiate strong disciplinary action. If the employee engages

in unacceptable behavior, start the disciplinary process when you first observe the misconduct and begin at the lowest possible level. The goal of discipline is to correct behavior.

## Bad Habits

**Case:** The supervisor of a group of employees looked the other way when it came to the 30-minute lunch break, rationalizing that 30 minutes was insufficient and his employees were generally hard-working and got the job done in spite of occasional long lunch breaks. However, the "occasional" long break evolved into an everyday occurrence, and the length of the breaks became longer. At 2:00 p.m. on a particular day, the supervisor went looking for several of his employees to assign them a "rush" project and discovered that they were at lunch and had been there for over two hours. When his employees returned, the supervisor informed them that he was charging them AWOL for the time they spent at their lunch break over 30 minutes, and contacted his servicing Labor Relations Specialist to initiate disciplinary action. What happened next?

**Discussion:** In general, a disciplinary action would not be recommended when a supervisor has a history of tolerating misconduct. Does that mean that you, as a supervisor, are prohibited from ever initiating disciplinary action if you have failed to enforce a rule in the past and now things are out of hand?

No, but you need to take an intervening action before initiating any discipline announce to the work group, preferably in writing, that although you may not have always enforced the rule in the past, you will do so now. Make sure that you state the new consequences of failing to follow the rule (discipline). Seek assistance from your servicing Labor Relations Specialist before announcing any change in office practice.

**The lesson to be learned.** Do not begin enforcing a rule whose violation you have tolerated by disciplining the very next person who violates it.

## Protecting the Good Employee

**Case:** You have two particular employees under your supervision. The first employee is an outstanding employee who always goes the extra mile in performing her duties. The second employee does the minimum to "get by," does not work well with her co-workers, and always seeks the easiest way out of any assignment. She has no formal disciplinary record. On a particularly busy day, you observe a loud verbal altercation between an employee from another office and your outstanding employee, requiring you to intervene to diffuse the situation. In a private discussion with the employee following the incident, she apologizes profusely and tells you that she has been on edge lately due to lack of sleep because she is going to college during her off-duty hours. You state your expectations about behavior with co-workers, and warn her not to engage in such behavior in the future.

Several weeks later, you receive a report that your marginal employee was rude to a co-worker, speaking loudly and inappropriately to him. Others in the office stopped working, fearing that the situation would escalate. You discussed the incident with the employee, who stated that the co-worker borrowed her stapler and didn't return it. You then initiated formal disciplinary action and eventually, the employee received a 2-day suspension for disruptive behavior. After failing to reach resolution through the grievance procedure, the union invoked arbitration on behalf of the employee. The arbitrator overturned the suspension.

**Discussion:** In this example, the misconduct committed by both employees is the same -- engaging in disruptive behavior. The range of penalties for this offense is a Letter of Reprimand to a 5-day suspension for a first offense.

But after all, the outstanding employee apologized for her behavior. After all, she has been under some personal stress. All true, but there is no getting around the fact that **both employees committed the same misconduct.**

Granted, some of the facts (and possible extenuating factors) in each case are different, but the behavior and the resulting charge are the same in both. Use of the Douglas factors (including employee's performance on the job and potential for rehabilitation [e.g., remorse and apology]) might be reasons for differing penalties (e.g., letter of reprimand for the outstanding employee and a short suspension for the other). The bottom line is that both employees should be disciplined for this behavior.

**The lesson to be learned:** While different penalties may be appropriate for similar behavior by different employees, it is not appropriate to discipline some and not others. To do so is to risk a disciplinary action being overturned in third party forums because of a disparate treatment claim. Although a supervisor's instinct is to protect the good employee, he/she must be consistent in responding to unacceptable behavior by subordinates and take disciplinary action, remembering that it may be possible to make distinctions in the severity or the penalty. Remember, you will need to be able to articulate the reasons for those distinctions.

# Chapter 10

## Meetings Involving NTEU

The purpose of this chapter is to focus on when, in the course of communicating with bargaining unit employees, you must provide an opportunity for NTEU to be represented. This is an area of confusion for many managers because of the many types of conversations and discussions you have with your employees on a daily basis – conversations over work assignments, performance evaluation and counseling, “gripes” and suggestions from employees, and feedback on work-related matters. When does NTEU have to be invited? When do they not need to be present?

### Formal Discussions

It’s easier to understand the concept of a “formal discussion” when you refer back to the central role of the NTEU to be the exclusive representative of the entire bargaining unit. Consequently, any changes in bargaining unit employees’ conditions of employment must be negotiated with NTEU, not the employees.

In accordance with 5 USC 7114(a)(2)(A), the Union’s right is established when 1) there is a discussion; 2) which is formal; 3) between a representative of the IRS and a unit employee or the Union; 4) concerning any grievance, personnel policy, practice, or other general condition of employment.

Factors which would indicate that a meeting was “formal” include, but are not limited to:

- (a) the status of the individual who held the discussion(s);
- (b) whether any other management representatives attended;
- (c) the location of the discussion(s);
- (d) how the meeting was announced;
- (e) the length of the discussion;
- (f) whether an agenda was established; and
- (g) the manner in which the discussion(s) was conducted.

### How to Spot a Formal Discussion

Ask yourself a few simple questions when you are about to meet with one or more employees:

- ◆ Who will attend the meeting? Will the discussion involve *both* a manager or other management official and one or more bargaining unit employees? If the answer is no, then it is not a formal discussion. If the answer is yes, go on to the next question.
- ◆ What will be discussed at the meeting? Will the discussion involve a detailed explanation or conversation about a personnel policy or practice, or general working conditions of unit employees? If so, the meeting is probably a formal discussion. Does the meeting involve a grievance? If so, it’s a formal discussion.
- ◆ Is the meeting or discussion a casual conversation or more “formal”? If the meeting is pre-scheduled, is attended by several persons on either side, requires mandatory

attendance, has a definite agenda, or is attended by higher than a first-level manager; it's more likely than not to be a formal discussion.

### **What Is Not A Formal Discussion?**

- Discussions solely between supervisors and management officials.
- Discussions between a supervisor and an employee who is not in the bargaining unit.
- Discussions about work procedures, assignments, deadlines, or guidance on how to perform an assignment.
- Discussions about an employee's conduct, counseling or warning concerning conduct, or suggestions for improvement (unless the employee believes discipline may result and requests representation – see next section).

**For further guidance go to the National Agreement Resource Center (NARC) web site at:**  
<http://shr.web.irs.gov/workfce/na/index.htm>

You may also contact your servicing LR Specialist for assistance.

### **What Should I Do Next?**

If after answering the above questions you find that the meeting is “formal”, then you must notify the union so the union can arrange to have a representative attend, if the union so chooses. Consult the National Agreement, Article 8, Subsections 1.A.4 and 1.B for information on how much advance notice you need to provide to the union.

### **Role of the Union Representative**

At the start of any formal discussion the manager is required to identify the NTEU representative. The NTEU representative attending a formal discussion has a right to take an active role in the meeting, but not to the extent that he/she disrupts or takes over the meeting. The NTEU representative can ask questions related to the topics under discussion and can state the union's position or views on the matter.

### **Note**

Whether or not the employee(s) involved in the discussion wants the union to be present is not relevant. The right of the union to attend formal discussions is granted by the law and cannot be waived by individual employees.

## Investigative Meetings

The second situation in which the law gives the union the right to represent employees in meetings is in an examination in connection with an investigation if the employee requests union representation. While some investigations or inquiries are conducted by TIGTA investigators, there are instances where you, as a supervisor or manager, will be called upon to question an employee(s) about a misconduct issue in order to determine an appropriate course of action.

Based on a private sector case that was decided by the Supreme Court, these conversations are commonly referred to as **Weingarten** or investigative meetings. The law outlines three requirements for a meeting to be considered an investigative meeting at which bargaining unit employees are entitled to union representation:

- 1) the meeting must be for management to examine (question) the bargaining unit employee in connection with an investigation;
- 2) the employee must request representation;
- 3) the employee must reasonably believe that disciplinary action may result from the meeting.

**If all three requirements are met**, the discussion or meeting qualifies as a Weingarten meeting.

Article 5 of the National Agreement provides additional information on Investigative interviews. You can also go to the National Agreement Resource Center (NARC) web site at:  
<http://shr.web.irs.gov/workfce/na/index.htm>

## Management Options

When faced with a Weingarten discussion, you have several alternatives in dealing with the situation.

- You can simply end the meeting.
- You can offer the employee the option of continuing the meeting without the union representative.
- You can temporarily stop the questioning long enough to obtain a union representative, and then continue the questioning when the representative arrives.
- You can attempt to remove the employee's "reasonable belief that discipline may result", and therefore his/her entitlement to union representation, by stating that the employee will not be disciplined.

## Role of the Union Representative

The role of the union is not just to observe or witness the examination, but to serve as an employee advocate. When the person being interviewed is accompanied by a representative furnished by the Union, in both criminal and non-criminal cases, the role of the representative included, but is not limited to, the following rights:

1. to clarify questions;
2. to clarify answers;
3. to assist the employee in providing favorable or extenuating facts;
4. to suggest other employees who have knowledge of relevant facts; and
5. to advise the employee.

## What Is Not A Weingarten Discussion?

- Discussions of an employee's performance, even if such discussions lead to an unacceptable performance rating or a performance-based action.
- Meetings solely for the purpose of delivering discipline proposal or decision letters.

### Note

**The key points to remember in this section are:**

- Union representatives have the right to be present at *formal discussions*. Supervisors are required to notify the union of such meetings in advance, and to give the union a chance to have a representative present.
- Union representatives may also attend investigative meetings if a bargaining unit employee asks for the help of a union representative. These meetings are referred to as *Weingarten meetings*.
- In both kinds of meetings, union representatives can take an active role.
- You have the right to maintain control of such meetings by limiting the subject matter of the discussion and by requiring the employee to answer questions posed rather than having the union answer for him/her.

# Chapter 11

## Your Labor Relations Specialist

Throughout this Guide, the Labor Relations Specialist has been mentioned as a resource for you, the supervisor. It is important for you to know that LR Specialists are *management representatives*. As subject matter experts on the laws, rules, and regulations concerning employee conduct and performance issues, their primary job is to assist you in taking the appropriate actions to resolve these issues. LR Specialists are **not** employee representatives or advocates. In dealing with employees, their job is to make sure that employees understand their rights and the regulations as they apply to them.

Q: So, exactly what can this individual do for you, as a supervisor or manager?

- A:
1. **Advise you** - There are usually several different ways to approach the same conduct issue. An LR Specialist will listen carefully to your issues and concerns, ask you detailed questions about the particular situation and maybe your work group as a whole, and offer different approaches to assist you in addressing the problems you are facing.
  2. **Draft written correspondence for your signature** - Once you have decided upon a course of action, the LR Specialist will draft any necessary correspondence to the employee to ensure that all the appropriate legal and regulatory language is included. They may ask you for written documentation concerning the case (time sheets, memos to the employee, etc.).
  3. **Assist in representing you** - This may take the form of taking notes for a Proposing Official during an oral reply and/or assisting you (along with Counsel) in preparing for a hearing before the MSPB or an arbitrator.

Remember, however, discipline is a management function and responsibility. LR Specialists act in an advisory capacity only and have no decision-making authority, but can help you reach decisions on these critical and sensitive issues by providing advice based on their experiences, the organizational track record, and case law. Use their expertise!

## Want to know more?

### Contact:

- Ethics.....Designated Ethics Official, General Legal Services (Ethics HotLine: (202) 283-7900)
- Rules of Conduct.....your servicing Labor/Employee Relations Specialist
- Discipline Process.....your servicing Labor/Employee Relations Specialist
- Reporting Requirements.....your local TIGTA office
- Miranda, Beckwith, or Kalkines Rights.....General Legal Services

For a recent listing of Labor and Employee Relations contacts go to:

<http://erc.web.irs.gov/DOCS/2002/AWSS/PS/wrb/LRContactGuide.doc>

# Appendix 1

## RRA '98 Section 1203

### What you need to know about Section 1203.

On July 22, 1998, President Clinton signed into law the landmark IRS Restructuring and Reform Act of 1998 (RRA'98). Employees should have an understanding of RRA'98 which defines some basic concepts about employee conduct and requires those who are determined to have violated any provision under Section 1203 to be removed from the Service.

#### **IMPORTANT REMINDERS**

- ❖ *Taxpayer rights come first!*
- ❖ *Equity and fair treatment of employees must be protected.*
- ❖ *Standards for good conduct have not changed.*
- ❖ *Employees must file accurate and timely tax returns regardless of whether there is a balance due.*
- ❖ *Employees have a responsibility to report allegations involving potential Section 1203 violations to appropriate officials. Reports may be made to management or the Treasury Inspector General for Tax Administration (TIGTA).*
- ❖ *Willfulness and some degree of intent are essential elements of Section 1203 violations as stated in the plain language summary. Simple mistakes in the course of doing your job in good faith are not Section 1203 violations.*
- ❖ *If you're ever in doubt about the appropriate actions, ask for assistance before proceeding.*

## Section 1203 Provisions:

- §1203(b)(1)** Willful failure to obtain the required approval signatures on documents authorizing the seizure of a taxpayer's home, personal belongings, or business assets.
- §1203(b)(2)** Providing false statements under oath with respect to a material matter involving a taxpayer or taxpayer's representative.
- §1203(b)(3)** With respect to a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, the violation of –
- (A) any right under the Constitution of the United States; or
  - (B) any civil right established under –
    - (i) title VI or VII of the Civil Rights Act of 1964;
    - (ii) title IX of the Education Amendments of 1972;
    - (iii) the Age Discrimination in Employment Act of 1967;
    - (iv) the Age Discrimination Act of 1975;
    - (v) section 501 and 504 of the Rehabilitation Act of 1973; or
    - (vi) title I of the Americans with Disabilities Act of 1990.
- §1203(b)(4)** Falsifying or destroying documents to conceal mistakes made by any employee with respect to a matter involving a taxpayer or taxpayer representative.
- §1203 (b)(5)** Assault or battery on a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, but only if there is a criminal conviction, or a final adverse judgment by a court in a civil case, with respect to the assault or battery.
- §1203(b)(6)** Violations of the Internal Revenue Code of 1986, Department of Treasury regulations or policies of the Internal Revenue Service (including Internal Revenue Manual) for the purpose of retaliating against, or harassing, a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service.
- §1203(b)(7)** Willful misuse of the provisions of Section 6103 of the Internal Revenue Code of 1986 for the purpose of concealing information from a congressional inquiry.
- §1203(b)(8)** Willful failure to file any tax return required under the Internal Revenue Code of 1986 on or before the date prescribed therefore (including extensions), unless such failure is due to reasonable cause and not to willful neglect.
- §1203(b)(9)** Willful understatement of Federal tax liability, unless such under- statement is due to reasonable cause and not to willful neglect, and
- §1203(b)(10)** Threatening to audit a taxpayer for purpose of extracting personal gain or benefit.

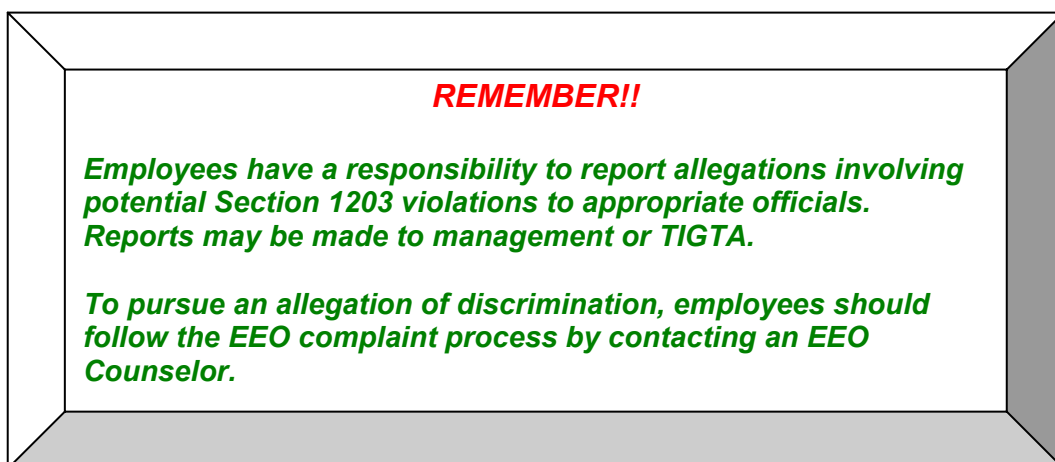
## Manager's Responsibilities

- Ensure that all 1203 allegations made by taxpayers, taxpayer representatives, IRS employees, and other external sources are processed according to established procedures;
- Assure quality customer service to the taxpayer and fair treatment of IRS employees who are the subjects of allegations;
- Record the allegation on the 1203 Allegation Referral Form and follow established procedures;
- Ensure that individuals who are the subject of complaints, including those in the chain of command who have been substantively involved, do not participate in the information gathering or decision making;
- Notify the employee of allegations of 1203 misconduct upon receipt, unless the matter requires referral to TIGTA or relates to EEO and/or tax compliance cases (bargaining unit employees are entitled to union representation at this meeting);
- Provide the employee with a 'Closed without action' or 'Clearance' letter as appropriate if the facts reveal that the allegations are frivolous or unfounded; and
- Seek the assistance of your local Labor/Employee Relations Specialist in all cases.

## Employee Appeal Rights

Employees have the right to appeal agency adverse action decisions to a third party such as the Merit Systems Protection Board (MSPB). However, unlike most other cases, in cases involving Section 1203, the decision of the Commissioner to remove the employee may not be overturned or mitigated if the charge of misconduct is sustained.

Under Section 1203, any decision to remove an employee will be carefully reviewed by the Review Board headed by the Deputy Commissioner of Operations. This will ensure that the same fair and equitable standard is applied to every removal action under Section 1203. The Review Board may recommend mitigation of the removal penalty, but only the Commissioner can mitigate the penalty.





## Appendix 2

### Employee Tax Compliance (ETC)

The Service has always recognized the importance of ensuring all IRS employees comply with the tax laws it administers. In simple terms, the Employee Tax Compliance (ETC) program utilizes a systematic approach to identify employee tax issues that could indicate non-compliance and to resolve those issues. The ETC program does not change any laws or regulations with which employees, like all taxpayers, must comply. Rather it fulfills the purpose and intent of the regulations and the responsibility of employees to satisfy just financial obligations, especially tax obligations that are imposed by law.

Safeguarding public confidence in the integrity and competence of the IRS is a vital component of encouraging taxpayers to voluntarily file timely, accurately, and fully pay all taxes when due. Most employees are conscientious and respect the taxpayer's right to expect all IRS employees to comply with the tax laws we administer daily. However, with the passage of RRA '98, the consequences are now much more severe for an employee who willfully fails to timely file a Federal return without reasonable cause, or willfully understates Federal tax liability without reasonable cause. Under Section 1203 of RRA '98, such employees must be charged with misconduct and terminated.

#### Responsibilities of the Employee Tax Compliance (ETC) Branch

The ETC Branch is an entity through which the IRS identifies employees who are non-compliant with Federal tax laws. The goals of the ETC program are to provide consistency in the treatment of employee non-compliance, to protect employee privacy by further restricting access to sensitive employee tax information, and to conserve resources by involving the minimum number of people needed to dispose of the concern.

The ETC Branch:

- (a) Identifies potential tax compliance issues, including the willful failure to timely file a tax return (§1203 (b)(8)) or willful understatement of federal tax liability (§1203 (b)(9)) violations in the course of its normal review of employee tax issues, and,
- (b) Consults with employees, management, and the servicing L/ER to resolve any outstanding employee tax issues. If the tax issues are not resolved, ETC will forward them to management, via the servicing L/ER office, for an appropriate action.

**Exception to the ETC Process:** There are, however, some ways potential tax non-compliance can be identified and/or worked outside the centralized ETC process.

- (a) New hires: As part of the hiring process, the service looks at an employee's last three tax years for non-compliance. Any non-compliance identified through this process can be addressed outside the ETC process.
- (b) The tax issues identified through a TIGTA investigation can be addressed when the TIGTA Report of Investigation (ROI) is received without waiting for a case to come out through the ETC process.
- (c) GAO or Congressional inquire that requires the IRS to investigate potential tax non-compliance

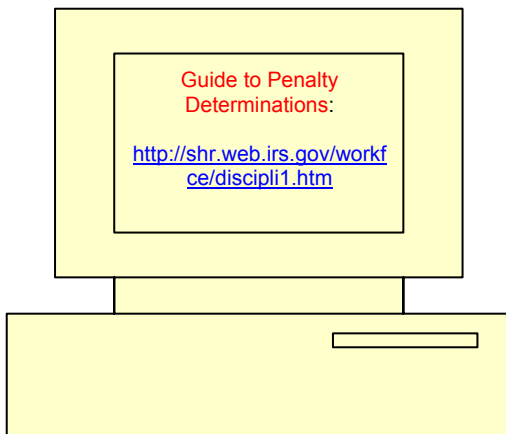
(d) Those instances where management has already taken an action involving a tax year and is simply following up to ensure that the employee is complying with any conditions related to that action.

(e) Allegations regarding non-bargaining unit (NBU) employees may be addressed outside the ETC process when necessary.

The Centralized Adjudication Unit (CAU) serves as the ETC function for all cases involving executives, senior manager pay-banded officials, and GS-15s. The ETC Unit initially will identify potential tax issues and will forward the information to CAU.

## Manager's Responsibilities

- Fully understand the ETC program. Most cases are now resolved without involving the employee's manager or servicing Labor Relations office. If an employee brings a letter from the ETC Office to you, encourage the employee to follow the instructions in the letter.
- Only those cases that cannot be resolved by the centralized ETC Office will be referred to the servicing Labor Relations office and manager for action. In cases requiring disciplinary action, the Guide to Penalty Determinations, Document 11500, is available to ensure consistent treatment of employees.



# Appendix 3

## Internet Policy

### What is the Internet?

The Internet is a world-wide alliance of public networks that employ a common set of protocols for communicating information. Use of the Internet offers tremendous benefits to Treasury users in terms of increased access to information sources relevant to their official duties. However, the Internet also suffers from significant security problems, and provides potential access to a wide variety of information not relevant to official duties.

### Department of Treasury Policy

The Treasury Intranet/Internet use policy defines the responsibilities of Treasury employees for the appropriate use of Internet services. It is the policy of the Department of the Treasury to provide Internet access to Treasury users where the following conditions prevail:

- ❖ Use of the Internet contributes to the accomplishment of official duties;
- ❖ Internet access is technically and financially supportable by the office or bureau; and
- ❖ Risks to sensitive systems or information from Internet access are minimized to a level acceptable to the office or bureau.

### Guidance for All IRS Personnel on Internet Access from Government Computers:

The IRS outlined strict prohibitions against employee access to certain Internet sites. The prohibitions are in effect to protect systems security and to ensure wise use of IRS resources. Here is an overview of the key points of our policy.

*As an IRS employee, you may **NOT** visit Web sites that provide:*

- *Access to personal e-mail accounts or ISPs, such as AOL or Hotmail, or instant messaging;*
- *Sexually explicit or pornographic content;*
- *Continuous data streams, such as streaming stock quotes;*
- *Hacker information or tools;*
- *Information pertaining to illegal gambling, illegal weapons, terrorist activities, or any other illegal or prohibited activities.*

*In addition, you may **NOT** use the Internet to:*

- *Download, copy, or play computer video games;*
- *Download or transmit greeting cards, screen savers, video, sound (including streaming video or music) or other large file attachments that can degrade the entire network;*
- *Subscribe to any unofficial service such as EntryPoint or LaunchPad that gathers information and sends it out automatically to subscribers;*
- *Support commercial purposes, "for-profit" activities or outside employment;*
- *Engage in any outside fund-raising, product or service endorsement, lobbying activity or prohibited partisan political activity;*
- *Post agency information to external news groups, bulletin boards or other public forums without authority;*
- *Subscribe to unofficial LISTSERVs or other services that create a high-volume of e-mail traffic.*

Remember, all access to the Internet must go through an IRS-approved Internet gateway or firewall. If you use a **government-owned computer** to access the Internet from non-office locations, you must always use an IRS-approved Internet gateway. The policy can be found at: <http://otac.no.irs.gov/policy/internetpolicyfinal.htm> .

Employees who violate the IRS policy on use of government information technology equipment and resources jeopardize the security of our systems and the reputation of the IRS as a whole. They also put themselves at risk for severe disciplinary action, up to and including removal, and other potential penalties. If you need more information on this policy or have questions, go to the following page on the IRWeb: <http://otac.no.irs.gov/news.asp>

## **Manager's Responsibilities**

As a manager you are responsible for:

- Ensuring employees properly use the information gained from accessing the Internet;
- Ensuring use of the Internet is consistent with official duties and does not expose Treasury systems or information to unacceptable risks;
- Ensuring the Intranet/Internet policy is disseminated to employees and supplemented with guidelines specific to the organization, its mission, the sensitivity of its systems and information, and labor-management agreements where applicable; and
- Initiating appropriate disciplinary action when employees fail to follow policies regarding use of the internet.