

# HR for Supervisors: Management-Employee Relations Handbook



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AR 690-700, Chapter 751  
Discipline

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

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

**Subchapter 1. General Provisions**

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

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

**1-2. APPLICABILITY**

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

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

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

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

**b. Formal disciplinary actions.**

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

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

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

**1-4. DETERMINING APPROPRIATE PENALTIES**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Subchapter 3. Written Reprimands**

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

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

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

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

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

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

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

(1) A sufficiently detailed description of the violation, infraction, conduct, or offense for which the employee is being reprimanded to enable the employee to fully understand the charges against him or her. Such specifics as the time, place, date, and a description of the incident giving rise to the disciplinary action should be included.

(2) A statement that the reprimand will be made a matter of record and incorporated in the employee's official personnel folder. The statement will > give the specific period of time (which may not exceed 3 years) < that the disciplinary action will remain a matter of record. (See FPM Suppl 293-31, para S4-5g (2)(b).)

(3) > A summary of previous offenses if the reprimand follows prior offenses and is considered progressive discipline. < Additionally, if the employee has failed to take any remedial action previously directed, that fact should be included. At this point, it may be appropriate to assess whether or not a reprimand is the best form of action to be taken.

(4) A warning that future misconduct may result in more severe disciplinary action. This warning will be included in all letters of reprimand.

(5) Advice, if appropriate, regarding services or assistance (such as the Employee Assistance Program) available to the employee to help overcome the deficiency and avoid future recurrences. The employee will be informed regarding any specific action required on his or her part.

(6) Information on the appropriate grievance channel the employee may use to contest the reprimand.

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

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

(1) Upon expiration of the period specified in the letter of reprimand, or

(2) Upon departure of the employee from the > Department of the Army, < or

(3) Upon determination through an appropriate adjudicatory procedure or by an appropriate management official of the involved activity that *the* reprimand is unwarranted and must be withdrawn, or

(4) Upon a determination by the initiating supervisor that the employee has sufficiently corrected his or her behavior and the letter of reprimand has served its purpose.

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

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

**APPENDIX A**

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

**22 March 1985**

MEMORANDUM FOR DIRECTOR OF THE ARMY STAFF

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

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

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

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

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

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

**AR 690-700; Chapter 751**

**Table 1-1: Table of Penalties for Various Offenses**

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

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

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

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

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

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

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

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

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

	activity while on Government premises or in a duty status.	day suspension			
	b. Operating, assisting or promoting an unauthorized gambling activity while on Government premises or in a duty status or while others involved are in a duty status.	14 day suspension to removal		Removal	
9. Indebtedness	Failure to honor valid debts where agency mission or employee performance are affected.	Written reprimand	Written reprimand to 1 day suspension	Written reprimand to 5 day suspension	See AR 690-700, chap. 735, app E. There must be a clear nexus between efficiency of the service and the debt complaint.

**B. OFFENSES WARRANTING PUNITIVE DISCIPLINE**

<b>OFFENSE</b>	<b>NATURE OF OFFENSE</b>	<b>FIRST OFFENSE</b>	<b>SECOND OFFENSE</b>	<b>THIRD OFFENSE</b>	<b>REMARKS</b>
10. False Statements	a. False statements, misrepresentation, or fraud in entitlements, includes falsifying information on a time card, leave form, travel voucher, or other document pertaining to entitlements.	Written reprimand to removal	30 day suspension to removal	Removal	See para. 2-1. Removal is warranted for a first offense.

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

Written reprimand to removal

14 day suspension to removal

30 day suspension to removal

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

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

Written reprimand to removal

Removal

	d. Deliberate misrepresentation, exaggeration, concealment, withholding of a material fact. Includes perjury, making false sworn statements, and lying to a supervisor.	Written reprimand to removal	5 day suspension to removal	10 day suspension to removal	
11. Stealing	Stealing, actual or attempted, unauthorized possession of government property or property of others, or collusion with others to commit such acts.	14 day suspension to removal	Removal		See para. 2-1. Penalty depends on such factors as the value or the property or amounts of employee time involved, and the nature of the position held by the offending employee which may dictate a higher standard of conduct.

12. Misuse or abuse of Government Property

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

Written reprimand to removal

1 day suspension to removal

14 day suspension to removal

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

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

Written reprimand to 14 day suspension

Written reprimand to removal

14 day suspension to removal

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

	b. Violation of administrative rules or regulations where safety to persons or property is endangered	Written reprimand to removal	30 day suspension to removal	Removal	
	c. Violations of official security regulations. Action against National Security				
	(1) Where restricted information is not compromised and breach is unintentional	Written reprimand to 5 day suspension	1-14 day suspension	5 day suspension to removal	See AR 604-5 and 5 USC 7532
	(2) Where restricted information is compromised and breach is unintentional	Written reprimand to removal	30 day suspension to removal	Removal	
	(3) Deliberate violation	30 day suspension to removal	Removal		
15. Discrimination because of race, color, religion, age, sex, national origin, political affiliation or handicap, or marital status	Prohibited discriminatory practice in any aspect of employment (e.g., employment, appraisal, development, advancement or treatment of employees). Includes failure to prevent or curtail discrimination of a subordinate when the supervisor knew or should have known of the	Written reprimand to Removal			Appropriate penalty depends on the facts in a given case weighed against DA policy that discrimination is prohibited.

discrimination.

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

established.

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

	b. Failure to deposit into the Treasury money accruing from lapsed salaries or from unused appropriations from salaries.	Removal		
22. Job Actions	Participating in or promoting a strike, work stoppage, slow down, sick out or other job actions.	Removal		
23. Reprisal	a. Intentional interference with an employee's exercise of, or reprisal against an employee for exercising a right to grieve, appeal or file a complaint through established procedures.	Written reprimand to removal	5 day suspension to removal	30 day suspension to removal
	b. Reprisal against an employee for providing information to an Inspector General, MSPB Office of Special Counsel, EEOC or USACARA investigator, or for testifying in an official proceeding.	Written reprimand to removal	5 day suspension to removal	30 day suspension to removal

c. Intentional interference with an employee's exercise of, or reprisal against an employee for exercising a right provided under 5 USC 7101 et seq (governing Federal Labor-Management Relations).

Written reprimand to removal

5 day suspension to removal

30 day suspension to removal

d. Finding by MSPB of refusal to comply with MSPB order or finding of intentional violation of statute causing issuance of a special counsel complaint.

Written reprimand to removal

Removal

5 USC 1206(g)(1) and 1207(b)

## The Douglas Factors

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

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

A supervisor is responsible for ensuring that a disciplinary penalty is fair and reasonable. If a penalty is disproportionate to the alleged violation or is unreasonable, it is subject to being

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Factor 5 – Erosion of Supervisory Confidence**

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

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

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

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

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

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

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

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

### **Factor 8 - Notoriety**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: February 5, 2007

**Questions & Answers:  
NSPS Rating Level 1**

**1. Question: What are the consequences for the employee receiving an unacceptable (level 1) rating of record?**

**Answer:** Employees with a level 1 rating of record may not receive any increase in base salary, or any applicable local market supplement increase, nor are they entitled to receive any performance shares (see implementing issuance references below). Additionally, the employee may face adverse action charges to include reduction in pay or pay band to removal.

- SC1930.8.1.1.3.2. [Employees] who have a current rating of record of "unacceptable" shall not receive any increase in base salary.

**Note:** Definition of base salary: SC1930.AP1.5. Base Salary means an employee's pay, as set by the authorized management official within the applicable pay band for the employee, before any deductions and exclusive of additional pay of any kind (e.g., local market supplement). For an employee receiving pay retention under SC1930.11, the base salary may exceed the maximum of the applicable pay band.

- SC1930.8.1.2.2.1.2. [Employees] who have a current rating of record of "unacceptable" shall not receive any applicable local market supplement increase for the occupation, specialization, pay band, and geographic location to which they are assigned. If the employee's rating of record for a subsequent appraisal period (see SC1940.10.) is above "unacceptable," the employee shall receive an increase in the local market supplement so that the supplement is equal to the supplement for the employee's occupation, pay band, and geographic location; this increase shall be prospective.
- SC1930.9.6. Performance Shares. Eligible employees with a rating of record of 3 or higher shall be assigned a number of performance shares within the applicable NSPS share range.

**2. Question: Since the money for the 2007 pay adjustment was not included in the pay pool funding formula for spiral 1.1 employees, will all spiral 1 employees receive the equivalent of the across-the-board pay increase and locality pay?**

**Answer:** No. Only eligible Spiral 1.1 employees will receive the equivalent of the across-the-board base pay increase and locality pay that will be received by General Schedule employees in January 2007. Eligible employees are those employees who received a NSPS rating of record above level 1. As stated in question 1 above, NSPS employees with a rating level of 1 are not entitled to any increase in base salary.

**3. Question: If after the pay pool process is complete and the Pay Pool Manager (PPM) approves the level 1 rating, is there any further action required by the supervisor?**

**Answer:** Yes, most certainly. As a matter of fact, the NSPS performance management implementing issuance requires that management act:

- SC1940.8.1. Any time management determines an employee is failing to meet expectations, management must take steps to promptly address the employee's unacceptable performance.

As to what action by the supervisor is required, that decision must be made on a case-by-case basis and depends on what remedial actions the supervisor has already utilized. Before discussing remedial actions, it is critical to understand what requirements or threshold management must meet before taking an adverse action based on a level 1 rating. Essentially there are three requirements management must be able to prove before initiating adverse action:

Requirement 1: The job objective(s) were communicated to the employee in writing prior to holding the employee accountable for them.

- The intent of this requirement is to ensure that the supervisor communicated to the employee what was expected and discussed the job objectives with the employee. This requirement is met if the employee is under an approved NSPS performance plan since the employee is required to sign the performance plan or acknowledge receipt.
- Issuance citation: SC1940.5.4.1. Performance expectations will be communicated to the employee in writing prior to holding the employee accountable for them. However, notwithstanding this requirement, employees are always accountable for demonstrating professionalism and standards of appropriate conduct and behavior, such as civility and respect for others.

Requirement 2: The supervisor clearly communicated to the employee the specific job objective that requires improvement.

- The intent of this requirement is to ensure that the supervisor informed the employee of any performance deficiencies and clearly explained to the employee what job objective requires improvement. It is critical that the supervisor address performance deficiencies as soon as possible and not wait till the end of the rating cycle.
- Issuance citation: SC1940.8.3. Determine and Clearly Define Unacceptable Performance. When addressing unacceptable performance, the supervisor shall identify and communicate to the employee the specific performance expectation(s) that require improvement.

Requirement 3: Documentation by the supervisor of all efforts to assist the employee in improving their performance before initiating any performance-based adverse action.

- Before initiating any adverse action, the supervisor must document and demonstrate efforts were made to assist the employee in correcting their deficient or poor performance. Supervisors should consider a wide range of options to include, but not limited to informal/formal training, regularly scheduled follow-up meetings, a self-improvement plan, an improvement period, reassignment, oral/written warnings, and/or letter of counseling.
- Issuance citation (Army supplement): AP-SC 1940.8.4.1.1. Supervisors are required to document their efforts to assist employees in improving their performance before initiating any performance-based adverse action.

#### **4. Question: What remedial action is required before the supervisor can initiate adverse action?**

**Answer:** There is no specific remedial action required. However, management has an obligation to assist an employee in improving unacceptable performance to the acceptable level before resorting to adverse action. Under Army NSPS guidance, a performance improvement plan (PIP) is not required but strongly encouraged.

- Issuance citation (Army supplement): AI-SC 1940.8.3.2. Range of Options to Address Unacceptable Performance. An improvement period is an option that provides the new supervisor and an employee who is performing at an unacceptable level with a tool for structuring and documenting the employee's improvement within a defined period. The use of an improvement period is strongly encouraged.

Possible remedial measures include but are not limited to performance coaching, on-the-job training, formal training, regularly scheduled follow-up meetings, a self-improvement plan, an improvement period, reassignment, oral/written warnings, and/or letter of counseling.

#### **5. Question: Since performance-based actions are now subject to mitigation, is management required to consider the Douglas Factors in assessing the appropriate penalty?**

**Answer:** Yes. In *Douglas v. Veteran's Administration*, 5 MSPR 280 (1981), the Merit Systems Protection Board (MSPB) set forth certain factors to be considered in determining the appropriate penalty in disciplinary actions. Since performance actions will now be taken under Chapter 75, mitigation by an MSPB AJ, full Board or the Court of Appeals for the Federal Circuit is a possibility. The Douglas Factors set forth a framework by which the MSPB will measure the reasonableness of the penalty selection. As before, if a particular Douglas Factor is inapplicable, it need not be considered.

**6. Question: If during the next rating cycle the employee's performance improves to above level 1, is the employee entitled to receive any salary or pay increase at that time or does the employee have to wait until the next scheduled pay adjustment and/or performance payout?**

**Answer:** The employee must wait until the next scheduled pay adjustment. There is no entitlement to an out of cycle pay adjustment at the time the employee's performance improves to level 2 or higher. However, the supervisor must initiate a Special Purpose Rating of Record (more on this topic shortly). The employee's performance must continue to remain at level 2 or higher until the next scheduled pay adjustment and/or performance payout.

Let's address each pay component individually. There are essentially three pay components: 1) rate range adjustment, 2) local market supplement adjustment, and 3) performance shares.

- **Rate range adjustment.** If during the next appraisal cycle the employee's performance improves to above unacceptable at any time during that rating cycle, the employee must wait until the next scheduled rate range adjustment before their salary may be adjusted.
- SC1930.8.1.1.3.3. An employee who receives a rating of "unacceptable" for one rating period and who subsequently receives a rating of "minimally acceptable" or higher at the end of the following appraisal period (see SC1940.10.), shall become entitled to a percentage increase in base salary under SC1930.8.1.1.3.1. The increase shall be based on the rate range adjustment occurring after the appraisal period for which the employee has received a rating above "unacceptable."

**Note:** SC1930.8.1.1.3.1. [employees in that pay band] who have a current rating of record above "unacceptable" shall receive a percentage increase in base salary equal to the percentage increase in the rate range minimum (except employees on pay retention – see SC1930.8.1.1.3.5.).

- **Local Market Supplement.** SC1930.8.1.2.2.1.2. If the employee's rating of record for a subsequent appraisal period (see SC1940.10.) is above "unacceptable," the employee shall receive an increase in the local market supplement so that the supplement is equal to the supplement for the employee's occupation, pay band, and geographic location; this increase shall be prospective.

- **Performance Shares.** If during the subsequent appraisal period the employee's performance improves to at least level 2, the supervisor must complete a special purpose rating of record. (see next question for additional guidance on procedures for processing a special purpose rating of record).

- SC1940.AP4.2. Special Purpose Rating of Record. The special purpose rating may only be applied in the case of an employee with a Level 1 rating of record who exhibits significant and sustained improvement (not less than 90 days) in his or her performance that equates to Level 2 performance or higher. A special purpose rating of record may be assigned during the appraisal period in addition to the regularly completed rating of record.
- SC1940.AP4.2.1. The assignment of a special purpose rating of record has no impact on pay, retroactive or prospective. To the extent practicable, special purpose ratings, like end-of-year ratings, are subject to the same pay pool panel process as are end-of-year ratings. A consistent approach in performance assessment and employee ratings is critical to the credibility and transparency of the pay-for-performance system.

## **7. Question: What is a Special Purpose Rating of Record and how does it work?**

### **Answer:**

- SC1940.10.8. Special Purpose Rating of Record. Subject to the procedures provided in Appendix 4, Early Annual and Special Purpose Ratings of Record, if the employee previously assigned a Level 1 rating of record improves his or her performance to an acceptable level (Levels 2 through 5) for a sustained period of time (not less than 90 days), the supervisor (or rating official, if different) shall recommend an additional rating of record to reflect the new level of performance. The special purpose rating of record does not provide for any retroactive or prospective change in pay.
- SC1940.AP4.2. Special Purpose Rating of Record. The special purpose rating may only be applied in the case of an employee with a Level 1 rating of record who exhibits significant and sustained improvement (not less than 90 days) in his or her performance that equates to Level 2 performance or higher. A special purpose rating of record may be assigned during the appraisal period in addition to the regularly completed rating of record.
- SC1940.AP4.2.1. The assignment of a special purpose rating of record has no impact on pay, retroactive or prospective. To the extent practicable, special purpose ratings, like end-of-year ratings, are subject to the same pay pool panel process as are end-of-year ratings. A consistent approach in performance assessment and employee ratings is critical to the credibility and transparency of the pay-for-performance system.
- SC1940.AP4.2.2. At a minimum, the pay pool panel must be convened and consider the appropriateness and validity of the special purpose rating.

**8. Question: Does the supervisor have to wait until the end of the rating cycle before addressing and/or initiating adverse action for unacceptable performance based on failing a job objective?**

**Answer:** Absolutely not. It is critical that the supervisor address unacceptable performance immediately. However, an adverse action cannot be initiated until the supervisor has met all of the 3 requirements discussed in Question 3.

- SC1940.8.1. Any time management determines an employee is failing to meet expectations, management must take steps to promptly address the employee's unacceptable performance.
- SC1940.8.2. Any time an employee is performing at an unacceptable level, including the proposed assignment of a Level 1 rating of record, timely and appropriate management action is critical. An adverse action may be taken independent of the processes and/or procedures for appraising and rating performance under SC1940.10. and pay pool procedures under SC1940.11.

**9. Question: Is it appropriate to consider work related misconduct in the rating process?**

**Answer:** Yes. See SC1940.8.4.4. Impact of Misconduct on Performance. (provided below)

- SC1940.8.4.4.1. If an employee engages in work-related misconduct and the nature and severity of that misconduct have an impact on the execution of his or her duties, that of the team, and/or that of the organization, the **impact** [emphasis added] may be reflected in the employee's rating of record. The impact of misconduct on the employee's rating of record will depend on its seriousness, negative effect on coworkers, customers, or mission, evidence of correction, and any other relevant matters.

**Note:** If the misconduct results in an adverse action, the supervisor should focus on the "impact" of the underlying misconduct on the employee's performance when documenting and appraising the employee's performance, not the adverse action itself.

**10. Question: If the misconduct is considered during the rating process, does that preclude taking corrective action to include adverse action?**

**Answer:** The implementing issuance speaks for itself:

- SC1940.8.4.4.2. The fact that misconduct may impact the employee's rating of record at the conclusion of the appraisal period should not be the basis for delaying corrective action, including initiating an adverse action under Reference (a).

**Note:** Reference (a) is the NSPS Public Law 108-136. This just means that the public law provides the authority to take adverse action and also defines the various adverse actions.

**11. Question: When is it permissible to initiate adverse action to reduce the employee's salary within the pay band or assign the employee to a lower pay band? What about removal?**

**Answer:** Reducing an employee's pay within the band or assignment to a lower pay band or removal may be an option if:

- the employee is assigned a level 1 rating of record; or
  - the supervisor determines unacceptable performance of a job objective during the rating cycle; or
  - serious misconduct or behavior that negatively affects performance.
- SC1940.8.4.3. An adverse action maybe taken to assign an employee to a position in a lower pay band and/or reduce an employee's base salary. Pay setting resulting from such reductions shall be determined in accordance with sections 9901.343, 9901.352, and 9901.354 of Reference (b) and SC1930. When an employee's base salary is reduced for unacceptable performance and/or conduct, the reduction in the employee's rate of pay may not be more than 10 percent, unless a larger reduction is needed to place the employee at the maximum rate of the lower band. An employee's annual base salary may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both.

**12. Question: What are the rules regarding reduction in pay actions?**

**Answer:** SCI930.10.6.3. Involuntary Reduction in Band. When an employee is involuntarily moved to a lower pay band through adverse action procedures (as a result of poor performance and/or misconduct), the authorized management official may reduce the employee's base salary by up to ten percent. The reduction may not cause an employee's base salary to fall below the minimum rate of the employee's new pay band or exceed ten percent unless a larger reduction is needed to place the employee at the maximum rate of the lower band. An employee's annual pay may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both. An employee's base salary may not increase under this section.

Subject: Internal NSPS Management Guidance on Level 2 NSPS Ratings

Discussion:

- If a job objective is scored at level 2, the contributing factors cannot be used to lower the job objective rating to a Level 1. (SC1940.10.4.1.)
- Employees that receive a level 2 rating of record are not entitled to a performance payout (see table below). They are entitled to any rate range adjustments or local market supplement increases.
- However, for conversion purposes, all spiral 1.1 employees above a rating level of 1 will receive the full January 2007 pay adjustment to include the across-the-board base pay increase and locality pay increase (see memo signed by Ms. Lacey dated March 14, 2006, subj: January 2007 Pay Adjustment for Spiral 1.1 Employees).
- In the future, the performance payout will only include that portion of the GPI not allocated to rate range adjustments or local market supplements (LMS).
- Rating an individual job objective at level 2 may or may not result in a level 2 rating of record. For example:

Job Objective Rating	Weight	Contributing Factor Adjustment	Adjusted Rating	Weighted Rating
3	40%	0	2	3 x .40 = 1.20
3	35%	0	3	3 x .35 = 1.05
2	25%	0	3	2 x .25 = .50
				Average Adjusted Rating = 2.75

Apply rounding: An adjusted rating of 2.75 equals a level 3 rating of record

Table SC1940-3. Converting Ave Adjusted Rating to Rating of Record

AVERAGE RATING RANGE	RATING OF RECORD	RATING OF RECORD DESCRIPTOR
4.51 to 5.00	5	Role Model
3.51 to 4.50	4	Exceeds Expectations
2.51 to 3.50	3	Valued Performer
2.00 to 2.50	2	Fair
1 on any objective	1	Unacceptable

## Questions & Answers: NSPS Rating Level 2

**1. Question:** What are the consequences of a level 2 rating of record for the employee?

**Answer:** The level 2 employee is not entitled to a performance payout. It is important to note that during conversion to NSPS, spiral 1.1 employees will receive the full GPI as it is still applied to the across-the-board pay adjustment and locality pay.

In the future, once the GPI is allocated as envisioned by the NSPS provisions, the level 2 employee will only be entitled to that portion of the GPI allocated to the pay band rate adjustment (if any) and the local market supplement increase (if any). Since the level 2 employee is not entitled to any shares in the payout process, the employee will not receive that portion of the GPI allocated to the performance payout fund.

Rating of Record	Share Range Available for Assignment
5 (Role Model)	5 – 6 shares
4 (Exceeds Expectations)	3 – 4 shares
3 (Valued Performer)	1 - 2 shares
2 (Fair)	No shares (eligible for Pay Band Rate Adjustment and Local Market Supplement)
1 (Unacceptable)	No shares ( <b>not</b> eligible for Pay Band Rate Adjustment and Local Market Supplement)

**2. Question:** Is it appropriate to take adverse action against an employee for a “Fair” (level 2) rating of record?

**Answer:** No. A Fair or level 2 rating of record is not a basis for adverse action. Level 2 performance is not considered unacceptable performance.

**3. Question:** Does the supervisor/rating official have any required action to take for level 2 employees?

**Answer:** There is no required action. However, it is important to point out that under NSPS, supervisors are responsible for effectively managing the performance of assigned employees. This includes:

SC1940.4.4.1.7. Providing employees meaningful, constructive, and candid feedback relative to performance expectations, including at least one documented interim review;

SC1940.4.4.1.3. Clearly communicating performance expectations and holding employees responsible for accomplishing them;

SC1940.4.4.1.11. Making meaningful distinctions among employees based on performance and contribution;

SC1940.4.4.1.13. Assuring that eligible employees are assigned a rating of record as prescribed by this subchapter;

**4. Question:** Are there actions the supervisor/rating official should consider for level 2 employees?

**Answer:** Absolutely. A level 2 rating of record should alert the supervisor that the employee is not meeting the job objectives as described by the performance indicators or by the contributing factors bench marks.

The first step is for the supervisor to assess why the employee received a level 2 rating of record. Was it a result of applying the contributing factors? That is to say, did the employee perform the job objective adequately but once the contributing factors were considered the score for that job objective was reduced. If that is the case, the supervisor should closely review the contributing factors to determine if the minimally acceptable performance is a result of work behaviors/conduct or if it is due to a knowledge gap.

The second step, once the cause for the minimal performance is determined, the supervisor should clearly communicate to the employee what the problem is and provide the employee with recommended areas for improvement. This may be a time to consider possible training needs or developmental opportunities.

Under NSPS, the employee shares in this responsibility. See SC1940.6.3.1 below:

SC1940.6.3. Dialogue and Feedback.

SC1940.6.3.1. Supervisors will provide on-going (i.e., regular and timely) feedback in the form of meaningful dialogue with employees regarding their performance. Face-to-face is the preferred method of supervisory/employee dialogue for performance-based issues. ***Although supervisors have the primary responsibility for providing employees feedback, employees share the responsibility of identifying and communicating successes and difficulties relative to their assigned performance expectations.***

**Note:** bolded and italic text are not part of the issuance but was added to emphasize the employee's role.

One possible approach is for the supervisor, during the annual appraisal performance conversation, to recommend to the employee the development of a plan that spells out areas

for improvement and commits both parties (or just the employee) to certain measurable outcomes. For example, the employee commits to reading the “technical” manual and then taking a training course with the expectation that the employee receives a B or better. The supervisor may commit to providing the employee with time to read the manual during work and approving the training request.

The main point here is that the supervisor should act to initiate an on-going dialogue and set specific timeframes for meaningful feedback.

The third step should be for the supervisor to actively monitor the employee’s performance during the new rating cycle. This may include setting a schedule for periodic meetings, assignment of a senior specialist as a resource/technical coach, or even begin the informal disciplinary/adverse action process if misconduct is involved or performance deteriorates to the unacceptable level. Without active monitoring by the supervisor, it will be difficult for the supervisor to recognize when that deterioration takes place.

**5. Question:** Is it appropriate to consider work related misconduct in the rating process?

**Answer:** Yes. See SC1940.8.4.4. Impact of Misconduct on Performance. (provided below)

SC1940.8.4.4.1. If an employee engages in work-related misconduct and the nature and severity of that misconduct have an impact on the execution of his or her duties, that of the team, and/or that of the organization, the impact may be reflected in the employee's rating of record. The impact of misconduct on the employee’s rating of record will depend on its seriousness, negative effect on coworkers, customers, or mission, evidence of correction, and any other relevant matters.

Note: The impact of misconduct may also be considered when assessing the contributing factors.

**6. Question:** If the misconduct is considered during the rating process, does that preclude taking corrective action to include adverse action?

**Answer:** The implementing issuance speaks for itself:

SC1940.8.4.4.2. The fact that misconduct may impact the employee’s rating of record at the conclusion of the appraisal period should not be the basis for delaying corrective action, including initiating an adverse action under Reference (a).

Note: Reference (a) is the NSPS Public Law 108-136. This just means that the public law provides the authority to take adverse action and also defines the various adverse actions.

It is important to note that the implementing issuance requires that the rating official explain to the employee that conduct will be considered in the rating process. See SC1940.4.4.1.6 below:

SC1940.4.4.1.6. Explaining to employees that conduct will be considered when evaluating their performance, both conduct that would raise the level of the employee's performance and conduct that would lower that level;

**7. Question:** May the employee's salary and/or pay band be reduced based on a level 2 rating of record?

**Answer:** No. Reducing an employee's salary and/or pay band for performance or conduct is considered an adverse action. A rating of "Fair" is not a basis for taking adverse action. If the basis for taking adverse action is the rating of record or the employee's performance, the performance must be unacceptable (level 1).

SC1940.8.4.2. Reduction in Rate of Pay/Pay Band by Adverse Action. A reduction in an employee's base salary and/or pay band may be initiated and made effective at any time through adverse action procedures based on a determination of unacceptable performance.