

ARTICLE 12752

DISCIPLINARY ACTION

CONTENTS

SUBARTICLE 1. GENERAL PROVISIONS

- 1 1 Purpose
- 1 2 Applicability
- 1 3 Definitions
- 1 4 Policy
- 1 5 Covered Actions
- 1 6 Exclusions
- 1 7 Responsibilities-Redelegation of Authority
- 1 8 Noncontestable Actions
- 1 9 Grievable Actions
- 1 10 Appealable Actions
- 1 11 Performance-Based Actions
- 1 12 Records
- 1 13 Senior Executive Service (SES) Actions

APPENDIX A. Definitions

APPENDIX B. Schedule of Offenses and Recommended Remedies

1 1. Purpose. To provide policy and procedures for effecting disciplinary actions within activities serviced by the Human Resources Office (HRO).

1 2. Applicability. This Article applies to all employees as defined in Appendix A, except any:

- a. Individual paid with nonappropriated funds.
- b. Reemployed annuitant.
- c. Excepted service appointee under Schedule C, Part 213 of 5, Code of Federal Regulations (CFR).
- d. Individual appointed by the President.
- e. Individual in a statutorily excepted position that has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character by the President, the U.S. Office of Personnel Management, or the head of the agency.
- f. Career appointee in the Senior Executive Service (SES) serving a probationary period or who was not covered by Section 7511 of 5, United States Code (USC), immediately before appointment to the SES.
- g. Limited term or limited emergency SES appointee not described as a covered employee at 5 CFR 752.601.
- h. Noncitizen appointed to an overseas position under Civil Service Rule VIII, 5 CFR 8.3.
- i. Civilian mariner covered under Civilian Marine Personnel Instruction 750.

1 3. Definitions. Definitions are contained in Appendix A.

1 4. Policy. It is the agency's policy to use discipline as a managerial tool to correct deficiencies in employee conduct or behavior (such as illegal drug use) and for correction of other situations which interfere with efficient operations. The objective is to promote the efficiency of the service by ensuring high standards of government service and maintaining public confidence in the agency. Adverse actions, including performance-based adverse actions, may be taken under this Article only for such cause as will promote the efficiency of the service.

1 5. Covered Actions. Appealable, grievable, and noncontestable actions as defined in Appendix A.

1 6. Exclusions

- a. Actions excluded by 5 CFR 752.401(b)(1) through (15).
- b. A suspension or removal taken in the interests of national security (5 USC 7531 and/or 7532).
- c. A reduction-in-force action (5 USC 3502).
- d. A separation during probation under 5 CFR 315.804, or a separation during probation based in whole or in part on pre- appointment reasons under 5 CFR 315.805.
- e. The denial of a within-grade increase (see Article 12431).

f. A suspension of 14 days or less of an SES employee (see 5 CFR 752.601(b)(1)).

g. A removal action affecting an SES employee taken under 5 U.S.C. 3592, or a reduction-in-force action affecting an SES employee taken under 3595.

h. Actions taken under provisions of statute, other than one codified in 5 U.S.C., which exempts the action from sub-chapter I and/or II of Chapter 75 of 5 U.S.C.

## 1 7. Responsibilities-Redelegation of Authority

a. Activity Heads: Activity Heads employing civilian personnel:

(1) Are authorized to propose and decide disciplinary actions under this Article. They may redelegate this authority to subordinate managers and supervisors to the extent they deem appropriate. This authority may be withdrawn and redelegated at any time in the disciplinary action process as deemed necessary. An adverse action may be modified to correct an error of fact or judgement made by a subordinate official to include cancelling a disciplinary action and proposing a lesser or harsher remedy after ensuring the employee's due process rights have been afforded.

(2) Will ensure that all employees are apprised of the activity disciplinary action policy, including Appendix B, through such means as activity newspaper or the use of bulletin boards.

(3) Will disseminate to all civilian employees, at least annually, applicable information on Standards of Conduct.

(4) Will ensure that the records required by subarticle 1 12 are maintained by HRO.

(5) Will disallow employee's choice of an employee representative if such representation would result in a conflict of interest or position, conflict with the priority needs of the activity, or would give rise to unreasonable cost to the Government. The terms of any applicable bargaining agreement govern representation for employees in an exclusive bargaining unit.

(a) Activity heads shall redelegate authority to make determinations to disallow the choice of an employee's representative to an appropriate level no lower than the level of the official designated to make the final written decision.

(b) Activity instructions shall establish an expedited process for resolving an employee's disagreement with a determination to disallow a choice of representative. At a minimum, the review process shall require an official higher than the one who made the determination to make a final decision.

b. Supervisors. Supervisors are responsible for:

(1) Communicating to employees Standards of Conduct and expectations regarding conduct and performance.

(2) Setting a good example by their own conduct.

(3) Monitoring employee conduct and taking or initiating corrective action as required.

(4) Referring employees to the Civilian Employee Assistance Program (CEAP) as appropriate under Article 12792.

(5) Consulting with the HRO as appropriate.

(6) Forwarding copies of documents to the HRO as listed in Subarticle 1 12.

c. Employees. Employees are responsible for:

(1) Conducting themselves, both on and off duty, in a manner which will ensure that their conduct does not reflect adversely on the activity or the agency.

(2) Complying with prescribed Standards of Conduct.

(3) Following on-the-job work rules, including reporting for work on time and in a condition which will permit safe and reliable performance of assigned duties.

(4) Performing their job duties at a fully successful level and in a safe and reliable manner. Employees who fail to comply with (1) - (4) above, may be subject to discipline under this Article.

1 8. Noncontestable Actions. Oral admonishments and letters of caution are not grievable under the Administrative Grievance System, Article 12771 and are not appealable to the Merit Systems Protection Board (MSPB), Article 12752. A letter of caution must state:

a. The reason(s) for issuance.

b. That the action is neither grievable under Article 12771 nor appealable to MSPB. Activities should review their collective bargaining agreements, however, because such action may be grievable under a negotiated grievance procedure (NGP).

c. That the action will not be made a matter of record in the employee's Official Personnel Folder (OPF).

d. That formal discipline may be imposed if conduct does not improve. Neither an oral admonishment nor a letter of caution will be counted as a prior offense in determining a range of remedies under Appendix B. However, either or both may be considered in determining an appropriate remedy should an offense later occur.

1 9. Grievable Actions. Grievable actions include letters of requirement, letters of reprimand, and suspensions of 14 days or less.

a. A letter of requirement must state:

(1) The reason(s) for issuance.

(2) The specific requirement(s) the employee must meet.

(3) That failure to meet a requirement may lead to disciplinary action.

(4) The length of time a requirement is in effect.

(5) The employee's right to file a grievance under Article 12771 or under an NGP, as appropriate.

(6) That it will not be made a matter of record in the employee's OPF.

(7) That it will not be counted as a prior offense when determining a range of remedies under Appendix B but may be considered in determining an appropriate remedy should an offense subsequently occur.

b. A letter of reprimand must state:

(1) The reason(s) for issuance.

(2) The employee's right to file a grievance under Article 12771 or under an NGP, as appropriate.

(3) The length of time (not less than one nor more than two years) that it will be retained in the employee's OPF, during which it may be counted as a prior offense for determining a range of remedies under Appendix B. (However, as with a letter of requirement or a noncontestable action, the letter of reprimand may continue to be considered when determining an appropriate remedy for a subsequent offense.)

c. A suspension of 14 days or less entitles the affected employee to:

(1) An advance written notice stating:

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

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

(c) The amount of time (not less than 24 consecutive hours) that the employee is allowed to provide an answer orally and/or in writing.

(d) The right to review, or have a representative review, the material relied upon to support the reason(s) given in the notice of proposed suspension.

(2) A reasonable amount of official time to review the notice and supporting material, to prepare an answer and to secure affidavits, if the employee is otherwise in an active duty status.

(3) A reasonable amount of time (not less than 24 consecutive hours) to answer orally and/or in writing and to furnish affidavits and other documentary evidence in support of the answer, including medical documentation as defined in 5 CFR 339 to support any medical condition alleged to have caused the reason(s) for the proposed action.

(4) Be represented by an attorney or other representative.

(5) A written decision at the earliest practicable date which:

(a) Considers only the reason(s) specified in the advance written notice.

(b) Considers any answer to the employee and/or the employee's representative made to a designated official, any medical or other documentation furnished under paragraph 1 9c(3) above, and any entitlement to reasonable accommodation under Article 12792 and 29 CFR 1614.

(c) Specifies the reason(s) for the decision.

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

(e) Specifies the employee's right to file a grievance under Article 12771 or under the NGP, as appropriate.

(f) Is delivered to the employee on or before the effective date of the suspension.

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

## 1 10. Appealable Actions

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

(1) At least 30 days advance written notice stating:

(a) The specific reason(s) for the proposed action. Material may not be used that cannot be disclosed to the employee or his or her representative or designated physician under 5 CFR 297. If the action is furlough, the notice must state the reason(s) for the furlough and the basis for selecting the employee if all individuals in the employee's competitive level are not being furloughed.

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

(c) The amount of time (not less than seven days) that the employee is allowed to answer orally and/or in writing and to furnish affidavits and other documentary evidence in support of the answer, including medical documentation as defined in 5 CFR 339 to support any medical condition alleged to have contributed to the reason(s) for the proposed action.

(d) The right to review or have a representative review the material relied upon to support the reason(s) given in the notice.

(e) The right to a reasonable amount of official time to review the notice and supporting material, to prepare an answer and to secure affidavits, if the employee is otherwise in an active duty status.

(f) The right to be represented by an attorney or other representative.

(2) A written decision at the earliest practicable date which:

(a) Considers only the reason(s) specified in the advance written notice.

(b) Considers any answer the employee and/or the employee's representative made to a designated official, any medical or other documentation furnished under paragraph 1 10a(1)(c), any entitlement to reasonable accommodation under Article 12792 and 29 CFR 1614, and the recommendation of the designated official (where applicable).

(c) Specifies the reason(s) for the decision.

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

(e) Specifies the employee's right to appeal to the MSPB and, when applicable, to file a grievance under an NGP, but not both (see applicable labor/management agreement).

(f) Provides the time limits and address for filing an appeal to the MSPB, a copy of the MSPB regulations, a copy of the MSPB appeal form (Optional Form 283), and specifies the time limits for filing a grievance under an NGP, if applicable.

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

b. Hearings. Activities shall not provide for a hearing in lieu of or in addition to the opportunity to respond orally and/or in writing to a notice of proposed action. Deciding officials may, however, on a case by case basis, grant an SES member a hearing with examination of witnesses in place of, or in addition to, the opportunity for written and oral reply.

c. Duty status during the notice period. Under ordinary circumstances, employees will remain in a duty status in their regular positions during the advance notice period. Other options, e.g., voluntary use of leave, reassignment, detail, etc., may be appropriate in a given situation. If all other options have been explored and found not feasible, an activity head may excuse an employee from duty, without charge to leave or loss of pay, during the notice period of that employee's removal or indefinite suspension effected under this Article. Excused absence for this purpose should be used only in those rare circumstances where the retention of the employee in an active duty status during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize Government interest (5 CFR 752.404(b)(3)). Care should be exercised to use the minimum amount of excused absence necessary in any individual situation. NOTE: If available evidence supports a conclusion that an employee is incapacitated for normal work, the enforced sick leave procedure described in Article 12630 should be considered.

d. Shortened notice period. Under 5 CFR 752.404(d)(1) (the "Crime Provision"), the notice period required in paragraph 1 10a(1) may be shortened when there is reasonable cause to believe that an employee has committed a crime for which a sentence of imprisonment may be imposed. Judicial action is not required. Activities/commands may effect such an action, including an indefinite suspension, in less than 30 days following the issuance of the advance written notice. In such cases, the employee may be required to furnish any answer to the proposed action and any affidavits or other documentary evidence in support of the answer, within such time as under the circumstances would be reasonable but not less than seven days.

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

f. Medical examinations. After reviewing medical documentation supplied by the employee in reply to a proposed action, the activity may, if authorized, require a medical examination or, at its option, offer a medical examination following the procedures in 5 CFR 339.

g. Disability retirement. When the employee meets the minimum disability requirements and asserts or documents impairment or disability, the activity shall refer the to HRO. An employee's application for disability retirement shall not preclude or delay any other appropriate personnel action.

1 11. Performance-Based Actions. Performance-based actions may be effected using either the procedures of Article 12432 or this Article. Before initiating a performance-based disciplinary action, an activity should consider the differences between the requirements of Article 12432 and those of this Article as they apply to the potential action.

1 12. Records

a. The HRO will retain case files concerning actions taken under this Article. Records shall contain copies of:

- (1) Sufficient documentary evidence to show the basis for the action taken.
- (2) Letters of requirement or reprimand.
- (3) For suspensions, removals, reductions in grade or pay, or furloughs for 30 days or less.
  - (a) Written notice of proposed action.
  - (b) Employee's written response, if any, or a brief written summary of any oral response.
  - (c) Written notice of decision including the reasoning behind the decision.
  - (d) Any order affecting the action.
  - (e) Any supporting evidence or material.
  - (f) The Notification of Personnel Action (Standard Form 50) effecting the action.

b. In the event the employee appeals an action to the MSPB, a copy of the record shall be furnished to the employee and to the MSPB, in accordance with any MSPB Order.

1 13. Senior Executive Service (SES) Actions

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

b. Suspensions of SES employees for more than 14 days and removals of such employees from the civil service may only be taken for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function (5 USC 7543(a)). Procedures applicable to such actions are described in Subarticle 1 10.

## APPENDIX A

### DEFINITIONS

1. Activity. A field installation, headquarters command, or office.
2. Appealable Action. A removal; a suspension for more than 14 days, including an indefinite suspension; a reduction in grade or pay; or a furlough of 30 days or less.
3. Current continuous employment. A period of employment or service immediately preceding an action under 5 CFR 752 in the same or similar positions without a break in Federal civilian employment of a work day.
4. Day. Calendar day.
5. Drugs. A controlled substance included in Schedules I – V established by section 202 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (84 Stat 1256) as updated and republished under the provisions of the Act.
6. Drug paraphernalia. Equipment, products, or materials used, intended for use, or designed for use in injecting, ingesting, or otherwise introducing drugs into the human body in violation of the law.
7. Employee. For:
  - a. Grievable actions
    - (1) An individual presently or formerly employed by the activity for whom a remedy can be provided (see Article 12771 for exclusions from the Administrative Grievance Procedure). A contractual NGP may not cover former employees. Refer to the appropriate labor-management agreement.
  - b. Appealable actions
    - (1) An individual in the competitive service who has completed a probationary or trial period.
    - (2) An individual in the competitive service who is serving in an appointment that requires no probationary or trial period, and who has completed one year of current continuous employment in the same or similar positions under other than a temporary appointment limited to one year or less.
    - (3) An individual in the excepted service as defined by 5 USC 7511, as amended by Public Law 101 – 376, August 17, 1990.
    - (4) An individual with competitive status who occupies a position in Schedule B of 5 CFR 213.
    - (5) An individual who occupies a professional and administrative career (PAC) position in Schedule B of 5 CFR 213, provided that (s)he has completed a trial period of one year after initial appointment in such a position.

(6) An individual who was in the competitive service at the time his or her position was first listed under Schedules A, B, or C of the excepted service, 5 CFR 213 and still occupies that position.

(7) Any nonprobationary Senior Executive Service (SES) Career appointee covered under 5 CFR 752.601(c) and any limited term or limited emergency SES appointee covered under 5 CFR 752.601(c).

8. Furlough. Temporary status without duties and pay because of lack of work or funds or for other nondisciplinary reasons.

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

10. Grievable Action. A letter of reprimand or requirement or a suspension for 14 days or less, or another action which is included in an NGP.

11. Illegal (or unlawful) use or possession of a drug. Use or possession of a drug without a valid medical prescription for the use of that drug or otherwise contrary to law or regulation.

12. Indefinite suspension. The placing of an employee in a temporary status without duties and pay pending investigation, inquiry, or further agency action. The indefinite suspension continues for an indeterminate period of time and ends with the occurrence of the condition(s) set forth in a notice of action which may include the completion of any subsequent administrative action.

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

14. Letter of reprimand. A written disciplinary action issued by a superior to an employee based on specific unacceptable conduct deficiencies.

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

16. Administrative Grievance Procedure. The grievance procedure set forth in Article 12771 which applies to all employees except those covered by a Negotiated Grievance Procedure (NGP).

17. Negotiated Grievance Procedure (NGP). An exclusive grievance procedure set forth in a labor-management agreement (union contract) which applies as described within the terms of the agreement (contract).

18. Noncontestable action. An oral admonishment or letter of caution. The actions are not recorded in an employee's OPF. While not grievable under Article 12771, they may be grievable under the provisions of an NGP for employees in an exclusively recognized bargaining unit.

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

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

21. Qualified handicapped employee/person. With respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of himself/herself or others and who, depending upon the type of appointing authority being used: (1) meets the experience and/or education requirements (which may include passing a written test) of the position in question, or (2) meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

22. Reasonable accommodation. Accommodation of an employee's physical or mental handicapping condition which will allow the employee to perform the essential duties of the position without endangering the health and safety of that employee or others and which will not impose an undue hardship on the activity. Reasonable accommodation may include referral to the Civilian Employee Assistance Program (CEAP) for diagnostic counseling and referral for treatment or rehabilitation or other assistance; granting leave for treatment, rehabilitation or assistance; and a reasonable opportunity to demonstrate minimally acceptable performance or conduct. Refer to 29 CFR 1614 for additional information. A decision to provide reasonable accommodation does not preclude concurrent disciplinary action.

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

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

25. Suspension. Placing an employee in a temporary status without duties and pay for disciplinary reasons, including pending inquiry.

## APPENDIX B

### SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES

#### 1. Instructions for use of this schedule

a. This schedule is a guide. Discipline is not punitive in nature, is expected to be progressive for subsequent offenses, and normally falls within the range shown in this Appendix or those established in an Alternative Discipline System. Mitigating or aggravating factors can justify a remedy outside the range. For example, remedies greater than those shown can be appropriate when the facts of an aggravated offense, frequent infractions, or simultaneous multiple offenses are established.

b. Consistent with DON policy in SECNAVINST 12752.XX, the schedule generally provides for a range of remedies (e.g., Reprimand to Removal) to provide management with flexibility in correcting conduct deficiencies. Selection of a reasonable remedy from such a broad range should be made with good judgment, including consideration of any appropriate "Douglas Factors," Appendix C. Excessive, arbitrary or capricious remedies and remedies selected without consideration of mitigating factors may be reversed by third parties, if challenged.

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

d. The schedule does not cover every possible offense. When specifying an offense not listed in the schedule, be careful when using terms such as "theft" or "fraud," which require establishing the element of intent and should only be used when the element of intent can be proven. Management officials should contact their servicing HRO for assistance in framing appropriate charges.

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

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

g. All adverse action cases, whether based on off-duty or on-duty misconduct, require establishment of a nexus or link between the conduct and its effect upon the efficiency of the service. Nexus is normally assumed when the misconduct is sustained in on-duty misconduct cases. In taking adverse actions for off-duty misconduct, the deciding official must show, by preponderant evidence, that the adverse action will promote the efficiency of the service by establishing a nexus between the off-duty misconduct and the employee's or activity's performance. The activity should not rely on a presumption of nexus but should make its strongest possible argument and introduce evidence showing the relationship between the misconduct and the employee's or activity's performance. The Merit Systems Protection Board generally recognizes three independent means by which an agency may show a nexus linking an employee's off-duty misconduct with the efficiency of the service: (1) a rebuttable presumption of nexus that may arise in certain egregious circumstances based on the nature and gravity of the misconduct; (2) a showing by preponderant evidence that the misconduct affects the employee's or his co-workers' job performance, or management's trust and confidence in the employee's job performance; and (3) a showing by preponderant evidence that the misconduct interfered with or adversely affected the agency's mission. Actual impairment need not be shown, but the

agency can establish that the off-duty misconduct is "directly opposed to the agency's mission." Some of the means for showing nexus include but are not limited to establishing: the probability that off-duty misconduct could happen at work; the misconduct caused such notoriety it has affectivity activity's ability to accomplish its mission; the misconduct impacted the work of the supervisor or other employees in the work area.

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

## 2. Past offenses

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

- (1) The employee was disciplined in writing;
- (2) The employee was provided the opportunity to dispute the action to a higher level; and
- (3) The action was made a matter of record in the employee's OPF.

b. Any past offense may form the basis for proposing a remedy from the next higher range of remedies for a subsequent offense. The offenses need not be identical or similar.

c. In its decision in United States Postal Service v. Gregory (122 S. Ct. 431 (2001)), the Supreme Court held that the Board may independently review prior disciplinary actions which are pending in grievance proceedings in order to determine the reasonableness of the penalty under appeal. You are cautioned to carefully examine any prior disciplinary actions that are being challenged if they are a factor in determining the reasonableness of the penalty.

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

- (1) Oral admonishments and letters of caution or requirement.
- (2) Letters of reprimand dated more than two years before the date of any advance written notice required under this Directive.
- (3) Reductions in grade or pay not effected for disciplinary reasons.

3. Other statutory and regulatory offenses. For information concerning other offenses for which employees may be disciplined by removal, fine or imprisonment, including offenses which require minimum mandatory remedies (such as misuse of government vehicles, Hatch Act violations, and giving gifts to superiors), see 5 CFR 734, 5 CFR 735, 5 CFR 2635, and DoD 5500.7-R.

4. Drug and alcohol abuse offenses. Any employee who engages in misconduct involving drugs and/or alcohol shall be disciplined according to this Appendix, except when covered under safe harbor. Safe harbor is a special situation described as: When the activity is unaware of illegal drug usage, an employee who voluntarily refers himself or herself to the CEAP as a user of illegal drugs under the Safe Harbor provisions of Implementation Directive 792-XX (Civilian Drug-Free Workplace Program in the Department of

the Navy) will be exempt from disciplinary action for the admitted acts, including possession incident to such use, provided the employee meets and complies with the requirements of Implementation Directive 792-XX, paragraph 7.b. Employees who admit to using drugs after being notified of a scheduled drug test or just after it is collected, or found to use drugs on the basis of appropriate evidence, drug trafficking and other drug-related misconduct are not covered under safe harbor, per Implementation Directive 792-XX, paragraph 7.b. Also, safe harbor does not insulate the employee from removal based on loss of security clearance. The range of remedies is broad for the various drug abuse first offenses. To determine the appropriate corrective action, you will consider the Douglas Factors in Appendix C. In doing so, you must also recognize that some positions are so sensitive that the conduct affects the employee's or his co-workers' job performance or negatively impacts management's trust and confidence in the employee's job performance. Thus, while counseling is always offered, a higher penalty than the minimum is appropriate in such cases.

5. Reasonable Accommodation. Guidance on providing reasonable accommodation is found at the EEOC web site (<http://www.eeoc.gov>) entitled Enforcement Guidance: on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act. You should also check with Office of Counsel to ensure you apply this guidance in a manner consistent with DON Policy.

a. Under the Rehabilitation Act Amendments of 1992, the standards applied under Title I of the Americans with Disabilities Act (ADA) are applicable to Federal employees. Section 104(c)(4) of the ADA permits a covered employer to hold employees who have drug and alcohol problems to the same qualification standards for employment or job performance and behavior as other employees, even if any unsatisfactory performance or behavior is related to the employee's alcoholism. (29 U.S.C. s 12114(c)(4))

(1) An agency is no longer required to offer an alcoholic employee who engages in misconduct a firm choice between treatment and discharge. While the ADA requires employers to consider other forms of reasonable accommodation for employees with alcoholism, for example, a flexible schedule or leave to accommodate an employee's treatment, employers do not have to excuse the violation of uniformly applied conduct or job performance standards by offering firm choice as a form of reasonable accommodation. (Dennis D. Johnson v. Babbitt, Secretary, Department of the Interior, EEOC Petition No. 03940100 (28 March 1996))

(2) To be considered a request for reasonable accommodation, the employee must request accommodation before s/he has committed the misconduct that violates one of the agency's qualification standards for employment or job performance and behavior under which the agency uniformly imposes discipline. (Francis P. Walsh v. USPS, 74 M.S.P.R. 627(1997))

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

(4) Trafficking in drugs is misconduct that does not normally entitle an employee to reasonable accommodation. Accordingly an employee who traffics in drugs will be subject to remedies as provided for in this Appendix.

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

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

**SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES**

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

\*See paragraphs 4 and 5 of this Appendix

**SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES**

<u>OFFENSE</u>	<u>RANGE OF REMEDIES</u>		
	<u>FIRST OFFENSE</u>	<u>SECOND OFFENSE</u>	<u>THIRD OFFENSE</u>
<u>DISCRIMINATION</u>			
Discrimination against an employee or applicant based on race, color, religion, sex, disability, national origin, or age, or any reprisal or retaliation action against a complainant, representative, witness, or other person involved in the EEO complaint process	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
Discrimination based on sexual orientation	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
Sexual harassment	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
<u>DRUG ABUSE</u>			
*Unlawful use, being under the influence, or possession of drugs or drug paraphernalia on or off duty	14-day suspension to removal	Removal	
*Unlawful use, being under the influence, or possession of drugs or drug paraphernalia on a military ship, aircraft, or submarine	30-day suspension to removal	Removal	

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

SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES

<u>OFFENSE</u>	<u>RANGE OF REMEDIES</u>		
	<u>FIRST OFFENSE</u>	<u>SECOND OFFENSE</u>	<u>THIRD OFFENSE</u>
<u>DRUG ABUSE</u>			
Refusal to obtain counseling and rehabilitation after having been found to use illegal drugs	Reprimand to removal	Removal	
Unlawful distribution, sale, or transfer of drugs or drug paraphernalia on or off duty	Removal		
<u>DRUG TESTING</u>			
Refusal to provide a urine sample when required	14-day suspension to removal	Removal	
Failure to appear for testing when directed, without a deferral	Reprimand to removal	Removal	
Substituting, adulterating or otherwise tampering with a urine sample, testing equipment or related paraphernalia	14-day suspension to removal	Removal	
Attempted or actual falsification, misstatement or concealment of a material fact, record, correspondence or other communication prepared in connection with the collection, handling, transportation or testing of urine samples	Reprimand to removal	14-day suspension to removal	30-day suspension to removal

**SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES**

<u>OFFENSE</u>	<u>RANGE OF REMEDIES</u>		
	<u>FIRST OFFENSE</u>	<u>SECOND OFFENSE</u>	<u>THIRD OFFENSE</u>
<u>MISCELLANEOUS OFFENSES</u>			
Betting, gambling, or the promotion thereof on duty or on Department of the Navy premises	Reprimand to removal	5-day suspension	10-day suspension to removal
Careless workmanship resulting in delay in production or spoilage to removal or waste of materials	Reprimand to removal	5-day suspension	10-day suspension to removal
Criminal, dishonest, infamous or notoriously disgraceful conduct	Reprimand to removal	14-day suspension to removal	30 day suspension to removal
Disobedience to constituted authorities; deliberate refusal or failure or delay in carrying out any proper order, work assignment or instruction; insubordination, including failure to follow local or higher level policy	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
Discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period	Reprimand to 14-day suspension		
Excessive Discourteous conduct to the public within any one-year period or any other pattern of discourteous conduct	Reprimand to 14-day suspension	7-day suspension to 14-day suspension	14-day suspension to removal
Disrespectful conduct, use of insulting, abusive or obscene language to or about other personnel	Reprimand to removal	5-day suspension to removal	10-day suspension to removal

**SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES**

<u>OFFENSE</u>	<u>RANGE OF REMEDIES</u>		
	<u>FIRST OFFENSE</u>	<u>SECOND OFFENSE</u>	<u>THIRD OFFENSE</u>
<u>MISCELLANEOUS OFFENSES</u>			
Falsification (or aiding or assisting in falsification) of time and attendance records or claims against the government	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
Falsification, misstatement, or concealment of material fact in connection with any official record	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
False testimony or refusal to testify in an inquiry, investigation or other official proceeding	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
Loafing, wasting time, inattention to duty, sleeping on duty	Reprimand to 5-day suspension	5-day suspension to removal	10-day suspension to removal
Making threats to other employees or supervisor; fighting; engaging in dangerous horseplay	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
*Misuse of a Government vehicle	Reprimand to removal	30-day suspension to removal	Removal

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

**SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES**

<u>OFFENSE</u>	<u>RANGE OF REMEDIES</u>		
	<u>FIRST OFFENSE</u>	<u>SECOND OFFENSE</u>	<u>THIRD OFFENSE</u>
<u>MISCELLANEOUS OFFENSES</u>			
Reckless driving or improper operation of motor vehicle:			
Causing personal injury to self or others or damage to government property	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
No personal injury to self or others or damage to government property	Reprimand to 5-day suspension	Reprimand to 10-day suspension	14-day suspension to removal
*Unauthorized possession, use, loss, theft or damage to Government property or the property of others	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
* Under Miguel v. Department of the Army, 727 F.2d 1081, 1083-84 (Fed. Cir. 1984), the Federal Circuit Court held that activities must consider the value of items stolen when determining a penalty for "unauthorized possession" or "theft" of government property. In the absence of aggravating factors, a removal based on de minimis theft will likely result in mitigation of the penalty, even when the activity can show that the employee was on notice that discipline, including removal, could result from theft of government property.			
Misuse of government equipment (e.g. unauthorized use of electronic mail, internet, phones, or facsimile equipment)	Reprimand to removal	14-day suspension to removal	30-day suspension to removal

**SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES**

<u>OFFENSE</u>	<u>RANGE OF REMEDIES</u>		
	<u>FIRST OFFENSE</u>	<u>SECOND OFFENSE</u>	<u>THIRD OFFENSE</u>
<u>MISCELLANEOUS OFFENSES</u>			
Misuse of Government sponsored travel charge card (e.g. use for unauthorized personal expenses, failure to pay charge card bill in a timely manner, or failure to use card for required expenses arising from official travel)	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
Unauthorized use of or failure to appropriately monitor use of Government purchase card	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
<u>PROHIBITED PERSONNEL PRACTICE</u>			
Committing a prohibited personnel practice (See 5 U.S.C. 2302)	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
<u>SAFETY</u>			
Failure to observe posted smoking prohibitions	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
Failure to use protective clothing or equipment	Reprimand to removal	5-day suspension to removal	10-day suspension to removal

**SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES**

<u>OFFENSE</u>	<u>RANGE OF REMEDIES</u>		
	<u>FIRST OFFENSE</u>	<u>SECOND OFFENSE</u>	<u>THIRD OFFENSE</u>
<u>SAFETY</u>			
Violation of safety or traffic regulations on duty or on an installation (on or off duty):			
Causing injury to self or others or damage to property or endangering the safety of self or others	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
No injury or property damage; not endangering the safety of self or others	Reprimand to 5-day suspension	Reprimand to 10-day suspension	Reprimand to removal
<u>SECURITY</u>			
Failure to safeguard classified material:			
Security compromised	Reprimand to removal	14-day suspension to removal	Removal
Security not compromised	Reprimand to 5-day suspension	Reprimand to 14-day suspension	30-day suspension to removal
<u>UNAUTHORIZED DISCLOSURE OR USE OF PROTECTED MATERIAL</u>			
Unauthorized disclosure or use of information or other protected material (e.g., records covered by the Privacy Act or under 42 CFR Part 2 (CEAP records))	Reprimand to removal	14-day suspension to removal	30-day suspension to removal