

ARTICLE 43

ADVERSE ACTIONS

SECTION 1

This Article applies to all bargaining unit employees who have completed the applicable probationary or trial period, as appropriate, in their current positions.

SECTION 2

- A. For purposes of this Article, an adverse action is defined under 5 USC 7512 as a suspension of more than fourteen (14) calendar days, reduction in grade or pay, furlough of thirty (30) calendar days or less, and removal.
- B. An adverse action will be taken only for such cause as will promote the efficiency of the service.
- C. Adverse actions will not be taken for arbitrary or capricious reasons.

SECTION 3

In effecting adverse actions, the Employer endorses the use of like penalties for like offenses and progressive discipline. The Employer shall give due regard to the existence of any mitigating and/or aggravating circumstances, the nature of the position occupied by the employee at issue, and any other factors bearing upon the incidents or acts underlying the action. The degree of discipline administered will be proportionate to the offense and the employee's disciplinary history, and will be determined on a case-by-case basis.

SECTION 4

- A. Decisions of courts and the Merit Systems Protection Board (MSPB), and issuances of OPM, have long recognized that a number of factors (often referred to as the "Douglas factors") as being relevant considerations in determining the appropriateness of a penalty in an adverse action case. Without purporting to be exhaustive, the factors generally recognized at the time of execution of this Agreement as being relevant to the setting of the penalty include the following:
 - 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 fully satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties;
 6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
 7. Consistency of the penalty with any applicable Agency table of penalties;
 8. The notoriety of the offense or its impact upon the reputation of the Agency;
 9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
 10. Potential for the employee's rehabilitation;
 11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter; and
 12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.
- B. All of the Douglas Factors may not be relevant in every case. Only those relevant factors should be considered in setting of a penalty. In determining the relevant factors, each case must be reviewed on a case-by-case basis. Factors may or may not weigh in an employee's favor. Selection of an appropriate penalty must involve a responsible balancing of the relevant factors in the individual case.

SECTION 5

- A. In all cases of proposed adverse action, except as stated in Section 8 of this Article or when there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, an employee will be given at least thirty (30) calendar days' advance written notice of the proposed action. This notice will state specifically and in detail the reasons for the action. The Employer will also provide a copy of the proposed written notice to the Union no later than the next workday. The Employer will provide this notice to the designated representative, if one is known, or to the local chapter president. It is understood that the proposal notice is not grievable upon receipt. However, disputes regarding the advance notice of proposed action may be merged in a grievance concerning the final decision of the Employer, after that final decision is issued.

- B. The employee, or his/her designee, will notify the Employer within seven (7) calendar days of receipt of the notice of proposed action that the employee intends to deliver an oral or written reply. An employee will be given ten (10) calendar days from the date s/he receives the notice of proposed action to deliver an oral and/or written reply. Reasonable requests for extension will be granted.
- C. The proposal notice will specify who will hear/receive the oral and/or written reply. This official will be the person who will be making the final decision on the matter, or his/her designee.
- D. The employee will have the right to be represented in the preparation and presentation of his/ her reply. If the employee elects to have a representative, s/he must inform the deciding official, in writing, of the representative's name. The employee and his/her representative will receive reasonable time to prepare the reply in accordance with the terms of Article 10 on use of official time and Article 5 (Employee Rights and Responsibilities).
- E. The proposal notice shall inform the employee of her/his right to review the material which is relied upon to support the proposed adverse action. The term "material relied upon" includes all information contained in the adverse action file that relates directly to the charge(s) and specification(s), whether favorable or unfavorable to either side's position in the matter.

The Employer will make a copy of such material available for review, concurrent with the delivery of the proposal notice to the employee. If requested by the employee or her/his representative, the Employer will furnish a copy of such material prior to the oral reply. Where management has relied upon witnesses to support the reasons for the proposed action, the Employer will make available, as part of the material relied upon, the identity of those witnesses and any written statements. The Employer reserves the right to sanitize any material which is provided to the employee, when required by law.

- F. In making a reply, the employee may set forth mitigating circumstances, refute aggravating circumstances, and give reasons as to why the proposed action should not be effected
- G. If an employee chooses to make an oral reply, it may be held via audio or videoconference when the employee, the employee's representative, and the oral reply official do not work in the same commuting area. However, if the employee or the employee's representative requests a face-to-face meeting, management will determine where the face-to-face reply will be held and the employee and one representative will be reimbursed for travel and per diem that is reasonable under GSA regulations.
- H. The Employer will provide a written summary of the employee's oral reply. A copy of the summary will be included in the material relied upon, and it will also be provided to the employee's representative (or to the employee if s/he is unrepresented). Within five (5) workdays after receiving the written summary, the employee or representative may submit comments on it. The comments will be added to the official record and will be considered by the Employer before a final decision on the matter is rendered.

- I. The Employer agrees that the employee may use the same means as the Employer does to take notes during the oral reply.
- J. Nothing in this section is to be construed as a waiver of the employee's or Union's right to request additional information under other authorities such as the Freedom of Information Act, Privacy Act, or Civil Service Reform Act.

SECTION 6

The final decision in an adverse action covered by this Article must be made by a higher level official than the one who issued the notice of proposed action, unless the proposing official is the head of an OPDIV/STAFFDIV, in which case the decision will be made by an appropriate official identified by the Employer. The decision letter will state which charge(s) is/are sustained and the reason(s) therefore, and will respond to relevant defenses raised by the employee.

SECTION 7

In any case where the charges are premised upon off-duty misconduct, the proposal and decision will describe the relationship (often referred to as the "nexus") between the misconduct and the employee's position.

SECTION 8

In the event the Employer sustains the charge(s) and effects an adverse action against the employee, s/he may elect to challenge the action through only *one* of the three procedures below:

- A. an appeal to the MSPB in accordance with applicable law and regulation;
- B. under this Agreement, going directly to Arbitration (which may include an allegation of discrimination), with the Union's concurrence;
- C. a formal complaint of discrimination filed under the administrative EEO process.

The final decision letter issued on the adverse action to the employee will contain a statement of her/his right to challenge the action in *one* of the above three procedures. Once an employee has elected one of these procedures, the employee may not change thereafter to a different procedure.

SECTION 9

- A. Under ordinary circumstances, an employee whose removal has been proposed shall remain in a duty status in his/her regular position during the advance notice period. In those circumstances where the Employer determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the Employer may consider whether any of the following alternatives is preferable:
 - 1. Assigning the employee to duties where he/she is no longer a threat to safety, the

Agency mission, or to Government property;

2. Placing the employee on leave with his/her consent;
3. Carrying the employee on appropriate leave (annual, sick, leave without pay, or absence without leave) if he or she is absent for reasons not originating with the Employer.

B. If none of these alternatives is selected, the Employer may place the employee in a paid, non duty status during all or part of the advance notice period, if otherwise consistent with applicable law, rule or regulation. The Employer may also curtail the notice period when it can invoke the provisions of 5 CFR 752.404(d) (1) (the "crime provision"). This provision may be invoked even in the absence of judicial action if the Employer has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed.

SECTION 10

The documentation supporting an adverse action will be purged/destroyed pursuant to applicable rule(s) for the system(s) of records in which the documentation is maintained. If an adverse action is overturned, appropriate action will be taken with respect to all other records (e.g., SF-50) in accordance with the disposition of the case.

SECTION 11

Records of disciplinary and adverse actions will remain in an employee's OPF no longer than the regulatory minimum period and the Employer will protect the privacy of those records so that no one sees them who does not have authority under the regulations.