



Chapter 9 – Disciplinary, Performance-Based, and Adverse Action Procedures

REFERENCES.....	9-3
PURPOSE.....	9-4
APPLICABILITY	9-4
POLICY	9-4
RESPONSIBILITIES.....	9-5
PROCEDURES.....	9-8
NON-DISCIPLINARY ACTIONS	9-8
DISCIPLINARY ACTIONS.....	9-10
ADVERSE ACTIONS.....	9-13
DUTY STATUS DURING THE NOTICE PERIOD.....	9-15
SHORTENED NOTICE PERIOD.....	9-16
EXTENSION OF REPLY TIME.....	9-16
DISALLOWANCE OF AN EMPLOYEE'S CHOICE OF REPRESENTATION.....	9-17
MEDICAL EXAMINATION.....	9-17

DISABILITY RETIREMENT.....	9-17
PERFORMANCE-BASED ACTIONS.....	9-17
EMPLOYEES' RIGHT TO REDRESS.....	9-17
DUE PROCESS APPEALS.....	9-18
SPECIAL TERMINATION AUTHORITY.....	9-18
RECORDS OF SUSPENSION, REMOVALS, REDUCTIONS IN GRADE OR PAY OR FURLOUGHS FOR 30 DAYS OR LESS.....	9-19
APPENDIX A - DON DCIPS SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES.....	9-20
APPENDIX B - THE "DOUGLAS FACTORS".....	9-32
GLOSSARY.....	9-34

REFERENCES

- (a) SECNAV Instruction 12900.2A, "Defense Civilian Intelligence Personnel System," February 8, 2013
- (b) DOD Instruction 1400.25-V2009, "DoD Civilian Personnel Management System: Defense Civilian Intelligence Personnel System (DCIPS) Disciplinary, Performance-Based, and Adverse Action," March 20, 2012
- (c) DON Civilian Human Resources Manual (CHRM), Subchapter 752, Disciplinary Actions, December 1, 2003
- (d) "Naval Intelligence Defense Civilian Intelligence Personnel Systems (DCIPS) Manual," July 25, 2014
- (e) DOD 5500.07-R, "Joint Ethics Regulation (JER)", November 17, 2011
- (f) Parts 339,734,752, 1201, 1209 and 2635 of Title 5, Code of Federal Regulations
- (g) Sections 2302,3592, 4303, 5335, 7502 and 7532 of Title 5, United States Code
- (h) Sections 1609 and 1612(b) of Title 10, United States Code
- (i) SECNAV Instruction 5210.8D, "DON Records Management Program" December 31, 2005

1. **PURPOSE.** To establish policies and implement guidance for disciplinary, performance-based, and adverse actions (whether based on unacceptable performance or misconduct) and appeals for Department of Navy (DON) employees covered by the Defense Civilian Intelligence Personnel System (DCIPS). This chapter establishes procedures, prescribes authorities, assigns responsibilities in accordance with references (b) and (c) for use by organizations managing DON DCIPS employees herein after referred to as the "Entities with DON DCIPS Positions (EDDPs)".

2. **APPLICABILITY.**

2.1 This chapter applies to all Department of the Navy (DON) employees who have been appointed under the Defense Civilian Intelligence Personnel System (DCIPS) as described in reference (a).

2.2 This chapter does not apply to members of the Defense Intelligence Senior Executive Service (DISES) or the Defense Intelligence Senior Level (DISL) unless specifically addressed in corresponding DON DCIPS Chapters.

2.3 It does not apply to employees covered by the Federal Wage System (FWS) or equivalent, non-appropriated fund employees, or foreign national employees hired under an authority other than DCIPS.

3. **POLICY.** It is Naval Intelligence (NAVINTTEL) policy that:

3.1. Discipline shall be used as a managerial tool to correct deficiencies in employee conduct in a manner consistent with law, regulation, and policy.

3.2. Discipline should not be punitive; it should serve as a deterrent to unacceptable conduct and for correction of other situations that interfere with effective and efficient operations.

3.3. Progressive discipline shall be used in the event an employee continues to engage in misconduct after having been disciplined, except in situations involving national security matters or severe misconduct where progressive discipline would not be appropriate.

3.4. All disciplinary, performance-based, and adverse actions are executed equitably and impartially with fair and uniform imposition of administrative and disciplinary actions as appropriate. All persons involved in these processes shall be free from restraint, interference, coercion, discrimination, or reprisal.

3.5. All parties attempt to resolve issues at the lowest practical level and may use alternate discipline, such as last chance agreements and alternative dispute resolution (ADR) to enhance communication and seek positive resolution of issues in lieu of formal dispute procedures.

4. **RESPONSIBILITIES.**

4.1. The **Head, Naval Intelligence Activity (NIAH)** has overall responsibility for oversight and coordination of DODI 1400.25, V2009, reference (b) and shall:

4.1.1. Develop, in collaboration with the Director of Intelligence, Headquarters Marine Corps (HQMC) and Entities with DON DCIPS Positions (EDDPs), DCIPS policies, procedures, programs and requirements for the DON DCIPS Community as specified in reference (a).

4.2. The **Naval Intelligence Human Capital Officer (CHCO)** shall:

4.2.1. Provide executive advice and consultation to the NIAH on disciplinary, performance-based and adverse actions policy and procedures.

4.2.2. Provide oversight and implementation of the DON DCIPS Disciplinary and Performance-Based Adverse Actions policies and practices and monitor their effect on Navy-wide personnel readiness.

4.3. The **Directors of Civilian Human Resources (DCHR)** shall:

4.3.1. In conjunction with the Director, Office of Civilian Human Resources (OCHR), develop, publish, and oversee the policies and procedures governing the administration of DON DCIPS disciplinary, performance-based, and adverse actions.

4.3.2. Assure that DCIPS disciplinary programs are established and implemented in their Entities with DON DCIPS Positions (EDDPs) in compliance laws, regulations, and policy.

4.3.2. Implement delegation of disciplinary action program authority per DCIPS policy.

4.3.3. Provide advice and guidance to their EDDPs on DCIPS disciplinary, adverse, and performance-based actions in accordance with this chapter.

4.3.4. Conduct periodic assessments on EDDP disciplinary programs to evaluate their effectiveness.

4.4. The **Directors of OCHR Operations Centers** shall:

4.4.1. Provide advice and guidance to Human Resources Offices (HROs) servicing DCIPS employees based on merit and in compliance with governing rules and regulations.

4.4.2. Receive, review, analyze, and maintain for purposes of gathering best practices and determining training needs.

4.4.3. Take action to promptly correct disciplinary action errors and ensure disciplinary and adverse action decisions directed by the Department of Defense (DoD), Under Secretary of Defense for Intelligence (USD(I)) and/or DON are implemented without delay.

4.5. The **Human Resources Directors (HRD)** servicing DON DCIPS employees shall:

4.5.1. Advise management officials and supervisors and on all matters associated with employee performance and conduct.

4.5.2. Coordinate on all non-disciplinary, disciplinary, adverse, and performance-based actions to ensure such actions are consistent with law, regulation, and policy.

4.5.3. Ensure that all official disciplinary, adverse, and performance-based action records are appropriately maintained by their HRO.

4.5.4. Ensure that employees are apprised of applicable grievance and/or appeal rights when disciplinary and adverse actions are taken.

4.5.5. Ensure that persons appointed to represent the EDDP in any disciplinary matter or appeals are properly trained and competent.

4.5.6. Ensure that appropriate training on disciplinary, adverse, and performance-based actions is provided to all individuals taking such actions.

4.5.7. Assist EDDPs in the conduct of periodic self-assessments of their disciplinary action programs.

4.6. The **Entities with DON DCIPS Positions (EDDPs)** shall:

4.6.1. Ensure that all DCIPS employees are apprised of DON DCIPS disciplinary, adverse, and performance-based actions policy, including associated implementing guidance.

4.6.2. Propose and decide disciplinary or adverse actions under this chapter. Authority to take disciplinary actions per this chapter may be delegated to subordinate managers and supervisors to the extent deemed appropriate. This authority may be withdrawn and re-delegated as deemed necessary. To correct an error of fact or judgment, a proposed disciplinary or adverse

action may be canceled or modified as long as due process rights are afforded to the employee.

4.6.3. Ensure that applicable standards of conduct information, as prescribed in DoD 5500.7-R, the "Joint Ethics Regulation," reference (e), available to all DCIPS employees for their review.

4.6.4. Ensure that disciplinary actions are not taken against employees as reprisal or retaliation for engaging in activities protected under law or regulation.

4.7. Agency Representatives represent the DON in third-party proceedings and shall:

4.7.1. Serve as DON Representatives, ensuring appropriate coordination on all issues pertaining to matters appealed to the Merit Systems Protection Board (MSPB).

4.7.2. Ensure that the DON's position on matters appealed to the MSPB is supported by objective evidence.

4.7.3. Draft or review proposed settlement agreements.

4.7.4. Advise DON officials regarding proposed terms of settlements.

4.7.5. Respond to appeals filed by appellants and file pleadings on behalf of DON.

4.8. Management Officials and Supervisors shall:

4.8.1. Promote a workplace for employees conducive to successful performance and acceptable conduct.

4.8.2. Closely monitor the workforce for deficiencies in performance or conduct.

4.8.3. Upon identification of deficiencies in performance or conduct, take the necessary non-disciplinary, disciplinary, adverse or performance-based actions in order to correct those deficiencies. Disciplinary and adverse actions shall be proposed and decided in accordance with the general guidance provided by the "DON DCIPS Schedule of Offenses and Recommended Remedies" in Appendix A.

4.8.4. Ensure that disciplinary actions are accomplished following applicable DoD, DON, and DCIPS guidance and criteria when exercising delegated disciplinary program authority.

4.8.5. Consult with their servicing DCIPS HRO prior to initiating any non-disciplinary, disciplinary, adverse or performance-based action.

4.9. Deciding Officials shall:

4.9.1. Consider documentation supporting the proposed action.

4.9.2. Receive and consider the reply of the employee.

4.9.3. Review and consider relevant attendant factors, to include those "Douglas Factors" in Appendix B, if applicable, in determining the appropriateness of the penalty.

4.9.4. Determine whether the proposed action should stand, be modified, or be withdrawn.

4.9.5. Make a determination expeditiously.

4.9.6. Coordinate final decision with the servicing DCIPS HRO.

4.9.7. Provide the employee a written final decision with the specific reason(s) for that decision as well as a notice of grievance or appeal rights, if applicable.

5. PROCEDURES. When a supervisor or management official becomes aware of an employee's misconduct or failure to improve performance to at least the minimally successful level following an opportunity to improve performance they shall promptly notify their servicing DCIPS HRO. The supervisor/management official will provide the servicing DCIPS HRO with supporting documentation of the events surrounding the misconduct or failure to improve performance. After review of the documentation, the servicing DCIPS HRO will advise the supervisor/management official of the appropriate actions to take. The servicing DCIPS HRO will draft all non-disciplinary, disciplinary, and adverse action letters to ensure compliance with regulatory requirements and DCIPS disciplinary, performance-based, and adverse action policy.

6. NON-DISCIPLINARY ACTIONS.

6.1. Oral Admonishment. An oral admonishment consists of a discussion between a supervisor/management official and an employee. Record of an oral admonishment is not retained in an employee's Official Personnel Folder (OPF); however, the supervisor/management official should document the facts, issues, and circumstances of the admonishment through a Memorandum for Record and maintain it in the supervisory file for a specified time period, e.g., 6 months. When issuing an oral admonishment, the supervisor/management official shall:

6.1.1. Bring the unacceptable behavior to the employee's attention.

6.1.2. Inform the employee that he or she is being admonished.

6.1.3. Explain to the employee what is expected of him or her.

6.1.4. Explain that further disciplinary action may result if the employee's improper behavior continues.

6.1.5. Explain the admonishment is neither grievable under DON DCIPS Chapter 14 "Employee Grievance and Appeal Procedures," reference (d), nor appealable to the MSPB.

6.1.6. Explain that it will not be counted as a prior offense when determining a range of remedies under the "DON DCIPS Schedule of Offenses and Recommended Remedies" in Appendix A, but may be considered in determining an appropriate remedy should an offense subsequently occur.

6.2. Letter of Caution. A letter of caution (LOC) serves as a warning to the employee that continued misconduct may lead to more serious, formal disciplinary actions. The LOC shall:

6.2.1. State the reason(s) for issuance.

6.2.2. Explain that the LOC is neither grievable according to reference (b) nor appealable to the MSPB.

6.2.3. Explain that the LOC is not recorded in the employee's OPF but that the supervisor/management official will keep a copy in the supervisory file for a specified period of time, e.g., 6 months.

6.2.4. Explain that the LOC will not be counted as a prior offense when determining a range of remedies under the "DON DCIPS Schedule of Offenses and Recommended Remedies" in Appendix A, but may be considered in determining an appropriate remedy should an offense subsequently occur.

6.2.5. Require signature acknowledgment from the employee. If the employee elects not to sign, the supervisor/management official will annotate the employee elected not to sign and initial and date. The supervisor/management official will provide a copy to the employee, retain a copy of the signed or annotated letter in the supervisory file, and forward a copy to their servicing DCIPS HRO.

6.3. Letter of Requirement. A letter of requirement is written counseling issued to the employee, which places specific requirements on the employee for a specified period. It is commonly used when imposing restrictions on the approval and use

of sick leave or unplanned annual leave, but it may be used for other reasons. The letter of requirement shall state:

6.3.1. The reason for issuance.

6.3.2. The specific requirements that the employee must meet and consequences of non-compliance including possible disciplinary action for failing to meet the requirements.

6.3.3. The length of time the requirements will remain in place.

6.3.4. The employee's right to file a grievance through the DON DCIPS Grievance and Appeal Procedures, according to Chapter 14, reference (d).

6.3.5. The fact that the letter is not a disciplinary action and will not be included in the employee's OPF.

6.3.6. That it will not be counted as a prior offense when determining a range of remedies under the "DON DCIPS Schedule of Offenses and Recommended Remedies" in Appendix A, but may be considered in determining an appropriate remedy should an offense subsequently occur.

6.3.7. Require signature acknowledgement from the employee. If the employee elects not to sign, the supervisor/management official will annotate the employee elected not to sign and initial and date. The supervisor/management official will provide a copy to the employee, retain a copy of the signed or annotated letter in the supervisory file, and forward a copy to their servicing DCIPS HRO.

7. DISCIPLINARY ACTIONS.

7.1. **Letter of Reprimand.** A letter of reprimand (LOR) is a formal written disciplinary remedy made by a supervisor/management official for the purpose of correcting an employee's conduct, attitude, or work habits, in order to maintain efficiency, discipline, and morale in the work force. A LOR shall be maintained in the employee's OPF for not less than 1 year, but no more than 2 years. During this period, the letter can be counted as a prior offense for determining a range of remedies under the "DON DCIPS Schedule of Offenses and Recommended Remedies" in Appendix A. The letter may also be considered in determining that the employee was clearly on notice that the behavior was inappropriate and in determining an appropriate remedy within the range for any subsequent offense should an offense later occur. The LOR shall include:

7.1.1. A detailed and complete description of the reason(s) for issuance.

7.1.2. The length of time the letter will be retained in the employee's OPF, and during which time it may be counted as a prior offense for determining a range of remedies under the "DON DCIPS Schedule of Offenses and Recommended Remedies" in Appendix A.

7.1.3. The employee's right to file a grievance through the DON DCIPS Grievance and Appeal Procedures, according to reference (d).

7.1.4. A signature acknowledgment from the employee. If the employee elects not to sign, the supervisor/management official will annotate the employee elected not to sign and initial and date. The supervisor/management official will provide a copy to the employee, retain a copy of the signed or annotated letter in the supervisory file, and forward a copy to the servicing DCIPS HRO.

7.2. Suspension for 14 Calendar Days or Less. When it is alleged an employee has demonstrated inappropriate conduct or repeat infraction(s), a supervisor/management official, in consultation with their servicing DCIPS HRO, may propose the employee be suspended for 14 calendar days or less. The employee shall be provided with at least 7 calendar days advance written notice of the proposed action.

7.2.1. The notice shall inform the employee:

7.2.1.1. Of the specific reason(s) for the proposed action and any aggravating or mitigating factors considered in proposing this corrective action.

7.2.1.2. Of the proposed length of the suspension.

7.2.1.3. Of the identity of the deciding official who will receive and consider the employee's replies, if any, and make the final decision on the proposed suspension action.

7.2.1.4. Of the right to reply to the proposed suspension in writing, provide affidavits or other documents (including medical documentation as defined in 5 CFR 339, reference (f), to support any medical condition alleged to have contributed to the reason(s) for the proposed action) in support of the reply; and/or request an oral reply with the deciding official, noting the written response, affidavits or other documents in support of the reply; and/or request for oral response must be received no later than the 15th calendar day, or the next business day thereafter if the 15th falls on a weekend or federal holiday, after receipt by the employee of the notice of proposed suspension.

7.2.1.5. Of the right to be represented by an attorney or other representative of the employee's choice, noting the designation of the representative must be in writing and the representative must not provide a conflict of interest, impose an unreasonable burden on the EDDP or give rise to unreasonable costs to the EDDP. The employee's choice of representation is subject to approval by appropriate management officials before assignment.

7.2.1.6. Of the right to review, or have a representative review, the material relied on to support the reason(s) for action given in the notice of proposed suspension.

7.2.1.7. That he or she may be granted a reasonable amount of time (not less than 24 consecutive hours, if the employee is otherwise in an official duty status), to prepare a reply (orally and/or in writing), and to secure affidavits and other documentary evidence in support of their reply, including medical documentation as defined in reference (f) to support any medical condition alleged to have caused the reason(s) for the proposed action.

7.2.2. The advance written notice of proposed action will require signature acknowledgement from the employee. If the employee elects not to sign, the supervisor/management official will annotate the employee elected not to sign and initial and date. The supervisor/management official will provide the original to the employee, retain a copy of the signed or annotated letter in the supervisory file, and forward a copy to the servicing DCIPS HRO.

7.2.3. A suspension for 14 calendar days or less entitles the effected employee to a written decision that:

7.2.3.1. Considers only the reason(s) for the action specified in the advance written notice.

7.2.3.2. Considers any reply the employee and/or the employee's representative made to a designated official, medical or other documentation furnished under paragraph 7.2.1.4. above, and any entitlement to reasonable accommodation under the provisions of the Rehabilitation Act.

7.2.3.3. Specifies the reason(s) for the decision, considering appropriate "Douglas Factors" in Appendix B.

7.2.3.4. Is signed by an official in a higher position than the official who proposed the action, unless the EDDP issued the advance notice, in which case the EDDP may issue the decision.

7.2.3.5. Specifies the employee's right to file a grievance through the DON DCIPS Employee Grievance and Appeal Procedures, according to Chapter 14, reference (d), if the decision is sustained or mitigated to a lesser adverse action.

7.2.3.6. Is delivered to the employee on or before the effective date of the suspension. The written decision will require signature acknowledgement from the employee. If the employee elects not to sign, the supervisor/management official will annotate the employee elected not to sign and initial and date. The supervisor/ management official will provide a copy to the employee, retain a copy of the signed or annotated letter in the supervisory file, and forward a copy to the servicing DCIPS HRO.

8. **ADVERSE ACTIONS.** An EDDP may take an adverse action (removal, suspension for more than 14 days or indefinite suspension, or involuntary reduction in grade, pay or work level, or furlough for 30 days or less) including a performance-based action under adverse action procedures only for such cause as will promote the efficiency of the service. An EDDP may not take an adverse action on the basis of any reason prohibited by 5 U.S.C. 2302, reference (g).

8.1. Adverse actions entitle the affected employee to:

8.1.1. At least 30 calendar days advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed (refer to paragraph 10. below) or for furlough without pay due to unforeseeable circumstances. When the employee's whereabouts are unknown, the EDDP must show that it took "intelligent and diligent" steps to serve the notice in order to avoid a finding of harmful procedural error. In such instances, the EDDP should send the notice via both certified and regular mail to the last known address that the employee provided to the EDDP.

8.1.2. The specific reason(s) for the proposed action:

8.1.2.1. If the action is a furlough, the notice shall state the reason(s) for the furlough, and the basis for selecting the employee.

8.1.2.2. If the action is a suspension for more the 14 calendar days or indefinite suspension, or a reduction in grade, pay, or work level, then consider relevant factors, including prior discipline used in determining the appropriate penalty to propose and any aggravating factors relied upon. In relying on

past misconduct to enhance a penalty, the misconduct must be referenced in enough detail to permit an informed reply.

8.1.2.3. If the action is performance-based, the notice shall identify the specific performance objectives and/or performance elements against which performance has been found to be unacceptable, and cite specific examples of unacceptable performance.

8.1.3. 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.

8.1.4. The right to be represented by an attorney or other representative. However, the employee's choice of representation is subject to approval by appropriate management officials before assignment.

8.1.5. The right to a reasonable amount of official time to review (not less than 24 consecutive hours, if the employee is otherwise in an official duty status), or have a representative review, the material relied upon to support the reason(s) given in the notice and to prepare an answer and to secure affidavits, if the employee is otherwise in an active duty status.

8.1.6. The right to reply to the proposal in writing, provide affidavits or other documents (including medical documentation as defined in reference (f) to support any medical condition alleged to have contributed to the reason(s) for the proposed action) in support of the reply, and/or request an oral reply with the deciding official, noting the written response, affidavits or other documents in support of the reply, and/or request for oral response must be received no later than the 15th calendar day, or the next business day thereafter if the 15th falls on a weekend or federal holiday, after receipt by the employee of the notice of proposed suspension. A medical condition, however, is not an excuse for misconduct but may be considered as a mitigating factor in determining the penalty.

8.1.7. A written decision at the earliest practicable date that:

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

8.1.7.2. Considers any answer the employee and/or the employee's representative made to a designated official, any medical or other documentation furnished under paragraph 8.1.6. above, any entitlement to reasonable accommodation under the Rehabilitation Act, and the recommendation of the designated official (where applicable). Where applicable, based on medical

issues raised by the employee, provides information on applying for disability retirement, with an offer to assist the employee in that effort.

8.1.7.3. Specifies the reason(s) for the decision, considering appropriate "Douglas Factors" in Appendix B.

8.1.7.4. Is signed by an official in a higher position than the official who proposed the action, unless the EDDP issued the advance notice, in which case the EDDP may issue the written decision.

8.1.7.5. Specifies the employee's right to appeal to the MSPB, if applicable, or file an appeal under the DON DCIPS Grievance and Appeal Procedures, reference (d), but not both, if the decision is sustained or mitigated to a lesser adverse action.

8.1.7.6. Provides the time limits and address for filing an appeal to MSPB, a copy of the MSPB regulations found in 5 CFR 1201 and 1209, reference (f), a copy or access to a copy of the MSPB Appeal form (Optional Form 283), and specifies the time limits for filing an appeal under the DON DCIPS Employee Grievance and Appeal Procedures.

8.1.7.7. Is delivered to the employee on or before the effective date of the action. The decision letter will require signature acknowledgement from the employee. If the employee elects not to sign, the supervisor/management official will annotate the employee elected not to sign, and initial, and date. The supervisor/management official will provide a copy to the employee, retain a copy of the signed or annotated letter in the supervisory file, and forward a copy to the servicing DCIPS HRO.

9. DUTY STATUS DURING THE NOTICE PERIOD. It is recommended that information about the employee's duty status be included in any notice of proposed action. Under ordinary circumstances, employees will remain in a duty status in their regular positions during the advance notice period. In those rare circumstances where the EDDP 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 EDDP may elect one or a combination of alternatives. Alternatives include:

9.1. Assigning the employee to other duties (i.e., reassignment, detail) where he or she is no longer a threat to safety, the mission, or to Government property.

9.2. Exploring leave flexibilities including approving employee's voluntary request to take sick (if applicable), annual, or leave without pay or charging "absent without leave" if the employee has absented himself or herself from the worksite without requesting leave.

9.3. Curtailing the notice period when the "crime provision" can be invoked.

9.4. Placing the employee in a paid, non-duty status for such time as is necessary to affect the action. If all other options have been explored and found not feasible, an EDDP 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 affected under this chapter. Excused absence for this purpose should be used only in those rare circumstances where the retention of the employee in an official 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 interests. Care should be exercised to use only the minimum amount of excused absence necessary in any individual situation.

10. **SHORTENED NOTICE PERIOD.** The notice period required in paragraph 8.1.1. 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. This notice exception is commonly referred to as the "crime provision." This exception may be invoked even in the absence of judicial action. An EDDP 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 an answer to the proposed action, and any affidavits or other documentary evidence in support of the answer, within such time as under the circumstance would be reasonable, but not less than 7 calendar days. When the circumstances require immediate action, an EDDP may place the employee in a non-duty status with pay for such time, not to exceed 10 calendar days, as is necessary to effect the action.

11. **EXTENSION 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 response will make the decision to grant or deny such a request.

12. DISALLOWANCE OF AN EMPLOYEE'S CHOICE OF REPRESENTATIVE

12.1. The EDDP may disallow an employee's choice of representative if such representation would result in a conflict of interest or position, conflict with priority needs of the activity/command, or would give rise to unreasonable cost to the Government.

12.2. The EDDP may delegate authority to make a determination 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.

12.3. The EDDP 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 the final decision to be made by an official higher than the one who made the disputed determination.

13. MEDICAL EXAMINATIONS. After reviewing medical documentation supplied by the employee in reply to a proposed action, the EDDP may, if authorized, require a medical examination or, at its option, offer a medical examination following the procedures in reference (f).

14. DISABILITY RETIREMENT. When the Civil Service Retirement System employee has 5 years or more of civilian service, or the Federal Employees Retirement System employee has 18 months or more of civilian service, and asserts or documents impairment or disability, the EDDP shall provide information to him/her concerning disability retirement. An employee's application for disability retirement shall not preclude or delay any other appropriate personnel action.

15. PERFORMANCE-BASED ACTIONS. Performance-based actions may be effected once an employee has failed to demonstrate acceptable performance after a reasonable opportunity to improve performance. When a non-trial period employee does not respond positively to an opportunity to improve and a determination is made that the employee's performance is unacceptable, the employee may be subject to removal or involuntary reduction in grade, work level, or pay.

16. EMPLOYEES' RIGHTS TO REDRESS.

16.1. Employees who are removed, suspended for more than 14 calendar days, involuntarily reduced in grade, work level, or

pay, placed on indefinite suspension, or furloughed for 30 days or less, may appeal those actions to MSPB only if the employees are:

16.1.1. Veteran preference eligible employees who have completed one year of current continuous service in the same or similar positions, or

16.1.2. Covered by 10 U.S.C. 1612(b), reference (h).

16.1.2.1. Employees are covered by this citation if they and their positions in an agency other than a DoD intelligence component were transferred to a DON command/activity and covered under DCIPS, and the employees were entitled to MSPB adverse action appeal rights prior to their transfer, and the employees continued their DCIPS employment without a break in service.

16.2. Employees who fall within the coverage of paragraph 17.1. above may elect to file an MSPB appeal, if applicable, or grievance under the DON DCIPS Grievance and Appeal Procedures according to Chapter 14, reference (d), but not both.

16.3. Employees who do not fall within the coverage of paragraph 17.1. should refer to the DON DCIPS Grievance and Appeal Procedures, Chapter 14, reference (d) for guidance.

17. DUE PROCESS APPEALS.

17.1. Employees serving a DCIPS trial period are entitled to limited due process for disciplinary and adverse actions during their trial period. The limited due process consists of providing the employee written notice of the action to take place and the reason for the action. Standard due process (detailed statement of charges, right to reply, right to review supporting documentation, and notice period) for any type of suspension or removal is not required for trial-period employees. A trial-period employee may not administratively grieve a removal action.

17.2. Veteran preference eligible employees who have completed one year of current, continuous service in the same or similar positions in Naval Intelligence or at a previous agency, without a break in service, are entitled to full procedural rights.

17.3. All other employees are entitled to full procedural rights upon completion of their DCIPS 2-year trial period.

18. SPECIAL TERMINATION AUTHORITY.

18.1. Title 10 U.S.C. 1609, reference (f), provides a special termination authority that may be used to terminate the

employment of any DON DCIPS employee if the action is in the best interest of the United States, and after a determination that the procedures prescribed in other provision of law that authorize termination of employees cannot be invoked in a manner consistent with national security.

18.1.1. If any provision outlined in this chapter can be used in a manner consistent with national security, then this authority is not appropriate.

18.2. This authority lies with the Secretary of the Navy and cannot be re-delegated.

19. RECORDS FOR SUSPENSION, REMOVALS, REDUCTIONS IN GRADE OR PAY, OR FURLONGHS FOR 30 DAYS OR LESS

19.1. As applicable, the record shall contain copies of:

19.1.1. The advance written notice of proposed action.

19.1.2. The employee's written answer, if any.

19.1.3. A written summary of the employee's oral reply, if an oral reply was made.

19.1.4. The reason(s) for and written notice of decision.

19.1.5. Any order affecting the action.

19.1.6. Any evidence and supporting material.

19.1.7. The Notification and Personnel Action, Standard Form 50, effecting the decision.

19.2. If an employee appeals to MSPB, the record shall be furnished to the employee and to the MSPB as directed in the MSPB's Acknowledgement Order.

19.3. Records required by this chapter shall be retained and disposed as described in SECNAVINST 5210.8D, DON Records Management Program, reference (i). Records that may be required for further administrative or judicial litigation may be retained until no longer necessary.

APPENDIX A

DON DCIPS

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 shall be the minimum that, in the judgment of the deciding official, can reasonably be expected to correct the affected employee and maintain discipline and morale among other employees. Mitigating or aggravating factors can justify a remedy outside the range cited herein. 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. When sufficient mitigating factors exist, remedies lesser than those shown include informal actions such as counseling, oral admonishments, and letters of caution/requirement.

b. Consistent with Naval Intelligence policy, 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 B. 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 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. Supervisors/ management officials contact their servicing DCIPS HRO for assistance in framing appropriate charges.

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

f. All disciplinary and adverse 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 EDDP's performance. The EDDP 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 EDDP's performance. The MSPB 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 EDDP's mission. Actual impairment need not be shown, but the EDDP 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 affected the EDDP's ability to accomplish its mission; and/or the misconduct impacted the work of the supervisor/management official or other employees in the work area.

h. Servicing DCIPS HROs will 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. EDDPs, supervisors and management officials delegated authority to propose and/or decide disciplinary and adverse actions must take advantage of such assistance to ensure conformance with this chapter.

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 *U.S. Postal Service v. Gregory*, 102 FMSR 7004, No. 00-758 (S. Ct.), (*USPS 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. It's advised 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 (1) and (2) of this paragraph may be considered in 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 chapter.
- (3) Actions using 752 procedures that are not disciplinary in nature (i.e., reductions in grade, work level, or pay not affected for disciplinary reasons), reference (c).

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, 735, and 2635, and DoD 5500.07-R.

4. Drug and alcohol abuse offenses. Any employee who engages in misconduct involving drugs and/or alcohol shall be disciplined according to this chapter, except when covered under safe harbor. The range of remedies is broad for the various drug abuse first offenses. To determine the appropriate corrective action, the "Douglas Factors" in Appendix B must be considered. In doing so, supervisors/management officials must 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: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (ADA). Also check with Office of Counsel to ensure this guidance is applied in a manner consistent with DON and Naval Intelligence policy.

a. Under the Rehabilitation Act Amendments of 1992, the standards applied under Title I of the 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 (42 U.S.C. 12114(c)(4)).

(1) An EDDP is not 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.

(2) An EDDP never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity, and may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.

(3) An individual who is currently engaging in the illegal use of drugs, when the EDDP 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 EDDP. 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 EDDP. 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 5.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 EDDP, or which strikes at the core of the job or the mission, can, standing alone, disqualify a DCIPS employee from his or her position.

6. Domestic Violence. Individuals whose positions include duties, activities, or responsibilities such as selling or disposing of firearms and ammunition; or receiving, possessing, shipping, or transporting any firearm or ammunition in or affecting interstate or foreign commerce are in covered positions subject to the mandatory requirements of the Gun Control Act of 1968 (18 U.S.C. 922(d)(9) and (g)(9)). Employees who have been convicted of a "misdemeanor crime of domestic violence" may not be retained in a covered position. As a matter of Department of Defense policy, a conviction for an offense meeting the definition of a "felony crime of domestic violence" on or after the Under Secretary of Defense memorandum of November 27, 2002 shall also be considered a qualifying conviction and the employee may not be retained in a covered position. Options may include redesigning the position so that it is no longer a covered position, reassigning an employee with a qualifying conviction, or taking an adverse action (e.g., a reduction in grade or removal). Adverse actions taken as a result of the requirement to remove convicted employees from covered positions must be taken under the provisions of this chapter and the requirements of the Under Secretary of Defense memorandum of November 27, 2002.

SCHEDULE OF OFFENSES AND RECOMMENDED REMEDIES

ALCOHOL ABUSE	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
Unauthorized possession, sale or transfer of alcohol on duty or on a military ship, aircraft, submarine, activity, or command	Reprimand to removal	14-day suspension to removal	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
ATTENDANCE	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
Excessive unauthorized absence (more than five consecutive workdays)	Reprimand to removal	10-day suspension to removal	Removal
Leaving job to which assigned or leaving EDDP premises at any time during working hours without proper authorization	Reprimand to 5-day suspension	Reprimand to 10-day suspension	Reprimand to removal
Unauthorized absence on five or less scheduled workdays 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
CONDITIONS OF EMPLOYMENT	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
** Failure to obtain or maintain eligibility for security clearance; access to classified information; or eligibility to occupy a sensitive position	Removal		
Failure (or delay) to obtain or maintain certification or license	Reprimand to Removal	5-day suspension to removal	14-day Suspension to Removal

DISCRIMINATION	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
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
DRUG ABUSE	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
*** 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	
Refusal to obtain counseling and rehabilitation after having been found to use drugs illegally	Reprimand to removal	Removal	
Unlawful distribution, sale, or transfer of drugs or drug paraphernalia on or off duty	Removal		

DRUG TESTING	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
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	
MISCELLANEOUS OFFENSES	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
Betting, gambling or the promotion thereof on duty or on DON premises	Reprimand to removal	5-day suspension to removal	10-day suspension to removal
Careless workmanship resulting in delay in production or spoilage or waste of materials	Reprimand to removal	5-day suspension to removal	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 supported by a supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct	Reprimand to 14-day suspension	1-day suspension to 14-day suspension	14-day suspension to removal
Excessive discourteous conduct to the public within any one-year period or any other pattern of discourteous conduct	1-day suspension to 14-day suspension	7-day suspension to 30-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
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
Attempted or actual 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 or 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 OR UNAUTHORIZED USE	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
***** Misuse of a Government vehicle	Reprimand to removal	30-day suspension to removal	Removal
***** Unauthorized possession, use, loss, theft or damage to Gov't property or the property of others	See comment at end of Table		
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
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 authorized 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
PROHIBITED PERSONNEL PRACTICE	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
Committing a prohibited personnel practice (see 5 U.S.C. 2302)	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
SAFETY	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
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

<i>Violation of safety or traffic regulations on duty or on an installation (on or off duty)</i>			
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
<i>Texting, operating GPS device, or using phone without hands-free device while driving (on base, or off base while on duty)</i>			
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
SECURITY	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
<i>Failure to safeguard classified material:</i>			
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

UNAUTHORIZED DISCLOSURE OR USE OF PROTECTED MATERIAL	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
Unauthorized disclosure or use of information or other protected material [e.g., records covered by the Privacy Act, records Under 42 CFR 2 (CEAP), or records under 45 CFR 164 (HIPAA) for health care providers	Reprimand to removal	14-day suspension to removal	30-day suspension to removal
* See paragraphs 4. and 5. of this Appendix.			
** Indefinite suspensions related to security clearance or position sensitivity investigation and/or adjudication, are subject to DoD regulations, policies and directives. Consult applicable regulations or higher authority, as appropriate.			
*** See paragraphs 4. and 5. of this Appendix.			
**** Mandatory referral to Civilian Employee Assistance Program (CEAP) is required. For additional guidance see paragraphs 4. and 5. of this Appendix.			
***** 31 U.S.C. § 1349(b) requires a minimum suspension of 30 calendar days even for the first offense, if the vehicle 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.			
***** Under <i>Miguel v. Depart. of Army</i> , 727 F.2d 1081 (Fed. Cir. 1984), the Federal Circuit 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.			

APPENDIX B

THE "DOUGLAS FACTORS"

(FACTORS TO BE CONSIDERED IN SELECTING THE APPROPRIATE ADVERSE ACTION)

In Douglas v. VA, 5 MSPR 280, 5 MSPB 313(1981), the Merit Systems Protection Board set out guidelines (or factors) that agencies should consider in selecting an appropriate penalty. Factors include:

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, technical or inadvertent, 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 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 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.

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

****NOTE:** Not all of these factors apply in every case. In an individual case, some of the pertinent factors will weigh in the employee's favor (mitigating circumstances); others may not or may even constitute aggravating circumstances. The deciding official should make notes about the factors as they are considered. Selection of an appropriate penalty involves a responsible balancing of the relevant factors in the individual case. All aggravating factors, such as prior disciplinary record, relied upon to enhance the penalty should be included in the advance notice of charges so that the employee has a fair opportunity to respond to those alleged factors before the deciding official. The decision notice should explain what weight was given to those factors.

GLOSSARY

Adverse Action. Term generally used in reference to an appealable disciplinary action (i.e., suspension of 15 days or more, removal, reduction in grade, work level or pay, or furlough for 30 days or less).

Alternative Discipline Systems (ADS). ADS' seek to maintain good order and discipline within the work environment through a process that: (1) focuses on the work-related problems caused by an employee's conduct; and (2) creates an environment in which an employee can acknowledge and correct the problem without the adversarial confrontations or impact normally associated with traditional discipline systems. MSPB case law indicates that:

ADS must be structured to meet the requirements of progressive discipline. This includes: documenting in writing prior offenses/counseling; placing the employee on notice that it intends to rely on the record of those actions in assessing future penalties; and, when using prior offenses to enhance a penalty, citing the previous actions/counseling in proposal letters thereby allowing employees to dispute their validity.

Within the DON, ADS may be established as an alternative to formal discipline under the requirements of this instruction.

Before ADS may be used, the activity must first establish a written plan, consistent with the requirements for due process and progressive discipline established in this instruction.

Appropriate penalty/reasonable remedy. These terms are used interchangeably to refer to the corrective action determined to be appropriate after consideration of the facts of the case, the employee's response, and relevant "Douglas Factors" contained in Appendix B.

Appealable Action. A removal; suspension for more than 14 days, including an indefinite suspension; a reduction in grade, work level or pay; or a furlough of 30 days or less.

Burden and Degree of Proof. In making a decision on a proposed action, there are different degrees of proof required for different types of actions. This degree of proof is the same level as required to support cases before the MSPB. Pursuant to 5 CFR 1201.56, the primary degrees of proof are: (1) Substantial evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence and applies to

performance-based actions taken under 5 U.S.C. § 4303. (2) Preponderance of the evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. This standard of proof applies to conduct or performance actions taken under 5 U.S.C. § 7502.

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 workday.

Deciding Official. A supervisor or management official delegated authority to make a determination on proposed disciplinary or adverse action.

Disability. With respect to an individual, disability means (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment (29 CFR 1630.2(g)). The terms disability and qualified individual with a disability (see definition below) do not include individuals currently engaging in the illegal use of drugs when the activity acts on the basis of such use. For a complete listing of exceptions read 29 CFR 1630.3.

Disciplinary Action. Action taken by a supervisor or management official to correct employee misconduct or other situations that interfere with effective operations. Such action is not intended to be punitive but it serves as a deterrent to unacceptable conduct or behavior, promotes high standards of government service, and maintains public confidence in the DON. Disciplinary action may only be taken for such cause as will promote the efficiency of the service.

Douglas Factors. Factors which must be considered in determining appropriate penalties.

Furlough. Temporary status without duties and pay because of lack of work or funds or for other non-disciplinary reasons.

Grade. The numerical designation, GG-1 through GG-15, grouped by work levels, which differentiates within the work level qualifications required, difficulty, and responsibility.

Grievable Action. A letter of reprimand or requirement or a suspension of 14 days or less.

Harmful Error. Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the appellant

to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights. The MSPB will not take cognizance of errors not alleged by appellants to be harmful.

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 the notice of action that may include the completion of any subsequent administrative action. Indefinite suspensions related to security clearance or position sensitivity investigation and/or adjudication, are subject to DoD regulations, codified at 32 C.F.R. § 154.56(b), which provide in relevant part, "no unfavorable administrative action shall be taken under the authority of this part" unless the individual concerned has been afforded... an opportunity to appeal to a higher level authority designated by the component concerned" (i.e., Personnel Security Appeals Board (PSAB)). Therefore, care should be taken to conform to DoD regulation when pursuing indefinite suspension related to security clearance or position sensitivity investigation and/or adjudication.

Letter of Caution (LOC). A non-disciplinary 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.

Letter of Reprimand. A written disciplinary action issued by a superior to an employee based on specific unacceptable conduct deficiencies temporarily retained in OPF for no more than two years.

Letter of Requirement. A written notification 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.

Nexus. The connection or link between the misconduct and the employee's or EDDP's performance that establishes that the adverse action will promote the efficiency of the service.

Noncontestable Action. An oral admonishment or letter of caution. These actions are not recorded in an employee's OPF.

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.

Pay. The rate of basic salary or wage 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).

Performance-Based Action. Reduction in grade, work level, or rate of base pay or removal taken to address unacceptable performance.

Preponderance of the Evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue (5 CFR § 1201.56(c)(2)). This is a higher burden of proof than substantial evidence and it is the level that applies when an appealable action is proposed under 5 CFR § 752 or this instruction. Compare this definition with "substantial evidence."

Qualified Individual with Disabilities. With respect to employment, an individual with disabilities who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of self or others and who, depending upon the type of appointing authority being used:

a. Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or

b. Meets the criteria for appointment under one of the special appointing authorities for individuals with disabilities.

Reasonable Accommodation. Reasonable accommodation is accommodation to the known physical or mental limitations of an employee who is a qualified individual with disabilities that will not impose an undue hardship on the operations of the agency's program. Reasonable accommodation can include, but is not limited to, making facilities readily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, provision of readers and interpreters, reassignment of a non-probationary employee, and other actions (29 CFR 1614.203). Reasonable accommodation may also include: referral to the Civilian Employee Assistance Program (CEAP) for diagnostic counseling and referral for treatment or rehabilitation or other assistance; granting of leave for treatment, rehabilitation or assistance; and a reasonable opportunity to demonstrate an acceptable level of

performance or conduct. A decision to provide reasonable accommodation does not preclude concurrent disciplinary action.

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

Safe Harbor. A provision of the Drug Free Workplace Program (DFWP) that gives an employee a one-time opportunity to voluntarily identify himself or herself as a user of illegal drugs, to willingly undertake counseling and, as necessary, rehabilitation. Safe harbor insulates the employee from discipline for these admitted, but otherwise unknown, past acts of illegal drug use. It does not protect the employee from discipline for admitting to drug trafficking or other drug-related offenses. Also, it does not insulate the employee from removal based on loss of security clearance, loss of access to classified information, or loss of eligibility to occupy a sensitive position.

Substantial Evidence. The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree (5 CFR 1201.56(c)(1)). This is a lower standard of proof than preponderance of evidence. This is the level that applies when the action is proposed under 5 U.S.C. 3592(a)(3), 4303 or 5335 (these actions are not covered in this subchapter). Compare this definition with "preponderance of the evidence."

Suspension. Placing an employee in a temporary status without duties and pay for disciplinary reasons, including pending inquiry. Also see "indefinite suspension."