



A Manager's Guide to Discipline and Documentation

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Agenda

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Authorities

- [VA Handbook 5013](#)
- [VA Handbook 5021](#)
- [AFGE Master Agreement \(2011\)](#)

Policy Governing Discipline and Adverse Action

- ❖ Maintain high standards of employee integrity, conduct, effectiveness and service to the public
- ❖ Prompt corrective action taken to maintain standards and promote efficiency
- ❖ Employees will be:
 - ❖ Informed in writing honestly and specifically why action being brought
 - ❖ Given a reasonable opportunity to present his/her/their side of the case
 - ❖ Employee and representative shall have assurance of freedom from restraint, interference, coercion, discrimination, or reprisal in discussing, preparing and presenting a defense

Steps to Correcting Behavior

- ❖ ORIENT
- ❖ TRAIN
- ❖ PROVIDE FEEDBACK/DISCUSS IMPROVEMENT
- ❖ COUNSEL
- ❖ DISCIPLINE/ADVERSE ACTION
- ❖ REMOVE

Exceptions to Progressive Discipline

- ❖ EGREGIOUS BEHAVIOR
- ❖ PROBATIONARY/TRIAL PERIOD EMPLOYEES

Progressive Discipline



*Oral Counseling is required to be documented. A best practice is to send an e-mail summarizing the conversation and have employee acknowledge receipt.

Counseling Tips

- ❖ Always Be Professional
- ❖ Counsel in private (office or somewhere quiet).
- ❖ Be prepared. Be timely.
- ❖ Use unemotional, calm, and constructive tone of voice.
- ❖ Explain reason for talking to employee.
- ❖ Separate the problem from the employee.
- ❖ Address the problem, not the employee.
- ❖ Discuss the facts, not hearsay.
- ❖ Discuss the workplace expectations (leave requesting policies, conduct during meetings)
- ❖ Allow adequate time for the meeting.
- ❖ Follow Up with written notes

Difference Between Conduct and Performance

Must be assessed early in the process – Is it a matter of “can’t do” or “won’t do”?

Performance – “Can’t do” involves quantity, quality, accuracy and timeliness of work products.

- ❖ Employee lacks the knowledge, skill, or ability to do the job at a satisfactory level
- ❖ Employee is unable to do the job
- ❖ Behavior appears not to be a matter of choice

Conduct – Can do but won’t do

- ❖ Employee violated work rules that related to behavior expectations
- ❖ Employee has the appropriate knowledge, skills, and abilities
- ❖ The behavior appears to be a matter of choice
- ❖ Employee has control over the outcome

Conduct: refusal or unwillingness to perform an assigned task or failure to adhere to established statutes, regulations and policies/procedures.

Examples of Misconduct

- ❖ Unauthorized absence, absence without leave (AWOL)
- ❖ Leave abuse
- ❖ Negligent or careless work
- ❖ Disrupting the work environment with aggressive or abusive behavior affecting morale or the performance of others

Documenting Unacceptable Conduct

Supervisor's Role

- ❖ Ensures policies and procedures are documented and clearly communicated to employees;
- ❖ Ensures employee understanding of policies and procedures and expected workplace behavior;
- ❖ Receives the misconduct complaint or observes the problem;
- ❖ With the help of ER/LR specialist, conducts an inquiry;
- ❖ Gathers evidence. This material may consist of reports of contacts or memorandum from employees/witnesses. Informs employee, as applicable, of right to have union representation; see VBA ERLR sharepoint, investigations page.
- ❖ Discusses with ER/LR specialist;
- ❖ Considers alternatives to discipline;
- ❖ Makes decision regarding action;
- ❖ If there is misconduct, determines action to propose/issue; (if appropriate proposing official)
- ❖ Issues notice of proposed action; and
- ❖ If applicable, hears oral reply to proposed action and makes decision.

Documenting Unacceptable Conduct

ER/LR Specialist's Role

- ❖ Consults with supervisor as needed at each step of the investigative and discipline process;
- ❖ Reviews evidence file;
- ❖ Provides advice and guidance on how to best handle situation;
- ❖ Advises on range of penalties;
- ❖ Discusses alternatives to discipline;
- ❖ Drafts proposal and decision letters including “charges” based on evidence, using OHRM employee relations sample letter templates.
- ❖ Reviews draft letters if created by proposing and deciding officials;
- ❖ Ensures proper procedures are followed, and employee receives due process;
- ❖ Ensures file is complete and complies with policy requirements; and
- ❖ Further advises employee of rights and procedures.

Documenting Unacceptable Conduct

Deciding Official's Role

- ❖ Reviews proposed action;
- ❖ Reviews evidence file;
- ❖ Considers employee's oral and/or written response(s);
- ❖ Conducts [douglas factors](#) analysis, if applicable;
- ❖ Considers alternatives to discipline;
- ❖ Consults with office of general counsel on adverse actions;
- ❖ Renders a decision;
- ❖ Informs bues of their right to have union representation;
- ❖ Informs employee of decision.

Sustaining Your Actions

- ❖ **PROVE THE CHARGE** – Write charge in such a way to identify the actual misconduct with which the employee is charged. Ensure you can support all details of the charge with evidence;
- ❖ **ESTABLISH NEXUS** – Ensure you can show a clear connection between the conduct and a negative impact on the agency’s operations/efficiency of the service (discernable or foreseeable).
- ❖ **SUPPORT PENALTY** – Ensure that evidence and testimony from the witness(es) support(s) the charges and specifications, and the penalty is reasonable considering the circumstances surrounding the misconduct (see Douglas Factors);
- ❖ **AVOID HARMFUL PROCEDURAL ERRORS** – Provide the employee with a notice of the charges, a copy of the evidence, and an opportunity to respond to the charges and evidence before taking the action. Ensure the deciding official can truthfully testify, “I considered nothing but the information in the evidence file and the employee’s reply when making my decision.”

Charge Writing Example - Insubordination

Insubordination is considered an “intent” charge:

- ❖ **Insubordination - Intentional** and **willful** refusal to obey an order which a supervisor is entitled to give and have obeyed.
- ❖ When using this charge, management must prove the employee acted intentionally and willfully, which is considered more difficult to prove. If electing to use this charge, please consult with HCS ER/LR and/or OGC.
- ❖ An alternative charge is "Failure to Follow Instructions" (only requiring proof that the employee was given instructions that he/she failed to follow) or “Conduct Unbecoming of a Federal Employee” (which covers any disruptive behavior).

Adverse Actions Under 38 USC 714

❖ ADVERSE ACTIONS ARE DEFINED AS:

- ❖ Suspensions without pay of more than 14 calendar days;
- ❖ Reductions in grade or rate of basic pay;
- ❖ Removals

❖ AN EMPLOYEE FACING AN ACTION UNDER 38 USC §714 IS ENTITLED TO:

- ❖ Review the evidence – at the time the adverse action proposal notice is issued, management must provide the employee a copy of the evidence file, which contains all the evidence considered in arriving at the proposed action;
- ❖ Reply to the proposal – management must provide the employee 7 business days to reply to the proposal notice;
- ❖ Representation – management must inform the employee he or she may be represented by an attorney or other representative of their choice at all stages, up to and including the issuance of the decision;
- ❖ A written decision with reason – management must provide the employee a written decision on the proposed action within 15 business days from the date of the proposed action.

Supervisory Pitfalls

- ❖ Failing to document conduct problems.
- ❖ Engaging in differential treatment in disciplinary actions from other similarly-situated employees when there is no past formal counseling or previous disciplinary action(s) to support the differential treatment.
- ❖ Providing personal negative feedback in front of peers or calling them in where everyone can hear that they are about to receive counseling.

Supervisory Pitfalls (Cont.)

- ❖ Do Not try to make an example of anyone. The rules apply across the board. Do not allow your personal feelings about anyone interfere in your decisions about what disciplinary action to take (or not take). If you are uncertain what is appropriate or you think you have a conflict of interest, get help from HR Specialist (ER/LR).
- ❖ Most people can accept negative feedback that is done tactfully. However, humiliation will drive a person both to complain or grieve and to reject the criticism. Since your goal is to correct the behavior, then do it so that it is most productive.

Performance Management

Continuous Process with three (3) mandatory components.

- ❖ Establishing the Performance Plan
- ❖ Mid-year Review
- ❖ Final Evaluation

Unacceptable Performance

Failing in one or more critical elements

Definition of a critical element - a work assignment or responsibility of such importance that unacceptable performance of that element alone results in a determination that an employee's overall performance is unacceptable.

Performance Improvement Plan

The elements of a performance improvement plan (PIP):

- ❖ Critical elements and performance standards at issue
- ❖ What the employees is doing improperly
- ❖ What the employee must do to correct the deficiency
- ❖ How you, the supervisor, is going to help
- ❖ Consequences of failing a (PIP) could lead to removal for unacceptable performance

Resources

- ❖ VA Handbook 5013
- ❖ VA Handbook 5021
- ❖ AFGE Master Agreement (2011)
- ❖ Your Local HR Specialist or HCS Employee and Labor Relations Specialist
- ❖ 38 U.S.C. § 714
- ❖ Title 5, United States Code, Chapter 75
- ❖ Title 5, Code of Federal Regulations, Part 752
- ❖ VA Handbook 5021, Part I, IV
- ❖ <http://vaww1.va.gov/ohrm//EmployeeRelations/Conduct.htm>
- ❖ Samples and templates may be found at the Employee Relations and Performance Management Web Site at:
<https://vaww.va.gov/OHRM/EmployeeRelations/>
- ❖ VBA ER/LR SharePoint, Addressing Misconduct
- ❖ VBA ER/LR SharePoint, Administrative Investigations

Questions





Thank You.



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