

**STATE OF OHIO
ADJUTANT GENERAL'S DEPARTMENT
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**Ohio National Guard Technician and Civilian Personnel Discipline and Adverse Action
Program**

15 March 2022

Supplement to Chief National Guard Bureau Instruction (CNGBI) 1400.25 Vol. 752, 08
November 2021, National Guard Technician and Civilian Personnel Discipline and Adverse
Action Program

OPR: Ohio National Guard Human Resources Office

UNCLASSIFIED

SUMMARY of CHANGE

Supplement to CNGBI 1400.25 Vol. 752, National Guard Technician and Civilian Personnel Discipline and Adverse Action Program
Effective: 15 March 2022

- New Enclosure B - Staff Functions
 - Acknowledges right of TAG to assign duties
 - Provides functions of ER and LR specialist in adverse actions
 - Clarification of LRS and ERS functions
 - Clarification of Proposing and Deciding Officials roles
- Enclosure C – New term “corrective actions”
- Enclosure E - Categories of Adverse Actions and Appeal Rights
 - Clarification of those actions not covered by the supplement
 - Clarification that Douglas factors must be considered at the proposing official level.
 - Requiring notice to the employee of other appeal rights (EEOC, OSC) in the proposal, which brings the supplement in line with recent statutory changes.
 - A clear identification of the exclusions from MSPB appeal rights
- Enclosure F – Proposed Action Letter
 - Higher standard of proof regarding Whistleblowers
- Enclosure J - Use of Investigative and Notice Leave
 - Definition of “employee” for purposes of adverse actions.
 - Use of LCAs, Stays, etc.
- Enclosure K – Table of Penalties
- Modification of suggested penalties to more appropriately reflect reality.
- Charges which include the required element of intent.

**Ohio Army and Air National Guard
Human Resource Office
Columbus, OH 43235-2789**

Discipline and Adverse Action Program

Ohio National Guard Technician and Civilian Personnel Discipline and Adverse Action Program

By order of The Adjutant General for Ohio:

**John C. Harris Jr.
Major General
The Adjutant General**

Official:

**Clarence K. Maynus Jr.
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Director of Human Resources**

History. This publication is a supplement to CNGBI 1400.25, Vol 752, 08 November 2021, National Guard Technician and Civilian Personnel Discipline and Adverse Action Program.

Summary. This supplement provides due process, through the NG Technician and Civilian Personnel Discipline and Adverse Action Program, IAW with merit systems principles for affected NG employees. Merit systems principles hold Federal employees accountable for performance and conduct. The term “NG employees” throughout this supplement is defined in accordance with (IAW) references a, b, and c as Title 32 Military technicians (Dual Status) excepted service and Title 5 NG excepted or competitive service employees of the Ohio National Guard.

Applicability. This supplement applies to bargaining unit NG employees of the Ohio National Guard.

Proponent and exception authority. The proponent of this supplement is the Adjutant General of Ohio. The proponent has the authority to approve exceptions to this regulation when they are consistent with controlling laws and regulation.

Management Control Process. This supplement is not subject to the requirements of Army Regulation (AR) 11-2 (Management Control) or Air Force Instructions (AFI).

Purpose.

- a. The purpose of this supplement is to establish policy and assign responsibilities for the Ohio National Guard in accordance with (IAW) references a through d.
- b. This supplement provides policy and procedures for the Ohio National Guard (NG) Technician and Civilian Personnel Discipline and Adverse Action Program IAW references e through j.

Cancellation. This supplement rescinds and replaces Ohio Technician Personnel Regulation (OHTPR) 752 Discipline and Adverse Action, 19 September 2011 and Technician Personnel Regulation (TPR) 752 Discipline and Adverse Action, 27 August 2010

Explanation of abbreviations and terms. Abbreviations and special terms in this regulation are explained in Appendix GL.

Enclosures

- A - Responsibilities
- B - Staff Functions
- C - Corrective Actions
- D - Disciplinary Actions (Letters of Reprimand)
- E - Categories of Adverse Actions and Appeal Rights
- F - Proposed Action Letter
- G - Agency Decision
- H - Suspensions and Removals in the Interest of National Security
- I - Miscellaneous Provisions
- J - Table of Penalties for Various Offenses
- K - References
- GL - Glossary

ENCLOSURE A

RESPONSIBILITIES

1. The Adjutant General (TAG). TAG will:

- a. Establish procedures to ensure due process for employees affected by this supplement.
- b. Consider the recommended discipline or adverse action and issue the agency decision in adverse actions. TAG may delegate responsibility for issuing the agency decision to an appropriate official within the NG.
- c. Provide, if appropriate, the employee the right to file an appeal to the Merit Systems Protection Board (MSPB) or to file a grievance.
- d. Be considered the head of the agency in any administrative action.
- e. Never waive jurisdictional defenses for NG Military Technicians (Dual Status) employed under reference b, and any waiver of TAG statutory authority must be coordinated with the Human Resources Officer (HROs) and State Judge Advocate General (JAG) and approved by TAG. The amendment to subparagraph 5 of paragraph f in reference b authorizes appeals beyond TAG to the Merit Systems Protection Board (MSPB) and Equal Employment Opportunity Commission (EEOC) only in limited circumstances.

ENCLOSURE B

STAFF FUNCTIONS

1. **Explanation of Staff Functions.** Positions identified below are appointed and administered by TAG. It is understood that TAG maintain authority to assign work to their staff. Therefore, the personnel chosen for the assignment of these functions may be determined by TAG. The below indicate suggested assignments.

2. **State JAG.** The State JAG:

- a. Advises TAG, in disciplinary cases including adverse actions and MSPB hearings.
- b. Provides legal guidance and direction to all managers and supervisors on disciplinary responsibilities, rights, and obligations.
- c. Defends any administrative complaint, grievance, claim, or action.

3. **Human Resources Officer (HRO).** The HRO:

- a. Provides procedural guidance and direction to all managers and supervisors on disciplinary responsibilities, rights, and obligations.
- b. Assists supervisors and managers with the procedural aspects of an action before issuing a proposed adverse action or original decision.
- c. Provides necessary training to managers and supervisors on the NG Technician and Civilian Personnel Discipline and Adverse Action Program.
- d. Advises TAG in disciplinary cases including adverse actions.
- e. Provides general and procedural guidance and case information to the affected employee(s).
- f. Consults with the State JAG Office for legal advice on adverse actions, Douglas Factors, and proposed penalties.
- g. Ensures commanders or security professionals report derogatory information promptly (typically within 72 hours) to the appropriate adjudication facility through the Joint Personnel Adjudication System and assist commanders in determining whether the derogatory information warrants the suspension of access to classified information.

4. **Labor Relations and Employee Relations Specialists (LRS and ERS).** LRS and ERS have a joint function in the administration of this supplement. LRS and ERS:

- a. Administer disciplinary and adverse action program for the HRO and TAG in coordination with the State JAG where appropriate and IAW local guidance.

- b. Prepare and implement local guidance regarding this supplement.
- c. Provide advice, assistance, and training to commanders, managers, and supervisors on the effective use of and participation in the program.
- d. Monitor compliance with law, applicable Code of Federal Regulations (CFR) provisions, other CNGB Instructions, this supplement, and all local directives and policies of TAG.
- e. Represent or advise TAG (or his or her representative) in cases regarding employee and or labor relations.

5. Managers and Supervisors. Managers and supervisors:

- a. Maintain an office or shop atmosphere conducive to good employee-management relations.
- b. Practice and maintain discipline to reduce the need for formal discipline or adverse actions.
- c. Ensure employees understand their duties and work practices, safety, and security requirements.
- d. Ensure any action taken is justified by facts and circumstances and is consistent with agency policy, precedent, and any applicable CBA.
- e. Investigate allegations of misconduct.
- f. Promptly report derogatory information about an individual with National security eligibility (regardless of whether that individual has access to classified information) to the appropriate security professional or commander of the NG organization to which the employee is assigned when such information relevant to the adjudicative guidelines is developed or otherwise becomes available.
- g. In effecting disciplinary actions, the agency endorses the use of like penalties for like offenses and progressive discipline. However, mere surface consistency is to be avoided. The agency shall give due regard to the existence of the mitigating and/or aggravating circumstances, the nature of the position occupied by the technician or 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 technician or employee's disciplinary history, and will be determined on a case by case basis.
- h. In determining the appropriate penalty to propose and/or impose in a disciplinary action, the Parties agree that it is appropriate for supervisors to consider and balance a variety of circumstances as pertinent to the case, which may result in mitigation or aggravation. Examples of such circumstances are the technician or employee's past work and disciplinary records, length of service, the potential for her/his rehabilitation, the seriousness of the offence and its

relation to the technician or employee's duties and its impact on the agency, the consistency of the penalty with those imposed on others in similar situations, potential alternative sanctions to deter future misconduct, etc.

i. Disciplinary actions will not be taken for arbitrary and capricious reasons. An employee will be disciplined only for such cause as will promote the efficiency of the service.

6. Proposing Official. The Proposing Official:

a. Develops the facts (by a preponderance of the evidence) that constitute cause for the action in consultation with Human Resources and State JAG.

b. Identifies the cause, specifications, (charge, specification(s)) for the action(s).

c. Completes the Douglas Factors Analysis (See Appendix A to Enclosure F, Figure 7) and explains the rationale for all aggravating factors and how the analysis was used to determine the proposed penalty. Consult with the servicing HRO and State JAG as needed.

d. Informs a bargaining unit employee of his or her Weingarten right to be represented by the union when three conditions apply:

(1) The employee is examined in an investigation conducted by one or more representatives.

(2) The employee reasonably believes disciplinary action against him or her may result.

(3) The employee requests a union representative.

7. Deciding Official. The Deciding Official is either TAG or an individual delegated by TAG to make agency decisions on adverse actions. The Deciding Official provides the final agency decision on an adverse action proposed by the Proposing Official.

8. Employee. The employee is responsible for maintaining professional conduct and courtesy in the workplace and for cooperating with the adverse action administrative and investigative process IAW reference r. Acknowledging the receipt of a notice of misconduct does not imply agreement with the charged misconduct.

ENCLOSURE C

CORRECTIVE ACTIONS

1. **Corrective Actions.** A corrective action is appropriate when the misconduct is minor or cessation or non-repetition of the misconduct is a satisfactory resolution of the matter. The action to be taken for an instance of misconduct should be tailored to the facts and circumstances. Each employee's work performance and disciplinary history are unique, and the action should be calibrated to the specific facts and circumstances of each individual employee's situation.

a. **Counseling.** Where corrective action is appropriate, counseling may be suitable. Counseling is oral and not recorded in the Supervisor's Work Folder on the electronic Supervisor's Employee Brief for the employee. A counseling is not applicable as a disciplinary or adverse action for the purposes of progressive discipline.

b. **Admonition.** If the minor misconduct continues or is repeated after counseling but corrective action is still appropriate, admonition is warranted. Supervisors and Deciding Officials are not required to issue an admonition before disciplining or proposing adverse action. The penalty for an instance of misconduct should be tailored to the facts and circumstances. The admonition is written in the Supervisor's Work Folder on the Supervisor's Employee Brief for the employee. The Employee Brief should be periodically printed from MyBiz TM for this and other uses. This supervisor's record is kept by the supervisor and only needs to be provided to the human resources office if it is required as evidence of employee awareness of a workplace rule or other factor in a subsequent disciplinary or adverse action. The employee must be allowed to write his or her reply to the facts and reasons stated by the supervisor on the brief. If the employee replies orally, the supervisor will write a short summary of the reply and if the employee is in agreement, the employee will sign acknowledgement of the short summary. If the employee refuses to sign, the supervisor will annotate on the summary with the date of refusal. The supervisor will state the date on which the admonition and reply will be expunged, absent continuation or repetition of the minor misconduct. An admonition is not applicable as a disciplinary or adverse action for the purposes of progressive discipline.

ENCLOSURE D

DISCIPLINARY ACTIONS (LETTERS OF REPRIMAND)

1. **Letter of Reprimand. Refer to the Collective Bargaining Agreement between the Ohio National Guard and AFGE Local 3970, Article 11 for procedures.** Letter of Reprimand. A letter of reprimand is a disciplinary action but does not constitute an adverse action. It may be used when corrective action is ineffective or when the nature of the offense warrants a more serious and formal action. NG employees should be treated equitably, so agencies should consider appropriate comparators as they evaluate potential disciplinary actions. When taking disciplinary action, supervisors will utilize the “Douglas Factors” in determining the appropriateness of a disciplinary action.

a. **Procedures.** A letter of reprimand is issued by a person in the employee’s supervisory chain, normally the first-line supervisor. The first-line supervisor will receive a copy of the letter of reprimand if it is issued by a different management official. The issuing supervisor must determine, by a preponderance of the evidence, that the facts supporting the issuance of the letter of reprimand are substantiated. This might, but does not always, require a formal or informal investigation. The letter of reprimand will be cleared for procedural accuracy through the LRS. All letters of reprimand must at a minimum include the following:

(1) A description of the offense (sometimes referred to as the cause or charge) in sufficient detail to show why the letter of reprimand is being issued.

(2) The timeframe that the letter of reprimand will remain in effect in the employee’s electronic Official Personnel Folder, typically one but no more than two (2) years. Circumstances or the applicable CBA may require a different timeframe. Detail the circumstances that require other timeframes in writing.

b. **Repeated Behavior.** Repetition of the same offense may warrant more severe disciplinary action, as indicated in the table of penalties (Enclosure K).

c. **Grievances.** All letters of reprimand are subject to grievance procedures. All bargaining unit employees must use the negotiated grievance procedure.

d. **Use in Adverse Actions.** Letters of reprimand may be used as evidence of a previous offense for consideration of progressive discipline in adverse action proceedings only if the adverse action is commenced before the letter of reprimand has expired and if the reprimand is otherwise still in effect and is like or a similar offense.

ENCLOSURE E

CATEGORIES OF ADVERSE ACTIONS AND APPEAL RIGHTS

1. **Actions That Constitute an Adverse Action.** Adverse Actions are defined in reference f. Examples of adverse actions include suspension without pay, a reduction to a lower grade or pay, or removal from employment. An action does not need to be for conduct or performance in order to be considered an adverse action. Actions that would not constitute an adverse action for the purpose of determining right to due process under reference f include but may not be limited to those items in Figure 1 below.

1. Actions based on classification or job grading determinations.
2. Reduction in force and furlough actions IAW reference o.
3. Mandatory retirements.
4. Denial of within-grade increases.
5. Reduction of an employee's rate of pay from rates that are contrary to law or regulation.
6. Termination or reduction of entitlements that affect employee pay but do not involve any loss of base pay (for example, night differential, environmental pay, hazard pay).
7. Actions that entitle an employee to pay or grade retentions or actions to terminate such entitlements taken under the appropriate procedures for such actions.
8. Terminations of temporary promotions or details when the temporary nature of the promotion or detail was made clear as a condition of such promotion or detail.
9. Adverse action taken on an individual who does not meet the definition of "employee" as provided in reference f.
10. A reduction in force action taken in accordance with reference o.
11. A reduction in grade of a supervisor or manager who has not completed an applicable supervisory probationary period if such a reduction is to the grade held immediately before appointment to that position.
12. An action taken in accordance with reference l.

Figure 1. Examples of Actions Not Covered in this Supplement

2. **Categories of Adverse Actions.** There are two (2) categories of adverse actions:

- a. Category 1 Suspensions of 14 calendar days or less.
- b. Category 2.

(1) Removal. Progressive discipline is required prior to removal unless the nature of the offense is egregious that removal is warranted in accordance with Ohio National Guard Collective Bargaining Agreement.

(2) Suspension for more than 14 calendar days.

(3) A reduction in grade.

(4) A reduction in pay.

(5) A furlough of thirty (30) days or less (is considered an adverse action in regulation but not covered in this instruction).

3. **Adverse Action Package.** An adverse action package contains the following items (see the enclosures for additional details):

- a. Proposed action letter (mandatory) to include an analysis of the Douglas Factors to support proposed penalty.
- b. Employee's response (if provided).
- c. All relevant documentation which may include but is not limited to; witness statements, ATAAPS reports, inquiry findings, etc, used in formulating the decision.
- d. Decision letter (mandatory).

4. **Adverse Actions Appeals.** Adverse actions, regardless of category, are administratively processed to TAG (or designee) for an agency decision. TAG (or designee) will issue the agency decision and inform the employee of any right he or she has to seek further review.

a. MSPB appeals may not apply when TAG (or designee) issues the agency decision for Category 1 adverse actions. For these actions, TAG (or designee) will:

(1) Issue the agency decision.

(2) Inform the employee of his or her right to:

- (a) Use the negotiated grievance procedures for bargaining unit employees or;
- (b) Request an administrative hearing, if applicable, through the NG Hearing Examiner Program.

(c) Request an appellate review. The appellate review is accomplished by the Adjutant General without the involvement of a NGB hearing examiner. This appellate review involves a review by the Adjutant General of all pertinent records including the reply(s) of the NG employee and/or their representative and any documents submitted with the appeal. In this method of appeal, the final decision on appeal is issued by the Adjutant General.

b. In Category 2 adverse actions, TAG (or designee) will:

(1) Issue the agency decision.

(2) Inform the employee of the right to:

(a) Appeal to the MSPB within thirty (30) calendar days of the effective date of the action, if any, or within thirty (30) calendar days after the date of receipt of the agency's decision, whichever is later or;

(b) Use the negotiated grievance procedures for bargaining unit employees or;

(c) Utilize other means of appeal including EEOC, Office of Special Counsel, etc., if applicable.

5. Canceling and Restarting Adverse Actions. Adverse actions are administrative actions, not criminal actions, and are not subject to "double jeopardy" rules. At any time, an adverse action may be cancelled, changed, or restarted. If an adverse action is cancelled for purposes of starting it over, the employee affected by the adverse action must be made whole (returned to the position the employee would have been in prior to the action). This may include returning the employee to a previously held position, restoring leave, and restoring back pay. All references to the initial action, including cancellation, must be removed from the employee's files if the cancellation is due to the agency determining the information leading to the action to be inaccurate or was taken illegally or in error.

6. Adverse Actions Taken Against Military Technicians Who are Not Subject to Due Process Procedures. These actions include those taken for activity occurring while the member is in a military pay status, or concern fitness for duty in the reserve components. These actions only require a thirty (30) calendar day prior notice IAW subsection (f)(6) of reference b.

ENCLOSURE F

PROPOSED ACTION LETTER

1. **Proposed Action Letter.** The proposed action letter is the first official document produced in the adverse action proceeding and must include, at a minimum, the items in Figure 2 and Figure 3 provides a sample proposed action letter that could be used for a hypothetical situation. The sample contains some crude language to point out that the action needs to be explained accurately and in detail.

1. Cause for the action being taken.
2. Penalty being proposed.
3. Analysis of Douglas Factors used to determine proposed penalty.
4. Statement indicating the right to interview witnesses that agree to be interviewed voluntarily, and to review, copy, or receive the materials (documents, recordings, emails, reports of investigations, etc.) relevant to the cause for the action. Witnesses who do not agree voluntarily to be interviewed in this manner will normally not be directed to however, management should ensure that they do not discourage such an agreement.
5. Statement indicating the NG employee's right to reply.
6. Statement providing potential appeal avenues if proposed action is sustained.
7. Deciding Official's contact information.

Figure 2. Proposed Action Letter Contents

- a. **Cause.** The cause (or Charge) is the reason that the adverse action is being proposed.

(1) Stating the cause by listing an offense from the Table of Penalties for Various Offenses (Enclosure K), not sufficient. Enough additional facts must be included in the proposed action letter to allow the employee to know the details (who, what, when, and where) of the offense that the employee is charged with. The additional facts are commonly known as "specifications". Separate causes can be addressed in the same action. For example, absent without leave (AWOL) and misuse of a Government charge card may be addressed in the same action. However, different charges for the same offense, such as AWOL and unexcused tardiness, should not be addressed in the same action.

(2) If an employee is arrested for, indicted for, or convicted of a criminal offense, the arrest, indictment, or conviction should not be used as the cause. The conduct that led to the arrest, indictment, or conviction can be used as cause for the adverse action. Additionally, effects arising from the arrest, indictment, or conviction could be used as cause for an adverse action. Conduct occurring away from the workplace or outside of the employee's duty day may be the basis for cause if there is a nexus between the conduct and the efficiency of the Service. Where a

nexus to off duty conduct is alleged, it should be explained in the cause portion of the letter and reviewed by the State JAG for legal sufficiency.

(3) The standard of proof for a criminal conviction is “beyond a reasonable doubt”; this standard does not apply to administrative adverse actions. The standard of proof for upholding an administrative adverse action based on conduct is “preponderance of the evidence.” The definition of a preponderance of evidence is generally accepted to be that a claim is more likely to be true than not. There may be sufficient evidence to support an adverse action even if the facts are insufficient for a criminal conviction. Proposing Officials need not, and generally should not, wait for a criminal conviction before proposing adverse action, but must speak to the State JAG and HRO before taking any action. In some criminal cases, an indefinite suspension may be appropriate while the criminal action is being adjudicated. An exception to the preponderant evidence standard is when an employee can make a substantiated claim that they are a whistleblower. In that case, the agency must prove by clear and convincing evidence that they would have taken the action regardless of the whistleblower status of the employee.

b. **Proposed Penalty.** The proposed penalty must be stated completely, and an explanation for selecting it must be briefly stated. Penalties must be similar for offenses with like circumstances. The Table of Penalties for Various Offenses (Enclosure K) provides a general guide for common offenses. Variation from the proposed penalties is permissible when facts and circumstances warrant it. When circumstances require variation, those circumstances must be detailed so the employee can respond. When a removal is proposed, the proposed action letter will also indicate the proposed effective date of the removal at least thirty (30) calendar days from the date of the proposal. However, no penalty will be imposed until TAG (or designee) issues the agency decision.

c. **Douglas Factors Consideration.** The Proposing Official will complete a Douglas Factors Analysis Worksheet (Appendix A to Enclosure F, Figure 7) and explain the rationale for all aggravating factors in consultation with the State JAG and HRO.

d. **The Right to Review Material and Interview Witnesses.** The employee or the employee’s representative is entitled to review, copy, or receive materials relevant to the proposed action letter; this includes having witnesses identified and the right to interview witnesses with their consent. If witnesses consent to be interviewed, a neutral party must be present. If witnesses refuse to be interviewed, this will be annotated in the employee’s rebuttal to the deciding official. If these materials are not available at the original time of review, the time for the employee’s response does not start until the materials are made available to the employee or the employee’s representative. Documents in the public domain may be used if the employee or the employee’s representative has access to the material. Material that cannot be made public, such as classified material, should not normally be used as the basis for an adverse action.

e. **The Right to Reply.** The employee must be informed of his or her right to reply to the proposed adverse action letter (See Figure 3) through a written submission(s), orally, or by both methods. The employee also must be informed of the timeframe for making the reply.

(1) Timeframes will be specified in calendar days, a minimum of seven (7) days will be afforded for the employee to reply, and the employee will be informed of the process for

requesting extensions. Employers must provide a reasonable amount of duty time for the employee to prepare a reply. If the State's administrative grievance procedure provides for a reasonable amount of duty time for an employee's representative, they may also provide the same consideration in cases of adverse action processes. The employee may request an extension of time to reply. The employee should articulate directly, or through his or her representative, communicate the reason for an extension in writing and in sufficient detail for the individual receiving the request to make an informed decision. The individual receiving the request may ask for clarification of the extension request when appropriate.

(2) The employee (or his or her representative) may reply in writing, orally, or by both methods. Witnesses will not be called during the reply portion of an adverse action. Voluntary statements or documents may be submitted as part of any reply. More than one reply by the employee may be submitted during the replying stage, such as when new information comes to light during the employee's initial reply. A reply is not required, and no adverse inference may be drawn from the fact that the employee did not submit a reply.

f. **HRO Technical Assistance.** The employee must be provided with the name and contact information of a member of the Human Resources Office for procedural assistance (normally the ERS or LRS). The Human Resources Office member cannot provide representation for the employee concerning the merits of the case but may provide procedural advice.

Heading: [Name, Date]

Subject: Notification of Proposed Adverse Action.

1. This is notification that I propose to [suspend for [number] days and/or change to lower grade or remove] you from your position as [Title and grade of position] for the following [Charge(s)].

a. [Charge One (example Failure to follow established leave procedures)]

(1) [Specification 1. Your established work schedule is 0800-1630 which has been in effect since the date of your appointment on [Date].

(2) [Specification 2. On [Date] you arrived to work 15 minutes after your scheduled duty shift without an appropriate explanation and you were counseled that repeated tardiness would result in disciplinary or adverse action.]

(3) [Specification 3. On [Date] you received a letter of reprimand for being absent without leave (AWOL) for 8 hours on [Date].

(4) [Specification 4. On [Date] you arrived at work 30 minutes past your scheduled work shift start. When you were confronted for this behavior, your behavior became inappropriate.

Figure 3. Sample Proposed Action Letter

b. [Charge Two (example Discourtesy)]

(1) [Specification 1. In regard to Charge 1, Specification 4, when I asked you to report to my office regarding your repeated tardiness you told me that I could “Go to Hell”.

(2) [Specification 2. After your remark I asked that you calm down and if you could not calm down that you should request leave and leave the workplace but that your prior unexcused absence would still be coded as AWOL and you could face a disciplinary action for that charge. You told me that I could take my disciplinary action and “Stick it up my ass”.

NOTE: The use of vulgar language here is for the purpose of highlighting the fact that all factual information is necessary. Sometimes it becomes necessary to include language that an employee has used, however offensive, to ensure the facts are known.

2. The witnesses known to me are [names and positions]. You are entitled to interview them and any other National Guard employee(s) or military members who may have relevant information if they are willing to be interviewed. You may arrange interviews on your own or with my assistance. I have enclosed all documents that I have relied upon for your use. OR: You may review and copy the documents I have relied upon by making arrangements with [name] at [location]. [NOTE: the period for the employee to reply does not start until the supporting documents are made available to the employee.]

3. In order to determine an appropriate penalty, I considered what are known as “Douglas Factors”. The analysis of those factors that I conducted is included in [Name attachment] along with an explanation of any that I considered to be aggravating factors.

4. You have the right to reply to this proposed action letter orally, in writing, or by both methods to [name, address, and contact information], who will receive your reply(s) and issue the original decision letter after the period for reply has ended. That reply must be received by [the named individual] no later than [no less than seven days from the date of this letter]. You will be granted [amount of time, hours, or days] of excused absence to prepare your reply. Arrange for the use of this time with your immediate supervisor.

5. If this proposal is sustained, you may have appeal rights through various processes including but not limited to [Include appropriate “from” (Merit Systems Protection Board, Office of Special Counsel, Equal Employment Opportunity Commission, or grievance)]. Each of these options have potential limitations for their processes. If you have questions regarding these options, you may contact the [name, address, and contact information].

6. The Human Resources Office has been consulted on the issuance of this letter and [Name and contact information] of the HRO is available to answer your procedural questions. This HRO member is not your representative.

(Figure 3. continued. Sample Proposed Action Letter)

7. After the period for your reply has ended, the Deciding Official will issue the original decision letter. If you require more time to reply, you must request an extension from the Deciding Official in writing, provide the reasons for the extension, and provide the period of time for your requested extension. This request must be received by the Deciding Official before the end of the reply period. The official may grant all, a portion, or none of this extension request.

8. [Optional] [Provide employee assistance information.]
[Signature block]

I [Name], have received this letter of proposed action this [number] day of [Month, Year]. My signing below is not agreement with the content, only acknowledgement that I have received a copy of the letter.

[National Guard employee's name]

(Figure 3. continued. Sample Proposed Action Letter)

g. **Employee Assistance Program (EAP).** If it appears that a personal drug or alcohol abuse or other significant personal problem may have contributed to the cause for the adverse action, Employee Assistant Program information should be provided to the employee. You may not order a command-directed mental health evaluation for a civilian employee. Consult with the HRO and State JAG before offering treatment.

APPENDIX A TO ENCLOSURE F

THE DOUGLAS FACTORS

1. Douglas Factors. In determining the appropriate remedy, management must observe the principle of “like penalties for like offenses in like circumstances.” This means penalties will be applied as consistently as possible. Management must establish that the penalty selected does not clearly exceed the limits of reasonableness. A well-known MSPB case (Douglas vs. Veterans Administration) addressed this issue in detail. A number of factors that management must consider in deciding an appropriate course of action are listed in Figure 4 (Douglas Factors) and Figure 5 (Douglas Factors Analysis Worksheet).

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 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. Note: To be considered, any past disciplinary action must have been a past action at the time the most recent conduct occurred.
4. The employee’s past work record, including the length of service, performance on the job, ability to get along with fellow workers, and dependability.
5. The effect of the offense on the employee’s ability to perform his or her job at a satisfactory level and its effect on the supervisor’s confidence in the employee’s ability to perform assigned duties.
6. The consistency of the penalty with those imposed on other employees for the same or similar offenses.
7. The consistency of the penalty with National Guard Bureau guidance regarding disciplinary actions.
8. The notoriety of the offense and its impact on the reputation of the agency.
9. The clarity with which the employee was on notice of any rules violated in committing the offense or any warning about the conduct in question.
10. The potential for the employee’s rehabilitation.

Figure 4. Douglas Factors

11. The mitigating circumstances surrounding the offense, such as unusual job tensions, personal problems, mental impairment, harassment or bad faith, malice, provocation on the part of others involved in the matter, or deployment-induced or combat-related stress.
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

(Figure 4. continued. Douglas Factors)

DOUGLAS FACTORS ANALYSIS WORKSHEET
Determining Appropriateness of Penalty Checklist for Deciding Officials

Employee's Name:

Action Proposed and Date of Proposal:

NOTICE TO PROPOSING OFFICIAL

As the Proposing Official, you are responsible for considering all relevant Douglas Factors (listed below) in determining whether the proposed disciplinary action is appropriate.

Your analysis of the Douglas Factors will be considered part of the case file, and you could be asked to testify regarding your analysis, should the employee appeal the decision.

Be sure to include all information that you relied upon in making your determination regarding the appropriateness of the penalty in this analysis of the Douglas Factors.

INSTRUCTIONS FOR PROPOSING OFFICIAL

Each of the factors should be considered in light of the facts and circumstances presented in management's proposal letter (and supporting documents) and in the employee's reply. For each factor, you should annotate whether the factor has been considered aggravating, mitigating, or having no impact (was neutral) in your formulating your final decision.

Write a brief explanation for each factor you determine to be aggravating or mitigating—particularly with respect to those factors you consider “aggravating.”

Aggravating: to make more severe, intense, serious, worse, or grave.

Neutral: Neither a contributing nor detracting factor.

Mitigating: to make less severe, intense.

Figure 5. Sample Douglas Factors Analysis Worksheet

DOUGLAS FACTORS ANALYSIS WORKSHEET

ANALYSIS OF DOUGLAS FACTORS

1. Nature and seriousness of the offense.

Nature of the offense (briefly summarize what happened):

Seriousness of the offense (explain how serious and why so serious):

Aggravating Neutral Mitigating

Explanation:

2. Employee's job level and type of employment.

a. Employee's Title, Series, and Grade:

b. Is the employee a supervisor? Yes No

c. Is the employee in a position of special trust? Yes No

d. Is the misconduct related to public contact required by the job? Yes No

[For example, rude to customers.]

e. Is the misconduct directly related to the job? Yes No

[For example, supply clerk who steals supplies in his or her care.]

Aggravating Neutral Mitigating

Explanation:

(Figure 5. continued. Sample Douglas Factors Analysis Worksheet)

DOUGLAS FACTORS ANALYSIS WORKSHEET

3. Employee's past disciplinary record. [This includes only documented discipline for which the employee received a reprimand or a written proposal notice, an opportunity to respond, and a decision letter. Any disciplinary action taken against the employee should have been made an official record in the employee's official personnel file. Memorandums of Record for the supervisor's personal use do not belong here.]

List all previous disciplinary actions considered:

Action effected: _____ Date: _____

Action effected: _____ Date: _____

Action effected: _____ Date: _____

Aggravating Neutral Mitigating

Explanation:

4. Employee's past work record.

a. How long has the employee been with the current organization? _____

b. How long has the employee been with the Federal Government? _____

c. Ratings of last three performance appraisals.

Last rating of record _____

Year prior rating of record _____

Two years prior rating of record _____

d. Is current performance acceptable? Yes No

[If no, provide documentation of counseling.]

Aggravating Neutral Mitigating

Explanation:

(Figure 5. continued. Sample Douglas Factors Analysis Worksheet)

DOUGLAS FACTORS ANALYSIS WORKSHEET

5. Effect of the offense on the employee's ability to perform his or her job and effect on supervisor's confidence in the employee.

Did the offense affect:

a. The employee's ability to do the job? [For example, an employee cannot perform job duties if AWOL.] Yes No

b. Your confidence in the employee's ability to do job? [For example, the employee is responsible for approving leave but lied on a timecard.] Yes No

c. Your confidence in the employee's ability to uphold the organization's mission? [For example, a supply specialist stealing supplies.] Yes No

Aggravating Neutral Mitigating

Explanation:

6. Consistency of penalty with other employees' penalties for similar offenses

No other employee under my supervision has committed offenses similar to those alleged. Does the union representative have any historical data regarding similar offenses?

The penalty is similar to those given to other employees under m supervision.

The penalty is NOT consistent with other penalties; however, I believe that a more severe or less severe penalty is appropriate. [This must be explained thoroughly because different treatment often forms the basis for claims of discrimination.]

Aggravating Neutral Mitigating

Explanation:

(Figure 5. continued. Sample Douglas Factors Analysis Worksheet)

DOUGLAS FACTORS ANALYSIS WORKSHEET

7. Consistency with agency's Table of Penalties. [The table is only a guide; and reasons for departing from it must be rational, well-reasoned, and explained because disparate treatment often forms the basis for claims of discrimination.]

The employee is being charged with _____

- This is a first offense.
- This is a second offense.
- This is a third offense.

Identify the most closely related charge in the table of penalties:

The table of penalties recommends _____

for a [circle one] first, second, or third offense of _____

- Aggravating Neutral Mitigating

Explanation:

8. Notoriety of the offense or its impact on the agency's reputation. [Adverse publicity within or the possibility of adverse publicity outside the agency that could have a negative impact on the reputation of the agency or the agency's mission is a factor that may be considered to enhance a penalty.]

- Aggravating Neutral Mitigating

Explanation:

9. Clarity of notice to employee of unacceptable conduct. [Was the employee aware that his or her actions or behaviors were inappropriate? How was the employee made aware (for example, meeting, email, policy issuance, prior counseling, or prior discipline)? Should the employee have known without being told? If so, why do you believe that the employee should have known?]

- Aggravating Neutral Mitigating

Explanation:

(Figure 5. continued. Sample Douglas Factors Analysis Worksheet)

DOUGLAS FACTORS ANALYSIS WORKSHEET

10. Potential for employee's rehabilitation. [The employee's reaction accepting responsibility and a sincere desire not to repeat the offense may be considered mitigating. On the other hand, if the misconduct was clearly wrong and the employee should have known better, you may believe the potential for rehabilitation is low. Remorse or lack of remorse is often listed here as showing of rehabilitative potential.]

Aggravating Neutral Mitigating

Explanation:

11. Mitigating circumstances.

The following factors do not excuse the misconduct; however, they may encourage you to reduce (mitigate) the penalty if the employee:

a. Was under unusual job stress? Yes No

[For example, stress contributed to the employee's insubordination.]

b. Was experiencing personal problems? Yes No

c. Was provoked? Yes No

[For example, a coworker threatened the employee before the employee punched the coworker.]

d. Was apologetic? Yes No

e. Brought the misconduct to management's attention? Yes No

[For example, the employee confessed the misuse of a Government Travel Card.]

Aggravating Neutral Mitigating

Explanation:

(Figure 5. continued. Sample Douglas Factors Analysis Worksheet)

DOUGLAS FACTORS ANALYSIS WORKSHEET

12. Adequacy of alternative sanctions to deter misconduct.

- I believe no lesser sanction will deter future misconduct.
- I believe a lesser sanction will deter future misconduct.
- I believe an alternative sanction is more appropriate.
- Aggravating Neutral Mitigating

Explanation:

Proposed action: After giving full and impartial consideration to the circumstances, the evidence, witness testimony, and the factors above, I am proposing to [name the proposed penalty]:

Additional comments:

I [print name] _____ certify that all of the information I considered in determining the appropriateness of the proposed penalty has been included in this analysis of the Douglas Factors and that I have considered all relevant Douglas Factors.

Signature _____ Date _____

(Figure 5. continued. Sample Douglas Factors Analysis Worksheet)

2. **Past Discipline or Adverse Action.** Management must ensure that previous disciplinary actions or adverse actions used as evidence of progressive discipline in determining a penalty are past actions (in effect) at the time the employee committed the unacceptable conduct. Otherwise, TAG (or designee) will have to find consideration of it improper and not rely on it.
3. **Relevant Factors.** Some factors may not apply to a given case, and relevant factors must be considered. Bear in mind, however, certain offenses (for example, willful misuse of a Government vehicle) carry mandatory minimum penalties.

ENCLOSURE G

AGENCY DECISION

1. **Decision Authority.** Development of TAG's decision is the final internal review process prior to imposing an adverse action. TAG may elect to delegate to a subordinate NG official(s) the authority to make the agency decision.
2. **Decision Process and Procedures.** TAG (or designee) will consider the merits of the case prior to issuing the agency decision. See Figure 6, "Elements of an Agency Decision Letter," for guidance on preparing a decision letter. The agency must remain aware that the employee is entitled to any information that was considering in deciding an adverse action. If any information is presented after the issuance of a proposed action, not including the employee's reply, and the Deciding Official considers that information, the employee must be made aware of that new information and provided an additional opportunity to reply.
3. **Agency Decision Criteria.** The agency decision will be based on the following:
 - a. Did the employee do what he or she is charged with?
 - b. Will some discipline, based on the proven misconduct, promote the efficiency of the service?
 - c. Is the penalty reasonable?
4. **Decision.** TAG (or designee) may sustain, reduce, or dismiss the penalty or enter into a last chance agreement. A decision letter will provide any appropriate explanation for the decision.
5. **Last Chance Agreements (LCAs).** On occasion it may be desirable to enter into an LCA rather than immediately remove an employee from his or her position. This determination is at the sole discretion of TAG (or designee). LCAs hold removals in abeyance under certain conditions. Conditions and a sample last chance agreement can be found in Enclosure J.
6. **Right to File a Grievance or Appeal.** Information about an employee's right to file a grievance, if applicable, or an appeal to the MSPB, if applicable, must be provided. The information must include the contact information of the MSPB regional office for the State in which the appeal is being filed. A copy of the MSPB appeal form (or the website and instructions for filing if the MSPB office of jurisdiction has limited appeals to an online process) and the time limits for appealing to the MSPB.
7. **Filing an Appeal.** An employee must file an appeal with the MSPB IAW reference 1 within thirty (30) calendar days of receiving the agency's final decision on an adverse action, or the effective date of the adverse action, whichever is later.

8. **MSPB Form.** The employee must be given a copy of MSPB Form 185, “U.S. Merit Systems Protection Board Appeal Form,” if applicable, and a copy, or access to a copy, of the MSPB regulations. If the MSPB office of jurisdiction requires online filing, the employee must be provided with the appropriate website and instructions on how to file.

1. The decision in specific terms. For example, “I have decided to [(remove you) (suspend you for calendar days) (reprimand you)].”
2. The specific reasons for the decision. Include:
 - a. Only the reasons specified in the notice of proposed action (or for which the employee was subsequently provided additional notice and an opportunity to reply).
 - b. A reference to the proposed notice, the recommendation if applicable, and the reason(s) you have sustained.
 - c. The reasons for the decision in enough detail to document the basis for the action.
 - d. The employee’s past disciplinary record, but only if it was relied on in proposing the action and included in the notice.
 - e. Comments on the Douglas Factor Analysis. If the Deciding Official considers any additional factors as aggravating beyond those identified in the proposed action that information must be provided to the employee with an additional time to reply prior to issuing the decision.
3. The effective date of an adverse action. For suspensions, include the first and last day of the suspension and the date and time the employee is to return to duty.
4. If mitigated to a reprimand, the expiration date of a reprimand. [For example, “This reprimand will be filed in your official personnel folder and noted on the automated Supervisor’s Employee Brief (generated by the Defense Civilian Personnel Data System with appointment action or as required) for two years from the date of this decision.”] Tell employees when the reprimand will be destroyed and when the reference to it on the Supervisor’s Employee Brief will be deleted.
5. Information about an employee’s right to a grievance procedure.
6. Information about an employee’s right to appeal to the MSPB, if applicable.

Figure 6. Elements of an Agency Decision Letter

7. Information about any other potential appeal rights including but not limited to EEOC and/or Office of Special Counsel.
8. An employee must file an appeal with the MSPB IAW reference 1 within thirty (30) calendar days of receiving the agency decision on an adverse action, or the effective date of the adverse action, whichever is later.
9. A copy of MSPB Form 185, if applicable, and a copy, or access to a copy, of the MSPB regulations.
10. Deciding Official's signature.
11. The decision date. Date the decision before delivering it to the employee.

(Figure 6. continued. Elements of an Agency Decision Letter)

ENCLOSURE H

SUSPENSIONS AND REMOVALS IN THE INTEREST OF NATIONAL SECURITY

1. **Suspension.** Notwithstanding other statutes, TAG may immediately suspend without pay an employee of their agency when they consider that action necessary in the interest of national security IAW Subchapter 7532 of reference f. Situations to consider in this enclosure include loss of access to classified information when that access is a requirement of the employee's position.
2. **Notification.** To the extent that TAG determines that the interests of national security permit, the suspended employee will be notified of the reasons for the suspension.
3. **Submission of Statements.** Within thirty (30) calendar days after the notification, the suspended employee is entitled to submit to TAG, or an official designated by TAG, statements or affidavits to show why they should be restored to duty.
4. **Removal.** TAG may remove an employee suspended under paragraph 1 when, after such investigation and review as they consider necessary, they determine that removal is necessary or advisable in the interests of national security. The determination of TAG is final.
5. **Right to Due Process.** An employee suspended according to this enclosure who has permanent or indefinite appointment, completed applicable probationary or trial period or is a citizen of the United States is entitled, after suspension and before removal, to:
 - a. A written statement of the charges against them within thirty (30) calendar days after the suspension, which may be amended within thirty (30) calendar days thereafter and will be stated as specifically as security considerations permit.
 - b. An opportunity within thirty (30) calendar days thereafter, plus an additional thirty (30) calendar days if the charges are amended, to answer the charges and submit affidavits.
 - c. A hearing at the request of the employee, by an agency authority duly constituted for this purpose.
 - d. A review of the case by TAG before a decision adverse to the employee is made final.
6. **Evidence Requirements.** In order for the agency to suspend and potentially remove an employee under this enclosure for failure to maintain appropriate access to classified information, the agency must be able to show:
 - a. That the position in question requires access to classified information.
 - b. That access has been suspended, revoked, or denied according to established procedures.

c. The employee has been allowed minimal due process rights as outlined in subchapter 7513 of reference f.

7. **Immediate Removal from the Workplace.** If it is determined that the employee must be immediately removed from the workplace, the agency should consider the use of Investigative and or Notice Leave in situations in which it chooses to take action under this enclosure. Investigative and Notice Leave are explained in paragraph 8 of Enclosure I of this supplement.

8. **Reassignment.** Although TAG may consider reassignment to avoid removal of the employee, this consideration is not required.

9. **Grievance.** IAW reference e, an action taken under this enclosure is not subject to a negotiated grievance procedure.

ENCLOSURE I

MISCELLANEOUS PROVISIONS

1. **Employee's Representative.** An employee who is the subject of an adverse action may choose any individual (other than a member of the Human Resources Office or the State JAG Office) as a representative or AFGE Local 3970, which is the exclusive representative for all bargaining unit NG employees who are the subject of an adverse action. The Trial Defense Service or Area Defense Counsel representation does not extend to a civilian adverse action. The NG does not provide civilian employees with Trial Defense Service or Area Defense Counsel. The employee is responsible for all costs associated with his or her defense if other than the AFGE Local 3970. All representatives, except for officials of AFGE Local 3970, will be designated in writing with a statement of understanding that is substantially the same as Figure 7. The agency may reject an employee's selection of representation if a bona-fide conflict of interest exists, and the employee must be provided the right to select an alternate representative if they choose. The complete reason for the denial of the selected representative must be provided. Any changes of representation will be provided in writing.

I, [Name and duty position], appoint [Name and contact information] to act as my representative in this adverse action proceeding. All notices or letters provided to me will also be provided to my representative. Notices or letters received by either of us will be binding on both of us.

[Printed name of employee] [Date]

[Signature of employee]

I, [Name and contact information], agree to represent [name of employee]. I agree to represent him or her and to receive notices, documents, and letters on his or her behalf. I am familiar with the adverse action regulation and with applicable appeal procedures. I understand that my actions will be binding on him or her in this action. I understand that my representation will continue until revoked in writing.

[Printed name of representative] [Date]

[Signature of representative]

Figure 7. Sample Letters of Representation

2. **Delivery of Documents.** The preferred method of delivery of documents is personal delivery with receipt of delivery noted on the retained copy of the delivered document or email with a read receipt. The acknowledgement of a document is only an admission that the document was received and does not constitute agreement with the contents of the received document. If the employee refuses to acknowledge delivery of the document, that fact and the name of the individual delivering the document and the date of the delivery should be noted on the retained copy of the delivered document. Documents received by or provided to the designated representative will be deemed to be received by the employee. If personal delivery cannot be accomplished, delivery may be accomplished by mail or email. Delivery by mail should be certified, return receipt requested. Delivery by mail is effective on the date signed for. An employee is responsible for keeping the employer informed of his or her current home address for purposes of receiving the proposal, decision, and related correspondence.

3. Correspondence Delivery. Correspondence is presumed to have been delivered to the addressee when properly addressed and sent to the employee's last known address by postal or commercial delivery. While such a presumption may be overcome under the circumstances of a particular case, an employee may not avoid service of a properly addressed and mailed proposal or decision nor by intentional or negligent conduct frustrate actual service. The employee may also be deemed to have received the agency's decision if it was received by a designated representative or by a person of suitable age and discretion residing with the employee. Figure 8 illustrates the application of this rule:

1. An employee who fails to pick up mail delivered to his or her post office box may be deemed to have received the agency decision.
2. An employee who lives alone and did not receive his or her mail while in the hospital may overcome the presumption of actual receipt, whereas if the employee is incarcerated, and the Proposing Official is aware of this fact, delivery should be sent both to the home of record and the jail or prison (by regular mail). For incarcerated individuals, before mailing the notice please contact the jail or prison for institution-specific limitations (for example, some jails and prisons do not allow letters with paperclips, staples, or self-addressed stamped envelopes) or in-person delivery requirements (visiting hours).
3. An employee may be deemed to have received an agency adverse action proposal or decision received by his or her roommate, spouse, teenage child, etc. An employee is deemed to have received an adverse action proposal or a final decision if he or she demonstrates actual knowledge of receipt (for example, by calling the Human Resources Officer or Proposing Official to request clarification). All correspondence and communications should be documented.
4. Although delivery by email is discouraged, if it is necessary delivery by email is considered effective on the date the email is marked read by the employee's email account.

Figure 8. Examples of Delivery of Documents

4. Counting of Days. Follow-on actions must take place within a certain number of days. The day of the delivery is not counted. The first day of the specified time period is the next calendar day after delivery. All calendar days are then counted, provided that the last day of the period cannot be a non-work day. If the period ends on a non-work day, the follow-on action must be completed by close of business on the next scheduled work day. Five days are added from the postmark date served on an employee by regular mail to determine any follow-on dates such as the required thirty (30) calendar day notice period for a Category 2 adverse action or an employee's deadline for responding to a document.

a. Example 1: If an employee receives a proposed notice of removal that is effective on 01 July, a seven-day (7)-day period for filing a response starts on 02 July. The 04 July holiday counts as one of the seven days. The filing ordinarily would be timely only if it is made by 08 July. If 08 July is a Saturday, however, the last day for replying would be on Monday, 10 July.

b. Example 2: If the Proposing Official serves a notice of removal by regular mail and it is postmarked 01 October, and the employee's response is due seven days after receipt of the notice of removal. If the employee receives the notice on 06 October, a seven-day reply deadline is 13 October (unless that is a non-work day). If 13 October is a non-workday, the deadline will be extended to the next workday.

5. **Requests for Extension of Time Limits.** All requests for an extension of time limits will be made to the Deciding Official whichever is applicable. Requests must be in writing or by email. The facts and reasons supporting the need for the extension must be included in the request. The official may grant the request, and initial requests for short extensions should be granted routinely even if unsupported by stated facts and reasons. A written or email response will be made to each request for an extension, either granting an extension to a certain date or, if denying the request, stating the reason(s) why the extension was denied.

6. **Harmful Error.** A harmful error is an administrative or procedural error that may have caused management to reach a conclusion different than the one it reached, or an error that substantially diminishes the employee's ability to prepare and present a defense to the proposed adverse action. The employee must allege a harmful error(s) immediately upon discovery. The burden of proof for showing that an error was a harmful error is on the employee. If an alleged harmful error is not raised immediately after it is known, the harmful error is deemed waived. "Immediately" means by a separate communication or in the next scheduled response, such as the employee's reply.

7. **Actions Taken Upon the Discovery of Administrative or Procedural Error.** If an administrative or procedural error occurs but can be corrected to prevent or eliminate harm, the correction must be made. This may be done by issuing a new letter, allowing additional reply or response time, or other such action, as long as it may be clearly shown that the action, as corrected, afforded the employee all the due process the employee is entitled to receive.

8. **Investigative and Notice Leave.** When an employee is the subject of an investigation or when indefinite suspension or removal is proposed, and where the continued presence of the employee may have an adverse impact on the mission, cause a safety concern, or unduly disrupt the work area, the employee may be granted investigative or notice leave IAW reference m. This leave is paid leave and is not subject to adverse action procedures. The default should be that an employee who is being investigated or against whom an adverse action has been proposed will remain in a duty status in his or her regular position or be placed on a detail during the investigation or notice period. The agency may also consider requiring an employee who is otherwise telework eligible and who is currently (or recently has been) participating in the agency telework program to telework. However, an employee may be placed on notice leave in instances after proposing adverse action when there is a determination that the employee's continued presence on the job during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or jeopardize legitimate Government concerns. There are limitations on the use of these leave categories and the State should take steps to ensure that all requirements for use are met.

a. Investigative and notice leave are not adverse actions and should be coordinated with the

HRO and State JAG before being implemented.

b. If an employee is granted notice leave, arrangements must be made with the employee or the employee's representative for the preparation of the reply, or appeal or both. This must include access to documents and witnesses who voluntarily wish to meet with the employee or the employee's representative. Normally, information about the placement into a notice leave status should be included in the proposed action letter or as soon as the criteria for placement into notice leave are met.

9. Actions Not Subject to the Due Process Procedures Included in This supplement. When taking an adverse action on individual not meeting the definition of "employee" as defined in subchapter 7511 of reference f the agency is not required to provide due process procedures covered in this supplement.

a. For excepted service NG employees, individuals excluded from the due process requirements are generally the following:

(1) Non preference individuals who have not served two years of current continuous service the same or similar position.

(2) Preference eligible individuals who have not served one year of current continuous service in the same or similar position.

(3) Military Technician (Dual Status) employees who are removed from their position for failure to maintain required military membership. These employees are only entitled to an advance 30-day notice as required by reference b.

b. Individuals in 9.a.(1) and 9.a.(2) above are entitled to a written notice only, with a general conclusion about deficiencies. Additionally, they only have the right to file appeals with the MSPB if the adverse action was taken for reasons pre-dating their appointment or if the removal was in relation to marital status.

c. Once an employee has acquired the definition of "employee" for the purposes of this supplement, the employee maintains the right to due process until such time as they have a break in service of more than one day.

10. **Drug or Alcohol Use.** If drug or alcohol use is cited as a defense or contributing factor for an employee's misconduct, the misconduct will be dealt with separately from the drug or alcohol use. Employees will be referred to a health care provider or the Employee Assistance Program for drug or alcohol counseling. The misconduct will be treated in the same manner that all such misconduct is dealt with, and a similar penalty for a similar offense will be imposed. If the penalty imposed is removal, the date of the proposed removal may be adjusted to allow the employee to obtain medical or substance abuse treatment services as recommended by a health care professional or other substance abuse treatment authority.

11. **Additional Rules.** Adverse action taken pursuant to this supplement does not preclude military discipline or administrative action for the same or related misconduct when appropriate. This is not double jeopardy, and the actions are separate and distinct. For example, fraudulent use of a Government Travel Card or illegal drug use could have far-reaching impact and could result in adverse action against the individual as an NG employee, non-judicial sanctioning from a military entity, and discharge from military service as well as possible loss of security clearance. Any and all actions should be pursued in a timely manner by leadership IAW applicable laws and regulations.

12. **Last Chance Agreements (LCAs).** Refer to the Collective Bargaining Agreement between the Ohio National Guard and AFGE Local 3970, Article 12 for procedures.

Conditions for Last-Chance Agreements (LCAs)

1. The continued good behavior of the employee with no repeat of a like or similar.
2. A written admission by the employee that he or she did commit the offense that he or she was accused of committing.
3. The offense would justify an adverse action up to the employee's removal.
4. How long this last-chance agreement will remain in effect (no more than two years).
5. If the employee violates this last-chance agreement during the period that it remains in effect, he or she can be processed for removal for violation of the terms of the agreement in accordance with the terms of the agreement.
6. Any such last-chance agreement must be in writing and signed by the original decision maker or the final appeal authority, the employee, and the employee's representative (if a representative has been appointed).

Figure 9. Conditions for a LCA

Letterhead

Subject: Last Chance Agreement

1. This is a Last Chance Agreement (LCA) between the Ohio National Guard and [Name of employee]. On [Date], the Ohio National Guard proposed [Name of employee]'s [adverse action] from [his or her] position. The proposal notice, which was issued by the first-level supervisor, [Name of employee's supervisor], proposed [his or her] removal on the basis of [describe the reasons for removal]. The Deciding Official has decided to sustain the removal.

2. However, as an alternative to removal, this LCA provides one last chance for [Name of employee] to demonstrate that [he or she] can fulfill all of the conditions of employment. Therefore, the Ohio National Guard, mindful of its rights to [remove] [Name of employee], agrees to place the Decision to [Remove] in abeyance in exchange for the following:

a. Employee acknowledges that the agency has evidence that, if not rebutted, is sufficient to prove [the charged misconduct] and waives [his or her] right to seek to rebut the evidence.

b. Employee agrees to [refrain from engaging in this or similar future misconduct].

c. Employee understands that [he or she] is expected to perform [his or her] duties at the fully successful or higher level.

3. In the event the [removal] is reinstated for failure to adhere to this agreement, employee agrees to waive all appeal rights to The Adjutant General of the Ohio National Guard, to the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, and any grievance or arbitration process concerning any action reinstating the removal being held in abeyance, the terms and conditions of this Agreement, or other discipline taken with a [[one-year] OR [two-year]] probationary period beginning at the time this Agreement was signed.

4. By accepting this LCA, [Name of employee] freely and voluntarily waives [his or her] right to personal recovery, including compensatory damages in any action brought against the United States, the Ohio the National Guard, or their agents, concerning any action reinstating the [removal] action being held in abeyance, taken within the [[one-year] OR [two-year]] probationary period, as well as any alleged breach of terms of this Agreement.

Figure 10. Sample Last Chance Agreement

Letterhead

[Name of employee] further agrees not to initiate a lawsuit and waives all rights to personal recovery, including but not limited to compensatory damages, in any lawsuit brought against the Agency by either [name of employee] or the Equal Employment Opportunity Commission, or other type of equal employment opportunity complaint or any other civil and criminal litigation in any court or other administrative forum, for all acts, events, and circumstances out of or connected to events that brought this LCA, including, but not limited to actions brought under Title VII of the Civil Rights Acts of 1964 and 1991, as amended; the Rehabilitation Act of 1973, as amended; or any Federal or State regulation.

5. These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

6. This agreement provides that no monies, including attorney fees, will be paid by either side unless specifically set forth in this LCA.

7. Violation of the LCA: The parties, both management and the employee, agree that if management determines this LCA has been violated, the only issue to be determined is whether there has been a violation. The penalty is not at issue.

8. This LCA will remain in force for the entire period specified above and shall not lapse or become void because of change in position by the employee or their supervisor.

9. The agency acknowledges that they cannot and do not require the employee to waive their rights to filing a whistleblower claim with the Office of Special Counsel.

(Figure 10. continued. Page 2 of Sample Last Chance Agreement)

Letterhead
_____ Employee
_____ Employee Representative
_____ Final Appeal Authority (TAG or Designee)
_____ HRO Representative
[Name (Signature Block) Rank, Agency Position]

(Figure 10. continued. Page 3 of Sample Last Chance Agreement)

<p>I, [Name of employee], understand that the Ohio National Guard has cause to remove me from my employment. I understand this last-chance agreement (LCA) means that I am being given one more chance and only this one chance to prove I can keep my job. I understand that I have one more chance to be a productive employee capable of following the rules of the workplace.</p> <p>Signed: _____ Date: _____</p> <p>Employee</p>
--

Figure 1. LCA Statement of Understanding

ENCLOSURE J

TABLE OF PENALTIES FOR VARIOUS OFFENSES

1. **Table of Penalties Guide.** Table 1 is a guide and is not all-inclusive. The penalties are graduated in severity based on whether the alleged offense is the first, second, or third offense. Conduct that was the subject of counseling or admonishment is not an offense for purposes of this table. For example, if an employee was counseled for unexcused tardiness and admonished for a second instance of unexcused tardiness, and management then decides to take disciplinary action for a third instance of unexcused tardiness, this third instance is the first offense for purposes of this table. More serious offenses have a more serious suggested penalty or range of penalties for a first offense than less serious types of first offenses. Table 1 provides suggested penalties and should not be applied inflexibly so as to impair consideration of factors relevant to the individual case.

2. **Supervisors and Deciding Officials.** Supervisors and Deciding Officials are not required to counsel or issue an admonition or letter of reprimand before proposing an adverse action. The penalty for an offense should be tailored to the facts and circumstances of the individual case.

Item	Nature of Offense	Subcategory	First Offense	Second Offense	Third Offense	Notes
1a	Attendance-related offenses	Unexcused tardiness	Letter of reprimand	Letter of reprimand to 1-day suspension	2-day to 5-day suspension to removal	1
1b		Failure to follow established leave procedures	Letter of reprimand to 1-day suspension	1-day to 5-day suspension	5-day suspension to removal	
1c		Absent without leave (AWOL) (includes leaving work site without permission)	Letter of reprimand to 1-day suspension	1-day to 14-day suspension	5-day suspension to removal	2
2a	Failure to observe written regulations or rules	Violation where safety to persons or property is not involved	Letter of reprimand to 1-day suspension	1-day to 14-day suspension	2-day suspension to removal	3

Table 1. Suggested Table of Penalties

2b		Violation where safety to persons or property is involved	Letter of reprimand to removal	14-day suspension to removal	Removal	3
3a	Breach of security regulations or practices	Classified information is not compromised and breach is unintentional	Letter of reprimand to 5-day suspension	1-day to 14-day suspension	2-day suspension to removal	
3b		Classified information is not compromised and breach is intentional	Letter of reprimand to removal	14-day suspension to removal	Removal	
3c		Classified information is compromised and breach is unintentional	Letter of reprimand to removal	2-day suspension to removal	14-day suspension to removal	
3d		Classified information is compromised and it is a deliberate violation	14-day suspension to removal	Removal		
4a	Alcohol-related offenses	Unauthorized use of alcoholic beverages while on Government premises or in a duty status	Letter of reprimand to 14-day suspension	14-day suspension to removal	Removal	4
4b		Sale or transfer of alcoholic beverage on Government premises or while any person involved is in a duty status	Letter of reprimand to 14-day suspension	14-day suspension to removal	Removal	4
4c		Reporting to or being on duty while under the influence of alcohol to a degree which interferes with proper performance of duty, is a menace to safety, or is prejudicial to the maintenance of discipline	Letter of reprimand to removal	14-day suspension to removal	Removal	4
5a	Drug-related offenses	Introduction of an unlawfully possessed controlled substance to a work area or Government installation for personal use	14-day suspension to removal	Removal		4
5b		Reporting to or being on duty while under the influence of unlawfully used drugs to a degree that interferes with proper performance of duty, is a menace to safety, or is prejudicial to the maintenance of discipline	Letter of reprimand to removal	Removal		4

(Table 1. continued. Page 2 of Suggested Table of Penalties)

5c		Introduction of a controlled substance to a work area or Government installation with the intent to unlawfully distribute it	14-day suspension to removal	Removal		4
6a	False statements	Deliberate misrepresentation, exaggeration, falsification, concealment, or withholding of a material fact	Letter of reprimand to removal	1-day suspension to removal	14-day suspension to removal	7, 21
6b		Making false or unfounded statements against coworkers, supervisors, subordinates, or Government officials that tend to damage the reputation or undermine the authority of those concerned	Letter of reprimand to removal	14-day suspension to removal	Removal	21
6c		False statements, misrepresentation, or fraud in entitlements, timecard, leave form, or travel voucher	Letter of reprimand to removal	14-day suspension to removal	Removal	5, 21
6d		False statements or misrepresentation on documents pertaining to qualifications or on another official record	Letter of reprimand to removal	Removal		6, 21
6e	Lack of Candor	Failure to disclose information that, under the circumstances should have been disclosed to make the information accurate and complete.	Letter of reprimand to removal	14-day suspension to removal	Removal	21
7a	Refusal to testify; interference or obstruction	Refusal or willful failure to testify or cooperate in a properly authorized inquiry or investigation	3-day suspension to removal	5-day suspension to removal	Removal	
7b		Interference with or attempting to influence or attempting to alter testimony of witnesses or participants	5-day suspension to removal	14-day suspension to removal	Removal	
7c		Attempting to impede an inquiry or investigation or to influence investigating officials	10-day suspension to removal	14-day suspension to removal	Removal	
8a	Insubordination	Refusal to obey lawful orders, defiance of authority	Letter of reprimand to removal	5-day suspension to removal	Removal	23

(Table 1. continued. Page 3 of Suggested Table of Penalties)

8b	Failure to follow instructions		Letter of reprimand to 14-day suspension	14-day suspension to removal	Removal	23
9a	Fighting; creating a disturbance	Creating a disturbance resulting in an adverse effect on morale, production, or maintenance of proper discipline	Letter of reprimand to 14-day suspension	14-day suspension to removal	Removal	8
9b		Threatening or attempting to inflict bodily harm	Letter of reprimand to removal	14-day suspension to removal	Removal	8 and 19
9c		Hitting, pushing, or otheracts against another without causing injury	Letter of reprimand to 14-day suspension	14-day suspension to removal	Removal	8 and 19
9d		Hitting, pushing, or otheracts against another causing injury	14-day suspension to removal	Removal		8
10a	Discourtesy	Rude, unmannerly, or impolite acts or remarks (non-discriminatory)	Letter of reprimand to 14-day suspension	Letter of reprimand to 14-day suspension	14-day suspension to removal	9
10b		Use of insulting, abusive, offensive, or obscene language, gestures, or similar conduct (non-discriminatory)	Letter of reprimand to 14day suspension	14-day suspension to removal	Removal	9
11a	Theft	Possession of another individual or entity's property with the intent to permanently deprive the owner of the possession or use of property	14-day suspension to removal	Removal		10, 22
11b	Improper possession	Possession of another individuals or entity's property without reasonable explanation	Letter of reprimand to removal	Letter of reprimand to 14-day suspension	Removal	
12a	Misuse or abuse of Government property or personnel	Negligent loss of, destruction of, or damage to Government property	Letter of reprimand to 14-day suspension	Letter of reprimand to removal	14-day suspension to removal	10

(Table 1. continued. Page 4 of Suggested Table of Penalties)

12b		Loss of or damage to Government property, records, or information when an employee is entrusted with safeguarding Government property as a requirement of the job	Letter of reprimand to 14-day suspension	Letter of reprimand to removal	Removal	10
12c		Using Government property or personnel in duty status for other than official purposes	Letter of reprimand to removal	1-day suspension to removal	14-day suspension to removal	10
12d		Misuse of Government credentials	Letter of reprimand to removal	5-day suspension to removal	14-day suspension to removal	
12e		Willful use or authorizing use of a Government vehicle or aircraft for other than an official purpose	30-day suspension to removal	Removal		11
12f		Intentionally mutilating or destroying a public record	Removal			12
13a	Sleeping on duty	Where no danger to persons or property is involved	Letter of reprimand to 14-day suspension	Letter of reprimand to 14-day suspension	14-day suspension to removal	
13b		Where danger to persons or property is involved	Letter of reprimand to removal	14-day suspension to removal	14-day suspension to removal	
14a	Loafing; delay in carrying out instructions; dereliction of duty	Idleness or failure to work on assigned duties	Letter of reprimand to 3-day suspension	Letter of reprimand to 14-day suspension	14-day suspension to removal	
14b		Delay or failure to carry out instructions within the time required	Letter of reprimand	1-to-14-day suspension	14-day suspension to removal	
14c		Dereliction of duty	Letter of reprimand to removal	5-day suspension to removal	Removal	
15a	Gambling	Participating in an unauthorized gambling activity on Government premises or in a duty status	Letter of reprimand	1-day to 14-day suspension	14-day suspension to Removal	

(Table 1. continued. Page 5 of Suggested Table of Penalties)

15b		Operating, assisting or promoting unauthorized gambling activity on Government premises while in duty status or while others are in a duty status	14-day suspension to removal	Removal		
16	Prohibited job actions	Participating in or promoting a strike, work stoppage, slow-down, sick-out, or other prohibited job action	14-day suspension to removal	Removal		
17	Indebtedness	Failure to honor just financial obligations in a proper and timely manner	Letter of reprimand	Letter of reprimand	Letter of reprimand	13
18a	Sexual harassment	Not involving a subordinate	Letter of reprimand to removal	14-day suspension to removal	Removal	14
18b		Involving a subordinate	14-day suspension to removal	Removal		14
19	Discrimination because of race, color, religion, age, sex, national origin, political affiliation, handicap, or marital status	Prohibited discriminatory practice in any aspect of employment, including failure to prevent or curtail discrimination of a subordinate when the supervisor knew or should have known of the discrimination	14-day suspension to removal	Removal		15
20a	Reprisal	Intentional interference against exercising the right of, or reprisal against an employee for, exercising a right to grieve, appeal, or file a complaint through established procedures	14-day suspension to removal	Removal		
20b		Intentional interference with the right to exercise, or reprisal against an employee for exercising, a right under reference e	Letter of reprimand to removal	5-day suspension to removal	Removal	

(Table 1. continued. Page 6 of Suggested Table of Penalties)

20c		Intentional reprisal against an employee for providing information to the Inspector General or Equal Employment Opportunity Commission or National Guard Bureau investigator or for testifying in an official proceeding	14-day suspension to removal	Removal		
20d		(Supervisors only) Prohibited personnel practice including whistleblower reprisal	3-day suspension to removal	Removal		
21	Constitutional violation	Violation of constitutional rights, such as freedom of speech, association, or religion	Letter of reprimand to removal	14-day suspension to removal	Removal	
22a	Political activity	Violation of prohibition against soliciting political contributions	Removal			
22b		Violation of prohibition against campaigning or influencing elections	14-day suspension to removal	Removal		
23	Misappropriation	Directing or rendering without a supervisor's direction services known not to be covered by appropriations	14-day suspension to removal	Removal		
24a	Misuse of a Government charge card (travel or purchase)	Deliberate or negligent travel card misuse, abuse, delinquency, or fraud	Letter of reprimand to removal	5-day suspension to removal	10-day suspension to removal	
24b		Purchase card use for a deliberate or negligent illegal, improper, or incorrect purchase	Letter of reprimand to removal	14-day suspension to removal	Removal	
25a	Conduct unbecoming a National Guard employee	Immoral, indecent, or disgraceful conduct	1-day suspension to removal	Removal		
25b		Solicitation of or accepting anything of monetary value from a person seeking contracts or other financial gain	10-day suspension to removal	Removal		16
26a	Uniform wear	Failure to wear uniform while performing duties as a military technician (dual status)	Letter of reprimand	Letter of reprimand to 14-day suspension	Removal	17

(Table 1. continued. Page 7 of Suggested Table of Penalties)

26b		Failure to conform to dress and grooming policy	Letter of reprimand	Letter of reprimand to 14-day suspension	14-day suspension to removal	17
27	Misuse of Government communication systems and equipment	Intentionally using Government communication systems for other unauthorized purposes	Letter of reprimand to 14-day suspension	14-day suspension to removal	Removal	18

(Table 1. continued. Page 8 of Suggested Table of Penalties)

NOTES	
1. This includes delay in reporting at the scheduled starting time, returning from lunch or break periods, and returning after leaving the workstation on official business. The penalty depends on the length and frequency of tardiness. The fourth offense may typically warrant five-day suspension to removal.	
2. These penalties generally do not apply to AWOL based on tardiness of one hour or less. If an employee is AWOL, it is appropriate that the time be recorded as AWOL and later changed to an approved leave category only when the approving authority determines that extenuating circumstances were such that the absence is improperly charged to AWOL. This offense includes leaving the workstation without permission. The penalty depends on the length and frequency of absences. Removal may be appropriate for a first or second offense if the absence is prolonged.	
3. "Persons" includes "self." The penalty depends on the seriousness of the injury or potential injury and the extent or potential extent of damages to property. Using the Employee Assistance Program and "reasonable accommodation" for assistance will not normally stop management from carrying out an adverse action.	
4. Using the Employee Assistance Program and "reasonable accommodation" for assistance will not normally stop management from carrying out an adverse action.	
5. This offense includes falsifying information on a timecard, leave form, travel voucher, or other document pertaining to an entitlement.	
6. Removal is warranted when selection was based on a falsified résumé or credentials, where falsification was intentional, or where the employee occupies a position with fiduciary responsibilities.	
7. This offense includes perjury, making false sworn statements, and lying to the supervisor.	
8. Lawful self-defense or defense of another is not an offense. The penalty may be exceeded based on such factors as type of threat, provocation, extent of injuries, whether actions were defensive (but in excess of lawful self-defense or defense of another) or aggressive, or whether actions were directed at a supervisor.	
9. The penalty for the fourth offense within one year may be a 14-day suspension to removal. The penalty may be exceeded if discourtesy or similar conduct was directed to a supervisor.	
10. The penalty depends on such factors as the value of the property or the amounts of employee time involved and the nature of the position held by the offending employee, which may dictate a higher standard of conduct.	
11. The penalty cannot be mitigated to less than a 30-day suspension, IAW reference p.	
12. The penalty dictated by reference q.	
13. There must be a clear nexus between efficiency of the Service and debt complaint.	

Table 2. Table of Notes to Penalties for Various Offenses

14. The appropriate penalty for sexual harassment depends on the facts in a given case weighed against National Guard policy that sexual harassment will not be tolerated. If the conduct creates a hostile or offensive work environment, consideration of removal is warranted for a first offense. Consult with the Human Resources Officer and servicing State JAG.
15. Includes failure to prevent or curtail discrimination against a subordinate when the supervisor knew or should have known of the discrimination. The appropriate penalty depends on the facts given in a case weighed against National Guard policy that discrimination is prohibited.
16. Exceptions to this general prohibition of accepting gratuities are contained in reference r.
17. IAW references b, s, and t.
18. Communications systems are the telephone, facsimile machine, pager, email, Internet, cellular phone, personal digital assistant, video camera, tape recorder, or other commercial information systems paid for by the Government.
19. Metz Factors -- Management must weigh the evidence to determine whether a "threat" has actually occurred. Evidence of an employee's intent in making a statement can show that the statement was or was not a threat. Rumors, or fear based on rumors, cannot suffice to prove that an employee threatened anyone. Management should not, however, disregard subjective evidence of fear or intent. Objective evidence typically bears the heaviest weight. Consult with the Human Resources Officer and servicing State JAG.
20. Figure 12 lists the five Metz Factors that provide a framework to weigh the evidence fairly, and all must be considered.
21. The charge of "False statement" or the implication of "false statement" carries a requirement to prove by preponderant evidence of the willful intent to deceive. If the intent element is not clear, the charge of Lack of Candor may be more appropriate.
22. The charge of "Theft" carries a requirement to prove by preponderant evidence the intent to permanently deprive the proper owner of the property. If the intent element is unclear, the charge of improper possession may be more appropriate.
23. The charge of "Insubordination" carries the requirement to prove the willful intent to disobey an order that the supervisor or management official has the right to give in accordance with statute, regulation and agency policy. If the intent element is unclear, the charge of failure to follow instructions may be more appropriate.

(Table 2. continued. Page 2 of Table of Notes to Penalties for Various Offenses)

METZ FACTORS
1. Listener's reactions.
2. Listener's apprehension of harm.
3. Speaker's intent.
4. Any conditional nature of the statements.
5. Attendant circumstances.

Figure 12. Metz Factors

ENCLOSURE K

REFERENCES

PART I. REQUIRED

- a. Chief of the National Guard Bureau (CNGB) Instruction 1400.25A, 11 May 2020, “National Guard Technician and Civilian Personnel”
- b. Title 32 United States Code (U.S.C.), “National Guard,” Chapter 7, “Service, Supply, and Procurement,” Section 709, “Technicians: Employment, Use, Status”
- c. 10 U.S.C. § 10508, “National Guard Bureau: General Provisions”
- d. Department of Defense (DoD) Directive 5105.77, 30 October 2015, “National Guard Bureau (NGB),” Incorporating Change 1, 10 October 2017
- e. 5 U.S.C. Chapter 71, “Labor-Management Relations”
- f. 5 U.S.C. Chapter 75, “Adverse Actions”
- g. CNGB Memorandum, 06 February 2017, “Designation of The Adjutants General to Appoint, Employ, and Administer National Guard Employees”
- h. Public Law (P.L.) 114-328, “National Defense Authorization Act for Fiscal Year 2017”
- i. P.L. 114-92, “National Defense Authorization Act for Fiscal Year 2016,” Section 1053, “Management of Military Technicians”
- j. 5 Code of Federal Regulations (CFR) Part 752, “Adverse Actions”
- k. Title 5 United States Code § 2301, “Merit Systems Principles.
- l. 5 CFR Chapter 2, “Merit Systems Protection Board,” Part 1201, “Practices and Procedures”
- m. 5 U.S.C. § 6329b, “Investigative and Notice Leave”
- n. 5 CFR Subchapter B, “Civil Service Regulations,” § 432.102, “Coverage”
- o. DoD Instruction 1400.25, 08 August 2019, “Civilian Personnel Management,” Volume 351, “DoD Civilian Personnel Management System: Coordination and Clearance Requirements for Personnel Reductions, Closures of Installations and Reductions of Contract Operations in the United States”
- p. 31 U.S.C. § 1349, “Adverse Personnel Actions”

- q. 18 U.S.C. § 2071, “Concealment, Removal, or Mutilation Generally”
- r. DoD Directive 5500.07, 29 November 2007, “Standards of Conduct”
- s. Department of the Army Pamphlet 670-1, 25 May 2017, “Guide to Wear and Appearance of Army Uniforms and Insignia”
- t. Air Force Instruction 36-2903, 07 February 2020, “Dress and Personal Appearance of Air Force Personnel”
- u. Director of National Intelligence Memorandum ES 2014-00674, 25 October 2014, “Adherence to Federal Laws Prohibiting Marijuana Use”
- v. Executive Order (E.O.) 12968, 02 August 1995, “Access to Classified Information”
- w. E.O. 13526, 29 December 2009, “Classified National Security Information”
- x. DoD Instruction 5200.02, 21 March 2014, “DoD Personnel Security Program (PSP),” Incorporating Change 2, Effective 11 May 2018
- y. E.O. 10450, 27 May 1953, “Security Requirements for Government Employment,” Amended 05 August 1954
- z. DoD Joint Publication 1-02, “Department of Defense Dictionary of Military and Associated Terms, 15, February 2016

PART II. RELATED

- aa. E.O. 12564, 15 September 1986, “Drug-Free Federal Workplace”
- bb. E.O. 13467, 30 June 2008 “Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information”
- cc. DoD Instruction 1400.25, 03 December 1996, “DoD Civilian Personnel Management System: General Provisions,” Administratively reissued 13 April 2009
- dd. CNGB Instruction 1400.25A, Vol. 715, 15 September 2021, “National Guard Technician and Civilian Personnel Voluntary and Non-Disciplinary Actions Program”
- ee. CNGB Instruction 1400.25A, Vol. 753, 29 June 2020, “National Guard Technician and Civilian Personnel Adverse Action Appeals and Hearing Examiner Program”

ENCLOSURE GL

GLOSSARY

PART I. ACRONYMS

AWOL	Absent Without Leave
CNGB	Chief of the National Guard Bureau
EEOC	Equal Employment Opportunity Commission
ERS	Employee Relations Specialist
HRO	Human Resources Officer
IAW	In accordance with
JAG	Judge Advocate General
LCA	Last Chance Agreement
LRS	Labor Relations Specialist
MSPB	Merit Systems Protection Board
NG	National Guard
NGB	National Guard Bureau
NGB-J1	Manpower and Personnel Directorate
NGB-J1-TCP	Technician and Civilian Personnel Policy
TAG	The Adjutant General

PART II. DEFINITIONS

Absent Without Leave

Absent from duty not authorized by the proper leave-approving official.

Administrative Grievances

Individual or group complaints regarding work conditions, employment decisions, etcetera.

Adverse Action

An official personnel action, usually taken for disciplinary reasons, that adversely affects an employee and is of a severity that a suspension, reduction in grade or status, or removal is warranted.

Cause

The reason that the adverse action is being proposed.

Classified Information

Reference w defines classified information as “Official information that has been determined to require, in the interests of National security, protection against unauthorized disclosure and has been so designated.”

Clear and Convincing Evidence

That degree of evidence that produces in the mind of the trier of fact a firm belief as to the

allegations sought to be established. This means that it is substantially more likely than not that the disputed fact is true.

Collective Bargaining Agreement

A written agreement between the agency and a labor organization, usually for a definite term, defining conditions of employment, rights of employees and labor organizations, and procedures to be followed in settling disputes or handling issues that arise during the life of the agreement.

Controlled Substance

Any drug, material, or other chemical compound identified and listed in reference y or applicable Service guidance.

Corrective Action

Communication from a supervisor requiring an employee to stop or to not repeat misconduct when such situation does not rise to the level that should be addressed by a reprimand or adverse action.

Days

Calendar days.

Derogatory Information

Information that reflects on the integrity or character of an individual, or circumstances suggesting that a person's ability to safeguard national security information may be impaired, that a person's access to classified or sensitive information clearly may not be in the best interest of National security, or that a person's activity may be in conflict with the personnel security standards or adjudicative guidelines.

Disciplinary Action

Letter of reprimand or adverse action.

Douglas Factors

Factors that management must weigh in deciding an appropriate course of action observing the principle of "like penalties for like offenses in like circumstances."

Employee

For the purposes of this supplement, the term "employee" has that definition as provided in reference f.

Grievance

A request by an employee, or by a group of employees acting as individuals, for personal relief in a matter of concern or dissatisfaction that is subject to the control of agency management and related to their employment.

Illegal Drug

A controlled substance included in Schedule I or II, as defined by reference u, or

applicable Service guidance. Because a State law may decriminalize acertain drug does not mean it is legal for Federal adverse action purposes. Misuse of prescription medication is illegal drug use.

Indefinite Suspension

Placing an employee in a temporary status without duties andpay, and pending investigation, inquiry, or further agency action.

Investigation

Examination of charges against an employee or any defense raised bythe employee using this instruction or any other investigation procedure.

Joint Personnel Adjudication System

The Department of Defense system of record forpersonnel security adjudication, clearance, verification, and history, plus any successor Department of Defense personnel security system of record.

Last Chance Agreement

A last chance agreement is an agreement made between theemployee and management to hold a removal action in abeyance and potentially cancelit when; the employee agrees that management has proven the case for removal, management has determined that the employee has the potential to be rehabilitated and it is for the efficiency of the service to offer them another chance, the employee agrees that a violation of the agreement during the term of the agreement will result in the immediate reinstatement of the removal action, and the employee waives all appealrights to the removal other than those appeals associated with prohibited personnel practices.

Letter of Reprimand

A disciplinary action without an adverse action connected to it.

Metz Factors

Named for the case Metz versus Department of the Treasury, these area means for evaluating whether a threat has actually occurred, based on the listener's reactions, the listener's apprehension of harm, the speaker's intent, any conditional nature of the remarks, and the circumstances surrounding the incident.

Misconduct

An employee's failure to comply with a regulation, rule, requirement,order, or instruction.

MyBiz

System that allows employees and supervisors on-line access to view information from current Department of Defense official personnel records including appointment, position, personal, salary, benefits, awards and bonuses, performance and personnel actions.

National Guard Employees

Title 32 Military Technician (Dual Status) excepted service employees and Title 5 National Guard excepted or competitive service employees within the States, Territories, and the District of Columbia in accordance with references a, b, and c.

National Security Duties

Work performed by individuals working for or on behalf of the Federal Government that concerns protection of the United States from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, or preservation of the military strength of the United States, including duties that require eligibility for access to classified information in accordance with references v, w, x and y.

National Security Eligibility

The status that results from a formal determination by an adjudication facility that a person meets the personnel security requirements for access to classified information or to occupy a national security position or a position requiring the performance of national security duties.

National Security Information

Information that has been determined to require protection against unauthorized disclosure in accordance with reference w and is so marked when in documentary form.

National Security Position

Any position in a department or agency, the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on national security.

Negotiated Grievance

Employees who are covered by a Collective Bargaining Agreement may exercise their right to file a negotiated grievance. A grievance is a complaint of an employee or labor organization concerning a claimed violation or misapplication of the Collective Bargaining Agreement or any law, rule, or regulations affecting conditions of employment.

Nexus

A connection or link between conduct occurring away from the workplace or outside of the employee's duty day and the employee workforce. Where a nexus is alleged, it must be fully explained in the cause portion of the letter. There must be a clear nexus between efficiency of the service and the debt complaint.

Preponderance of 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. A supervisor issuing a letter of reprimand must determine by a preponderance of the evidence that the facts supporting the issuance of the letter of reprimand are substantiated. Prior to serving a proposed action letter, a supervisor must

develop the facts by a preponderance of the evidence that constitute cause for the adverse action.

Procedural Advice

Technical assistance provided by a Human Resources Officer, usually the Labor Relations Specialist, to assist an employee with the procedures of the adverse action process.

Proposing Official

The initiator of the proposed action and is usually someone in the employee's supervisory chain (normally the employee's first-line supervisor).

Range of Penalties

Penalties graduated in severity based on whether the alleged offense is the first, second, or third and possibly depending on mitigating or aggravating factors impacting relative degrees of culpability (for example, employee A improperly appropriates \$5 from a coworker's wallet without permission to buy lunch and is given a short suspension, whereas employee B takes without permission \$1000 without permission from unit morale funds to pay for a family vacation and is removed at the first offense).

Referral

Notification of commanders, security officers, and a Consolidated Adjudication Facility when relevant and material derogatory information concerning an individual who has been granted national security eligibility is developed or otherwise becomes available to any Department of Defense element.

Reportable Behavior

Acts by persons with favorable national security eligibility determinations that may not be consistent with the interests of national security.

Security Clearance

A personnel security determination by a competent authority that an individual is eligible for access to national security information, under the standards of this manual. Also called a clearance. The individual must have both eligibility and access to have a security clearance. Eligibility is granted by the central adjudication facilities, and the access is granted by the individual agencies.

Security Professional

United States Government military or civilian personnel (including security managers and special security officers) whose duties involve managing or processing personnel security actions relating to the Department of Defense Personnel Security Program.

Sexual Harassment

Influencing, offering to influence, or threatening the career, pay, job, or work assignment of another person in exchange for sexual favors; or deliberate or repeated

offensive comments, gestures, or physical contact of a sexual nature.

Supervisor

In accordance with reference e, an individual employed full-time by an agency and having authority to hire, direct, assign, promote, reward, transfer, furlough, lay off, recall, suspend, discipline, or remove employees; adjust their grievances; or effectively recommend such action. The performance of one or more of these duties qualifies an employee as a “supervisor” for labor relations purposes and excludes the employee from the bargaining unit.

Weingarten Rights

The rights of a bargaining unit employee to have union representation.