

## **Article 21: Discipline**

### **Section 1.**

The parties agree that employees shall maintain high standards of integrity, conduct and concern for the public interest and that the federal workforce shall be used efficiently and effectively. Disciplinary actions generally will be initiated in a timely manner, as circumstances warrant. The parties agree to the principle of progressive discipline except when not warranted by the nature of the misconduct. The specific penalty for an instance of misconduct shall be tailored to the facts and circumstances of the situation. Progressive Discipline means the agency will consider the employee's past disciplinary record as one factor among the Douglas Factors when determining an appropriate penalty.

### **Section 2. Informal Actions.**

A. Informal actions in response to employee misconduct are non-punitive and can be:

1. closer supervision;
2. an oral admonishment (which may be memorialized in an email communication);
3. a written warning or
4. counseling.

B. Any written informal action should identify the misconduct and include an outline of positive corrective steps and/or expectations going forward, if necessary.

C. Prior to determining whether to issue an informal action, it may be appropriate for a management official made aware of potential employee misconduct, who did not directly observe the infraction or who otherwise may not have sufficient information, to make an inquiry of the employee and to provide an opportunity for the employee to explain their side of the situation. Nothing in this provision waives an employee's Weingarten Rights.

D. After an informal action is issued, employees may consult with their union representative and may respond to explain their side of the story.

E. The Agency will not cite any records regarding an informal action, beyond eighteen (18) months in any subsequent formal disciplinary action except:

1. to establish the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; or
2. a like offense has been identified during the eighteen (18) month period following the initial informal disciplinary action.

F. Nothing in this section shall preclude an employee from requesting a meeting with management and a union representative to discuss an informal disciplinary action.

### **Section 3. Formal Disciplinary Actions.**

#### **A. Written Letter of Reprimand**

1. Prior to issuing a Letter of Reprimand, the Agency will provide an employee an opportunity (verbally or in writing) to explain their side of the situation. The Letter of Reprimand will not be issued until at least two (2) workdays after the employee's explanation, if any.
2. The employee will be given five (5) workdays to provide a written response to the Letter of Reprimand. The employee shall be authorized a reasonable amount of official time to prepare a response. If requested in writing, the response will be included in the employee's eOPF with the Letter of Reprimand as one document.
3. A Letter of Reprimand and the employee response thereto, if any, will be maintained in an employee's eOPF for up to two (2) years.
4. Letters of Reprimand will be issued for just and sufficient cause.

#### **B. Adverse Actions (Suspensions, Removals, Reductions in Grade or Pay, or Furloughs for thirty (30) Days or Less)**

1. Any suspension (except for D and E below):
  - a. Will be preceded by advance written notice of at least thirty (30) calendar days before the action is effective.
  - b. The employee will be given fifteen (15) calendar days to provide the deciding official a response either orally, in writing, or both.
  - c. The employee shall be authorized a reasonable amount of official time to prepare a response.
2. Advance notices will specify the deciding official to whom the employee should provide any reply.
3. The notice will state the employee's right to be represented by an attorney or other representative, including the Union.
4. Adverse actions will be taken to promote the efficiency of the service.

C. Thirty (30) days advanced notice is required in all cases except when the Agency has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed and is proposing a removal or suspension, including indefinite suspension.

D. An advance written notice and opportunities to respond are not necessary for furlough without pay due to unforeseeable circumstances, such as acts of God, or sudden emergencies requiring immediate curtailing of activities. Management agrees that such furloughs will be an act of last resort. When management has the authority to do so, excused absence may be granted.

E. Records. The employee will be electronically provided the material relied on to support the Agency's proposed action, except where the sharing of such materials would violate agency policies or the law.

F. The Agency notice of proposed action supplied to the employee will contain language explaining that an employee has the right to be represented by an attorney or other representative, including the Union. The notice of proposed action will also state that the employee may share the attached material with their representative.

G. When an employee does not have access to Agency systems the Agency may effectuate delivery via a known personal email address or via hard copy to the employee's last address on file with the Agency.

#### **Section 4 Exceptions.**

A. The provisions of this Article do not apply to the removal including termination or non-conversion of probationary or trial period employees. Probationary and trial period employees retain their appeal rights to the Merit Systems Protection Board existing under Chapter 75 of Title 5 of the United States Code.

#### **Section 5. Decisions on proposed suspensions and disciplinary removals.**

A. The decision will be provided in writing to the employee and will specify the charges sustained and the penalty imposed. The decision will include the rights of appeal available to the employee and will notify them of the right to designate a representative, including the Union.

B. The Agency will consider the Douglas Factors when making a decision on a proposed action. The proposing and deciding official (normally a higher-level manager than the proposing official) must review each case individually and consider those Douglas Factors that are relevant. The Douglas Factors may or may not weigh in the employee's favor.

#### **Section 6. Duty Status Pending a Decision.**

A. Under ordinary circumstances, an employee whose removal or suspension, including indefinite suspension, has been proposed will remain in a duty status in their regular position during the advance notice period. In those rare circumstances where the Agency determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the Agency may elect one or a combination of the following alternatives:

1. Assigning the employee to duties where they are no longer a threat to safety, the Agency mission, or to Government property;
2. Allowing the employee to take leave, or carrying them in an appropriate leave status (annual, sick, leave without pay, or absence without leave) if the employee has absented themselves from the worksite without requesting leave;
3. Curtailing the notice period when the Agency can invoke the provisions of 5 CFR 752.404(d)(1); or
4. Placing the employee in a paid, nonduty status for such time as is necessary to effect the action.

**Section 7. Grievance/Appeal.**

A. Employees may grieve a disciplinary action through the Negotiated Grievance Procedure (NGP) Article of this MCBA.

B. Grievances of disciplinary actions may only be processed through the Negotiated Grievance Procedure (NGP). Employees may appeal Suspensions of 15 days or more, Removals, Reductions in Grade or Pay, or Furloughs for 30 Days or Less to the Merit Systems Protection Board (MSPB) or file a grievance under the NGP Article of this MCBA but may not do both. Once an employee has elected to file an MSPB appeal or a written grievance under the NGP, the employee may not change subsequently to the other procedure.

C. To the extent not prohibited by law, arbitrators will apply a preponderance of the evidence standard to letters of reprimand and adverse actions. This standard does not apply to performance actions under Chapter 43 of the United States Code, which is covered by the performance article.

D. The Agency has the burden of proof for all actions taken under this Article.

**Section 8. Settlements.**

In lieu of rendering a decision on a proposed action, a deciding official may choose to offer an employee a settlement agreement, or access to Alternate Dispute Resolution (ADR) if locally established pursuant to this CBA. The Union may grieve any settlement agreement inconsistent with this CBA.

**FOR ESC:**

**FOR EPA:**