



CHIEF OF THE NATIONAL GUARD BUREAU INSTRUCTION

NGB-J1-TCP
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NATIONAL GUARD TECHNICIAN AND CIVILIAN PERSONNEL DISCIPLINE AND ADVERSE ACTION PROGRAM

References: See Enclosure L.

1. Purpose.

a. This instruction is composed of several volumes, each containing its own purpose. The purpose of the overall instruction is to establish policy and assign responsibilities for the National Guard Bureau (NGB) Technician and Civilian Personnel Policy Division (NGB-J1-TCP) in accordance with (IAW) references a through d.

b. Volume. This volume provides policy and procedures for the National Guard (NG) Technician and Civilian Personnel Discipline and Adverse Action Program IAW references e through j.

2. Cancellation. This instruction rescinds and replaces Chief of the National Guard Bureau (CNGB) Instruction 1400.25 Volume 752, 29 June 2020, "National Guard Technician and Civilian Personnel Discipline and Adverse Action Program."

3. Applicability. This instruction:

a. Applies to the NG of the States, Territories, and District of Columbia, hereafter referred to collectively as "States," and to all NG employees. The term "NG employees" throughout this volume is defined IAW references a, b, and c as Title 32 Military Technician (Dual Status) excepted service employees and Title 5 NG excepted or competitive service employees within the States.

b. Does not apply to the civilian employees of the Office of the CNGB, NGB Joint Staff, Air National Guard Directorate, and Army National Guard Directorate.

4. Policy. It is NGB policy to provide 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.

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a. Merit systems principles found in reference k state that employees should maintain high standards of integrity, conduct, and concern for the public interest and that the Federal workforce should be used efficiently and effectively. Employees should be retained based on the adequacy of their performance, inadequate performance should be corrected, and employees who cannot or will not improve their performance to meet required standards should be separated. Failure to address unacceptable performance and misconduct undermines morale, burdens good performers with subpar colleagues, and inhibits the ability of executive agencies to accomplish their missions.

b. Supervisors will have an enhanced ability to promote mission readiness and accountability consistent with merit systems principles while simultaneously recognizing employees' procedural rights and protections.

c. Administrative actions initiated before the effective date of this volume will continue to be processed consistent with the procedures and requirements of the cancelled volume, having been current at the time of initiation, IAW references i and l unless such actions conflict with current law.

5. Definitions. See Glossary.

6. Responsibilities. See Enclosure A.

7. Summary of Changes. This instruction has been substantially revised. Users are encouraged to read the entire document.

8. Releasability. This instruction is approved for public release; distribution is unlimited. It is available at <<https://www.ngbpmc.ng.mil/>>.

9. Effective Date. This instruction is effective upon publication and must be revised, reissued, cancelled, or certified current every five years.



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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 -- Letter of Recommendation for Agency Decision
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- I -- Suspensions and Removals in the Interest of National Security
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- L -- References
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ENCLOSURE A

RESPONSIBILITIES

1. Manpower and Personnel Directorate (NGB-J1). NGB-J1 will provide the CNGB with oversight of NG human resource technician and civilian employee program development, staffing, and implementation of policies, plans, and programs concerning employment.
2. NGB-J1-TCP. NGB-J1-TCP will develop, coordinate, and maintain procedures for conduct management, discipline, and adverse actions of the NGB-J1-TCP.
3. Chief of Labor and Employee Relations, NGB-J1-TCP (NGB-J1-TCPL). The Chief of NGB-J1-TCPL will conduct training for State-level HR specialists on policy and systems related to discipline and adverse action.
4. The Adjutants General (TAGs) and the Commanding General of the District of Columbia (CG). TAGs and the CG will:
 - a. Establish procedures to ensure due process for employees affected by this volume.
 - b. Consider the recommended discipline or adverse action and issue the agency decision in adverse actions. TAG or the CG may delegate responsibility for issuing the agency decision to an appropriate official within the NG, including the Reviewing Official.
 - 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 or CG. It is understood that TAG and CG maintain authority to assign work to their staff. Therefore, the personnel chosen for the assignment of these functions may be determined by TAG or CG. The below indicate suggested assignments.
2. State JAG. The State JAG:
 - a. Advises TAG or the CG, 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. State HROs. State HROs:
 - a. Provide procedural guidance and direction to all managers and supervisors on disciplinary responsibilities, rights, and obligations.
 - b. Assist supervisors and managers with the procedural aspects of an action before issuing a proposed adverse action or original decision.
 - c. Provide necessary training to managers and supervisors on the NG Technician and Civilian Personnel Discipline and Adverse Action Program.
 - d. Advise TAG or the CG in disciplinary cases including adverse actions.
 - e. Provide general and procedural guidance and case information to the affected employee(s).
 - f. Consult with the State JAG Office for legal advice on adverse actions, Douglas Factors, and proposed penalties.
 - g. Ensure 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 volume. 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 volume.
- 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 volume, 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.
- f. When new regulations, policies, and local directives that substantially impact working conditions are proposed and prepared for implementation, notify the exclusive representative (labor organization) of the bargaining unit for appropriate bargaining. When a change is in conflict with a negotiated Collective Bargaining Agreement (CBA), the agreement prevails unless the change is necessary to comply with a statutory change or in order for management to take necessary actions to carry out its mission in emergency situations. In either of these cases, post-implementation bargaining may still be required.

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.

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, if applicable, 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. Reviewing Official. Reviewing Officials (if used):

a. Review the proposed action.

b. Consult with the HRO and the State JAG for legal advice on the proposed adverse action, Douglas Factors, and proposed penalty.

c. Prepare and provide a recommendation to TAG or the CG for the agency decision.

d. Provide a notice and an opportunity to reply to any information the Reviewing Official uses or relies on in making their recommendation that was not included in the Proposing Official's notice.

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

9. 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™ 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. 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. 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. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time, particularly where the employees are in different work units or chains of supervision. Nonetheless, employees should be treated equitably, so agencies should consider appropriate comparators as they evaluate potential disciplinary actions. When taking disciplinary action, supervisors have the discretion to take into account an employee's disciplinary record and past work record, including all past offenses not only similar past offenses).

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 to three 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, unless excluded by local CBAs. All bargaining unit employees must use the negotiated grievance procedure if applicable. All non-bargaining unit employees must use the State administrative 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. However, expired letters of reprimand may always be used as impeachment evidence to call into question the credibility of the individual when relevant, or in the case of similar misconduct to

demonstrate that the employee knew, or should have known, that the alleged misconduct was improper. Letters of reprimand remain in effect for the time stated in the reprimand.

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 Volume

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

a. Category 1 Suspensions of 14 days or less.

b. Category 2.

(1) Removal.

(2) Suspension for more than 14 days. Suspensions should not be a substitute for removal in circumstances in which removal would be appropriate. There is no legal requirement to counsel, admonish, reprimand, or suspend an employee before proposing to remove that employee.

(3) A reduction in grade.

(4) A reduction in pay.

(5) A furlough of 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. Reviewing Official's letter of recommendation to TAG or the CG (if applicable).

d. All relevant documentation which may include but is not limited to; witness statements, ATAAPS reports, inquiry findings etc.

e. Decision letter (mandatory).

4. Adverse Actions Appeals. Adverse actions, regardless of category, are administratively processed to TAG, the CG, (or designee) for an agency decision. TAG, the CG, (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, the CG, (or designee) issues the agency decision for Category 1 adverse actions. For these actions, TAG, the CG, (or designee) will:

(1) Issue the agency decision.

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

(a) Use the negotiated grievance procedures, if applicable, for bargaining unit employees or;

(b) Use the administrative grievance procedure, if applicable, for non-bargaining unit employees.

(c) Request an administrative hearing, if applicable, through the NG Hearing Examiner Program.

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

(1) Issue the agency decision.

(2) Inform the employee of the right to:

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

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

(c) Use the administrative grievance procedure, if applicable, for non-bargaining unit employees or if the action is excluded from the negotiated grievance procedure;

(d) 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 30 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. Reviewing or Deciding (as applicable) 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 30 days from the date of the proposal. However, no penalty will be imposed until TAG or the CG (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. These materials may be provided as copies. 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 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]].

Figure 3. Sample Proposed Action Letter

(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.

b. [Charge Two (example Discourtesy)]

(1) [Specification 1. In regards 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.

(Figure 3. continued. Sample Proposed Action Letter)

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.

7. After the period for your reply has ended, the [Reviewing Official will make a recommendation to TAG for their final decision] OR [Deciding Official will issue the original decision letter]. If you require more time to reply, you must request an extension from the Reviewing/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. Reviewing Official. If the State retains the functionality of a Reviewing Official, the employee will be given the Reviewing Official's contact information. This individual must be higher in position than the supervisor who proposed the adverse action, but need not be in the employee's chain of command. The Reviewing Official must be reasonably available during the period for reply and any extensions. The Reviewing

Official's contact information, including work address, telephone number(s), and email address, will be provided to the employee.

h. Employee Assistance Program. 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.
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. 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?
[For example, rude to customers.] Yes No

e. Is the misconduct directly related to the job?
[For example, supply clerk who steals supplies in his or her care.] Yes No

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 employees 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.

Date

Signature

(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 the CG (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

LETTER OF RECOMMENDATION FOR AGENCY DECISION

1. Initial Process. States may use the optional Reviewing Official process when TAG or CG is the Deciding Official for adverse actions. When using this option, the Reviewing Official named in the proposed action letter must make a recommendation to TAG or the CG for the agency decision. The recommendation can be equal to or lesser than the penalty proposed, it cannot be greater. The adverse action letter of recommendation will be prepared with assistance from the State JAG and/or the HRO. NOTE: It is critical to remember that the employee has the right to be informed of and reply to any information used to develop the adverse action. Therefore, agencies should take care to ensure that; either the Reviewing Official consider only that information in the proposal and reply or, if additional items are considered, notify the employee of the additional information and provide them an additional time to reply. The adverse action letter of recommendation contains the content outlined in Figure 6 and Figure 7:

1. The recommendation in specific terms. For example, write, ["Upon review of the Proposing Official's information already provided to the employee, and the reply provided by the employee I have found that the charges are sustained and the proposed penalty is reasonable therefore I recommend that the proposed penalty be sustained."] OR ["Upon review of the Proposing Official's information already provided to the employee, and the reply provided by the employee, I have found that Charge One has been sustained, and Charge Two has not. For this reason, I recommend that the penalty be reduced to XX."]
2. The specific reasons for the recommendation. Include:
 - a. Only the information provided in the notice of proposed action. (If additional information (other than mitigating factors provided in the employee's reply) is considered, the employee must be provided notice of that and allowed additional time to reply to that information.
 - b. A reference to the proposed notice and which charges you have sustained.
 - c. The reasons for the recommendation 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.

Figure 6. Adverse Action Letter of Recommendation Contents

e. A reply to any factors provided in the employees reply and how those factors affected the recommendation. (If the employee's reply caused a consideration of a factor to be further aggravating, the employee must be informed of such and allowed time to reply to that information.)

f. No information outside of that provided in the proposed action letter or the employee's reply can be considered by the Reviewing Official unless an additional notice to employee and an additional reply period is granted to address that information.

3. The proposed 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. The recommended expiration date for a reprimand if that is the recommendation. [For example, "My recommendation is that this reprimand will be filed in the employee's official personnel folder and noted on the automated Supervisor's Employee Brief (generated from the Defense Civilian Personnel Data System) with appointment action or as required from two years from the date of the decision."]

5. The signature of the Reviewing Official.

(Figure 6 continued. Adverse Action Letter of Recommendation Contents)

2. Reviewing Official's Statement. The Reviewing Official may recommend to TAG or the CG to uphold the proposed action, select a less-severe penalty, or cancel the action.

a. If a suspension is recommended, the number of days should be clearly stated.

b. If a change to a lower grade or reduction in pay is recommended, the grade and step must be specified.

c. A Last-Chance Agreement (LCA) may also be proposed for TAG's or the CG's consideration in lieu of termination when appropriate. Employees may waive their right of appeal in exchange for a last-chance opportunity to retain employment. The proposed LCA terms must be clear, concise, and detailed in a standard LCA approved by the NG prior to TAG or CG review. The LCA can include a mitigated penalty (such as a 30-day suspension without pay in lieu of removal).

(1) The duration of an LCA is typically one to two years. If "actionable misconduct" occurs within the period, the employee is subject to the terms of the LCA, and the employee can be removed for violation of the terms of the LCA.

(2) There is no requirement to equally apply an opportunity for an LCA to all employees pending removal for the same misconduct. Higher-performing employees

are prime candidates for an LCA provided the allegations are not egregious (such as sexual assault, workplace violence, child pornography, or embezzlement).

(3) If an LCA is recommended, parties must obtain Human Resources technical review and State JAG legal review prior to TAG or CG consideration. If approved and agreed to by the employee, an LCA ends the adverse action and appellate review processes. Only an arbitrator or judge can decide whether an employee violated the terms of the LCA in an appeal or grievance. If the third party finds that the employee breached the terms of the agreement, the termination stands. If the employee refuses to accept the LCA, the original adverse action process should be completed.

(4) LCAs are not generally appropriate for employees who do not have not performed in their position for long enough to acquire due process rights as the purpose of this time period is specifically designed to determine fitness for continued federal service.

(5) State NGs will not agree to erase, remove, alter, or withhold from another agency any information that evidence reasonably indicates is true about a civilian employee's performance or conduct, and that is stated in that employee's official personnel records (including an employee's electronic Official Personnel Folder and Employee Performance File) as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action. This does not apply to corrections made due to the agency determining that that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error.

3. Effective Date. Recommend the date that the action will take effect. The effective date may not be before the date of the agency decision letter. If the recommended action is removal, the removal cannot be effective on a date sooner than 30 days after the date of the proposed action letter.

4. Reference to the Employee's Replies. The Reviewing Official's recommendation will refer to all replies received from the employee. If an oral reply is received, the recommendation must provide a brief description of the issue or issues raised in the reply. When referencing replies, the recommendation will note all issues raised in the replies and indicate whether the issues were resolved. If no reply is received, this fact will be noted. No adverse inference may be made from the fact that no reply has been received.

5. Provide the Reasons for the Recommendation. The recommendation will explain which causes in the proposed action letter were sustained and which causes were not sustained. All Douglas Factors (see Appendix A to Enclosure F, Figure 4), that apply to resolution the determination of the recommended penalty will be noted. When the recommended penalty in the proposed adverse action letter is recommended to be imposed, an explanation of why such penalty is appropriate will be included. The reasons for any modification of the penalty from that included in the proposed action letter will be explained.

6. Provide Human Resource Office Assistance Information. Provide contact information for the member of the Human Resource Office who can provide technical and procedural assistance.

Heading: [Name, Date, etc.]

Subject: Adverse Action Letter of Recommendation for Agency Decision

1. On [date], [Rank or Title] [First Name Last Name] proposed that [Employee Name] be removed from their position, [choose from the following or any such recommendation that is found to be appropriate: "Upon review of the Proposing Official's information already provided to the employee, and the reply provided by the employee I have found that the charges are sustained and the proposed penalty is reasonable I recommend that the proposed penalty be sustained." OR "Upon review of the Proposing Official's information already provided to the employee, and the reply provided by the employee, I have found that Charge One has been sustained, and Charge Two has not. For this reason, I recommend that the penalty be reduced to [XX.]" I am recommending this action will be effective on [Date]. [Note: Removals cannot be effective sooner than the next workday after 30 days from the proposed action letter.]

3. The employee provided a written response on [Date]. (Address employee's response and any consideration given to the response and any affect it had on the recommendation)

4. I recommend this action because [describe the reasons that support the imposition of whatever action was, or is, recommended. The reasons for finding each cause must be detailed, and the reasons for not finding the issues raised in the employee's reply(s) and any Douglas Factors applied to the action should be included. If any Douglas Factors are considered aggravating that were not identified in the proposal letter, the employee must be provided with a notice of this change and provided with an additional opportunity to respond and that further response should be provided to TAG for their consideration].

5. Directions to the employee: You may choose to provide an additional verbal response or written response directly to TAG in response to anything contained herein. You have until [Date] to provide that response. Any response you choose will be considered in TAGs final decision, however a choice not to provide a response will in no way be held against you. If you have any questions about the procedures, you may contact [HR Representative]. This person is only able to provide procedural guidance and is not your representative.

[Signature block]

Figure 7. Sample Letter of Recommendation for Agency Decision

ENCLOSURE H

AGENCY DECISION

1. Decision Authority. Development of TAG's or the CG's decision is the final internal review process prior to imposing an adverse action. TAG or the CG may elect to delegate to a subordinate NG official(s) the authority to make the agency decision. If TAG or CG choose to delegate the decision authority that delegation should also clearly state that as TAG is not the deciding authority, there is no longer any need for a Reviewing Official. See Figure 8, "Elements of an Agency Decision Letter," for guidance on preparing a decision letter.
2. Decision Process and Procedures. TAGs, the CG, (or designee) will consider the merits of the case prior to issuing the agency decision. 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 the CG (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 the CG (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 I within 30 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 or Reviewing Official's recommendation, 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, if applicable.
6. Information about an employee's right to appeal to the MSPB, if applicable.

Figure 8. 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 I within 30 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 8. continued. Elements of an Agency Decision Letter)

ENCLOSURE I

SUSPENSIONS AND REMOVALS IN THE INTEREST OF NATIONAL SECURITY

1. Suspension. Notwithstanding other statutes, TAG or CG 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 or CG 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 30 days after the notification, the suspended employee is entitled to submit to TAG or CG, or an official designated by TAG or CG, statements or affidavits to show why they should be restored to duty.
4. Removal. TAG or CG 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 or CG 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 30 days after the suspension, which may be amended within 30 days thereafter and will be stated as specifically as security considerations permit.
 - b. An opportunity within 30 days thereafter, plus an additional 30 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 or CG 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 J of this volume.
8. Reassignment. Although TAG or CG 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 J

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 IAW applicable CBAs. 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. All representatives will be designated in writing with a statement of understanding that is substantially the same as Figure 9. 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, [<u>Name and contact information</u>], agree to represent [<u>name of employee</u>]. 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 9. 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. 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 10 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 10. 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 30 day notice period for a Category 2 adverse action or an employee's deadline for responding to a document.

a. If an employee receives a proposed notice of removal that is effective on 01 July, a seven-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. 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 Reviewing Official or 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 Volume. 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 volume.

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 volume, 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 volume 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. 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 the CG (or designee). LCAs hold removals in abeyance under certain conditions. Figures 11, 12, and 13 list the conditions that must be part of the LCA, a sample LCA and a sample statement of understanding. LCAs are generally only used for conduct related actions and not performance actions.

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 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 11. Conditions for a LCA

Letterhead

Subject: Last Chance Agreement

1. This is a Last Chance Agreement (LCA) between the [State] National Guard and [Name of employee]. On [Date], the [State] National Guard proposed [Name of employee]'s removal 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 [Reviewing Official has recommended the reason(s) identified in the notice be sustained and recommended the penalty of removal] and/or [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 [State] National Guard, mindful of its rights to terminate [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 [State Name or Territory National Guard, or the Commanding General of the District of Columbia 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 [State Name or Territory Name or District of Columbia], 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 12. 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 12. continued. Page 2 of Sample Last Chance Agreement)

Letterhead	

Employee	

Employee Representative	

Final Appeal Authority (TAG or the CG or Designee)	

HRO Representative	
	[Name (Signature Block) Rank, Agency Position]

(Figure 12. continued. Page 3 of Sample Last Chance Agreement)

<p>I, [Name of employee], understand that the [State, Territory, or the District of Columbia] 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:</p>	
_____	Date: _____
Employee	

Figure 13. LCA Statement of Understanding

13. Stay of Imposition of Penalties Other than Removal. On occasion, it may be desirable to not impose a penalty based upon justice or the needs of the organization. Where an original decision has been issued and no appeal is pending, or where the final appeal authority has made a determination on an appeal, a penalty may be directed but not imposed based upon certain conditions. If the employee meets the conditions of the stay, the penalty is not imposed. Figure 14 lists the conditions that must be a part of a stay of imposition of a penalty. The document used for the stay and the statement of understanding would be similar in nature to those used for the LCA. It should be also noted here that if the employee violates the stay of imposition agreement, the agency must execute the penalty prior to using this action as a prior offense under the progressive discipline concept. Remember, if the employee violates the agreement, the penalty can be executed immediately so if properly done, this should not delay further appropriate disciplinary actions based on subsequent offenses.

1. The continued good behavior of the employee with no repeat of a like or similar.
2. The period of time that the stay of imposition will remain in effect (not more than one year).
3. Acknowledgment by the employee that a violation of this stay of imposition will result in the immediate imposition of the penalty previously imposed.
4. Acknowledgment by the employee that the new offense that constituted a breach of the stay of imposition may be the subject of an entirely separate adverse action.

Figure 14. Conditions for Stay of Imposition

ENCLOSURE K

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, time card, 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 other acts 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 other acts 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 time card, 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 15 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 15. Metz Factors

ENCLOSURE L

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"

GLOSSARY

PART I. ACRONYMS

AWOL	Absent Without Leave
CG	Commanding General of the District of Columbia
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 Division
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 volume, 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 a certain 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 and pay, and pending investigation, inquiry, or further agency action.

Investigation -- Examination of charges against an employee or any defense raised by the employee using this instruction or any other investigation procedure.

Joint Personnel Adjudication System -- The Department of Defense system of record for personnel 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 the employee and management to hold a removal action in abeyance and potentially cancel it 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 appeal rights 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 are a 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.

Reviewing Official -- Normally the next-level supervisor or management official who conducts an administrative review of the proposed adverse action. The use of a Reviewing Official is an optional step available to those States who maintain The Adjutant General or Commanding General decision making. The Reviewing Official is not a decision maker themselves, their task is simply to review the materials provided by the Proposing Official and provide their recommendation to The Adjutant General or Commanding General along with any applicable justification for that recommendation.

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.