



# Beyond performance – dealing with poor behavior

Disciplinary actions made easy



# Employee recognition

- ▶ Give appropriate recognition to employees' behavior whether it is good, bad, ugly or indifferent.



# Encourage desirable attributes

- ▶ Set rules or boundaries
- ▶ If rule is unique to your worksite, make sure employee understands what is expected.
- ▶ Articulate it clearly, follow up with e-mail.



# Conduct vs performance

Performance – employee, who despite diligent efforts is unable to meet your expectations concerning the quality, quantity, and/or speed of work.

Conduct – employee is capable of proper behavior but does not comport with reasonable expectations.



# Performance action

- ▶ **The elements which must be proven in a performance based action are:**
- ▶ **Supervisor communicated performance standards to employee.**
- ▶ **Employee had opportunity to demonstrate acceptable performance.**
- ▶ **Employee failed to perform at acceptable level in critical element of the performance standards.**



# Performance

- ▶ **Identify the critical results expected from the employee.**
- ▶ **Relay the expectations to the employee.**
- ▶ **Establish quantitative and/or qualitative measurement of results.**
- ▶ **Monitor the employee's performance during the rating period.**
- ▶ **Rate the employee.**



# Performance Improvement Plan (PIP)

- ▶ Allow employee opportunity to demonstrate acceptable performance.
- ▶ Clearly identify the expectations within the PIP.
- ▶ Avoid absolute standards.
- ▶ Must be in place at least 30 days.
- ▶ Review employee performance during term of the PIP.
- ▶ Document progress or lack thereof.
- ▶ Document all efforts to assist employee.



# Conduct based actions

- ▶ Misconduct is generally, behavior of an employee that is either proscribed by agency (or Federal) rules, policies, or regulations, or;
- ▶ that which may not be specifically proscribed but is beyond the realm of behavior considered acceptable within society in general *and* which negatively affects the service in its mission.



# Conduct based actions

- ▶ What the employee did or did not do.
- ▶ Management bears the burden of proof.



# Just cause

- ▶ The 7 tests for Just cause
- ▶ 1. **Notice:** Did the employee know that the behavior was likely to result in disciplinary action?
- ▶ 2. **Reasonableness:** Was the rule or order reasonably related to efficient, orderly, and safe operation of the facility?
- ▶ 3. **Investigation:** Was there an attempt to determine whether the employee engaged in misconduct before disciplinary action was imposed?



# Just cause – continued

- 4. **Fairness:** Was the investigation conducted fairly and objectively?
- ▶ 5. **Proof:** Was there substantial evidence that the employee was guilty of the alleged misconduct?
- ▶ 6. **Equitable Treatment:** Have rules and penalties been applied equitably to all employees?
- ▶ 7. **Penalty:** Was the degree of discipline imposed reasonably related to seriousness of the offense and the employee's past record?



# Cause

- ▶ The language specifically applied to discharge of educators for the BIE is found in 25 CFR § 38.9 which states in part,
  - ▶ “In order to provide due process for educators, the Director shall publish in 62 BIAM representative conditions that could result in the discharge of educators for cause and procedures to be followed in discharge cases.”
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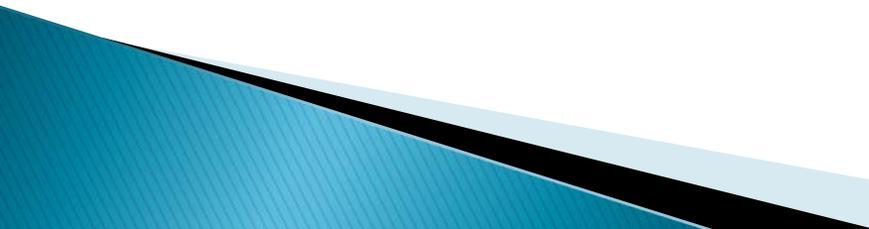


# Supervisory responsibility

- ▶ 62 BIAM 11.77 D, states as follows,
  - ▶ “D. All supervisors are responsible for:
  - ▶ (1) Keeping all employees informed on employee responsibilities and regulations regarding conduct and discipline;
  - ▶ (2) Gathering, analyzing and carefully considering all facts and circumstances before taking or recommending disciplinary or discharge actions and assuring that efforts are made to minimize the impact of non-disciplinary discharges. They also follow established procedures in the preparation of disciplinary procedures;
  - ▶ (3) Correcting employees constructively, individually, and in private:
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# Evidence

- ▶ **Demonstrative or physical evidence** is evidence that one can see and inspect.
  - ▶ **Direct evidence** is based upon personal knowledge or observation and, if true, generally proves a fact. This generally either testimonial or documentary.
  - ▶ **Testimonial evidence** is that which is related through the testimony of an observer at the scene.
  - ▶ **Documentary evidence**, generally a contemporaneous record of the writer's observations or a document which speaks for itself.
  - ▶ **Hearsay evidence** is generally testimonial evidence that relates not to what the witness knows personally but what others have said.
  - ▶ *"Get your facts right; then you can distort them all you want."*  
Mark Twain
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# Evidence Acquisition or Inquiry

- ▶ Violation based investigation.
  - ▶ The theory of a violation is a supposition based on an allegation that a violation occurred, it happened in a certain way, certain individuals have knowledge of it, certain evidence may exist, and that certain individuals may be culpable.
  - ▶ Remain objective, you may obtain evidence that disproves your initial theory.
  - ▶ Understand the elements necessary to prove or disprove your theory of the violation.
  - ▶ Failure to follow instructions;
  - ▶ 1–the employee was given proper instructions,
  - ▶ 2–the employee improperly failed to follow the instructions regardless of whether the failure to act was intentional or unintentional.
  - ▶ Format investigation in a manner that's responsive to the requisite elements.
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# Inquiry Preparation

- Preparation
  - Outline important facts of the incident or issue
  - Draft foundational semi-structured interview questions
    - Flexible and open-ended
    - Focused direction and agenda
  - Design the questions of Who, What, Where, When, Why and How
  - If a bargaining unit employee, arrange for a Union Steward or Representative to be present just in case the employee requests one.



# Order of questioning

The subject, or subjects of the inquiry.

“Neutral” witnesses—those without any evident bias concerning the outcome of the investigation.

“Friendly” witnesses—those whose bias may be counter to that of the subject, or subjects, of the inquiry.

“Hostile” witnesses—those who may be biased towards the subject, or subjects, of the inquiry.



# Representation

When an investigative interview is conducted with a bargaining unit employee the applicable rights are found at 5 USC § 7114 (a), which states, in pertinent part,

- ▶ “(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
  - ▶ (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—
  - ▶ (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
  - ▶ (ii) the employee requests representation”
  - ▶ This statutory right is incorporated into the negotiated agreement.
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# Weingarten Rights

- ▶ Weingarten Rights – Bargaining unit employee is entitled to Union representation if (1) being examined by management, (2) the employee reasonably believes the examination may result in disciplinary action, and (3) the employee requests the Union representation. Not Miranda rights.



# Weingarten Rights

- ▶ J. Weingarten v NLRB
  - ▶ Employee has to assert the right.
  - ▶ Representative designated by Union.
  - ▶ If interview will not lead to discipline of the questioned employee the right is not triggered.
  - ▶ Reasonable person standard
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# Charges

- ▶ Characterization of the misconduct.
- ▶ You must prove the charge leveled against the employee.
- ▶ Charge what you can prove.
- ▶ Factual basis.
- ▶ What did the employee do, or not do, that was wrong?
- ▶ Describe in a straightforward manner.



# Charges

- ▶ You must be specific.
- ▶ Must be sufficiently specific to allow the employee to mount a defense.
- ▶ Don't copy information from penalty guide.



# Charges

- ▶ Who, what, when, where, sometimes how and why.



# Charge construction

- ▶ Charge = label
- ▶ Specification = description.
- ▶ Elements of the charge



# Charge construction

- ▶ Charge– Failure to Follow Instructions
  - ▶ You were on duty on November 3, 2003, at 3:00 pm. At that time, I instructed you to report to my office before you ended your shift at 3:30 pm. You did not report to my office. You did not follow my instructions.
  - ▶ 1–the employee was given proper instructions,
  - ▶ 2–the employee improperly failed to follow the instructions regardless of whether the failure to act was intentional or unintentional.
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# Charge construction

- ▶ Words have specific meanings, say what you mean.
- ▶ Don't say things you cannot prove.

# Disciplinary Actions

- **Disciplinary Actions**
  - Low level actions
    - **Letter of Warning**
    - **Letter of Reprimand**
      - Filed in OPF
        - » 1 year for Bargaining Unit Employees
        - » 2 years for Non-bargaining Unit Employees
    - **Suspensions of 14 days or less**
      - Loss of Pay
      - Cannot occur any sooner than 30 days from the date of proposal
      - 2 step process – Allows the employee due process
        - » Proposal
        - » Decision
      - Only the decision may be grieved.

# Adverse Actions

## – Suspensions of more than 14 days

- Loss of Pay
- Cannot occur sooner than 30 days from the date of the proposal
- 2 step process – Allows the employee due process
  - Proposal
  - Decision
  - Only the decision may be grieved.

## – Indefinite Suspensions

- Reasonable cause to believe that a crime for which imprisonment may be imposed is committed.

# Adverse Actions

## – Removal for Cause

- Cannot occur any sooner than 30 days from the date of the proposal
- 2 Step Process – Allows the employee due process
  - Proposal
  - Decision
  - The decision may be grieved



# Penalty selection

- ▶ Discipline corrective not punitive.
- ▶ Progressive discipline—assess the lowest level of penalty that can reasonably be expected to correct the deficient behavior.
- ▶ Subsequent infractions may result in progressively severe penalties.

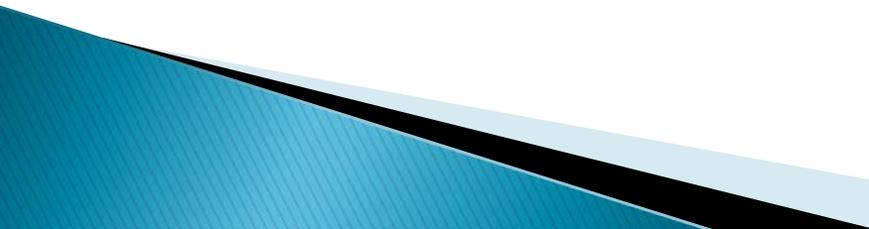


# Douglas factors

- ▶ 1) The nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional, technical, inadvertent, was committed maliciously or for gain, or was frequently repeated;
  - ▶ 2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
  - ▶ 3) The employee's past disciplinary record;
  - ▶ 4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
  - ▶ 5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties;
  - ▶ 6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
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# Douglas factors – continued

- ▶ 7) Consistency of the penalty with any applicable agency table of penalties;
  - ▶ 8) The notoriety of the offense or its impact upon the reputation of the agency;
  - ▶ 9) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
  - ▶ 10) Potential for the employee's rehabilitation;
  - ▶ 11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter; and
  - ▶ 12) The adequacy and effectiveness of alternate sanctions to deter such conduct in the future by the employee or others.
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# Factors to consider

- ▶ **Aggravating factors**—those factors that tend to make an offense more serious than it would otherwise have been.
- ▶ **Mitigating factors**—factors that tend to reduce the severity of the selected penalty.



# Quantum of proof

- ▶ Preponderance of the evidence. Evidence sufficient to incline a fair and impartial mind to one side of the issue rather than the other, however slight the edge may be.
- ▶ Sufficient to tip the scales of justice to one side.



# Aftermath

- ▶ Grievance, complaint, or appeal process.
- ▶ Employees have a right to a hearing.
- ▶ Negotiated or administrative grievance process.
- ▶ EEO complaint process.
- ▶ MSPB appeal process.

# Aftermath

- ▶ A hearing on the matter may occur.
  - ▶ May be heard by an impartial 3<sup>rd</sup> party.
  - ▶ You will need to testify.
  - ▶ Be prepared.
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