



Instructor Guide
Lesson 7 Performance and Conduct-Based Actions



Cyber Excepted Service (CES) HR Elements Performance and Conduct-Based Actions

Instructor Guide





Cyber Excepted Service

The logo for Cyber Excepted Service features a stylized green pentagon with a blue swoosh that loops around it, resembling a satellite or a data path.

Instructor Guide
Lesson 7 Performance and Conduct-Based Actions

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Cyber Excepted Service (CES) HR Elements Course, Lesson 7 Performance and Conduct-Based Actions

COURSE OUTCOME

The overall course goal is to prepare HR Professionals to guide supervisors and employees covered under CES for transition to the new personnel system with a basic understanding of performance and conduct based actions, grievance, and appeal procedures.

METHODOLOGY

Lecture: Transmit information which supplements or enhances reading; promote understanding via explanations; respond to student misconceptions or difficulties; create or engage interest in a new area; motivate reading or other assignments. Examples of lecture content includes: Create interest in the performance management program, promote understanding via explanations; and respond to student misconceptions or difficulties.

Discussions: Practice thinking and communicating in the subject/discipline; evaluate positions, arguments, or designs; defend own position; identify problems, conflicts and inconsistencies; get feedback from/about students; draw on students' expertise and prior knowledge.

TARGET AUDIENCE

The primary target audience is HR Professionals covered under CES.

About Facilitating

MATERIALS NEEDED

Be sure you have the following materials, which will be needed to complete the activities:

- ◆ Instructor Guide/Slides
- ◆ Copies of Lesson 1- Ice Breaker Participant Activity Sheet
- ◆ Chart paper/easel (at least 3)
- ◆ 3"x3" Post-It notes
- ◆ Markers for Chart paper





SETUP

Prior to a training session, be sure that the following setup has been completed:

- ◆ Practice with slides on session computer
- ◆ Test slides/practice in room
- ◆ Test microphone if used

SPECIAL FACILITATION REQUIREMENTS

Keep the participants actively involved, but watch the time!

BEST PRACTICES

Here are some best practices for facilitating an instructor-led training course.

1. Refer to the *Instructor's Guide* and rely on the script. Rehearse the script several times so that you can paraphrase it in a natural way. To the degree the schedule allows, try to add information that supports or highlights the points being made in the slide (e.g., add examples from your own experience).
2. Encourage participation. Accomplish this by asking questions and by having the participants interact as directed.
3. Encourage participants to speak in turn.
4. Encourage participants to follow along on the slides.
5. At the end of a lesson, ask the participants what they remember. Let them summarize the major instructional points, if time permits.
6. Keep the atmosphere informal so that the participants are comfortable asking questions, participating in activities, and sharing their knowledge or concerns.





COURSE Introduction and Overview

COURSE NAME

Lesson 7 Performance and Conduct-Based Actions

Duration

60 minutes

PURPOSE

The purpose of this lesson is to prepare HR Professionals to guide supervisors and employees covered under CES for transition to the new personnel system with a basic understanding of performance and conduct based actions, grievance, and appeal procedures.





LESSON 7: Conduct Based Adverse Actions, Grievance, and Appeal Procedures

PURPOSE

The purpose of Lesson 7 is to prepare HR Professionals to guide supervisors and employees covered under CES for transition to the new personnel system with a basic understanding of performance and conduct based actions, grievance, and appeal procedures.

LEARNING TOPICS

When participants have completed Lesson 7, they will be able to discuss:

- Define performance and conduct based actions
- List the procedural requirements for taking a performance or conduct based action
- Discuss the requirements for a within-grade increase (WGI) and the circumstances when to delay or withhold a WGI.
- Procedural Requirements of Performance and Conduct based actions
- Explain and apply the Douglas Factors and the applicable agency Table of Penalties
- Discuss the grievance and appeal processes for performance based actions





TIME

The following is a suggested time plan for this lesson. The instructor(s) may adapt it as needed. Note this table does not reflect breaks – use your judgement to determine the timing of breaks for participants.

LESSON	SUGGESTED TIME
Lesson 7: Performance and Conduct-Based Actions	50 minutes with one 10 minute break



Instructor Notes

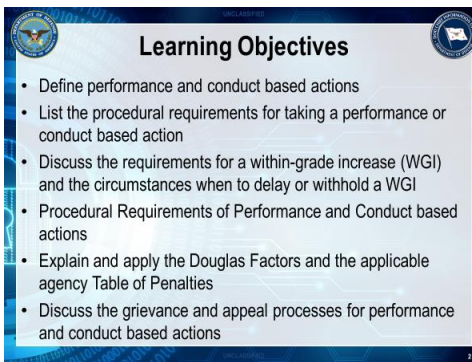


LESSON 7: Performance and Conduct Based Actions, Grievance, and Appeal Procedures

DO- Display the course title slide as participants arrive for training each morning.

- Welcome participants as they arrive for the class
- Thank them for coming

SAY: Welcome participants as they arrive for the class. Thank them for coming.



DO - Show Slide 2

SAY: After completing this lesson, you will be able to:

- Define performance and conduct based actions
- List the procedural requirements for taking a performance or conduct based action



Instructor Notes

- Discuss the requirements for a within-grade increase (WGI) and the circumstances when to delay or withhold a WGI
- Procedural Requirements of Performance and Conduct based actions
- Explain and apply the Douglas Factors and the applicable agency Table of Penalties
- Discuss the grievance and appeal processes for performance based actions

As an HR Practitioner you will be equipped with a basic understanding of performance and conduct based actions, but it is strongly recommended that you and your customers consult Employee Relations Specialists.



DO - Show Slide 3 - Walk the participants through references

SAY: This framework consists of the regulations that govern actions relating to employee relations.

This is the guide by which employee relations decisions are made for matters pertaining to performance appraisals, performance-based reduction in grade and removals, performance management, and employment, adverse actions, representation rights and duties, grievance procedures and appeals.

While the government-wide United States Code (U.S.C.) and Code of Federal Regulations (CFR) and DoD regulations are uniform, there may be Component or local regulations or articles in negotiated agreements that contain additional procedural requirements that need to be considered - like the Table of Penalties - that often tend to be unique to the Components.

Transition: Now let's begin our exploration of performance and conduct based actions.



Instructor Notes

Importance of Early Intervention

➤ Failure to take immediate action with employee issues could mean:

Damaging Office Morale	Disciplinary Issues
<ul style="list-style-type: none">Creates issues with other employeesProjects image of ineffective leadership from supervisor	<ul style="list-style-type: none">Discipline issues are usually symptoms of performance or conduct issues

DO - Show Slide 4

SAY: **Early intervention** is key to preventing the onset of or continuation of performance or conduct issues. When poor performance or misconduct is allowed in the workplace it can be very damaging to the morale of the team and at times to the organization.

Transition: Can I see a show of hand for those who can articulate the difference between a performance-based action and a conduct-based action?

Early Intervention Is Key

- Feedback and assistance should be provided to employees early on, whenever there is a need for improvement or when there is a decline in performance
- Employee performance ratings are a primary factor in reduction in force procedures
- What actions should be taken?

DO - Show Slide 5

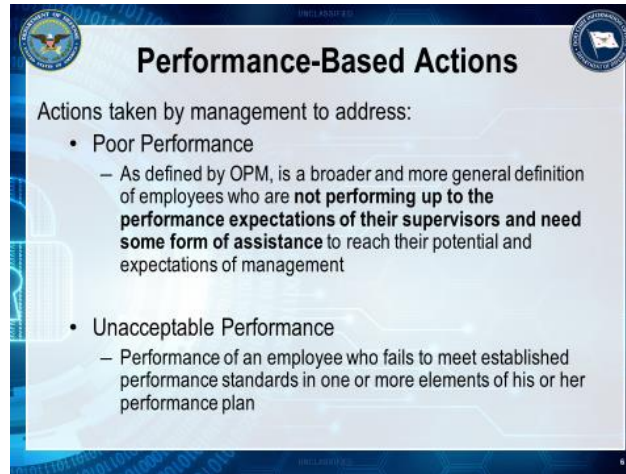
SAY: Feedback and assistance should be provided to employees early on, whenever there is a need for improvement or when there is a decline in performance.

Employee performance ratings are a primary factor in reduction in force procedures.

Transition: What actions should be taken?



Instructor Notes



DO - Show Slide 6

SAY: Performance-based actions are actions taken by **management to address poor performance and unacceptable performance, ranging from informal measures such as counseling through Performance Improvement Periods (PIPs) or formal adverse actions.**

How does management respond to performance-based actions?

- **Poor Performance:** As defined by OPM, is a broader and more general definition of employees who are **not performing up to the performance expectations of their supervisors and need some form of assistance to reach their potential and expectations of management.**
 - management works to improve performance through: Coaching, Retraining, Mentoring, etc.
- **Unacceptable performance:** Title 5 of the U.S.C. (4301(3)) defines unacceptable performance as “performance of an employee which **fails to meet established performance standards in one or more critical elements of such employee’s position.**”
 - management takes more official types of action; we will talk more about this

The DoD Performance Management and Appraisal Program (DPMAP) clearly establishes the difference between Successful and Unsuccessful levels of performance based on the element rating pattern.

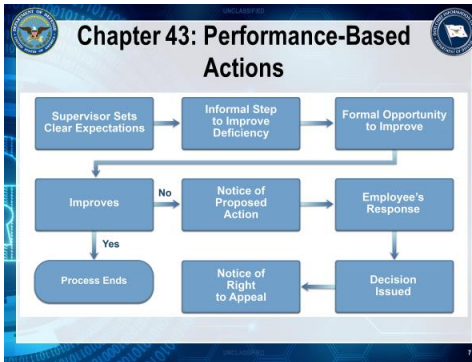
But remember, **only unacceptable performance in an element puts an employee at risk for removal or demotion.**

Transition: First, let’s define further unacceptable performance.





Instructor Notes



DO - Show Slide 7

SAY: This slide illustrates a process for supervisors/managers to work through performance-based actions with employees.

SUPERVISOR SETS CLEAR EXPECTATIONS

Clarity and trust are two critical elements to managing employee performance.

- When managers/supervisors set clear expectations at the beginning of the appraisal period, they can more easily identify and address unacceptable performance.
- By clearly defining the expected performance at the onset, supervisors can monitor and address an employee's strengths as well as identify performance deficiencies. If employees do not understand what is expected, it is difficult for them to meet those expectations.

INFORMAL STEP TO IMPROVE DEFICIENCY

If an employee performs at less than an acceptable level, the manager/supervisor must provide specificity in four areas:

- Determining unacceptable performance in one or more critical elements
- Issuing an opportunity period notice by informing the employee in writing
- Defining the formal opportunity to improve during which time the employee must bring performance up to an acceptable level in failed critical element(s)
- Determining changes in performance in one or more critical elements



Instructor Notes

FORMAL OPPORTUNITY TO IMPROVE

The opportunity to demonstrate acceptable performance takes the form of a Performance Improvement Period, commonly referred to as a PIP.

- **Note:** Writing a PIP may be one of the most difficult tasks a manager/supervisor has to do. The manager/supervisor determines the length of time of the opportunity period, although most fall in the range of 60–120 days depending on the complexity of the job.
- Check with your agency about the processes for providing an opportunity to demonstrate acceptable performance and work with your employee relations specialist.

During the opportunity to demonstrate acceptable performance, managers/supervisors may:

- Supervise more closely and provide frequent feedback/counseling.
- Demonstrate challenging tasks for the employee.
- Provide on-the-job training or peer coaching.

As an HR Practitioner, you advise managers/supervisors to keep detailed records of the employee's progress during the PIP.

IMPROVEMENT (YES/NO)

DOES NOT IMPROVE

During or after an agency gives an employee the opportunity to demonstrate acceptable performance, if the performance continues to be unacceptable in one or more critical elements, management may propose a reduction-in-grade or removal.

- A reduction-in-grade means the involuntary assignment of an employee to a position at a lower classification or job grading level.
- A removal means the involuntary separation of an employee from employment within an agency (5 CFR 432.103(f)).

DOES IMPROVE

If the employee's performance improves during the PIP period and then falls below satisfactory again within a year of the beginning of the PIP, an agency need not reinstitute the PIP, but may go directly to a proposed reduction-in-grade or removal action. Employees under a PIP have one year to bring performance to an acceptable level (5 CFR 432.105).





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At the end of the PIP, if the employee does improve performance and continues at an acceptable level for one year from the beginning of the opportunity to demonstrate acceptable performance, and if, after that year the employee's performance again becomes unacceptable, the agency must then give the employee an additional PIP before determining a reduction-in-grade or removal.

A proposed action may be based on instances of unacceptable performance that occur within a one-year period ending on the date of the notice of the proposed action.

NOTICE OF PROPOSED ACTION

If a reduction-in-grade or removal is proposed, according to 5 CFR 432.105 (4), an employee is entitled to:

- An advance written notice stating the reason for the proposed action

EMPLOYEE RESPONSE

- A reasonable time to answer orally or in writing
- Representation by an attorney or other representative – an agency may restrict the employee's representative if there is a conflict of interest, unreasonable costs, or priority work assignments that preclude the individual from serving as the representative.
- Consideration of medical conditions

DECISION ISSUED

- A written decision and the reasons at the earliest practicable date. The agency provides a written decision within 30 days after the advance notice expiration date.

If an employee belongs to a bargaining unit, he or she may file a grievance.

NOTICE OF RIGHT TO APPEAL

A bargaining unit employee who is reduced in grade or removed from service may file a grievance under an applicable negotiated grievance procedure if the removal or reduction-in-grade falls within its coverage, i.e., is not excluded by the parties to the collective bargaining agreement (5 CFR 432.106 (b)), and the employee is:

In the competitive service and has completed a probationary or trial period;

In the competitive service, not subject to a probationary period, and has completed one year of continuous service in the same or similar positions other than in a temporary appointment limited to one year or less;





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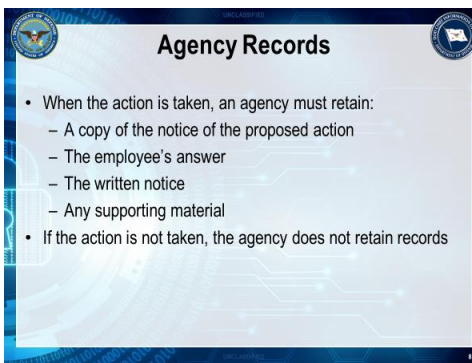
Preference eligible in the excepted service and has completed one year of continuous employment in the same or similar positions;

Non-preference eligible in the excepted service who is covered by 5 CFR, Part 752 – Adverse Actions (Subpart C – Principal Statutory Requirements for Removal, Suspension for more than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less; and Subpart D – Regulatory Requirement for Removal, Suspension for More than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less) and has completed two years of continuous employment in the same or similar positions;

If a bargaining unit employee grieves a matter under this section, 5 U.S.C. 7121 (a)(5), and the terms of the applicable negotiated grievance process govern the actions, the employee may not appeal to the MSPB and file a grievance on the same matter. Only one option may be taken: grievance or appeal.

The burden of proof differs for Chapter 43 and Chapter 75.

Transition: The regulations call for agencies to keep records. The requirements differ if the action was effected or not effected. Let's take a closer look at these requirements.



DO - Show Slide 8

SAY: When the action is taken, an agency must retain all documentation relating to the reduction-in-grade or removal. The documentation is available for review by the affected employee or his or her representative.

At a minimum, agency records must consist of:

- A copy of the notice of the proposed action
- The employee's answer (in writing or a summary of it if given orally)
- The written notice of decision (and the reasons for it)



Instructor Notes

- Any supporting material (including documentation about the opportunity to demonstrate acceptable performance)

If the action is not taken and the employee improves his or her performance, any notation of the unacceptable performance is removed from the agency record. In spite of this, encourage supervisors to keep the records for one year in the event the employee's performance falls below satisfactory.

An action may not be taken for a variety of reasons. Examples might include:

- The employee raises his or her performance to satisfactory during the PIP
- The employee provides extenuating factors that cause the Deciding Official not to take the action, i.e., temporary medical problem that the supervisor or Proposing Official was not aware of that caused a temporary lapse in performance
- The Deciding Official uncovers a harmful procedural error that may cause the case to be overturned

The Deciding Official decides there is a personality conflict between the supervisor and the employee, and decides to reassign the employee to a new supervisor.

Transition: Another area impacted by performance is a within-grade increase commonly known as a WGI ("Wiggy"). We begin with the regulatory framework.

Within-Grade Increase

- Employee performance is based on the most current rating of record
- When a WGI decision is not consistent with the employee's most recent rating of record, a more current rating of record must be prepared
- WGIs may be withheld if:
 - The employee's performance is less than "Fully Successful"
 - The employee is reassigned because of unacceptable performance and is eligible for a WGI prior to completing the minimum period of performance

DO - Show Slide 9

SAY: 5 CFR, Part 531.404 – Earning a within-grade increase...

According to 5 CFR 531.404 (a)(1), a WGI is an increase in the employee's rate of basic pay by advancement from one step of his or her grade to the next after meeting requirements for length of service and satisfactory performance.



Instructor Notes

WGIs are generated automatically in the Human Resources Office unless the manager/supervisor has identified a performance problem with the employee. In that case the WGI may be postponed or withheld.

- An employee's performance is based on the most current rating of record

The supervisor/manager needs to notify the employee of lower performance before withholding the WGI.

- When a WGI decision is not consistent with the employee's most recent rating of record, a more current rating of record must be prepared

According to 5 CFR 531.409(c)(1), the WGI must be postponed when either of the following conditions exist:

- The employee's performance is less than fully successful and he or she has not been given a performance plan or told the specific requirements for fully successful performance at least 30 calendar days before the end of the waiting period. In this situation, the manager/supervisor promptly contacts Human Resources for guidance.
- The employee is reassigned or demoted because of unacceptable performance and is, or will be, eligible within the minimum period of performance for a WGI. Human Resources will notify the manager/supervisor of the requirement to postpone.

If either of those two conditions exists, the manager/supervisor should notify the employee in writing of the postponement, the reason for it, and that he or she has to demonstrate fully successful performance.

According to 5 CFR 531.411, the employee's performance at an acceptable level must be determined within 52 calendar weeks following the original eligibility date for the WGI. If the WGI is still considered denied, the period is extended for up to another 52 calendar weeks.

The determination to deny the WGI is communicated in writing.

The WGI denial is a three-step process:

- Notify the employee of the negative determination (30 days advanced notice)
- Request for reconsideration by the employee
- Determine final decision

The notice (see 5 CFR 531.409 (e) (1)):

- Gives reasons for the negative determination and what the employee must improve to be granted a WGI
- Informs the employee of his or her right to request a reconsideration of the determination





Instructor Notes

There may be additional requirements for denying a WGI contained within a collective bargaining agreement. Please contact your Labor & Employee Relations Specialist.

Employees must submit a request 15 days from receiving the initial determination (see CFR 531.410 (a) (3)):

Employees must have a reasonable amount of official time to review materials and prepare a response to the determination.

An employee has the right to representation.

The agency must provide the employee with a prompt written final decision.

Managers/supervisors may approve the WGI at any time once the employee has demonstrated an acceptable level of competence (see CFR 531.411). To do so, the manager/supervisor must issue a new rating of record that meets the accepted level of competence.

The determination to grant a WGI is based on:

- Meeting the appropriate waiting period
- Having the most recent rating of record be at an acceptable level of competence, or better

The granting of a WGI requires the issuance of a determination that the employee is demonstrating an "acceptable level of competence" as documented in a current rating, i.e., not more than one year old.

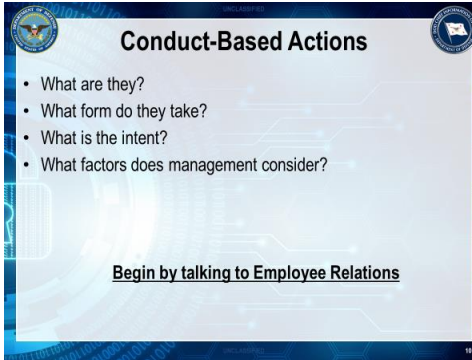
Upon denial of a WGI, supervisors have the flexibility to approve a WGI at any time thereafter once they determine the employee is performing at an acceptable level of competence. However, the agency must consider the employee's performance at least every 52 weeks after the denial.

Transition: And now we are going to conclude this lesson with a comparison of conduct-based and performance-based actions. In the previous lesson we focused on conduct-based actions. So let's begin comparing the two.





Instructor Notes



DO - Show Slide 10

SAY: After the manager/supervisor intervenes to improve the unacceptable performance of an employee without success, the next step is to consider a conduct-based action. As an HR Practitioner you will be equipped with a basic understanding of conduct based actions, but it is strongly recommended that you encourage your customers to consult Employee Relations Specialists.

What are they?

- They are actions taken by management to address delinquency or misconduct personally attributable to the employee.

What form do they take?

- Misconduct may take many forms of varying severity, from insubordination, leave abuse, theft, to Internet gambling. Similarly, the type of conduct-based action management can take varies in severity, from informal actions, such as an oral reprimand, to adverse actions, such as removal.

What is the intent?

- Management takes conduct-based actions to address delinquencies or misconduct when it is clear that an employee did something or failed to do something that adversely affects his or her work, the ability of others to do their work, or the agency's mission.
- The intent is to "motivate," "educate," and "rehabilitate." We will talk more about this in a few minutes.

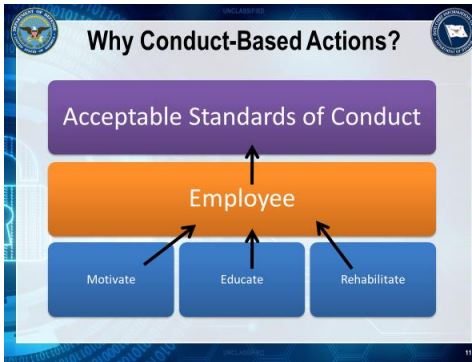
What factors does management consider?

- The supervisor must decide what type of management action best addresses the incident. Two questions arise: Is the employee incapable ("I can't") or unwilling ("I won't") conform to the rules?



Instructor Notes

A manager must consider several factors in order to determine what type of action is warranted. Foremost, one must decide whether the incident involves the employee's poor performance or an act of misconduct. In most cases, it is one or the other, but in some cases, it may be both.



DO - Show Slide 11

SAY: So why conduct-based actions?

The intent of conduct-based actions is to correct, motivate, educate, and rehabilitate employees to conform to acceptable standards of conduct. Depending on the nature and history of the employee's misconduct, supervisors may modify undesirable employee behavior through a range of options.

If supervisors address conduct in a punitive, inconsistent, or non-communicative manner, they can expect employee resistance or recidivism. To best influence an employee's conduct, supervisors must deliver immediate, honest, and consistent communication.

As Employee Relations Practitioners, remind supervisors of the purpose of conduct-based actions:

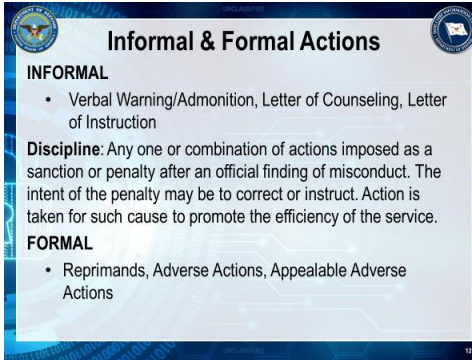
- **Motivate:** Clarity and trust between the supervisor and employee are essential to motivate employees to be responsible. Mixed messages frustrate employees and allow for an easy excuse in times of misconduct.
- **Educate:** Employees require clear expectations. Communicate acceptable standards of conduct at the onset of employment. At the first sign of potential misconduct, educate the employee; revisit the standards, and discuss the misconduct and potential reasons for it.

Rehabilitate: Through coaching and conversation, identify the reasons and remedies for the misconduct. Work as a team to restore and mold the employee's conduct into an acceptable path.

Transition: Now that we understand what conduct-based actions are, what form do they take?



Instructor Notes



DO - Show Slide 12

SAY: While employee misconduct may appear in various forms, managers can take a range of conduct-based actions that vary in severity from informal (such as oral reprimand) to formal actions (such as removal). Let's take a look at the informal actions that supervisors may take to correct misconduct.

- Informal actions are the first measures management takes to correct unwanted behavior. They are designed to provide the employee an indication of, and an opportunity to change, the undesired behavior.

Informal actions establish the employee's failure to meet expectations and state boundaries for him or her. If the actions do not cause the employee to change his or her behavior, supervisors may have to consider a formal action.

The three most commonly used informal actions are:

- **Verbal Warning/Admonition**

- **Verbal Warning:** Typically the warning is a form of oral counseling. Because oral counseling involves face-to-face communication, it can be a very direct and effective means available to a supervisor in dealing with conduct or performance issues. It may be a singular occurrence or an ongoing process. Although usually oral, it may be beneficial to make counseling notes and share them with the employee, even though the notes are not maintained in an official file. Often, counseling is the first (and only) step in addressing performance concerns, but it also may be used with conduct, such as attendance problems.
- **Oral Admonition/Counseling Session:** The oral admonition/counseling session consists of a private meeting or discussion between an employee and a supervisor or management official for the purpose of identifying a conduct or performance problem, offering assistance if appropriate and notifying the employee that recurrence will result in more severe action. It is important to record that you gave an employee an oral admonition. The employee should be



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informed that he or she is being admonished. You can rely on the oral admonition as a basis to the next step, if necessary.

- **Letter of Counseling** – A written letter of counseling may be appropriate where an oral warning did not achieve the desired result or the concern being addressed is of such seriousness that a warning or counseling would be insufficient. A written warning specifies for the employee the conduct or performance that is in need of remediation and what the employee must do to correct the conduct or performance problem. If improvement is not forthcoming, the written warning provides documentation that the employee was clearly on notice of the conduct or performance requirement(s). A copy of the written warning is generally part of a supervisor's desk notes and is not filed in a Privacy Act "system of records."
- **Letter of Instruction** – Some agencies refer to this as a letter of requirement.
 - Probably the most common of these is the "leave restriction notice," a written notice specifying required procedures, often more exacting than applied to other employees that must be followed before leave, especially unscheduled leave, will be approved.
 - A letter of instruction usually follows a lack of success from counseling or an oral admonishment and is used to ensure the employee is clearly on notice of the required changes in conduct to avoid a formal disciplinary action in the future. In this case, a letter of leave restriction is in effect for a stated period of time, perhaps 6-12 months, at which time the supervisor will review the employee's progress and may release the employee from any requirements that exceed those applicable to other employees. While informal precautionary actions do not go into an employee's permanent record, encourage supervisors to document and retain informal written memos or notes.
 - A letter of instruction often deals with two particular requirements when it comes to leave. If the problem is unscheduled leave, then the letter should spell out to the employee how and by when to request leave from the supervisor. If the problem is one of undocumented absences due to illness, the letter may impose a requirement to provide medical documentation for any length of absence due to illness.

These informal actions provide a variety of tools for supervisors to address conduct and performance concerns without resorting to an adversarial environment often associated with disciplinary and adverse actions. Informal actions allow the supervisor to maintain good order and discipline in the work place by using non-confrontational tools and techniques.

Disciplinary Action

Disciplinary action is a formal action (sanction or penalty) imposed after an official finding of misconduct, taken by a supervisor or manager to correct an employee's delinquency or misconduct.



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- Disciplinary action includes Letters of Reprimand, Suspensions, reductions in pay or grade, and removals.
- The intent of the penalty may be, in some instances, to correct or instruct. Such action promotes high standards of government service, and maintains public confidence in the agency.
- Disciplinary action may only be taken for such cause as will promote the efficiency of the service.
- The intent of the penalty may be, in some instances, to correct or instruct; however, the penalty is issued in response to misconduct on the part of the employee.

Let's begin with "Reprimands."

Reprimand and Letter of Reprimand

A reprimand is a written action describing misconduct of an employee. The action may be written to serve as a deterrent to future unacceptable conduct or behavior.

- It is not appealable to MSPB but is grievable through a negotiated grievance procedure or the Administrative Grievance System.
- It is not maintained permanently in the employee file.

A letter of reprimand is a formal disciplinary action that a supervisor issues to an employee to correct significant misconduct or delinquency. The reprimand is reduced to writing and cites the reasons for its issuance and the duration of the reprimand. A Letter of Reprimand is not an adverse action.

The first line supervisor generally issues the Letter of Reprimand.

The letter of reprimand is a temporary document that goes into the employee's official personnel folder (OPF) for a specified period of time.

Non-bargaining unit employees have the right to grieve this action through whatever administrative grievance process is available to them. Bargaining unit employees must refer to the collective bargaining agreement to determine whether the matter must be grieved through that procedure or through the administrative grievance procedure.

Check your agency regulations and collective bargaining agreements for specific procedures, format, retention period, and grievance process.

Adverse Action

An employee is accorded due process rights including an advanced notice of the proposal, a reasonable time to respond, the right to representation and a written final decision.



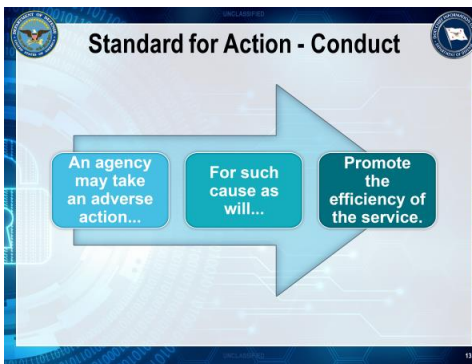
Instructor Notes

These adverse actions are not appealable to MSPB, but are grievable through a negotiated grievance procedure or the Administrative Grievance System.

Appealable Adverse Action

Appealable Adverse Action is a term used to identify a disciplinary action consisting of a suspension of more than 14 days, a reduction in pay or grade/band, a furlough of 30 days or less, or a removal. These are appealable to MSPB.

An employee is accorded due process rights including an advanced notice of the proposal, a reasonable time to respond, the right to representation and a written final decision.



DO - Show Slide 13

SAY: 5 U.S.C. 7513(a) states that under regulations prescribed by OPM, an agency may take an action under Chapter 75, Volume II (removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less) only for such cause as will promote the efficiency of the service. Each action taken must satisfy this test or cause standard. This standard goes all the way back to the Lloyd-La Follette Act in 1912 and before. Executive Order N0. 173 (1902) defined "just cause" for removal as "any cause, other than one merely political or religious, which will promote the efficiency of the service".

As we learned, an adverse action promotes the efficiency of the service if the grounds for the action relate either to an employee's failure to accomplish his duties satisfactorily or to some other legitimate government interest.

The agency must meet four criteria for each case:

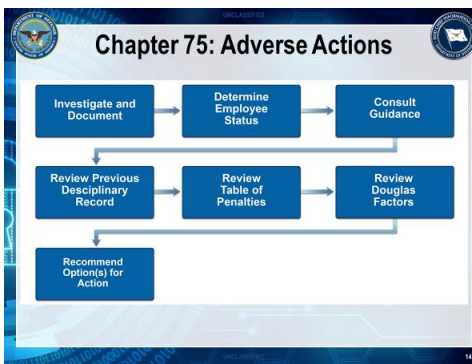
1. The charges or reasons upon which the action is based must be specified.
2. The facts or reasons that form the basis for the action must be proven by a "preponderance of the evidence".



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- The agency must show the connection or nexus between the charges and how the employee's conduct caused an identifiable detriment to the agency's mission or operation (the efficiency of the service).

The penalty chosen was justified and appropriate to the circumstances of the case. Determine the reasonableness of the discipline as warranted through application of the Douglas Factors and Table of Penalties.



DO -Show Slide 14

SAY: An incident may come to your attention in a number of ways. The most common way is for a management official to bring up the issue personally and seek your guidance. It also may come from a union official, an employee, or an Inspector General report.

Regardless of its source, as an Employee Relations Practitioner, it is important that you know and understand the essential steps to take:

INVESTIGATE AND DOCUMENT

- By asking questions, you can determine the validity of the charge:
 - Do the facts establish the claim?
 - Is the employee's behavior a violation?
 - Did the employee know of the rule, regulation, or requirement?
 - Has the rule been applied consistently?
 - Did the behavior have a negative impact on the employee or others?



Instructor Notes

Once someone contacts you, maintain records of any documentation you receive or submit. Doing so not only helps you recall key facts, but it also may help in the future to prove the charge, if necessary.

DETERMINE THE EMPLOYEE'S STATUS

- To assist a supervisor, first determine the status of the employee and if Chapter 75 covers him or her. 5 U.S.C. 7511 provides the following definitions of covered employees:
- An individual in the competitive service –
 - Who is not serving a probationary or trial period under an initial appointment; OR
 - Who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less
- A preference eligible individual in the excepted service who has completed 1 year of current continuous service in the same or similar positions
- An individual in the excepted service (other than a preference eligible) –
 - Who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; OR
 - Who has completed two years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less

CONSULT GUIDANCE

Determine the required guidance needed:

- Agency guidance
- U.S.C.
- CFR
- Collective bargaining unit agreement
- Applicable case law precedents
- Applicable regulations
- Agency's procedures on the topic





Instructor Notes

Determine if you need to review the collective bargaining agreement.

Create a library of key resources for your organization and consider creating a binder of resources that are specific to your organization. This step better prepares you to assist supervisors. Rather than scuffle through various resources, you have an organized system to assist supervisors.

REVIEW PREVIOUS DISCIPLINARY RECORD

- In this step, your goal is to create a fact-based picture of the situation. Sometimes supervisors close to the situation need assistance to move from feelings to facts.
- Establish a comprehensive picture of the employee's overall conduct. This eliminates the potential villainization of the employee. Consider the overall picture, not just the one instance.

Note any patterns. Does the misconduct occur at a particular time? If recurring, has the supervisor discussed the situation with the employee? What actions did the supervisor take to correct the action?

REVIEW THE TABLE OF PENALTIES

- A Table of Penalties is a list of the infractions agency employees commit most frequently, along with a suggested range of penalties for each offense.

We will talk more about this later.

REVIEW DOUGLAS FACTORS

- The Douglas Factors are twelve factors or information that should be considered by supervisors, proposing officials, and deciding officials when determining what disciplinary or adverse action is appropriate, if any. The name is derived from the landmark MSPB decision in Douglas v. Veterans Administration, 5 MSPR 280 (1981).

We will talk more about this later.

RECOMMEND OPTION(S) FOR ACTION

- In determining the appropriate penalty, supervisors must observe the principle of "like penalties for like offenses in like circumstances". This means that penalties will be applied as consistently as possible.

Please make sure you are in contact with you Employee Relations Specialist.

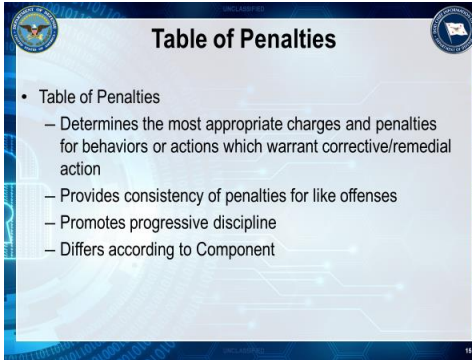
ASK: Are there any questions?

Transition: Let's take a closer look at the Table of Penalties.





Instructor Notes



DO - Show Slide 15

SAY: REVIEW THE TABLE OF PENALTIES

A Table of Penalties is a list of the infractions agency employees commit most frequently, along with a suggested range of penalties for each offense.

The Table of Penalties promotes progressive discipline. As offenses increase in frequency, the discipline progresses in severity.

- For example, if it is the first offense, normally you give a lower level of discipline, but as the employee continues with a second or third offense, the severity of the discipline increases.
- The offenses do not have to be continuous or similar in nature. In other words, if the first offense is a failure to follow instructions and then later the employee commits an offense of insulting a supervisor, the prior offense of failure to follow instructions may be used as the first offense regardless of the dissimilar nature of the offenses.
- The penalties graduate in severity based on whether an employee has no previous record of misconduct or has a pattern of misconduct. More serious types of misconduct have a more serious suggested penalty (or a range of penalties) for a first offense than less serious types.

The Table of Penalties varies for each agency Component.

Remember:

- The Table of Penalties is considered an advisory document or guide. If you exceed the suggested level of discipline listed in the guide, you should explain your rationale in the notice.
- The Table of Penalties is but one factor to be considered in determining the appropriateness of a penalty.

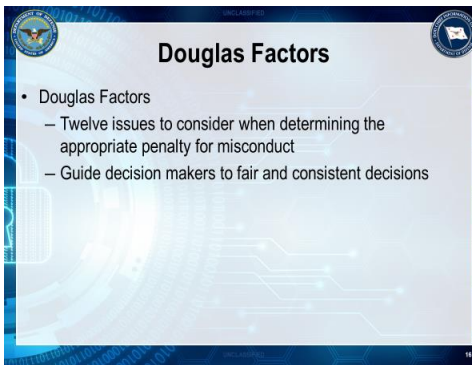




Instructor Notes

- It is far from being comprehensive. It can't cover all types of possible misconduct specifically.
- Apply the appropriate discipline likely to be necessary to correct the offense.
- Some Components identify egregious offenses as zero tolerance offenses (i.e., sexual harassment, workplace violence).
- Precaution is taken with zero tolerance offences, as it does away with application of the Douglas Factors. The Douglas Factors will be discussed in the following slides.

Transition: This Table of Penalties is intended as a guide for your use in determining the most appropriate charges and penalties for behavior(s) or action(s) which warrant corrective/remedial action and helps to ensure a relative consistency of penalties for like offenses.



DO - Show Slide 16

SAY: REVIEW DOUGLAS FACTORS

The Douglas Factors are twelve factors or information that should be considered by supervisors, proposing officials, and deciding officials when determining what disciplinary or adverse action is appropriate, if any. The name is derived from the landmark MSPB decision in Douglas v. Veterans Administration, 5 MSPR 280 (1981).

THERE ARE 12 DOUGLAS FACTORS

1. Nature and seriousness of the offense – what was the nature and seriousness of the offense?
 - Does it strike at the very core of the mission?
 - Have there been any policy statements on the seriousness of this type of offense?



Instructor Notes

2. Employee's job level and type of employment – what does the employee do? What is his or her level of position?

- Higher positions carry greater responsibilities and are held to a higher standard, as they set the example for the entire workforce (i.e. supervisors or SES members).
- Allowing misconduct at a higher level by senior officials may send a message that misconduct is accepted and/or ignored within the Component.

3. Employee's past disciplinary record – what is the employee's past disciplinary record?

- Is this the first, second, or third offense?
- In *Bolling v. Air Force*, 9 M.S.P.R. 335 (1981), it was found that a full third-party review of prior discipline is not necessary as long as the appellant was informed of the earlier action in writing, had an opportunity to have it reviewed by an authority (other than the one who took the action), and the prior action was made a matter of record.

4. Employee's past work record – what is the employee's past work record?

- Review the employee's rating and award history.

5. Effect of the offense upon the employee's ability to perform at a satisfactory level – has the offense impacted the employee's ability to perform at a satisfactory level?

- Does it impact the employee's security clearance?
- How does it impact trust among employees, customers, or others in his or her chain of command?
- Is the employee able to carry out all of his or her responsibilities (fiduciary responsibilities)?

6. Consistency with similarly situated employees – is the decision consistent with similarly situated employees?

- What is the local disciplinary record for this type of offense? In the past, what was the decision for this type of penalty?

7. Consistency with Table of Penalties – is the decision consistent with the Table of Penalties?

8. Notoriety of the offense – did the case appear in the newspaper?

- What is the impact on the agency's reputation?
- Does it call into question the reputation or image of the agency, especially relating to mission?



Instructor Notes

9. Clarity with which employee is on notice of any rule violated by the misconduct – had the employee been warned about the conduct in question?

- Did the employee receive training on the particular offense?
- Was the employee properly counseled?
- Was there proper notice provided to the workforce?

10. Potential for employee's rehabilitation – is there the potential for rehabilitation?

- In cases of alcohol or drug abuse related offenses, has the employee sought assistance?

11. Mitigating circumstances – where there unusual job tension or personality problems?

- Were there mitigating circumstances surrounding the offense, such as personality problems, mental impairment, harassment, bad faith, malice or provocation on the part of others?

12. Adequacy of the alternative sanctions to deter future misconduct – what is the effectiveness of the decision to deter the behavior? Are there alternatives?

Transition: It is very important to consider and/or address each of the Douglas factors in imposing a penalty, especially in light of recent MSPB decisions which indicate a renewed emphasis on Douglas. Failure to address the Douglas factors could result in the mitigation of penalties by the MSPB.

Grievance and Appeal Processes

- Bargaining Unit Employees (BUEs) may file an appeal to the Merit Systems Protection Board (MSPB) or a grievance under their applicable collective bargaining agreement (CBA)
- Employees not represented by a union may file an appeal to the MSPB
- In limited circumstances, employees may file an administrative grievance
- Contact your Labor and Employee Relations Specialist to determine individual employee appeal rights

DO - Show Slide 17

SAY: An employee's option for appealing or grieving a conduct-based action is limited by both their representation status, law, and agency policy.

Bargaining unit employees may file an appeal with the Merit Systems Protection Board (MSPB) or file a grievance through their negotiated grievance procedure contained in their collective bargaining agreement. Because certain actions are not appealable to the MSPB (e.g. suspensions of 14 days or less),





Instructor Notes

bargaining employees will often be limited to filing a grievance to their negotiated grievance procedure. Where the MSPB has jurisdiction (e.g., removal) the employee must choose between the negotiated grievance procedure or filing an appeal with the MSPB. In rare circumstances, the negotiated grievance procedures may exclude appealable adverse actions to the MSPB.

Employees not represented by a labor union are limited to the MSPB or administrative grievance procedures. The administrative grievance procedures limit the scope of issues that may be grieved to matters not appealable to the MSPB.

Contact your Labor and Employee Relations Specialist to determine an employee's appeal rights before taking a conduct or performance-based action.

Lesson 7 Review

- Define performance and conduct based actions
- List the procedural requirements for taking a performance or conduct based action
- Discuss the requirements for a within-grade increase (WGI) and the circumstances when to delay or withhold a WGI
- Procedural Requirements of Performance and Conduct based actions
- Explain and apply the Douglas Factors and the applicable agency Table of Penalties
- Discuss the grievance and appeal processes for performance based actions

DO - Show Slide 18

SAY: After completing this lesson, you should now be able to:

- Define performance and conduct based actions
- List the procedural requirements for taking a performance or conduct based action
- Discuss the requirements for a within-grade increase (WGI) and the circumstances when to delay or withhold a WGI
- Procedural Requirements of Performance and Conduct based actions
- Explain and apply the Douglas Factors and the applicable agency Table of Penalties
- Discuss the grievance and appeal processes for performance based actions

REMEMBER: As an HR Practitioner you will be equipped with a basic understanding of performance and conduct based actions, but it is **strongly recommended that you and your customers consult Employee Relations Specialists.**





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