United States Department of the Interior

BUREAU OF LAND MANAGEMENT
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Instruction Memorandum No. OR-2010-025
Expires: 9/30/2011

To: DMs, DSDs, Staff and Branch Chiefs

From: State Director, Oregon/Washington

Subject: Disciplinary Actions Based on Violent, Threatening, or Disruptive Behavior

Program Area: Disciplinary actions.

Purpose: To present guidance on disciplinary actions to be considered in response to violent, threatening, or disruptive behaviors in the workplace. Effective 09/30/04, IM-OR-2003-116 has expired. This is a reissuance of current policy, which was established in that directive. There are no changes to this policy.

Policy/Action: The appropriate guidance on disciplinary actions is found in The Department of the Interior Personnel Handbook, Part 370, Chapter 752, Subject: Discipline and Adverse Actions, dated December 22, 2006. This handbook assists management officials in selecting appropriate corrective action and establishes the policy of The Department of the Interior that discipline be administered in a constructive and progressive manner whenever practical. It does so by providing a range of penalties to be considered given the first offense and/or subsequent offenses. However, the penalties suggested in the table are guidelines only. Nothing precludes management officials from considering penalties in excess of the listed maximums where aggravated circumstances exist.

There may be circumstances which require a management official to consider removing an employee from the worksite pending further determinations (investigation, medical inquiries, or ongoing criminal proceedings).

There are four (4) available options:

1. Temporary detail to another position or work area.

This is an effective way of getting an employee away from the worksite where he or she is under stress or is causing other employees at the work site to be disturbed. Details of this type may be made in 120-day increments up to one year to unclassified duties.

2. Excused absence.

This is an immediate, temporary solution for short absences only. The employee continues to receive pay and benefits just as if he or she was in a duty status. The Controller General of the General Accounting Office has allowed the use of excused absence in situations where the agency has reason to believe that the employee is a danger to himself/herself, or others, if the employee were to remain in the workplace.

3. Enforced leave.

This is placement of an employee in a leave status (sick, annual, leave without pay, or absence without approved leave) without the employee's consent (e.g., if the employee has absented himself/herself from the worksite without requesting leave or receiving approval for leave). Of course, it is also permissible to allow the employee to take leave, if requested. Periods of enforced leave constitute a suspension. Enforced leave for 14 days or less is subject to agency grievance procedures (negotiated procedures if the employee is represented by a union).

Enforced leave for periods of more than 14 days requires the procedural protections provided for adverse actions (i.e., advance notice, opportunity to reply, decision by higher level official) and is appealable to the Merit Systems Protection Board (MSPB).

4. Indefinite suspension.

Indefinite suspension is defined in 5 CFR 752 as the placing of an employee in a temporary status without duties and pay pending outcome of criminal procedures or further agency action based on safety, health, or security concerns. The indefinite suspension continues for an indeterminate period of time and ends with the resolution of the pending conditions set forth in the suspension notice. Indefinite suspensions are those over 14 days and require adverse action procedures (notice periods can be curtailed under the “crime provision”).

Once the pending circumstances are resolved, and/or it is clear from the onset that disciplinary action is appropriate, the following offenses and corresponding range of penalties should be considered from the Departmental Personnel Handbook, Table of Penalties:

a. Actions based on intimidating, bizarre, or irrational behavior or remarks.

You may wish to charge the employee with committing acts or making statements which have intimidated or harassed other employees or which, because of their bizarre or irrational character, have disrupted the workforce. You should evaluate the employee's attitude, actual statements or actions, impact on the affected individuals, and impact on the agency's ability to fulfill its mission.

The Table of Penalties has the following charges which are appropriate to consider in this situation:

> "Discourteous conduct (e.g., rude, insolent, disgraceful acts or remarks) toward supervisors, co-workers, or the public." (Nature of Offense #4); and,
>
> "Boisterous or disruptive/disorderly conduct; use of insulting, intimidating, abusive or offensive language to or about another employee or supervisor." (Nature of Offense #5)

The range of penalties for the first offense is **written reprimand to 5-day suspension**. The range of penalties for subsequent offenses is **5-day suspension to removal.**

b. Actions based on violent behavior or threats of violent behavior.

(1) Violent behavior may be directed at another individual or may involve physical damage or destruction of Government property. Examples are assaulting a co-worker, supervisor, or agency client; causing bodily injury or inflicting bodily harm; throwing a chair at someone, injuring him or her; menacing conduct, including destruction of furniture, that puts the victim in fear of immediate, serious bodily injury. Assaults or threats to assault with a weapon are serious misconduct. In general, assaults must be proven. The agency must carefully document the facts or witness statements regarding an assault, recognizing that there are several defenses of violent conduct that the MSPB has allowed as mitigating. Examples of mitigating circumstances are provocation or harassment by the victim to which the employee was responding; mental illness or stress which left the employee more than usually upset by minor incidents at the worksite; past good record and/or lack of willfulness on the part of the offender; lack of harmful effect on the safety and order of the workplace.

(2) Employees sometimes use words or gestures that supervisors or other employees find threatening, disturbing, or otherwise fear-provoking. The Federal Circuit Court (Metz v. Department of the Treasury, 780 F.2d 1069, Fed. Cir. 1983) has set five evidentiary criteria that an agency must meet to prove a "true threat" to a supervisor or other individual. These are:

(a) the listener's reactions to the statement,
(b) the listener's apprehension of harm,
(c) the speaker's intent to make a threat,
(d) any conditional nature of the statements, and
(e) the attendant circumstances.

In proposing an adverse action (e.g., removal, suspension for more than 14 days, reduction in grade or pay, etc.), the agency should evaluate these five criteria and be prepared to give evidence, upon appeal to MSPB, to prove a "true threat." This can be done by documenting the actual statements made, in the words of the recipients recorded at the time; by describing the reactions of recipients in response to the statements and who they reported them to; by describing the actual effect on the agency's ability to continue normal work and on the amount of work done; etc. If unable to obtain actual statements, a more appropriate charge may be "intimidating or harassing remarks or behaviors" under Nature of Offense #5 mentioned above.

The Table of Penalties has the following charges which are appropriate to consider in situations (1) and (2).

> "Threatening statements or behavior, (of a physical nature)." (Nature of Offense #7)

The range of penalties for the first offense of threatening statements or behavior is **14-day suspension to removal**, and, for subsequent offenses, the range is **removal**.

> "Fighting and offenses related to fighting. a) Engaging in potentially dangerous "horseplay.", b) Hitting, pushing, or other acts against another without causing injury, c) Hitting, pushing, or other acts against another causing injury." (Nature of Offense #8)

The range of penalties **for the first offense** of fighting and offenses related to fighting are based on the range of severity (a through c). **For "a)" above, the range of penalty is a written reprimand to 14 day suspension; for "b)" above, the range of penalty is a 5- to 30-day suspension; and, for "c)" above, the range of penalty is a 30-day suspension to removal.** Check with your Employee Relations Specialist regarding the range of penalties for successive penalties of this nature.

Assaults or threats of assault with a weapon and physical encounters such as striking or otherwise physically injuring a supervisor will result in a proposal to remove the employee from the Federal service, even if it is the first offense. These appeals were all adverse actions, and it may be appropriate in most cases to propose an adverse action (i.e., removal, suspension of more than 14 days, reduction in grade, etc.). However, you must also consider, in each case, the Douglas Factors in arriving at the selection of the appropriate penalty.

Proposed disciplinary actions MUST be coordinated with your Servicing Human Resources Office, Employee Relations staff (Laurie McKnight at 503-808-6238, Sherry Tracy at 503-808-6609, or Michael Lysne at 541-947-6153). It is also critical that the Special Agent-in-Charge (SAC) be contacted for determination of possible criminal conduct prior to taking any disciplinary action to ensure criminal and administrative responses are coordinated (the OR/WA SAC is Keith Aller at 503-808-6469).

Timeframe: Immediate.

Budget Impact: None.

Background: The Bureau of Land Management Oregon/Washington is committed to having a safe and secure work environment for employees. This information memorandum presents guidance on a spectrum of disciplinary actions to be considered in response to violent, threatening, or disruptive behaviors in the workplace. To reiterate, the BLM OR/WA has **zero tolerance** for violence in the workplace. This means that every identifiable offense will result in some form of disciplinary action determined to be necessary to correct misconduct and to discourage repetition. In some cases, the proposed penalty will be removal from the Federal

service. (NOTE: In addition, the employee may face criminal prosecution if the conduct rises to the level of a criminal assault.)

Manual/Handbook Sections Affected: Department of the Interior Personnel Handbook, Subject: Charges and Penalty Selection for Disciplinary and Adverse Actions, dated December 22, 2006, and in CFR 5, Part 752.

Coordination: Oregon/Washington Law Enforcement and Human Resources Employee Relations staff.

Contact: WO120 and OR953

Districts with Unions are reminded to notify their unions of this instruction memorandum and satisfy any bargaining obligations before implementation. Your servicing Human Resources Office or Labor Relations Specialist can provide you with assistance in this matter.

Signed by
Michael S. Mottice
Associate State Director

Authenticated by
Paj Shua Cha
Records Section

Attachment
1 – Douglas Factors (2pp)

Distribution
WO700 (Room 5628 MIB)

Part 2. Factors to Consider in Penalty Determination (Douglas Factors)
(From DOI's Handbook)
After the supervisor has determined that there is sufficient basis for taking action and has framed a charge or charges fully supported by the available evidence, he/she must choose the specific penalty. At this point, it is wise to give full consideration to all remedies that have any likelihood of success in resolving the problem, whether they are disciplinary or nondisciplinary, formal or informal.

Normally, the management officials most familiar with the circumstances of the case (often the employees' first-line supervisor) and agency policy are in the best position to decide the appropriate penalty for a particular charge, although it is essential to confer with an employee relations specialist and SOL attorney at this stage. In making its selection of an appropriate penalty, management must exercise responsible judgement, to ensure that the penalty is proportional to the offense.

a. Selecting the Penalty

In selecting a penalty, management should take into account all of the specific circumstances of the case including any mitigating factors. Deciding officials should ensure, to the extent possible, that employees who commit similar offenses are treated consistently. In Curtis Douglas v. Veterans Administration. 5 M.S.P.R. 280 (Douglas), however, the MSPB specified a number of factors that agencies should consider when deciding on appropriate penalties. Application of these factors to individuals, even those who have committed similar offenses, may result in differing penalties. Thus, agencies should avoid a mechanistic approach to penalty determination and conduct a thorough analysis of the Douglas factors for each individual charged with misconduct. The Douglas factors include:

(1) The nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities;

(2) The employee's job level and type of employment, including supervisory or fiduciary role;

(3) Any past disciplinary record;

(4) The past work record, including length of service, performance, ability to get along with fellow employees, and dependability;

(5) The effect of the reasons for action on the employee's ability to perform satisfactorily and on supervisors' confidence;

(6) Consistency of the penalty with those imposed on other employees for the same or similar offenses;

(7) Consistency of the penalty with any applicable agency table of penalties;

(8) The notoriety of the offense or its impact on the agency's reputation;

(9) The clarity with which the employee was on notice of any rules violated in committing the offense or had been warned about the conduct in question;

(10) Any potential for rehabilitation;

(11) Mitigating circumstances surrounding the offense; and

(12) The adequacy and efficacy of alternative sanctions to deter such conduct in the future by the employee or others.

There is no requirement that management demonstrate it has considered .!!ll potential mitigating or aggravating factors before selecting its penalty. However, the penalty may be questioned if there are demonstrably relevant issues it does not address. MSPB case law suggests that it is wise for agencies to cite the factors they considered in penalty selection in both the proposal and decision letters. Therefore, the proposing official should address each Douglas factor and specifically cite and discuss those which are particularly relevant to penalty selection, and address any relevant mitigating factors. Including this information in the proposal will also enable the employee to prepare and present any statement(s) he/she may wish regarding the charge(s), the Douglas factor analysis and the proposed penalty. In the decision letter, the deciding official should reference the Douglas factor analysis as developed by the proposing official and the employee's statement, if any, before presenting his/her judgement on the factors and why they do (or do not) support the proposed penalty.

Management should not interpret the last Douglas factor as an indication that they may choose a particular penalty primarily for its value as an example or warning to other employees, since third parties (such as MSPB, ~ Arbitrators, o~ EEOC, etc.) generally do not accept this as a sole basis for penalty selection.