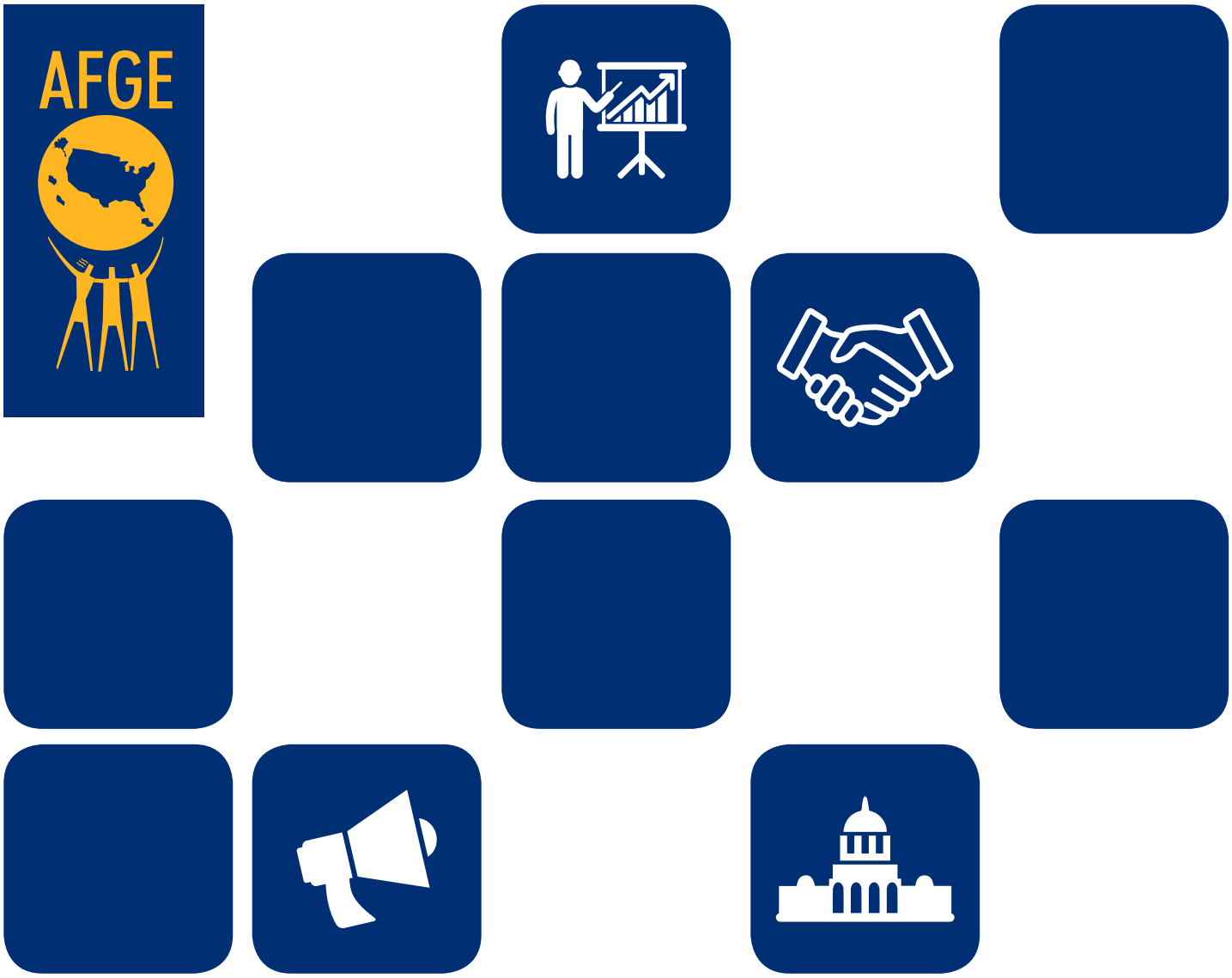


AFGE Steward's Participant Workbook

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Welcome to the AFGE Representation Classroom Course

The job of the AFGE Steward is one of the most exciting and challenging jobs you can have. As a new Steward, you are the face of AFGE and you are managements equal. Members will look to you for guidance and leadership when they need to solve problems with their employer. During your time as a Steward, you will be involved in a wide variety of labor-management relations matters, member recruitment, and the promotion of AFGE's Big Enough to Win strategic plan to build a large, powerful, effective union for workers in government service.

It is often said that, "Stewards are the backbone of the union." This is true for several reasons; but it is mostly because Stewards have a direct line to our members and are in the best position to know what issues matter most to them. The union cannot be effective without highly trained and experienced Stewards on every worksite, and in every local. As a Steward, you must be highly motivated and engaged in advancing the interests of our members and our union.

This Participant's Workbook is designed for you to use during AFGE's Representation Course. Besides taking notes, use this workbook and its activities to help you remember important information that will be discussed in the course. Supplemental materials for this course can be found on AFGE's Training Department's page on the AFGE website.

In addition to this Participant Workbook, you will be given the following to use and keep as resources:

- ✓ Representation PowerPoint
- ✓ AFGE Steward's Handbook
- ✓ A copy of the Title 5 U.S.C Chapter 71
- ✓ AFGE Local Officers Resource Guide, 2nd Edition
- ✓ Access to supplemental materials on the AFGE website

TABLE OF CONTENTS

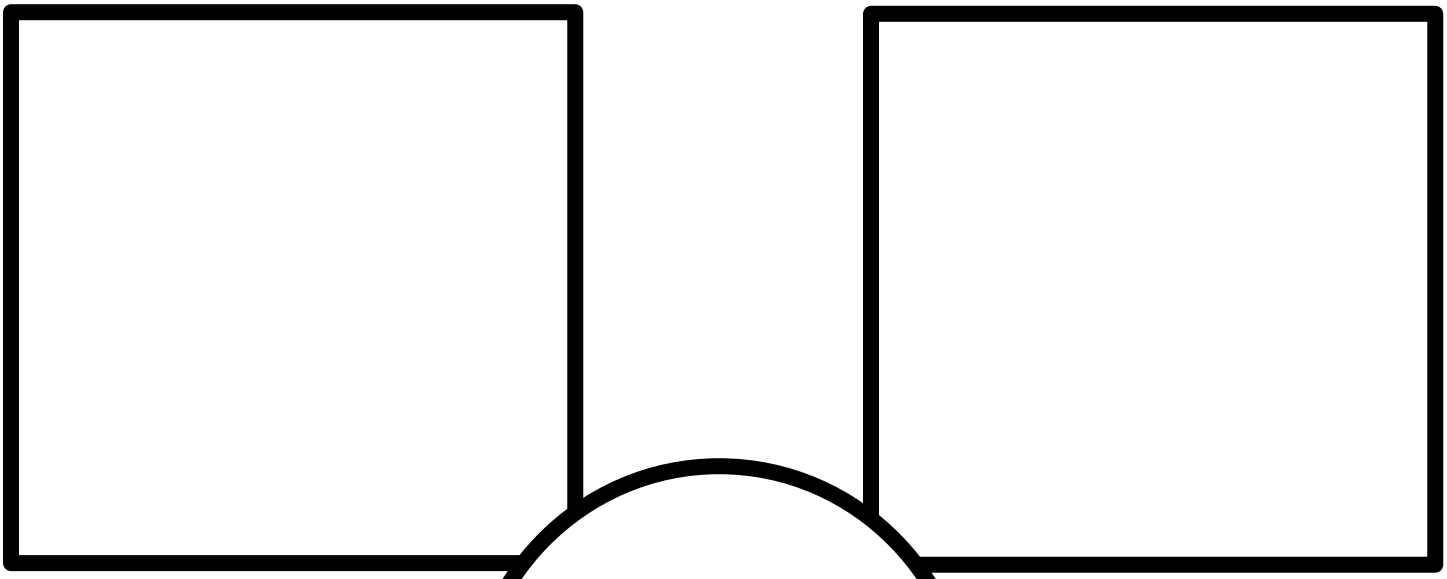
Union Triangle

Describe the three (3) primary functions of a Union.

We Count on Each Other

Local Union Officers
count on Stewards to:

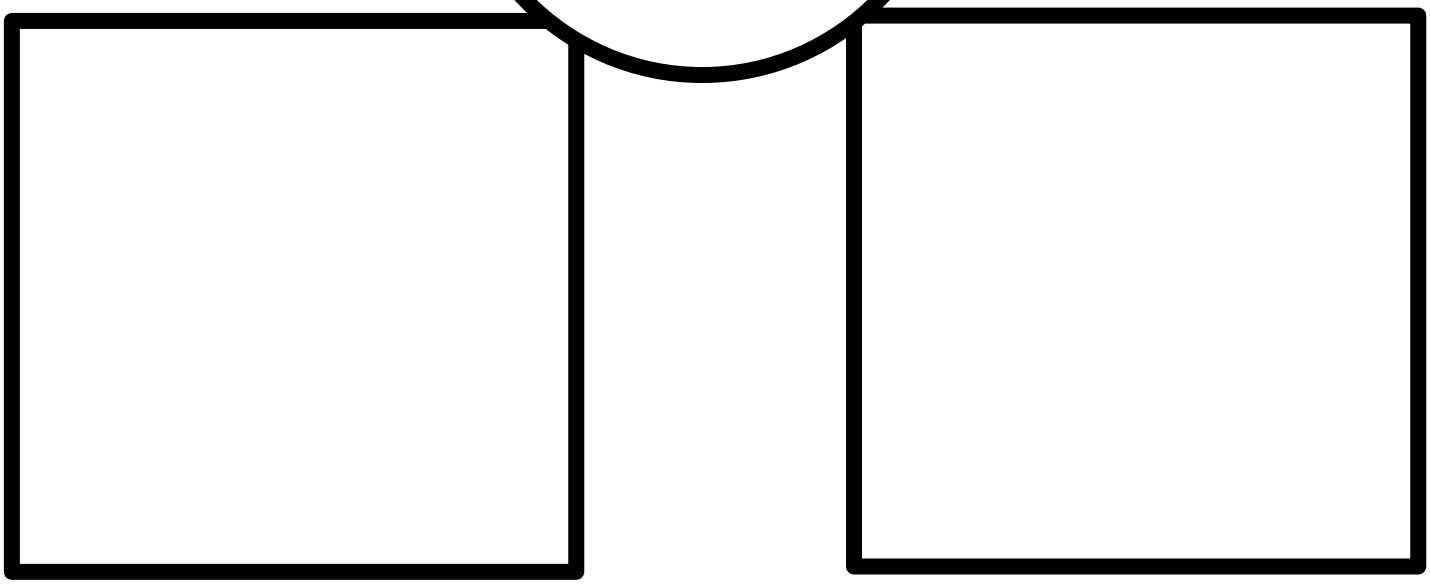
Local Union Members
count on Stewards to:



THE STEWARD

The local community
count on Stewards to:

Management
count on Stewards to:



Knowledge and Resources

A Steward must know:

The materials a Steward needs to do their job includes:

Work Group Roster

NAME	UNIT/ POSITION	MEMBER Yes/No	WORK #/ HOME #	HOME EMAIL	COMMENTS

Directory of Union Leadership

On the lines below, add the names of the persons who hold the offices shown. Update this reference tool whenever there is a change in leadership.

Local Officers

President

_____

Vice-President

_____

Secretary

_____

Treasurer

_____

Other Officer

_____

Other Officer

_____

Elected officer positions within each Local are established by that Local's Constitution and By-Laws.

National Officers

AFGE President

_____

National Secretary - Treasurer

_____

NVP, Women's & Fair Practices

_____

National Vice-President

_____

AFL-CIO President

_____

President, State AFL-CIO

_____

President, Central Labor Council (CLC) or Area Labor Federation (ALF)

_____

AFL-CIO and ME

- _____: the largest federation of unions in the United States, made up of 56 national and international unions; together representing more than 12 million workers.
- _____: tend to focus on state legislative lobbying, statewide economic policy, state elections, and other issues of a more over-arching nature.
- Local Bodies, such as _____ and _____ tend to focus on county or city lobbying, city or county elections, county or city zoning and other economic issues, and more local needs.
- Affiliates: National unions and locals can affiliate with their state federation or CLC.
- Constituency Groups: non-profit, nonpartisan organizations chartered and funded by the AFL-CIO to enhance the representational effectiveness of various under-represented groups. Some examples include the *A. Phillip Randolph Institute*, *Asian Pacific American Labor Alliance (APALA*), and *Labor Council for Latin American Advancement (LCLAA).*
- Allied Groups: organizations that have more informal relationships to the AFL-CIO. They are truly independent organizations that wish to work closely with the AFL-CIO and promote its missions and goals. Such groups include: *Jobs with Justice, Interfaith Worker Justice.*

What are some benefits of your Local affiliating with and participating in the AFL-CIO at the state and local level?

_____

_____

_____

_____

_____

_____

Union Rights under 5 U.S.C. Chapter 71

- Research the questions using 5 U.S.C. Chapter 71 handout. Read and review the relevant section and write your answer. Reference the page and cite the section where the answer was found.
- Do not write down all the information in the section, only summarize key points that provide the answer to the question.
- Be prepared to report back.

7101. Findings and purpose

1. Why did Congress enact a law establishing the right of employees to organize, bargain collectively, and participate in unions in the Federal Sector?

***Citation*:** _____

Page(s): _____

***Key Point(s*):**

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

7102. Employees' Rights

2. What rights do employees have?

***Citation*:** _____

Page(s): _____

***Key Point(s*):**

_____

_____

_____

_____

_____

_____

_____

7103. Definitions; applications

3. How is "grievance" defined in the Statute?

***Citation*:** _____

Page(s): _____

***Key Point(s*):**

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

4. What is “collective bargaining”?

***Citation*:** _____

Page(s): _____

***Key Point(s*):**

_____

_____

_____

_____

_____

_____

_____

_____

5. What are three (3) examples of a “condition of employment”?

***Citation*:** _____

Page(s): _____

***Key Point(s*):**

_____

_____

_____

_____

_____

_____

_____

_____

_____

7106. Management rights

6. List four (4) rights the Agency has under this section and it does not have to negotiate with the Union:

***Citation*:** _____

Page(s): _____

***Key Point(s*):**

_____

_____

_____

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_____

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_____

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_____

_____

_____

7. List three (3) items under this section that the Union can negotiate with the Agency:

***Citation*:** _____

Page(s): _____

***Key Point(s*):**

7114. Representation rights and duties

8. Which employees is the union required to represent and negotiate collective bargaining agreements for?

***Citation*:** _____

Page(s): _____

***Key Point(s*):**

_____

_____

_____

_____

_____

9. Describe two (2) situations when the agency must provide the union with the opportunity to represent employees?

***Citation*:** _____

Page(s): _____

***Key Point(s*):**

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

10. Under section 7114(b), describe two (2) requirements for good faith negotiations:

***Citation*:** _____

Page(s): _____

***Key Point(s*):**

7116. Unfair labor practices

11. Describe two (2) types of actions that would constitute an unfair labor practice (ULP) by an Agency.

***Citation*:** _____

Page(s): _____

***Key Point(s*):**

7121. Grievance procedures

12. What is the primary document the union and the agency shall use for grievance and arbitration procedures?

***Citation*:** _____

Page(s): _____

***Key Point(s*):**

Roles, Rights, and Resources

Please review the scenario below and answer the questions to determine how you can use your role as a union steward to assist the member(s) with their situation.

A member comes to you and tells you that she and three other co-workers have been suffering from eye, throat, and respiratory problems such as tightness in their chest, difficulty breathing, and similar problems that seem to get worse when they are at work but diminish once they are away from work, including when they are on duty traveling for the agency. She says that the area where they work is in the basement of the old Frandbury building. The building, originally constructed in 1930, has a reputation for poor ventilation, and mold is visible in various areas including near the ventilation system as well as on some of the walls and ceiling tiles. The last building renovation for the Frandbury occurred in 1964. The member says that she and her co-workers are the only four who work in the basement, the rest of the area is being used for storage or is currently not utilized by the agency.

1. What problem or issues is the member having? Are other members affected by this same situation?

2. What actions can you take as union steward to help this member and her co-workers?

3. What rights do you have as a union steward under 5 USC Chapter 71 that could help you address this situation?

4. What potential resources are available through AFGE and/other labor organizations that could assist with this situation?

Attitude Reflects Leadership[1]

Film Title & Synopsis: ***Remember the Titans (2000).*** Based on true events, the story is set in Alexandria, VA in 1971. Under court order to integrate the school system, a black high school and a white high school were merged into one school, T.C. Williams High School. Herman Boone (Denzel Washington), an outsider who is blank, is hired as the new head football coach, displacing the previous coach, Bill Yoast (Will Patton), who is white, victorious, and popular. Yoast, who was a candidate for the head coach position, reluctantly agrees to stay on as the assistant coach. Now the team must be integrated. Of course, everyone wants a winning football team. The story is about the ups and downs of relationships among the students and among the adults, as the town and team struggle with integration.

Clip Setup: Gerry Bertier (Ryan Hurst), leader of the white team members and captain of the team, and Julius Campbell (Wood Harris), leader of the black players, accidentally run into one another at the water fountain during practice. The conversation they have raises several issues.

Discussion Questions:

- Julius asks Gerry if, as a Captain, he was also a leader and Gerry says yes. Do you agree with this? Why or why not?

- Julius has a bad attitude about the team; is this a reflection of poor leadership?

- What can you do to be a leader?

- How can you manage your attitude during challenging times?

[1] Adopted from: *Energizing Staff Development Using Film Clips - Memorable Movie Moments That Promote Reflection, Conversation, and Action* by Walter R. Olsen and William A. Sommers and *Movie Clips that Teach and Train* by Becky Pike Pluth

Leadership Traits of Union Stewards

Stewards in our union are leaders. Over time, opportunities for growth and increased responsibility in our union will become available to those who want to take on increasing challenges. To be effective, leaders in our union need to have certain skills.

These skills include:

Formal Discussions

The Union's right, established in 5 USSC, Section 7114 (a)(2)(A) states that "an exclusive representative of an appropriate unit shall be given the opportunity to be represented at—any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment..."

The Union's rights at the discussion, based on the FLRA and the courts, include:

Asking _____ related to matters under discussion at the meeting.

Making _____ remarks concerning those matters.

Stating the Union's _____ on the matters under discussion.

Some criteria used to determine a formal discussion include:

Who_____?

Was there _____; were questions addressed?

Did the meeting concern a _____?

Did the meeting concern _____?

How Formal Is This Discussion?

Determine if the following circumstances described represent a formal discussion. Explain your determination in the space provided after each scenario.

1. Terry's office is short-staffed because of a recent large turnover of employees. As the Steward for the office, he has expressed concern about the matter and manager promised new employees were to be hired for the entry-level jobs. Last week, three new employees showed up. A couple of days later, Terry overheard the new employees in the supervisor's office being briefed about parking policy, leave request issues, and frequency of performance ratings.

2. Susan is a Steward who works with David. David has requested a meeting with the supervisor to review claims processing procedures since he's having trouble doing them correctly. Susan passes the supervisor's office and sees David being "walked-through" the claims process by the supervisor.

3. One of the employee's in Terry's office has filed a grievance, without his assistance, over an annual leave denial. One afternoon, Terry passes the supervisor's office and hears him discussing the leave issue with the employee.

4. Susan is representing an employee in a performance appraisal grievance. The grievance wasn't resolved and is scheduled for hearing at arbitration. Two weeks before the hearing, the grievant, Robert, tells Susan that the agency's attorney called him. Robert tells Susan the attorney asked about his performance and said from what he knew he wasn't that good a worker. He also told him that his case looked "weak." Robert says the agency's attorney was rude to him and he wants Susan to speak with him about being more considerate.

Laura Collins: A Story

J. Weingarten, Inc. operated a large chain of convenient stores, several of which allowed customers to purchase packaged meals. In June 1972, Ms. Laura Collins, a lunch-counter clerk at Store No. 98 in Houston, Texas, was called into the manager's office and interrogated by her manager and a loss prevention investigator employed by the store. Unknown to Ms. Collins, this investigator had been observing her for the past two days based on a report that she was stealing from the register. Although this particular investigation uncovered no evidence of wrongdoing on Ms. Collins' part, another manager learned (from a coworker) that she "had purchased a [$2.98] box of chicken … but had placed only $1.00 in the cash register."

During the interview, Ms. Collins, a member of Retail Clerks Local Union No. 455, requested several times that her steward or another union representative be present. When questioned about the chicken, Ms. Collins replied that she only took a dollar's worth, but was forced to use a large-size box since the small ones were not available. The investigator went to confirm this; upon his return, he "told Collins that her explanation had checked out [and] that he was sorry if he had inconvenienced her, and that the matter was closed."

It was at this point that Ms. Collins finally broke down, exclaiming that the only thing the company ever gave her was a free lunch. Hearing this, the manager and the investigator were surprised, since Store No. 98 had no such policy. Once again Ms. Collins was interrogated, once again she requested representation and once again it was denied. The investigator then asked her to sign a statement that claimed she owed the company $160 for those "free" lunches. She refused. In Store No.2, where she had previously worked [1961-1970], free lunches were policy. It was later learned that other J. Weingarten employees, including the manager, took "free" lunches, since the company had no official policy that forbade it, a fact confirmed to the investigator who then ended the interview.

Upon leaving, Ms. Collins was asked by the manager "not to discuss the matter with anyone because he considered it a private matter between her and the company [and] of no concern to others." However, Ms. Collins reported this incident to her union and an unfair labor charge was filed.

This is the case, NLRB vs. Weingarten - decided on by the Supreme Court in 1975, that brought us Weingarten rights.

Weingarten Rules

Rule 1:

There must be an _____ interview.
The employee must, either before or during the interview, ask for
_____.

Rule 2:

When the request is made, the supervisor must:

_____ the request and delay questioning until a union representative arrives and has a chance to consult privately with the employee;

or deny the request and _____ the interview immediately;

or give the employee a choice of (1) having the interview without representation or (2) _____.

Rule 3:

If the supervisor refuses to honor the employee's request and insists on the interview, she or he commits an _____.

Weingarten or Not?

Read and discuss the scenarios below and determine if the affected employee has cause to invoke their Weingarten Rights.

1. Last week, Malcolm had a verbal disagreement with his manager over an assignment. While he was walking to his desk today after lunch, the supervisor called Malcolm into his office to discuss the incident. During the conversation, Malcolm asks for a Union Representative to attend the meeting. The supervisor refuses. *Is this a violation of his Weingarten Rights? What if anything should Malcolm do*?

2. John is called into the supervisor's office for a discussion of his work performance. John's Steward is out sick so John asks that the interview be delayed until his Steward returns. *Is John entitled to representation? Does management have to wait until the requested Steward/Representative returns to work? Explain*.

3. You, an employee who happens to be a Union Steward, are called into the office to discuss an incident that occurred between you and between you and another employee. *Under Weingarten, are you entitled to union representation? Why or why not?*

4. Jane is called to her supervisor's office and questioned about a fight she witnessed between two other co-workers in her area. *Is Jane required to have Union representation? Explain.*

Grievances Defined

5USC 7103(a)(9)

A Grievance is/can be:

Any Complaint:

By an _____concerning any matter relating to the employment of the employee

By any _____concerning any matter relating to the employment of any employee.

By an employee, labor organization, or _____ that concerns:
The effect or interpretation, or claim of breach, of a collective bargaining agreement (contract, memorandum of understanding), or:
Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

A Grievance Cannot Concern:

Any claimed violation of Subchapter II of Title 5, United States Code (pertaining to prohibited political activities);

_____, life insurance, or _____ _____;

Suspension or removal under Section 7532 of Title 5, United States Code (concerning national security);

Any _____, _____, or _____.

The classification of any positions, which does not result in the reduction in grade or pay of an employee; and

Any other matter the parties have agreed to exclude.

Complaint, Grievance, or ULP

Read the scenarios below and determine if the situation is a complaint, grievance, or ULP. After your determination, provide an explanation.

1. Robert comes to you to complain that he was injured on the job and the Workers Compensation program denied him benefits. *Does he have a grievance? Why or why not*?

2. As the Union Representative, you were denied official time to organize a lunch and learn. *Is this a grievance? Why or why not?*

3. Cynthia recently requested a temporary telework schedule to provide elderly care for her mother who just got out of the rest home. Her request was denied and she wants to file a grievance. *Is this a grievance? Why or why not?*

4. Jessie comes to you to complain that a manager just sexually harassed her. She went to the EEO counselor but was told that it would take years to get a hearing. She wants the union to file a grievance now. *Is this a grievance? Why or why not?*

5. You just received a letter from the agency that effective in two weeks; they are going to stop subsidizing the monthly parking fee. *Is this a grievance? Why or why not?*

Grievance Procedure

Using your contract, complete the information below.

The negotiated grievance procedure for my local is found in Article_____, Sections _____, and is found on page(s)_____.

Remember, a grievance could be lost if not filed within _____days from

_____

_____

Union **STEP 1** **Management**

Number of days to file_____
Who? _____
Written_____ Oral_____

Number of days to act____
Who? _____
Written_____ Oral_____

Union **STEP 2** **Management**

Number of days to elevate_____
Who? _____
Written_____ Oral_____

Number of days to act_____
Who? _____
Written_____ Oral_____

Union **STEP 3** **Management**

Number of days to elevate_____
Who? _____
Written_____ Oral_____

Number of days to act_____
Who? _____
Written_____ Oral_____

ARBITRATION

Number of days to invoke_____

How to invoke_____
_____

Grievance Handling Process

In the appropriate space below, record the five elements in the grievance handling process and key points.

1 - _____

Past practice is:

Four principles of past practice

2 - _____

3 - _____

Grievance Handling Process

4 - _____

5 - _____

Remember:

The **Agency has the Burden of Proof** in discipline cases and grievances it files.

The **Union has the Burden of Proof i**n grievances we file (except those involving discipline).

Particularized Need

Our Union has the right, under law, to get information needed to do our job of representing employees. When we need information, the agency has, there are certain rules we need to follow to make sure the information is provided to us. Under 5 USC 71 (section 7114), there are certain rules we need to follow to make sure the information needed to do our job of representing employees is provided to us. When requesting information, we must:

1.

2.

3.

When we've done all three of the items above (and they need to be done in writing), we've shown a "particularized need" for the information requested. In meeting the particularized need test; we have shown the information we request is necessary in doing our job. If the agency doesn't understand what we are saying in any of the three items above, it has a responsibility to ask us for clarifying information. Should the agency simply ignore our request, it commits an Unfair Labor Practice.

When the agency asks us to clarify our request, we need to respond. However, we don't have to give information revealing our strategies or the name of a potential grievant who wants to remain anonymous.

We are not privy to information requested that is:

1.

2.

3.

In addition, information requested must be:

1.

2.

3.

Getting the Information

Consider the facts presented and decide if the situation would require the agency to provide the requested information.

1. Several members of your Local have come to you with concerns about the way the city bus lines are changing schedules. Because of the schedule changes, several employees have been late reporting to work. A couple of the employees have been admonished for that lateness. One of the members insists that the Local ask the Personnel Office for a copy of the bus schedules to prove his point.

2. A member comes to you as the Local's Chief Steward to ask for help with a proposed removal for unsatisfactory performance. The reason stated in the proposal is that the member did not process the minimum required vouchers during his performance improvement period. The member insists that he did meet the requirement and that the records of his performance maintained in his Division will prove his claim.

3. A member comes to you for help with a suspension she got for alleged patient abuse. She states that others in her Service have been accused of patient abuse but only got reprimanded for that misconduct. You write the agency and ask for a copy of every allegation of patient abuse and any actions the agency took based on those allegations. You ask for the information by names of the employees involved. In your request, you state that the Local needs to see the information to determine if the member getting suspended is being treated differently from other employees.

4. You are on the Local's bargaining team. The Local is getting ready to bargain over temporary promotion procedures. In preparation for bargaining, you send a request to the agency for any memorandums it has on file showing the reasons for temporary promotions made in the past six months. You state the information is needed to decide on proposals to bargain over selections for temporary promotions.

Formal Grievance Writing

Point #1-Limit Details to Basic Information:

Put only enough information in writing to identify the grievance so that management understands:

- What the basic problem(s) is/are
- What violation(s) occurred
- How the problem should be resolved

Point #2-On Written Grievances to be given to Management:

Leave out our Union's arguments, evidence, and justification for position. That information could be used by management to prepare a better case against the grievance.

Point #3-Don't Limit Contract Violations:

In stating "why" there is a grievance, use the phrase *"violates the contract"* and cite the specific articles and sections of the contract violated. Then, add the phrase *"and all other relevant articles of the contract."* It is important to sue this phrase because you may need to add other articles and sections violated in later steps of the grievance process. Arbitrators will generally restrict themselves to reviewing only the specific provisions of a contract alleged as violated during the grievance procedures.

Point 4-Avoid Personal Remarks:

Remember, the grievance states our Union's position, not yours or the grievant's opinions. Personal remarks tend only to inflame the issues and don't contribute to early resolutions.

Some phrases to avoid might be:

_____

_____

_____

Some appropriate phrases might be:

_____

_____

_____

Point 5-Don't Limit the Remedy:

Remember the saying, *"Be careful what you ask for; you just might get it."* If you limit the remedy stated in a grievance, you might limit our Union to something less than full compensation for the grievant by leaving out something you remember only after the grievance was filed.

To make sure that all lawful and possible remedies are not overlooked, use phrases that leave room for those remedies.

A key phrase to use in all grievances would be:

_____

_____

_____

Point 6-Consult with the Grievant:

While it might be tempting to "charge ahead," keep in mind that the grievance belongs to the affected employee. At each step of the grievance process be sure to go over each filing with the grievant. Explain the remedy requested and get the grievant's full understanding and agreement of each action taken.

Point 7-Solidarity:

When it concerns an appropriate issue, take the time to explain the grievance to affected members of the work group. Be sure they understand the actions you are taking. Use the grievance to illustrate the efforts our Union makes on the employee's behalf. IF the matter concerns an individual grievant and the case is resolved, it's appropriate to use general terms to share the success of the case. Obviously, if the matter is sensitive, use discretion in the amount of information shared.

Some appropriate ways to share information on successful grievance issues could be:

_____

_____

_____

Point 8-Feedback and More Feedback:

Keep the grievant up to date on each action you take. Don't rely on him/her to come to you. Make sure the grievant gets a copy of all actions filed on his/her behalf. If it's decided that the grievance isn't going to be taken to hearing at arbitration, let the grievant know promptly**.**

Point 9-Arbitration:
Prepare each grievance on the assumption that it will need to be taken to hearing at arbitration. Proper investigation, research, preparation, and presentation within the grievance procedures may save your local having to proceed to arbitration. Should the case not be resolved, those advance efforts will greatly improve the chances of success at hearing.

Considerations in Moving to Arbitration

Not all grievances can be resolved within the negotiated grievance procedures. While in the grievance procedures, the goal of both parties (our Union and management) should be the resolution of the problem.

Whenever a grievance moves through the steps of the procedure and remains unresolved, our Union has to decide about taking the case to hearing arbitration. In making that decision, there are several factors a Local may consider.

The first consideration should always be the merits of the case. Is it a good case, a bad one, or one that can go either way?

There are other considerations that may be applied to the decision. Decisions about arbitration are left to the sole discretion of the Local.

The decision to arbitrate a grievance is normally made by a committee of the Local. The Local should have a formal system for considering cases subject to arbitration. The Local should document all decisions about going to arbitration and the grievant should be informed about the decision of the Local.

Without a formal system for making arbitration decisions, the Local could be at risk for allegations of unfairness in the decision process and a possible unfair labor practice charge for violating the duty of fair representation (DFR).

REPRESENTING THE GUILTY EMPLOYEE

Review the following scenario about Sydney.
Sydney "Sid" Malone comes to you because he received a letter stating that he would be suspended from the agency for "assaulting" his supervisor. Sydney acknowledges that he did in fact brush against his supervisor while moving past him in a doorway but insists that he was not in any way "assaulting" him as the letter stated.

Sydney stated that he and the supervisor were in the break room and Sydney was attempting to leave to return to his work station. The supervisor was in the doorway talking with another employee. Sydney said he asked the supervisor to move several times and the supervisor repeatedly ignored his request. Sydney then moved past the supervisor in the doorway, brushing against him with his right shoulder. Sydney proceeded to walk down the hall towards his work station as both the supervisor and the other employee backed away from the entrance.

After investigating, you find out that Sydney, who has been employed with the agency for 18 years, and the supervisor had a verbal disagreement 3 years ago regarding a work issue. Sydney has never had any discipline problems and from all documentation, appears to be an outstanding employee. The supervisor is alleging that Sydney physically assaulted him in the doorway and is proposing a ten (10) day suspension.

How would you handle this situation?

REPRESENTING THE GUILTY EMPLOYEE

Step 1 Grievance for Sydney L. Malone

January 26, 2016
Thomas Madd, OIS, Director
U.S. Agency of Important Stuff
101 Street, N.E.
Washington, DC 20001

RE: Sydney M.
Step One Grievance

Dear Director Madd:

Pursuant to Article 33 of the AIS/AFGE Master Labor Agreement, please accept this letter as AFGE Local 3500"s Step 1 Grievance to challenge the January 25, 2016 decision to suspend Sydney M for ten (10) days. The Union is filing this initial grievance at a Step 1 pursuant to Article 33, Section 8.1 of the Master Agreement. In short, the Union asserts that the Agency did not have just or sufficient cause to suspend Mr. M for ten days.

<u>The Agency is in violation of Article 32 – Disciplinary and Adverse Actions of the Master Agreement for it did not have Just or Sufficient Cause to suspend Mr. L. for ten (10) days.</u>

The Agency has proposed suspension of Mr. M due to an alleged assault on his supervisor, Mr. Madd on January 21, 2016. The proposed suspension is in violation of the provisions of Article 32 of the Master Agreement and all other applicable sections of the contract, policy, custom, laws and/or regulations. Mr. M denies that his action was an assault on Mr. Madd. Since Mr. M did not assault Mr. Madd as alleged, the Decision to suspend him for ten days is without just and sufficient cause.

CONCLUSION
The Agency has not and cannot establish that Mr. M assaulted Mr. Madd as outlined in its proposed termination and the proposed discipline is grossly punitive in nature. Therefore, Mr. M respectfully requests that the January 25, 2016, Decision to suspend Mr. M be reduced to one day and that he be made whole with any other remedy deemed appropriate.

Sincerely,

Julie M, Steward
Local 3500

cc: Gloria Justicia, Local President, Local 3500

GRIEVANCE MEETING DEBRIEF

- What elements (presentation, writing, etc.) were effective in presenting the case for the employee?

- Are there changes or different approaches that could be make this grievance more effective?

MOBILIZING MEMBERS

Think about current issues affecting your members and respond to the following questions.

- What is a major issue that is or could affect your members and why should others care about it?

- How could you mobilize others around this issue?

- What resources will the Local need in order to be successful in their mobilization efforts?

MOBILIZATION 3-2-1

- Identify three (3) ways a Steward can keep employees informed about what the Local is doing.

- Name two (2) methods the Steward can use to get feedback from employees about current worksite problems, concerns, and/or celebrations.

- List one (1) strategy to encourage Union involvement.

LOCAL UNION BEST PRACTICES

- Advantages of a large membership include:

- Disadvantages of a small membership include:

- Actions to take to ensure a healthy Local:

GETTING CLOSER—THE ART OF FACE-TO-FACE

(Role Play)

Scenario: It is lunchtime and the Steward wants to get to know the employee better and encourage them to join the Union.

Questions:

1. What does the Steward think s/he could have done better?

2. What were the most impressive communication skills used by the Steward?

3. What did the Steward do or say that would interest the employee in our Union?

4. Does the Steward need to spend some more time visiting with the new employee?

5. Other discussion/ideas that need to be highlighted?

OFFICIAL TIME SCENARIOS

1. Andrea, a steward for Local 12300, has been asked to investigate a water leak that is affecting three employees on the 3rd floor. The supervisor stated that he would address the issue two weeks ago but nothing has happened.

   Can Andrea use official time to investigate this issue?

2. Barbara, a steward for Local 32100, wants to set up a meeting with two other stewards to create campaign materials for the Local President reelection.

   Can Barbara use official time to develop campaign materials for the Local President's reelection?

3. Latisha, a steward for Local 11100, has received a request to attend a meeting with Hector Ramirez and his supervisor. Hector's boss wants to ask him questions about a recent project that received negative comments from headquarters.

   Can Latisha use official time to attend the meeting with Hector?

4. Tony, a steward for Local 22200, received an email from employee on another shift that were interested in learning more about the union. Tony wants to use official time for meeting with the employees after his regular shift has ended.

   Can Tony use official time to attend the meeting?

LEGISLATIVE AND POLITICAL INVOLVEMENT

- Challenges getting members and potential members involved:

- Ideas to overcome these challenges:

HATCH ACT

Scenario 1

You have a conversation with another AFGE member in the lunchroom about how the budget cuts are undermining the ability of the Agency to conduct its mission. You ask the member, who works in a different part of the facility, to speak with other co-workers about opposing a recent legislative bill, H.R. Bill 1001 that would cut the Agency's budget by another 10% over the next two years.

Question 1: Is this activity acceptable under the Hatch Act?

Question 2: Are there any guidelines or restrictions that may affect this action?

Question 3: What other actions could the member take to help fight against H.R. Bill 1001 and other efforts to reduce the ability of the Agency to conduct its mission?

HATCH ACT

Scenario 2

You are talking with several people at work about how the agency is getting less effective and a co-worker suggests that the Union send a letter to the congressional representative requesting that the Secretary of the Department reconsider several cuts to agency staffing. Another co-worker recommends inviting the congressional representative to meet with the union at the facility to discuss their concerns.

Question 1: Is this activity acceptable under the Hatch Act?

Question 2: Are there any guidelines or restrictions that may affect this action?

Question 3: What other actions could the members take?

HATCH ACT EXERCISE

Scenario 3

An AFGE member invites several co-workers in the department out for a happy hour event at a local tavern. One of the Local VPs is also invited. At the happy hour, the conversation gets into politics, which ends in the VP asking the dozen or so employees who are there to "do what you can and volunteer to help elect Sue Mallory!' Sue Mallory is a candidate for the 3rd District Congressional seat. The outburst was then followed by a round of drinks to toast the candidate.

Question 1: Is this activity acceptable under the Hatch Act?

Question 2: Are there any guidelines or restrictions that may affect this action?

Question 3: What other actions could the members take?

HATCH ACT EXERCISE

Scenario 4

The U.S. presidential election is underway and the AFGE Executive Board has endorsed a candidate. Your Local votes to hold a voter registration drive in the cafeteria every month until the election.

Question 1: Is this activity acceptable under the Hatch Act?

Question 2: Are there any guidelines or restrictions that may affect this action?

Question 3: What other actions could members take to register their co-workers?

APPENDIX A

INFORMATION REQUEST TEMPLATE

The following is a sample hypothetical request on a model form created by the FLRA Office of the General Counsel to assist unions in articulating their interests in information requested from agencies under section 7114(b)(4) of the Federal Service Labor Management Relations Statute.

Union Request For Information Under Section 7114(b)(4) of the Statute: A Model for Use When Requesting Information

DATE: Date of the information request. October 10, 1995.

REQUESTER: Name of the requesting union. (union name).

UNION CONTACT: Name, position, mailing address and phone number of the union contact submitting the request: (name, position, address and phone).

AGENCY CONTACT: Name, position, mailing address and/or phone number of the agency representative to whom the request is being made. (name, position, address and phone).

INFORMATION REQUESTED: Description of information requested. (Include whether personal identifiers (such as names, social security numbers or other matters identifying individual employees) are included or may be deleted.) Copies of all final disciplinary actions taken against unit employees during the one year period October 1,1994 through September 30, 1995, including any documents attached to the final decision which discuss or refer to the specific discipline was imposed. All personal identifiers (such as names, social security numbers and other matters which identify a particular employee) should be sanitized. The documents, however, should be coded to reflect whether or not the employee is a union member and they should be numbered sequentially.

PARTICULARIZED NEED: Specific statements explaining exactly why the union needs the requested information. (Explain exactly how the union intends to use the requested information and how that use of the information relates to the union's role as the exclusive representative. Include a specific statement for each type of information requested, as well as for the time period(s) encompassed by the request and the need for personal identifiers, if applicable.) The Union needs this information to determine if the agency is imposing disparate discipline on union members than on non-union members for similar conduct. Article 3, Section 2 of the Contract provides that discipline will be imposed without regard to union membership and that similar discipline will be imposed for similar offenses. Bargaining unit employees who are union members have recently complained to the union that they believe they have received disparate discipline. The requested information will enable the union to fulfill its representational responsibilities to represent employees under the Statute and administer the contract by allowing the union to compare the discipline imposed on Union and non-union members to determine if grievances under the contract or other action is warranted. The requested documents attached to the final action which discuss or refer to the discipline imposed will enable the Union to determine if the agency either intentionally or unintentionally treated members differently from non-members and imposed like discipline or like offenses. Coding the documents for member and non-members will allow the union to make the comparison. Coding and sequential numbering will also allow the Union to make a more specific request in the future if deemed necessary. The one year time period encompassed by the request tracks the time period that the contract has been in effect.

PRIVACY ACT: Do you know if the requested information is contained within a system of records under the Privacy Act? (If so, identify that system of records.) The Union believes that the documents are covered by the Privacy Act, but the union does not know which specific system of records.

PUBLIC INTEREST: If you know or think that the requested information is within a system of records under the Privacy Act, describe how disclosure of the requested information, including any personal identifiers and the time period encompassed by the request, would shed light on the agency's performance of its statutory duties or otherwise inform citizens of the activities of the Government. The disclosure of these documents would enable the public to monitor the manner in which the Government disciplines Federal employees and to assess the job conduct of public servants. Disclosure of the requested information would serve the public interest by allowing the public to compare the discipline imposed by the agency on employees for similar offenses and to thus to determine if the agency is carrying out its management responsibilities in a fair and equitable manner. Disclosure would also serve the public interest by allowing the public to determine if the agency is discriminating against public servants for exercising rights provided in Federal law, such as the right to join, form ans assist a union, and whether the agency is complying with its legal contractual requirements. The time period is limited to the time that the current contract has been in effect and thus serves the public interest by allowing the public a reasonable time frame upon which to base its determinations. Since the personal identifiers will be omitted, we believe that the public interest outweighs any privacy interests.

OTHER MATTERS: Other matters related to the request for information. (Discuss any other matters not listed above which relate to the union's information request and which may assist the agency in responding to the request.) The Union is willing to meet with appropriate agency officials to discuss the events giving rise to the Union's perception that Union members are being treated in a disparate manner by certain supervisors.

Pleases contact me if the agency requires further clarification of our request or wants to meet to discuss the request, or a format or means of furnishing this information to the union, or the issues giving rise to our request.

APPENDIX B

GRIEVANCE EXAMPLES

GRIEVANCE EXAMPLE 1

NATIONAL GRIEVANCE

NG-07/5/201_

Date: July _, 201_

To: Name
Deputy Assistant Secretary, Labor - Management Relations Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

From: Name, Attorney, National Veterans Affairs Council (#53) (NVAC), American Federation of Government Employees (AFGE), AFL-CIO

Subject: National Grievance in the matter of the Department of Veterans Affairs CVA) failure to comply with Article 35, Section 17, concerning the granting of donor leave for employees who participate in sponsored or endorsed blood donation.

STATEMENT OF CHARGES

Pursuant to the provisions of Article 43, Section 11 of the Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees *(2011)* (MCBA), American Federation of Government Employees/National Veterans Affairs Council (Union) is filing this national grievance against you and all other associated Department of Veterans Affairs ("VA") officials and/or individuals acting as agents on behalf of the VA for violations as it relates to its failure to comply with Article 35, Section 17, concerning the granting of donor leave for employees who participate in sponsored or endorsed blood donation.

Specifically, on or about April 30, 201_ and continuously thereafter, the VA, by and through its representatives and/or agents, has issued a HRML which has been interpreted to limit the amount of donor leave that can be approved by Supervisors for employees participating as blood donors.

In doing so, the VA has violated the following provisions:

Section 17 of Article 35; and

Any and all other relevant articles, laws, regulations, customs and past practices not herein specified.

STATEMENT OF THE CASE:

I. Background

During a Minneapolis VHA staff meeting, Supervisors instructed staff that they must return to work for the remainder of their shift immediately after completing the donor process. Because Minneapolis Locals 3669 and 1969 have a past practice of allowing 4 hours of donor leave for blood donors, a Union Officer inquired of ___, Minneapolis VHA Human Resources Director. On May 31, 201_, Mr. ___ sent a copy of a HRML he had received from the VA Central Office with an example illustrating fixed times for travel, donation, and rest and recuperation. (See Attachment A) These Supervisors have interpreted this language to mean that they no longer have discretion to approve donor leave beyond a standard donation time for all participating employees in violation of the language found in Article 35, Section 17.

II. Violation

The April 30, 201_ HRML has been improperly interpreted to remove the Supervisors contractual discretion in determining the appropriate amount of donor leave on a case-by-case basis. The HRML also fails to account for relevant local past practices.

Remedy Requested

The Union asks that to remedy the above situation, the VA agrees to the following:

(1) To provide guidance describing proper considerations for Supervisors in determining appropriate leave, including, but not limited to, travel, wait times, and individual rest and recuperation times;

To review all donor employees' individual circumstances for potential leave adjustments, and credit any employees' leave allocations based on the review;

To agree to recognize all Local past practices until appropriate bargaining has occurred; and

To agree to any and all other remedies appropriate in this matter.

Time Frame and Contact

This is a National Grievance and the time frame for resolution of this matter is not waived until the matter is resolved or settled. If you have any questions regarding this National Grievance, please feel free to contact me at _____.

Name Attorney AFGE/NVAC

Cc: Name, President, AFGE/NVAC
Name, Chairperson, Grievance and Arbitration Committee, AFGE/NV

Attachment A

Department of Veterans Affairs
Washington, DC

Worklife and Benefits Service (058)

FLYER

Leave12-04
April 30, 201_

TO: Chief, HRMS

SUBJ: Granting of Authorized Absence for Blood Donor Programs

This Flyer provides Human Resources (HR} offices with guidance regarding the use of authorized absence for blood donor programs.

VA Handbook 5011, Part III, Chapter 2, paragraph 12e, and Part 111, Chapter 3, paragraph 9e, provides the authority to grant authorized absence for any period of the day needed for rest and recuperation when participating in uncompensated blood donor programs, such as the American Red Cross. Additionally, it is also appropriate to grant authorized absence for reasonable time spent traveling to and from the blood donation site, processing in, and time needed to draw blood. However, it is not appropriate to grant additional authorized absence as a "thank you" or as an official or unofficial time off award for donating blood as donating blood is a voluntary action on the part of the employee. Granting of authorized absence that exceeds policy could be construed that the Department of Veterans Affairs is paying our employees to donate blood.

Example. On April 9, 201_, an employee donates blood during a local blood drive. Time required for this donation is:

5 minutes to walk to the donation site;
10 minutes to complete the necessary paperwork;
10 minutes to draw blood;
30 minutes for rest and recuperation; and
5 minutes to walk back to work.

Since the total time needed for this blood donation is one hour, granting of one hour of authorized absence is appropriate.

Inappropriate uses of authorized absence. Inappropriate uses of authorized absence include, but are not limited to:

Using the example above, granting an additional 3 hours of authorized absence in order for the employee to receive a total of four hours authorized absence for donating blood based on the mistaken belief that employees are entitled to
4 hours of authorized absence for giving blood regardless of the time needed for the donation;
Granting additional authorized absence, to be used at a later date, to thank the employee for donating blood; or

Granting an official or unofficial 4-hour time off award to thank the employee for donating blood. **NOTE:** Granting of time off awards must be consistent with VA Handbook 5017, Employee Recognition and Awards. Official time off awards may not be granted to employees for donating blood.

We appreciate HR office cooperation in ensuring that granting of authorized absence for blood donor programs is consistent with VA Handbook 5011 and this guidance.

Office of Human Resources and Administration Office of Human Resources Management

GRIEVANCE EXAMPLE 2

January 30, 2011

D. Tree, FACHE, Director Oklahoma City
VA Medical Center 921 N.E. 13th St.
Oklahoma City, OK 73104-5028

Re: Veronica M, Social Worker
Step 3 Grievance

Dear Director Tree:

Pursuant to Article 42 of the Master Agreement, please accept this letter as AFGE Local 25001's Step 3 Grievance to challenge the January 24, 2011 decision to remove Veronica M. The Union is filing this initial grievance at a Step 3 pursuant to Article 42(7)(Note 5) of the Master Agreement. In short, the Union asserts that the Agency did not have just or sufficient cause to remove Ms. M and that her termination is in unlawful retaliation for her union activity, EEO activity, and Whistleblower activity.

<u>The Agency is in violation of Article 13 of the Master Agreement for it did not have Just or Sufficient Cause to terminate Ms. M.</u>

Although the Agency has charged Ms. M with seven reasons for the proposed removal, most of those reasons refer to one incident, specifically, Ms. M's alleged retrieval of unprotected files and her notification of this security breach to VISN 16 Privacy Officer Mary J through her union representative Robert S. Ms. M denies that her actions were misconduct. Ms. M is required – as all DVA employees are – with reporting Privacy Act violations; this is exactly what she did. Additionally, Ms. M denies that she was absent without leave on October 12 and 13, 2010. Ms. M was prevented from requesting leave herself on October 12, 2010, due to her arrest. Notwithstanding, Ms. M requested leave for both days through her union representative. Article 32(1)(D) and (E) of the Master Agreement is clear that leave shall not be denied for the

purposes of discipline and that no arbitrary restraints on requesting leave shall be imposed.[1] Since Ms. M did not violate any agency policy by her actions, the Decision to terminate her is without just and sufficient cause.

The Agency is in violation of Article 2 and Article 13(6) of the Master Agreement for its termination is in retaliation for statutorily protected conduct.

Article 2 and Article 13(6) of the Master Agreement requires the Agency to follow all laws in its disciplinary actions. However, the Agency has not done so in this Decision as the removal is in retaliation for Ms. M's statutorily protected (1) EEO activity, *see* 42 U.S.C. § 2000e *et seq.,* (2) whistleblowing activity, *see* 5 U.S.C. § 2302(b)(8), and (3) her union activity, *see* 5 U.S.C. § 7116(a)(1), (2), (4) and (8). Therefore, Article 2 and Article 13(6) of the Master Agreement have been violated.

The Agency is in violation of Article 16(1) and Article 17 of the Master Agreement for its termination is in retaliation for protected EEO conduct.

In addition for violating the Master Agreement in its protection against unlawful retaliation, the Agency also violated the Master Agreement in its own protection against retaliation for EEO activities. It is undisputable that Ms. M has engaged in recent, protected, EEO activity. Similarly, there can be no doubt that Mark L (the proposing official) and you (the deciding official) were aware of Ms. M's protected activities. Lastly, there is a temporal nexus between the proposed termination, termination and Ms. M's protected activities. Therefore, Ms. M has presented a *prima facie* case of retaliation with respect to the proposed termination. The Agency's alleged legitimate reasons as documented in the proposed termination[2] are pretextual.

[1] Therefore, the Union asserts that Article 32 has also been violated by the Decision.

[2] Although Ms. M submitted a comprehensive written opposition to the proposed termination, the January 24th Letter of Decision does not address any of her points. In fact, the Decision does not explain on what basis or even which of the charges were sustained. Instead, it merely concludes that "the sustained charges against you are of such gravity, mitigation of the proposed penalty is not warranted." Therefore, the only alleged legitimate reasons remain those documented in the proposed termination.

Because Ms. M's actions were not only consistent with the Agency's policy and/or VISN's express directions, discipline for the specifications outlined in the proposed termination is pretextual. Therefore, Article 16(1) and Article 17 of the Master Agreement have been violated.

The Agency is in violation of Article 16(9) of the Master Agreement for its termination is in retaliation for protected whistleblowing conduct.

In addition for violating the Master Agreement in its protection against unlawful retaliation, the Agency also violated the Master Agreement in its own protection against retaliation for whistleblowing activities. Ms. M engaged in whistleblowing activity when she collected the evidence of supervisory misconduct, contacted Ms. J via her union representative, and by making a protected disclosure by forwarding the evidence to Ms. J. It is undisputable, given that five alleged reasons for the proposed termination are related to said disclosure, that the disclosure was a contributing factor in the agency's decision to propose the termination. As applied herein, Ms. M had a reasonable belief that her disclosure to the VISN Privacy Officer was a disclosure of unlawful activity or gross mismanagement by her supervisor.
Notwithstanding VISN 16's assurances that no disciplinary action would result, Ms. M has now been issued a Decision of termination. Therefore, Article 16(9) of the Master Agreement has been violated.

The Agency is in violation of Article 16(1)(C), (2), and (5) of the Master Agreement for its termination is in retaliation for protected union activities.

In addition for violating the Master Agreement in its protection against unlawful retaliation, the Agency also violated the Master Agreement in its own protection against retaliation for union activities. Ms. M was open and public about her union activities beginning with her support for Mr. James' election as the new local president of AFGE Local 25001. On June 27, 2010, the Union held elections and that evening, Mr. James was elected and he appointed Ms. M to union steward. The very next day, the Agency issued Ms. M a disciplinary action which was mitigated to an admonishment. In early August 2010 the Agency again issued proposed discipline but this proposal was rescinded. Thereafter, on or about August 17, 2010, the Agency issued a proposed 10-day suspension for alleged failure to follow a supervisory instruction which was mitigated to

written reprimand.[3] This termination is yet another in the litany of meritless disciplinary actions that have begun since the day Ms. M assumed any role in the union. Therefore, Article 16(1)(C), (2) and (5) of the Master Agreement have been violated.

Alternatively, the Agency failed to properly address *Douglas* factors.

Ms. M began employment with the Agency on or about February 9, 2004. In September 2008, she was promoted to be the supervisor of the geriatric and extended care social work service. From her hire through mid-2009, Ms. M has consistently received awards for her performance and contributions. Many of her awards were listed in her written opposition to the notice of proposed removal and total thousands of dollars. Similarly, Ms. M received the best performance appraisal ratings possible within the Agency, i.e., "outstanding" with much praise in the narrative portions. Ms. M's employment history and lack of discipline through February 2010 – before the filing of her first EEO complaint, her nomination to a union position, and her whistleblowing activity – are all factors which mitigate against the imposition of any adverse action. Nevertheless, in the Decision to terminate Ms. M's employment, you expressly declined to evaluate mitigating facts and instead concluded "the sustained charges against you are of such gravity, mitigation of the proposed penalty is not warranted." Your failure to consider mitigating factors is a violation of the Master Agreement, case law, and public policy.

CONCLUSION

The Agency has not and cannot establish that Ms. M violated Agency regulation or policy as outlined in its proposed termination. Furthermore, the proposed adverse action is in retaliation for protected activities. Therefore, for the foregoing reasons, Ms. M respectfully requests that the January 24, 2011, Decision to terminate Ms. MacBeth be rescinded with prejudice and she be restored to her position without restriction.

Sincerely,

[3] The September 2010 formal EEO complaint was amended to include this disciplinary action as a basis for retaliation.

APPENDIX C

DOUGLAS FACTORS

Douglas Factors

Overview

Perhaps the most difficult decision in an adverse action is determining the appropriate penalty for the employee's misconduct. On appeal, the Merit Systems Protection Board consistently points out that it will not disturb an agency's choice of penalty unless it is clearly beyond the bounds of reasonableness. A review of the case law since the board's decision in *Douglas v. Veterans Administration*, 81 FMSR 7037, 5 MSPR 280 (MSPB 1981), tells a somewhat different story.

In *Douglas*, the MSPB listed 12 factors that agencies must balance. However, it didn't assign weights to these factors, and to make things more confusing, it frequently reminds us that not all factors will be relevant to every set of circumstances. It is clear that the board views the seriousness of the offense as the most important consideration. However, beyond that we aren't quite sure whether, for example, an employee's expression of remorse for his misconduct should be given more weight than his past disciplinary record. What we can say for sure is that an agency's thorough explanation for its balancing of the relevant factors, in its decision letter, testimony, and other submissions can have a significant impact on the board's ruling.

This Quick Start Guide covers the following Key Points:

Key Points

These key-point summaries cannot reflect every fact or point of law contained within a source document. For the full text, follow the link to the cited source. The references to ***Broida*** in this Quick Start Guide are to federal employment law expert Peter Broida's treatise, *A Guide to Merit Systems Protection Board Law and Practice* (Dewey Publishing Inc.), to which ***cyber*FEDS®** has exclusive Web rights.

The *Douglas* factors

- ***Broida:*** The responsibility is clearly on the agency to set the penalty, and the agency's determination will not be disturbed by the MSPB unless the penalty is unreasonable. To earn that deference, the agency theoretically must pay its dues. Those dues consist of adherence to the commandments of *Douglas v. Veterans Administration*, 81 FMSR 7037, 5 MSPR 280 (MSPB 1981). *Broida Guide to MSPB Law*: *Douglas* Standards; Decision to Reflect Consideration of Mitigating Factors or MSPB Imposes Maximum Reasonable Penalty.
- In deciding on a penalty, an agency must consider the relevant *Douglas* factors, which include:

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 technical 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;
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 supervisors' 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;
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 alternative sanctions to deter such conduct in the future by the employee or others.

Douglas v. Veterans Administration, 81 FMSR 7037, 5 MSPR 280 (MSPB 1981).

- Not all 12 *Douglas* factors will apply in every case. The relevant factors must be balanced in each case to arrive at the appropriate penalty. *Gartner v. Department of the Army*, 107 LRP 2661, 104 MSPR 463 (MSPB 2007); *Batten, Jr. v. U.S. Postal Service*, 106 LRP 13637, 101 MSPR 222 (MSPB 2006).
- ***Broida:*** Some agencies use checklists that enumerate the *Douglas* factors. Deciding officials tick off the various points that they have considered, or provide narrative descriptions of what they have considered as to various potential points of mitigation, and they then sign the forms. The forms become part of the adverse action record that is placed before the MSPB. *Broida Guide to MSPB Law*: Articulation of Relevant Factors; By the Agency; Decision Notice.

Factor: Nature and seriousness

- The seriousness of the appellant's offense is always one of the most important factors considered by the MSPB in assessing the reasonableness of an agency's penalty determination. *Schoemer v. Department of the Army*, 99 FMSR 5137, 81 MSPR 363 (MSPB 1999); *Rosenberg v. Department of Transportation*, 107 LRP 15378, 105 MSPR 130 (MSPB 2007).
- The MSPB places primary importance upon the nature and seriousness of an offense, and its relation to an appellant's duties, position and responsibilities. *Gartner v. Department of the Army*, 107 LRP 2661, 104 MSPR 463 (MSPB 2007); *Batten, Jr. v. U.S. Postal Service*, 106 LRP 13637, 101 MSPR 222 (MSPB 2006).
- Serious misconduct can outweigh an employee's good performance, length of service, and lack of prior discipline. *Von Muller v. Department of Energy*, 106 LRP 9274, 101 MSPR 91 (MSPB 2006).
- If the misconduct is serious enough, mistakes by the agency in the application of other *Douglas* factors, such as relying on matters affecting the penalty without including them in the proposal notice or failing to seriously consider the adequacy of a lesser penalty, may be overlooked. *Von Muller v. Department of Energy*, 106 LRP 9274, 101 MSPR 91 (MSPB 2006); *Wiley v. U.S. Postal Service*, 106 LRP 41624, 102 MSPR 535 (MSPB 2006).

Case examples

- Spending an excessive amount of work time using the Internet for personal use, and the presence of sexually explicit material on the hard drive of his government-issued computer raised concerns about the appellant's ability to function as an effective supervisor. The sustained specifications evinced serious misconduct, particularly for a supervisor whose duties and responsibilities included serving as a role model for employees and enforcing rules against computer misuse and access to sexually explicit materials. *Martin v. Department of Transportation*, 106 LRP 48679, 103 MSPR 153 (MSPB 2006).
- An appellant left a meeting regarding his alleged sexual harassment of a female supervisor, and he allegedly said in the presence of two coworkers that he felt like "getting [his] gun and shooting up the place." He also allegedly stated to another employee, "I am not going to let some woman make me lose my job and I feel like killing her." The MSPB found the statements made by the appellant to be very serious, especially in light of the climate in which the agency operates. *Wiley v. U.S. Postal Service*, 106 LRP 41624, 102 MSPR 535 (MSPB 2006).
- The MSPB found that a postmaster's improper accounting practices were serious and intentional. The agency also had the right to expect a higher standard of conduct from a supervisor than a nonsupervisory employee. *Stack v. U.S. Postal Service*, 106 LRP 23221, 101 MSPR 487 (MSPB 2006).
- An economic development account executive sent sexually explicit e-mails from his agency e-mail address, in some cases to constituents with whom he developed relationships on behalf of the agency. The MSPB found that the appellant's serious misconduct compromised the public image of the agency he was supposed to represent and removal was reasonable under the circumstances. *Von Muller v. Department of Energy*, 106 LRP 9274, 101 MSPR 91 (MSPB 2006).

Factor: Employee's job

- Agencies are entitled to hold supervisors to a higher standard of conduct than nonsupervisors because they occupy positions of trust and responsibility. *Martin v. Department of Transportation*, 106 LRP 48679, 103 MSPR 153 (MSPB 2006).
- Individuals in positions of substantial responsibility and trust can be held to a higher standard of conduct than other federal employees. *Ferguson v. Office of Personnel Management*, 105 LRP 54397, 100 MSPR 347 (MSPB 2005).
- Positions of trust include jobs with supervisory, law enforcement and fiduciary responsibilities. *Ferguson v. Office of Personnel Management*, 105 LRP 54397, 100 MSPR 347 (MSPB 2005); *Jones v. Department of Justice*, 104 LRP 57856, 98 MSPR 86 (MSPB 2004); *Fischer v. Department of the Treasury*, 104 LRP 45199, 97 MSPR 546 (MSPB 2004); *Singletary v. Department of the Air Force*, 103 LRP 46089, 94 MSPR 553 (MSPB 2003).
- When a supervisor engages in misconduct that reflects adversely on his reliability, veracity, trustworthiness and ethical conduct, legitimate concerns are raised about his trustworthiness, particularly in light of his position of responsibility as a supervisor. *Leatherbury v. Department of the Army*, 107 LRP 20063, 105 MSPR 405 (MSPB 2007).
- An agency's loss of confidence in an employee's integrity as a supervisor supports demotion to a nonsupervisory position. *Hornbuckle v. Department of the Army*, 90 FMSR 5297, 45 MSPR 50 (MSPB 1990).

Case examples

- Spending an excessive amount of work time using the Internet for personal use and the presence of sexually explicit material on the hard drive of his government-issued computer raised concerns about the appellant's ability to function as an effective supervisor. The sustained specifications evinced serious misconduct, particularly for a supervisor whose duties and responsibilities included serving as a role model for employees and enforcing rules against computer misuse and access to sexually explicit materials. *Martin v. Department of Transportation*, 106 LRP 48679, 103 MSPR 153 (MSPB 2006).
- The MSPB found that a postmaster's improper accounting practices were serious and intentional. The agency also had the right to expect a higher standard of conduct from a supervisor than a nonsupervisory employee. *Stack v. U.S. Postal Service*, 106 LRP 23221, 101 MSPR 487 (MSPB 2006).

Factor: Past disciplinary record

- ***Broida:*** Agencies often seek to justify adverse action on the basis of current charges coupled with references to past discipline imposed against the employee. The use of past discipline is mitigation in reverse. Past discipline is

an aggravating factor, and it can make a significant difference in a case. *Broida Guide to MSPB Law*: Agency Consideration of Past Discipline.

- A lack of a prior disciplinary record is a significant mitigating factor. *Wentz v. U.S. Postal Service*, 102 FMSR 5155, 91 MSPR 176 (MSPB 2002).
- When an appellant has a past disciplinary record involving behavior similar to the current offense, he has been put on notice that such behavior will not be tolerated by the agency. *Zwagil v. General Services Administration*, 106 LRP 47305, 103 MSPR 63 (MSPB 2006); *Murry v. General Services Administration*, 103 LRP 33706, 93 MSPR 554 (MSPB 2003).
- An agency cannot rely on an employee's past disciplinary record to prove current misconduct. The past record can only be considered with regard to the reasonableness of the penalty for presently sustained charges. *Raines v. U.S. Postal Service*, 86 FMSR 5375, 32 MSPR 56 (MSPB 1986).
- When an agency relies on past discipline to support the disciplinary action that is on appeal, the MSPB will review the past discipline to determine whether: 1) the employee was informed of the action in writing; 2) the employee had an opportunity to have the action reviewed, on the merits, by an authority different from the one that took the action; and 3) the action was made a matter of record. If those three criteria are met, the board will discount the past discipline only if it is left with a definite and firm conviction that a mistake has been committed. *Bolling v. Department of the Air Force*, 81 FMSR 5580, 9 MSPR 335 (MSPB 1981); *Rosenberg v. Department of Transportation*, 107 LRP 15378, 105 MSPR 130 (MSPB 2007).
- *Bolling* review is required only where the appellant has actually challenged the validity of his prior discipline on appeal. *Holland v. Department of Defense*, 99 FMSR 5374, 83 MSPR 317 (MSPB 1999); *Rosenberg v. Department of Transportation*, 107 LRP 15378, 105 MSPR 130 (MSPB 2007).
- It is improper for an agency to rely on the appellant's past disciplinary record where it was not cited in either the notice of proposed removal or in the decision notice and was mentioned for the first time when the agency's proposing and deciding officials testified that they relied on the prior offense in determining the penalty. *Lentine v. Department of the Treasury*, 103 LRP 46061, 94 MSPR 676 (MSPB 2003).
- The MSPB will not consider prior discipline that has been overturned in grievance proceedings at the time of board review. *Jones v. U.S. Postal Service*, 109 LRP 17969, 110 MSPR 674 (MSPB 2009).
- An agency cannot cite disciplinary actions that have expired in accordance with agency regulations or a collective bargaining agreement. *Whitmore v. Department of the Navy*, 87 FMSR 5413, 34 MSPR 137 (MSPB 1987).
- Prior disciplinary actions may be cited even if they involved offenses unrelated to the current charges. *Slaughter v. Department of Agriculture*, 93 FMSR 5039, 56 MSPR 349 (MSPB 1993).
- When considering prior discipline, if the nature of the earlier misconduct is not similar to the misconduct involved in the current charge, the weight of the prior discipline is significantly diminished in the determination of a proper penalty. *Skates v. Department of the Army*, 96 FMSR 5027, 69 MSPR 366 (MSPB 1996).
- The MSPB can review independently prior disciplinary actions pending in grievance proceedings when reviewing termination and other serious disciplinary actions. *U.S. Postal Service v. Gregory*, 102 FMSR 7004, 122 S. Ct. 431 (U.S. 2001).

Case examples

- A prior disciplinary record consisting of a letter of admonishment for misconduct helped support a demotion penalty. *Martin v. Department of Transportation*, 106 LRP 48679, 103 MSPR 153 (MSPB 2006).
- A prior disciplinary record that included a seven-day suspension for alleged absence without leave helped show that a removal penalty was reasonable. *Starks v. Department of the Army*, 103 LRP 39435, 94 MSPR 95 (MSPB 2003).
- An employee was removed for insubordination involving disrespect, insolence, and like behavior to her supervisor. She was previously counseled about her sarcastic and disrespectful behavior and warned that such behavior would not be tolerated in the workplace. She also was suspended for 30 days for abusive, discourteous and disruptive behavior in the presence of supervisors and coworkers. The MSPB found that because she had a past disciplinary record involving similar behavior, she was put on notice that such behavior would not be tolerated by the agency. *Murry v. General Services Administration*, 103 LRP 33706, 93 MSPR 554 (MSPB 2003).

Factor: Past work record

- Performance records and years of service can be significant mitigating factors. *Jackson and White v. Department of the Army*, 105 LRP 45028, 99 MSPR 604 (MSPB 2005).
- When the offense involves supervisory misconduct, an excellent work record weighs in favor of retaining the appellant in the workforce, but less weight will be accorded to this factor in determining whether his demotion to a nonsupervisory position is unreasonable. *Hornbuckle v. Department of the Army*, 90 FMSR 5297, 45 MSPR 50 (MSPB 1990).
- Disciplinary actions or additional misconduct occurring after the issuance of the adverse action proposal may not be cited as a past disciplinary record, but may be used to show an overall poor work record. *Wigen v. U.S. Postal Service*, 93 FMSR 5278, 58 MSPR 381 (MSPB 1993).
- An agency's promotion of an employee or allowing him to perform his duties for an extended period of time after learning of his misconduct can indicate that his overall work record outweighs the seriousness of the offense. *Hovanec v. Department of the Interior*, 95 FMSR 5156, 67 MSPR 340 (MSPB 1995).
- Better-than-satisfactory performance ratings, numerous annual performance awards, and occasional special act awards are mitigating factors, but they do not outweigh the seriousness of the offense. *Suarez v. Department of Housing and Urban Development*, 104 LRP 25889, 96 MSPR 213 (MSPB 2004).

Case example

- An appellant's 29 years of service creditable for retirement (26 of which were with the agency) and his superior work record were outweighed by the seriousness of his misconduct and the fact that he continued to engage in the misconduct despite being warned about it repeatedly. *Lentine v. Department of the Treasury*, 103 LRP 46061, 94 MSPR 676 (MSPB 2003).

Factor: Ability to perform in the future

- When a supervisor engages in misconduct that reflects adversely on his reliability, veracity, trustworthiness and ethical conduct, legitimate concerns are raised about his trustworthiness, particularly in light of his position of responsibility as a supervisor. *Leatherbury v. Department of the Army*, 107 LRP 20063, 105 MSPR 405 (MSPB 2007).
- An employee's lack of candor is a serious offense that strikes at the heart of the employer-employee relationship. *Jackson and White v. Department of the Army*, 105 LRP 45028, 99 MSPR 604 (MSPB 2005).
- Offenses inconsistent with an employee's supervisory responsibilities call into question his ability to function as a supervisor in the future. *Hanna v. Department of Labor*, 98 FMSR 5413, 80 MSPR 294 (MSPB 1998).

Case example

- Where an appellant had the responsibility to review the employment documents and security investigative forms completed by other applicants and employees, falsification of his own employment documents and security investigative forms adversely affected his credibility to the extent that the agency could not continue to have trust in his integrity and honesty. The MSPB upheld the removal penalty. *Forma v. Department of Justice*, 93 FMSR 5139, 57 MSPR 97 (MSPB 1993).

Factor: Consistency with other penalties

- An agency cannot knowingly and intentionally treat similarly situated employees differently. *Fearon v. Department of Labor*, 105 LRP 41646, 99 MSPR 428 (MSPB 2005).
- For purposes of disparate penalty analysis, an appellant is no longer required to prove such factors about a comparator employee as being in the same work unit, having the same supervisor, and having the same proposing or deciding official to establish that the comparator was similarly situated. Now, there must be enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly situated employees differently. The MSPB will not have hard and fast rules regarding the "outcome determinative" nature of these factors. *Lewis v. Department of Veterans Affairs*, 110 LRP 31478 (MSPB 2010), *citing Williams v. Social Security Administration*, 109 LRP 70875, 586 F.3d 1365 (Fed. Cir. 2009).

- ***Broida:*** The MSPB has long held that mathematical rigidity or perfect consistency in discipline is not necessary. *Broida Guide to MSPB Law*: Degree of Consistency Required, *citing Filson v. Federal Aviation Administration*, 81 FMSR 5378, 7 MSPR 125 (MSPB 1981).
- If an agency decides to begin levying a more severe penalty for a certain offense, it must give notice of the change in policy. *Fearon v. Department of Labor*, 105 LRP 41646, 99 MSPR 428 (MSPB 2005).
- Where the punishment is appropriate to the seriousness of an employee's offense, an allegation of disparate penalties is not a basis for reversal or mitigation of the penalty. *Jackson and White v. Department of the Army*, 105 LRP 45028, 99 MSPR 604 (MSPB 2005).
- An agency may refute a charge of disparate treatment by establishing a legitimate reason for the difference in treatment, either by showing that the offenses in question were not really equivalent, or that mitigating or aggravating factors justified a difference in treatment. *Parker v. Department of the Navy*, 91 FMSR 5554, 50 MSPR 343 (MSPB 1991).

Factor: Consistency with table of penalties

- An agency's departure from its table of penalties is permissible if the agency: 1) is not required by statute or regulation to follow the table; and 2) has not stated that it intends to be bound by the table. *Farrell v. Department of the Interior*, 102 LRP 40110, 314 F.3d 584 (Fed. Cir. 2002); *Rosado v. Department of Homeland Security*, 107 LRP 45264 (Fed. Cir. 2007, *unpublished*).
- An agency may take a more severe action than suggested in the table of penalties for a first offense if the employee has a record of prior, unrelated offenses. *Villela v. Department of the Air Force*, 84 FMSR 7010, 727 F.2d 1574 (Fed. Cir. 1984).
- An agency should not apply its table of penalties so rigidly as to ignore other *Douglas* factors. *Douglas v. Veterans Administration*, 81 FMSR 7037, 5 MSPR 280 (MSPB 1981).
- An agency's table of penalties is only one factor to be considered in assessing the reasonableness of a penalty. This is especially true where the agency has described the table of penalties as a guide that does not replace supervisory judgment or require specific penalties, but instead provides a general framework within which supervisors may exercise sound judgment in dealing with particular circumstances. *Phillips v. Department of the Interior*, 103 LRP 46073, 95 MSPR 21 (MSPB 2003).

Case example

  - Although an agency's table of penalties could be interpreted to mean that removal is ordinarily not imposed for a first drug offense, the table is only one factor to be considered in determining the appropriateness of the penalty, and deviation from the table is permissible where the circumstances of the case so justify. Deviation from the table might be appropriate where: 1) an employee frequently works without supervision and is privy to sensitive intelligence and information impacting the agency's mission and national security; 2) the consequences of the employee's lapse are serious and far-reaching; 3) the employee is a law enforcement officer, who is held to a higher standard of conduct than other employees; 4) the employee's misconduct, by its nature, strikes at the core of his former position. *Zazueta v. Department of Justice*, 103 LRP 46095, 94 MSPR 493 (MSPB 2003).

Factor: Notoriety and impact

- Publicity or even the possibility of publicity that could have a negative impact on the reputation of the agency is a factor that may be considered to enhance a penalty. *Eilertson v. Department of the Navy*, 84 FMSR 5781, 23 MSPR 152 (MSPB 1984); *Rotolo v. Merit Systems Protection Board*, 81 FMSR 7064, 636 F.2d 6 (1st Cir. 1980); *Velez II v. Department of Homeland Security*, 106 LRP 29266, 101 MSPR 650 (MSPB 2006).

Case examples

  - The substantial amount of negative publicity that resulted from a supervisory border patrol agent failing to ensure that subordinate border patrol agents ran an FBI National Crime Information Center criminal records check prior to releasing an illegal alien apprehended at the Mexico-U.S. border was a factor to be considered in making the penalty determination. *Velez II v. Department of Homeland Security*, 106 LRP 29266, 101 MSPR 650 (MSPB 2006).
  - The impact of negative publicity was a factor to be considered in a penalty determination where an employee sent sexually explicit e-mails from his agency e-mail address, in some cases to constituents with whom he had developed relationships on behalf of the agency, and the misconduct occurred at a time when customer relations had already suffered as a result of a recent 50 percent rate hike, and the agency could not afford further bad publicity. The employee's misconduct compromised the public image of the agency he was supposed to represent. *Von Muller v. Department of Energy*, 106 LRP 9274, 101 MSPR 91 (MSPB 2006).
  - The MSPB downplayed the effect of publicity where the board found no evidence suggesting that an employee's misconduct resulted in any adverse publicity outside the agency or that the offense had any impact on the reputation of the agency or the agency's mission. *Brown v. Department of the Treasury*, 102 FMSR 5136, 91 MSPR 60 (MSPB 2002).

Factor: Clarity of notice

- While lack of notice of the rules to be followed can be a mitigating factor, an agency is under no obligation to warn employees about behavior they should know is improper. *Flanagan v. Department of the Army*, 90 FMSR 5210, 44 MSPR 378 (MSPB 1990).
- Training on agency policies constitutes notice of expected behavior. *Morrison v. National Aeronautics and Space Administration*, 94 FMSR 5595, 65 MSPR 348 (MSPB 1994); *Batts v. Department of the Interior*, 106 LRP 29252, 102 MSPR 27 (MSPB 2006).
- An appellant is on notice that she is not to engage in dishonest and unethical actions when the critical duties listed in her core personnel document require her to exhibit honesty and integrity in the federal workplace. *Gebhardt v. Department of the Air Force*, 105 LRP 30288, 99 MSPR 49 (MSPB 2005).
- When an appellant receives multiple express warnings concerning deficiencies in his behavior, he is on notice that his behavior is not acceptable. *Pinegar v. Federal Election Commission*, 107 LRP 30185, 105 MSPR 677 (MSPB 2007).
- When an appellant has a past disciplinary record involving behavior similar to the current offense, he has been put on notice that such behavior will not be tolerated by the agency. *Zwagil v. General Services Administration*, 106 LRP 47305, 103 MSPR 63 (MSPB 2006); *Murry v. General Services Administration*, 103 LRP 33706, 93 MSPR 554 (MSPB 2003).
- An agency must give notice to an employee when previously condoned activity is no longer condoned, giving the employee the opportunity to conform to any new rules. *Crane v. Department of the Air Force*, 107 LRP 37325 (Fed. Cir. 2007, *unpublished*).

Case examples

  - An appellant was on notice that refusal to report for duty when on call could lead to removal because he was warned of this when such a refusal to report was the basis of an earlier suspension. *Walker v. Department of the Army*, 106 LRP 41622, 102 MSPR 474 (MSPB 2006).
  - An appellant who was removed for continued misconduct was clearly on notice, through quarterly counseling sessions, that he was only entitled to two 15-minute breaks and a 30-minute lunch break; that

he should avoid excessive breaks; and that he should avoid "loafing" on the job. *Williams v. Department of the Army*, 106 LRP 34576, 102 MSPR 280 (MSPB 2006).

- Suspensions which were taken for misconduct similar to the current offenses specifically put the appellant on notice that further misconduct could result in the issuance of even more severe disciplinary action. *Alaniz v. U.S. Postal Service*, 105 LRP 43000, 100 MSPR 105 (MSPB 2005).

Factor: Potential for rehabilitation

- An employee who has served an agency for a substantial period of time without prior discipline, has a good work ethic, and immediately reports an incident of misconduct and takes responsibility for his actions shows a good potential for rehabilitation. *Wentz v. U.S. Postal Service*, 102 FMSR 5155, 91 MSPR 176 (MSPB 2002).
- An appellant seeking treatment for medical problems that contributed to his misconduct demonstrates good potential for rehabilitation. *Vitanza v. U.S. Postal Service*, 101 FMSR 5371, 89 MSPR 319 (MSPB 2001).
- Seeking help from an employee assistance program helps demonstrate rehabilitative potential. *Negron v. Department of Justice*, 104 LRP 9940, 95 MSPR 561 (MSPB 2004).
- An employee's admission of his misconduct and his expression of remorse show his rehabilitative potential and constitute a significant mitigating factor when he voluntarily notifies an agency of his wrongdoing, prior to the agency's initiating an investigation into the misconduct. *Singletary v. Department of the Air Force*, 103 LRP 46089, 94 MSPR 553 (MSPB 2003).
- Even a good potential for rehabilitation does not outweigh an agency's legitimate concern as to an appellant's ability to perform his duties and the effect of his conduct upon the efficiency of the service. *Singletary v. Department of the Air Force*, 103 LRP 46089, 94 MSPR 553 (MSPB 2003).
- Where an employee's admission of misconduct and expression of remorse do not come until after the agency conducts its investigation, the employee's apology is entitled to little or no mitigating weight. *Singletary v. Department of the Air Force*, 103 LRP 46089, 94 MSPR 553 (MSPB 2003).
- Continued misconduct by an employee in spite of notice that further misconduct could result in the issuance of even more severe disciplinary action demonstrates a poor potential for rehabilitation. *Alaniz v. U.S. Postal Service*, 105 LRP 43000 100 MSPR 105 (MSPB 2005).
- When assessing an employee's potential for rehabilitation, a deciding official can consider the fact that the employee refused to take responsibility for her actions and made false statements in response to the notice of proposed removal. *Talavera v. Agency for International Development*, 107 LRP 1753, 104 MSPR 445 (MSPB 2007).
- An employee's inability or unwillingness to improve his conduct despite having been disciplined for prior misconduct shows poor potential for rehabilitation. *Walker v. Department of the Army*, 106 LRP 41622, 102 MSPR 474 (MSPB 2006); *Williams v. Department of the Army*, 106 LRP 34576, 102 MSPR 280 (MSPB 2006).
- Lack of rehabilitative potential is a significant aggravating factor that can outweigh mitigating factors when the employee is a supervisor who fails to follow agency instructions and provides the agency with inconsistent explanations of his circumstances. *Jones v. Department of Justice*, 104 LRP 57856, 98 MSPR 86 (MSPB 2004).
- An appellant's refusal to acknowledge that she has done anything wrong reflects very poorly on her potential for rehabilitation. *Grubb v. Department of the Interior*, 104 LRP 30780, 96 MSPR 377 (MSPB 2004).
- It is reasonable for an agency to take the position that evidence of an employee's temporary improvement in behavior does not necessarily signal the potential for permanent rehabilitation because employees who are "under surveillance" could be expected to alter their behavior only for as long as they think necessary. *Levinsky v. Department of Justice*, 105 LRP 45030, 99 MSPR 574 (MSPB 2005).

Case examples

- An appellant's potential for rehabilitation was questionable where his conduct was serious and prolonged, he posted material on his Web site that demonstrated a deep-seated antipathy toward his colleagues and supervisors, and he did not fully acknowledge his wrongdoing or the gravity of his misconduct. *Winters v. Department of the Navy*, 107 LRP 38427 (Fed. Cir. 2007, *unpublished*).

- The MSPB determined that an appellant's long-term potential for rehabilitation was somewhat uncertain, finding that the agency's doubts about the significance of his apparent efforts to modify his behavior were reasonable. The appellant had been warned on previous occasions that his profanity and his comments regarding various nationalities could be regarded as offensive, and any effect these warnings may have had was only temporary. *Levinsky v. Department of Justice*, 105 LRP 45030, 99 MSPR 574 (MSPB 2005).
- An appellant showed poor rehabilitation potential where he unhesitatingly violated fundamental principles of honesty, failed to understand the severity of his misconduct or to accept responsibility for his actions, engaged in gamesmanship, and skirted culpability at his oral reply, and his actions reflected a lack of remorse. *Simmons v. Department of the Air Force*, 105 LRP 30308, 99 MSPR 28 (MSPB 2005).
- An appellant exhibited little potential for rehabilitation based upon the failure of prior discipline and the mediation process to prevent the misconduct at issue, as well as his refusal to acknowledge the inappropriateness of his conduct. *Beaudoin v. Department of Veterans Affairs*, 105 LRP 41637, 99 MSPR 489 (MSPB 2005).

Factor: Mitigating circumstances

- An appellant's failure to bring a mitigating factor to an agency's attention does not prohibit an administrative judge from considering that factor. Such failure merely affects the weight of the factor. *Singletary v. Department of the Air Force*, 103 LRP 46089, 94 MSPR 553 (MSPB 2003).
- An alleged medical condition will be entitled to considerable weight as a mitigating factor only where it played a part in the charged conduct. *Sherlock v. General Services Administration*, 106 LRP 55402, 103 MSPR 352 (MSPB 2006).
- Job-related tensions and stress can be mitigating factors. *Brown v. Department of the Army*, 104 LRP 27036, 96 MSPR 232 (MSPB 2004); *Franklin v. Department of Justice*, 96 FMSR 5308, 71 MSPR 583 (MSPB 1996).
- Where the MSPB sustains a charge of involvement with a controlled substance on duty, stress or personal problems experienced by the appellant generally should not be considered as a mitigating or relevant factor in determining the reasonableness of an agency's penalty selection, absent a reasoned explanation of the relationship between the appellant's personal circumstances and the charged misconduct, and without further addressing the question of whether the appellant expressed remorse for the misconduct and otherwise demonstrated a potential for rehabilitation. *Zazueta v. Department of Justice*, 103 LRP 46095, 94 MSPR 493 (MSPB 2003).
- The absence of intent by an appellant to engage in the sustained misconduct is a mitigating factor. *Fernandez v. Department of Agriculture*, 103 LRP 46032, 95 MSPR 63 (MSPB 2003).
- An appellant's use of a prescription drug that played a part in the charged misconduct can be a substantial mitigating factor. *Wentz v. U.S. Postal Service*, 102 FMSR 5155, 91 MSPR 176 (MSPB 2002).
- When mental impairment or illness is reasonably substantiated, and is shown to be related to the ground of removal, this must be taken into account when taking an adverse action against an employee. *Malloy v. U.S. Postal Service*, 109 LRP 52969 (Fed. Cir. 2009).
- Emotional problems, depression and stress can be mitigating factors, but there must be some evidence showing the problems contributed to the misconduct. *Wynne v. Department of Veterans Affairs*, 97 FMSR 5244, 75 MSPR 127 (MSPB 1997); *Stuhlmacher v. U.S. Postal Service*, 101 FMSR 5347, 89 MSPR 272 (MSPB 2001).
- A deciding official's possible predisposition against an employee can be a mitigating factor. *Eichner v. U.S. Postal Service*, 99 FMSR 5351, 83 MSPR 202 (MSPB 1999); *House v. U.S. Postal Service*, 98 FMSR 5384, 80 MSPR 138 (MSPB 1998).
- Evidence that supervisors engaged in a concerted effort to get rid of an employee can be a mitigating factor. *House v. U.S. Postal Service*, 98 FMSR 5384, 80 MSPR 138 (MSPB 1998).
- The fact that an employee's misconduct involved one continuing incident rather than a pattern or practice of insubordination, and that she disobeyed an order to continue helping a customer, are mitigating factors in determining a penalty for insubordination. *Cardwell v. Veterans Administration*, 86 FMSR 5357, 32 MSPR 1 (MSPB 1986).

Factor: Availability of alternative sanctions

- An agency does not have to prove that the greater penalty it imposed was necessary to promote the efficiency of the service when it was free to choose a lesser penalty. It only has to show that it considered the relevant factors and that the penalty was reasonable. *Lewis v. Bureau of Engraving and Printing*, 85 FMSR 5508, 29 MSPR 447 (MSPB 1985).
- Continued misconduct by an employee in spite of notice that further misconduct could result in the issuance of even more severe disciplinary action suggests that a lesser penalty would be unlikely to deter future misconduct. *Alaniz v. U.S. Postal Service*, 105 LRP 43000, 100 MSPR 105 (MSPB 2005).
- Exemplary punishment, where the motivation for choosing a penalty is to make an example of the appellant to other employees, is generally contrary to the *Douglas* factors. Although one of the *Douglas* factors to be considered is the adequacy and effectiveness of alternative sanctions to deter similar conduct in the future by the employee or others, an agency cannot decide to make an example of an appellant irrespective of the other *Douglas* factors. *Blake v. Department of Justice*, 99 FMSR 5107, 81 MSPR 394 (MSPB 1999); *Harper v. Department of the Air Force*, 94 FMSR 5150, 61 MSPR 446 (MSPB 1994).
- If an employee is capable of performing the duties of a vacant lower-graded position, the administrative judge can consider this fact in determining whether the penalty of removal, as opposed to reassignment to a position within the employee's medical restrictions, falls within the tolerable limits of reasonableness. *Marshall-Carter v. Department of Veterans Affairs*, 103 LRP 46065, 94 MSPR 518 (MSPB 2003).

Case example

- An agency had no reason to believe that a penalty other than removal would be sufficient to alter an employee's behavior where: 1) the employee was previously counseled about her sarcastic and disrespectful behavior and warned that such behavior would not be tolerated in the workplace; 2) the employee was suspended for 30 days for abusive, discourteous, and disruptive behavior in the presence of supervisors and coworkers; 3) the penalty of removal was consistent with the agency's penalty guide; and 4) the employee showed no remorse for the misconduct and took no responsibility for it. *Murry v. General Services Administration*, 103 LRP 33706, 93 MSPR 554 (MSPB 2003).

APPENDIX D

HATCH ACT INFORMATION SHEET

THE HATCH ACT

Permitted and Prohibited Activities
For Employees Who May Engage in Partisan Political Management and Campaigns*

- **May not use their official authority or influence to interfere with or affect the result of an election. For example:**
  - **May not use their official titles or positions while engaged in political activity.**
  - **May not invite subordinate employees to political events or otherwise suggest to subordinates that they attend political events or undertake any partisan political activity.**
- **May not solicit, accept or receive a donation or contribution for a partisan political party, candidate for partisan political office, or partisan political group. For example:**
  - **May not host a political fundraiser.**
  - **May not invite others to a political fundraiser.**
  - **May not collect contributions or sell tickets to political fundraising functions.***
- **May not be candidates for public office in partisan political elections.**
- **May not knowingly solicit or discourage the participation in any political activity of anyone who has business pending before their employing office.**
- **May not engage in political activity – *i.e.*, activity directed at the success or failure of a political party, candidate for partisan political office, or partisan political group – while the employee is on duty, in any federal room or building, while wearing a uniform or official insignia, or using any federally owned or leased vehicle. For example:**
  - **May not distribute campaign materials or items.**
  - **May not display campaign materials or items.**
  - **May not perform campaign related chores.**
  - **May not wear or display partisan political buttons, T-shirts, signs, or other items.**
  - **May not make political contributions to a partisan political party, candidate for partisan political office, or partisan political group.**
  - **May not post a comment to a blog or a social media site that advocates for or against a partisan political party, candidate for partisan political office, or partisan political group.**
  - **May not use any e-mail account or social media to distribute, send, or forward content that advocates for or against a partisan political party, candidate for partisan political office, or partisan political group.**

- **May be candidates for public office in nonpartisan elections.**
- **May register and vote as they choose.**
- **May assist in voter registration drives.**
- **May contribute money to political campaigns, political parties, or partisan political groups.**
- **May attend political fundraising functions.**
- **May attend and be active at political rallies and meetings.**
- **May join and be an active member of political clubs or parties.**
- **May hold office in political clubs or parties.**
- **May sign and circulate nominating petitions.**
- **May campaign for or against referendum questions, constitutional amendments, or municipal ordinances.**
- **May campaign for or against candidates in partisan elections.**
- **May make campaign speeches for candidates in partisan elections.**
- **May distribute campaign literature in partisan elections.**
- **May volunteer to work on a partisan political campaign.**
- **May express opinions about candidates and issues. If the expression is political activity, however – *i.e.*, activity directed at the success or failure of a political party, candidate for partisan political office, or partisan political group – then the expression is <u>not</u> permitted while the employee is on duty, in any federal room or building, while wearing a uniform or official insignia, or using any federally owned or leased vehicle.**

For further information, contact the
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at:
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(202) 254-3650
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Hatch Act advisory opinion requests: hatchact@osc.gov

* Soliciting, accepting, or receiving such donations or contributions may be done so long as the person being solicited is: 1) a member of the same federal labor organization as defined under section 7103(4) of this title or a federal employee organization which as of the date of enactment of the Hatch Act Reform Amendments of 1993 had a multicandidate political committee (as defined under section 315(a)(4) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(4))); 2) not a subordinate employee; and 3) the solicitation is for a contribution to the multicandidate political committee (as defined under section 315(a)(4)of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(4))) of such federal labor organization as defined under section 7103(4) of this title or a federal employee organization which as of the date of the enactment of the Hatch Act Reform Amendments of 1993 had a multicandidate political committee (as defined under section 315(a)(4)of the Federal Election Campaign Act of 1971 (2) U.S.C. 441a(a)(4))).

* This list of permitted and prohibited activities does not apply to federal employees in the following agencies, divisions, or positions:
  - Election Assistance Commission
  - Federal Election Commission
  - Office of the Director of National Intelligence
  - Central Intelligence Agency
  - Defense Intelligence Agency
  - National Geospatial Intelligence Agency
  - National Security Agency
  - National Security Council
  - National Security Division (Department of Justice)
  - Criminal Division (Department of Justice)
  - Federal Bureau of Investigation
  - Secret Service
  - Office of Criminal Investigation (Internal Revenue Service)
  - Office of Investigative Programs (Customs Service)
  - Office of Law Enforcement (Bureau of Alcohol, Tobacco and Firearms)
  - Merit Systems Protection Board
  - U.S. Office of Special Counsel
  - Career members of the Senior Executive Service
  - Administrative law judges, administrative appeals judges, and contract appeals board members

(Rev. 5/11)

NOTES

NOTES