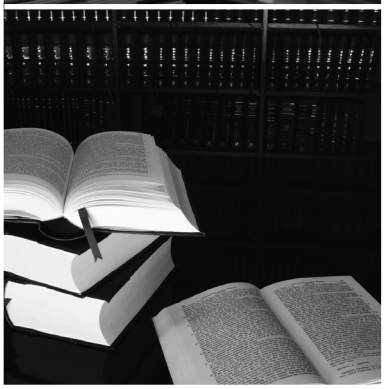


Alternative Discipline: Creative Solutions for Agencies to Effectively Address Employee Misconduct

A Report to the President and the Congress of the United States
by the U.S. Merit Systems Protection Board

THE CHAIRMAN

U.S. MERIT SYSTEMS PROTECTION BOARD
1615 M Street, NW
Washington, DC 20419-0001

July 2008

The President
President of the Senate
Speaker of the House of Representatives

Dear Sirs and Madam:

In accordance with the requirements of 5 U.S.C. 1204(a)(3), it is my honor to submit this Merit Systems Protection Board (MSPB) report, *Alternative Discipline: Creative Solutions for Agencies to Effectively Address Misconduct*.

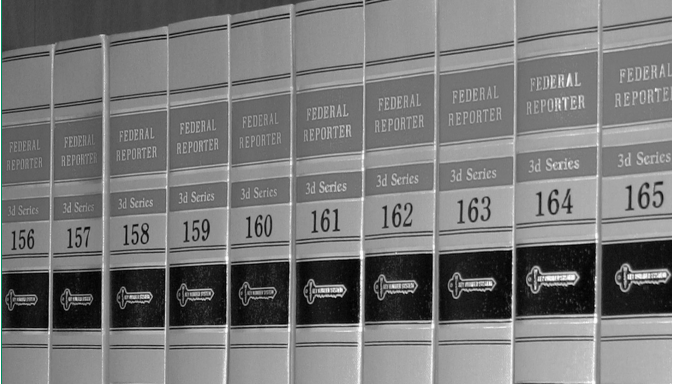
The purpose of this report is to describe the Federal Government's current use of alternative discipline and alternative discipline's potential to help agencies better manage their workforces. The merit principles encourage agencies to be effective and efficient in how they use the Federal workforce. This includes the responsibility to address misconduct in a manner that has the greatest potential to prevent further harm to the efficiency of the service. Under the correct circumstances, alternative discipline may be the most effective method for addressing such misconduct.

Our research indicates that few agencies take a comprehensive approach to alternative discipline. Rather, its application appears, in most cases, to be ad hoc use by individual managers, with little or no formal guidance from the agency. However, in rare situations, agencies set rules that prevent supervisors from being able to make a case-by-case assessment of what approach to discipline may have the greatest potential for success. This report contains recommendations for agencies to empower their supervisors more and provide a greater degree of guidance to supervisors on how they can successfully use alternative discipline.

I believe you will find this report useful as you consider issues affecting the Federal Government's ability to effectively manage its workforce.

Respectfully,

Neil A. G. McPhie



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by the U.S. Merit Systems Protection Board

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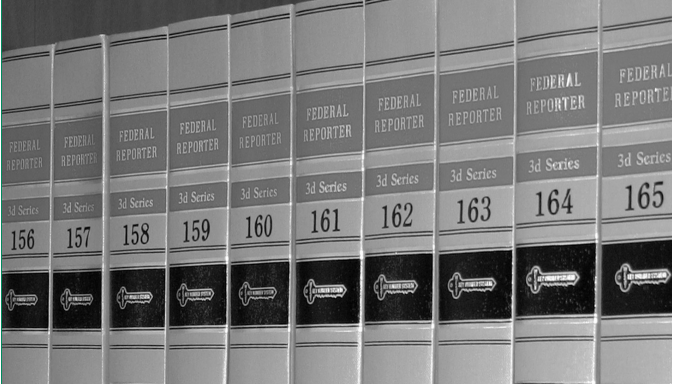

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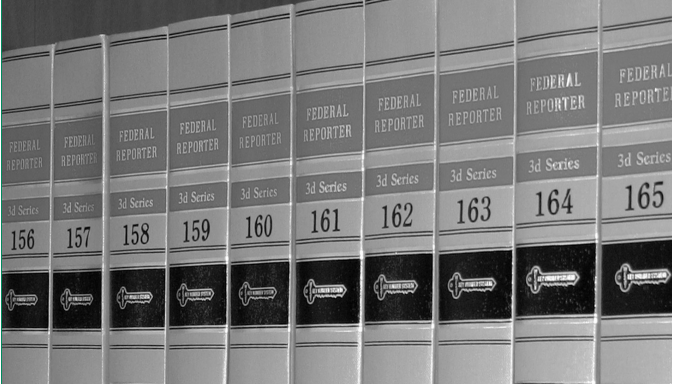


EXECUTIVE SUMMARY

Federal agencies have a responsibility to manage their workforces effectively and this includes the effective use of discipline to address misconduct by employees. Alternative discipline may—under the right circumstances—be a more efficient and more effective approach than traditional discipline. Which method is more appropriate for a particular situation will depend greatly on the nature of the offense and the individual who committed the misconduct. While alternative discipline requires more thoughtful decision-making and thus poses a greater challenge for managers and agencies than traditional discipline, the results can be worth the time and effort.

Background

One factor agencies must consider when deciding to take a disciplinary action that may come before the U.S. Merit Systems Protection Board (MSPB) is the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. Regardless of the grievance or appeals process to be used, as an element of good management, agencies should always consider what disciplinary approach will best serve the efficiency of the Federal civil service. In some cases, this may be an alternative form of discipline.

While alternative discipline is not easily defined because it can take many forms, a simplified explanation is that alternative discipline is an effort, undertaken by an employer, to address employee misconduct using a method other than traditional discipline. Traditional discipline is most often a reprimand (sometimes called an admonishment), suspension, change to lower grade, or removal based upon the

employee having engaged in conduct that damaged the efficiency of the service. Alternative discipline is management taking a different course of action to address the misconduct.

This report provides information on the policy approaches of some Federal agencies regarding alternative discipline, describes some of the critical elements of alternative discipline agreements, and provides views from departments and agencies on what has and has not worked well for them in the past.

Methodology

We asked 22 departments and agencies to provide us with responses to a questionnaire we created regarding their use of alternative discipline. In total, we received 46 responses from headquarters and subcomponents of various departments and agencies. The responding departments and agencies are listed in Appendix A. We also spoke with several management and labor organizations. We are not disclosing their names due to the small number of organizations involved and our commitment to confidentiality when obtaining sensitive information.

Findings

The following are the major findings from our study of alternative discipline:

- The level of guidance on alternative discipline that agencies provide to their workforce varied greatly by agency, but in most agencies there was little or no guidance. Only 7 of our 46 responding organizations told us their agency has a formal agency-wide policy. However, 80 percent of those organizations *without* such a policy are permitted by the agency to use alternative discipline on an ad hoc basis.

- Training was also missing in most agencies. Of the 37 organizations permitted to use alternative discipline, only 2 organizations reported that their agency provides specific training on alternative discipline to personnelists, supervisors or employees.

- Only a few organizations indicated they keep track of alternative discipline as a program. Seven of the 37 organizations that use alternative discipline reported that they track its use, while only 3 keep track of how often the alternative discipline successfully modifies the conduct.

- A few agencies use alternative methods automatically, with little or no assessment of the employee or possible nuances of the particular situation. However, the overwhelming majority of agencies encourage managers to assess the situation on a case by case basis to determine what approach is most likely to resolve the situation.

- Some agencies limit the use of alternative discipline to low-level offenses or early offenses, while others use it primarily as a final effort before removal.

- Almost all responding organizations indicated that when alternative discipline occurs, it is the result of an agreement between the agency and the individual employee as opposed to being unilaterally imposed by the agency without consulting the employee.

- When alternative discipline is addressed in a collective bargaining agreement, it tends to be an option for management rather than a requirement. (The U.S. Postal Service is a notable exception.)

The following is not a "new" finding, but this report reiterates that:

- Alternative discipline agreements are contracts. Thus, how they are formed, executed, enforced, and potentially breached will be evaluated by legal standards if a party seeks MSPB or judicial enforcement.

Recommendations

1. Managers and human resources personnel should consult with legal counsel when implementing an alternative discipline agreement that requires the employee's consent. It is extremely important for agreements to meet certain legal requirements to form a valid agreement. We strongly recommend that a legal advisor review such agreements.

2. Agencies should develop policies, or at least provide guidance, on the use of alternative discipline in order to ensure that human resources staff can properly advise managers on the issues to consider when determining if alternative discipline is appropriate and, if so, what approaches should be considered.

3. Managers should be trained, before the problem arises, on the existence of alternative discipline and the basic principles behind it. Knowing that alternative discipline is available may help managers to effectuate an early intervention before the poor conduct worsens. Agencies have a responsibility to ensure their supervisors develop the necessary skills and have the required knowledge of Federal rules in order to address conduct issues. We recommend that training in this area include information about when and how to use alternative discipline.

4. Agencies should, in general, avoid inflexible rules on the use of alternative discipline:

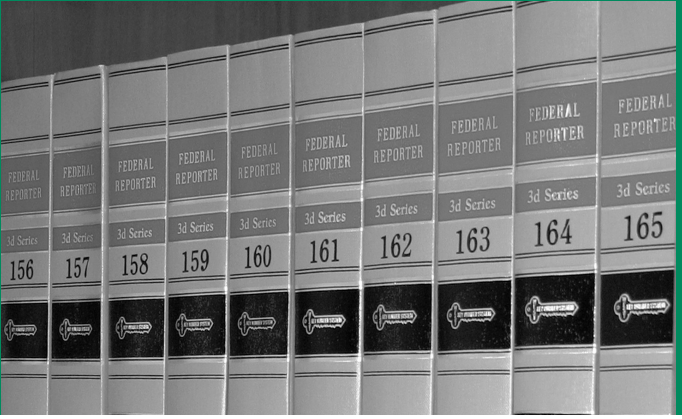
- Not every situation is appropriate for alternative discipline, and it should not be used if management has reason to believe traditional discipline is likely to be more effective. However, where management has reason to believe alternative discipline will be more likely to effect the necessary change, we recommend that management be given the opportunity to try an alternative approach.

- While some terms must be in the agreement to ensure it is a valid contract, agencies should consider limiting the number of non-negotiable requirements they place on supervisors' use of alternative discipline. The more items that are non-negotiable, the

more supervisors are limited in their ability to reach fair and effective solutions. Legal necessities should be mandated, but for all other terms, a strong recommendation from the agency should suffice.

5. The U.S. Office of Personnel Management (OPM) should consider requesting data from agencies on their use of alternative discipline. Because of the small number of employees disciplined compared to the size of the workforce, many agencies will not have sufficient data to analyze on their own. However, if OPM were to serve as a central repository, OPM might be better able to advise agencies on more effectively managing conduct issues within the Federal Government in keeping with OPM's mission to "support the Federal government's ability to have the best workforce possible to do the best job possible."[1]

[1] U.S. Office of Personnel Management, *Performance and Accountability Report, 2001*, available at: http://www.opm.gov/gpra/opmgpra/par2002/mda/mission.asp (last visited Sep. 25, 2007) and U.S. Office of Personnel Management, *Biography of an Ideal: A History of the Federal Civil Service*, 278-79, available at http://www.opm.gov/biographyofanideal/.



INTRODUCTION

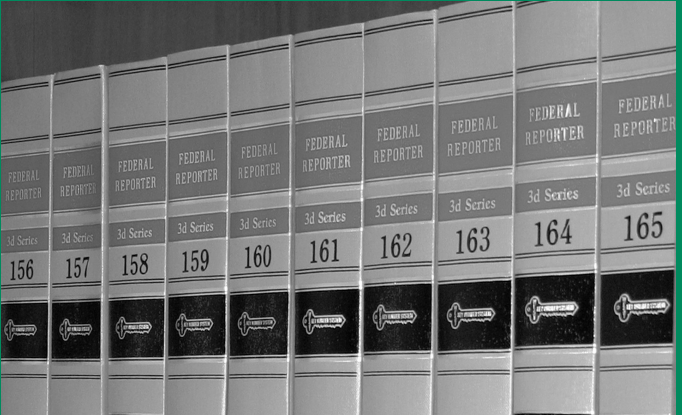
When there is misconduct by an employee, management's goal should be to either persuade the employee to behave properly in the future, or to remove the employee if the conduct is serious enough. Managers are given a few traditional options to modify conduct that does not rise to the level of a removable offense: primarily reprimands and suspensions, with the occasional change to a lower grade. However, agencies also have the option (under most circumstances) to use alternative methods to correct behavior. Alternative discipline is characterized by what it is not—namely traditional discipline. Alternative discipline is a measure taken by management to address a situation where traditional discipline would have otherwise been an appropriate response. Whether traditional or alternative discipline is used, an agency's goal should be to respond to the misconduct in a manner that will cause the employee to choose not to repeat the misconduct.[2]

The purpose of this report is to discuss what Federal agencies are doing with alternative discipline. This report provides information on the different approaches to discipline taken by various Federal agencies, some of the critical elements of alternative discipline agreements, and views from departments and agencies on what has and has not worked well.

This report takes a different approach to recommendations than many of MSPB's other reports. In this report we frequently recommend that managers and agencies consider various points, but we rarely take the position that one particular approach

[2] This report addresses what an agency may do to most effectively correct an individual's misconduct. It does not specifically address settlement agreements which may be reached after an action is taken in order to resolve a complaint, grievance, or appeal regarding the disciplinary action that has already occurred. However, many of the aspects of what must be in an alternative discipline agreement will be similar to what is required in a settlement agreement, as they are both forms of contracts subject to contract law.

will be the correct one. Alternative discipline works best when agencies consider the character and personality of the individual as well as the unique needs or risks involved for the individual's workplace. Thus, at many points this report provides specific recommendations about what options agencies and managers should consider without recommending what particular management action should result from those deliberations. Those sections of this report often include a discussion of both the potential advantages and drawbacks of a particular approach to aid the reader in making a more informed decision.



FORMS OF DISCIPLINE

This chapter describes traditional discipline and various forms of alternative discipline available to supervisors to help describe what alternative discipline is and how it may be used. The process for creating an alternative discipline agreement is discussed in a later chapter.

What Is Traditional Discipline?

Traditional discipline is formal chastisements or negative consequences designed to correct unacceptable behavior that has had a negative impact on the efficiency of the Federal civil service. The most common forms of discipline range from admonishments or reprimands, to suspensions of varying lengths, to more serious and permanent measures such as a change to a lower grade or removal if the employee cannot be effectively rehabilitated.

A conventional counseling session is not discipline, as the purpose of counseling should not be to create a negative experience, but rather to communicate helpful information. A meeting between a supervisor and an employee to explain workplace rules or requirements is a regular responsibility of supervisors whenever an employee is unclear about management expectations. Similarly, discipline is not appropriate for situations in which an employee is trying hard to do well, but performs poorly despite the employee's best efforts. Poor performance, when there is no misconduct contributing to the problem, should be addressed through guidance and training.[3] If that is unsuccessful, a change to lower graded work or removal may be necessary. In contrast, discipline is reserved for those times when

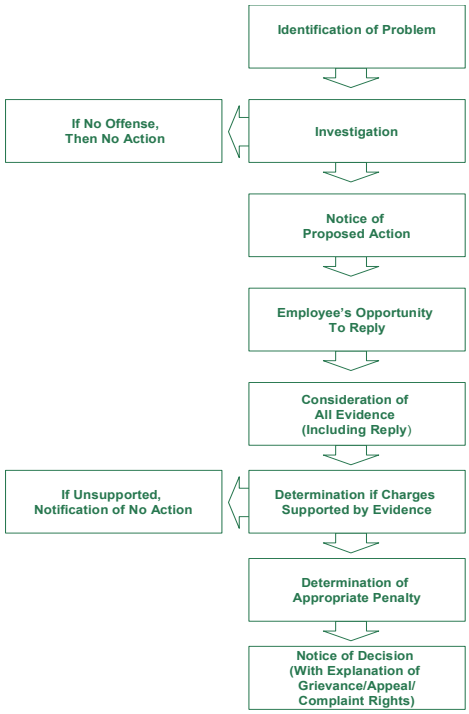
[3] The degree of guidance and training appropriate for a probationer will often be different from that provided to a fully appointed employee. For more information on addressing poor performing probationers, see: U.S. Merit Systems Protection Board, *The Probationary Period: A Critical Assessment Opportunity*, Washington, D.C., 2005, available at www.mspb.gov (last visited Aug. 8, 2007).

an employee was aware—or should have reasonably been aware—of what was required, but engaged in an act of misconduct despite that awareness.

When managing employees, supervisors have a responsibility to set clear rules and expectations. For example, if there is a firm time when an employee's duty shift begins, the employee must be notified about it. Before using discipline, supervisors should ensure that their employees understand the rules. It is possible that misbehaving employees would have complied with agency requirements, if they had understood what was required.

However, not every workplace rule must be specified. For example, supervisors should be able to assume that employees know they are not permitted to report for work under the influence of illegal substances. Supervisors should be able to assume that employees know they are not permitted to inflict bodily harm on colleagues in the workplace. When an employee is aware—or should reasonably be aware—of management's expectations, and chooses to violate those expectations, discipline may be necessary to modify the employee's behavior.

Figure 1: Traditional Discipline Process



Before management takes a form of discipline involving a suspension, a change to a lower grade, or a removal, a Federal employee is entitled to a certain process. This is often referred to as "due process" (because it is a process due to employees) or "procedural rights" (because employees have a right to these procedures).[4]

[4] This segment of the report contains a simplified explanation of the disciplinary process that is provided to facilitate a discussion of the spectrum of disciplinary philosophies. This segment does not address every employee right, or provide sufficient detail to guide an agency taking an action. Agencies should consult the U.S. Code, the Code of Federal Regulations, agency policies, and relevant case law when taking a disciplinary or adverse action.

The first formal procedural right is the employee's right to be notified of what the employee is being charged with having done and what disciplinary action management is considering imposing. (See Figure 1 for a very basic pictorial rendering of the major steps.) The employee is then provided an opportunity to explain to the deciding official either why the charges are not accurate, or why the proposed punishment is not appropriate. The employee has a right to be represented in this process, either by an attorney, a union officer, or another person authorized by the employee.

The agency official who will decide what action to ultimately take (the deciding official) then has a responsibility to consider the reply of the employee, any evidence supplied by the employee, and the evidence upon which the proposing official based his recommendation. Evidence cannot be considered unless the employee was informed of it and given an opportunity to rebut it. If the deciding official finds that it is possible the employee engaged in the described misconduct, but finds it equally likely that the employee did not do so, the proposed action should not be effected. That is because in the Federal civil service, the charges underlying an adverse action for misconduct must be proven by a preponderance of the evidence—it must be more likely than not that the employee did what employee has been charged with doing.[5]

If the deciding official finds that a preponderance of the evidence supports the charges, there is another decision the official must make—the appropriate penalty.

Most agencies have a table of penalties that guides deciding officials in determining what penalty is likely to be appropriate. Furthermore, there is generally a scale to the recommended penalty. For example, if an Army employee reports to duty under the influence of alcohol, the penalty for a first offense may range from a reprimand to removal,

[5] For an agency's action taken for conduct to be sustained before the MSPB, the agency must establish that there is a "degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 CFR § 1201.56. If the deciding official determines the employee may have done something for which he or she was not charged, and discipline may be appropriate, then the process for that discipline must start at the beginning with a new notice of proposed action, and possibly a new investigation. A deciding official cannot "find" the employee committed an offense that he or she was not charged with committing. (A new deciding official may be appropriate for any new charges if the deciding official is no longer able to impartially consider the new charges.)

depending upon how much the intoxication interfered with the maintenance of discipline, how much it affected the individual's ability to perform assigned duties, and whether the safety of personnel or property was placed in danger.[6] Likewise, if an employee of the Department of the Interior commits a prohibited personnel practice, the penalty may range from a 1-day suspension to a removal action.[7] As with any well-drafted table of penalties, these tables warn the reader that the table is only guidance and supervisors must exercise their own judgment. "Ideally, selection should be made of the least severe penalty necessary to correct misconduct and to discourage repetition. However, it is important to note that the supervisor retains full authority to set penalties as he/she deems appropriate based on the particular circumstances and specifications of the offense."[8] Thus, the table is only a guide, and a penalty outside the table's recommended range may be used when the situation warrants it.

A deciding official may implement the level of discipline recommended in the notice of proposed action, or a lesser penalty. However, a greater penalty may not be used unless the employee was notified that the greater penalty was under consideration and was provided the opportunity to provide arguments against that greater penalty.

When a deciding official reaches a decision to implement discipline, the employee will be provided the opportunity to grieve or appeal the decision and the penalty. An employee (who meets the legal definition of an employee at 5 U.S.C. § 7511) has a statutory right to appeal a suspension of more than 14 days, a change to a lower grade, or a removal for cause to the Merit Systems Protection Board. If the employee is a member of a collective bargaining unit, the collective bargaining agreement (CBA) may provide further options, such as a grievance which may lead to an arbitration, depending upon the content of the CBA as agreed to by the bargaining unit and agency management. However, once an employee selects one avenue for redress, the employee cannot later make use of the other.

[6] U.S. Army Table of Penalties, available at: http://cpol.army.mil/library/permiss/5a111.html (last visited July 23, 2007).

[7] U.S. Department of the Interior Table of Penalties, available at: http://www.doi.gov/hrm/guidance/tbpnfn3c.htm (last visited July 23, 2007).

[8] Ibid.

So, if an employee opts for arbitration, the MSPB will not be permitted to later adjudicate the claim (except under limited circumstances).[9]

For suspensions of 14 days or less, most cases cannot come before the MSPB because the MSPB lacks jurisdiction. (There are exceptions to this rule, such as a whistleblower complaint or an action initiated by the Office of the Special Counsel.)[10] However, smaller suspensions may be grieved using an agency's administrative grievance process or other dispute resolution process, or the CBA's grievance process if it is applicable.[11]

An employee also may file a complaint regarding a disciplinary action with the agency's Equal Employment Opportunity (EEO) Office, and then with the Equal Employment Opportunity Commission (EEOC) if the employee is dissatisfied with the result of the agency's EEO finding.[12]

While the MSPB is noted for adjudicating its cases in a more timely manner than most similar agencies or courts, and the EEOC has made efforts to improve its timeliness, the reality is that it can take a long time before there is a final resolution of the case. After the initial decision by an MSPB Administrative Judge, or the full Board's decision on a petition for review, the employee is still entitled to file with the Federal Circuit of the U.S. Court of Appeals. A few decisions involving employee discipline have even been granted a hearing (certiorari) by the U.S. Supreme Court. Depending upon the complexity of the case and the determination of the parties to pursue all appeals, it can take years to fully adjudicate a case to the end result.

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[9] "Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both." If the employee alleges that discrimination has occurred, the employee may request that the MSPB review the arbitrator's final decision. 5 U.S.C. § § 7121 (e) (1), (d). However, the MSPB gives great deference to the factual findings of an arbitrator and will overturn only for legal error. *Means v. Department of Labor*, 63 M.S.P.R. 180, 182 (1994).

[10] U.S. Merit Systems Protection Board, *Introduction to the MSPB*, available at www.mspb.gov (last visited Feb. 16, 2007).

[11] 5 CFR § 771.101.

[12] 29 CFR § 1614.302.

Agencies may not be happy about the amount of time and energy that they may need to devote to grievances and appeals—and that can happen even if the agency was correct in its actions. If the agency loses an appeal, having an employee returned after a removal is often unpleasant for all involved. The back pay and legal fees can be expensive for the agency, and the employee, even if made whole by back pay with interest, still was put in the position of financial difficulties and the stress of worrying about continued employment for a period of time before the case was resolved. Being made financially whole does not erase the experience. Furthermore, if the employee is unsuccessful, the time (and in many cases the legal fees) involved in the appeals process can cause the employee more of a hardship than the actual penalty imposed by the agency for the misconduct.

The purpose of traditional discipline is to send the message that the behavior is unacceptable in order to deter the employee from repeating the conduct, and to deter others from similar actions by demonstrating that management takes misconduct seriously. (Personnel actions are confidential, but a lack of repetition of the conduct, or the employee's removal when the conduct repeats, can send the message to others in the workplace. Also, while the implementation of a suspension is private, the absence of the offending individual following the misconduct can be noticed by others.) However, as discussed above, traditional discipline can consume substantial time and energy, particularly when it comes to the appeals and grievance processes. These procedures are necessary to ensure a fair and impartial system when employees are deprived (temporarily or permanently) of their jobs or pay, but the process can be unappetizing for all involved.

One of the greatest benefits of alternative discipline agreements, according to our responding organizations, is that an employee's grievance or appeal rights can be greatly curtailed if the employee voluntarily agrees to waive those rights as a condition of the alternative discipline agreement. (Please see the chapter on the content of alternative discipline agreements for details on how to ensure a waiver of rights will be upheld.)

What Is Alternative Discipline?

Alternative discipline in the Federal system is any form of action taken to correct behavior other than the traditional disciplinary methods used by the Government. Therefore, alternative discipline is generally not a reprimand, a suspension with a loss of duties and pay, a change to a lower grade, or a removal from service for cause without the consent of the individual unless additional terms have been added.

For example, what if a supervisor has an employee who is regularly absent without approved leave (AWOL)? The employee has already suffered a self-inflicted loss of pay for those days when the person did not come to work to perform the assigned duties. Is sending the employee home with no duties and no pay likely to alter the conduct when the employee has already chosen to do without the duties and pay despite knowing the conduct was unacceptable? Does imposing discipline that causes the same result as the misconduct adequately send the message that the conduct must cease? Under circumstances such as these, a supervisor may wish to try a method other than a suspension with a loss of duties and pay.

The following is a list of potential approaches to use for alternative discipline. The appropriateness of the particular approach will vary based upon the nature of the offense and personality of the individual whose conduct needs correcting. What works well for one person may have no impact on another. These ideas are not recommendations, merely examples of alternative approaches some agencies have used. Readers may wish to modify or combine any of these approaches to better suit their needs.

These examples are provided in no particular order, and the location on the list should not be seen as an endorsement. The list is not exhaustive. Managers should be as creative as possible, provided the penalty is appropriate and in compliance with agency regulations, collective bargaining agreements, and any applicable statutes. (Please be aware that most of these approaches are only possible as a part of an agreement with the employee and cannot be imposed unilaterally by the agency.)

1. Employee donates annual leave to a leave bank or leave transfer program equal to the amount of time that would have been spent on a suspension.

2. Employee performs hours of community service equal to the amount of time that would have been spent on a suspension.

3. Employee performs research on the issue of the particular misconduct to better understand the harm it causes to the work unit and then provides training or a briefing to others to share the knowledge.

4. Employee issues a public apology to individuals affected by the misconduct.

5. Employee agrees to work less desirable duty shifts for a particular period of time (provided there is no CBA prohibition on this).

6. Employee attends an appropriate program approved by the Employee Assistance Program (EAP) (e.g. for misuse of a travel card, the employee attends debt management classes; for shouting at a supervisor or co-worker, the employee attends anger management classes; or for substance abuse, the employee enters a substance abuse program).

7. Employee serves the suspension on a weekend or other non-duty days to enable the agency to continue to use the employee's services and to prevent a financial impact on the employee.

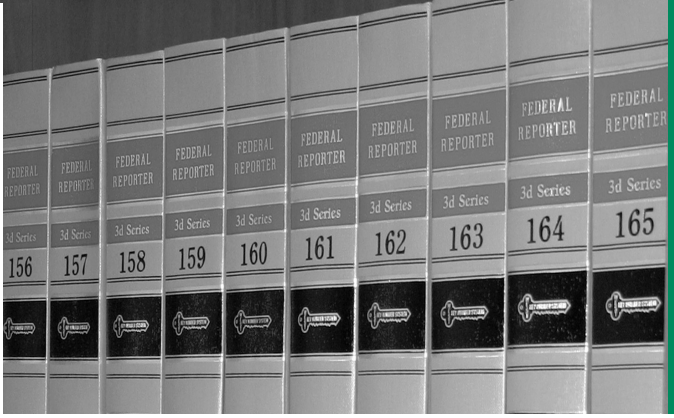
8. Employee serves a suspension in smaller pieces over the course of multiple pay periods to soften the financial impact.

9. Employee's suspension is recorded as LWOP so that there will be no permanent record of a disciplinary action.

10. Employee serves a suspension that exists only on paper – no loss of duties or pay but the record indicates an agreement that the paper will be considered equivalent to a suspension of a particular length.

11. Employee receives a reduction in the number of days to be served on suspension. (Alternative discipline should not be used to require an employee to waive any rights in order to obtain a lesser penalty when that lesser penalty was already the appropriate degree of discipline. However, it may be used to reduce the penalty below the level management believed was otherwise appropriate if the employee offers something in exchange, such as an acceptance of responsibility and an acknowledgement that the behavior was inappropriate.)

12. Employee's penalty is held in abeyance; if there is another incidence, the penalty takes effect, if there are no future incidences for the life of the agreement, the penalty will not take effect.



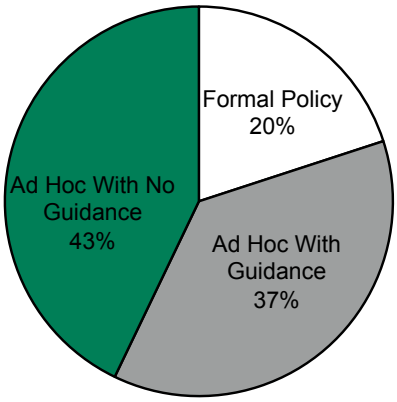
WHAT FEDERAL AGENCIES ARE DOING

Organizations reported a great deal of variation in how managers in different agencies use alternative discipline. Whether it was when alternative discipline could be used, when it was required to be used, or if there was even a definition of alternative discipline, there was no single, consistent answer across Government.

Guidance and Instruction

Guidance and instructions regarding alternative discipline are important to help managers: (1) become aware of their options; (2) understand the potential benefits and drawbacks of any particular approach; and (3) comply with any legal aspects that could invalidate elements of what they seek to do.

Figure 2: Level of Guidance in Organizations Permitting Alternative Discipline



Written polices are one way to communicate this information. Only 7 of the 46 responding organizations told us their agency has a formal agency-wide policy. However, roughly 80 percent of the organizations *without* such a policy are permitted by the agency to use alternative discipline on an ad hoc basis.[13] Of the 30 organizations with permission to use alternative discipline without a formal policy, less than half reported that their agency provided guidance to personnelists, supervisors

[13] Of the 39 respondents with no formal policy, 30 are permitted to use it on an ad-hoc basis, 7 are not, and 2 did not answer our question regarding ad-hoc use.

or employees.[14] As can be seen in Figure 2, this means that more than 40 percent of the organizations that are permitted to use alternative discipline are not given guidance on how to go about using it.

Even in agencies that provide a policy or guidance, training on the use of alternative discipline does not appear to be a priority. Of the seven organizations that reported having a formal policy, only one reported that it provides specific training on alternative discipline to personnelists, supervisors or employees. Of the 30 organizations that permit ad hoc use, only one reported that specific training is provided. The other 42 organizations stated in response to our question that there was no specific training on alternative discipline (with two non-responses to that question).

Given the importance of contract law in crafting valid alternative discipline agreements, we strongly recommend that anyone pursuing alternative discipline, in the absence of a detailed policy or very specific guidance, work closely with legal counsel to ensure that the agreement is properly drafted. (It is also a good idea for others to obtain legal advice, but it is especially crucial if there is no available policy or guidance on alternative discipline contract formation.)

Collective bargaining agreements were also unusually silent on the topic of alternative discipline. Two-thirds of organizations that had CBA's reported that alternative discipline was not addressed in those agreements. Another 20 percent said that alternative discipline was addressed in some, but not all, of their CBA's. Less than 15 percent reported that all their CBA's addressed alternative discipline.

One agency—reporting that they did not permit alternative discipline on even an ad hoc basis—stated, "We would have to negotiate or renegotiate a section (or more) of our CBA to get AD. The union has not requested it." We recommend that agencies in this position consider the potential for alternative discipline to serve the interests of management—as

[14] Of the 30 respondents permitted to use alternative discipline on an ad-hoc basis, 13 agencies provide guidance, 15 do not, and 2 did not answer our question regarding providing guidance.

well as the employees—and that management may therefore want to raise the issue for discussion rather than waiting for the union to be the one to bring it to the table.

One of the leaders in the use of alternative approaches to management-employee conflicts, the U.S. Postal Service, began its use of alternative discipline by trying it on their supervisors. The Postal Service later worked with the unions to expand the program to cover members of bargaining units.[15] We suggest that agencies that are leery of negotiating alternative discipline into CBA's first test the program on supervisors, and then perhaps non-bargaining unit employees. If an agency then finds that some use of alternative discipline is more effective at modifying behavior than traditional discipline alone, its experience using alternative discipline can contribute to well-informed—and therefore more persuasive—discussions with any unions.

Keeping Track of Effectiveness

Many organizations agreed that there is a lack of recordkeeping on alternative discipline as a program. Forty-three organizations answered our question, "Does your agency track how often alternative discipline is used?" Of these, only seven (16 percent) track its use—and only 3 organizations (7 percent) kept track of how often the alternative discipline successfully modified the conduct.

This lack of recordkeeping is unfortunate, as it prevents concerned parties from being able to study precisely which alternatives tend to be most successful, or under what circumstances alternative discipline tends to work best. However, the data from one agency that did track its degree of success indicates alternative discipline succeeds often enough that it is worth serious consideration by any manager.

From 2004 through 2006, this agency used alternative discipline in lieu of a reprimand 414 times and in lieu of a suspension 378 times (for a total of 792 uses). Yet, in the same 3-year

[15] U.S. Office of Personnel Management, "Alternative Discipline Resolution: A Resource Guide," Section II, "Alternative Discipline Agency Practices," available at: http://www.opm.gov/er/adrguide_2002/Section2-alt_discipline.asp (last visited July 23, 2007).

period, the agency reported only 110 subsequent disciplinary actions against employees who had entered into an alternative discipline agreement. This record, of one subsequent action for approximately every seven alternative discipline agreements (14 percent), may not be the same outcome experienced by other agencies.[16] A lack of records in most agencies makes it impossible to provide a wider analysis.

However, we can look at the number of subsequent disciplinary actions for individuals Government-wide who have undergone a disciplinary action. From FY 2004 through FY 2006, there were 26,000 traditional suspensions of 14 days or less recorded in OPM's Central Personnel Data File (CPDF). By the close of FY 2006, 22 percent of these individuals had undergone a subsequent disciplinary action. This is, on the surface, a higher recidivism rate than experienced by that one agency when it used alternative discipline.

One important factor to note about the above agency's success rate for its 792 uses of alternative discipline is that they used alternative discipline on a selective basis. From 2004 through 2006, the agency also issued 2,584 traditional reprimands and 1,675 suspensions of 14 days or less.[17] This agency's selectivity in determining when alternative discipline was appropriate may have played a significant role in its success rate. By carefully using alternative discipline when there is a high potential for rehabilitation, alternative discipline can appear much more effective than the default option of traditional discipline. Once again, a more definitive analysis to determine why alternative discipline may have worked better than traditional discipline in this agency is not possible without the ability to compare data from other agencies using different approaches to alternative discipline.

Another agency reported tracking its use of alternative discipline associated with a positive test for illegal drug use. It is a standard operating procedure for this agency that any employee who tests positive under its random drug testing procedures will be offered an

[16] Because of the lag time between offenses, the number of alternative discipline agreements may not track exactly with the number of subsequent actions. However, by using a 3-year period, a very rough approximation is possible.

[17] This agency's disciplinary action policy prohibits the use of alternative discipline in lieu of suspensions of more than 14 days, changes to a lower grade or removals. Only reprimands and suspensions of 14 days or less are eligible for alternative discipline.

opportunity at a last chance agreement (LCA) provided there has been no prior offense involving illegal substances. (An LCA is typically an offer to hold a removal in abeyance while the employee complies with the terms of the agreement.) Any material breach of this agency's LCA by the employee is grounds for immediate removal from service. For this agency, under the LCA, the employee must agree to obtain treatment approved of by the agency, agree to unannounced follow up testing, and test negative for a period of 2 years. A failure to complete the program, failure to comply with a test, or a positive result on a test, constitutes a breach for which the employee may be removed.[18]

Of the 37 individuals for whom an LCA was used by this agency for positive drug tests, 17 individuals successfully completed the 2-year period without another positive drug test. Six individuals left the agency without a subsequent positive test before the LCA period was completed, while 14 employees were removed for violating the LCA or resigned after a positive test.[19] While this is too small a sample to allow substantive conclusions, the fact that more than half of this small group were able to rehabilitate themselves to the extent that they did not test positive again at this agency is an argument that agencies should consider using alternative discipline for substance abuse offenses.[20]

While most agencies did not track their use of alternative discipline, many agencies are too small to be able to reach substantive conclusions through an analysis of data, even if they had kept centralized records of offenses and alternative penalties used. However, it could be helpful to managers considering alternative discipline if they could know the general success rate of various approaches. For example, while it may vary by person, which is typically the most successful approach for discourtesy in the workplace: a paper-only suspension; an

[18] Under Executive Order 12564, "Agencies shall initiate action to remove from the service any employee who is found to use illegal drugs and: (1) Refuses to obtain counseling or rehabilitation through an Employee Assistance Program [ ] or (2) Does not thereafter refrain from using illegal drugs." E.O. 12564, Drug Free Workplace, September 15, 1986 § 5 (d).

[19] Several other employees were still under their LCAs with this agency at the time the agency sent its response to our questionnaire. These employees are not included in the numbers discussed above as the terms of their agreements cannot be fully met until the LCA expires without a positive drug test. There were also a few records which were incomplete without a clear explanation of the outcome, and were therefore not included in this data.

[20] Because the CPDF does not maintain a record of the underlying conduct that caused a traditional disciplinary action or removal, we cannot compare this success rate to traditional discipline for drug related offenses.

action held in abeyance; donating leave to those in need; community service; counseling through EAP; or another approach entirely?

Because of the wide range of offenses that employees commit and the variety of possible alternative approaches, establishing a useful record at any single agency may be impractical except for the largest departments. OPM leadership in gathering, maintaining, and possibly assessing information from multiple agencies would be necessary for the data to be used effectively. [21]

Currently, through the CPDF, OPM maintains a record of formal discipline resulting in a personnel action. However, because one aspect of alternative discipline is often the lack of a formal record in the official personnel folder (OPF), another means of reporting such discipline would be necessary for the Government to be able to assess when alternative discipline is most effective. Agencies are currently required to make a number of annual reports, such as their number of cases involving the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, their equal employment opportunity recruitment program, and their disabled veterans affirmative action program (DVAAP).[22] A report on agencies' use of alternative discipline may be an appropriate addition to this list.

Misconduct affects not only the employee and the supervisor; it also impacts upon those who interact with the employee. Effectively addressing misconduct benefits the entire organization, while a failure to address the situation, or addressing the situation ineffectively, can harm the effectiveness of the entire organization. It is important for agencies to be well informed about their options, and the potential for success with each option.

[21] OPM's mission statement is to "ensure the Federal Government has an effective civilian workforce" and one of the ways it accomplishes this mission is "delivering human resources policies, products and services[.]" https://www.opm.gov/strategicplan/2006/StrategicPlan_2006-2010.pdf (last visited July 23, 2007). OPM has provided a resource guide to ADR (see footnote 13), indicating the agency may have some interest in this area of discipline. However, OPM's published guide does not contain any quantitative or qualitative analysis.

[22] 5 CFR §§ 724.302, 720.207, and 720.305.

Therefore, while it would require a small additional workload for agencies to report on their use of alternative discipline, we recommend that OPM consider instructing agencies to supply information on when alternative discipline is being used, which types of alternative discipline are being used, and the rate at which the employees involved appear to become rehabilitated. This information could then be supplied to agencies for their consideration when making decisions on how to best address misconduct.

Automatic Use of Alternative Discipline

A few responding organizations reported a nearly automatic use of alternative discipline under certain circumstances. The Postal Service, which was not a respondent to our questionnaire, has a labor agreement that automatically uses alternative discipline. It states that for suspensions of 14 days or less:

> A suspended employee will remain on duty during the term of the suspension with no loss of pay. These disciplinary actions shall, however, be considered to be of the same degree of seriousness and satisfy the same corrective steps in the pattern of progressive discipline as the time-off suspensions. Such suspensions are equivalent to time-off suspensions and may be cited as elements of past discipline in subsequent discipline….[23]

In one case involving an employee under this agreement, the individual was removed from service for a series of offenses that occurred after the employee received four separate suspensions with no loss of duties or pay as well as five letters of warning. We cannot know what would have happened to the employee if traditional discipline—such as a suspension with a loss of pay—had been used for an earlier offense. Perhaps the employee still would not have been rehabilitated. However, after the five letters of warning and the first three paper-only suspensions failed to modify the employee's behavior, the automatic use of another paper document does not appear on the surface to be the best approach. Is it

[23] National Agreement Between the National Association of Letter Carriers & the United States Postal Service, 2001-2006, Article 16 § 4. Please note, there is more than one union representing employees in the Postal Service. The contract with the American Postal Workers Union contains different terms.

surprising that the fourth paper-only suspension failed to modify the individual's behavior, given his reaction to similar prior discipline? The Postal Service acted within its authority to take this approach.[24] However, we encourage agencies to consider the potential effectiveness of any penalty—including an alternative discipline penalty—when deciding the best possible response to an employee's misconduct.

It is understandable that an agency would want its employees' services to remain available to the agency, which is one of the benefits of a "suspension" when there is no loss of duties and pay.[25] However, the purpose of discipline—whether traditional or alternative—is to modify behavior. The effectiveness of alternative discipline can vary, especially if the message does not get through that the alternative is still serious discipline. Once an alternative form of discipline has failed to correct the behavior, managers should ask themselves what—if anything—in the situation has changed that would make the same (or similar) alternative discipline suddenly become more effective for that individual if used again. This is particularly true for paper-only suspensions, where a fear of more serious repercussions in the future is intended to be a prime motivator for the employee to change the poor conduct. If there is not sufficient reason to believe a particular type of discipline will be effective, management should consider other options. There is more than one type of alternative discipline, and traditional discipline should remain an option if it has a greater probability for success. We caution agencies to consider carefully the potential consequences of any policy or bargaining agreement that limits the ability of supervisors to exercise these options.

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[24] In the initial decision in this case, the administrative judge concluded that:

> "…although characterized as '14 day 'No Time Off' suspensions', the facts are that appellant was not penalized a single penny, nor did he suffer a single day off. Although the agency and the employee's bargaining units may have agreed that the 'virtual' suspensions are real, the 'notice' effect of inhibiting future bad behavior is clearly questionable and, accordingly, of some offense to the notion of 'progressive discipline.'" *Alaniz v. U.S. Postal Service*, SF-0752-04-0553-I-1, WL 2777051, Oct. 14, 2004.

On a Petition for Review of this case to the Board, the Board held that because the employee was notified in the alternative discipline documents that further misconduct could lead to more severe disciplinary action, the employee was on notice that progressive discipline was being used. Because the *Bolling* criteria (addressed later in this report) were met by the alternative discipline documents, the agency acted within its authority when it removed the employee. *Alaniz v. U.S. Postal Service*, 100 M.S.P.R. 105 (2005).

[25] Under 5 U.S.C. § § 7511 (a) (2), 7501 (2), an action that does not result in the loss of duties and pay cannot be considered a "suspension" for purposes of that section of the law. *Labinski v. USPS,* 88 M.S.P.R. 125 (2001). However, if a properly constructed agreement states that the paper-only suspension will be equivalent to a legal suspension, the agreement will be honored.

As a representative of one union we consulted said when describing paper-only suspensions, "Our union does not believe that the message to the employee causes sufficient inconvenience that behavior is adjusted." A representative of a different union stated that whether or not the employee understands the seriousness of a paper suspension varied based upon the individual. One responding agency also expressed concern that "for many employees, losing money in a suspension is necessary before employees realize the seriousness of their actions." If a paper-only suspension has been tried—and has failed—we encourage agencies to make a strategic decision on whether it is likely to succeed for the same individual in the future.

Many organizations also expressed concern about a one-size-fits-all approach. As phrased by one responding agency, "it works for some, and for others, it just postpones the inevitable." A management organization representative expressed a similar viewpoint, stating that "… some cases just require a mild prodding to get [employees] back on the right track. In other cases you need shock and awe in order to get their attention. It is not until they are faced with a suspension or termination [that] they will change." This respondent also expressed the opinion that the use of alternative discipline should depend on the individual.

There are 12 factors the MSPB will expect management to have considered when reaching an appropriate penalty: Known as the Douglas Factors, the last of these is the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.[26] In some cases, the alternative to alternative discipline may well be the use of traditional discipline. We encourage agencies to consider what approach, under the specific circumstances, is most likely to effectively modify the conduct of the particular employee. As with a well-written table of traditional penalties, agency policies on alternative discipline should give supervisors the freedom to be flexible on the use of an alternative or a traditional penalty based upon the specific situation at hand.

[26] *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). A complete list of Douglas Factors is in Appendix B. Deciding officials are expected to consider if each factor is pertinent, and then apply the relevant factors. In some cases, not every factor will apply to the situation.

Alternative Discipline Based Upon Severity of Offense

Most agencies did not place limits on the use of alternative discipline based upon the severity of the traditional penalty under consideration, but a few agencies did have this type of restriction. Under one agency's CBA, alternative discipline can only be used in lieu of a reprimand or suspension of 14 days or less; more severe penalties were not eligible for substitution with an alternative approach for this agency. A few agencies only permitted the use of an LCA (an agreement used in lieu of a removal action), and did not allow the use of alternative discipline in lieu of lesser penalties.

One agency indicated alternative discipline was used primarily for first offenses, while a different agency stated, "We feel that alternative discipline may result in modified behavior if used early on in the discipline process for smaller, less serious offenses. However, we do not believe that AD would result in modified behavior for more serious issues or habitual offenders." Yet another agency placed in its standard operating procedure on alternative discipline a cautionary note to managers that if the offense is not the employee's first, then "chances are less likely" that alternative discipline will correct the misconduct. Two other agencies described types of misconduct which were serious (and are therefore likely to have a severe penalty) and then stated such conduct would be ineligible.

Early intervention is important to help employees break bad habits, and thus it makes sense to emphasize the use of alternative discipline at an early stage. However, we encourage agencies to empower their managers to consider alternative sanctions regardless of the number of prior offenses, and factor in the employee's reaction to past approaches when determining the correct tactic to take in dealing with a new offense. As put by one agency, "We have found that Department managers involved in the cases at issue are in the best position to make informed judgments about the use of alternative discipline and regularly do so."

Last chance agreements—taken when an agency has decided removal is the appropriate traditional penalty—were particularly popular with our responding organizations. As noted above, more than one respondent stated that it was the only form of alternative discipline permitted—no other penalty was eligible for the use of alternative discipline.

One reason LCA's were so popular with many organizations is that they make the responsibility to prevent a removal rest with the employee. A manager who believes removal is appropriate, but hesitates because of a fear of grievances or appeals, or who does not want to be the "bad guy," may be more comfortable taking action when an LCA is used. Under an LCA, the employee agrees that a repeat of the misconduct will result in the employee's removal. So, by repeating the misconduct, the employee—in essence—is the one who triggers the removal action.[27]

Managerial reluctance to perform an appropriate removal is a separate problem altogether, but it is a reality in our world. Some organizations thought that the use of an LCA could help reluctant managers to ultimately get the job done. Properly constructed and utilized LCA's also ease the adjudication of any removal action, as the MSPB does not have jurisdiction over an action taken pursuant to a properly drafted LCA in which an appellant waives the right to appeal to the MSPB.[28]

We recommend that agencies not impose inflexible rules on when alternative discipline may be considered. As stated before, one of the Douglas Factors is the adequacy and effectiveness of alternative sanctions. If a supervisor concludes that—for a particular situation—alternative discipline is likely to be more effective than a traditional penalty, we encourage agencies to empower the supervisor to make that call.

[27] If the employee makes a non-frivolous claim that the he or she did not actually breach the agreement, the MSPB will first determine if the agreement was breached before any waiver within the agreement will be applied. *Stewart v. U.S. Postal Service,* 926 F.2d 1146, 1149 (Fed. Cir. 1991).

[28] *Rosell v. Department of Defense*, 100 M.S.P.R. 594, 598 (2005) citing *Merriweather v. Department of Transportation,* 64 M.S.P.R. 365, 375 (1994), *aff'd*, 56 F.3d 83 (Fed. Cir. 1995).

The Time to Offer Alternative Discipline

We wanted to know at what point in the disciplinary process agencies first raised alternative discipline as an option. Responses varied greatly by agency, from discussions with the employee before there is even a proposed notice, to treating alternative discipline as a settlement agreement once a decision on traditional discipline has already been reached.

One agency's national CBA requires the agency to notify the employee, before a reprimand or proposal to suspend is issued, that the agency is considering discipline and that the employee may request alternative discipline. The responsibility then lies with the employee to make this request, after which there will be one or more meetings between management and the employee to discuss alternative discipline. The disciplinary process is put on hold for up to 5 days while these discussions occur—a period that can be extended with the consent of both parties. If an agreement is not reached, then the agency may formally propose traditional discipline.

Yet another agency's CBA states that the employee or the union may request a meeting to discuss alternative discipline after receipt of a notice of proposed suspension of 14 days or less. The agency, the employee, and the union representative then meet to discuss options. (This agreement also states that no inference that misconduct occurred may be drawn from the discussions and that nothing which arises from the discussions can be used by either party outside of the alternative discipline process. Presumably, this is intended to ensure open communication during the alternative discipline discussions.)

A different agency empowers either management or the employee to initiate a request for alternative discipline. Its policy specifically states that alternative discipline may be initiated before or after the proposal notice is issued. However, the policy stresses the importance of making sure that employees understand the process they would be entitled to if they were to elect traditional discipline and understand that by selecting alternative discipline, they are waiving not only their appeal rights, but also the process by which a traditional penalty is

reached.[29] This full understanding is crucial for meeting the required aspect of a knowing and voluntary waiver. When an agency offers to use an alternative discipline agreement at a stage before the decision has been reached, an employee who agrees may be waiving more than just appeal rights—the employee may be also be waiving the right to be given the specific details of the charges, to see the evidence, or to provide a reply for consideration by a deciding official. How many rights the employee is waiving will depend on how far the disciplinary process has progressed and how many steps still remain to complete it.

One personnelist we spoke with (at yet another agency) thought highly of the following approach: Before proposing any action, the supervisor would meet with the employee; find out what the employee was prepared to admit to; mutually agree upon the severity of the penalty (such as the length of a traditional suspension); and mutually agree upon a convenient time for the penalty to be served. The employee would then sign an agreement with a full understanding of what the employee's rights would have been if traditional discipline had been pursued, including the process for determining if the employee committed an offense and the appeal rights being waived.

This approach has the benefit of being very mutual, which can help rebuild the management-employee relationship. It can also save resources. In the words of another respondent whose organization pursues a similar approach, "there is usually no need for an exhaustive investigation, since the employee admits to misconduct. The management preparation and documentation of adverse action proposals and decisions, together with the employee preparation and presentation of replies and possible costs of representation, are diminished."

However, there is a serious, potential drawback to this approach that should be considered. It is important that agencies get to the truth of the matter. One benefit of an investigation, a notice of proposed action, and an opportunity for the employee to reply is that the

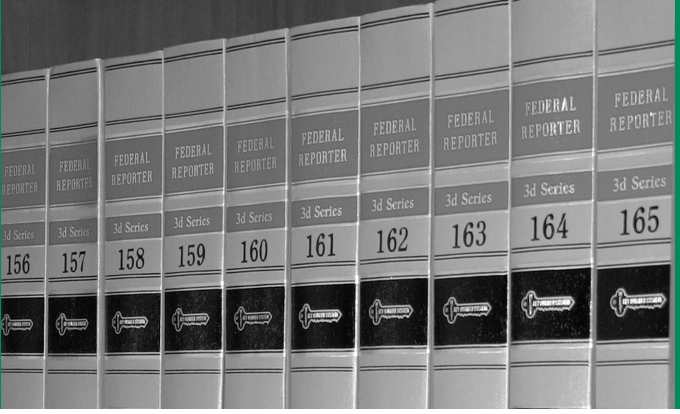
[29] While a waiver of appeal, grievance, or complaint rights is typically a part of most alternative discipline agreement, there is no requirement that a waiver be a part of the agreement unless one party insists on it as a condition of their agreement.

agency can gain new information that could lead to new conclusions. There could be an unresolved cause, such as difficulties in the employee's personal life that have spilled over into the workplace. If the agency skips straight to the discipline, without identifying the cause, the misconduct is more likely to be repeated. There could also be even more serious misconduct underlying the misconduct management has learned about, or the employee could be innocent. As discussed earlier in this report, it may be important for discipline to be swift, but it is more crucial that it be based on an accurate assessment of the situation.

An employee should never be placed in a position of believing that his or her guilt is a foregone conclusion for the agency without any investigation or consideration of the employee's response. It is conceivable that an innocent employee could admit to the offense in exchange for a less severe penalty if the agency gives the impression that it is not interested in learning what actually happened. However, if an employee is willing to admit to misconduct in order to put the bad act into the past, then alternative discipline at an early stage can be appropriate.

One of the most logical stages at which to offer alterative discipline is with the notice of decision. By offering the alternative discipline agreement alongside the notice of decision on traditional discipline, the employee knows that the evidence and the employee's response have already been considered, that a decision was reached as to which charges were supported by the evidence, and the specific penalty the agency has determined is appropriate. Providing the notice of decision at the same time enables the employee to make the decision to accept or decline the offer of alternative discipline with the fullest possible awareness of what the employee is facing, and with the knowledge that the employee was given the full process required before a traditional penalty could be implemented. The employee can then sign the agreement, or accept a known outcome. This timing has the benefit of eliminating any sense that the employee must take a gamble by accepting or declining the alternative discipline offer without knowing for certain what traditional discipline—if any—would otherwise occur.

As is true of most things involving alternative discipline, the nuances of the particular situation will be critical to management's forming the correct approach to the timing of the offer.



THE CONTENT OF ALTERNATIVE DISCIPLINE AGREEMENTS

The alternative discipline document is often referred to as an alternative discipline agreement because in most situations there has been an agreement between the agency and the employee on the details of the alternative discipline. While alternative discipline is not always required to be the result of an agreement between management and the individual, it is has a greater potential to be successful if the employee has buy-in. We therefore recommend that alternative discipline be used primarily when it is mutually agreed upon by the particular supervisor and the individual in question. These are the parties in the best position to understand the specific situation. If one or both of these individuals do not think alternative discipline is appropriate or likely to be successful, then there is a fair chance that it is, in fact, not appropriate for the particular situation or not likely to modify the employee's conduct in the future.

While one of the most well-known type of agreements is a settlement agreement, it is important to recognize that alternative discipline agreements cover broader territory than that. The words "settlement agreement" imply there is a dispute—often a legal dispute—in need of resolution and that the agreement is a means to end a law suit or avoid one that is impending.[30] However, alternative discipline agreements can be used when there is no impending appeal or grievance. In fact, it is especially effective when an employee is willing to admit that what he or she did was wrong. Therefore, while alternative discipline can be used as a part of a settlement agreement, we encourage parties to think about it much more broadly. If there is misconduct that should be addressed, and an alternative method is more likely to be effective than a traditional method, an agreement to use the alternative method may be best for all parties. An appeal or grievance is not required.

[30] Settlement is generally defined as, an "agreement ending a dispute or lawsuit." *Black's Law Dictionary,* 1337 (7th ed.1999).

While some types of alternative discipline may be possible without an agreement between the employee and the agency, agreements are helpful because they provide more flexibility. There are some things that management lacks the authority to order, but can place as a condition within a properly constituted agreement. With a few exceptions (such as where the law or public policy prohibits it), the content of a mutually agreed upon alternative discipline document is limited only by:

1. Limits the agency places on its managers;
2. Limits CBA's place on managers;
3. What is fair, appropriate, and likely to be effective; and
4. The limits of the parties' imaginations.

The guidance in this section provides advice targeted to agencies, as the input we received indicates that the agency is most often the party who drafts the alternative discipline agreement. However, any party who signs the agreement, advises a signatory, or shares responsibility for the agreement's content, would benefit from the information below.

Mutual Agreements Are Contracts

The Federal Circuit has held that alternative discipline agreements are contracts, and that the terms of the agreement will be evaluated under the principles of contract law.[31] This means that both parties—the employee and the agency—have obligations that must be met.

Agencies should be aware that it is a basic principle of contract law that if the language in the contract is ambiguous, and the opposing party's interpretation is reasonable, then the agreement will be interpreted to favor the party that did *not* draft the agreement.[32] As most alternative discipline agreements are drafted by the agency, this means that ambiguities will typically fall in favor of the employee. Therefore, when describing the obligations of each party, the agency (or other drafter) should be as clear as possible about exactly what is being required of each party.

[31] *Greco v. Department of the Army,* 852 F.2d 558, 560 (Fed. Cir. 1988).

[32] *Bables v. Department of the Army,* 86 M.S.P.R. 171, 175-76 (2000).

It is also a principle of contract law that all contracts carry an implied term: that the parties will act in good faith.[33] A failure to do so can constitute a breach of the agreement.[34] Thus, when an agency drafts an alternative discipline agreement, it is important to recognize that the agency is also promising to deal honestly with the employee. If the agency acts in bad faith, that can constitute a breach of the agreement, and as the breaching party, the agency could become unable to enforce the terms of the agreement.[35]

Agencies also cannot use threats, coercion, or any deliberate misrepresentation to force an employee to enter into an alternative discipline agreement. For example, if the employee's agreement is induced by the agency's threat to take an action that the agency knows could not be substantiated and serves no legitimate purpose, the employee's decision to sign the agreement would be considered coerced, and the agreement would not be enforced by the MSPB or its reviewing court, the Federal Circuit.[36]

However, being faced with an unpleasant reality that you will be subjected to appropriate discipline is not considered coercion.[37] When the agency warns an employee of its intent to take a legitimate disciplinary action, the employee's agreement to accept alternative discipline in lieu of the traditional penalty is a binding contract.

There are four defenses available to employees who are alleged to have violated the terms of an alternative discipline agreement. These are:

1. That the employee complied with the terms of the agreement;

2. That the agency breached the terms of the agreement;

[33] Restatement (Second) of Contracts, § 205, "Duty of Good Faith and Fair Dealing."

[34] *Stewart v. U.S. Postal Service*, 926 F.2d 1146, 1149 (Fed. Cir. 1991).

[35] *McCall v. U.S. Postal Service*, 839 F.2d 664, 667 (Fed. Cir. 1988).

[36] *Staats v. U.S. Postal Service*, 99 F.3d 1120, 1124 (Fed. Cir. 1996).

[37] *Williams v. Department of the Treasury,* 52 M.S.P.R. 344, 346 (1991).

3. That the employee did not enter into the agreement knowingly and voluntarily; or
4. That the contract was the result of fraud or a mutual mistake.[38]

Compliance With Terms

Any terms contained in the agreement should: be clear and not subject to multiple or conflicting interpretations; be practical to put into effect; and not conflict with public policy. Using terms that are unclear could cause the agreement to be interpreted in a manner differently than the agency might desire, while terms that are difficult to actually implement could limit the agency's ability to achieve what it sought or cause inadvertent violations. Perhaps most fatally, the use of terms that violate public policy could make the agreement unenforceable. Therefore, agencies must be very careful to think through the terms of the agreement, including how the agreement will function in practice.

Agencies need to be careful how they phrase their alternative discipline agreements if they wish to ensure they will be able to take action if the employee breaches (violates) the agreement. Agreements are subject to interpretation by third-party adjudicators, and those adjudicators may not put the same interpretation on words or terms as the authors of the agreement. Agencies must be clear about what they mean in order to get the result that they want.

For example, in *Gose v. U.S. Postal Service*, the agency used the term "public place" in an alternative discipline agreement when describing a location where the employee was not permitted to drink while in uniform. The Postal Service later removed the employee for violating this term of the agreement. However, the Federal Circuit gave a different meaning to the term "public place" than the agency had given to it. As a result, the agency's action, removing the employee for violating the alternative discipline agreement, was reversed.[39]

[38] *Link v. Department of the Treasury,* 51 F.3d 1577, 1582 (Fed. Cir. 1995) and *Williams v. Department of the Treasury,* 95 M.S.P.R. 547, 550 (2004). A mutual mistake can make a contract voidable if the parties relied upon an erroneous basic assumption and this mistake had a material effect on the agreement. Restatement (Second) of Contracts, § 152, "When a Mistake of Both Parties Makes a Contract Voidable."

[39] *Gose v. U.S. Postal Service*, 451 F.3d 831 (2006).

Agencies must also be careful about any promises they make in the agreement as they will be held accountable for meeting those promises. One item to be especially careful about is confidentiality. While confidentiality issues arise most often in settlement agreements, they may also appear in alternative discipline agreements. Agencies can find it difficult to control the number of people who are involved in an alternative discipline agreement, and to ensure that no one discloses information—either accidentally or purposefully—to someone who might not be authorized to know about the agreement. As a practical matter, confidentiality is hard to maintain, and once confidentiality has been breached, it is impossible to undo the passing of that information. The entire agreement can fall apart as a result.[40]

It is therefore important that agencies be very careful about what they promise in the agreement, and understand how the terms will be put into practical effect. For example, if the confidentiality clause mentions by name the individuals who are permitted to know about the agreement, what happens when those individuals leave the agency and are replaced by new workers? The new supervisor will almost certainly need to know about an alternative discipline agreement that has not yet run its full course. A new personnelist might need to know about the agreement in order to comply with a clause in it that addresses the removal of information from the OPF after a set period of time. Agencies should be very careful not to include in the agreement any promises that would hamper their ability to meet the terms of the agreement or damage their ability to use the agreement for future discipline if that was one of the original purposes.

The Federal Circuit has expressed some concern about agencies promising clean records. In one case involving a clean record the court noted, "Perhaps as a matter of sound governmental administration such agency agreements should be prohibited…. Indeed, such agreements invite trouble."[41]

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[40] *Sena v. Department of Defense*, 66 M.S.P.R. 458, 466 (1995).

[41] *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1372 (Fed. Cir. 1999), citing in part *Thomas v. Department of Housing & Urban Development*, 124 F.3d 1439, 1442 (Fed. Cir. 1997).

There is a difference between promising to remove a particular document from a file (such as an SF-50 removed from the OPF), promising to remove all history of misconduct, and promising not to disclose to anyone that the behavior ever occurred. Agencies should be clear in their agreements on precisely what they are promising, and try to avoid creating a situation in which agency officials, when asked for references on an employee, "must either outright lie, or attempt some artful evasion…."[42]

Agencies should also be aware that there are some things about which they cannot promise to maintain silence. For example, agencies cannot promise to conceal or fail to report a crime. If the employee has done something for which the Department of Justice or the local police would otherwise be notified, the agency must not make its silence a part of an alternative discipline agreement. Such an agreement could be unenforceable as a violation of public policy. [43]

Waivers in the Agreements

As noted earlier, the appeals and grievance processes can be very time consuming and frustrating. More than 40 percent of organizations reported that their agency required a waiver of appeals rights as a condition of supervisors being able to use alternative discipline, while less than 20 percent indicated there were any other requirements for the use of alternative discipline.

Waivers tend to be used the most when an action is held in abeyance. An agency agrees not to implement the discipline yet, and the employee agrees that future misconduct will result in the discipline taking effect. In exchange for putting the action on hold, agencies typically require that the employee agree to waive the right to grieve or appeal the action if it is later put into effect.

[42] *Ibid, Pagan,* 1372.

[43] "[I]t is a long-standing principle of general contract law that courts will not enforce contracts that purport to bar a party…from reporting another party's alleged misconduct to law enforcement authorities for investigation and possible prosecution. We have no doubt that a contract provision requiring the United States to conceal possible crimes from state or foreign authorities would be contrary to public policy and unenforceable in most circumstances…." *Fomby-Denson v. Department of the Army,* 247 F.3d 1366, 1377-78 (Fed. Cir. 2001).

As explained earlier, when an employee is facing a removal action, this type of alternative discipline is referred to as a Last Chance Agreement. However, any level of discipline may be eligible to be put on hold while the employee attempts to demonstrate that the behavior will not be repeated.

When we asked agencies what they thought were the advantages of alternative discipline, most agencies mentioned the importance of reducing grievances and appeals, particularly through the use of waivers.

Knowing and Voluntary Waiver

As stated above, a waiver in an alternative discipline agreement is a part of a contract, and it must be entered into knowingly and voluntarily. When it comes to waivers, there are particular requirements that courts may apply to determine whether or not the standard of knowingly and voluntarily has been met.

What constitutes knowingly and voluntarily may vary based upon the situation. However, the MSPB has held that waivers must be "the informed, intentional abandonment of a known right."[44] Given the complexity of the appeal rights of Federal employees, it is important that agencies recognize that a decision which is based upon a mere statement that appeal rights are waived may not be sufficiently informed. Likewise, a reference to a part of the statute or regulations may not be sufficient, especially when more than one part of a statute contains relevant information. While personnelists and lawyers may spend copious amounts of time reading statutes and regulations, for an employee, the agency merely mentioning in the agreement a citation to the applicable statute or regulation covering the rights being waived is not necessarily the same thing as ensuring that the employee understands the full panoply of rights available to Federal employees.

[44] *McCall v. U.S. Postal Service,* 839 F.2d 664, 668 (Fed. Cir. 1988).

Agencies should err on the side of caution and ensure the employee is fully informed of the rights being waived. If an employee does "not know of the rights he was waiving, or if the waiver did not reflect an intentional relinquishment or abandonment of those rights, the waiver is not effective and cannot be enforced." [45] Furthermore, it is "well settled that a waiver of a statutory right must be clear, unequivocal, and decisive."[46] To ensure that waivers are upheld by the MSPB and the courts, agencies should be very careful to ensure that waivers are clearly expressed in unambiguous terms.

If the employee is over the age of 40, agencies should also consider the possibility that the Older Worker Benefit Protection Act (OWBPA) will be an issue. OWBPA applies to situations where an individual claims age discrimination. Under the OWBPA a waiver will not be considered "knowing and voluntary" unless, at a minimum:

- The waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
- The waiver specifically refers to rights or claims arising under Title 29, Chapter 14;
- The individual does not waive rights or claims that may arise after the date the waiver is executed;
- The individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual is already entitled;
- The individual is advised in writing to consult with an attorney prior to executing the agreement; and

[45] *Chavies v. Department of the Navy,* 104 M.S.P.R. 81, 85 (2006) citing *Brewer v. Williams,* 430 U.S. 387 (1977).

[46] *Smith v. Department of Veterans Affairs,* 78 M.S.P.R. 594, 597 (1998).

- The individual is given a reasonable period of time within which to consider the settlement agreement.[47]

The provision above that only past claims can be waived applies to other Title VII complaints outside of age discrimination. An individual can waive the right to appeal past actions by the agency, but cannot waive the right to allege future offenses appealable to the EEOC.

Future Misconduct

LCA's and similar agreements covering lesser discipline often state that the employee agrees not to grieve or appeal the implementation of the original discipline. However, it is possible that during the period covered by the agreement, an employee may engage in misconduct that is different from the original offense. What occurs as a result of the new misconduct depends upon how the alternative discipline agreement was drafted. Will any misconduct by the employee constitute a breach, or must the misconduct be of a similar nature? For example, if the employee abuses leave, the agreement may state that the employee agrees any future leave abuse will constitute a violation of the agreement, for which the original penalty may be implemented without a right to grieve or appeal the implementation of the action. However, under an agreement phrased this way, disrespect towards a supervisor would not be a breach of the agreement. It would be new misconduct for which an independent action would be permissible. However, a new disciplinary action that is not taken under an existing alternative discipline agreement will be eligible for the same due process before the final action, and the same grievance and appeal rights afterwards, as any other disciplinary action taken against an ordinary employee.[48] An agency must clearly express that the new action is taking place pursuant to the existing agreement if it seeks to apply the terms of that agreement to effect the action.

[47] *Harris v. Department of the Air Force*, 98 M.S.P.R. 261, 264 (2005). The *Harris* decision was summarizing 29 U.S.C. § 626 (f)(1) and (2).

[48] *Alexander v. U.S. Postal Service,* 264 F.3d 1067, 1070 (Fed. Cir. 2001) and *Fiori v. U.S. Postal Service*, 104 M.S.P.R. 278, 281 (2006).

Admission of Wrongdoing

The organizations responding to our questionnaire had divergent approaches to the issue of requiring an employee to admit to a wrongdoing. Several agencies specifically require the employee to admit to committing the offense, and to acknowledge it was wrong, in order to qualify for alternative discipline. However, the majority of organizations did not indicate that this was absolutely mandatory.

Under the right circumstances, an admission can be advantageous. Through the admission, the employee takes responsibility for the unacceptable actions. However, if the employee claims to be innocent and refuses to admit to the conduct, then the agency should consider the possibility that one of the below may be occurring:

1. The employee is actually innocent, in which case discipline (alternate or traditional) is not appropriate;
2. The employee is responsible for something resembling the charged conduct, but the agency has not gotten all the facts correct; or
3. The employee is being dishonest, in which case rehabilitation may be especially difficult.

While requiring an admission of responsibility can be beneficial, we recommend against an absolute rule where a lack of an admission can become a roadblock. If an employee does not wish to admit to the misconduct, but expresses a strong and seemingly genuine interest in using alternative discipline to put the issue into the past and move on to a future free of misconduct, alternative discipline should not be automatically ruled out.[49] One of the best things about alternative discipline (and one of the most challenging) is that each situation must be judged on its own merits.

[49] Please remember, employees have a Fifth Amendment privilege against self-incrimination if they have a reasonable belief that a statement could be used against them in a criminal proceeding. *Modrowski v. Department of Veterans Affairs,* 252 F.3d 1344, 1350 (Fed. Cir. 2001). Immunity from criminal prosecution cannot be granted by a Federal agency other than the Department of Justice.

Promise not to Repeat Conduct

Several organizations reported that they require the employee to agree that the unacceptable behavior will not occur again, although, again, most did not mandate that this must be in the alternative discipline agreement. In general, the purpose of discipline is to prevent a repetition of the misconduct. Alternative discipline is used when agencies have reason to believe the alternative has a greater potential than traditional discipline to prevent a repetition of the misconduct. By requiring a promise that the conduct will not be repeated, agencies are reinforcing that principle. Furthermore, if the employee does not feel able to promise to refrain in the future, that can be a strong indicator that the alternative discipline is unlikely to be effective. After all, if the employee does not expect to alter his or her own behavior, why should management expect an alteration to occur?

An agreement to hold an action in abeyance so long as the behavior is not repeated would necessarily contain the employee's promise not to engage in that behavior, because repeating the behavior is how the agreement becomes breached. However, it may be useful to require the employee to make the same promise when a different form of alternative discipline is used where all terms of the agreement are completed at the time of signing and there are no outstanding terms with which a party must comply. For example, a paper-only suspension with no loss of pay takes effect shortly after the signing of the agreement. But, an agency can make the employee's promise not to repeat the conduct a part of the agreement, even though the employee's actual compliance can become clear only with the passage of time. Any future breach of the promise would not breach the agreement, but can help the agency determine the employee's rehabilitative potential in the future.

Requiring the employee to promise not to repeat the conduct can serve as a reminder to the employee that the agency is taking extra measures to help the employee, and that in exchange, the employee is not only supposed to agree to the alternative form of discipline, but also to help serve the purpose of using discipline—preventing the reoccurrence. The use of the promise not to repeat the behavior is yet another way for the agency to make its point that the conduct is not permitted.

Furthermore, specifically placing a value on having the employee give his or her word that the conduct will not be repeated, and accepting that word, can be seen as a mark of respect that in turn can help strengthen management's relationship with the employee. Discipline can be demoralizing, and a demonstration by management that the employee's promise has value to the manager can have the potential to, in some small measure, counteract some of that effect. The usefulness of the employee's promise in impacting future conduct will vary by person, but it is worth asking for in most situations because it costs the agency so little once alternative discipline is already being used.

Alternative Discipline Counts as Progressive Discipline

Alternative discipline is used with the intent to prevent future misconduct, but its use should not hold management back from being able to take progressively serious discipline if the behavior remains uncorrected.

While alternative discipline is supposed to be used when there is reason to believe it will have a greater rehabilitative effect than traditional discipline, it is unrealistic to expect that every employee who participates in alternative discipline will suddenly cease to misbehave. It should be used with an awareness that the hoped for change in behavior may not materialize. Therefore, we encourage agencies to give strong consideration to including terms that would ensure that the alternative discipline would count as past discipline when management considers the appropriate degree of severity for future discipline. The easiest way to do this is to place in the alternative discipline agreement a statement that the alternative will be considered the equivalent of a certain traditional discipline penalty.

Agencies most commonly make the alternative equivalent to a suspension. The number of days of that putative suspension depends upon the seriousness of the offense and is often the length of the traditional discipline that would have been imposed if the alternative discipline had not occurred.

The MSPB has held that alternative discipline can be considered a form of past discipline for the purposes of establishing progressive discipline if the following conditions were met:

1. The appellant was informed of the disciplinary action in writing;
2. The disciplinary action is a matter of record; and
3. The appellant was given the opportunity to dispute the charges to a higher level than the authority that imposed the discipline.[50]

Once these terms are met, the MSPB will conduct only a very limited review of the record of the prior action to determine if the action gives the MSPB a "definite and firm conviction" that the earlier action was a mistake. Provided the above three criteria were met, and the action was not clearly erroneous, it can be used to establish progressive discipline.[51] Accordingly, we strongly urge agencies to ensure any alternative discipline agreement includes these three elements.

The third term, giving the opportunity to dispute the charges to a higher authority, may be waived by the employee in the alternative discipline agreement. As stated earlier, for this to be a knowing and voluntary waiver, agencies should ensure the employee understands that the opportunity to dispute the charges would have been a part of the traditional discipline, and that this right is being given up in exchange for the alternative discipline.

When asked to list the disadvantages of alternative discipline, several organizations indicated they had encountered trouble using alternative discipline to establish progressive discipline, often because the period for which the alternative discipline was kept on record had expired or the managers who were aware of the alternative discipline had moved on without notifying their replacements.

We recommend that agencies balance their desire to let the employee put the discipline fully into the past with the need to maintain a record of the discipline to establish past efforts

[50] *Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 340 (1981).

[51] *Ibid.*

by the agency to help the employee to become rehabilitated. Maintaining the record of the alternative discipline for only a short period has drawbacks that agencies should consider when agreeing upon a particular duration for the record. Imposing discipline—whether traditional or alternative—can be time consuming and emotional for all involved. It can be especially frustrating for an agency to go through the effort involved to take an action, and then start over at "square one" when new misconduct occurs because the action will not count as prior discipline because there is no record of it, or because its period of use as prior discipline has expired.

Furthermore, a short duration may not be necessary. Under most circumstances, agencies can make the duration of the agreement several years, and then shorten it later if appropriate. As a contract, an alternative discipline agreement can be modified if both parties consent. If an agency makes an agreement that alternative discipline will remain on the record for several years, but after just 1 or 2 years the employee has shown no signs of backsliding into bad habits, the agency will be able to offer to clean the disciplinary action from the employee's record. The original alternative discipline agreement can even state that at the agency's sole discretion the action may be removed from the employee's record at an earlier date than scheduled. By signing the contract the employee agrees to this term, and it is a term most employees are likely to prefer over having the agreement run for the full period.

Early removal of the disciplinary history should only be done after sufficient time has passed for the employee to truly prove the offense is unlikely to recur and if the agency believes removing the action is in the agency's best interest. Improving the agency's relationship with the employee—once the employee has extensively demonstrated full rehabilitation—is one way the early cleansing of a record can be in the agency's interest. However, any removal of the record of discipline must be well thought out. Once the record is clean, the discipline cannot be used in a future action to establish the repeated nature of an employee's offense or to demonstrate the employee's lack of capacity for rehabilitation. Thus, any decision to remove the record of discipline should occur only after a careful analysis of the benefits and drawbacks of such an act.

Non-Precedential

As noted earlier, each situation should be individually assessed to determine if alternative discipline is appropriate. For example, a person who misuses the Government travel card to buy life-saving medicine for a sick child is not necessarily similar to a person who misuses the card to pay for gambling or "adult" entertainment. Any employee who uses the travel card for a reason unrelated to official travel has acted wrongly, but the reasons behind the conduct can differ greatly, and therefore the best means to prevent a reoccurrence may also differ.

Several organizations informed us that they place in their agreements a statement that the agreement cannot be used to establish a precedent. This is important to ensure agencies have flexibility not only in deciding what alternative to use, but also in deciding if an alternative approach is appropriate for a particular situation. Put simply, what makes one employee take notice may not get the attention of another. One of the most essential elements to the effective use of alternative discipline is tailoring the discipline to the situation in order to be as successful as possible at correcting the behavior. Supervisors need to be able to assess each situation individually to determine what approach is most likely to be effective for that employee's character as well as the nuances of that employee's situation.

Confidential

A few agencies informed us they require confidentiality as a term of the agreement. As discussed previously, this can pose challenges for an agency, as it may be difficult to know in advance everyone who might have a legitimate reason to be informed of the existence of the agreement and possibly the content. Furthermore, some forms of alternative discipline require some public disclosure, such as when a public apology to individuals impacted by the misconduct is a condition of the agreement. While discipline is generally a private matter, agencies should weigh each situation individually to determine what degree of confidentiality they want placed into the agreement, bearing in mind that they will have a responsibility to meet that agreement and cannot unilaterally change the terms at a later date.

Other Agreement Terms

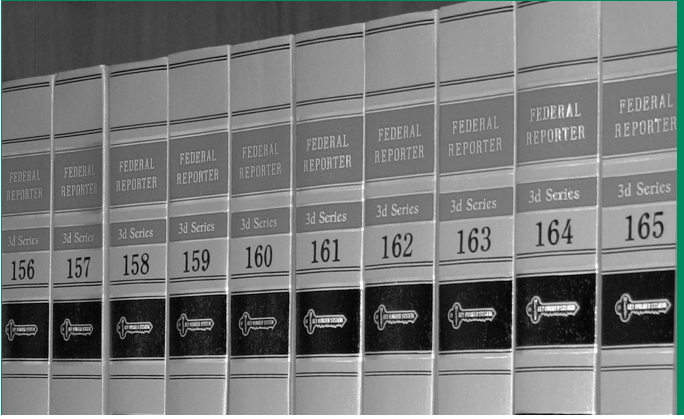
There are other terms that are generally put into the agreement that agencies should consider using. We strongly recommend the following to prevent any confusion as to what has been agreed upon:

- The specific offense that was allegedly committed and is therefore covered by the agreement;
- The specific form of alternative discipline that will be used and its duration; and
- Any expiration date for the record of discipline.

Other terms we encourage agencies and managers to consider using include:

- The employee's agreement that he or she was offered an opportunity to seek advice from an attorney or representative;
- The employee's agreement that he or she understood what the traditional penalty would have been and understood that he or she could have elected to proceed with the traditional penalty;
- The supervisor's expressed commitment to help the employee by being available to explain rules, policies and related guidance, or to approve leave related to attending treatment programs;
- Where the record of the discipline will be kept (e.g., in the employee's OPF, a manager's file or the human resources office);[52] and
- What will happen to all records of the action if the employee leaves the organization or the agency. The interest of both the agency and the public service as a whole should be considered, as well as any potential issues of fairness to the employee.

[52] Please note, under 5 CFR § 293.103, OPM may place limits on what documents can be maintained in an OPF. Agencies should consult OPM's *Guide to Personnel Record Keeping* or their agency's OPM point of contact if they wish to place a document inside the OPF.



CONCLUSION

Alternative discipline is an important tool for managers to effectively address misconduct within the Federal workforce because it allows the agency to tailor its approach to the individual and the work situation. However, it is a device that must be carefully wielded after thoughtful consideration of the individuals and conduct involved. When it is properly utilized, both the employee and the Government can benefit.

Findings

The following are the major findings from our study of alternative discipline:

- The level of guidance on alternative discipline that agencies provide to their workforce varied greatly by agency, but in most agencies there was little or none. Only 7 of our 46 responding organizations told us their agency has a formal agency-wide policy. However, 80 percent of those organizations *without* such a policy are permitted by the agency to use alternative discipline on an ad hoc basis.

- Training was also missing in most agencies. Of the 37 organizations permitted to use alternative discipline, only 2 reported that their agency provides specific training on alternative discipline to personnelists, supervisors or employees.

- Only a few organizations indicated they keep track of alternative discipline as a program. Seven of the 37 organizations permitted to use alternative discipline reported that they track its use, while only 3 keep track of how often the alternative discipline successfully modifies the conduct.

- A few agencies use alternative methods automatically, with little or no assessment of the employee or possible nuances of the particular situation. However, the overwhelming majority of agencies encourage managers to assess the situation on a case-by-case basis to determine what approach is most likely to resolve the situation.

- Some agencies limit the use of alternative discipline to low-level offenses or early offenses, while others use it primarily as a final effort before removal.

- Almost all responding organizations indicated that when alternative discipline occurs, it is the result of an agreement between the agency and the individual employee.

- When alternative discipline is in a collective bargaining agreement, it tends to be an option for management rather than a requirement. (The U.S. Postal Service is a notable exception.)

The following is not a "new" finding, but this report reiterates that:

- Alternative discipline agreements are contracts. Thus, how they are formed, executed, enforced, and potentially breached will be evaluated by the legal standards applicable to contracts.

Recommendations

1. Managers and human resources personnel should consult with legal counsel when drafting and implementing an alternative discipline agreement that requires the employee's consent. It is extremely important for agreements to meet certain legal requirements to form a valid agreement. We therefore strongly recommend that a legal advisor review such agreements.

2. While legal advice is crucial for the party drafting the agreement, it can also be beneficial for any other party to the agreement. If the employee can obtain competent and impartial advice at a reasonable cost or no cost at all to the employee, then we encourage employees to seek such advice.

3. We recommend agencies use plain language in any agreement to the greatest extent possible. Employees may not be able to afford legal counsel, and it is important the agreement be sufficiently understandable for the employee's consent to be knowing and voluntary.

4. Agencies should develop policies, or at least provide guidance, on the use of alternative discipline in order to ensure that human resources staff can properly advise managers on the issues to consider when determining if alternative discipline is appropriate and, if so, what approaches should be considered.

5. Managers should be trained, before the problem arises, on the existence of alternative discipline and the basic principles behind it. Knowing that alternative discipline is available may help managers to effectuate an early intervention before the poor conduct worsens.

6. Agencies should, in general, avoid inflexible rules on the use of alternative discipline:

- Not every situation is appropriate for alternative discipline, and it should not be used if management has reason to believe traditional discipline is likely to be

more effective. However, where management has reason to believe alternative discipline will be more likely to effect the necessary change, we recommend that management be given the opportunity to try an alternative approach.

- In general, alternative discipline should be the result of an agreement between the supervisor and the employee, not something automatically put into place. The formation of agreements on a case-by-case basis not only enables the agency to tailor the alternative penalty around the situation in order to make it as appropriate as possible, it also gives the parties directly affected (the supervisor and the employee) buy-in and possibly a sense of responsibility regarding the outcome.

- While some terms must be in the agreement to ensure it is a valid contract, agencies should consider limiting the number of non-negotiable requirements they place on supervisors' use of alternative discipline. The more items that are non-negotiable, the more supervisors are limited in their ability to reach a fair and effective solution. Legal necessities should be mandated, but for all other terms, a strong recommendation from the agency should suffice.

7. OPM should consider requesting data from agencies on their use of alternative discipline. Because of the small number of employees disciplined compared to the size of the workforce, and the fact that only some of those cases use alternative discipline, many agencies will not have sufficient data to analyze on their own. However, if OPM were to serve as a central repository, OPM might be better able to advise agencies on effectively managing conduct issues within the Federal Government.

Appendix A

The following organizations responded to our questionnaire on their use of alternative discipline. Because in some cases, several components or organizations within a department or agency provided separate responses, we received a total of 46 responses.

- Department of Agriculture
- Department of the Army
- Department of Defense
- Department of Education
- Department of Energy
- Department of Health and Human Services
- Department of Homeland Security
- Department of Housing and Urban Development
- Department of Justice
- Department of the Navy
- Department of State
- Department of Transportation
- Department of the Treasury
- Department of Veterans Affairs
- Defense Logistics Agency
- Environmental Protection Agency
- Federal Deposit Insurance Corporation
- General Services Administration
- National Aeronautics and Space Administration
- Office of Personnel Management
- Smithsonian Institution
- Social Security Administration

We also communicated with several management organizations and labor organizations to gather input on the Government's use of alternative discipline. Because of the small number of organizations involved, we will not identify these organizations in order to preserve the anonymity of their input.

Appendix B

The Douglas Factors come from a 1981 case, *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06. They are the factors the MSPB will expect management to have considered when reaching an appropriate penalty. While agencies are not required to use them for cases that are not appealable to the MSPB, they can be helpful when determining any penalty, and some agencies have chosen to apply them to disciplinary decisions that are not eligible for MSPB review. The 12 factors are:

(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.

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