# Employee Relations Considerations

## Overview

Having an understanding of the employee relations issues that come into play in violent and potentially violent situations is important for all members of an agency's planning group. It helps in coordinating an effective response, in determining whether outside resources will be needed in certain situations, and in ensuring that appropriate disciplinary actions are taken.

In many agencies, the Employee Relations staff coordinate the agency's workplace violence program. One reason is that most reported incidents will result in some type of disciplinary action. Another reason is that, since the goal of the workplace violence prevention effort is to deal effectively with problem behavior early on, reporting incidents to the Employee Relations office can result in swift disciplinary action which stops the unacceptable behavior before it can escalate. When another office, such as the Security Office, is responsible for coordinating the response effort, immediate involvement of the Employee Relations staff is usually necessary for an effective response.

This section will discuss:

- Administrative options available in removing potentially dangerous employees from the worksite;
- Taking appropriate disciplinary action based on violent, threatening, harassing, and other disruptive behavior;
- Responding to an employee who raises a medical condition/disability as a defense against the misconduct;
- Ordering and offering psychiatric examinations;
- Assisting employees in applying for disability retirement; and
- Information on appeals of disciplinary actions.

## Administrative Actions to Keep an Employee Away from the Worksite

In situations where a disruption has occurred on the job, or where there is a belief that the potential for violence exists, a supervisor may need to keep an employee away from the worksite to ensure the safety of employees while conducting further investigation and deciding on a course of action.

### *Immediate, short-term actions*

- **Place employee on excused absence (commonly known as administrative leave)**. Placing the employee in a paid, non-duty status is an immediate, temporary solution to the problem of an employee who should be kept away from the worksite.

  Some employees who are placed on excused absence consider this measure to be punitive. However, relevant statute and case law have indicated that as long as the employee continues receiving pay and benefits just as if he or she were in a duty status, placing the employee in an excused absence status does not require the use of adverse action procedures set forth in 5 USC Chapter 75.

  Agencies should monitor the situation and move toward longer-term actions (as discussed below) when it is necessary, appropriate, or prudent to do so. Depending on the circumstances, it may also be a good idea to offer the employee the option to work at home while on excused leave.

- **Detail employee to another position**. This can be an effective way of getting an employee away from the worksite where he or she is causing other employees at the worksite to be disturbed. However, this action will be useful only if there is another position where the employee can work safely and without disrupting other workers.

### *Longer-term actions*

Supervisors are sometimes faced with a situation where there is insufficient information available to determine if an employee poses a safety risk, has actually committed a crime, or has a medical condition which might make disciplinary action inappropriate. To take an employee out of a paid duty status, an agency must use adverse action procedures, which require a 30-day paid status during the advance notice of the adverse action. Included below are the two types of actions which place an employee in non-duty status.

## Administrative Actions to Keep an Employee Away from the Worksite (continued)

- **Indefinite suspension.** An indefinite suspension is an adverse action that takes an employee off-duty until the completion of some ongoing inquiry, such as an agency investigation into allegations of misconduct. Agencies usually propose indefinite suspensions when they will need more than 30 days to await the results of an investigation, await the completion of a criminal proceeding, or make a determination on the employee's medical condition. Indefinite suspensions are 5 CFR Part 752 adverse actions requiring a 30-day notice period with pay. This means that 30 days after an indefinite suspension is proposed, the employee will no longer be in a pay status until the completion of the investigation, completion of the criminal proceeding, or determination of the employee's medical condition.

- **Indefinite enforced leave.** The procedure for indefinite enforced leave is the same as for an indefinite suspension — Part 752 adverse action procedures. It involves making the employee use his or her own sick or annual leave (after the 30-day notice period with pay) pending the outcome of an inquiry.

## Disciplinary Actions

Where the supervisor possesses the relevant information regarding violent, harassing, threatening, and other disruptive behavior, the supervisor must determine the appropriate disciplinary action. The selection of an appropriate charge and related penalty should be discussed with the Employee Relations staff and the Office of General Counsel where appropriate. Some disciplinary actions are:

- **Reprimand, warning, short suspension, and alternative discipline.** These lesser disciplinary actions can be used in cases where the misconduct is not serious and progressive discipline may correct the problem behavior. They are an excellent means of dealing with problem behavior early on. These lesser disciplinary actions involve considerably fewer procedures than the adverse actions listed below.

- **Removal, reduction-in grade, and suspension for more than 14 days.** Law and regulations[8] provide that an agency may take an adverse action against an employee only for such cause as will promote the efficiency of the service. A Federal employee

[8] 5 USC 7513(a) and 7701(c)(1)(B) and 5 CFR Part 752.

## Disciplinary Actions (continued)

against whom an adverse action is proposed is entitled to a 30-day advance written notice. A seven-day notice period instead of the usual 30 days is permitted "when the agency has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed."[9]

In either case, the agency must give the reasons for the proposed action in the written notice and provide the employee an opportunity to respond. The agency must consider the employee's response and notify the employee when a decision has been made. If the agency's final decision is to take the proposed action, the employee must be advised of the appeal rights to which he or she is entitled and the time limits that apply to those appeal rights.

## Disabilities as a Defense Against Alleged Misconduct

The Equal Employment Opportunity Commission (EEOC) has issued important guidance that specifically addresses potentially violent misconduct by employees with disabilities. Although this guidance deals specifically with psychiatric disabilities, it applies generally to other disabling medical conditions. It advises that an agency may discipline an employee with a disability who has violated a rule (written or unwritten) that is job-related and consistent with business necessity, even if the misconduct is the result of the disability, as long as the agency would impose the same discipline on an employee without a disability. The guidance specifically states that nothing in the Rehabilitation Act prevents an employer from maintaining a workplace free of violence or threats of violence.

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The guidance specifically states that reasonable accommodation is always prospective. Thus, an agency is never required to excuse past misconduct as a reasonable accommodation. A reasonable accommodation is a change to the workplace that helps an employee

[9] 5 USC 7513(b).

## Disabilities as a Defense Against Alleged Misconduct (continued)

perform his or her job and may be required, along with discipline, when the discipline is less than removal.

For a detailed discussion of all these points, see *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, EEOC number 915.002, 3-25-97. The guidance is available on the Internet at http\\www.eeoc.gov, or a copy can be obtained by calling the EEOC Publications Office at (800) 669-3362. Interpretation of the Rehabilitation Act is complex and changing, and any specific questions should be discussed with your Office of General Counsel.

## Ordering and Offering Psychiatric Examinations

Supervisors should gain a better understanding of their rights (and limitations) regarding psychiatric examinations for employees. There are some absolute prohibitions in Federal personnel regulations regarding what medical information a supervisor can demand from an employee and every supervisor should learn what can be **ordered** and what can be **offered**. Discuss specific questions with your Office of General Counsel. However, below is some basic information on psychiatric examinations.

***Ordering* a psychiatric examination.** Under 5 CFR Part 339, an agency may **order** a psychiatric examination, or psychological assessment, under very rare circumstances.[10] The only time an employee can be ordered to undergo a psychiatric examination is:

> *"…an agency may order a psychiatric examination, or psychological assessment, under very rare circumstances."*

- If he or she occupies a position requiring specific medical standards and the results of a current general medical exam which the agency has the authority to order show no physical basis to explain actions or behavior which may affect the safe and efficient performance of the individual or others, or
- If a psychiatric examination is specifically required by medical standards or a medical evaluation program.

[10] 5 CFR 339.301 and 302.

## Ordering and Offering Psychiatric Examinations (continued)

***Offering* a psychiatric examination.** Under 5 CFR Part 339, an agency may **offer** a psychiatric evaluation or psychological assessment (or it may ask the employee to submit medical documentation) in any situation where it is in the interest of the Government to obtain information relevant to an individual's ability to perform safely and efficiently, or when the employee has requested, for medical reasons relating to a psychiatric condition, a change in duty status, working conditions, or any other benefit or reasonable accommodation. If the employee decides not to be examined or to submit medical documentation, the agency should act on the basis of the information available.

## Disability Retirement

Supervisors should also gain a better understanding of their rights, and limitations, regarding assisting employees with disability retirement applications. The restrictions on filing a disability retirement on behalf of an employee are rigorous, so supervisors should understand their role in encouraging and assisting employees who wish to seek disability retirement. Below is some basic information on disability retirement.

Employees with medical disabilities may be eligible for disability retirement if their medical condition warrants it and if they have the requisite years of Federal service to qualify. In considering applications for disability retirement from employees, the Office of Personnel Management (OPM) focuses on the extent of the employee's incapacitation and ability to perform his or her assigned duties. OPM makes every effort to expedite any applications where the employee's illness is in an advanced stage.

It is important to note that OPM's regulations[11] specifically provide that an individual's application for disability retirement does not stop or stay an agency's taking and effecting an adverse action. An agency should continue to process an adverse action, even while informing the employee of his or her ability to file an application for disability retirement, or informing family members that they can apply on behalf of the employee.

### *Assisting employees in applying for disability retirement*

The agency can and should counsel the employee any time it believes that a medical condition is causing a service deficiency and the employee is otherwise eligible for disability retirement.

[11] 5 CFR 831.501(d).

## Disability Retirement (continued)

This does not mean that the agency has a specific number of documents in hand to show that the employee is medically incapacitated. It only means that the option of disability retirement be given to the employee to consider.

The agency cannot force the employee to file an application for disability retirement, despite its belief that it is in his or her best interests. If the agency believes that the employee does not understand the consequences of his or her choice not to do so, the next paragraph explains agency-filed applications for disability retirement.

### *Agency-filed applications for disability retirement*

The conditions for filing an application for disability retirement on behalf of an employee are strictly limited. The Office of Personnel Management has set out five conditions that must be met before an agency can file on an employee's behalf.[12] If the following five conditions are met, the agency must file on the employee's behalf.

- The agency has issued a decision to remove the employee;
- The agency concludes, after review of medical documentation, that the cause of the unacceptable performance, conduct, or leave problems is due to the disease or injury;
- The employee is institutionalized, or based on the agency's review of medical and other information, it concludes that the employee is incapable of making a decision to file on his or her own behalf;
- The employee has no representative or guardian with the authority to file on his or her behalf; and
- The employee has no immediate family member (spouse, parent, or adult child) who is willing to file on the employee's behalf.

## Appeals of a Disciplinary Action

Once a disciplinary action is taken by an agency, the employee involved has options regarding his or her appeal (or challenge) to the agency's final decision. The various avenues of redress that may be available to an employee include the agency's administrative or negotiated grievance system, the Equal Employment Opportunity Commission or the Merit Systems Protection Board. Employees covered by a bargaining unit often turn to the union for guidance on their appeal rights.

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[12] 5 CFR part 831.1201-1206 (covering CSRS employees). For FERS employees, see 5 CFR 844.202.

## Appeals of a Disciplinary Action (continued)

Numerous holdings by third parties uphold agencies' rights to discipline employees who have threatened, intimidated, or physically injured their supervisors or coworkers, or otherwise caused a disruption in the workplace. However, since case law relating to disciplinary actions is constantly evolving, agency officials should always consult their employee/labor relations specialists and Office of the General Counsel when considering disciplinary actions.

Case Studies 6, 8, 13, and 15 provide practical examples of some of the issues discussed in this section.