

**UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
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Instruction Memorandum No. OR-2003-116
Expires: 9/30/2004

To: DMs, DSDs, Staff and Branch Chiefs
From: State Director
Subject: Disciplinary Actions Based on Violent, Threatening, or Disruptive Behavior

Program Area: Disciplinary actions.

Purpose: To present guidance on disciplinary actions to be considered in response to violent, threatening, or disruptive behaviors in the workplace. IM-OR-2001-001 has expired effective 09/30/02. This is a re-issuance of current policy which was established in that directive. There are no changes to this policy.

Policy/Action: The appropriate guidance on disciplinary actions is found in Department of the Interior Personnel Handbook, Subject: Charges and Penalty Selection for Disciplinary and Adverse Actions, dated June 27, 2001. This guide assists management officials in selecting appropriate corrective action. This guide establishes the policy of the Department of the Interior that discipline be administered in a constructive and progressive manner, whenever practical. It does so by providing a range of penalties to be considered given the first offense and/or subsequent offenses. However, the penalties suggested in the table are guidelines only. Nothing precludes management officials from considering penalties in excess of the listed maximums where aggravated circumstances exist.

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

There are four (4) available options:

1. Temporary detail to another position or work area.

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

2. Excused absence.

This is an immediate temporary solution, for short absences only. The employee continues to receive pay and benefits just as if he or she was in a duty status. The Controller General of the General Accounting

danger to himself/herself, or others, if the employee remains in the workplace.

3. Enforced leave.

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

Enforced leave for periods of more than 14 days require the procedural protections provided for adverse actions, i.e., advance notice, opportunity to reply, decision by higher level official.

4. Indefinite suspension.

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

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

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

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

The Table of Penalties has the following charge which is appropriate to consider in this situation:

"Unprofessional or discourteous conduct toward supervisors, co-workers, or the public; use of foul language; angry outbursts; provoking quarrels; inappropriate remarks; disruptive conduct." (Nature of Offense #3)

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

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

A. Violent behavior may be directed at another individual or may involve physical damage or destruction of Government property. Examples are assaulting a co-worker, supervisor, or agency client; causing bodily injury or inflicting bodily harm; throwing a chair at someone, injuring him or her; menacing conduct, including destruction of furniture, that puts the victim in fear of immediate serious bodily injury. Assaults or threats to assault with a weapon are serious misconduct. In general, assaults must be proven. The agency must carefully document the facts or witness statements regarding an assault, recognizing that there are several defenses of violent conduct that the Merit Systems Protection Board (MSPB) has allowed as mitigating. Examples of mitigating circumstances are provocation or harassment by the victim to which the employee was responding; mental illness or stress which left the employee more than usually

upset by minor incidents at the worksite; past good record and/or lack of willfulness on the part of the offender; lack of harmful effect on the safety and order of the workplace.

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

1. The listener's reactions to the statement
2. The listener's apprehension of harm
3. The speaker's intent to make a threat
4. Any conditional nature of the statements
5. The attendant circumstances

In proposing an adverse action (e.g., removal, suspension for more than 14 days, reduction in grade or pay, etc.), the agency should evaluate these five criteria and be prepared to give evidence, upon appeal to MSPB, to prove a "true threat." This can be done by documenting the actual statements made, in the words of the recipients recorded at the time; by describing the reactions of recipients in response to the statements and who they reported them to; by describing the actual effect on the agency's ability to continue normal work and on the amount of work done, etc. If unable to do so, a more appropriate charge may be "intimidating or harassing remarks or behaviors" under Nature of Offense #3 mentioned above.

The Table of Penalties has the following charge which is appropriate to consider in situations A. and B.:

"Fighting, threatening bodily harm to another, or physical resistance to responsible authority; creating a disturbance." (Nature of Offense #5)

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

Assaults or threats of assault with a weapon and physical encounters such as striking or otherwise physically injuring a supervisor will result in a proposal to remove the employee from the federal service, even if it is the first offense. Third parties have upheld the agency decisions to remove in these kinds of serious misconduct cases (see the Index of Cases, attachment 1). As you will see from the many MSPB cases and court cases cited in the Index, there have been many appeals. These were all adverse actions, and it may be appropriate in most cases to propose an adverse action, i.e., removal, suspension of more than 14 days, reduction in grade, etc. However, you must also consider in each case the Douglas Factors (see attachment 2) in arriving at the selection of the appropriate penalty.

Budget Impact: None.

Timeframe: Immediate.

Background: This memorandum was previously issued as Instruction Memorandum No. OR-2000-069. Consistent with established policy (Information Bulletin No. OR-95-335, Subject: Preventing Violence in the Workplace, dated June 5, 1995) regarding BLM OR/WA's commitment that employees are entitled to a safe and secure work environment, this memorandum presents guidance on a spectrum of disciplinary actions to be considered in response to violent, threatening, or disruptive behaviors in the workplace. To reiterate, IB No. OR-95-335 clearly stated that BLM OR/WA policy is **zero tolerance** of violence in the workplace. This means that every identifiable offense will result in some form of disciplinary action necessary to correct misconduct and to discourage repetition. In some cases, the proposed penalty will be removal from the federal service. (NOTE: In addition, the employee may also face criminal prosecution if the conduct rises to the level of a criminal assault.)

Manual/Handbook Sections Affected: Department of the Interior Personnel Handbook, Subject: Charges and Penalty Selection for Disciplinary and Adverse Actions dated June 27, 2001 and in CFR 5, Part 752.

Coordination: Proposed disciplinary actions MUST be coordinated with your Servicing Human Resources Office, Employee Relations staff (Larry Spaulding, OR-953, 503-808-6237; Laurie McKnight, OR-953, 503-808-6238; Kyle Worley, Western

Oregon Districts, 541-464-3407). It is also critical that the Special Agent-in-Charge (SAC) be contacted for determination of possible criminal conduct prior to taking any disciplinary action to ensure criminal and administrative responses are coordinated. (SAC - Robert "Craig" Magill, OR-914, 503-808-6469).

Contact: Larry Spaulding, OR-953 at 503-808-6237.

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

Signed by
John K Keith
Acting Associate State Director

Authenticated by
Mary O'Leary
Management Assistant

2 Attachments

- 1 - [Index of cases](#) (2pp)
- 2 - [Douglas Factors](#) (1p)

Distribution

WO700 (Room 5628 - MIB) - 1

INDEX OF CASES

1. Indefinite Suspensions or Enforced Leave

Thomas v. General Services Administration, 756 F.2d 86 (Fed. Cir. 1985)

An agency may indefinitely suspend an employee when the "agency believes that the employee's retention on active duty could result in damage to federal property, or be detrimental to government interests, or be injurious to the employee, his fellow workers, or the public."

Kinsey v. Department of the Navy, 59 MSPR 226 (1993)

Sustained agency's placement on involuntary leave (using adverse action procedures) while he was subject to temporary medical restrictions pending referral for further medical treatment.

Backus v. Office of Personnel Management, 22 MSPB 457 (1984)

An agency was justified in indefinitely suspending an employee pending its investigation of his arrest based on charges of aggravated assault.

Johnson v. Department of Health and Human Services, 22 MSPR 521 (1984)

The employee's indefinite suspension after his indictment on charges of off-duty forcible rape, sexual offenses, carrying a deadly weapon, and robbery was proper given that the charged crimes were so egregious that other employees were apprehensive for their safety if the employee was allowed to be at work.

2. Assault

Muldrow v. Veterans Administration, 22 MSPR 586 (1984)

The agency charged the appellant with assaulting and threatening his supervisor by shouting at her, shoving and pushing her, and forcing her to put her arms in front of her face to protect herself, and striking her arms out of the way. The Board sustained the charge and the action, finding the misconduct to be serious.

Spearman v. U.S. Postal Service, 44 MSPR 135 (1990)

Agency proved its charge of unsatisfactory conduct/physical assault. The employee argued that he had not committed "physical assault" because he did not actually strike his co-worker, but the Board noted that the agency had specified that the basis for the charge was that the employee "swung at [co-worker]." The legal definition of "assault" includes attempts to inflict bodily injuries as well as actual striking.

3. "Striking" or otherwise physically touching another

Smith v. Defense Logistics Agency, 4 MSPR 425 (1980)

MSPB affirmed the agency's action for pushing and striking his team leader, causing physical injury.

4. Disorderly conduct

Yoshida v. Department of the Navy, 14 MSPR 300 (1983)

The agency suspended the employee for 15 days for disorderly conduct, based on its specification that he angrily threw a wrench at his supervisor while shouting belligerently. The Board sustained the charge, even though the appellant did not intend to strike the supervisor, finding that throwing the wrench in the direction of the supervisor as well as his belligerent remarks supported the charge of disorderly conduct by preponderant evidence.

Attachment 1-1

Colon v. Department of the Navy, 58 MSPR 190 (1993)

The Board found that the agency did not use charges of "threats," "assault," or "battery," but rather the specific charge of "disorderly conduct" which does not require proof of intent.

5. Threats or threatening behavior

If an agency charges an employee with making a threat to a supervisor or other individual, it must be able to prove its charge under the five "evidentiary factors" established in Metz v. Department of the Treasury, 780 F. 2d 1001 (Fed. Cir. 1986).

The five factors are: 1.) The listener's reactions to the statements; 2.) the listener's apprehension of harm; 3.) the speaker's intent to make a threat; 4.) any conditional nature of the statements; and 5.) the attendant circumstances.

These are usually evaluated using objective evidence and "the reasonable person" criterion by considering what reasonable persons hearing the statements actually did.

In Robinson v. U.S. Postal Service, 30 MSPR 678 (1986), the Board applied the Metz factors in finding the charge of threatening a supervisor to be sustained. The Board noted first that the threat was conditional (if the supervisor called the building guards, the appellant would take his head off), and the appellant became calm and returned to work, but these factors were offset by the fact that the supervisor was apprehensive and fearful and called a foreman and security guards to the scene and had the employee escorted from the premises. Furthermore, the agency was justified in removing the employee, because a verbal threat to a supervisor is a serious offense and affects the agency's obligation to maintain a safe workplace for its employees.

6. Rude, disruptive, or abusive language

Hudson v. Department of the Army, 64 MSPR 162 (1994)

MSPB affirmed the removal of an employee for rude and discourteous speech and behavior that adversely affected the productivity of the workplace and offended fellow employees and clients.

Johnson v. Department of Justice, 65 MSPR 46 (1994)

The agency's charge of disrespectful conduct (use of insulting, abusive, and obscene language, including racial epithets, to and about others) was sustained and its demotion of the appellant to a non-supervisory position upheld.

7. Bizarre misconduct or remarks

McKoy v. Federal Communications Commission, 10 MSPR 221 (1982)

Affirmed the appellant's removal for a continuing pattern of misconduct and disruptive behavior. She was charged with using Government equipment to duplicate flyers for personal use and posting them in unauthorized locations despite repeated warnings not to. The Board found that the employee's behavior was disruptive and caused various agency officials to divert significant amounts of time in order to deal with her behavior.

Attachment 1-2

REVIEW OF DOUGLAS FACTORS

In a 1981 case (Douglas v. Veterans Administration), the Merit Systems Protection Board held that it had the authority to review and mitigate agency-imposed penalties in adverse action appeals. In Douglas, the Board set forth pertinent factors to be considered in determining the propriety of disciplinary actions. These factors included:

- 1.) The type of offense and its severity
- 2.) The employee's past disciplinary record
- 3.) The employee's past work record
- 4.) The employee's job level and nature of employment
- 5.) The effect of the offense on the employee's ability to do his job, and the effect on his supervisor's belief in that ability
- 6.) The consistency of penalties imposed on other employees for same or similar misconduct
- 7.) The consistency of the penalty with the agency's table of penalties
- 8.) The notoriety of the offense and any effect on the agency's reputation
- 9.) Whether the employee had been informed that he had violated any rules
- 10.) Whether the employee demonstrated a potential for rehabilitation
- 11.) Whether there were any other applicable penalties that would be effective in deterring future misconduct, and
- 12.) Whether any other mitigating circumstances existed.

While the Board acknowledged its obligation to defer to "the agency's primary discretion in exercising its function of maintaining efficiency and discipline," it enumerated these guidelines to be used in assuring that the agency's choice of penalty was within the "tolerable limits of reasonableness."

Attachment 2