TECHNICIAN PERSONNEL REGULATION
No. 752

HEADQUARTERS
DEPARTMENTS OF THE ARMY AND THE AIR FORCE
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DISCIPLINE AND ADVERSE ACTION

This regulation covers disciplinary actions, adverse actions, appeal rights, administrative hearings and the NGB Administrative Hearing Examiner System. FPM chapter 752 does not apply to National Guard technicians; it is replaced in its entirety by this TPR. The provisions of this regulation apply to both military and competitive technicians.

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*Supersedes TPR 752, 16 August 1982

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CHAPTER 1. DISCIPLINARY ACTION

1-1. GENERAL

a. Counseling a technician can normally resolve a problem without the need for disciplinary or adverse action. Counseling is a friendly business-like exchange of information guided by the supervisor. It is a private matter between the technician and his/her supervisor and has the specific purpose of improving the technician's conduct or knowledge of a particular subject; it is not a disciplinary action. A problem can also be resolved by warning a technician. This too is a private matter between the technician and his/her supervisor and is not a disciplinary action. Unlike counseling, a warning has a more serious intent because along with a business-like exchange of information is a warning that disciplinary or adverse action may result if the problem is not corrected.

b. A counseling or warning should be annotated in pencil (date and subject) on the NGB Form 904-1 (Supervisor's Record of Technician Employment). The technician should be told the annotation will remain until the supervisor determines it is no longer needed or relevant to a continuing or recurring problem. Supervisors may counsel or warn a technician without consulting the SPMO. Collective bargaining agreements and/or State supplements to this TPR may contain additional procedures/requirements (e.g., representation rights) and should be reviewed before counseling or warning a technician..

1-2. ORAL ADMONISHMENT

a. Oral admonishment is a disciplinary action that notifies a technician to desist from a certain course of action. Oral admonishments should take place in as private an environment as possible and be in the form of the most appropriate criticism necessary to correct the technician. If there has been no previous counseling or warning, the supervisor must first ensure that all relevant facts have been raised. This can best be done by discussing the facts with the technician and giving him/her an opportunity to express views or provide explanations. The supervisor takes whatever time is needed to decide whether or not an oral admonishment is appropriate. If warranted, the technician is then orally admonished. If an oral admonishment is not warranted, the supervisor tells the technician the issue has been resolved without the need for disciplinary action.

b. An oral admonishment should be annotated in pencil (date and subject) on the NGB Form 904-1. The technician should be told the annotation will remain until the supervisor determines it is no longer needed or relevant to a continuing or recurring problem. Supervisors may orally admonish a technician without consulting the SPMO. Collective bargaining agreements and/or State supplements to this TPR may contain additional procedures/requirements (e.g., representation rights) and should be reviewed before orally admonishing a technician.

1-3. LETTER OF REPRIMAND

a. A letter of reprimand is a disciplinary action which makes a technician aware of a violation (e.g., improper attitude, violation of agency rules). It can be issued when counseling, warning, and orally admonishing prove ineffective. It can also be used when the nature of the violation warrants more than counseling, warning, or an oral admonishment but does not warrant adverse action. The letter of reprimand is normally issued by the first line supervisor. If someone else in the technician's supervisory chain issues a reprimand, it should be endorsed through the first line supervisor to the technician. For example, the second line supervisor issues a letter of reprimand to a technician for being insubordinate while the immediate supervisor was TDY.

b. A supervisor must ensure all relevant facts are raised before issuing a letter of reprimand. This can best be done by discussing the facts with the technician and giving him/her an opportunity to express views or provide explanations. The supervisor takes whatever time is needed to decide whether a letter of reprimand is appropriate. If it is not warranted, the supervisor tells the technician the problem is resolved without the need for disciplinary action. If action is needed but a letter of reprimand is too severe, the supervisor can resolve the problem by orally admonishing the technician. If a letter of reprimand is warranted, the technician is told a reprimand will be issued as soon as possible. A letter of reprimand must, as a minimum:

(1) describe the violation in sufficient detail to enable the technician to understand why the reprimand is being given. If the violation relates to a continuing problem, the supervisor should include a summary of past violations and the attempts made by management to correct those violations;

(2) tell the technician how long (provide actual date) the reprimand will be filed as a temporary document in the Official Personnel Folder (OPF);

(3) tell the technician the reprimand may be grievable through the State or negotiated grievance system, whichever is applicable (except as outlined in paragraph 2-19c(2) of this regulation);

(4) include a warning that further offenses could result in suspension, change to lower grade, or removal.

c. A letter of reprimand must be cleared for procedural accuracy by the SPMO before issuance. Collective bargaining agreements and/or State supplements to this TPR may contain additional procedures/requirements (e.g., representation rights) and should be reviewed before issuing a letter of reprimand. Once a letter of reprimand is removed from the OPF, it is as if it never happened and may not be referenced as past discipline. The letter of reprimand and related annotations on NGB Form 904-1 must be removed from the supervisor's file when the reprimand is removed from the OPF.

CHAPTER 2. ADVERSE ACTION

2-1. TYPES OF ADVERSE ACTION

a. There are only three types of adverse action which may be taken against a technician: (1) suspension (includes indefinite suspension); (2) change to lower grade, and (3) removal. The procedures and protections provided in this chapter must be followed when management initiates any one or combination[1] of these three adverse actions.

b. The following actions do not constitute an adverse action, and the procedures and protection provided in this chapter will not be applied to these actions:

(1) Actions addressed in chapter 1 and actions addressed in TPR 715. Note: Appeal rights established in this chapter are afforded technicians as outlined in chapter 1, TPR 715.

(2) Actions taken for performance reasons.

(3) Actions based on classification or job grading determinations.

(4) Reduction-in-force and furlough actions covered by TPR 300(351).

(5) Discharge of trial/probationary technicians. (Adverse action procedures would apply when suspending trial/probationary technicians).

(6) Mandatory retirements.

(7) Denial of within-grade increases.

(8) Actions excluded by law (e.g. political activity cases).

(9) Alleged loss or lessening of promotion potential.

(10) Reduction of technician rates of pay from rates that are contrary to law or regulation.

(11) Recording absences as AWOL (AWOL can become the basis for initiating adverse action).

(12) Termination or reduction of entitlements that affect technician pay but do not involve any loss of base pay (e.g. night shift differential, HDP, EDP).

(13) Actions which entitle technicians to grade or pay retention or actions to terminate such entitlements.

(14) Termination of temporary or indefinite type appointments or termination of temporary promotions, details, etc. (Adverse action procedures would apply when suspending temporary or indefinite technicians.)

(15) Placement of technicians serving on an intermittent or part-time basis in a nonduty status in accordance with conditions established at time of appointment.

(16) Details to lower-graded positions without a change in official position assignment or loss of pay.

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[1] For example, management may propose a suspension of 5 days and a change to lower grade as penalty for the offense.

2-2. ROLE OF THE SPMO

Responsibility for advising and assisting managers and supervisors is vested primarily in the SPMO staff, which is ultimately responsible for conclusive processing of adverse actions. In view of the complex body of laws, regulations and case precedents that govern adverse action and the negative consequences that can occur, it is essential that all actions be meticulously documented, researched, prepared, executed and defended. The SPMO obtains advice and assistance from the legal officer in those cases adjudged necessary by the SPMO. SPMO clearance on the procedural aspects of the action must be obtained before issuance of a proposed adverse action notice, original decision, or final decision.

2-3. CAUSE FOR ADVERSE ACTION

a. There must be a reason for taking adverse action; that reason is commonly referred to as a "cause" and is defined as "an offense against the employer-employee relationship." What constitutes a "cause" is a decision that must be made on the merits of each situation.. Having a "cause" is not sufficient to warrant adverse action. Management must also conclude that taking adverse action will promote the efficiency of the service. This is done by establishing a relationship between the "cause" and its impact or effect upon the efficiency of the service. For example, the efficiency of the service requires technicians be present to perform the duties of their positions as scheduled. Therefore, tardiness, AWOL, or failure to request prior approval for leave has an adverse effect on the efficiency of the service.

b. When a "cause" involves off-duty misconduct, management must establish an adequate relationship between the grounds for the adverse action and the efficiency of the service (i.e., the technician's ability to perform his/her duties; the agency's ability to fullfill its mission).

2-4. PREPONDERANCE OF THE EVIDENCE

Management must support its reasons for the adverse action by a preponderance of the evidence. This means that considering the record as a whole, the evidence is more convincing to the trier of facts (i.e., deciding official, NGB administrative hearing examiner, or State Adjutant General) than the opposing evidence.

2-5. INVESTIGATIONS

a. Management has a responsibility to investigate the charges against the technician and/or any defense raised by the technician. The procedures contained in AR 20-1, AFR 120-3, and AFR 120-4 can be used as a framework for conducting such investigations. Collective bargaining agreements and/or State supplements to this TPR may contain additional procedures/requirements (e.g., representation rights) and should be reviewed. Whenever any criminal misconduct is suspected, consultation with local, State, or Federal law enforcement officials is required. If those officials decide that the conduct warrants criminal investigation, management's investigation must cease. If they conclude that there will be no criminal prosecution, management may proceed with its investigation.

b. Technicians (including the technician against whom action may be taken) being interviewed as part of an investigation need to be advised that failure to disclose material facts during the inquiry may result in disciplinary or adverse action. Additionally, technicians need to be advised that failure to answer an investigator's questions may be grounds for removal. The fact that management is not able to advise a technician of specific charges does not justify his/her refusal to answer questions. Since the purpose of the investigation is to discover facts, management may not be able to formulate

the precise charge until completing the investigation. The 5th amendment protection against self-incrimination is not infringed by orders to answer questions in an investigation where there is no likelihood of criminal prosecution. When dealing with waivers of 5th amendment rights, the investigator, in conjunction with the SPMO, should obtain advice and assistance from the legal officer.

2-6. TECHNICIAN'S STATUS

The fact that an adverse action is being processed does not in itself mean that the technician should not be allowed to continue performing his/her normal duties. If, however, there is reason to keep the technician away from his/her normal duties, management may detail the technician to other duties or, if necessary, indefinitely suspend the technician. NOTE: There must be some event that will bring an indefinite suspension to an end, and that event must be explained in the proposed adverse action notice. When management determines that the technician's presence at the worksite may not be in the Government's best interest, the technician may be placed in a nonduty pay status for all or part of the time it takes to process the action.

2-7. REPRESENTATION

a. Technicians are permitted to be represented by a representative of their choice unless otherwise provided by a collective bargaining agreement (reference paragraph 2-8). A technician can request in writing that all communication be made with or sent to his/her representative. When this happens, management proceeds under the premise that all communication with the representative reaches the technician.

b. The State Adjutant General will decide any attempt to disqualify a representative except when the challenge arises after election of an administrative hearing. In that situation, the NGB administrative hearing examiner will make the decision. If there is an attempt to disqualify an examiner, the State Adjutant General will make the decision. The person seeking the disqualification has the burden of proving his/her challenge. Conflict of interest or position, conflict with the needs of the organization, and unreasonable cost to the Government are some of the reasons that can be raised in attempting to disqualify the person.

c. Management officials may consider granting a reasonable amount of excused absence to a technician who has agreed to prepare and present a case for a fellow technician.

2-8. COLLECTIVE BARGAINING AGREEMENT

Provisions of a collective bargaining agreement establish requirements under which the State operates. SPMOs must ensure compliance. Violation of the applicable collective bargaining agreement could be prejudicial to the case.

2-9. HARMFUL ERROR

a. Harmful error is an error committed by management in the application of its procedures which, if it had not occurred, might have caused management to reach a conclusion different than the one reached. The harmful error standard avoids reversal of actions because of technical procedural oversights that have not substantially prejudiced or impaired the technician's rights. The burden is upon the technician to show that based upon the record as a whole the error was harmful; not upon management to prove the error harmless. The technician is not entitled to reversal of the action without showing that the procedural error substantially prejudiced his/her rights. If the technician can show that harmful error occurred, the action cannot be sustained. When events do not clearly show whether the error was actually harmful,

the probable effect of the error is determined in light of all the evidence. Mere theoretical possibility of harm cannot form the basis for inferring actual harm.

b. Ordinarily, when a procedural error is not alleged as harmful, it will be assumed not to have been harmful since the technician has the burden to show harmful error. However, it would be appropriate for a deciding official, NGB administrative hearing examiner, or State Adjutant General to address an error on their own initiative in order to prevent manifest injustice. Even greater leeway is justified when the technician is unassisted by a representative and unlikely to recognize the procedural error and its harmful effect.

2-10. ALLEGATION OF DISCRIMINATION

A technician who alleges that discrimination is involved in the adverse action will be advised by the SPMO of the appropriate channels for processing such allegations. The adverse action proceeds with the discrimination allegation given due weight. The fact that the allegation is considered in the adverse action does not prohibit the processing of charges through EEO channels.

2-11. ALCOHOL OR DRUG PROBLEMS

a. In the case of alcohol or drug problems, management is required to offer rehabilitative assistance as "reasonable accommodation" of a technician's known handicap. If the technician agrees to participate in a rehabilitative program and then does not keep his/her appointments or the rehabilitative efforts do not result in improved conduct, management may proceed with appropriate action.

b. When a technician's reply to a proposed adverse action establishes for the first time a handicapping condition of alcoholism or drugs, management proceeds by issuing the original decision as outlined in paragraph 2-17. However, the original decision must place the penalty decided upon in abeyance for a specified period (usually 6 months to 1 year) to provide the technician reasonable time to participate in a rehabilitative program. If within the specified period the technician fails to successfully participate or the participation does not result in improved conduct, the adverse action is effected; SPMO clearance is required before effecting the action. If the penalty is not effected within the specified period, management must treat it as if it never happened.

c. When a technician's appeal alleges for the first time that management should have known of his/her handicapping condition of alcoholism or drugs, the NGB administrative hearing examiner and/or State Adjutant General determines whether or not management failed to provide reasonable accommodation (should have inferred from the circumstances of the case that the technician was handicapped by alcohol or drugs).

2-12. ARREST, INDICTMENT, OR CONVICTION FOR CRIMINAL OFFENSE

a. The fact that a technician is arrested or criminally indicted should not normally be used as a cause for adverse action except as outlined in b below. If it is relied on, later acquittal or dismissal of the charge would vacate the cause for management's administrative action. Rather, management should rely on the technician's wrong doing. Generally this would not be affected by later legal action.

b. When management finds it undesirable to have a technician remain in a pay and duty status because of an arrest or criminal indictment, management may indefinitely suspend the technician. The technician may be placed in a nonduty pay status for all or part of the time it takes to process an

indefinite suspension. NOTE: There must be some event that will bring an indefinite suspension to an end, and that event must be explained in the proposed adverse action notice.

2-13. METHOD OF DELIVERY

To avoid questions over receipt, a notice or decision should be given directly to the technician with the technician acknowledging receipt by signing and dating a copy. When the U.S. mail is used, management should use certified mail with return receipt requested. Registered mail can be used (proves that the mail reached the technician's last known home address). Ordinary first-class mail should be used only as a backup to certified or registered mail.

2-14. FIVE BASIC STEPS

There are five basic steps in processing an adverse action:

STEP 1. Issue proposed adverse action notice.
STEP 2. Technician replies to proposed notice.
STEP 3. Issue original decision.
STEP 4. Process administrative appeal.
STEP 5. Issue final decision.

Each of the five steps are addressed in this chapter. However, not all of them have to occur. For example step two would not occur if a technician did not reply; or steps four and five would not occur if the technician did not appeal the original decision.

2-15. PROPOSED ADVERSE ACTION NOTICE (STEP 1)

The adverse action process begins with the technician's supervisor and the SPMO representative reviewing the information gathered about the misconduct along with the factors listed in appendix A to decide what if <u>any</u> adverse action should be imposed. When adverse action is decided upon, the technician's immediate supervisor initiates a proposed adverse action notice to inform the technician of the reasons for the adverse action and provide information on procedural rights. Circumstances may require others in the technician's supervisory chain to initiate such notices (e.g., the immediate supervisor may be personally involved in the misconduct). Whenever the State Adjutant General is the technician's immediate supervisor, other staff members may be designated to process the action thereby eliminating any question of impartiality if a final decision becomes necessary. SPMO clearance on the procedural aspects of the proposed adverse action notice <u>must</u> be obtained before issuance. The proposed adverse action must contain the following eight elements:

ELEMENT 1. STATE WHAT ACTION IS BEING PROPOSED. The proposed adverse action notice tells the technician what type of adverse action is being proposed (suspension, change to lower grade, or removal). If it is a suspension, include the number of days involved (day means calendar day). If change to lower grade is proposed, provide the title, pay plan, series, grade, and organization/location of the lower-graded position. Examples:

(a) This is notice that I propose to suspend you for 3 days from your position as warehouse worker, WG-6907-06.

(b) This is notice that I propose to change you from electronic mechanic foreman, WS-2614-10, to instrument mechanic, WG-3359-11, located at _____. This action constitutes a change to lower grade.

(c) This is notice that I propose to remove you from your position as aircraft mechanic, WG-8852-11.

ELEMENT 2. STATE THE REASONS FOR THE PROPOSED ACTION.

(a) The proposed adverse action notice tells the technician the reasons why management is proposing to take adverse action. The reasons must be specific and in sufficient detail (who, what, where, when, etc.) so the technician knows exactly what allegations to refute or which acts to justify. Without such details, the technician may not be able to formulate a meaningful reply. For example, reasons like "failure to display a high degree of professionalism, poor working relationships, and unprofessional attitudes" provide no underlying facts for the technician to respond to. If there are regulations or operating procedures that have been violated, reference them. Although not required, such references offer those involved in the case a better understanding of what occurred. Always doublecheck references for currency and applicability.

(b) Reasons can be better understood by "labeling" the offense if that label is relevant. Labeling is not mandatory; however, it is imperative that the label fit the facts since it establishes what management must prove and what the technician will respond to. Examples of labeling are: tardiness in reporting for duty; absence without leave (AWOL); refusal to perform assigned duties; and violation of shop safety regulations. The following examples illustrate pitfalls to avoid when labeling:

(1) Not including all the offenses in the label. Management's proposed adverse action notice to a unit administrator labeled the offense "converting armory funds to your own use" and went on to explain how the unit administrator violated National Guard accounting procedures in the process. The technician's response was directed solely at disproving the label. The deciding official found that management's charge was not supported by the evidence but did find a clear violation of accounting procedures. At that point, the technician could not be penalized for accounting violations since it was not included in the label. Had it been included, the technician may have been able to raise and prove a defense.

(2) Mislabeling. On several occasions a technician failed to call before taking leave. After hearing the technician's explanation the supervisor charged the absences to annual leave. The next time it happened, the supervisor charged the technician AWOL for the 8 hours and proposed an adverse action labeling the offense "repeated instances of AWOL". The label should have been "AWOL and repeated failure to obtain advance approval of leave."

(3) Misuse of legal terms. Using the label "theft of Government property" when all that can be proven is "unauthorized removal of property" or using "assault and battery on a supervisor" when all that can be proven is "striking a supervisor."

(c) On appeal, the NGB administrative hearing examiner and/or State Adjutant General will determine if the technician did what he/she was charged with. The burden rests with management to prove the charge by a preponderance of the evidence.

ELEMENT 3. PROVIDE RATIONALE FOR PENALTY SELECTION. The proposed adverse action notice explains the appropriateness of the penalty, including any facts that the supervisor relied on for imposing a penalty more severe than would normally be imposed. This information gives the technician a fair opportunity to respond to the supervisor's rationale when making a reply to the deciding official. It will also assist management in meeting its burden of proving it considered all relevant circumstances and reached a responsible conclusion. Appendix A contains information on penalty selection.

ELEMENT 4. PROVIDE A RIGHT TO REVIEW MATERIAL RELIED ON. Evidence must be disclosed to the technician so that he/she has an opportunity to learn what management's case is based on. Therefore, the proposed adverse action notice advises the technician of the right to review material relied on and where that material is located. If the proposed adverse action notice includes copies of the material relied on, it should tell the technician that all relevant material is attached. Unless there are compelling reasons not to, the technician should be provided copies of relevant material for his/her personal use. Management may not support its action with restricted material (e.g., certain medical information) unless it can be provided in a form that can be made available to the technician for review. If prior disciplinary or adverse action records are relied on, copies need not be provided to the technician if they were provided in the past. The proposed adverse action notice advises the technician that the records are available for review in the SPMO if his/her personal copies are not available.

ELEMENT 5. GIVE RIGHT TO REPLY. The proposed adverse action notice advises the technician of his/her right to reply, who to make that reply to, time limits involved, and how to request an extension of time. The right to reply provides an opportunity for the technician to discuss the case with an official who is knowledgeable about the incident and has the authority to decide whether or not the proposed action should be sustained. This official is normally the next level supervisor or management official and is referred to as the "deciding official". His/her name, telephone number, and business address is included in the notice. Requests for extension should be in writing and include justification for the additional time. The deciding official's decision to grant or deny the extension should also be in writing and include justification if the extension is partially or completely denied. NOTE: To save time, extension requests and decisions may be verbal and followed up in writing.

ELEMENT 6. PROVIDE RIGHT TO EXCUSED ABSENCE TO PREPARE REPLY. The proposed adverse action notice advises the technician that he/she will receive excused absence to prepare reply and who to see to arrange the use of such time. It is not necessary to include the number of hours in the notice. In a typical, noncomplex case, 4 to 8 hours is normally sufficient to review material, secure statements, prepare a written reply, etc. Scheduling the excused absence is management's responsibility. So as not to interfere with the organization's mission, this excused absence can be given in consecutive or nonconsecutive blocks of time.

ELEMENT 7. GIVE SPMO ASSISTANCE INFORMATION. The proposed adverse action notice gives the name, telephone number, and address of the SPMO staff member who can be contacted for procedural assistance. This SPMO staff member provides access to applicable regulations and answers questions relative to the technician's rights. The SPMO contact does not represent the technician.

ELEMENT 8. ADVISE TECHNICIAN ABOUT THE NEXT STEP. The proposed adverse action notice tells the technician that the deciding official will issue an original decision at the earliest practical date after receipt of replies or after the reply period has ended. It also advises the technician that if the proposed action is upheld by the deciding official, it will be effected on the date established in the original decision.

2-16. TECHNICIAN'S REPLY (STEP 2)

a. When a technician makes an oral reply, he/she has the right to expect the deciding official to give the reply due consideration and not treat the

time as an empty formality. The technician may bring up factors that might benefit his/her response (e.g. marital problems, financial obligations, number of dependents, and alleged bias of immediate supervisor). The deciding official should make a written summary of the oral reply for the record. Such summary will help establish that bona fide consideration was given to all of the technician's reasons and arguments.

b. A technician is not entitled to call witnesses during the oral reply since he/she will later be entitled to an administrative hearing or appellate review on the merits of the adverse action. However, this does not preclude the deciding official from choosing to interview persons suggested by the technician or to take necessary steps to resolve any questions that arise.

2-17. ORIGINAL DECISION LETTER (STEP 3)

The deciding official issues an original decision letter to tell the technician what action has been decided on. It should be issued as soon as possible (normally within 15 work days) after receipt of replies or after the reply period has ended. SPMO clearance on the procedural aspects of the original decision letter must be obtained before issuance. The original decision letter must contain the following six elements:

ELEMENT 1. STATE WHAT ACTION WAS DECIDED UPON. The deciding official may uphold the proposed action, change the proposed action to something less severe, or take no action at all. An action more severe than proposed can never be taken. In reaching his/her decision, the deciding official cannot consider reasons for taking adverse action other than those specified in the proposed adverse action notice. This does not stop the deciding official from considering matters not charged in the proposed notice that are brought to his/her attention, which would assist in determining if charges are true or if the penalty should be reduced. Examples:

(a) On 3 February 1986, Major John Smith proposed that you be removed from National Guard technician employment. I have decided that your removal is for just cause and will promote the efficiency of the service.

(b) On 3 February 1986, Major John Smith proposed that you be removed from National Guard technician employment. Although there is just cause to warrant the taking of adverse action, I have concluded that removal would not promote the efficiency of the service. Therefore, I have reduced the proposed action to a 30-calendar-day suspension.

(c) On 3 February 1986, Major John Smith proposed that you be removed from National Guard technician employment. I have found insufficient cause to warrant your removal. Therefore, I have decided that no action be taken against you.

(d) On 3 February 1986, Major John Smith proposed that you be suspended from your technician position for 3 calendar days. Although I have found sufficient cause, I have concluded that a suspension would not promote the efficiency of the service. Therefore, I have reduced the proposed action to a letter of reprimand and have directed Major Smith to issue such reprimand. NOTE: The letter of reprimand would be not grievable.

ELEMENT 2. INCLUDE DATE ACTION WILL BE AFFECTED.

(a) The original decision letter tells the technician when the action will take place/start. An action cannot start earlier than the date of the original decision. There is no prohibition against starting an adverse action during the period 15 December through 3 January.

(b) The National Guard Technicians Act requires technicians be given at least 30 days advance notice when removal from employment is involved (32 U.S.C. 709(e)(6)). The following rules apply when computing the 30-day notice: (1) day means calendar day, (2) calendar day is the 24-hour-period between 12 midnight and 12 midnight, (3) the 30-day period begins the day after the proposed adverse action notice is given directly to the technician or if mailed, 5-days after the date mailed as shown on the certified mail return receipt, and (4) the last day of the 30-day period may not be a nonwork day.

ELEMENT 3. REFERENCE THE TECHNICIAN'S REPLIES.

(a) The original decision letter explains that the technician's replies were considered in arriving at the decision. For example, I have given full consideration to your oral reply of 10 February and your written reply of 13 February. When no replies are received, the original decision letter should document that fact. A decision to take an adverse action cannot be made solely on the basis that the technician failed to refute the charges. When a technician's oral/written reply disputes reasons included in the proposed notice, the original decision letter must include a response to that dispute to show that there does in fact exist a basis for the reason.

(b) In cases where the deciding official receives a reply after the time allowed but before issuance of the original decision letter, it is permissible, but not required, to consider the late reply.

ELEMENT 4. PROVIDE REASONS FOR THE DECISION. The original decision includes reasons for the decision. This is done by explaining which reasons in the proposed notice were sustained. For example, I find all reasons outlined by Major Smith sustained; or I find the reasons outlined in paragraph 2a and c of Major Smith's proposed notice sustained. It is not necessary to repeat the charges and specific reasons that are contained in the proposed adverse action notice. When the deciding official sustains some of the reasons but decides not to reduce the penalty, the original decision letter must explain why. When the deciding official sustains all of the reasons but decides to take a less severe action, the original decision must explain why.

ELEMENT 5. GIVE SPMO ASSISTANCE INFORMATION. The original decision gives the name, telephone number, and address of the SPMO staff member who the technician can contact for procedural assistance. Normally, this will be the same staff member listed in the proposed adverse action notice (see element 7, paragraph 2-15).

ELEMENT 6. PROVIDE APPEAL RIGHTS.

(a) The original decision letter explains the appeal rights available, how to appeal, and time limits involved. This information is not included if the deciding official decides to take no action.

(b) A technician can appeal the original decision by requesting an appellate review or an administrative hearing, but not both. The appellate review is accomplished by the State Adjutant General without the involvement of an NGB administrative hearing examiner. It involves a review by the State Adjutant General of all pertinent records including material submitted by the technician with his/her appeal. The administrative hearing means that an examiner from another State will gather all available facts though an administrative hearing process and then issue a report of findings and recommendations to the State Adjutant General (copy is also sent to the technician). Regardless of the appeal method selected, a final decision on the appeal is issued by the State Adjutant General.

(c) A technician appeals by sending a written notice to the SPMO stating whether he/she wants an appellate review or an administrative hearing. This appeal must be postmarked no later than 20 calendar days after receipt of the original decision. If an appellate review is selected, the technician can submit any information or material he/she deems relevant to the State Adjutant General's review. If the technician selects an administrative hearing, no further information is required. Requests for extensions should be in writing and include justification for additional time. Although such requests are sent to the SPMO, the State Adjutant General is the person who decides to grant or deny the extension. The SPMO is responsible for notifying the technician in writing of the State Adjutant General's decision including rationale if the extension is partially or completely denied. NOTE: To save time, extension requests and decisions may be verbal and followed up in writing.

2-18. PROCESS ADMINISTRATIVE APPEAL (STEP 4)

How the SPMO processes an appeal depends on the appeal method selected by the technician. If an appellate review is selected, the SPMO provides the State Adjutant General with all relevant material and assists in resolving any questions that may arise. An appellate review may result in a discussion between the State Adjutant General and the technician concerned, and, if requested by the technician, his/her representative. If this occurs, an SPMO staff member should be present as an observer. If the technician requests an administrative hearing, the SPMO processes the appeal in accordance with chapter 3.

2-19. THE FINAL DECISION (STEP 5)

a. The issuance of the final decision is the method by which the technician is notified of the State Adjutant General's decision on his/her appeal. The final decision must be provided in writing and must be signed by the State Adjutant General. It is issued at the earliest practical date after completion of the appellate review or after receipt of the examiner's report of findings and recommendations. SPMO clearance on the procedural aspects of the final decision letter must be obtained before issuance. In addition to the technician concerned, a copy of the final decision is sent to NGB-TN. If an examiner was appointed, he/she should also be provided a copy of the final decision.

b. In making the final decision, the State Adjutant General must address three issues:

(1) Did the technician do what he/she was charged with? This is a factual determination using the preponderance of the evidence standard.

(2) Will some discipline, based on the proven conduct, promote the efficiency of the service? This is a judgmental determination based on the record.

(3) Is the penalty appropriate?

If an administrative hearing was held, the examiner's report will address these three issues for the State Adjutant General's consideration. If the State Adjutant General is in total agreement with the findings and recommendations (including how they were reached), the final decision need only state agreement with the report. When an examiner's findings and/or recommendation are not accepted, the final decision must provide rationale for the State Adjutant General's position. When only an appellate review is made, the State Adjutant General must address these issues without benefit of an examiner's report.

c. In addition to the three issues outlined in b above, the final decision must -

(1) Include, if appropriate, information on corrective actions. A statement that the SPMO has been directed to take corrective action is enough, unless the State Adjutant General has decided to limit the amount of corrective action to be taken.

(2) State that in accordance with 32 U.S.C. 709e(5) there is no further administrative review of the State Adjutant General's final decision.
NOTE: If the State Adjutant General's final decision reduces the penalty to a letter of reprimand, that letter of reprimand is not grievable.

2-20. ATTORNEY FEES

a. The State Adjutant General has authority to award reasonable attorney fees under 5 U.S.C. 5596.[2] OPM has issued implementing regulations for payment of attorney fees in 5 CFR 550. The requirements for payment of attorney fees are: (1) the technician must be the prevailing party, (2) the attorney fee must be reasonable as determined by the State Adjutant General, and (3) a determination must be made by the State Adjutant General that payment is warranted in the interest of justice. Attorney fees are not automatically granted; the burden of establishing entitlement and reasonableness rests with the technician. Each case must be examined on its own merits.

b. Requests for attorney fees must be sent to the State Adjutant General. Once received, such requests are provided to the SPMO and legal officer for review and recommendation as to whether or not payment is warranted. In addition, the legal officer provides recommendation on the reasonableness of the fee request. If an administrative hearing was held, the State Adjutant General may also request the examiner's review and recommendation. (The examiner will not address the reasonableness of the fee request.) All of these recommendations must provide articulated, rational reasons for or against the award.

c. The State Adjutant General is bound by the findings on the merits of the case and may not recharacterize them when evaluating a request for attorney fees. The State Adjutant General's decision on the attorney fees request is issued as an addendum to the final decision.. If fees are awarded, it must set forth the reasons why such payment is "in the interest of justice." If fees are not awarded, the addendum must provide rationale for such decision. There are no administrative appeals for attorney fee requests.

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[2] 5 U.S.C 5596. Back pay due to unjustified personnel action. (b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of the pay, allowances, or differentials of the employee--
(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect --
(i) an amount equal to all or part of the pay... which the employee normally would have earned, or received during the period if the personnel action had not occurred...
(ii) reasonable attorney fees related to the personnel action....

2-21. ADVERSE ACTION FILE

The SPMO is responsible for maintaining the official adverse action file. It should include all documents relevant to the processing of the adverse action. For example: supporting documentation, the proposed adverse action notice, requests for extension and approval/denial responses, written reply, summary of oral reply, original decision, memos for the record, the appeal, request for examiner, administrative letters involving hearing arrangements, hearing transcript, examiner's report of findings and recommendation, and final decision addendums relating to attorney fee requests.

CHAPTER 3. ADMINISTRATIVE HEARING

3-1. PREPARATION FOR THE HEARING

The SPMO requests an NGB administrative hearing examiner IAW procedures outlined in chapter 4. Other responsibilities of the SPMO include

(1) Providing written notification to the technician of an examiner's selection (information copy must be sent to the examiner).

(2) Establishing, with all parties, a mutually acceptable date, time, and place for the pre-hearing conference and the hearing. The examiner resolves any disagreements which may arise. The location should be as close to the work site as possible, accessible by all parties, relatively quiet, and neutral to both parties.

(3) Notifying the technician and or representative in writing of the mutually acceptable date, time, and location of the pre-hearing conference and hearing. (Information copy must be sent to the examiners.)

(4) Providing a case file to the examiner and the technician or his/her representative at least 3 weeks in advance of the hearing. File must be indexed and include as a minimum the proposed adverse action notice and all material relied on; technician's written reply; summary of oral reply; and the original decision.

(5) Arranging for a court reporter (verbatim transcript).

(6) Honoring the examiner's instructions for supplies, equipment, and hearing room lay-out.

(7) Arranging for examiner lodging, transportation, and travel order fund cite.

(8) Arranging for the appearance of agency witnesses being called by management or the technician. A technician has the right to secure the attendance of agency witnesses; problems relative to agency witness availability will be resolved by the examiner.

3-2. PRE-HEARING CONFERENCE

A pre-hearing conference is an informal meeting of the parties involved and is normally held the day before the hearing. During the pre-hearing conference, the examiner explains the hearing process, helps to identify problems, discusses responsibilities and rights, reviews case file, identifies documents, obtains stipulations, and assists in settlement offers. Normally, the pre-hearing conference is not recorded verbatim. When there is no transcript, the results of the conference are summarized by the examiner and read into the record when the actual hearing begins.

3-3. CONDUCT OF THE HEARING

a. The purpose of the administrative hearing is to develop fully all the facts surrounding the issues of the case. The administrative hearing is not a court of law. It is not subject to the procedural and substantive rules which govern conduct of trials because its purpose is not to find the technician guilty or innocent. The hearing is conducted in order to determine three issues:

(1) Did the technician do what he/she was charged with? This is a factual determination using the preponderence of the evidence standard.

(2) Will some discipline, based on the proven conduct, promote the efficiency of the service? This is a judgmental determination based on the record.

(3) Is the penalty appropriate? The choice of penalty will not be disturbed unless the record indicates the choice to be arbitrary, capricious, or otherwise unreasonable in light of the proven conduct.

b. The hearing will be closed to the public unless the technician and management agree to hold a public hearing. Normally, only the examiner, management's representative (with technical advisors), technician, technician's representative (with technical advisors), and the individual recording the proceedings will be present at a closed hearing. However, local labor agreements may require others to be included. At a public hearing, the examiner decides the number of people allowed. Disputes over attendance will be resolved by the examiner. A hearing must be recorded verbatim with a copy of the transcript provided free of charge to the technician.

c. The examiner directs the hearing proceedings and has authority to take whatever action is necessary to ensure an equitable, orderly, and expeditious hearing. The order of business is -

(1) Examiner calls the hearing to order, identifies the nature of the hearing, names the participants, and makes other statements needed for the record.

(2) Management's representative makes opening statement.

(3) Technician's representative makes opening statement or may defer until after management's representative presents witnesses and evidence. (A technician may represent himself/herself, though it is recommended in the interest of the individual and to facilitate the hearing that a representative be selected.)

(4) Management's representative presents witnesses and evidence.[3]

(5) Technician's representative presents witnesses and evidence.[3]

(6) Closing statement by management's representative.[4]

(7) Closing statement by technician's representative.[4]

(8) Examiner prepares to close hearing.

(9) Examiner closes and adjourns hearing.

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[3]Both sides have the right to cross-examine witnesses.

[4]Either side may request the opportunity to submit post hearing briefs in lieu of closing arguments. This is usually done when there has been a lengthy hearing, when the issues are numerous or complexed, or when questions of law or regulation are involved. Requests from the technician's representative are automatically granted. Requests from management must be reviewed carefully by the examiner with due weight given to the effects such delay will have on the technician.

3-4. REPORT OF FINDINGS AND RECOMMENDATIONS

Once the examiner receives the transcript, the report is prepared and finalized within 45 calendar days. The examiner goes through six processes in preparing the report. First, the charges are reviewed and evidence that supports each charge is identified and given appropriate weight. Second, conflicts in testimony are resolved. Third, credibility of witnesses is determined. Fourth, a check for procedural compliance is made. Fifth, conclusions are drawn on each charge. Sixth, the appropriateness of the penalty is determined. The report is formatted in nine sections. They are-

I Introduction
II Case Summary
III Compliance with Procedural Requirements
IV Management's Position
V Technician's Position
VI Issues Considered
VII Conclusions
VIII Discussion (Optional)
IX Recommendations

The original copy of the report is addressed to the State Adjutant General but mailed to the SPMO along with the case file and transcript. A copy of the report is also sent to the technician and to NGB-TN. A final decision is then issued as outlined in paragraph 2-19.

CHAPTER 4. NGB ADMINISTRATIVE HEARING EXAMINER SYSTEM

4-1. PURPOSE

The NGB administrative hearing examiner system was established to provide a cadre of qualified individuals to conduct administrative hearings and prepare reports of findings and recommendations for State adjutants general.

4-2. QUALIFICATIONS

When the need exists to add new examiners to the system, NGB-TN will request the State adjutants general to nominate individuals for attendance at the NGB administrative hearing examiner course. Those nominated should meet the following criteria:

a. Be currently employed as a technician in grade GS-11 or above (WG equivalent) or full-time support personnel with rank of captain or above.

b. Possess 4 years of progressively responsible experience in administrative, managerial, professional, investigative, or technical work.

c. Possess the personal attributes essential to the effective performance of an examiner (integrity, discretion, impartiality, reliability, resourcefulness and emotional stability).

d. Demonstrate abilities to: analyze, evaluate, and make logical determinations of pertinent facts; develop practical recommendation; interpret regulations and other complex written material, effectively communicate, orally and in writing; prepare clear and concise reports; and deal effectively with individuals and groups.

e. Understand the relationship between personnel administration and overall management concerns as well as the principles, systems, and methods for accomplishing the work of an organization.

4-3. REQUESTING AN EXAMINER

When an administrative hearing has been selected, the SPMO sends NGB-TN a written request for an examiner list (normally within 5 workdays after receipt of the appeal). Included in the request is the technician's name, position title, grade, service, charge, and penalty. A list of six examiners will be sent to the SPMO. Telephonic contact with those on the list is made by an SPMO staff member to determine availability. Additional names will be provided by NGB-TN if those referred are unable to conduct the hearing. It is the examiner's responsibility to get appropriate supervisory clearances before accepting a case. The SPMO will send written notification to the technician when an NGB administrative hearing examiner is selected (information copy will be sent to examiner).

4-4. GRIEVANCE HEARING

a. An examiner referral list may be requested when a State grievance system requires a hearing on a grievance. Examiners from the same State as the grievant may be used if the criteria established in FPM chapter 771 is met. The procedures in paragraph 4-3, apply when requesting an examiner. (The information sent to NGB-TN should be changed to fit the grievance situation.) Examiners may also be requested if a negotiated labor agreement provides for their involvement in lieu of arbitration.

b. The grievance hearing is conducted as outlined in paragraph 3-3c, except management and technician representative's roles are reversed in presentation (e.g., technician's representative makes opening statement, then management's representative makes opening statement).

APPENDIX A. PENALTY SELECTION

A-1. GENERAL

Determining the appropriateness of a penalty relies not only on establishing factual circumstances but also on application of judgment and discretion. In other words, the issue should be not whether the penalty is within the permissable range, but rather, why that particular penalty was chosen.

A-2. RELEVANT FACTORS

Selection of an appropriate penalty results from a responsible balancing of relevant factors. Some may be in the technician's favor while others may not. The factors listed below are generally recognized as being relevant considerations in determining the appropriateness of a penalty. The list is intended as a guide and should not be applied in a mechanical fashion.

(1) The nature and seriousness of the offense and its relation to the technician's duties, position, and responsibilities, including whether the offense was intentional, technical, inadvertent, or was committed maliciously or for gain or was frequently repeated.

(2) The technician's job level and type of employment, including supervisory role, and position of trust such as those involved in handling funds, contacts with the public, and prominence of the position.

(3) The technician's past disciplinary or adverse action record and the time period between these past offenses (see paragraph A-3).

(4) The technician'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 technician's ability to perform at an acceptable level and its effect upon the supervisor's confidence in the technician's ability to perform assigned duties.

(6) Consistency of the penalty with those imposed upon other technicians for the same or similar offenses.

(7) Consistency of the penalty with the guide provided in paragraph A-5.

(8) The notoriety of the offense or its impact upon the reputation of the National Guard.

(9) The clarity with which the technician has been made aware of the rule(s) violated in committing the offense, or has been warned about the conduct in question.

(10) Potential for technician'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 matters.

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

A-3. PAST DISCIPLINE OR ADVERSE ACTION

a. When a technician's past disciplinary or adverse action record is referenced, management must ensure that it is in fact a past action at the time the most recent misconduct occurred. Otherwise, the State Adjutant

General an/or the examiner will have to find consideration of it improper and not rely on it.

b. When a technician's past record is considered by the supervisor as a relevant factor in selecting the penalty, the proposed adverse action notice should list each past record. For example: The following elements of your past record were considered in selecting the penalty to be imposed: Letter of Reprimand dated 1 February 1986 for AWOL and Letter of Reprimand dated 10 February 1986 for tardiness. Unrelated offenses may be used collectively to justify an enhanced penalty.

c. If a technician challenges prior desciplinary or adverse action records, the review of that challenge will depend on whether or not the prior action meets three criteria. First, the technician was informed of the action in writing (annotation of NGB Form 904-1 satisfies this criteria); second, the technician was given an opportunity to dispute the action by having it reviewed on the merits; and third, the action was a matter of record. Where the three criteria are met, review will be limited to the record, and no new evidence or argument can be accepted. Where the three criteria are not met, the technician will be allowed to submit new evidence or arguments concerning the merits of the discipline or adverse action.

A-4. PENALTY REVIEW

If on appeal a technician challenges the appropriateness of the penalty, the burden rests with management to show that the penalty was appropriate (see element 3, paragraph 2-15). When the penalty is unchallenged by the technician, management must still establish that it gave necessary considerations to the relevant factors and that the penalty did not exceed the limit of reasonableness. This penalty review is not meant to displace management's responsibilities, but to assure that managerial judgment and discretion has been properly exercised in the selection of the penalty.

A-5. TABLE OF PENALTIES

The table of penalties provided below is a guide; it is not all inclusive. It will aid managers and supervisors in carrying out the principle of "like penalties for like offenses" in genuinely similar cases. The table provides suggested penalties and should not be applied so inflexibly as to impair consideration of factors relevant to the individual case. Throughout the table, the word "day" means "calendar days".

Nature of Offense		First Offense	Second Offense	Third Offense	Remark
1. Attendance related offenses	a. Unexcused tardiness	Oral admonishment to written reprimand	Written reprimand to 1-day suspension	2-day to 5-day suspension	1
	b. Failure to follow established leave procedures	Written reprimand to 5-day suspension	1-day to 5-day suspension	5-day suspension to removal	
	c. Absence without leave (AWOL)	Written reprimand to 5-day suspension	1-day to 15-day suspension	5-day suspension to removal	2
2. Failure to observe written regulations, rules	a. Violation where safety to persons or property is not involved	Written reprimand to 1-day suspension	1-day to 15-day suspension	2-day suspension to removal	3
	b. Violation where safety to persons or property is involved	Written reprimand to removal	30-day suspension to removal	Removal	3
3. Breach of security regulations or practices	a. Where classified information is not compromised and breach is unintentional	Written reprimand to 5-day suspension	1-day to 15-day suspension	5-day suspension to removal	
	b. Where classified information is compromised and breach is intentional	Written reprimand to removal	30-day suspension to removal	Removal	
	c. Where classified information is compromised and it is a deliberate violation	30-day suspension to removal	Removal		
4. Alcohol-related offenses	a. Unauthorized use of alcoholic beverages while on Government premises or in duty status	Written reprimand to 15-day suspension	15-day to 30-day suspension	30-day suspension to removal	4
	b. Sale or transfer of an alcoholic beverage while on Government premises or in a duty status or while any person involved is in a duty status	Written reprimand to 15-day suspension	15-day suspension to removal	Removal	4

Nature of Offense		First Offense	Second Offense	Third Offense	Remarks
	c. Reporting to or being on duty while under the influence of alcohol to a degree which would in any way interfere with proper performance of duty, would be a menace to safety, or would be prejudicial to the maintenance of discipline	Written reprimand to 30-day suspension	15-day suspension to removal	Removal	4
5. Drug-related offenses	a. Unauthorized possession of a drug or controlled substance while on Government premises or in a duty status	Removal			4
	b. Unauthorized use of a drug or controlled substance while on Government premises or in a duty status	Removal			4
	c. Reporting to or being on duty while under the influence of a drug or controlled substance to a degree which would in any way interfere with proper performance of duty, would be a menace to safety, or would be prejudicial to the maintenance of discipline	Removal			4
	d. Unauthorized sale or distribution of a drug or controlled substance on government premises or in a duty status or while any person involved is in a duty status	Removal			4
6. False statements	a. Deliberate misrepresentation, exaggeration, falsification, concealment or withholding of a material fact	Written reprimand to removal	1-day suspension to removal	15-day suspension to removal	7
	b. Making false, malicious or unfounded statements against coworkers, supervisors, subordinates, or Government officials which tend to damage the reputation, or undermine the authority of those concerned	Written reprimand to removal	30-day suspension to removal	Removal	

Nature of Offense		First Offense	Second Offense	Third Offense	Remarks
	c. False statements, misrepresentation, or fraud in entitlements	Written reprimand to removal	30-day suspension to removal	Removal	5
	d. False statement or misrepresentation, on an SF 171, or other documents pertaining to qualifications, or other official record	Written reprimand to removal	Removal		6
7. Refusal to testify; interference or obstruction	a. Refusal or willful failure to testify or cooperate in a properly authorized inquiry or investigation	3-day suspension to removal	5-day suspension to removal	Removal	
	b. Interference with or attempting to influence, or attempting to alter testimony of witnesses or participants	5-day suspension to removal	30-day suspension to removal	Removal	
	c. Attempting to impede inquiry or investigation or to influence investigating officials	10-day suspension to removal	30-day suspension to removal	Removal	
8. Insubordination	Refusal to obey orders, defiance of authority	Written reprimand to removal	5-day suspension to removal	Removal	
9. Fighting; creating a disturbance	a. Creating a disturbance resulting in an adverse effect on morale, production, or maintenance of proper discipline	Written reprimand to 5-day suspension	5-day to 10-day suspension	Removal	9
	b. Threatening or attempting to inflict bodily harm	Written reprimand to 15-day suspension	15-day suspension to removal	30-day suspension to removal	8
	c. Hitting pushing or other acts against another without causing injury	Written reprimand to 30-day suspension	30-day suspension to removal	Removal	8
	d. Hitting, pushing or other acts against another causing injury	30-day suspension to removal	Removal		8
10. Discourtesy	a. Rude, unmannerly, impolite acts or remarks (non-discriminatory)	Oral admonishment to 1-day suspension	Written reprimand to 5-day suspension	1-day to 10-day suspension	10 & 11
	b. Use of insulting, abusive, offensive, or obscene language, gestures or similar conduct (non-discriminatory)	Written reprimand to 10-day suspension	5-day suspension to removal	30-day suspension to removal	10

Nature of Offense		First Offense	Second Offense	Third Offense	Remarks
11. Stealing or wrongful appropriation	a. Stealing/wrongfully appropriating, actual or attempted, unauthorized possession of government property or property of others	Written reprimand to removal	Removal		
12. Misuse or abuse of government property or personnel	a. Negligent loss, destruction, or damage to government property	Written reprimand to 5-day suspension	Written reprimand to removal	15-day suspension to removal	
	b. Loss of or damage to government property, records or information when a technician is entrusted in safeguarding government property as a requirement of the job (i.e. warehouse worker, supply technician)	Written reprimand to 15-day suspension	Written reprimand to removal	15-day suspension to removal	
	c. Using government property or technician personnel in duty status for other than official purposes	Written reprimand to removal	1-day suspension to removal	15-day suspension to removal	12
	d. Misuse of government credentials	Written reprimand to removal	5-day suspension to removal	15-day suspension to removal	
	e. Willfully using or authorizing the use of a government passenger motor vehicle or aircraft for other than official purposes	30-day suspension to removal	Removal		13
	f. Intentionally mutilating or destroying a public record	Removal			14
13. Sleeping on duty	a. Where no danger to persons or property is involved	Oral admonishment to 1-day suspension	Written reprimand to 5-day suspension	5-day suspension to removal	
	b. Where danger to persons or property is involved	Written reprimand to removal	15-day suspension to removal	30-day suspension to removal	
14. Loafing; delay in carrying out instructions; dereliction of duty	a. Idleness or failure to work on assigned duties	Oral admonishment to 3-day suspension	Written reprimand to 5-day suspension	5-day suspension to removal	
	b. Delay in carrying out or failure to carry out instructions within the time required	Written reprimand to 15-day suspension	3-day suspension to removal	5-day suspension to removal	
	c. Dereliction of duty	Written reprimand to removal	5-day suspension to removal	Removal	

Nature of Offense		First Offense	Second Offense	Third Offense	Remarks
15. Gambling	a. Participating in an unauthorized gambling activity while on government premises or in a duty status	Oral admonishment to written reprimand	1-day to 5-day suspension	5-day to 30-day suspension	
	b. Operating, assisting, or promoting an unauthorized gambling activity while on government premises or in a duty status or while others involved are in a duty status	15-day suspension to removal	Removal		
16. Prohibited job actions	Participating in or promoting a strike, work stoppage, slow down, sick out or other prohibited job action	Removal			
17. Indebtedness	Failure to honor just financial obligations in a proper and timely manner	Written reprimand	Written reprimand	Written reprimand	15
18. Sexual harassment	a. Not involving a subordinate	Written reprimand to 5-day suspension	5-day suspension to removal	10-day suspension to removal	16
	b. Involving a subordinate	3-day suspension to removal	10-day suspension to removal	30-day suspension to removal	16
19. Discrimination because of race, color, religion, age, sex, national origin, political affiliation, handicap or marital status	a. Use of critical, demeaning, slanderous, inflammatory, defamatory, ignominious, or degrading remarks, comments, observations or statements not directed at a subordinate	Written reprimand to 5-day suspension	1-day to 5-day suspension	5-day suspension to removal	17
	b. Prohibited discriminatory practice in any aspect of employment (e.g. employment, appraisal development, advancement or treatment of technicians)	Written reprimand to removal			18
20. Reprisal	a. Intentional interference with a technician's exercise of, or reprisal against a technician for exercising a right to grieve, appeal or file a complaint through established procedures	Written reprimand to removal	5-day suspension to removal		

Nature of Offense		First Offense	Second Offense	Third Offense	Remarks
	b. Intentional interference with a technician's exercise of, or reprisal against a technician for exercising a right under 5 U.S.C. 7101 (governing Federal labor-management relations)	Written reprimand to removal	5-day suspension to removal		
	c. Intentional reprisal against a technician for providing information to an Inspector General, EEOC investigator, NGB investigator, or for testifying in an official proceeding	30-day suspension to removal	Removal		
21. Constitutional violation	Violation of a technician's constitutional rights, (i.e., freedom of speech/association/religion)	Written reprimand to removal	5-day suspension to removal	30-day suspension to removal	
22. Conduct unbecoming a National Guard technician	a. Immoral, indecent, or disgraceful conduct	1-day suspension to removal	Removal		
	b. Solicitation of or accepting anything of monetary value from person who is seeking contracts or other business or financial gain	10-day suspension to removal	Removal		19

REMARKS

1. This includes delay in reporting at the scheduled starting time, returning from lunch or break periods, and returning after leaving work station on official business.
   Penalty depends on length and frequency of tardiness.
   Fourth offense typically may warrant 5-day suspension to removal.

2. These penalties generally do not apply to AWOL charged for tardiness of 1/2 hour or less.
   If a technician is absent without leave having been approved, it is appropriate that the time be recorded as AWOL and later changed to an approved leave category only when the approving authority determines that extenuating circumstances were such that the absence is improperly charged to AWOL.
   This offense includes leaving the work station without permission.
   Penalty depends or length and frequency of absences.
   Removal may be appropriate for a first or second offense if the absence is prolonged.

3. "Persons" includes "self".
   Penalty depends on seriousness of injury or potential injury and extent or potential extent of damages to property.

4. Actions involving this offense must be reviewed to insure the requirements of the Technician Assistance Program are met.

5. This offense includes falsifying information on a time card, leave form, travel voucher, or other document pertaining to entitlement.

6. Removal is warranted when selection was based on falsified SF 171 where falsification was intentional or where the technician occupies a position involved in money matters..

7. This offense includes perjury, making false sworn statements, and lying to supervisor.

8. In deciding whether statements are threats, consider the reactions and apprehensions of listeners, the wording of the statements, the speaker's intent and the attendant circumstances.
   In selecting penalty, consider such factors as provocation, extent of injuries, whether actions were defensive or offensive in nature, or whether actions where directed at a supervisor.

9. In selecting penalty, consider how severely work is disrupted.

10. Penalty should be exceeded if conduct was directed to a supervisor.

11. Penalty for fourth offense within 1-year may be 15-day suspension to removal.

12. In selecting the penalty consider the value of the property or amounts of technician time involved and the nature of the position held by the offending technician which may dictate a higher standard of conduct.

13. In accordance with 31 U.S.C. 638a(c)(2), penalty can not be less than 30 day suspension.

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14. Penalty dictated by 18 U.S.C. 2071.

15. A "just financial obligation" is one acknowledged by the technician, reduced to judgement by a court, or imposed by law. In a "proper and timely manner" means in a way that shows good faith and a real effort to meet the obligation.
Action should not be taken unless management can establish a clear link between the efficiency of the service and the technician's debt.
Suspension is not recommended.

16. Sexual Harassment - Influencing, offering to influence, or threatening the career, pay, job, or work assignment of another person in exchange for sexual favors; or deliberate or repeated offensive comments, gestures, or physical contact of a sexual nature.
Appropriate penalty depends on the facts in a given case weighed against National Guard policy that sexual harassment will not be tolerated.
Where conduct created a hostile or offensive work environment removal is warranted for a first offense.

17. If a subordinate is involved see Offense #19 b.
If a superior is involved see Offense #8 (Insubordination).

18. Includes failure to prevent or curtail discrimination of a subordinate when the supervisor knew or should have known of the discrimination.
Appropriate penalty depends on the facts in a given case weighed against National Guard policy that discrimination is prohibited.

19, DOD Directive 5500.7 contain exceptions to this general prohibition of accepting gratuities.

Users of this publication are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) to NGB-TN, 5600 Columbia Pike, Falls Church, VA 22041-5125

BY ORDER OF THE SECRETARIES OF THE ARMY AND AIR FORCE:

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