

New Article 45

Old Article 39B

Disciplinary/Adverse Actions

39.1 Definition

~~This Article covers Adverse actions are defined as~~ removals, suspensions, reductions-in-grade or pay, or furloughs for 30 calendar days or less which are taken to promote the efficiency of the service. Some adverse actions are disciplinary while others are not. The procedures set forth below will be used to effect both disciplinary and non-disciplinary adverse actions. ~~Additionally, procedures are provided below to effect letters of reprimand and memoranda of admonishment which, although disciplinary actions, are not adverse actions as defined in 5 U.S.C Chapter 75.~~

39.2 Exclusions

The provisions of this Article do not apply to:

39.2.1 adverse actions taken against an employee who is serving a probationary or trial period under an initial appointment or a temporary employee (see Article 6);

39.2.2 suspension or removal under Section 7532 of 5 U.S.C.;

39.2.3 any action initiated under Sections 1215 and 7521 of 5 U.S.C.;

39.2.4 a reduction-in-force action;

39.2.5 a reduction in grade or removal under Chapter 4303, 5 U.S.C.;

39.2.6 emergency suspensions; or

39.2.7 disciplinary actions covered under Article 39A (suspensions of 14 days or less, letters of reprimand or memorandum of admonishment), oral or written counseling (~~O~~oral or written counseling is not considered discipline or an adverse action, and is therefore not covered under this article. Although not covered by this article, such counseling may be considered when taking action under this article.).

39.3 Progressive Discipline

The parties recognize that disciplinary actions should normally be progressive in nature if they are to correct an offending employee. However, discipline need not follow any specific sequence. Major offenses may be cause for severe action, including removal,

irrespective of whether previous discipline had been taken against the offending employee. Consistent with applicable law, in deciding what adverse action may be appropriate, the Agency will give due consideration to the relevance of an aggravating and/or mitigating circumstances. The following factors, included herein for purposes of illustration, are meant to be neither exhaustive nor mechanically applied by management in exercising its discretion to selecting the appropriate penalty:

1. The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical and inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2. The employee's job level and type of employment including fiduciary role, contacts with the public, and prominence of the position;
3. The employee's past disciplinary record;
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the Employer's confidence in the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. The notoriety of the offense or its impact upon the reputation of the Employer;
8. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
9. Potential for the employee's rehabilitation;
10. 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 the others involved in the matter; and
11. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

39.4 Copies of ~~Evidence~~ Documents

An employee who is the subject of an ~~disciplinary~~/adverse action under this Article Sections 39.7 and 39.8 below will be furnished a copy of the materials relied upon to support the reasons for the proposed disciplinary action.

39.5 Favorable Information in Investigative Reports

If the proposed ~~disciplinary~~ adverse action is based on an investigative report(s), the portions of the report(s) which relate to the proposed ~~disciplinary~~ adverse action and are favorable to the employee will also be furnished to the employee ~~upon request~~.

39.6 Arbitrator Request for Documents

If it is demonstrated to an arbitrator that favorable information described in Section 39.5 can be made available but has not been furnished by the NRC, upon request of the arbitrator, the complete report will be furnished to the arbitrator for an in camera inspection, except such portions of the report which contain classified, proprietary or other information, the disclosure of which is restricted by law.

~~39.7—Notification of Suspension of 14 Days or Less~~

~~39.7.1—When the NRC proposes to take adverse action consisting of a suspension of 14 calendar days or less, the employee is entitled to:~~

~~39.7.1.1— an advance written notice of at least 15 calendar days stating the specific reasons for the proposed action;~~

~~39.7.1.2— reasonable time; but no less than 7 calendar days from receipt of the advance written notice to answer orally or in writing and to furnish affidavits and/or other documentary evidence in support of the answer;~~

~~39.7.1.3— a copy of the materials relied upon to support the reasons for the proposed suspension;~~

~~39.7.1.4— be represented by an attorney or other representative;~~

~~39.7.1.5— a reasonable amount of official time to prepare and present his or her oral and/or written response; and~~

~~39.7.1.6— a written decision and the specific reasons therefore at the earliest practicable date.~~

~~39.7.2— Where an employee chooses to make an oral reply, the reply will be heard by an official or designee at a higher level than the one who proposed the action.~~

~~39.7.3— The final decision in any action covered by this Section must be made by a higher level official or designee other than the one who proposed the action. The final decision letter will contain the specific reasons for the decision and will be issued at the earliest practicable date after receipt of the employee's oral and/or written reply or after the date that such reply would have been due. The decision shall inform the employee of his/her appeal rights.~~

~~39.7.4— The NRC shall prepare a summary of any oral reply. The employee will be provided a copy of the summary.~~

~~39.7.5— In arriving at his/her written decision the deciding official shall consider only the reasons specified in the notice of proposed action and shall consider any reply of the employee or his or her representative. If, in arriving at his/her decision, the deciding~~

~~official considers and intends to rely upon documents no previously known or relied upon by the proposing official, those documents must be given to the employee prior to issuance of the decision. The employee will be permitted a reasonable amount of time to review and respond to this material. Alternatively, management may choose to repropose an action. The deciding official shall deliver the notice of decision to the employee at or before the time the action will be effective.~~

~~39.7.6 The decision of the deciding official may be appealed by NTEU pursuant to Article 52, "Arbitration Procedures."~~

~~39.78~~ Notification of Other Adverse Actions Procedures

When the NRC proposes to take an action covered by this Article, ~~furlough an employee for 30 calendar days or less or to take an adverse action other than a suspension for 14 calendar days or less~~—an employee against whom such an action is proposed is entitled to:

39.~~78~~.1 An advance written notice of at least 30 calendar days (unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed) stating the specific reasons for the proposed action and providing the employee with a copy of the materials relied upon to support the reasons in the notice of proposed ~~disciplinary~~ adverse action.

39.~~78~~.2 A reasonable time, but not less than 7 calendar days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer.

The employee shall be provided with a reasonable amount of ~~official~~ duty time to prepare and present his/her oral and/or written response.

39.~~78~~.3 Be represented by an attorney or other representative:

39.~~78~~.3.1 NRC may disallow as an employee's representative an individual whose activities as a representative would cause a conflict of interest or position.

39.~~78~~.3.2 The rights of the Union under this Agreement shall not be construed to preclude an employee from:

- (a) being represented by an attorney or other representative, other than a Union representative of the person's own choosing; or
- (b) exercising appellate rights established by law, rule, or regulation.

39.~~78~~.4 A written decision and the specific reasons therefore at the earliest practicable date. The decision shall inform the employee of his/her appeal rights.

39.78.5 Where an employee chooses to make an oral reply, the reply will be heard by a higher level official or designee other than the one who proposed the action who will have the authority either to make or recommend a final decision on the proposed action.

39.78.6 The final decision in any action covered by Section 39.8 must be made by a higher level official or designee other than the one who proposed the action, except that if the proposing official is at the Office Director or higher, the decision may be made by another official at the same level or higher. The final decision letter will contain the specific reasons for the decision and will be issued at the earliest practicable date after receipt of the employee's oral reply and/or written reply or after the date that such reply would have been due.

39.78.7 The NRC shall make a verbatim transcript for any oral reply under Section 39.78. The employee will be provided a copy of the transcript in those cases where the employee represents him/herself. In those cases where the Union serves as representative, the Union rather than the employee will be provided the copy of the transcript.

39.78.8 In arriving at his/her written decision the deciding official shall consider only the reasons specified in the notice of proposed action and shall consider any reply of the employee or his/her representative. If, in arriving at his/her decision, the deciding official considers and intends to rely upon documents not previously known or relied upon by the proposing official, those documents must be given to the employee prior to issuance of the decision. The employee will be permitted a reasonable amount of time to review and respond to this material. Alternatively, management may choose to re-propose an action. The deciding official shall deliver the notice of decision to the employee at or before the time the action will be effective; the notice shall advise the employee of his/her appeal rights, which includes an appeal by NTEU pursuant to Article 52, "Arbitration Procedures," as specified in 39.8.9 below.

39.78.9 A non-preference eligible employee against whom an adverse action decision has been issued under the terms of Section 39.8 of this Article, who has two years of creditable service, may appeal the decision to the Merit Systems Protection Board, when appropriate, or may, with the consent of NTEU, appeal pursuant to Article 52, Arbitration Procedures, or any other procedure available under law.

A preference eligible employee against whom an adverse action decision has been issued under the terms of Section 39.8 of this Article, who has one year of creditable service, may appeal the decision to the Merit Systems Protection Board, when appropriate, or may, with the consent of NTEU, appeal pursuant to Article 52, Arbitration Procedures, or any other procedure available under law.

39.89 Copies

An employee ~~affected by Section 39.7 or 39.8~~ shall be provided a second two copies of the notice of proposed action, and the final decision to be provided to his or her representative.

~~39.10 Reprimands or Admonishments~~

~~39.10.1 — A letter of reprimand may remain in an employee's official personnel folder for not more than 2 years from the date of the misconduct. Memoranda of admonishment may remain in an employee's official personnel folder for not more than 6 months from the date of the misconduct.~~

~~39.10.2 — A letter of reprimand or a memorandum of admonishment may be cited by management in the context of progressive discipline without regard to the time limits stated in Section 39.10.1. Although the reprimand or admonishment is removed from the employee's Official Personnel Folder, the agency, pursuant to applicable law, will retain the letter and related documentation in the official case file maintained by the Office of Human Resources. The agency may use this case file information when considering future discipline. An employee may request to review the contents of this case file in accordance with applicable law and regulation.~~

~~39.10.3 — An employee receiving a reprimand or admonishment will, upon request, be provided the material which is relied upon to support the reasons for the reprimand or admonishment.~~

~~39.10.4 — An admonishment or reprimand may be appealed only by filing a grievance pursuant to Article 51, "Grievance Procedures," of this agreement.~~

~~39.11 Assessment~~

39.9 Information

Every six months, the Agency will provide the NTEU Chapter President with a sanitized list describing bargaining unit adverse action cases that were closed during the previous six months and the penalties that were imposed.

~~Every six months, the Chief, Labor Relations or designee and NTEU representative(s) will meet to discuss bargaining unit disciplinary cases that were closed during the previous six months and the types of penalties that were imposed.~~

39.10~~2~~ Employee Notification of No Action Taken

If management, based on its own inquiry, or based on its review of an investigative report (e.g., an IG report) provided to them, determines that no action shall be taken against the subject(s) of the inquiry or investigation, it shall advise such employee(s) of that

outcome. In this circumstance, an employee is one who had been informed that he/she is the subject of an inquiry or investigation.