

# EMPLOYEE RELATIONS NOTES

**June 2008**  
For the REE Agencies, USDA

**Employee Relations Branch (ERB), HRD, ARS**  
301-504-1355

*For management advice on issues of Employee Relations and Labor Relations, please do not hesitate to call your servicing specialist.*

All past issues of ER Notes are now on the Employee Relations Branch (ERB) webpage at <http://www.afm.ars.usda.gov/hrd/er/index.htm>

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**It's that time of year again,**



**Performance Appraisals!**

## **Performance Appraisal Cycle Ends September 30, 2008**

We are fast approaching the end of this year's Performance Appraisal cycle to coincide with the end of the fiscal year. Therefore, the rating period for non-SES employees in the Agricultural Research Service will be shorter this year and end on September 30, 2008. The new performance cycle for some employees began January 1, 2008, and will end on September 30, 2008. Other employees' new performance cycles began April 1, 2008, and will end on

September 30, 2008.

The first step of any performance cycle is to establish expectations for employees in the form of a Performance Plan. Performance Plans should be established as early in the rating cycle as possible to ensure that employees are clear about expectations. An employee must be on a 2008 Performance Plan at least 90 days before a Performance Rating can be given.

The next step in the performance cycle is the mid-year review. Mid-year reviews should be scheduled earlier than previous years. By now, supervisors should have held mid-year reviews—sometime between late April and early June 2008. Supervisors should be aware of changes in the employee’s performance during the performance cycle and discuss these issues with the employee. Supervisors are advised to document any progress reviews or conduct counseling sessions if there are performance issues. Providing regular feedback and documenting counseling are effective tools in improving an individual and organizational effectiveness in meeting Agency mission and goals.

The final step in the performance cycle is the performance rating. Employees who have been in their positions and under performance standards for 90 calendar days or more are ratable and must receive an appraisal using the AD-435P, “Performance Appraisal.” If an employee has not been covered under standards for the minimum appraisal period of 90 calendar days, the appraisal period for that employee should be extended to meet the 90-day requirement, at which time the employee must receive a rating of record. In order to effectively assist an employee who receives a less than “Fully Successful” summary rating, supervisors should contact their servicing Employee Relations Specialist immediately upon making that determination. A written supervisory justification must be prepared when a rating of “Unacceptable” is given.

**Deborah Rodriguez, ER Specialist**

## **Off-Duty Misconduct and the Federal Employee**



**So You Think You’re EXEMPT from Off-Duty Misconduct? Absolutely Not True!**

Disciplinary or adverse action can be implemented if the agency can prove a nexus or “connection” between the off-duty misconduct and the employee’s position. The Merit Systems Protection Board (MPSB) has 3 methods in which a “nexus” can be proven.

1. Claim that there is a nexus between a serious act of off-duty misconduct and continued efficiency of the Service.
2. Show that the misconduct itself affected the employee's performance and/or trust and confidence in the employee's performance.
3. Show that the misconduct interfered with the agency's mission.

Additionally, the level of the employee's job position can determine the degree or weight of the penalty placed on an off-duty misconduct noted in the Douglas Factors. Higher penalties can be placed on positions such as, but not limited to, Supervisors, Managers, Law Enforcement Officials, etc. These specific positions are subject to stricter penalties because they have a high degree of trust and independence to an agency and to the public. Misconduct in these positions are generally highly visible and widely known; therefore, a higher penalty is charged. Widely known includes any misconduct that: (a) conflicts with co-workers' work performance, or (b) if an agency employee is publically identified, reduces trust factors.

A prime example of stricter treatment of high-level officials being charged or convicted with criminal trespass is found in the *Negron v. Department of Justice case (95 MSPR 561)*. A corrections officer was removed after he trespassed and had a criminal mischief encounter while off duty. The officer failed to cooperate when asked to supply appropriate documentation during his arrest. The officer also provided false documents that were relevant to the investigation. Law Enforcement Officers are held to a higher standard of conduct; therefore, the court upheld his removal. The nexus occurred when the officer refused to provide the proper documentation which is common procedure for an employee arrest. "The relationship between the employee's misconduct and the employee's position is an important consideration which must be analyzed as part of the penalty determination."

Once a nexus is proven, it can result in a termination or removal of the employee, if the off-duty misconduct corrupts trust or degrades the agency's mission under 5 United States Code (USC) 7513(a). Management also has the option of placing an employee on an indefinite suspension. An indefinite suspension can be implemented while a pending investigation occurs. The agency must have a reasonable cause to believe that the employee has committed a crime with potential imprisonment. It is important to know that once the investigation is resolved, the SUSPENSION should be TERMINATED and a decision must be made on the employee's future with the agency.

Please remember that off-duty misconduct cases can be so distinctive that there are no similar cases where action has been taken. Please feel free to contact your servicing ER Specialist for further information.

**Janelle Davis, HR Assistant**

## What do I do, when my employee gets sick?

Every employee fears it, and every Supervisor cringes at the thought of it--illness! It is something that may plague any one of us, and every Supervisor needs to know what resources are available should the situation arise.

If an employee approaches you about an illness or medical condition that requires extensive leave, don't panic. There are many resources in the Agency to assist both you and the employee. You should assess how long the employee will be out of the office, what options are available if they do not have enough accrued leave, and who can cover their work while out. Business must continue during the employee's illness, so you must create a strategy that supports both the employee and the mission of the agency.

If the condition is chronic and requires frequent or prolonged absence, contact the Pay and Leave Team. Pay and Leave can explain leave options for the employee, to include the Family Medical Leave Act (FMLA) and the Leave Donor Program. The employee's condition may allow them to attend work, but not perform all functions of their job without assistance. If this occurs, the employee may need an accommodation in performing the essential functions of their job. If the employee requests a medical accommodation, he should complete Form-REE 172, "Reasonable Accommodation Request," and submit it to the Disability Program Manager, Mary Ward. Additionally, employees may contact the TARGET Center for an evaluation of their available services for medical accommodation. For example, if the employee has vision impairment, the TARGET Center may be able to provide an enlarged computer screen, magnifying software, or some other assistance to enhance the employee's ability to view their work. The TARGET Center staff is eager to assist employees who request accommodations to perform their job, and can be reached at 202-720-2600.

The key components to dealing with an illness are communication and knowing what is available to you in the agency. You and the employee should discuss leave options, accommodations, and the likelihood of their return to the office. Your local Employee Relations Specialist is available to assist you and the employee in locating agency services and programs to address the employee's illness.



**Leslie Terry, ER Specialist**

## Hatch Act Compliance

Rules governing political activities in the Federal sector appear both simple and complex and can be violated both unintentionally and unwittingly. Violations can carry stiff penalties. The Hatch Act Reform Amendments of 1993 broadly permit covered employees to take an active part in political management or in political campaigns on their *own personal time and away from the worksite*. Some of the political activities in which covered employees may participate include: working the polls, distributing literature, participating in “get-out-the-vote” drives, and signing nominating petitions. Some general prohibited political activities include: soliciting, accepting, or receiving volunteer services from a subordinate for any political purpose; engaging in political activity while using any Government-owned or leased vehicle or while using a private vehicle in the discharge of official duties; or using your official title while participating in any political activity. Serious violations of the Hatch Act generally involve fundraising or campaigning while on official duty. However, since e-mail has become a favorite tool for communication, political discussion via e-mail is an activity that can result in serious violations as well. Keep in mind that the use of Government e-mail for nonwork-related purposes on duty is also governed by Federal regulations contained within Title 5, Code of Federal Regulations (CFR) 2635.704(d). Determinations as to whether use of e-mail violates the provisions of the Hatch Act must be reviewed on a case-by-case basis. If you have specific concerns about political activities, we strongly encourage you to contact your headquarters USDA Office of Ethics for guidance on issues surrounding political activities at (301)504-4414 or the website at [www.afm.ars.usda.gov/hrd/ethics](http://www.afm.ars.usda.gov/hrd/ethics).



Deborah Rodriguez, ER Specialist

## Progressive Discipline

### *Progressive Discipline*

Progressive discipline is a process for dealing with job-related behavior that does not meet expected and communicated standards. The primary purpose for progressive discipline is to assist the employee to correct a conduct problem that adversely affects or interferes with the efficiency of the organization. Progressive discipline catches an employee's attention, and when effective, helps the employee improve some aspect of his or her work.

*So how do you decide what to do?*

## 1. **Make it clear.**

When proving progressive discipline, you should be able to show that the employee was given clarity of notice on the consequences of the conduct.

## 2. **Embrace progressive discipline**

Unless a first offense is serious and clearly warrants immediate removal, you should use progressive discipline to address an employee's misconduct. If there is progressive discipline on record (i.e. short suspension, long suspension), it is more likely that a removal will be upheld on appeal.

### *Guidelines on progressive disciplinary/corrective action*

The Progressive Disciplinary/Corrective Action Process refers to the following steps:

#### **Conduct:**

- **Verbal warning**- Follow up with an e-mail to document the verbal counseling.
- **Written warning**- Supervisors must consult with their Employee Relations Specialist for counseling and advice on this step.
- **Reprimand**- Kept in the personnel file for up to 2 years (as short as 6 months or shorter).
- **Suspension**- 14 days or less is grievable. Anything 15 days or greater is eligible for a MSPB appeal. This can be paid or unpaid time off.
- **Removal**- This happens in extreme cases after multiple suspensions have been exhausted and no other option is available.

Depending on the situation, any step may be repeated, omitted, or taken out of sequence. Each case is considered on an individual basis by the department/ branch.

- For any disciplinary/corrective action, there should be clear and direct communication between the employee and his/her immediate supervisor (or other official issuing the corrective action). This communication should include a meeting between the employee and the supervisor to discuss the nature of the problem and how it affects the department's operations. During the meeting, the supervisor should make it clear to the employee that there are specific conduct expectations he/she has failed to meet, and a disciplinary/corrective action is being issued. It should also be clearly established that the employee must work on correcting the problem to avoid future progressive actions.
- For all employees, disciplinary/corrective action steps should be documented. The documentation of the action should be signed and dated by the employee and the supervisor initiating the action. A copy of the corrective action documentation should be given to the employee.
- The employee's signature on the documentation of corrective action does not indicate agreement with the action taken; it acknowledges receipt of the corrective action. If the

employee refuses to sign the corrective action, it should be noted by the supervisor that a copy was given to the employee but he/she refused to sign.

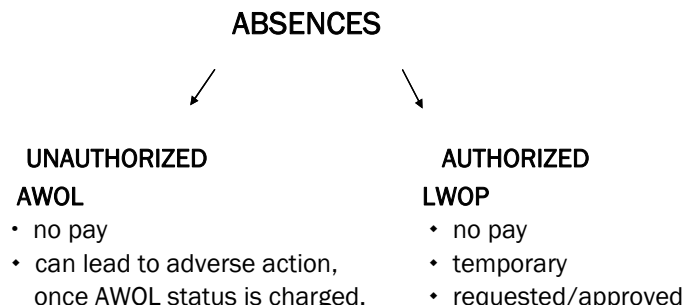
- Corrective action should be taken within a timeframe that will allow for a positive change in the employee's conduct or work performance.
- The progressive corrective action process should be handled consistently within each unit and for each problem.

*\*\*\*In the case of serious infraction, an employee may be suspended and/or removed on the first offense.\*\*\**

**Supervisors initiating corrective action should first consult with their Employee Relations specialist for guidance or advice regarding disciplinary/corrective action.**

**Yemi Oyemade, ER Specialist**

## **AWOL vs. LWOP, what's the difference?**



The Government has two categories of absences: authorized and unauthorized. Absence Without Leave (*AWOL*) refers to unplanned and unexcused absence. *AWOL* is an absence from duty without pay, but unlike Leave Without Pay (*LWOP*), it is **NOT** an authorized absence.

Recording an absence as *AWOL* is not a disciplinary action in and of itself. However, when an employee is absent from duty without prior approval, that absence may be the basis for initiating adverse action where discipline is appropriate. The Merit Systems Protection Board and the courts have held that an employee's absence, by its very nature, adversely affects an agency's ability to accomplish its mission, thereby recognizing that there is a nexus between the employee's absence and the efficiency of the Service.

When using *AWOL* as a basis for discipline, you must first prove two things: 1) that the employee was indeed absent; and 2) that the absence was not authorized, or a request for leave was properly denied. For example, *AWOL* is the proper charge when an employee is ordered to another worksite, but instead reports to his regular worksite. Another example is when an employee has been notified that he/she must either provide a medical certificate for any sick leave request or report daily during an absence, and the employee fails to meet these requirements; the absence will be charged as *AWOL*. It is important to note that before you

charge AWOL, you must first take the administrative action of recording an AWOL entry on the employee's Time and Attendance (T&A) record. AWOL can be charged in fractions of hour, i.e., 15 minutes increments. Furthermore, when charging AWOL, a supervisor must always show that someone else was required to do the AWOL employee's work or that productivity was lost.

LWOP, on the other hand, is a temporary, non-pay absence from duty that is requested to and approved by a supervisor. It allows an employee to remain on the rolls without pay while absent from work. Granting LWOP is a matter of administrative discretion; it is not routinely granted, except in the following situations:

- Disabled veterans who are receiving treatment for service-connected injuries are allowed LWOP.
- An employee waiting on disability retirement application when sick leave expires is placed on LWOP.
- Military reservists who have orders for training are given LWOP.

LWOP is usually not a matter of employee right. **When does LWOP become an employee right?** When an employee invokes his/her entitlement to the Family Medical Leave Act (FMLA), then agencies must grant up to 12 weeks a year of LWOP for certain family and medical emergencies.

As a general rule, a supervisor's approval of LWOP precludes him or her from taking an adverse action on the basis of those absences. Exceptions to this rule exist when an employee makes excessive use of unscheduled LWOP or when an employee fails to maintain a regular work schedule. In these cases, the supervisor may place the employee on AWOL.

So, what's the difference in terms of the impact? AWOL may not be punitive on the T&A record, but it may affect the judgment of the person who evaluates the job performance of an individual with an AWOL on their record. In evaluating the terms AWOL vs. LWOP, there is no question that AWOL has a greater negative impact.

Controlling absenteeism is a major management priority and helping management do it is a significant duty of an Employee Relations Specialist. Please contact your servicing ER specialist should you need guidance and assistance regarding this matter.

**Yansi Hernandez, ER Specialist**



## What Do We Do?



**Your Employee Relations Specialist!!** We are here to work closely with you and provide advice and guidance on how best to address employee performance and conduct issues. We will help you prepare performance improvement plans, leave restriction letters, requests for medical information, proposal letters, and decision letters. We also serve as Agency Representatives before the Merit Systems Protection Board (MSPB); negotiate settlement of mediated disputes, MSPB appeals, discrimination complaints (affirmative defense in MSPB appeals), whistleblower complaints, Uniformed Services Employment and Reemployment Rights Act (USERRA) complaints, and other workplace conflicts; investigate Office of Inspector General (OIG) Hotline Complaints, prepare Reports of Investigation, and initiate through management, any remedial actions; provide analysis and final decision on formal grievances; and develop employee relations instructional material, with an emphasis on remedial and preventive action, and train all employees. Call us as soon as you suspect you may have a problem with an employee. The names of the Employee Relations Specialists, the Areas they service, and their telephone numbers and e-mail addresses are available on the ERB webpage at <http://www.afm.ars.usda.gov/hrd/er/index.htm>.

## Inside the Employee Relations Branch

The Employee Relations Branch also includes Alternative Dispute Resolution, Labor Relations, and Employee Relations Policy. These programs are administered REE-wide.

### **Alternative Dispute Resolution**

Coordinates the REE Cooperative Resolution Program (CRP), ensuring all employees are trained in the program and that mediation is offered as a means to resolve conflict. Ensures a cadre of trained mediators assigned throughout REE. For additional information, visit the REE CRP website at <http://www.afm.ars.usda.gov/programs/coopres/>.

### **Labor Relations**

Manages the Labor Relations Program, which includes contract management, negotiations, Partnerships, impact and implementation bargaining, and arbitration. Represents and serves as an advisor to management officials during union contract negotiations.

### **Employee Relations Policy**

Initiates ER policy, develops ER training and communications, adjudicates grievances, and provides investigative leadership. Provides guidance and service in preparation and presentation before MSPB.



## EMPLOYEE AND LABOR RELATIONS DIRECTORY

<u>Office of the Branch Chief:</u>	<u>Phone Number</u>	
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Frick, Pat	301-504-1450	CRP
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