

EMPLOYEE RELATIONS

And ETHICS NOTES

1st Quarter 2006
For the REE Agencies, USDA

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

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

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New Look

Beginning with this quarter, our newsletter will be formatted differently. Our intent is to cover one or two topics extensively so it will be easier for you to refer back to a newsletter when you are looking for information. We want it to be reader friendly, though, and will be covering the main points through short segments by bold typing, bulleting, etc. To illustrate, each quarterly newsletter will contain:

- The main topics(s)
- Quotes of the Quarter
- Ask the Editor
- Communication Corner
- The LightER Side
- Current Case Law
- Ethical Ethics

Documentation-Document, Document, Document!



Why should I document?

- + Basis for successful discussion with your employees. Informs your employee that a problem exists and what the problem is.
- + Basis for all disciplinary and most non-disciplinary actions.
- + May demonstrate you made a good-faith attempt to rehabilitate your employee.
- + Used to prepare a detailed proposal notice if you must take disciplinary action.
- + Supports management's decisions if disciplinary or adverse action is taken.
- + Used by your Employee Relations (ER) Specialist to compile an Agency file, which must be provided to the Merit Systems Protection Board (MSPB) in response to an employee appeal.
- + Can hold weight in court if your employee appeals any corrective action. The more fully a case is documented, the more likely the Agency will prevail.
- + Serves as a memory jogger, especially at a later time if you are called to testify in an appeal.

What should I include?

A good rule of thumb is to include the 4 Ws—what, when, where, and who. These address: What happened? When did it happen? Where did it happen? Who was involved? Additionally, documentation should:

- o Be legible; otherwise, the points following this one won't matter.
- o Be accurate. Don't rely on your memory, but record details as soon as possible.
- o Include specifics--full names, titles, dates, times, locations, hours of duty. "John Doe, contract negotiator, reported to work at 10 a.m. on March 1, 2006, and did not call prior to this time. His tour of duty is from 8 a.m. to 4:30 p.m. I witnessed John entering the building at 10 a.m."
- o Detail specific, **observable** behavior, such as the employee staggered, slurred words, and smelled of alcohol. Document facts, not your personal thoughts or opinions.
- o Indicate what the employee said, using actual words in quotations when possible.
- o Explain any technical processes involved, so that anyone unfamiliar with your program will understand what you're saying.
- o Be productive. Don't call the employee names, use offensive language, or make reference to a protected activity, such as EEO.
- o List witnesses present and their statements. If a witness won't provide a statement, write detailed notes of the witness' observations.
- o Cite the rules or instructions violated and how the employee should have known of the violation; for example, prior written notice, verbal instructions, or previous disciplinary action.
- o Explain the consequences, such as the impact on your time, work of other employees, or the Agency's ability to carry out its mission.
- o Show what your employee stated as an explanation and whether it's plausible or not.
- o State if your employee had any prior incidents of misconduct and include all supporting

documentation. Point out any extenuating circumstances that may be involved, including personal problems.

- Describe how your employee didn't meet the standards of his/her performance plan in performance cases. The description should include measurable performance, such as quality, quantity, timeliness, and method (following procedures, policies, technical requirements).
- Indicate whether the employee was referred to the Employee Assistance Program and how it was done.



When and how do I document?

Start early, start small—In the early stage, when you're merely trying to resolve a small problem, you don't need formal, extensive documentation. When you become aware of a minor conduct or performance issue, discuss it with your employee and document it with a quick note. It can be a handwritten note in the margin of the work product or a note on a post-it or your desk calendar. "Tom 5 minutes late," "Susie missed report deadline," etc. is enough. This informal documentation is for your own use and possible future reference. This will show you discussed the matter with your employee, and show the employee was aware of your expectations.

Next step, more detail--Be prepared to move to the next step, and that next step might be impossible without adequate documentation of your initial efforts to correct the problem. If you find a need to counsel an employee several times for similar offenses or unacceptable performance and you begin to envision disciplinary action as the only alternative, it is time to begin documenting as outlined above.

E-mail documentation can present problems. For example, e-mail messages are usually not as well thought out as traditional documentation, and they often involve long exchanges, much of which may not be related to the issue. To keep e-mail documentation effective:

- Limit the e-mail exchange to the person(s) and incident(s) involved.
- Don't include opinion or other thoughts that you don't want to share with the employee.
- If the number of e-mail messages is extensive, prepare a short summary. In a long exchange of messages, the problems can be lost or obscured.

Does the Privacy Act prevent me from keeping documentation I haven't shared with my employee?

Federal courts have upheld supervisors' rights to keep memory jogging notes about their employee's conduct and performance even without their awareness of the existence of the notes. To comply with Privacy Act requirements, however, you should avoid creating a system of records to contain the notes. This means:

- Keep all your notes about employees in one common location.
- Don't create a file for each employee.
- Each employee's name should be on the note but not on the file.

Does this mean that my employee will never be able to see my documentation?

If your employee's conduct or performance deficiencies result in a disciplinary or adverse action being taken against them, the employee will be entitled to any documentation used to support that action.

But it takes time to document!

Documenting can be a time-consuming process, but spending time on the front end will save you time and problems on the back end. And remember, as soon as you think you have a problem developing, make sure you contact your Employee Relations Specialist. If you follow the guidelines in this article, your ER Specialist will have everything necessary to help you through this, and that will save you time!

Quotes of the Quarter



“Treat people as if they were what they ought to be, and you help them become what they are capable of being.” -Johann Wolfgang von Goethe

“You can tell whether a man is clever by his answers. You can tell whether a man is wise by his questions.” -Naguib Mahfouz

Ask the Editor



Government Vehicle Misuse

Beginning with the 1st Quarter 2005 issue of Employee Relations and Ethics Notes, we informed you that prior issues and all forthcoming newsletters would be available on our HRD/ERB webpage. We even went so far as to ask for comments, suggestions, and questions for future issues and provided an e-mail address for you to do so. And we actually received a question! We did **not** tell you that if you took the time to do this, we would respond, however. And we didn't! But with our new look, we want an “Ask the Editor” section, so maybe if we respond to the last question, we'll get another one.

An avid reader asked for information regarding improper use of government-owned vehicles (GOVs), unauthorized use of GOVs, and unofficial use of GOVs. He wanted examples and possible penalties for each offense.

Deciding what charge for misuse of a GOV is a complicated process because you have to take into account not only that misconduct occurred, but whether it was intentional. Why? *Because, unlike most offenses, the intentional misuse of such vehicles requires imposition of a mandatory minimum penalty of a 30-day suspension under the provisions of 31 USC 1349 (b).* Therefore, in making such charges,

the Agency must prove not only that the vehicle was used for inappropriate, unofficial purposes, but that the misuse was intentional. Consequently, distinguishing between minor, unintentional use of a GOV from that which meets the "willful misuse" standard of the statute is more important than trying to pigeonhole the charge between "unauthorized" and "unofficial," both of which are "improper" use of a GOV. A willful violation of the statute prohibiting unofficial use of a GOV takes place if the employee voluntarily uses a GOV with knowledge of whether the use was for other than official purposes. The outcome of the following actual cases adjudicated by MSPB demonstrates the complexity of this issue.

- ❖ The Board sustained a 40-day suspension for an employee using a GOV to commute to law school in one case, yet determined it wasn't willful misuse for another employee to drive his son to day care in a GOV on several occasions in another case.
- ❖ The Board affirmed a 60-day suspension for an employee who transported an unauthorized passenger (his son) in his GOV in one case, yet determined it wasn't willful misuse for another employee to transport an unauthorized passenger (his girlfriend) in his GOV in another case.
- ❖ The Board upheld a 45-day suspension for an employee who assisted relatives who were having car trouble and who obtained lunch for them while in his GOV in one case, yet determined it wasn't willful misuse to use a GOV to pick up lunch and bring it back to the agency in another case.

In the cases above, there were obviously many other factors that contributed to the outcome of the case, but you must be extremely careful with the "willful misuse" charge. You should only use that charge if you can prove that the employee voluntarily used the car with full knowledge that the use was not for official purposes. If you lack proof of full knowledge, but want to take a disciplinary or adverse action, you can use another charge such as those listed below. Make sure you contact your ER Specialist to assist you.

- ✓ Unauthorized deviation from your route.
- ✓ Unauthorized use of a GOV.
- ✓ Using a GOV for unapproved use.
- ✓ Transporting an unauthorized passenger.
- ✓ Making an unauthorized trip in a GOV.
- ✓ Making an unauthorized stop in a GOV.
- ✓ Failing to follow the most efficient route.
- ✓ Careless operation of a GOV.
- ✓ Unsafe operation of a GOV.
- ✓ Misuse of a GOV (omit "willful").





Because communication between you and your employees is so vital, we decided to include an article devoted to it in each newsletter. At this time, you should be preparing evaluations for the appraisal period ending March 31, and preparing performance plans for the appraisal period beginning April 1, for support scientists, technicians, wage grade employees, and clerical and secretarial employees. Therefore, we want to remind you of the requirements, and importance, of communication and performance. In fact, P&P 418.3, ARS Performance Appraisal System, was developed to improve communications between supervisors and employees.

This P&P states that within 30 days of the beginning of the appraisal period, supervisors will communicate performance plans to employees **in writing**. Supervisors must include employees in developing the performance plan. You may do this in one of four ways--discuss and develop the employee's performance plan together, have the employee provide a draft performance plan to you, have the employee comment on a draft performance plan prepared by you, or have a group of employees occupying similar positions prepare a performance plan with your approval.

Good supervisors recognize that evaluating and communicating performance is a continuing process and not restricted to the P&P's mandatory requirement of conducting a midyear review within 5 to 7 months of the beginning of the appraisal period. Good supervisors are alert to any change in their employee's performance and discuss it with them immediately. Good supervisors make suggestions for improvement based on examples that are fresh in their employee's mind. *Are you a good supervisor?*

Within 30 days after the end of the appraisal period, the supervisor shall discuss the rating of record with the employee. A rating of record is based only on the evaluation of actual job performance for the designated appraisal period in which an employee was under a **written** performance plan. This is why it is critical to communicate performance plans to your employees within 30 days of the beginning of the appraisal period. And remember, one measure of your success is that none of your employees are surprised by their rating of record.

The LightER Side



A husband goes home after a long day at the office and tells his wife he has a new boss. "Remember how we used to get cash bonuses, a gym membership, and a day-care subsidy?" he asks. "Sure," said his wife. "Well, today the new boss posted his incentive plan on the bulletin board. It said, 'Work or Get Fired!'"

Who Ya Gonna Call?



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 Representative before 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 listed on the ERB webpage at <http://www.afm.ars.usda.gov/hrd/operations/erb.htm>.

The Employee Relations Branch also includes Employee Relations Policy, Labor Relations, the Ethics Program, and Alternative Dispute Resolution. These programs are administered REE-wide. The names, telephone numbers, and e-mail addresses for these employees can also be found at the ERB webpage listed above.

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.

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.

Ethics Program

Manages the REE Ethics Program ensuring that all employees are in conformance with the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. 2635.

Provides advice and counsel on ethic-related issues to supervisors, managers, and employees.

Alternative Dispute Resolution

Coordinates the REE Cooperative Resolution Program 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.

Ethical Ethics



LETTERS OF RECOMMENDATION

Employees may write letters of recommendation using their official title and letterhead if they are responding to a request from an individual who seeks an employment recommendation or character reference if: the individual being recommended is seeking Federal employment, **OR** the USDA employee has dealt with the individual being recommended in the course of Federal employment **AND** the USDA employee has personal knowledge of the ability or character of the individual making the request. Employees are prohibited from using their public office for their own private gain; for the endorsement of any product, service, or enterprise; or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations.

<u>OFFICIAL TITLE AND LETTERHEAD MAY BE USED</u>	<u>OFFICIAL TITLE AND LETTERHEAD MAY NOT BE USED TO:</u>
<p>TO: </p> <ul style="list-style-type: none">○ Write a letter recommending an individual seeking to work for USDA or another Government agency;○ Write a letter of recommendation for a person who is applying to a potential non-Federal employer <u>only</u> if the supervisor determines that responding to such a request is part of the USDA employee's official duties;○ Provide a university with a statement concerning an evaluation of the professional	<p>USED TO: </p> <ul style="list-style-type: none">○ Write a letter recommending a relative or personal friend, or a person with whom you are affiliated in a nongovernmental capacity;○ Write a letter recommending a grant applicant in support of a grant application to the USDA or another Federal agency;○ Write a letter recommending a federal contractor, vendor, or supplier of goods or services. <i>Note: employees may "officially" write about a contractor's progress/</i>

<p>qualifications of a university tenure candidate if: (1) the university requests it, and (2) the USDA employee expresses a factual evaluation of the candidate's credentials based upon observations that the USDA employee made during their official duties. <i>Note: the statement must avoid language making a tenure "recommendation."</i></p>	<p><i>performance in the course of an official evaluation of the contract, but may not recommend that others use the vendor's services;</i></p> <ul style="list-style-type: none"> ○ Write a letter of recommendation for a non-citizen in support of a visa or green card, unless the request is made officially from one Government agency to another.
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For additional information, visit the REE Ethics website @ <http://www.afm.ars.usda.gov/hrd/ethics/index.htm> or contact the REE Ethics Office or your Agency/Area Ethics Advisor.

<p>ER and Ethics Notes Chief: Vicki Hanbury, ERB, HRD Contributors to this issue: Clarice Carter, Ethics Advisor Editor: Paula Rollow, ER Specialist</p>
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