

Labor Relations

Discipline and Adverse Actions

FOR THE GOVERNOR:

WILLIAM H. WADE II
Major General
The Adjutant General

OFFICIAL:

STUART D. EWING
Captain, CA ANG
Human Resources Officer



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Applicability. California National Guard Full-time Personnel Regulation (CNGFPR) applies to all California Army and Air National Guard technicians and to commanders, managers and supervisors (military or civilian) with authority or responsibility over technician personnel management.

Proponent and Exception Authority. The proponent of this regulation is the Joint Force Headquarters, J-1, Directorate for Human Resources. The proponent has authority to approve exceptions to this regulation when they are consistent with controlling laws and regulations.

Supplementation. Supplementation of this regulation is prohibited.

Suggested Improvements. Users of this regulation are invited to send comments and suggested improvements to Joint Force Headquarters, Directorate for Human Resources, 9800 Goethe Road, Sacramento, CA 95826-9101.

Distribution. Distribution of the regulation is Army - A and Air Force - F.

History. None

Summary of Changes. This regulation reiterates existing policies and procedures for handling discipline and adverse actions affecting California National Guard technicians. This FPR is to be used in conjunction with the National Guard Bureau TPR 752. It replaces the Technician Personnel Manual, dated March 2000, Chapter 7. This regulation also replaces any Technician AGR Administrative

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1. Purpose.

This regulation provides the California National Guard (CNG) policy and procedure for implementing Technician Personnel Regulation (TPR) 752, Discipline and Adverse Action, published by the National Guard Bureau.

2. Objective.

The objective of this regulation is to provide instruction and information relating to the processing of conduct-related adverse actions, including but not limited to removals, suspensions, and reductions in grade; conduct-related disciplinary and non-disciplinary actions. Performance based actions are not covered by this regulation. (See CNG FPR 432 for processing performance based actions.)

3. Responsibilities.

a. The Directorate for Human Resources (HRO).

- (1) Provides guidance and direction to all managers and supervisors on disciplinary responsibilities, rights and obligations.
- (2) Assists supervisors and managers with the procedural aspects of an action before issuance of a proposed adverse action or original decision.
- (3) Provides necessary training to managers and supervisors on the subject of this regulation.
- (4) Represents and/or advises The Adjutant General (TAG) or TAG representative in disciplinary and adverse actions cases.
- (5) Provides general and procedural guidance and case information to the effected technicians.
- (6) Consults with the Judge Advocate Office.
- (7) Maintains the official adverse action case file.

b. Supervisor or Manager.

- (1) Ensures that misconduct and deficiencies are addressed as they surface and initiates the appropriate progressive discipline step(s) in a timely manner.
- (2) Must insure the provisions of their respective Collective Bargaining Agreement (CBA) are followed prior to initiating any disciplinary or adverse action.
- (3) Ensure that no adverse action is taken without prior approval from the HRO.
- (4) Are responsible for providing the required documentation to process an adverse action, including but not limited to, pencil-annotated (initialed by both supervisor and technician) NGB 904-1 entries, time and attendance (T&A) sheets, doctor’s notes/medical certifications, witness statements, photos, accident/investigation reports, etc.

(5) May act as the proposing official for all adverse actions for whom they are in the line of supervision.

(6) May issue an oral admonishment to a technician without prior HRO consultation.

c. Commander or Director.

(1) Will ensure that all technicians in their organizational units are fully informed of applicable laws, rules and regulations governing acceptable behavior and conduct.

(2) May act as the deciding official for all adverse actions proposed at a lower level within their organization or directorate. As the deciding official, the commander or director may uphold, mitigate, or overturn the proposed adverse action. The deciding official may not, however, increase the proposed adverse action penalty.

d. Technicians.

(1) Must comply with the laws, rules, regulations, and ethical standards governing the conduct of Federal technicians.

(2) Must conduct themselves, on and off duty, in a manner consistent with federal laws, rules, and regulations and California National Guard policies regarding ethical conduct.

(3) Must respond to charge(s) within the time period allowed.

(4) May initiate an appeal.

4. Non-Disciplinary Actions.

a. Counseling and Warning.

(1) Counseling a technician is not a disciplinary action. Positive and constructive counseling can normally resolve a problem without the need for disciplinary or adverse action. Counseling is a private matter between a technician and the supervisor and has the specific purpose of improving the technician's conduct or knowledge of a particular subject. Simply conveying information or describing a procedure does not constitute a counseling or warning. A counseling session will be annotated in pencil and initialed by both the supervisor and the technician on NGB Form 904-1.

(2) A warning is a private matter between the technician and the supervisor and is not a disciplinary action. Unlike counseling, a warning has a more serious intent because along with a professional exchange of information, a warning conveys the message that a disciplinary or adverse action may result if the problem is not corrected. A warning will be annotated in pencil and initialed by both the supervisor and technician on NGB Form 904-1 or the automated supervisor's brief.

(3) Supervisors may counsel or warn a technician without consulting the HRO. Unless it is so stipulated in the CBA, counseling or warning a technician does not require notice to the union or the right to union representation at the time the counseling or warning is given. The technician should be advised the annotation on NGB Form 904-1 or the supervisor's brief will remain until the supervisor determines it is no longer required or relevant to a continuing or recurring problem. It is recommended that counselings and warnings be maintained for 6 to 12 months, unless there are recurring problems. The annotation will be removed from the NGB Form 904-1 or supervisor's brief by lining through the penciled entry and with initials and date. Refer to applicable collective bargaining agreements concerning requirements for counselings and warnings.

(4) Counseling and warnings serve the purpose of informing the technician of minor performance/conduct deficiencies where extensive fact gathering is not required. The goal is improvement of these minor deficiencies. Supervisors and managers should not confuse a counseling or warning with an *investigative* meeting. An investigative meeting does involve a technician's Weingarten rights (if requested) and requires the technician to formally answer questions with one or more supervisors or management officials present.

(5) Discipline does not commence until actual notice of the discipline is served on the technician (e.g., written reprimand). At that point, the technician should be aware of any applicable appeal rights and may elect union representation. Unless the CBA so stipulates, supervisors do not have to notify technicians of their Weingarten rights prior to initiating any type of disciplinary action.

b. Supervisors and managers should not confuse a counseling or warning with an **investigative meeting**. An investigative meeting **does** implicate a technician's Weingarten right (if requested) and requires the technician to formally answer questions with one or more supervisors or management officials present.

5. Disciplinary Actions.

a. Oral Admonishment.

(1) An oral admonishment is a disciplinary action that notifies a technician to stop a certain course of action or commence a certain course of action as required by the technician's position or chain of command directive. Supervisors may orally admonish a technician without consulting the HRO.

(2) Oral admonishments should take place as quickly as possible, in as private an environment as possible, and in the form of appropriate feedback necessary to correct the technician.

(3) During an oral admonishment, a supervisor must ensure that all relevant facts are raised, especially if there had been no previous counselings or warnings. This is best done by first discussing the facts with the technician and allowing for the technician's input and explanation. The supervisor takes whatever time is necessary to decide if an oral admonishment is appropriate. If warranted, the technician is then orally admonished; if not warranted, the supervisor informs the technician the issue has been resolved without the need for further disciplinary action.

(4) The technician will be advised that the annotation on the NGB Form 904-1 will remain until the supervisor determines it is no longer relevant or necessary. However, supervisors should create a timeline for removal of the annotation if the problem has been corrected. The annotation will be removed by lining through, initialing, and dating the entry. No further reference will be made regarding the admonishment.

(5) **Collective bargaining agreements may contain additional procedures/requirements and should be thoroughly reviewed before orally admonishing a technician.**

b. Letter of Reprimand (LOR).

(1) **A letter of reprimand must be cleared for procedural accuracy by the HRO prior to issuance.**

(2) A letter of reprimand is a disciplinary action that makes the technician aware of a violation (e.g., improper conduct, violation of agency rules, etc.).

(3) A letter of reprimand is normally issued when counseling has not proven effective or the misconduct warrants disciplinary action. It can also be used when the nature of the violation warrants more than a counseling, warning, or an oral admonishment but does not warrant an adverse action.

(4) The letter of reprimand is normally issued by the supervisor, but may be issued by any higher-level supervisor (in the chain of command) with a copy furnished to the first level supervisor.

(5) The supervisor must ensure all relevant facts are obtained and reviewed concerning the incident or conduct involved. This is best accomplished by discussing the facts with the technician and allowing for the technician's input and explanation. The supervisor takes whatever time is required to decide if a letter of reprimand is appropriate. **Collective bargaining agreements may contain additional procedures/requirements and should be thoroughly reviewed.**

(6) Once the decision has been made to issue a letter of reprimand, the technician should be informed of such as soon as possible.

(7) A letter of reprimand must, as a minimum, include:

(a) A description of 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.

(b) A notice to the technician of the timeframe the reprimand will remain in effect in the Official Personnel Folder (OPF). Typically, the minimum period is one year and the maximum period is three years. It is recommended that a reprimand remain in effect for one year.

(c) Include a warning that further offenses could result in more severe disciplinary measures being initiated.

(d) A notice to the technician, that the reprimand may be grievable through the appropriate negotiated grievance system. However, as a result of appealing an adverse action, TAG's final decision reduces the penalty to a letter of reprimand, that letter of reprimand is not grievable.

(8) 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 must also be removed from the supervisor's file and related annotations deleted from NGB Form 904-1.

6. Adverse Actions.

a. The reason for taking an adverse action is commonly referred to as a "for cause" and is defined as "an offense against the employer-employee relationship". What constitutes "cause" is a decision that is made on the merits of each situation.

b. Management must support its reasons for the adverse action with a "preponderance of the evidence", meaning what a reasonable person would conclude as "more likely true than not true" when the record as a whole is weighed. Thus, the evidence in favor of the action must be found by the deciding official, Hearing Examiner, or TAG, to be "more likely true" than the opposing evidence.

c. Management has a responsibility when contemplating adverse action to consider any mitigating or aggravating factors regarding penalty selection. For example, the technician's length of service, prior offenses of record, seriousness of the offense, conformity with the table of penalties.

d. When a "cause" involves off-duty misconduct, management must establish a relationship or connection, often referred to as nexus, between the misconduct and the efficiency of the service (i.e., the employee's ability to

perform the duties of the job and/or the agency's to fulfill its mission). Off-duty misconduct that brings or could bring discredit to the California National Guard or impedes the accomplishment of the mission of the California National Guard is considered "cause" and may warrant adverse action.

e. There are three types of adverse actions which may be taken against a California National Guard technician:

(1) Suspension. An action which places a technician, for disciplinary reasons, in a temporary status without duties and pay. A suspension, regardless of duration, is an adverse action and considered a severe disciplinary action.

(2) Change to Lower Grade. An adverse action that demotes a technician to a lower grade either by redesigning the current position or by moving the technician to a different lower-graded position.

(3) Removal. An involuntary separation of a technician from Federal employment. It is considered the most severe adverse action penalty.

f. The procedures and protections provided in this chapter must be followed when management initiates any one or a combination of the three adverse actions.

g. The following actions do not constitute an adverse action; the procedures and protection provided in this regulation will not be applied:

(1) Actions addressed in TPR 715, Voluntary and Non-Disciplinary Actions.

(2) Performance-based actions that cover performance management in general (such as performance standards, ratings, etc.).

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

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

(5) Mandatory retirements.

(6) Denial of within-grade increases.

(7) Actions excluded by law (i.e., political activity cases, Hatch Act violations).

(8) Alleged loss or lessening of promotion potential.

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

(10) Recording absences as absence without leave (AWOL) can become the basis for initiating adverse action.

(11) Termination or reduction of entitlements that affect employee pay but do not involve any loss of base pay (e.g. night differential, hazardous duty pay, environmental differential pay).

(12) Actions that entitle technicians to grade or pay retention or actions to terminate such entitlements.

(13) Terminations of temporary or indefinite type appointments or termination of temporary promotions, details, etc. (An adverse action procedure applies when suspending temporary or indefinite technicians.)

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

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

7. Procedures.

a. Always consult the Directorate for Human Resources (HR), Labor Relations (LR), whenever considering taking an adverse action. The HR-LR provides advice in fact-finding, weighing the evidence, and penalty selection.

b. Fact finding is critical in disciplining technicians; management must demonstrate, by a preponderance of the evidence, that the misconduct or other wrongdoing occurred, that there is a rational connection, or nexus, between the misconduct or other cause of action and the "efficiency of the service."

c. The determination of which penalty to impose in a particular situation requires the application of responsible judgment. Management must observe the principle of "like penalties for like offenses in like circumstances" thereby ensuring the penalty selected does not clearly exceed the limits of reasonableness.

(1) A source of information and well-known case is *Metz v. Dept. of Treasury*. Here information regarding "threats" is provided. See Attachment A, The "Metz Factors."

(2) A well-known Merit Systems Protection Board (MSPB) case (*Douglas v. Veterans Administration*) addresses penalty selection in detail. See Attachment B, The "Douglas Factors."

(3) The suggested penalties and ranges of penalties for various offenses are contained in the Table of Penalties for Various Offenses, Attachment C. This information is a guide and is not all inclusive.

d. Factors to consider when selecting a penalty include:

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

(2) The technician's job level and type of employment.

(3) The technician's past disciplinary record.

(4) The technician's past work record, including length of service, performance, ability to get along with others, and dependability.

(5) The effect of the offense on the technician's ability to perform at a satisfactory level.

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

(7) Technician's potential for rehabilitation.

(8) 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 matter.

(9) Adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the technician or others.

e. Technician Assistance Program (EAP). When a supervisor has reasonable belief that a technician's unacceptable conduct may be caused in whole or part by personal problems, including but not limited to family issues or substance abuse, the supervisor should suggest that the technician seek assistance through the EAP. However, if the technician does seek counseling through the EAP, it does not shelter the technician from disciplinary or adverse action. A review of CNGFPR 820 will provide more detailed information regarding the EAP.

8. Technician Rights.

The technician must be notified in writing and in advance of what adverse action is proposed and the specific reason(s) for the action. The notice must inform the technician of his/her rights in connection with the action as follows:

a. The technician is entitled to review the material relied upon to support the action detailed in the proposed notice.

b. The technician is entitled to have a reasonable amount of time to answer orally and/or in writing and to furnish evidence in support of their reply.

c. The technician is entitled to have a reasonable amount of official time (up to four hours) to review the material relied upon to support the proposed adverse action and to prepare an answer.

d. The technician is entitled to be represented during the action by an attorney or other representative of their choice at their own expense.

e. The technician is entitled to a written decision stating what action will be taken (it may be the same or less than what was proposed, but not more severe) and the reasons for the action. The decision should consider the technician's reply and also show how mitigating or aggravating circumstances were considered in setting the penalty.

f. The technician has the right to appeal the original decision letter to TAG. This appeal will be for either an appellate review by TAG or an administrative hearing by a qualified hearing examiner, but not both.

9. Leave Warning/Restriction.

a. Technicians earn and may use their accrued leave with the approval of their supervisor. Should there be a reasonable belief that a technician may be abusing leave privileges, the supervisor will counsel the employee, annotate and date the NGB Form 904-1; both supervisor and employee will initial.

b. If the abuse continues, the supervisor may issue a Letter of Warning up to a Letter of Leave Restriction. (Samples at Attachment 8 and 9)

c. At the end of the stated monitoring period and if improvement has been made, a rescission letter will be issued. (Sample at Attachment 10)

10. Investigations.

Management has a responsibility to investigate the charges against the technician and/or any defense raised by the technician.

a. The procedures contained in AR 15-6 and AFI 90-301 can be used as guidance for conducting such investigations. Collective bargaining agreements may contain additional procedures/requirements (e.g., representational rights) and should be reviewed.

b. When criminal misconduct is suspected, consultation with the HRO, local, State, or Federal law enforcement officials and the Staff Judge Advocate (SJA) Office is required. If those officials decide the conduct warrants criminal investigation, management's investigation must cease. If the officials conclude there will be no criminal investigation and/or prosecution, management may proceed with its investigation.

c. Technicians (including a technician against whom action may be taken) that are being interviewed as part of an investigation should be advised that failure to disclose material facts during the inquiry may result in disciplinary or adverse action. Additionally, technicians should be advised that failure to answer an investigator's questions may be grounds for removal. However, where collective bargaining agreements so provide, these technicians shall be advised of their Weingarten rights.

d. The purpose of an investigation is to discover facts. Therefore, management may not be able to formulate the precise charge until completing its investigation. The Fifth Amendment protection against self-incrimination is not infringed upon by orders to answer questions where there is no likelihood of criminal investigation. When dealing with waivers of Fifth Amendment rights, the investigator, in conjunction with the HRO, obtains advice and assistance from the Staff Judge Advocate Office.

11. Duty Status.

a. The fact an adverse action is being processed does not in itself mean a technician should not be allowed to continue performing normal duties.

b. However, if there is reason to keep the technician away from normal duties, management may detail the technician, or if necessary, place the technician in a non-duty with pay status, known as excused (administrative) leave. There must be some event that will bring a non-duty with pay status to an end, and that event must be explained in the proposed adverse action notice.

c. When management determines the technician's presence at the work site may not be in the Government's best interest, the technician may be placed in a non-duty with pay status for the time it takes to process the action. The supervisor will seek guidance from the HRO as soon as it becomes evident it is necessary to place a technician in a non-duty with pay status, known as excused (administrative) leave. *See* 39 Comp. Gen. 203 (1958).

d. Enforced leave may be enforced by management when it is determined that a technician is not ready, willing or able to perform assigned duties; or the technician's continued presence is highly undesirable; presents an immediate threat to the him/herself, co-workers, the public or to Government property. Detailed information is contained in CNGFPR 715, page 7, paragraph 16.

d. When management finds it necessary to indefinitely suspend a technician without pay in a non-duty status, that action is an adverse action. This action requires cause, proposed notice, reply period, original decision and appeal rights. Note also that some event must be indicated on the proposed indefinite suspension notice that would bring the suspension to an end (investigation completed, fitness for duty exam completed, etc).

12. Representation.

a. The technician is permitted to be represented by a representative of their choice, unless otherwise provided by a collective bargaining agreement. A technician may request, in writing, that all communication be made with or furnished to their representative. When this choice is made, management proceeds under the premise that all communication with the representative reaches the technician.

b. TAG will adjudicate any attempt to disqualify a representative except when the challenge arises after the election of an administrative hearing. In that situation, the NGB hearing examiner will make the decision. The party seeking the disqualification has the burden of proving the challenge. Conflict of interest or positions, 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 representative.

c. Management 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.

13. Collective Bargaining Agreement (CBA).

a. Provisions of a collective bargaining agreement establish the requirements under which the organization operates. Violation of the applicable collective bargaining agreement could be prejudicial to the case.

b. Representational rights and duties apply to investigations where exclusive representation has been elected. Such rights, commonly known as Weingarten Rights, provide for union representation in situations when a technician is being questioned by a management representative and reasonably fears that disciplinary action may be taken. In accordance with 5 U.S.C. §7114(a)(2)(B), an exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented in:

“Any examination of an employee in the unit by a representative of the agency in connection with an investigation if – (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation.”

c. Unless required by the collective bargaining agreement, there is no obligation that a technician be informed of his or her right to representation at the time of the interview. The Weingarten Right arises only when invoked by the technician. The technician may waive his/her representation right.

d. In accordance with law, the agency is required to post an annual notice to bargaining unit technicians of their rights under 5 U.S.C §7114(a)(3), concerning union representation during investigations. Supervisors are responsible for briefing all technicians annually regarding their Weingarten rights.

e. Weingarten Rights do not apply to interviews when there is no investigation or when there is no reasonable belief that a disciplinary action will follow. Thus, bargaining unit members not the subject of an investigation are not entitled to representation under Weingarten, unless the bargaining unit member believes disciplinary action may result from the investigation.

14. Harmful Error.

a. A harmful error is an error committed by management in the application of its procedures, which, had the error not occurred, management may have reached a different conclusion or taken different action. The harmful error standard avoids reversal of actions because of administrative procedural oversights that have not substantially prejudiced or impaired the technician’s rights.

b. The burden of proof 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 the procedural error substantially prejudiced his/her rights.

c. When events do not clearly show whether the error was actually harmful, the probable effect of the error is determined in light of all evidence. The mere theoretical possibility of harm cannot form the basis for inferring actual harm or that harmful error occurred.

d. When procedural error is not alleged as harmful, it would be appropriate for a deciding official, hearing examiner, or TAG to address such 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. If a non-harmful error can be corrected without necessarily starting the process over, the deciding official, hearing examiner, or TAG should make the correction. For example, an improper date is set for the response period (too short) and it could be corrected to expand the time to cover the proper time period.

15. Allegation of Discrimination.

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

16. Medical Issues and Substance Abuse Claims.

a. If a supervisor has reason to believe a technician may be under the influence of drugs or alcohol, the technician may be referred to the Employee Assistance Program (EAP). Whether the technician attends the EAP is voluntary.

b. In the case of alcohol or drug problems raised as an affirmative defense to the issuance or carrying out of an adverse action, the employer is not required to offer the technician reasonable accommodation which holds the action in abeyance. This permits the employer to hold a technician with an admitted drug or alcohol problem to the same standards for employment or job performance standards as other technicians, even when unsatisfactory performance or behavior is related to the technician’s substance abuse problem. See 42 U.S.C. § 12114.

c. In the case of a technician who raises as an affirmative defense on receipt of an adverse action that he or she “is currently participating in” a supervised drug rehabilitation program, management should contact the State Judge Advocate Office before proceeding with the adverse action. The technician in this case may qualify as a “qualified individual with a disability” entitled to reasonable accommodation. See 42 U.S.C. § 12114.

d. In the case of medical problems raised as an affirmative defense to the issuance or carrying out of an adverse action (e.g., stress, hypertension, disease), the medical condition may qualify the technician as a “qualified individual with a disability.” Medical documentation should be obtained by the HRO from the technician that is administratively acceptable in terms of diagnosis or prognosis of the condition, with a probable return to duty date by the technician’s physician. Medical documentation is obtained in order to make necessary employment decisions. The medical determination should be reviewed by or in conjunction with a qualified practitioner to determine if the

medical information meets practice guidelines. In this case, the agency should provide the technician reasonable accommodation by following the physician's recommendations or leave requirements as indicated. Adverse action should be held in abeyance accordingly until the technician's physician has cleared the technician for full duty. The technician will be required to update the medical information as the condition requires and as requested by the supervisor. Check with the State Judge Advocate's Office to determine if the condition qualifies for coverage under The Rehabilitation Act.

17. Arrest, Indictment, or Conviction for Criminal Offense.

a. The fact a technician is arrested or criminally indicted should not normally be used as sole cause for an adverse action. If the criminal charge were relied upon, later acquittal or dismissal of the charge would vacate the cause for management's administrative action. Management should focus on the technician's wrongdoing and whether there is an impact on the employer-employee relationship, not that the technician has been arrested or charged with wrongdoing.

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 place the technician in a non-duty with pay status. An indefinite suspension without pay, however, is an adverse action for which there must be cause, usually the technician is a danger or poses a safety risk to self or others. When the reason to keep a technician away from normal duties is based upon an arrest or a charge of misconduct and the charge might be true, this will not support "cause" for suspension without pay. The technician should continue to be paid.

c. Should the criminal charge, upon which an indefinite suspension was based, later be withdrawn, not prosecuted or the technician found not guilty, management has the discretion to award back pay from the time of the suspension to reinstatement. An indefinite suspension is tested at the time of the suspension and may be proper even though the ultimate disposition is favorable to the employee; back pay is within the discretion of TAG.

18. Method of Delivery.

a. When possible, a notice or decision should be given directly to the technician. In turn, the technician acknowledges receipt by signing and dating a copy. If the technician declines to sign, the supervisor or HRO representative must annotate on the copy the technician declined to acknowledge receipt

b. Certified mail with return receipt requested can be used. If such delivery becomes necessary, the certified mail receipt, as well as the return receipt, becomes part of the adverse action case file.

c. Registered mail may also be used as a means of delivering a notice or decision to a technician. Acceptance of the mail (registered or certified) by someone at the last known address may be viewed as actual delivery to the technician. Regular mail should be used in conjunction with b and c above. Delivery is assumed after 5 calendar days.

19. The Basic Five Step Process for an Adverse Action.

There are five steps in processing an adverse action. All of the steps do not have to occur every time an adverse action is processed. For example, step two, (A Technician's Reply), would not occur if a technician chose not to reply; or step four and five, (The Appeal Rights and The Final Decision), would not occur if a technician did not appeal the original decision. The five steps are:

Step 1. The Proposed Adverse Action.

a. The proposed action serves as a notice of the agency action and is unquestionably the most important document in an adverse action. The adverse action process begins with a technician's supervisor and the HRO representative reviewing the information gathered about the reasons for the proposed action. Along with the factors listed in Attachment 2, The Douglas Factors, a decision is made concerning what, if any, adverse action is appropriate.

b. When an adverse action is decided upon, a technician's supervisor initiates a proposal to inform the technician of the reasons for the adverse action and provide information on procedural rights. HRO clearance on the procedural aspects of the proposed adverse action notice must be obtained before the issuance of the notice. The individual proposing the initial charge is called the proposing official.

c. Circumstances may require others in the technician's supervisory chain to initiate such proposals (i.e., the immediate supervisor may be personally involved in the misconduct, performing military duty, etc.). If TAG 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 is made.

d. Management has the obligation to conduct the investigation to obtain all relevant facts in proposing an adverse action. Procedures contained in AR 15-6 and AFI 90-301 can be used as framework for conducting investigations. Those documents establish procedures for conducting an investigation.

e. The National Guard Technician Act requires IAW 32 U.S.C. 709(f)(5):
“A technician shall be notified in writing of the termination of his employment as a technician and, unless the technician is serving under a temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such membership is a condition of employment, such notification shall be given at least 30 days before the termination date of such employment.”

f. The following rules apply when computing notice.

- (1) One day means one calendar day.
- (2) Calendar day is the 24-hour period between 12 midnight and 12 midnight (0001-2400).
- (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.
- (4) The last day of the notice period may not be a non-work day.

g. Throughout the notice period, the technician is in a paid duty status. However, if it is determined the technician’s presence may pose a threat, result in the loss or damage of government property, or jeopardize legitimate government interests, there are several options.

- (1) The technician may be assigned to duties where his/her presence is not a problem.
- (2) The technician may be allowed to take leave (voluntary or enforced).
- (3) The technician may be placed on administrative leave (paid non-duty status) for the time it takes to effect the action. However, 38 Comptroller General 203 (1958), does limit an agency’s discretion to grant administrative leave in a paid non-duty status. See also 67 CG 126,64 CG 542.

h. The proposed adverse action notice must include all the charges, plus all the reasons. The reasons must be in sufficient detail (who, what, where, when) so the technician knows exactly what allegations must be rebutted. Without such details, the technician may not be able to formulate a meaningful reply.

i. The proposed adverse action notice advises the technician what type of adverse action is being proposed (suspension, reduction in grade, and/or removal). The notice must state in sufficient detail the facts and reasons for the penalty proposed, including facts and reasons with respect to relevant matters on which the penalty proposal is based. If it is a suspension, include the number of days involved (day equals calendar day). If a reduction in grade is proposed, provide the title, pay plan, series, grade and organization/location of the lower graded position.

Examples:

- (1) “This is notice that I propose to suspend you for 3 days from your position as Supply Clerk, GS-2005-05.”
- (2) “This is notice that I propose to change you from Electronic Mechanic Supervisor, WS-8852-11 to Electronics Mechanic, WG-8852-10, located at OMS #6. This action constitutes a reduction in grade.”
- (3) “This is notice that I propose to remove you from your position as Aircraft Mechanic, WG-8852-10.”

j. Reference all regulations or operating procedures that have been violated. Reasons such as “failure to display a high degree of professionalism”, “poor working relationships”, or “unprofessional attitude”, provide no underlying facts against which the technician may respond. Although not required, references often provide those involved in the case a better understanding of the standards. Double check references for timeliness and applicability.

k. Common charges. Management may describe the charge in appropriate language; using the language of a specific charge in the Table of Penalties is not necessary. Be specific; do not assume common meanings for common words. Examples include:

(1) Insubordination – Not all forms of insolent or contentious behavior can be characterized as insubordination. Insubordination occurs when a supervisor gives a direct order and the technician clearly refuses to obey that order. If there is a question demonstrating a clear case of insubordination, consider using alternative charges: failure to carry out work assignments, failure to follow instructions, disrespect, disrespectful language or failure to promptly complete a work assignment.

(2) Threats – Assess the threats using the Metz Factors, Attachment 1. Threats are evaluated based upon (1) the listener’s reactions; (2) the listener’s apprehension of harm; (3) the speaker’s intent; (4) any conditional nature of the remarks; and the circumstances surrounding the incident. In plain language, the speaker meant it, the threat was unconditional, and the listener feared it. See *Metz v. Dept. of Treasury*, 780 F.2d 1001 (Fed. Cir. 1986). These considerations are covered in Appendix B of this regulation.

(3) Theft – To prove theft you must prove the technician knowingly took something that did not belong to him/her and intended to keep it. If there is no solid proof the technician intended to keep what he/she took, then consider alternative charges like unauthorized possession, taking without permission, or unauthorized removal from the work site.

(4) Sexual harassment – There are two types of sexual harassment, quid pro quo and hostile environment. *See* 29 CFR 1604.11(a). The quid pro quo is the easiest to understand. For example, the supervisor requires sex in exchange for preferential treatment or in retaliation against someone. Hostile environment requires pervasive and persistent harassment based on gender. To qualify as hostile environment sexual harassment, the conduct must be more than offensive, it must typically be sexual. Some alternative charges include: inappropriate language on the job, touching without permission, inappropriate touching, inappropriate comments, exposing individuals in the work environment to sexually explicit material.

(5) Willful misuse of a government vehicle. It is easy to prove the employee was in a government vehicle when they were not supposed to be. However, it is not easy to prove the misuse of the vehicle was willful. Some alternative charges that may better describe the offense in greater detail include deviation from route, unauthorized trip, unauthorized change in route or carrying an unauthorized passenger.

l. Multiple charges or offenses: Use separate charges and use separate specifications. Don't use multiple specifications for the same offense. Do not mistakenly merge all of the charges into one offense, which might require the deciding official to dismiss the entire charge if one of the incidents is not supported. Other problems that occur when writing multiple specifications for the same offense include:

(1) For example, "thereby causing the technician great emotional distress". Avoid inserting enhancing language to inflate the seriousness of the act, because, in addition to proving the original charge, the technician's emotional state must also be proved.

(2) For example, if you use "gross insubordination", then you have to prove "gross" in addition to the "insubordination".

(3) Use specific, not general terms. Be cautious of general charges like "inappropriate conduct" or "conduct unbecoming a National Guard technician". Without specific language, the deciding official may assume what you seem to be charging the technician with and may not judge the conduct to the standard you intended.

(4) Including specific citations of regulations or laws.

(5) Using insignificant charges or "piling on" charges. If using multiple charges and some are more serious than others, bring that out in the charge and reflect it in the proposal associated with each charge. Use individual paragraphs for each charge.

m. On appeal, the NGB hearing examiner and/or TAG 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.

n. In determining the appropriateness of a penalty, management must observe the principle of "like penalties for like offenses in like circumstances". In both the grievance process and appeal process, a vital consideration is whether or not a disciplinary process is fair and reasonable. One standard for analysis of disciplinary penalties is known as the Douglas Factors; these considerations are covered at Attachment 2. Supervisors considering all relevant Douglas Factors should be prepared to testify to any conclusion reached after consideration of these individual factors.

o. When referencing prior disciplinary action to expand the penalty for the current offense, management must ensure the factors on which they plan to rely are relevant to the technician's most recent misconduct.

p. If a technician challenges consideration of prior disciplinary or adverse action records, the review of that challenge will depend on whether or not the prior action meets the three criteria listed below. If the three criteria are met, review will be limited to the record and no new evidence will be accepted. If the criteria are not met, the technician will be allowed to submit new evidence concerning the merits of the prior discipline or adverse action.

(1) The technician was informed of the action in writing. (An annotation of NGB Form 904-1 or Supervisor's Brief satisfies this criterion.)

(2) The technician was given the opportunity to dispute the action by having it reviewed on the merits through grievance or appeal.

(3) The action was a matter of record.

q. If on appeal, a technician challenges the appropriateness of the penalty, the burden rests with management to show the penalty was appropriate.

r. The evidence management is relying on shall be disclosed to the technician so that the employee has a full and fair opportunity to respond to the charge(s). If the proposed adverse action notice includes copies of the material relied upon, it should inform the technician all relevant materials are attached. Otherwise, the employee shall be informed where these materials are available for inspection and copying. Management may not support this action with restricted materials except in rare instances such as an on-going criminal investigation or security investigation.

s. Any materials the technician desires for his/her case that have not been previously provided must be requested from the HRO in a timely manner.

t. The proposal advises the records are available for review in the HRO if the technician's personal copies are not available.

u. The proposal advises the technician of his/her right to reply, whom to reply to, the time limits involved, and how to request an extension of time. The proposal must advise the technician a reply may be oral, written or both. 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 “deciding official” is normally the next level supervisor or management official and is different from the “proposing official”. The name, telephone number, and business address of the deciding official is included in the notice.

v. The proposal also provides the name, phone number, and address of an HRO staff member who can be contacted for procedural guidance. This staff member will provide access to applicable regulations, and answer questions pertaining to the technician’s rights. The HRO contact may not represent the technician.

w. The proposal advises the technician that he/she will receive a reasonable amount of duty time to prepare a reply and the point of contact to arrange the use of such time. Upon receipt of the request for time to prepare, management will schedule the excused absence making a good faith effort to schedule the time as quickly as possible. The excused absence may not interfere with the organization’s mission, therefore, the absence can be granted for either consecutive or non-consecutive blocks of time. Normally, excused absences do not exceed one (1) working day. If additional time to prepare is necessary, the technician may request (limited) additional time, or annual leave, or leave without pay. Requests for extension should be in writing and include justification for the additional time.

x. The deciding official’s decision to grant or deny the extension must be in writing and include the rationale if the extension is partially or completely denied. However, to save time, extension requests and decisions may be initiated verbally and followed up in writing.

y. Finally, the proposal advises the technician the deciding official will issue an original decision at the earliest practical date after receipt of his/her response or after the reply period has ended. Also, if the deciding official upholds the proposed action, it will be affected on the date established in the original decision.

Step Two. The Technician Reply.

a. When a technician makes a reply, the technician has the right to expect the deciding official to give the reply due consideration. The technician may bring up factors that might impact the decision (e.g. marital problems, financial obligations, or alleged bias of immediate supervisor). The deciding official should make a written summary of an oral reply for the record. The purpose of this summary is to 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 a reply since he/she is entitled to an administrative hearing or appellate review on the merits of any 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 from the reply.

Step Three. The Original Decision Letter.

The original decision letter explains what action has been decided upon. It should be issued as soon as possible (normally within 15 work days) after receipt of the reply or after the reply period has ended. A decision must not be dated or served on the technician until after the expiration of the technician’s response time. Although the technician may have replied orally, or earlier than the suspense date, further replies (oral or written) may follow. HRO clearance on the procedural aspects of the original decision letter must be obtained before issuance. The following six elements must be contained in the original decision letter:

a. Element One. What action is decided upon.

(1) The deciding official may uphold the proposed action, change the proposed action to a less severe penalty, or overturn/reject the proposed action. An action more severe than originally proposed by the proposing official should not be taken by the deciding official. In reaching the decision, the deciding official should not consider reasons for taking adverse action other than those specified in the proposed adverse action notice. (This does not prevent the deciding official from considering matters not charged in the proposal that is brought to their attention. These types of matters would assist in determining if the charges are true or if the penalty should be reduced). The following examples of actions decided upon are provided as samples:

(2) “On 5 February 2007, Major J. K. Smith proposed your removal from National Guard technician employment. I have decided that your removal is for just cause and will promote the efficiency of the service.”

(3) “On 6 February 2007, Major J. K. Smith proposed your removal 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.”

(4) “On 7 February 2007, Major J. K. Smith proposed your removal from National Guard technician employment. I have found insufficient cause to warrant your removal. Therefore, I have decided no action be taken against you.”

(5) “On 8 February 2007, Major J. O. Smith proposed your suspension from your technician position for three 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: In this case, the letter of reprimand would not be grievable.

b. **Element Two.** Include the date the action will be effective.

The National Guard Technician Act requires technicians be given at least 30 days advance notice when removal is involved. *See* 32 U.S.C. §709(f)(5). The action cannot, however, begin earlier than the date of the original decision. There is no prohibition against starting an adverse action during the period of 15 December through 3 January.

c. **Element Three.** Reference the technician’s reply.

(1) The original decision explains 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 2004 and your written reply of 14 February”. When no replies are received, the original decision letter should document that fact.

(2) A decision to take an adverse action cannot be made solely on the basis the technician failed to refute the charges. The evidence file as a whole must sustain or not sustain the charge by a preponderance of evidence.

(3) When a technician’s oral/written reply disputes reasons included in the proposed notice, the original decision letter must include a response to show that a basis exists for those management reasons.

(4) 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.

d. **Element Four.** Provide reasons for the decision.

(1) The original decision includes the reasons for the decision by explaining which changes in the proposal were sustained. For example, “I find the reasons outlined by Major Smith sustained”; or “I find the reasons outlined in paragraph 2a and 2c of Major Smith’s proposal sustained”. It is not necessary to repeat the charges or specific reasons contained in the proposal.

(2) If the deciding official sustains some of the changes but not others and still decides not to reduce the penalty, the original decision letter must explain why. If the deciding official sustains all of the changes but decides to take a less severe action, the original decision must explain why.

e. **Element Five.** Provide HRO assistance information.

The original decision provides the name, telephone number, and address of the HRO staff member for the technician to contact for procedural assistance.

f. **Element Six.** Appeal information.

The original decision letter explains what appeal rights are available, how to appeal, and the time limits involved. No appeal information is included if the deciding official decides not to take any action.

Step Four. The Appeal Rights.

a. The technician can appeal the original decision by requesting an appellate review or an administrative hearing, but not both. If provided for by the collective bargaining agreement, advisory arbitration may be used. TAG without the involvement of an NGB hearing examiner accomplishes the appellate review. TAG review procedure involves a review by TAG of all pertinent records including material submitted by the technician with his/her appeal.

b. An administrative hearing means an examiner, not affiliated with the technician’s State, will gather all available facts through an administrative hearing process and then issue a report of findings and recommendations to TAG. A copy is also provided to the technician.

c. Regardless of the method selected, a final decision on the appeal is issued by TAG.

d. It is the responsibility of the technician to initiate the appeal by forwarding a written notice to the HRO stating the technician’s desire for an appellate review or an administrative hearing. This appeal must be postmarked no later than 20 calendar days after receipt of the original decision.

e. If an appellate review is elected, the technician can submit any information or material deemed relevant for TAG’s review. If the technician selects an administrative hearing, no further information is required.

f. Requests for extensions to file an appeal should be in writing and include justification for additional time. Although such requests are forwarded to the HRO, TAG makes the decision to grant or deny the extension. The HRO is responsible for notifying the technician in writing of TAG’s decision including the rationale if the extension is partially or completely denied. To save time, extension requests and decision may be initiated verbally and followed up in writing.

g. If an appellate review is elected, the HRO provides TAG all relevant written material and assists in resolving any questions that may arise. An appellate review may result in a discussion between TAG and the technician concerned, and if requested by the technician, his/her representative. If this occurs, an HRO staff member should be present as an observer. If an administrative hearing is requested, the HRO processes an appeal in accordance with Chapter 6 and 7 of this regulation.

Step Five. The Final Decision.

The method by which the technician is notified of TAG's final decision regarding the appeal is in writing and must be signed by TAG. The final decision is issued at the earliest practical date after completion of the appellate review or after receipt of the hearing examiner's report of findings and recommendations. HRO 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 forwarded to NGB-J1-TNL. If an administrative hearing occurred, the hearing examiner is also provided a copy of the final decision.

a. As the authority for the final decision, TAG must address three issues: (1) did the technician do what he/she was charged with? (2) Will some discipline, based on the proven infraction, promote the efficiency of the service? (3) Is the penalty reasonable in light of the proof?

b. If an administrative hearing was conducted, the examiner's report will address the three issues for TAG's consideration. If TAG is in total agreement with the findings and recommendations (including how they were reached), then he/she only states agreement with the final decision report. When an examiner's finding or recommendations are not accepted, the final decision report must provide rationale for TAG's position. When only an appellate review is considered, TAG must address the issues without the benefit of an examiner's report.

20. The Adjutant General's (TAG) Authority.

a. TAG may choose to uphold the proposed action, mitigate the proposed action to a less severe penalty, or reject the proposed action. TAG may not impose a more severe penalty. TAG is charged solely with deciding the facts under the specific charges and should not consider additional reasons for taking adverse action other than those specified in the adverse action notice.

b. The final decision may not contain actions to be accomplished in the future. Such corrective or improvement actions, if appropriate, should be the subject of separate counseling.

c. There is no further administrative review of TAG's final decision. If TAG's final decision reduces the penalty to a letter of reprimand, that letter is not grievable, and this fact must also be included in the final decision report.

21. Attorney Fees.

a. TAG has the authority to award reasonable attorney fees under 5 U.S.C. § 5596 related to an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the technician. Attorney fees are not automatically granted; the burden of establishing entitlements and reasonableness rests with the technician.

b. OPM has issued implementing regulations for the payment of attorney fees in 5 CFR § 550.807: (1) the technician must be the prevailing party, (2) attorney fees must be reasonable as determined by TAG, and (3) a determination must be made by TAG that payment is warranted in the interest of justice. Each case must be examined on its own merits.

c. Requests for attorney fees are forwarded to TAG. Once received, the request is provided to the HRO and the JAG for review and recommendation as to whether the payment is warranted. In addition, the JAG provides recommendation on the reasonableness of the fee request. If an administrative hearing was conducted, TAG may also request the hearing examiner's review and recommendation. (The examiner does not address the reasonableness of the fee request.) All of these recommendations must provide articulated rational reasons for or against the award.

d. TAG is bound by the findings on the merits of the case and may not re-characterize the findings when evaluating a request for attorney fees. TAG's decision on the request is issued as an addendum to the final decision. If fees are awarded, the reasons for such payment are set forth "in the interest of justice". If fees are not awarded, the addendum must provide rationale for such decision. There are no administrative appeals on attorney fee determination.

21. **Back Pay.** See Title 5 USC 5596.

23. Official Files.

a. The HRO is responsible for maintaining the official adverse action case file. The file 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 hearing examiner, administrative letters involving hearing arrangements, hearing transcript, etc.

b. The supervisor or manager taking the action is responsible for providing required documentation to process the action to the HRO, such as time cards, copies of counseling statements, reports of contact, incident reports, etc.

c. Official files are sensitive in nature and should be available only on a “need-to-know” basis as determined by the HRO and JAG.

d. Official files will be destroyed four (4) years after the case is closed.

24. National Guard Bureau (NGB) Administrative Hearing Examiner System.

a. The NGB Hearing Examiner Program was established to provide a centralized register of qualified individuals to conduct administrative hearings and prepare the reports of findings and recommendations for TAG.

b. When the need exists to add new examiners to the centralized register, NGB-J1-TNL will request TAG’s to nominate individuals for attendance at the NGB Hearing Examiner course. Those nominated will meet the following criteria:

(1) Be currently employed as a technician in grade GS-12 or above (WG equivalent) or AGR personnel with the rank of Captain and above, Warrant Officer Three and above.

(2) Possess 4 years of progressively responsible experience in administrative, managerial, professional, investigative, or technician personnel work.

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

(4) Demonstrate abilities to analyze, evaluate, and make logical determinations of pertinent facts; develop practical recommendations; 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.

(5) 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.

25. Requesting an Examiner.

A qualified hearing examiner register is maintained at NGB-J1-TN. States requiring an examiner request a roster from NGB-J1-TNL who will provide a list of currently qualified and available Hearing Examiners to the requesting HRO. States requesting Hearing Examiner support are expected to pay the expenses of the individual selected. A hearing examiner may not serve in the state in which they are employed. The appellant (or representative) does not have a right to concur/non-concur with the selection of the specific hearing examiner.

26. Preparation for the Hearing.

Other responsibilities of the HRO include:

a. Providing written notification to the technician of an examiner’s selection with an information copy forwarded to the examiner.

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

c. Notifying the technician and/or representative in writing of the mutually acceptable date, time, location of the pre-hearing conference and hearing. (Information copy must be forwarded to the examiner.)

d. Providing a case file to the examiner and the technician or his/her representative at least three weeks in advance of the hearing. Files must be indexed and include, as a minimum, the proposed adverse action notice and all the material relied upon; the technician’s written reply; a summary of oral reply; and the original decision.

e. Arranging for a court reporter to provide a verbatim transcript.

f. Providing examiner’s requests for supplies, equipment, and hearing room layout.

g. Arranging for examiner’s lodging, transportation, and travel order fund cite. The Hearing Examiner’s travel, lodging and per diem expenses are provided by the requesting state.

h. Arranging for the appearance of agency witnesses requested by management or the technician. A technician has the right to secure the attendance of agency witnesses. The examiner will resolve problems relative to the availability of the agency witnesses.

27. Pre-Hearing Conference.

a. A pre-hearing conference is an informal meeting of the parties involved and is normally conducted the day before the hearing. During the conference, the examiner explains the hearing process, helps to identify problems, discusses responsibilities and rights, reviews case files, identifies documents, obtains stipulations, and assists in settlement offers.

b. It is recommended the pre-hearing conference and hearing be recorded. If the pre-hearing conference is not recorded, the results of the pre-hearing conference will be summarized by the examiner and read into the record when the actual hearing begins. The actual formal hearing must be recorded.

28. Hearing Procedures.

a. The purpose of the administrative hearing is to fully develop 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 that govern conduct of trials because its purpose is not to find the technician guilty or innocent. The hearing is conducted to determine three issues:

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

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

(3) Is the penalty appropriate? The original 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. The Hearing Examiner may not recommend a more severe penalty.

b. The hearing will be closed to the public unless the technician and management agree to hold a public hearing. Typically only the examiner, management's representative (with technical advisors), the technician, the technician's representative (with technical advisors), and the individual recording the proceedings will be present at a closed hearing. However, collective bargaining agreements may address others to be included.

c. At a public hearing, the examiner decides the number of people allowed and will resolve disputes over the attendance.

d. A hearing must be recorded verbatim with a copy of the transcript provided free of charge to the technician.

e. 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 provides other statements required for the record.

(2) Management's representative provides opening statement.

(3) Technician's representative provides opening statement or may defer until after management's representative presents witnesses and evidence. A technician may represent himself/herself, although 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.*

(5) Technician's representative presents witnesses and evidence.*

(6) Closing statements by management representative.**

(7) Closing statements by technician representative.**

(8) Examiner prepares to close hearing.

(9) Examiner closes and adjourns hearing.

*Both sides have the right to cross-examine witnesses. The technician has the right to present by telephone the testimony of a witness who is not an agency employee and who resides outside of the commuting area of the hearing site. Use of telephonic testimony by either party must be communicated to the hearing examiner prior to the hearing.

**Either side may request the opportunity to submit post-hearing briefs in lieu of closing arguments. This is usually accomplished when the hearing has been lengthy, when the issues are numerous or complex, 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 what effects a delay will have on the technician.

29. Hearing Examiner's Report of Findings and Recommendations.

a. When the examiner receives the transcript, the report is prepared and finalized within 45 calendar days of the receipt of the transcript. The examiner completes six processes when preparing the report.

(1) The charges are reviewed and evidence that supports each charge is identified and given appropriate weight.

- (2) Conflicts in testimony are resolved.
- (3) Credibility of witnesses is determined.
- (4) A check for procedural compliance is made.
- (5) Conclusions are drawn on each charge.
- (6) The appropriateness of the penalty is determined.

b. The report is formatted into nine sections:

- 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

c. The original report is addressed to TAG and mailed to the HRO together with the case file and transcript. A copy of the report is also forwarded to the technician and to NGB-J1-TNL. A final decision is issued in accordance with paragraph 19.

ATTACHMENT 1

THE “METZ FACTORS”

1. In deciding whether an employee threatened his/her supervisors or co-workers, management must consider several factors. A well known Merit Systems Protection Board (MSPB) case (*Metz v. Dept. of Treasury*, 780 F.2d 1001 (Fed. Cir. 1986)) addresses this issue in detail. The MSPB held the following evidentiary factors must be considered:

- a. listener’s reactions;
- b. listener’s apprehension of harm;
- c. speaker’s intent;
- d. any conditional nature of the statements;
- e. and attendant circumstances.

Note: *Meehan v United States Postal Service* (718 F2d 1069, 1075 (Fed. Cir 1983)) initially established these evidentiary factors.

2. Management must weigh the evidence in order to determine if a “threat” has actually occurred. Evidence of an employee’s intent in making a statement can show the statement was or was not a threat. Rumors, or fear based on rumors, cannot suffice to prove an employee threatened anyone. Management should not, however, disregard subjective evidence of fear or intent. Remember objective evidence typically bears the heaviest weight. The five “Metz Factors” provide a framework to weigh the evidence fairly and must all be considered.

An example: the MSPB overturned the removal of an employee for threatening a supervisor because the “Metz Factors” were not in evidence. An employee was removed because the employee told his supervisor over the telephone the supervisor’s “career and family are going to suffer” because of what the supervisor had done to the employee. First, the threat was not specific; allowing the employee to argue he merely meant his successful grievance would get the supervisor fired and in turn, affect his family. Secondly, and even more damaging, the supervisor apparently did not take it seriously at the time the statement was made since he waited a week before writing up a report of the incident. Third, the agency took no immediate actions in the form of precautions or discipline.

Especially in these days of increased awareness of workplace violence, threats against supervisors and co-workers usually justify the most severe penalties. However, you must be able to prove the words the employee used were indeed intended as a threat. One of the ways to make that decision is whether or not you responded in a manner consistent with the perceived threat.

ATTACHMENT 2

THE “DOUGLAS FACTORS”

In determining the appropriate remedy, management must observe the principle of “like penalties for like offenses in like circumstance.” This means penalties will be applied as consistently as possible. Management must establish the penalty selected does not clearly exceed the limits of reasonableness. A well-known Merit Systems Protection Board (MSPB) case (*Douglas v. Veterans Administration*) addressed this issue in detail. A number of factors which management must weigh in deciding an appropriate course of action are discussed in this case. These factors are often referred to as the “Douglas Factors”. Some factors may not be applicable to a given case; relevant factors must be considered. Bear in mind, however, certain offenses (e.g., drug trafficking) warrant mandatory penalties.

Section I. Appropriateness of the Penalty

In both the appellant review and the administrative hearing, a vital consideration is whether or not a disciplinary penalty is fair and reasonable. In determining the appropriate penalty, management must observe the principle of “like penalties for like offenses in like circumstances”. This means penalties will be applied as consistently as possible.

1. Consider the nature and seriousness of the offense, and its relation to the technician’s duties, position, and responsibilities, including whether the offense was intentional or inadvertent, or was committed maliciously or for gain, or was frequently repeated.
2. Consider the technician’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.
3. Consider the technician’s past disciplinary record.
4. Consider the technician’s past work record, including the length of service, performance on the job, ability to get along with fellow workers, and dependability.
5. Consider the effect of the offense on the employee’s ability to perform his/her job at a satisfactory level and its effect on supervisor’s confidence in the technician’s ability to perform assigned duties.
6. Consider the consistency of the penalty with those imposed on other technicians for the same or similar offenses.
7. Consider the consistency of the penalty with NGB guidance regarding disciplinary actions.
8. Consider the notoriety of the offense and its impact on the reputation of the agency.
9. Consider the clarity with which the employee was on notice of any rules violated in committing the offense, or any warning about the conduct in question.
10. Consider the potential for the technician’s rehabilitation.
11. Consider mitigating circumstances surrounding the offense such as unusual job tensions, personal problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter.
12. Consider the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Section II. Past Discipline or Adverse Action

Management must ensure when a technician’s past disciplinary or adverse action record is referenced, that it is in fact a past action (in effect) at the time the most recent conduct occurred. Otherwise, TAG and/or Hearing Examiner will have to find consideration of it improper and not rely on it.

ATTACHMENT 3

TABLE OF PENALTIES FOR VARIOUS OFFENSES

The table of penalties below is a guide; it is not all-inclusive. The penalties are graduated in severity based on whether the alleged offense is the first, second, or third. More serious types of misconduct have a more serious suggested penalty or range of penalties for a first offense than less serious types of first offenses. The table provides suggested penalties and should not be applied inflexibly so as to impair consideration of factors relevant to the individual case.

<i>Item</i>	Nature of Offense	Sub-category	First Offense	Second Offense	Third Offense	Remark
1a	Attendance related offenses	Unexcused tardiness	Oral Admonishment to written reprimand	Written reprimand to 1 day suspension	2-day to 5-day suspension	1
1b		Failure to follow established leave procedures	Written reprimand to 1-day suspension	1-day to 5-day suspension	5-day suspension to removal	
1c		Absence without leave (AWOL) includes leaving work site without permission.	Written reprimand to 1-day suspension	1-day to 15-day suspension	5-day suspension to removal	2
2a	Failure to observe written regulations, rules	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
2b		Violation where safety to persons or property is involved	Written reprimand to removal	30-suspension to removal	Removal	3
3a	Breach of Security regulations or practices	Classified information is not compromised and breach is unintentional	Written reprimand to 5-day suspension	1-day to 15-day suspension	2-day suspension to removal	
3b		Classified information is not compromised and breach is intentional	Written reprimand to removal	30-day suspension to removal	Removal	
3c		Classified information is compromised and breach is unintentional	Written reprimand to 15-day suspension	2-day suspension to 30-day suspension	30-day suspension to removal	
3d		Classified information is compromised and it is a deliberate violation	30-day suspension to removal	Removal		
4a	Alcohol-related offenses	Unauthorized use of alcoholic beverages while on government premises or in a duty status.	Written reprimand to 15-day suspension	15-day to 30-day suspension to removal	30-day suspension to removal	4
4b		Sale or transfer of alcoholic beverage on government premises or while any person involved is in a duty status	Written reprimand to 15-day suspension	15-day to 30-day suspension to removal	30-day suspension to removal	4

4c		Reporting to or being on duty while under the influence of alcohol to a degree which interferes with proper performance of duty, a menace to safety, or prejudicial to the maintenance of discipline	Written reprimand to 15-day suspension	15-day suspension to removal	Removal	4
5a	Drug-related offenses	Introduction of an unlawfully possessed controlled substance to a work area or govt. installation for personal use	Removal			4
5b		Reporting to or being on duty while under the influence of unlawfully used drugs to a degree which interferes with proper performance of duty, a menace to safety, or prejudicial to the maintenance of discipline	Written reprimand to removal			4
5c		Introduction of a controlled substance to a work area or govt. installation with the intent to unlawfully distribute it	Removal			4
6a	False statements	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
6b		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	
6c		False statements, misrepresentation, or fraud in entitlements; time card, leave form, travel voucher	Written reprimand to removal	30-day suspension to removal	Removal	5
6d		False statements, misrepresentation on documents pertaining to qualifications, or other official record	Written reprimand to removal	Removal		6
7a	Refusal to testify; interference or obstruction	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	

7b		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	
7c		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	
9a	Fighting; creating a disturbance	Creating a disturbance resulting in an adverse affect on morale, production or maintenance of proper discipline	Written reprimand to 5-day suspension	5-day to 10-day suspension	Removal	8
9b		Threatening or attempting to inflict bodily harm	Written reprimand to 15-day suspension	15-day suspension to removal	30-day suspension to removal	8
9c		Hitting, pushing, or other acts against another without causing injury	Written reprimand to 30-day suspension	30-day suspension to removal	Removal	8
9d		Hitting, pushing, or other acts against another causing injury	30-day suspension to removal	Removal		8
10a	Discourtesy	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	9
10b		Use of insulting, abusive, offensive, obscene language, gestures or similar conduct (non-discriminatory)	Written reprimand to 10-day suspension	5-day suspension to removal	30-day suspension to removal	9
11	Stealing	Stealing, actual or attempted, unauthorized possession of govt. property or property of others, or collusion with others to commit such acts	Written reprimand to removal	Removal		10
12a	Misuse or abuse of government property or personnel	Negligent loss, destruction or damage to government property	Written reprimand to 5-day suspension	Written reprimand to removal	15-day suspension to removal	10
12b		Loss or damage to govt. property, records or information when a technician is entrusted in safeguarding govt. property as a requirement of the job	Written reprimand to 15-day suspension	Written reprimand to removal	15-day suspension to removal	10
12c		Using govt. property or personnel in duty status for other than official purposes	Written reprimand to removal	1-day suspension to removal	15-day suspension to removal	10

12d		Misuse of govt. credentials	Written reprimand to removal	5-day suspension to removal	15-day suspension to removal	
12e		Willful use or authorizing use of govt. vehicle or aircraft for other than official purpose	30-day suspension to removal	Removal		11
12f		Intentionally mutilating or destroying a public record	Removal			12
13a	Sleeping on duty	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	
13b		Where danger to persons or property is involved	Written reprimand to removal	15-day suspension to removal	30-day suspension to removal	
14a	Loafing; delay in carrying out instructions; dereliction of duty	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	
14b		Delay 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	
14c		Dereliction of duty	Written reprimand to removal	5-day suspension to removal	Removal	
15a	Gambling	Participating in an unauthorized gambling activity on govt. premises or in a duty status	Oral admonishment to written reprimand	1-day to 5-day suspension	5-day to 30-day suspension	
15b		Operating, assisting or promoting unauthorized gambling activity on govt. premises or in a duty status or while others 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	Oral admonishment to written reprimand	Written reprimand	Written reprimand	13
18a	Sexual harassment	Not involving a subordinate	Written reprimand to 5-day suspension	5-day suspension to removal	10-day suspension to removal	14
18b		Involving a subordinate	3-day suspension to removal	10-day suspension to removal	30-day suspension to removal	14

19	Discrimination because of race, color, religion, age, sex, national origin, political affiliation, handicap or marital status	Prohibited discriminatory practice in any aspect of employment and includes failure to prevent or curtail discrimination of a subordinate when the supervisor knew or should have known of the discrimination	Written reprimand to removal	30-day suspension to removal	Removal	15
20a	Reprisal	Intentional interference against exercising the right 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		
20b		Intentional interference with right to exercise, or reprisal against a technician for exercising a right under 5 U.S.C. 7101	Written reprimand to removal	5-day suspension to Removal		
20c		Intentional reprisal against a technician for providing information to the IG, EEOC or NGB investigator, or for testifying in an official proceeding	30-day suspension to removal	Removal		
21	Constitutional violation	Violation of constitutional rights, freedom of speech, association, religion	Written reprimand to removal	5-day suspension to removal	30-day suspension to removal	
22a	Political activity	Violation of prohibition against soliciting political contributions	Removal			
22b		Violation of prohibition against campaigning or influencing elections	30-day suspension to removal	Removal		
23	Misappropriation	Directing or rendering without a supervisor's direction services known not to be covered by appropriations	Removal			
24a	Misuse of govt. charge card; travel or purchase	Deliberate or negligent travel card misuse, abuse, delinquency and fraud	Written reprimand to removal	5-day suspension to removal	10-day suspension to removal	
24b		Purchase card use for deliberate or negligent illegal, improper, or incorrect purchase	Written reprimand to removal	14-day suspension to removal	30-day suspension to removal	
25a	Conduct unbecoming a National Guard technician	Immoral, indecent, or disgraceful conduct	1-day suspension to removal	Removal		

25b		Solicitation of or accepting anything of monetary value from person seeking contracts or other financial gain	10-day suspension to removal	Removal		16
26a	Uniform Wear	Failure to wear uniform while performing duties as a military technician	Counseling to Oral admonishment	Oral admonishment to written reprimand	1-day to 5-day suspension	17
26b		Failure to wear uniform properly	Counseling to Oral admonishment	Oral admonishment to written reprimand	1-day to 5-day suspension	17
27	Misuse of govt. communication systems & equipment	Intentionally using govt. communication systems for other than official purposes	Written reprimand to 15-day suspension	Written reprimand to removal	15-day suspension to removal	18

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

Remark 2. These penalties generally do not apply to Absent Without Leave (AWOL) charged for tardiness of ½ hour or less. If a technician is absent without leave being approved, it is appropriate 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 the absence is improperly charged to AWOL. This offense includes leaving the workstation without permission. Penalty depends on length and frequency of absences. Removal may be appropriate for a first or second offense if the absence is prolonged.

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

Remark 4. Using the Employee Assistance Program (EAP) and “reasonable accommodation” for assistance will not normally stop management from carrying out an adverse action.

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

Remark 6. Removal is warranted when selection was based on falsified resume or credentials, where falsification was intentional and/or where the technician occupies a position involved in money matters.

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

Remark 8. Penalty may be exceeded based on such factors as type of threat, provocation, extent of injuries, whether actions were defensive or aggressive in nature, or whether actions were directed at a supervisor.

Remark 9. Penalty for fourth offense within one year may be 14-day suspension to removal. Penalty may be exceeded if discourtesy or similar conduct was directed to a supervisor.

Remark 10. Penalty depends on such factors as the value or the property or the amounts of employee time involved, and the nature of the position held by the offending employee, which may dictate a higher standard of conduct.

Remark 11. In accordance with 31 U.S.C. § 1349, penalty cannot be mitigated to less than 30-day suspension.

Remark 12. Penalty dictated by 18 U.S.C. § 2071.

Remark 13. There must be a clear nexus between efficiency of the service and the debt complaint.

Remark 14. 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 creates a hostile or offensive work environment, removal is warranted for a first offense.

Remark 15. 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.

Remark 16. DoD Directive 5500.7 contains exceptions to this general prohibition of accepting gratuities.

Remark 17. IAW 32 U.S.C. §709(b), AR 670-1, AFI 36-2903, TPR 302.7-6(a) (b), TPR 400.6(e), and TPR 400.12(b).

Remark 18. Telephone, facsimile machine, pager, e-mail, Internet, cellular phone, personal digital assistant (PDA), video camera, tape recorder, or other commercial information systems paid for by the government.

ATTACHMENT 4

SAMPLE OF WRITTEN REPRIMAND (LOR)

***ALWAYS CONTACT HRO/LR PRIOR TO ISSUING A LETTER OF REPRIMAND ***

LETTERHEAD

(OFFICE SYMBOL)

(DATE)

MEMORANDUM FOR (Use Technician's Full Name and HOR Address)

SUBJECT: Written Reprimand

(State briefly the nature of the incident/violation.)

1. This Letter of Reprimand is the result of your continued tardiness.

(State clearly the specific offense(s) or violation(s) upon which the Letter of Reprimand is based. Use date, time, place, and/or other information that describes where and how the incident(s) occurred. If the offense includes more than one incident, list each one in a separate subparagraph.)

2. Specifically, on Friday, 06 October 2006, I informed you that your lack of punctuality in reporting for duty was unsatisfactory. I reviewed your time and attendance record for the preceding two months and see that you have been late in reporting for work 13 out of 30 workdays. I reminded you that your tour of duty begins at 0700 hours and that you are expected to start work at that time. I informed you that continued tardiness could result in disciplinary action. For the past three weeks, you have been excessively late in reporting for work. Specifically, you were late on:

Thursday, 12 October 2006, 1 hour late
Monday, 16 October 2006, 15 minutes late
Tuesday, 23 October 2006, 30 minutes late
Monday, 06 November 2006, 1 hour late.

(State how long the written reprimand will be maintained in the technician's Official Personnel Folder [OPF]. The period may vary from one to three years depending on the severity of the offense and any previous occurrences that have been called to the attention of the technician.)

3. This written reprimand will be made a matter of record and temporarily incorporated in your Official Personnel Folder (OPF), maintained in the Directorate for Human Resources, for one year from the date of this letter.

(Provide remedial action comments; be specific in describing ways to correct shortcomings.)

4. You are required to report for duty not later than 0700 hours every scheduled duty day. You are required to contact me by telephone not later than 0715 hours, if an unexpected situation arises that would prohibit you from reporting to work by 0700 hours. At that time, you must inform me of the reason you are requesting to report to work late and obtain my approval. Any other type of leave must be requested and approved in advance.

(Advise that further incidents may result in more severe discipline.)

5. Any further occurrence of actions, such as those identified in this letter, could result in more severe disciplinary measures being initiated against you.

(Include an information statement that a Letter of Reprimand may be grieved.)

6. This Letter of Reprimand may be grieved (1) under the negotiated established grievance procedure or (2) under the agency grievance procedure. (Choose which one depending on the bargaining unit status of the technician.)

(Provide Directorate of Human Resources, Labor Relations, contact information.)

7. You may contact CMSgt Michael Hunt, Labor Relations Specialist, (916) 854-3412, DSN 466-3412, CAGNET 6-3412, or Ms. Judy Heintzelman, Labor Relations Specialist, (916) 854-3600, DSN 466-3600, CAGNET 6-3600, for procedural guidance.

(Always include this statement regarding the Technician Assistance Program (EAP))

8. Work related problems may be the result of personal situations. It is imperative that you consider all factors which may be contributing to your problems at work and that you take appropriate action. The Employee Assistance Program (EAP) is available if you wish to seek confidential assistance at no cost. You may contact the EAP "Help-Line" at 1-888-290-4EAP. If you choose to take part in the EAP during the duty day, you must first obtain proper approval.

(Supervisor's Signature Block)

Receipt acknowledged by _____ on _____
(Signature) (Date)

(After issuing, forward the original signed Letter of Reprimand to the HRO/LR for filing in the technician's Official Personnel Folder.)

ATTACHMENT 5

SAMPLE OF PROPOSED ADVERSE ACTION
ALWAYS CONTACT HRO/LR PRIOR TO ISSUING A PROPOSED ADVERSE ACTION

LETTERHEAD

(OFFICE SYMBOL)

(DATE)

MEMORANDUM FOR (Use Technician's Full Name and HOR Address)

SUBJECT: Proposed Adverse Action

(State the specific action you propose to take, i.e., removal, suspension, or change to lower grade. Include series and grade of position incumbent occupies, and show full unit name and mailing address to which the technician is assigned.)

1. This memorandum will serve as your advance notice that I propose to suspend you for a period of five (5) work days (40 hours) from your technician position as Unit Administrator, GS-0303-09, Position Number TF1 234000, located at Company A, 123rd Infantry Battalion, End of the Road, Los Angeles, California not earlier than thirty (30) calendar days from the date you receive this notice. The reasons for this proposed suspension are:

(Refer to TPR 752 Handbook, Table of Penalties, for the specific charge, i.e., absence without leave, etc. Give the reason(s) for the adverse action. Use all available information in sufficient detail so that the technician will understand why the proposed action is being taken.)

a. Failure to observe written rules and regulations. When I arrived at the armory at 1000 hours on Wednesday, 13 September 2006, I found the main entrance door to the armory unlocked. Additionally, the south side overhead door was in the open position. A thorough search of the armory revealed that no one was in the building at the time. Upon your return to the armory at 1300 hours, I met you inside the main entrance door. As we walked to your office (also unlocked) to further review the circumstances, I noted a ring of keys lying on top of your desk. An examination of this ring of keys showed that it included the supply room keys and a master key for all the rooms in the armory. The sign out record showed you held personal responsibility for this set of keys. Your failure to provide reasonable security for the armory facilities by leaving two main entrances unlocked during an absence from the armory premises, combined with the lack of protection for a complete set of armory keys, is a clear violation of the building and equipment control responsibilities for an individual holding the position of Unit Administrator.

(If previous offenses of the same or similar nature have been recorded that contribute to the reason(s) for the adverse action, cover in sufficient detail to describe the offense.)

b. A review of your past performance records shows that you were previously counseled for building and equipment control violations on Thursday, 9 February 2006 and again on Tuesday, 13 June 2006. Further, you were issued a letter of reprimand dated Wednesday, 30 August 2006 for leaving the main entrance door to the armory unlocked for a full day when you traveled to battalion headquarters on Friday, 4 August 2006.

(Advise technician of his/her right to reply orally or in writing, who to make reply to (normally next level supervisor or management official), time limits involved, and how to request an extension of time.)

2. You have a right to reply to this notification, either orally or in writing, to the deciding official, COL Joseph Smythe, **(include address and telephone number)** who will decide whether or not the proposed action should be sustained. You may submit affidavits in support of your response. Your response must be submitted to arrive within twenty (20) calendar days of receipt of this notice. Consideration will be given to extend this period if you submit a request stating your reasons for requiring more time.

(Advise technician of timeframe expiration)

3. As soon as possible after your answer is received, or after expiration of the twenty (20) calendar day limit if you do not respond, you will be provided an original decision.

(Provide right to excused absence to prepare reply.)

4. You may be allowed four (4) hours of official time to review the material relied upon to support this proposed action, to secure affidavits, and to prepare an answer to this notice. You must arrange with your supervisor for the use of this official time.

(Provide Directorate of Human Resources contact for procedural guidance.)

5. You may contact CMSgt Michael Hunt, Directorate for Human Resources, Labor Relations Specialist, (916) 854-3412, DSN 466-3412, CAGNET 6-3412, or Ms. Judy Heintzelman, Labor Relations Specialist, (916) 854-3600, DSN 466-3600, CAGNET 6-3600, for procedural guidance.

(Always include this statement regarding the Employee Assistance Program (EAP).)

6. Work related problems may be the result of personal situations. It is imperative that you consider all factors which may be contributing to your problems at work and that you take appropriate action. The Employee Assistance Program (EAP) is available if you wish to seek confidential assistance at no cost. You may contact the EAP "Help-Line" at 1-888-290-4EAP. If you choose to take part in the EAP during the duty day, you must first obtain proper approval.

(Supervisor's Signature Block)

Receipt acknowledged: _____
(Technician's Typed Name) (Date)

I, _____ the twenty (20) day response.
(Technician's Typed Name) Waive / Do Not Waive

(After issuing, the signed original of the proposed adverse action is forwarded to the HRO/LR)

ATTACHMENT 6

SAMPLE OF ORIGINAL DECISION
ALWAYS CONTACT HRO/LR PRIOR TO ISSUING AN ORIGINAL DECISION MEMORANDUM

LETTERHEAD

(OFFICE SYMBOL)

(DATE)

MEMORANDUM FOR (Use Technician's Full Name and HOR Address)

SUBJECT: Original Decision - Adverse Action

(Indicate the same general information stated on the notice of proposed adverse action; however, do not repeat the specific reason.)

1. The proposed notice of adverse action dated 27 September 2006 and received by you on 27 September 2006 informed you of a proposal to suspend you for a period of five (5) work days (40 hours) from your technician position as Unit Administrator, GS-0303-09, Company A, 123rd Infantry Bn, End of the Road, Los Angeles, CA.

(State your consideration of the technician's oral and/or written reply, to include representation, if applicable; consider all reasons, to include affidavits and supporting documents. Indicate your findings by sustaining either all or part of the reasons stated in the notice of proposed adverse action. If all reasons are not sustained, then separate explanations must be made for those reasons sustained and for those dismissed)

2. I have given full consideration to your oral reply presented to me in the presence of your representative on 5 October 2006 and to your written reply dated 4 October 2006. In reviewing your written answers and oral reply against the reasons stated in the 27 September 2006 notice of proposed adverse action, I find that the reasons for the proposed action are fully supported by the evidence presented. It is my decision to sustain all the charges contained in the notice of proposed adverse action.

(or)

The proposed adverse action indicated you could respond orally, in writing, or both. You elected not to respond and the allowable time for response has passed. I have given full and careful consideration to all the information available to me and I find that the reasons for the proposed action are fully supported by the evidence presented. It is my decision to sustain all the charges contained in the notice of proposed adverse action.

(State what action was decided upon, to include the effective dates.)

3. Based upon the facts stated above, I have determined that the evidence presented warrants your suspension. It is my decision that you be suspended for a period of five (5) work days, 40 hours, effective 13 November 2006 through 17 November 2006.

(Provide the name and telephone number for the Directorate for Human Resources contact person for procedural assistance. Advise the technician that he/she has a choice of an appellate review by The Adjutant General or an administrative hearing by a qualified hearing examiner, but not both.)

4. You have the right to appeal this action to The Adjutant General (TAG). The right of appeal extends no further than TAG. Your appeal rights consist of either an appellate review by TAG or an administrative hearing by a qualified hearing examiner, but not both. You may contact CMSgt Michael Hunt, Directorate for Human Resources, for procedural assistance in filing an appeal at DSN 466-3412 or (916) 854-3412.

(List appeal information.)

5. An appeal to TAG must be in writing and must provide a basis for the appeal. As a minimum, an appeal must include your name, organization, date the original decision was received, type of appeal requested, and the name/source of representation, if any. The following information describes both types of appeals:

a. An appellate review by TAG involves an overall review of the official adverse action file along with any additional information you may wish to provide. An appellate review may include, upon TAG's approval, a discussion between TAG and the appellant, to include appellant's representative and a Directorate for Human Resources staff member. Upon completion of review, TAG will then issue the final appellate decision.

b. An administrative hearing gives you the opportunity to present your case to a qualified National Guard Hearing Examiner from another state. The hearing examiner gathers all available facts through an on-site hearing, to include exhibits, witnesses as appropriate/applicable, management and appellant's representation and a verbatim transcript of the actual hearing. The hearing examiner will render the report of findings and recommendations within 45 days to the Adjutant General who will then issue the final appellate decision.

(State time frame and address for requesting an appeal.)

6. Your request for an appellate review or an administrative hearing must be received by TAG not later than 20 calendar days after the date you receive this original decision. You may request an extension of this 20-day deadline by providing your reasons through the Directorate for Human Resources for the Adjutant General's review, who will either grant or deny your request. An appeal or a request for additional time must be in writing and addressed to the Joint Force Headquarters California National Guard, Directorate for Human Resources, ATTN: CAJS-J1-HR-LR, 9800 Goethe Road, Sacramento, CA 95826-9101.

(Inform technician of the appellate decision options.)

7. An appellate decision by the Adjutant General will either (a) sustain the original decision of the adverse action or (b) reduce the severity of adverse action, or (c) dismiss the adverse action in its entirety.

(Always include this statement regarding the Employee Assistance Program (EAP).)

8. Work related problems may be the result of personal situations. It is imperative that you consider all factors which may be contributing to your problems at work and that you take appropriate action. The Employee Assistance Program (EAP) is available if you wish to seek confidential assistance at no cost. You may contact the EAP "Help-Line" at 1-888-290-4EAP. If you choose to take part in the EAP during the duty day, you must first obtain proper approval.

(Deciding Official's Signature Block)

Receipt Acknowledge: _____
(Technician's Typed Name) (Date)

I, _____ the appellate review or administrative hearing.
(Technician's Typed Name) Waive / Do No Waive

(After issuing, a copy of the signed original decision must be forwarded to the HRO/LR)

ATTACHMENT 7

SAMPLE OF ADVERSE ACTION APPEAL

(Date)

Joint Force Headquarters
California National Guard
ATTN: CAJS-J1-LR
9800 Goethe Road, P.O. Box 269101
Sacramento, CA 95826-9101

SUBJECT: Appeal of Disciplinary/Adverse Action

In accordance with TPR 752, I respectfully request that I be granted an appellate review (or an administrative hearing, but not both) in regard to the adverse action (whatever the offense was) which has been initiated against me. The following information is furnished for your consideration:

- a. Name: Simon N. Simon, Unit Administrator, GS-0303-09
- b. Organization: Company A, 123rd Infantry Bn, Los Angeles, CA
- c. Date of original decision receipt: 21 October 2006
- d. I will be represented by _____, (either) an attorney/or the labor organization representing bargaining unit members.

My request for an appeal of the adverse action is based primarily on the same reasons given in my written reply dated 4 October 2006; i.e., the penalty being imposed is disproportionate to the charges; the fact that similar violations have occurred with far less disciplinary measures taken against other individuals; and the severe financial impact this suspension will have on my family.

Sincerely,

(Technician's Signature Block)

Copy Furnished: Deciding Official/Name

SAMPLE WARNING ON LEAVE USAGE

(*ALWAYS REFER TO YOUR NEGOTIATED AGREEMENT FOR SPECIFICS RELATING TO LEAVE USAGE.)

LETTERHEAD

(OFFICE SYMBOL)

(DATE)

MEMORANDUM FOR (Use technician's full name and HOR address)

SUBJECT: Warning on Leave Use

(The following paragraphs are examples that can be tailored to fit the individual situation.)

1. This warning is to express my concerns about your (sick) and/or/both (annual) leave status.
2. My review of your leave record shows that between (date) and (date), you have used a total of ____ hours of _____ and or _____ leave. Most of this leave has been unscheduled and has fallen on Mondays, Fridays, or days following a holiday.

or

A study of your leave record indicates a serious need for improvement in your pattern of attendance and leave usage. As of (date), your annual leave balance was ____ and/or your sick leave balance was ____.

or

You have taken leave in 10 of the 19 pay periods so far this year. Much of the leave requested has been taken on an unplanned or emergency call-in basis.

3. I am concerned that I may need to issue a Leave Restriction Letter if your attendance does not improve. I am hoping to see an immediate and lasting improvement so that action will not be necessary.

or

If your attendance does not improve, I will have no alternative but to issue a Leave Restriction Letter.

4. I am available to meet with you if there are any extenuating circumstances you might need to discuss. or I will work with you etc., etc, etc.

(Always include this statement regarding the Employee Assistance Program (EAP).)

5. Work related problems may be the result of personal situations. It is imperative that you consider all factors which may be contributing to your problems at work and that you take appropriate action. The Employee Assistance Program (EAP) is available if you wish to seek confidential assistance at no cost. You may contact the EAP "Help-Line" at 1-888-290-4EAP. If you choose to take part in the EAP during the duty day, you must first obtain proper approval.

Signature Block

Receipt acknowledged _____
(Technician's Typed Name) Date

ATTACHMENT 9

SAMPLE LEAVE RESTRICTION MEMORANDUM
(*ALWAYS CONTACT HRO/LR PRIOR TO ISSUING A LEAVE RESTRICTION MEMORANDUM.)
****ALWAYS REFER TO YOUR NEGOTIATED AGREEMENT FOR SPECIFICS RELATING TO LEAVE.**

LETTERHEAD

(OFFICE SYMBOL)

(DATE)

MEMORANDUM FOR (Use technician's full name and HOR address)

SUBJECT: Leave Restriction Notification

(The following paragraphs cover a variety of issues: tardiness and attendance problems; abuse of leave, etc., plus documentation requirements. The paragraphs also contain sample language that can used.)

1. I find it necessary to issue this leave restriction memorandum because of your unreliable attendance. *(Cite history of leave problems, previous counseling/verbal warnings, dates charged to AWOL, etc.)*

A review of your leave record indicates a serious need for improvement in your attendance and leave usage. *(Cite history of leave problems, previous counseling/verbal warnings, dates charged to AWOL, etc.)*

Regarding your tardiness, you arrived at work between 20-30 minutes late on the following dates: May 14, 15, 20 and 4, 7, and 15 June 2007. On June 10, you called in at 0800 to request 2 hours of annual leave. On May 21, 28, 29 and June 2, 3, and 14 you called in after 0800 and requested annual leave because you were going to be late for work. *(Cite history of leave problems, previous counseling/verbal warnings, dates charged to AWOL, etc.)*

We have had several documented conversations concerning what I perceive to be excessive absences, the need for you to come to work on time and plan your leave in advance, and the hardship your absences cause in our office. You continue to request time off in excess of your accruals and to request leave for unplanned absences. Accordingly, effective immediately, the following restrictions are placed on your leave usage. *(Cite history of leave problems, previous counseling/verbal warnings, dates charged to AWOL, etc.)*

I have previously counseled you regarding your tardiness, your use of sick leave, and failure to follow proper leave approval procedures. Because of your absences, many of the other technicians need to fill in for you and our mission is being affected. You need to significantly decrease your rate of absenteeism and tardiness and you need to consistently follow leave approval procedures. Be aware that continuing to follow this pattern may result in disciplinary actions. At the current time, I am placing you leave restriction notification. *(Cite history of leave problems, previous counseling/verbal warnings, dates charged to AWOL, etc.)*

(Now that you have laid the foundation for leave restriction notice, you will inform the technician how future notification(s) will be handled.)

2. You must personally contact me or my designee *(it is your choice to appoint your designee or not)* by telephone, my office number is###-####, or the designee's #, and/or the main office number, ###-####. If I am unavailable, and you cannot reach anyone at the above numbers, you must leave a message giving a telephone number where you can be reached during the day. You may not assume that your absence is approved until you receive confirmation from me or my designee.

If you are unable to come to work because of illness and are using annual leave or sick leave, or requesting permission for leave without pay, you must notify me as soon as possible but not later than two (2) hours after your scheduled starting time.

Except in cases of illness or unavoidable emergency, you must obtain my approval IN ADVANCE for any for any absence from work or for late arrival to work. If I am unavailable to reach me at ###-####, you will contact (my designee) at ###-####. If you are unable to contact either of us, you are permitted to leave a message with a telephone number where you can be reached during the day.

You must observe your designated duty hours, which are from _____ to _____, unless you obtain official approval to change your hours. If you are late for work, you will be charged with AWOL in 15-minute increments for the time you are not at work.

Approval of requests for sick leave for medical, optical, or dental appointments for yourself or for a family must be obtained at least 24 hours in advance by submitting an SF-71, Application for Leave. Approval will be at my discretion.

(Now that you have made the technician aware of how the notifications will be handled, you will explain the required documentation.)

3. All future requests for sick leave, or annual leave or leave without pay (LWOP) in lieu of sick leave, must be supported by a medical certificate. The certificate shall be submitted within three (3) working days of you return to duty. The medical certificate will contain the physician/medical professional's name, address, facility, date and original signature and the dates you or your family member was incapacitated for work. Pending receipt of this certificate and approval of leave, your absence will be recorded as AWOL.

All leave requests, whether they are emergencies or made in advance, must be documented on a SF 71, Application for Leave. For emergency requests, a SF 71 must be submitted to me on the day you return to work following the unscheduled absence.

Approval of an LWOP request is at the discretion of the agency. The request may be denied if your services are required or if you have not followed procedures.

Unless you invoke your entitlement to coverage under the Family Medical Leave Act (FMLA) or other entitlement program, I will only authorize accrued leave or LWOP if your services can be spared without detriment to the performed in this office and you have properly requested leave. You should be prepared to provide documentation supporting any request for LWOP since it is not an earned leave category.

(Review of leave usage time period)

4. Your leave usage will be reviewed in six months. If I determine improvement has been made, I will rescind this leave restriction.

I will monitor your leave usage closely over the next 6 months. When I see an improvement, this leave restriction notification will be rescinded.

(Human Resource, Labor Relations Information)

5. You may contact CMSgt Michael Hunt, Labor Relations Specialist, Directorate for Human Resources, (916) 854-3412 or DSN 466-3412, or Ms. Judy Heintzelman, Labor Relations Specialist, (916) 854-3600, DSN 466-3600, CAGNET 6-3600, for procedural guidance.

(Always include this statement regarding the Employee Assistance Program (EAP).)

6. Work related problems may be the result of personal situations. It is imperative that you consider all factors which may be contributing to your problems at work and that you take appropriate action. The Employee Assistance Program (EAP) is available if you wish to seek confidential assistance at no cost. You may contact the EAP "Help-Line" at 1-888-290-4EAP. If you choose to take part in the EAP during the duty day, you must first obtain proper approval.

Signature Block

Receipt acknowledged _____ on _____
(Technician's Typed Name) Date

ATTACHMENT 10

SAMPLE OF RESCISSION OF LEAVE RESTRICTION
(*ALWAYS CONTACT HRO/LR PRIOR TO ISSUING THIS NOTIFICATION)

LETTERHEAD

(OFFICE SYMBOL)

(DATE)

MEMORANDUM FOR (Use Technician's full name and HOR address)

SUBJECT: Rescission of Leave Restriction Notification

(The following language is an example only. Compose your memo to fit your particular circumstance.)

1. Due to your unacceptable pattern of leave usage, you were given a notice of leave restriction dated _____. In that memorandum, I stated I would review your leave in six (6) months and if I saw a improvement, the restriction would be rescinded.
2. It has now been six months since the notice was issued. During that time, you have shown satisfactory improvement and I appreciate your efforts. Therefore, I am rescinding the notice effectively this date.
3. I will, however, continue to monitor your leave and should I see any abuse developing, I will immediately issue a new leave restriction memorandum.
4. If you have any questions concerning this memorandum or the leave usage policy and procedures, please contact me.