



Disciplinary Process in the U.S. Department of State

Introduction

The U.S. Department of State is our nation's oldest executive branch department responsible for the foreign policy and relations of the United States. Established in 1789, it was led by Thomas Jefferson as its first Secretary of State from 1790 to 1793, initially situated in New York, and maintained diplomatic posts in London and Paris.

Since then, it has transitioned to its permanent home in Washington, D.C. from where it oversees approximately 80,214 personnel located domestically and abroad at over 270 diplomatic posts. These personnel encompass foreign and civil service employees, eligible family members, and locally employed staff. The U.S. Department of State also contracts with numerous companies which employs thousands of individuals providing a variety of services from construction to security.

The execution of U.S. foreign policy is dependent upon these personnel. As a result, the U.S. Department of State holds its personnel accountable during and after working hours or when the employee is on leave or in travel status. Drawing from the U.S. Department of State's policies relevant to personnel operations and Foreign Service Grievance Board (FSGB) cases, this article provides a basic overview of the disciplinary process the U.S. Department of State applies to its foreign and civil service employees.

Background

Regarding Foreign Service (FS) employees, the U.S. Department of State balances the protection of U.S. Government interest and the efficiency of the FS with fair and impartial treatment of the employee in question as well as care in the process to avoid any unwarranted invasion of privacy. The U.S. Department of State's Foreign Affairs Manual (FAM) and Foreign Affairs Handbook (FAH) contain the applicable provisions regarding personnel operations.

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First and foremost, FS and Civil Service (CS) employees should familiarize themselves with the standard of appointment and continued employment outlined in 3 FAM 4130. There are a variety of issues the U.S. Department of State specifically identifies from sexual activity, dishonesty, freedom of expression to habitual use of intoxicating beverages, obligation to account for conduct affecting employment, and notoriously disgraceful conduct. Additionally, CS employees who are or are being assigned or detailed overseas should also be aware of and familiar with the contents of Title 5 Code of Federal Regulations Section 731. Regardless of the allegations of conduct giving rise to administrative action, FS employees must be advised of the right to a representative of *their* own choosing at every stage, including initial questioning.

Disciplinary action pursued against both FS and CS personnel can take a variety of forms:

- admonishment, a verbal or written warning or caution to an employee.;
- reprimand, a written official rebuke, censure, or registration of disapproval of a specific action or actions by an employee;
- suspension, placement of an employee in a temporary non-duty and non-pay status for disciplinary reasons; and
- separation for cause, separation from the Service for such cause as will promote the efficiency of the Service under Section 610 of the Act (22 U.S.C. 4010).

The Process

A supervisor or other management official who is aware of incidents or allegations that may serve as grounds for disciplinary action against an employee is responsible for taking action or reporting such incidents or allegations to the appropriate proposing official.

A management official aware of an allegation of conduct that could serve as grounds for disciplinary action and/or criminal prosecution must initially determine whether *they* or another management official should be the investigating official, or whether the matter should be referred to the



Office of Inspector General (OIG), Bureau of Diplomatic Security (DS), or comparable office in the other foreign affairs agencies for further action. If the management official determines that the observed or alleged misconduct is relatively minor such as leave abuse or failure to perform assigned duties, that official, or another management official, may handle the administrative inquiry.

As a general rule, an investigating official should give the employee appropriate notice that an administrative inquiry has been opened, unless such notice might compromise the inquiry. Additionally, the Privacy Act of 1974 generally requires that the employee be informed in writing of particular details if an investigating official requests the employee to provide any personal information for inclusion in a subsequent report.

During the administrative inquiry, an employee may be excluded from the premises and/or curtailed from their assignment. However, involuntary curtailment is not a disciplinary action and must not be substituted for disciplinary action. Upon the conclusion of the administrative inquiry, the responsible official must carefully consider the evidence, including any mitigating factors, and decide whether to: (1) close the case; (2) admonish the employee; and/or (3) recommend to the appropriate personnel official that disciplinary action be taken.

Before proposing disciplinary action, the proposing official will review prior similar cases within the agency, in order to foster equity and consistency in the imposition of discipline. Additionally, all documents related to an administrative inquiry must be kept separate from the FS employee's Official Performance File (OPF), except for the placement of a decision letter in the OPF.

Admonishments

In cases wherein a written admonishment is the implemented discipline, the FS employee will receive the original. The deciding official will retain a copy of the admonishment, under appropriate safeguards, but will destroy the copy no later than 1 year after the date of the admonishment. The letter of written admonishment will not be placed in the employee's OPF.



Reprimands

A FS employee assigned outside of the United States¹ has 30 days from receipt of the proposal to reprimand, to respond in writing and/or orally to the deciding official. If assigned in the U.S., the employee has 15 days from receipt of the proposal to reprimand to respond in writing and/or orally to the deciding official. The employee may submit a written request for more time to respond which may be approved if reasonable.

After reviewing the proposal to reprimand and the employee's response, if any, if the deciding official proceeds with imposing a reprimand, the employee must be notified in writing: (1) of the specific charges; (2) that copy of the letter of reprimand will be made a part of the employee's OPF for a specific time period, which will be no less than 12 and no more than 24 months; and (3) right to file a grievance.

Suspensions

A FS employee assigned outside of the United States has 30 days from receipt of the proposal to suspend, to respond in writing and/or orally to the deciding official. If assigned in the U.S., the employee has 15 days from receipt of the proposal to reprimand to respond in writing and/or orally to the deciding official. The employee may submit a written request for more time to respond which may be approved if reasonable.

After reviewing the proposal to suspend and the employee's response, if any, if the deciding official proceeds with imposing a suspension, the employee must be notified in writing: (1) of the specific charges; (2) the length of suspension; (3) the date suspension will commence, (3) that copy of the letter of suspension will be made part of the employee's OPF for a specific time period, and (3) right to file a grievance.

¹ Per the U.S. Department of State Standardized Regulations (DSSR 040), the United States when used in a geographical sense, means the several States of the United States of America, including Alaska and Hawaii, and the District of Columbia. Although some U.S. Department of State personnel serve in locations considered to be domestic assignments, such as Puerto Rico, these employees technically would have 30 days to respond because they are "assigned outside the United States." However, to avoid any claim by the U.S. Department of State that an employee failed to respond timely, such employees should respond within 15 days out of prudence or request an extension.



Further, absence from duty because of suspension without pay must be recorded on the employee's time and attendance record as provided in instructions issued by the appropriate payroll office or regional payroll center. A Form SF-50, Notification of Personnel Action, must be processed by the appropriate administrative office and becomes a permanent record in the employee's OPF. The personnel action will not be removed from the OPF unless the suspension is overturned by a third party.

Separation for Cause

A FS employee assigned outside of the United States has 30 days from receipt of the proposal to separate for cause, to respond in writing and/or orally to the deciding official. If assigned in the U.S., the employee has 15 days from receipt of the proposal to reprimand to respond in writing and/or orally to the deciding official. The employee may submit a written request for more time to respond which may be approved if reasonable.

After reviewing the record on which the separation was based, and the employee's response, if any, if the deciding official proceeds with implementation of a separation for cause, the employee must be notified in writing: (1) of the specific reasons; and (2) notice that no sooner than seven calendar days after the decision is issued, the employee will be placed in a leave without pay status pending final resolution, unless the employee has been in an away without leave status in which case the employee will remain in that status pending final resolution. If the employee is entitled to a separation hearing, the decision to separate for cause and employee's response, if any, and the record on which the decision is based will be transmitted to the FSGB.

Eligibility for retirement benefits under the Foreign Service, Civil Service, or other U.S. Government retirement system may be affected when an employee is separated for cause.

Burden of Proof and Determination of Discipline

In disciplinary cases, the agency has the burden of establishing by a preponderance of the evidence that disciplinary action is justified.² This

² Title 22 Code of Federal Regulations Section 905.2 and FSGB Case No. 2020-048 (May 17, 2021).

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requires that the agency establish that the charged party committed the misconduct; there is a nexus between the misconduct and the efficiency of the Service; and the penalty is proportionate to the offense and consistent with penalties imposed for similar offenses.³ To establish that a penalty is reasonable, the agency must show that it considered the mitigating and aggravating factors and whether the penalty is consistent with the precept of like penalties for similar misconduct.⁴

The U.S. Department of State requires observation of certain principles when considering disciplinary action. Specifically, “that the disciplinary action taken should be consistent with the precept of like penalties for similar offenses with mitigating or aggravating circumstances taken into consideration. Whether or not offenses are alike will be based on the similarity of the underlying conduct rather than how the charge is worded. The action taken should be fair and equitable; and if a penalty is warranted, it should be no more severe than sound judgment indicates is required to correct the situation and maintain discipline.”⁵

Additionally, this serving in leadership or in law enforcement positions must understand *that they will be held to a higher standard of conduct* and that they are expected to model professionalism, integrity, and responsibility.⁶

It should be noted that the FSGB has traditionally held that: “There is no precedent that holds the principle of ‘similar penalties for like offenses’ requires mathematical rigidity or perfect consistency regardless of variations in circumstances or change in prevailing regulations, standards, or mores... it is hornbook law that the selection of an appropriate penalty by

³ FSGB Case No. 2020-048 (May 17, 2021) at p. 11 citing FSGB Case No. 2013-040 (July 31, 2014), FSGB Case No. 2006-037 (September 28, 2007) and FSGB Case No. 2004-035 (January 28, 2005).

⁴ Douglas v. Veterans Administration, 5 MSPB 313 (1981) and FSGB Case No. 2020-048 (May 17, 2021) at p. 11 citing FSGB Case No. 2002-039 (January 27, 2003); and FSGB Case No. 2000-042 (June 21, 2002).

⁵ 3 FAM 4374(1)

⁶ 3 FAM 4374(3)



an agency involves a reasonable balancing of the relevant facts in the individual case.”⁷

Further, in cases wherein an employee is claiming the discipline is excessive, the FSGB had generally given weight to the “agency’s primary discretion in exercising the managerial function of employee discipline and efficiency” and focuses on whether “managerial judgment has been properly exercised within tolerable limits of reasonableness.”⁸

In Conclusion

Aside from the occasional case wherein an employee has engaged in intentional bad conduct, most situations involving disciplinary action center around individuals who, simply put, made a mistake or a series of mistakes which may be insignificant or extremely serious. None of us is perfect and we all have our flaws. As the saying goes, to err is human. However, just as the vast majority of cases involve individuals who should have made better decisions regarding their conduct, the disciplinary process is influenced by people who also may have made mistakes in support of that process. Mistakes can stem from preconceived biases to failure to collect, communicate, or consider all relevant information to misapplication or misinterpretation of the established regulations.

As a result, it is essential that when an employee may be facing or is contending with a disciplinary process, he or she should seek legal counsel. Although the employee can review the applicable regulations of their own accord to inform themselves of their respective rights and obligations as well as represent themselves, there is no substitute for employing an attorney who will zealously advocate on behalf of the employee. Legal representation naturally entails financial costs, but the consequences of a disciplinary process without professional guidance are potentially much greater. Protecting one’s interest should be seen as an investment.

⁷ FSGB Case No. 2021-015 (November 22, 2021)

⁸ FSGB Case No. 2020-048 (May 17, 2021) at p. 13 citing FSGB Case No. 2002-034 (February 24, 2004).