

Chapter 7B

Discipline and Adverse Action

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Glossary

Section 1

Introduction

7B-1. Purpose

This regulation prescribes policies, procedures, and responsibilities governing the discipline and adverse action program for National Guard technicians employed in accordance with the provisions of Title 32 USC Chapter 7. National Guard technicians are either military technicians (dual status) as defined in 10 USC §10216 or non-dual status technicians serving in a technician position as defined in 10 USC§10217.

7B-2. Explanation of terms

Definitions of selected terms used in this regulation are listed in the Glossary.

7B-3. Responsibilities

a. The Chief of the National Guard (CNGB) serves as the strategic focal point in developing, managing, and integrating employment of National Guard capabilities for the Office of the Secretary of Defense, the Joint Staff, and the Departments of the Army and Air Force in support of Combatant Commanders. Administers DoD, Joint, Army and Air Force programs; acquires, distributes, and manages resources. Coordinates departmental policies and programs for the employment and use of National Guard technicians under section 709 of Title 32, United States Code (USC) in accordance with the National Guard Bureau Charter.

b. NGB-J1 serves as the primary advisor to the CNGB on all personnel and manpower issues in the National Guard. Provides oversight and has primary responsibility to the CNGB on human resource technician program development, staffing, and execution of policies, plans and programs concerning technician employment.

c. The Chief, Technician Personnel Division, NGB-J1-TN, is the primary advisor to NGB-J1, commanders, staff and operating officials on all matters pertaining to military technicians assigned to the National Guard. Develops, maintains and revises the technician disciplinary and adverse action program.

d. The Adjutants General (TAG) supplement and publish military technician management policies relating to technician programs and processes. Monitor the states' compliance with technician guidelines, polices, directives, and report to NGB-J1 and CNGB on program effectiveness. Establish an effective process to provide due process for affected technicians under this regulation.

e. The Human Resources Office (HRO), JFH-MS-HR provides:

- (1) Oversight and management of the disciplinary/adverse action program.
- (2) The administration of the disciplinary/adverse action program.
- (3) Provides guidance and direction to all managers and supervisors on disciplinary responsibilities, rights and obligations;
- (4) Assists supervisors and managers with the procedural aspects of an action before issuance of a proposed adverse action or original decision;
- (5) Provides necessary training to managers and supervisors on the subject of this regulation;
- (6) Represents and/or advises the State Adjutant General (TAG) or TAG representative in disciplinary and adverse actions cases;

(7) Provides general and procedural guidance and case information to the affected technicians; and

(8) Consults with the State Judge Advocate Office.

f. The Manager and/or Supervisor:

(1) Maintains an office or shop atmosphere which is conducive to good employee-management relations;

(2) Practices and maintains discipline to reduce the need for formal discipline or adverse actions;

(3) Ensures employees understand the duties and work practices, safety and security requirements and administrative procedures; and

(4) Ensures any disciplinary action taken is justified by facts and circumstances and is consistent with agency policy, precedent and applicable collective bargaining agreement.

Section 2

Non-Disciplinary Actions

7B-4. General

Non-disciplinary action—counseling or admonition—is communication from a supervisor requiring an employee to stop or to not repeat misconduct that is an offense stated in Table C-1. Non-disciplinary action is appropriate where the offense is minor and cessation or non-repetition of the offense is a satisfactory resolution of the matter.

7B-5. Counseling

Where non-disciplinary action is appropriate, counseling is appropriate in the first instance. Counseling is oral and is not recorded in the Supervisor's Work Folder on the Supervisor's Employee Brief for the technician.

7B-6. Admonitions

If after counseling the misconduct continues or is repeated, but non-disciplinary action is still appropriate, admonition is warranted. The admonition is written in the Supervisors Work Folder on the Supervisor's Employee Brief for the technician. The employee must be allowed to write on the brief his or her reply to the facts and reasons stated by the supervisor. If the employee replies orally and declines to reply in writing, the supervisor will write on the brief a summary of the reply. The supervisor will state the date on which the admonition and reply will be expunged, absent continuation or repetition of the misconduct. This date may not be more than one year after the date of the admonition. Expungement eliminating all record of the occurrence of the admonition will be accomplished on that date absent continuation or repetition of the misconduct.

Section 3 Disciplinary Actions

Letter of Reprimand

7B-7. General

A letter of reprimand is a disciplinary action without an adverse action connected to it. A letter of reprimand may be used where a counseling or admonition is ineffective or where the nature of the offense warrants a more serious and formal action. Appendix C delineates various offenses and possible penalties.

7B-8. Procedures

A letter of reprimand is issued by a person in the technician's supervisory chain. If it is issued by a supervisor other than the first line supervisor, the first line supervisor will receive a copy of the letter of reprimand. The supervisor issuing the letter of reprimand must determine by a preponderance of the evidence that the facts supporting the issuance of the letter of reprimand are substantiated. This may, but does not always, require an investigation, either formal or informal. The letter of reprimand should be in substantially the same form as the Sample Letter of Reprimand in Appendix A. All letters of reprimand will be cleared for procedural accuracy through the Human Resources Office. All letters of reprimand must at a minimum include the following:

- a. A description of the violation/offense/action (hereinafter referred to as the cause) in sufficient detail to show why the letter of reprimand is being given.
- b. The timeframe that the letter of reprimand will remain in effect in the Official Personnel Folder (OPF) of the technician. The timeframe is typically 1-3 years. Circumstances may require some other timeframe. If circumstances require some other timeframe, those circumstances must be detailed.
- c. Notice that the letter of reprimand may be grievable through the State administrative grievance procedure.
- d. A statement that the repeat of this type of conduct or behavior may result in a more severe disciplinary action to include suspension, change to lower grade or removal.

7B-9. Grievances

All letters of reprimand are subject to grievance procedures except letters of reprimand issued by The Adjutant General as a reduction of a penalty imposed in an adverse action.

7B-10. Use in adverse actions

Letters of reprimand may only be used in adverse action proceedings as a previous offense if the adverse action is commenced before the timeframe specified in the letter of reprimand has expired. Letters of reprimand remain in effect for the period of time stated in the body of the letter. Letters of reprimand that have expired by their terms do not constitute a previous offense in determining the penalty to be imposed. Letters of reprimand that have expired may be used as a consideration when determining the penalty to be imposed in an adverse action when a range of penalties may be imposed.

Section 4 Adverse Actions

7B-11. General

a. Actions that constitute adverse actions. Adverse actions are actions that may result in a suspension without pay, a reduction to a lower grade, or removal from technician employment.

b. Actions that do not constitute adverse actions. The following actions do not constitute an adverse action, and 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) Discharge of probationary or trial period technicians. (An adverse action procedure applies when suspending probationary or trial period technicians.)
- (6) Mandatory retirements.
- (7) Denial of within-grade increases.
- (8) Actions excluded by law (i.e., political activity cases, Hatch Act violations).
- (9) Alleged loss or lessening of promotion potential.
- (10) Reduction of technician rates of pay from rates that are contrary to law or regulation.
- (11) Recording absences as absent without leave (AWOL can become the basis for initiating adverse action.)
- (12) 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).
- (13) Actions that entitle technicians to grade or pay retention or actions to terminate such entitlements.
- (14) Terminations of temporary or indefinite type appointments or termination of temporary promotions, details, etc.
- (15) 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.
- (16) Details to lower-graded positions without a change in official position assignment or loss of pay.

c. Trial/Probationary technician removals.

(1) Removal action may be taken at any time during the probationary period. If the removal of the technician is for post-appointment reasons, the technician is entitled only to written notice, with a general conclusion about deficiencies, before the end of tour of duty on the last day of the probationary period.

(2) A trial period (dual status technician) or a probationary period (non-dual status technician) removal does not provide the affected technician with the right to an administrative hearing or appellate review. This applies to either pre-appointment or post- appointment trial/probationary period removals.

(3) A 30 day notice is not required for removal of trial/probationary technicians within their trial/probationary period.

d. Suspension with pay. The fact that an adverse action is being processed does not require that a technician be prevented from performing their normal duties. In cases where there is no good reason to do so the technician will continue with their normally assigned duties. Where the

continued presence of the technician may have an adverse impact on the mission, cause a safety concern or will unduly disrupt the work area, the technician may be suspended from duty with pay until such time as an original decision is rendered or the end of the 30 day notice of removal period. Suspension with pay is not an adverse action. If a technician is suspended with pay, arrangements must be made with the technician and/or their representative for the preparation of their reply and or appeal. This must include access to documents and witnesses who voluntarily wish to meet with the technician or their representative.

7B-12. Procedures

All adverse actions may have the following steps: 1. Proposed action letter (mandatory); 2. Technician's response (responses may be made by or on behalf of the technician at the technician's option, but are not required); 3. Original decision letter (mandatory); 4. Technician's appeal (Appeals may be made by or on behalf of the technician, at the technician's option, but are not required); and 5. Final decision letter (mandatory if technician appeals).

Section 5

Proposed Action Letter

7B-13. General

The proposed action letter is the first official document produced in the adverse action proceeding. The initiator of the proposed action letter is someone in the technician's supervisory chain. Prior to the proposed action letter being issued, the initiator must develop the facts (by a preponderance of the evidence) that constitute cause for the adverse action. The supporting facts may, but do not have to, be determined as a result of an investigation. The proposed action letter must consist of the following parts: 1. The cause for the action being taken; 2. What penalty is being proposed; 3. The right to interview witnesses that agree to do so voluntarily, and to review, copy or receive the materials (documents, recordings, emails, reports of investigations etc.) that support the cause for the action; 4. The technician's right to reply; 5. A representative from the HRO that can provide technical assistance; and 6. The deciding official's contact information. All proposed action letters must be produced in conjunction with the HRO. A sample proposed action letter is provided at Appendix B.

7B-14. Cause

Cause is the reason that the adverse action is being proposed. Stating the cause by listing an offense from the Table of Penalties for Various Offenses, Appendix C, is not sufficient. Enough additional facts must be included in the proposed action letter to allow the technician to know the details (who, what, when and where) of the offense that they are charged with. All separate causes should be combined in the same action, for example AWOL and misuse of a government vehicle, but different levels of the same offense should not be included, such as AWOL and unexcused tardiness. If a technician is arrested, indicted or convicted of a criminal offense, the arrest, indictment or conviction should not be used as cause. When a technician is arrested, indicted or convicted of a criminal offense, the conduct that lead to the arrest, indictment or conviction can be used as cause for the adverse action. Conduct occurring away from the workplace or outside of the technician duty day may be the basis for cause if there is a nexus between the conduct and the technician workforce. Where a nexus is alleged, it must be fully explained in the cause portion of the letter.

7B-15. Penalty being proposed

The penalty being proposed must be completely stated and an explanation for selection of it must be briefly stated. Penalties must be similar for similar offenses with like circumstances. The Table of Penalties for Various Offenses, Appendix C, provides a general guide for common offenses. Variation from the proposed penalties is permissible. When circumstances require a variation, those circumstances must be provided in enough detail for the technician to be able to respond to them. When a removal is proposed, the proposed action letter will also constitute the 30-day advance notice of removal.

7B-16. The right to review material relied upon

The technician or their representative is entitled to review, copy or receive the materials that make up the basis for the proposed action letter; this includes having witnesses identified and, if the witnesses consent, the right to interview them. These materials may be provided as copies when the proposed action letter is presented or may be made available for examination and copying at a later date. If they are not provided as copies at the time that the proposed action letter is presented, the time for the technician's response does not start until the materials are made available to the technician or their representative. When the documents relied upon are part of the public domain, reference to the portion of the law, regulation, policy etc. is sufficient delivery if the technician or their representative has access to the material. Material that cannot be made public, such as classified material or confidential information, cannot be used as the basis for an adverse action.

7B-17. The right to reply

The technician must be informed that they have the right to reply to the proposed action letter by means of written submissions, orally or by both methods. The technician is informed of the timeframe for making their reply. The timeframe will be specified in calendar days, a minimum of seven days will be afforded, and the technician will be informed of the process for requesting extensions of time to reply. The employer must provide a reasonable amount of excused absence for the technician to prepare their reply. At a minimum, this is four (4) hours and should be longer if the circumstances require.

7B-18. HRO technical assistance

The technician must be provided with the name and contact information for a member of the HRO that will be available to assist the technician with technical assistance about the adverse action process. The HRO member cannot provide representation for the technician concerning the merits of their case, but is limited to providing procedural advice.

7B-19. The deciding official

The technician is provided with the identity and contact information of the individual to whom they must reply if they decide to make a reply. This individual must be higher in the supervisory chain of the technician than the supervisor who proposed the adverse action. The deciding official must be reasonably available during the period for reply and any extensions. Contact information including address, telephone numbers and email address will be provided.

7B-20. Employee assistance information (optional)

If it reasonably appears that a personal problem may have contributed to the cause for the adverse action, it is encouraged that employee assistance information be provided to the technician. Providing employee assistance information is for the voluntary use of the technician only and will be used for no other purpose.

Section 6 Technician's Reply

7B-21. Technician's Reply

The technician named in a proposed action letter has the right to reply to any fact or procedural issue raised by that letter. The technician (or their representative) may reply in writing, orally or by both methods. Witnesses will not be called during the reply portion of an adverse action. Voluntary statements or documents may be submitted as a portion of any reply. More than one reply by the technician may be submitted during the reply step. A reply is not required, and no adverse inference may be drawn from the fact that a reply was not made.

Section 7 The Original Decision Letter

7B-22. General

The deciding official named in the proposed action letter must make the original decision; this duty may not be delegated. The original decision letter will be prepared in conjunction with the HRO. The original decision letter contains the following parts: 1. A statement of what action has been decided upon; 2. The date the action will be effective; 3. Reference the technician's replies; 4. The reasons for the decision; 5. HRO assistance information; and 6. Appeal rights. The original decision letter is issued as soon as practical after the period for the technician reply has ended. A sample original decision letter is contained in Appendix D.

7B-23. Statement of what action has been decided upon

The deciding official may uphold the proposed action, select a less severe penalty, or take no action at all. A more severe penalty than recommended in the proposed action letter may not be imposed. If a suspension is decided upon, the number of days should be clearly stated. If a change to a lower grade is decided upon, the grade and step for the lower grade must be specified.

7B-24. The effective date

The deciding official will specify the date that the action taken will be effective on. The effective date may not be before the date of the original decision letter. If the action decided upon is removal, the removal cannot be effective on a date sooner than 30 days after the date of the proposed action letter.

7B-25. Reference to the technician's replies

The original decision letter will refer to all replies received from the technician. If an oral reply is received, the original decision letter must provide a brief description of the issue or issues raised in the reply. When referencing replies, the original decision letter will note all issues raised in the

replies and indicate if the issues were resolved. If no reply is received, this fact will be noted as well. No adverse inference may be made from the fact that no reply has been received.

7B-26. Provide the reasons for the decision

The original decision will explain what causes in the proposed action letter were sustained and which were not. The causes need not be restated. All —Douglas Factors”, found in Appendix E, that apply to resolution of each cause will be noted. When the penalty proposed in the proposed adverse action letter is to be imposed, an explanation of why such penalty is appropriate will be included. Any modification of the penalty from that included in the proposed action letter will be explained.

7B-27. Provide HRO assistance information

The contact information for the member of the HRO that can provide technical and procedural assistance will be given.

7B-28. Appeal rights

Information about the right to appeal, the process for making the appeal and the types of appeals will be provided to the technician in the original decision letter. The letter will refer the technician to TPR 752-1. Notice will also be given that if an appeal is not made, or is not made in a timely manner, that the original decision letter will become final.

Section 8

Miscellaneous Provisions

7B-29. Technician representatives

The technician who is the subject of an adverse action may choose any individual (other than a member of the HRO) to represent them. If the applicable collective bargaining agreement has provisions about representatives, those provisions will be followed. All representatives will be designated in writing with a statement of understanding that is substantially the same as that in the example found in Appendix F. Any changes of representation will be provided in writing.

7B-30. Delivery of documents

The preferred method of delivery of documents is personal delivery with receipt of delivery noted on the retained copy of the delivered document; see the example letters in Appendices A, B, and D. The acknowledgement of a document is only an admission that the document was received and does not constitute agreement with the contents of the received document. Documents received by or provided to the designated representative will be deemed to be received by the technician represented. If personal delivery cannot be accomplished, delivery may be accomplished by mail or email. Delivery by mail must be by certified, return receipt requested, delivery. Delivery by mail is effective on the date signed for. Delivery by email is effective on the date the email is opened by the technician’s account.

7B-31. Counting of days

In all actions which specify that some follow-on action must take place within a certain number of days, the day of delivery is not counted in that number of days. The first day of the specified time period is the next calendar day after delivery. All calendar days are then counted, provided

that the last day of the period cannot be a non-work day. If the period ends on a non-work day, the follow on action must be completed by close of business on the next scheduled work day.

7B-32. Requests for extension of time limits

All requests for extension of time limits will be made to the official that will act next in the process. Requests must be in writing or by email. The facts and reasons supporting the need for the requested extension must be included in the request, but the official may grant any request and initial requests for short extensions routinely should be granted even if unsupported by stated facts and reasons. A written or email response will be made to each request for an extension either granting an extension to a date certain or if denying the request the reasons why the extension was denied.

7B-33. Harmful error

A harmful error is an administrative or procedural error which may have caused management to reach a conclusion different than the one it reached, or an error that substantially diminishes the technician's ability to prepare and present a defense to the proposed adverse action. Harmful errors must be alleged immediately upon discovery. The burden of proof for showing that an error was a harmful error is on the technician. If an alleged harmful error is not immediately raised, the harmful error is deemed waived. Immediately means by separate writing or in the next scheduled response, such as the technician's reply.

7B-34. Corrective actions

If an administrative or procedural error occurs but can be corrected to prevent or eliminate harm, the correction must be made. This may be done by issuing a new letter, allowing additional reply or response time or other such action as long as it may be clearly shown that the action as corrected afforded the technician with all the due process that they are entitled to.

7B-35. Cancelling and re-starting adverse actions

Adverse actions are administrative actions, not criminal actions and are not subject to "double jeopardy" rules. At any time before an original decision letter is issued, an adverse action may be cancelled, changed and restarted. If an adverse action is cancelled for purposes of starting it over, the technician affected by the adverse action must be made whole. Making a technician whole means returning that technician to the position they would have been in had the action not been started. This may include returning the technician to a position they previously held, restoring leave and back-pay. All references to the action, to include cancellation, must be removed from the technician's files.

7B-36. Last chance agreements

On occasion it may be desirable to enter into a last chance agreement, rather than immediately removing a technician from their Federal position. This is a determination that is at the sole discretion of the original decision maker or the final appeal authority. Last chance agreements hold removals in abeyance on certain conditions. These conditions must be part of the last chance agreement: (a) the continued good behavior of the technician with no repeat of a like offense, or one of like severity, (b) the continued good performance of the technician, (c) a written admission by the technician that they committed the offense that they were accused of, (d) that that offense would justify their removal, (e) how long this last chance agreement will

remain in effect (not more than 2 years) and (f) that if they violate this last chance agreement during the period that it remains in effect that their removal can be effected immediately with no right to appeal. Any such last chance agreement must be reduced to writing and signed by the original decision maker/final appeal authority, the technician and their representative (if any).

7B-37. Stay of imposition of penalties other than removal

On occasion it may be desirable to not impose a penalty based upon justice or the needs of the organization. Where an original decision has been issued and no appeal is pending, or where the final appeal authority has made a determination on an appeal, a penalty may be directed, but not imposed based upon certain conditions. These conditions must be part of the stay of imposition: (a) the continued good behavior of the technician with no repeat of a like offense, or one of like severity, (b) the continued good performance of the technician, (c) the period of time that the stay of imposition will remain in effect (not more than 1 year) (d) acknowledgement by the technician that a violation of this stay of imposition will result in the immediate imposition of the penalty previously imposed, and (e) acknowledgement by the technician that the new offense that constituted a breach of the stay of imposition will be the subject of an entirely separate adverse action.

7B-38. Drug or alcohol use

Where drug or alcohol use is cited as a defense or contributing factor for a technician's misconduct, the misconduct will be dealt with separately from the drug or alcohol use problem. The employee will be referred to a medical provider or an employee assistance program for the drug or alcohol use. The misconduct will be treated in the same manner that all such misconduct dealt with and similar penalty for a similar offense will be imposed. If the penalty imposed is a penalty other than removal and the technician can establish that the drug or alcohol use is a handicapping condition, then reasonable accommodations may be made. If the penalty imposed is removal, consideration should be made about the date of the proposed removal to allow the technician to obtain medical or treatment services as recommended by competent medical or professional authority.

Appendix A
Sample Letter of Reprimand

Heading: (name, date, etc.)
Subject: Letter of Reprimand

1. This letter is a reprimand for your conduct on (time and location). At that time, you (specify the details, who, what and effect). This has had an adverse impact on the organization by (specify impact).
2. A repeat of this or similar conduct may result in more severe action being taken such as suspension, reduction to a lower grade or removal.
3. This letter was coordinated with the Human Resource Office and will remain in your Official Personnel File (OPF) for a period of (NTE 3 Years).
4. This letter may be grieved using the administrative grievance procedures.
(For letters of reprimand where TAG issued it as a reduction from a more severe penalty in an adverse action appeal, this paragraph should state that this letter is a result of an appeal proceeding and may not be grieved.)
5. The Human Resource Office (HRO) has been consulted on the issuance of this letter and (name, and contact information) of the HRO is available to answer your procedural questions. This HRO member is not your representative.
6. (Optional - Provide employee assistance information) Should personal problems be contributing to your misconduct, the Employee Assistance Program (EAP) is available to you for appropriate consultation and referral. If you desire assistance, you should contact the EAP Coordinator, (name and contact information).

Supervisor's Signature block

CF:
Higher Level Supervisor(s)
Human Resources Office, JFH-MS-HRT

I acknowledge receipt of this letter of reprimand. My signing below is not agreement with the content, only acknowledgement that I have received a copy of it.

Technician's Signature block

Date

Appendix B

Sample Proposed Action Letter

Heading: (name, date, etc.)

Subject: Proposed Action Letter

1. This is notification that I propose to (suspend and/or change to lower grade or remove) you from your position as (title and grade of technician position). The cause for this action is (a complete explanation of the cause {or offense} including the who, what, when and where.
2. I propose to (suspend you for __ number of days, reduce you to ____ grade, step _____, or remove you from your technician employment). {In removal cases add} This letter constitutes your 30 day notice of removal.
3. I have enclosed all documents that I have relied upon for your use. Or: You may review and copy the documents I have relied upon by making arrangements with (name) at (location). {NOTE: the period for the technician to reply does not start until the supporting documents are made available to the technician}.
4. You have the right to reply to this proposed action letter orally, in writing, or by both methods to Name, address and contact information who will receive your reply(s) and will issue the original decision letter after the period for reply has ended (normally next level supervisor). You will be granted amount of time, hours or days of official time and/or excused absence to prepare your reply. Arrange for the use of this time with your immediate supervisor.
5. The Human Resource Office (HRO) has been consulted on the issuance of this letter and (name, and contact information) of the HRO is available to answer your procedural questions. This HRO member is not your representative.
6. After the period for your reply has ended, name, address and contact information will issue the original decision letter. If you require more time to reply, you must request an extension from the original decision maker in writing, providing the reasons for the extension and the period of time the extension is requested for. This request must be received by the original decision maker before the end of the reply period. The original decision maker may grant all, a portion, or none of this extension request.
7. (Optional - Provide employee assistance information) Should personal problems be contributing to your misconduct, the Employee Assistance Program (EAP) is available to you for appropriate consultation and referral. If you desire assistance, you should contact the EAP Coordinator, (name and contact information).

Supervisor's Signature block

I acknowledge receipt of this letter of proposed action. My signing below is not agreement with the content, only acknowledgement that I have received a copy of it.

Technician's Signature block

Date

Appendix C 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. Conduct that was the subject of counseling or admonishment is not an offense for purposes of this table. For example, if a technician was counseled for unexcused tardiness and admonished for a second instance of unexcused tardiness and management then decides to take disciplinary action for a third instance of unexcused tardiness, this third instance is the first offense for purposes of this table. 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. Note: Numbered remarks in last column follow this table.

Table C-1. Penalty Guide

Item	Nature of Offense	Sub-category	First Offense	Second Offense	Third Offense	Remark
1a	Attendance related offenses	Unexcused tardiness	Letter of reprimand	Letter of reprimand to 1 day suspension	2-day to 5-day suspension	1
1b		Failure to follow established leave procedures	Letter of 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	Letter of 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	Letter of 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	Letter of reprimand to removal	30-day suspension to removal	Removal	3
3a	Breach of security regulations or practices	Classified information is not compromised and breach is unintentional	Letter of 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	Letter of reprimand to removal	30-day suspension to removal	Removal	
3c		Classified information is compromised and breach is unintentional	Letter of 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 Govt. premises or in a duty status	Letter of 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 Govt. premises or while any person involved is in a duty status	Letter of 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	Letter of 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	Letter of 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	Letter of reprimand to removal	1-day suspension to removal	15-day suspension to removal	7
6b		Making false or unfounded statements against coworkers, supervisors, subordinates or Govt. officials which tend to damage the reputation or undermine the authority of those concerned	Letter of reprimand to removal	30-day suspension to removal	Removal	

6c		False statements, misrepresentation, or fraud in entitlements; time card, leave form, travel voucher	Letter of reprimand to removal	30-day suspension to removal	Removal	5
6d		False statements, misrepresentation on documents pertaining to qualifications, or other official record	Letter of 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 lawful orders, defiance of authority	Letter of 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	Letter of reprimand to 5-day suspension	5-day to 10-day suspension	Removal	8
9b		Threatening or attempting to inflict bodily harm	Letter of reprimand to 15-day suspension	15-day suspension to removal	30-day suspension to removal	8, 19
9c		Hitting, pushing, or other acts against another without causing injury	Letter of reprimand to 30-day suspension	30-day suspension to removal	Removal	8, 19
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)	Letter of reprimand to 1-day suspension	Letter of 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)	Letter of 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	Letter of reprimand to removal	Removal		10
12a	Misuse or abuse of Govt. property or personnel	Negligent loss, destruction or damage to Govt. property	Letter of reprimand to 5-day suspension	Letter of 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	Letter of reprimand to 15-day suspension	Letter of reprimand to removal	15-day suspension to removal	10
12c		Using Govt. property or personnel in duty status for other than official purposes	Letter of reprimand to removal	1-day suspension to removal	15-day suspension to removal	10
12d		Misuse of Govt. credentials	Letter of 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	Letter of reprimand to 1-day suspension	Letter of reprimand to 5-day suspension	5-day suspension to removal	
13b		Where danger to persons or property is involved	Letter of 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	Letter of reprimand to 3-day suspension	Letter of reprimand to 5-day suspension	5-day suspension to removal	
14b		Delay or failure to carry out instructions within the time required	Letter of reprimand to 15-day suspension	3-day suspension to removal	5-day suspension to removal	
14c		Dereliction of duty	Letter of 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	Letter of reprimand	1-day to 5-day suspension	5-day to 30-day suspension	

15b		Operating, assisting or promoting unauthorized gambling activity on Govt. premises while in 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	Letter of reprimand	Letter of reprimand	Letter of reprimand	13
18a	Sexual harassment	Not involving a subordinate	Letter of 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	Letter of 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	Letter of 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 USC 7101	Letter of 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	Letter of 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	Letter of 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	Letter of 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	Letter of reprimand	Letter of reprimand to 1-day suspension	1-day to 5-day suspension	17
26b		Failure to wear uniform properly	Letter of reprimand	Letter of reprimand to 1-day suspension	1-day to 5-day suspension	17
27	Misuse of Govt. communication systems & equipment	Intentionally using Govt. communication systems for other unauthorized purposes	Letter of reprimand to 15-day suspension	Letter of reprimand to removal	15-day suspension to removal	18

Remarks:

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.

2. These penalties generally do not apply to Absent Without Leave (AWOL) charged for tardiness of one 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.

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

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

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

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 with fiduciary responsibilities.

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

8. Lawful self-defense or defense of another is not an offense. Penalty may be exceeded based on such factors as type of threat, provocation, extent of injuries, whether actions were defensive (but in excess lawful self-defense or defense of another) or aggressive in nature, or whether actions were directed at a supervisor.

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.

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.

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

12. Penalty dictated by 18 USC§ 2071.

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

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.

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.

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

17. IAW 32 USC§709(b), AR 670-1, AFI 36-2903, TPR 400.6(e), and TPR 400.12(b).

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.

19. Metz Factors – 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, and are as follows:

- a. Listener’s reactions
- b. Listener’s apprehension of harm
- c. Speaker’s intent
- d. Any conditional nature of the statements
- e. Attendant circumstances

Appendix D

Sample Original Decision Letter

Heading: (name, date, etc.)

Subject: Original Decision Letter

1. On date, Major John Smith proposed that you be removed from National Guard technician employment. I have decided that there is (cause for your removal, or cause for taking adverse action but with some lesser specified penalty, or not cause for taking adverse action).
2. This action will be effective on date. (Note: for removals it cannot be effective sooner than the next workday after 30 days from the proposed action letter.)
3. I have considered your reply(s) of date(s). In your reply(s) you raised the following points or issues (summarize the substance of the technician reply(s)).
4. I have decided upon this action because (describe the reasons that support the imposition of whatever adverse action was imposed. The reasons for finding each cause must be spelled out, and reasons for not finding the issues raised in the technician's reply(s) and any Douglas Factors applied to the action should be included.)
5. The Human Resource Office (HRO) has been consulted on the issuance of this letter and (name, and contact information) of the HRO is available to answer your procedural questions on your appeal rights. This HRO member is not your representative.
6. You have the right to appeal this original decision. You may request either an appellate review or an administrative hearing. You may not request both methods of appeal. The appellate review is accomplished by the State Adjutant General without the involvement of a NGB hearing examiner. This appellate review involves a review by the State Adjutant General of all pertinent records including the reply(s) of the technician and any documents submitted with the appeal. In an administrative hearing, a NGB hearing examiner from another State will gather all available and relevant facts through the administrative hearing process. After the hearing process, the NGB hearing examiner will issue a report of findings and recommendations to the State Adjutant General. In either method of appeal the final decision on appeal is issued by the State Adjutant General. You can appeal by sending a written notice to the HRO specifying which method of appeal you request. This request must be postmarked no later than 20 days after the date of this letter, or emailed to the HRO no later than 20 days from the date of this letter. If a request for extension of this appeal period is requested, such request is directed to the State Adjutant General and must be received within the 20 day period, and the reasons for the request must be included. The State Adjutant General will decide if the requests for extension should be granted or not.

Deciding Official's Signature block

I acknowledge receipt of this original decision letter. My signing below is not agreement with the content, only acknowledgement that I have received a copy of it.

Technician's Signature block

Date

Appendix E

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.

E-1. 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.

- a. 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.
- b. Consider the technician’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.
- c. Consider the technician’s past disciplinary record.
- d. 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.
- e. 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.
- f. Consider the consistency of the penalty with those imposed on other technicians for the same or similar offenses.
- g. Consider the consistency of the penalty with NGB guidance regarding disciplinary actions.
- h. Consider the notoriety of the offense and its impact on the reputation of the agency.
- i. 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.
- j. Consider the potential for the technician’s rehabilitation.
- k. Consider mitigating circumstances surrounding the offense such as unusual job tensions, personal problems, mental impairment, harassment or bad faith, malice, provocation on the part of others involved in the matter, or deployment induced/combat related stress.
- l. Consider the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

E-2. Past Discipline or Adverse Action

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

Appendix F
Sample Letter of Representation

I, Name and duty position, appoint name and contact information, to act as my representative in this adverse action proceeding. All notices/letters provided to me will also be provided to my representative. Notices or letters received by either of us will be binding on both of us.

Technician's Signature block

I, Name and contact information, agree to represent name of technician. I agree to represent him/her, to receive notices/documents/letters on his/her behalf. I am familiar with the adverse action regulation TPR 752 and with the Appeal procedures in TPR752-1. I understand that my actions will be binding on him/her in this action. I understand that my representation will continue until revoked in writing.

Representative's Signature block

Appendix G Sample Last Chance Agreement

Heading: (Name, Date, etc.)

Subject: Last Chance Agreement

1. On date, technicians name was proposed to be removed from his/her technician position because (state the facts and cause which support a termination). Technician's name admits and agrees that his/her actions would support his/her removal from the technician program.

2. The employer State National Guard, mindful of its right to terminate the above named employee, desires to allow them to continue in their position as an employee of the State National Guard under the following conditions:

a. That the employee will continue to perform their duties at an acceptable or higher level of performance.

b. That the employee will not commit any same or similar level of offense against the employer/employee relationship.

3. This Last Chance Agreement will remain in effect for a period of 1-2 years. If the employee should violate any terms of this agreement, the employee in consideration of their continued employment hereunder specifically agrees as follows:

a. That the removal proposed above may be effected immediately, without further notice provided that it is at least 30 days after the above referred to proposed action letter.

b. That no further right of appeal exists for the above proposed action, either by Administrative Hearing or Appellate Review.

4. This agreement will remain in force and effect for the entire period specified above, and shall not lapse or become void because of change of supervisor or change of technician position by the technician.

Signature blocks for:

Technician

Technician Representative (if any)

Original Decision Maker

HRO Representative

Glossary

Absent Without Leave

Absence from duty not authorized by the proper leave-approving official.

Administrative Grievances

An administrative grievance system is provided for all employees not covered by a bargaining agreement. This grievance system provides technicians with the opportunity to receive an objective review of individual or group complaints regarding work conditions, employment decisions, etc.

Adverse Action

An official personnel action, usually taken for disciplinary reasons, which adversely affects an employee and is of a severity that a suspension, reduction in grade or status, or removal is warranted.

Cause

The reason that the adverse action is being proposed. Additional facts must be included in the proposed action letter to allow the technician to know the details (who, what, when and where) of the offense they are charged with.

Collective Bargaining Agreement

A written agreement between the agency and a labor organization, usually for a definite term, defining conditions of employment, rights of employees and labor organizations, and procedures to be followed in settling disputes or handling issues that arise during the life of the agreement.

Conditions of Employment

Personnel policies, practices and matters whether established by rule, regulation or otherwise, affecting working conditions. It does not include policies, practices and matters relating to prohibited political activities, to the classification of any position, or to the extent the matters are specifically provided for by statute.

Days

Calendar days.

Deciding Official

The deciding official is normally the next level supervisor or management official who resolves and renders decisions on grievances.

Disciplinary Action

Letter of reprimand or adverse action.

Double Jeopardy

The fact of taking adverse action on an employee twice for substantially the same offense. Adverse actions are administrative actions, not criminal actions and are not subject to "double jeopardy" rules. At any time before an original decision letter is issued, an adverse action may be

cancelled, changed and restarted. If an Adverse action is cancelled for purposes of starting it over, the technician affected by the adverse action must be made whole.

Douglas Factors

A number of factors which management must weigh in deciding an appropriate course of action. 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.

Grievance

Request by an employee, or by a group of employees acting as individuals, for personal relief in a matter of concern of dissatisfaction which is subject to the control of agency management and relates to the employment of the employee(s).

Investigations

Management has a responsibility to investigate the charges against the technician and/or any defense raised by the technician, using AR 15-6, AFI 90-301, or any other investigation procedure. If management determines the conduct warrants criminal investigation, management must stop the investigation and contact the HRO and Staff Judge Advocate (SJA).

Metz Factors

Metz v. Dept. of Treasury, 780 F.2d 1001 (Fed. Cir. 1986), threats would be 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; (5) the circumstances surrounding the incident.

Negotiated Grievances

Technicians who are covered by a collective bargaining agreement may exercise their right to file a negotiated grievance. A grievance is a complaint of a technician or labor organization concerning a claimed violation or misapplication of the collective bargaining agreement or any law, rule, or regulation affecting conditions of employment.

Nexus

A connection or link between conduct occurring away from the workplace or outside of the technician duty day and the technician workforce. Where a nexus is alleged, it must be fully explained in the cause portion of the letter. There must be a clear nexus between efficiency of the service and the debt complaint.

Preponderance of Evidence

The greater weight of the evidence, sufficient to incline a fair and impartial mind to one side of the issue rather than the other. A supervisor issuing a letter of reprimand must determine by a preponderance of the evidence that the facts supporting the issuance of the letter of reprimand are substantiated. Prior to serving a proposed action letter, a supervisor must develop the facts by a preponderance of the evidence that constitute cause for the adverse action.

Previously involved

Official must have directly influenced the decision regarding the matter being grieved or must have a personal interest in the matter.

Procedural Advice

Technical assistance provided by a member of the HRO, usually the Labor Relations Specialist, to assist a technician with procedures regarding the adverse action process.

Range of Penalties

A variation of possible penalties, that are graduated in severity based on whether the alleged offense is the first, second, or third offense.

Reasonable Accommodations

An action taken to adapt or adjust for a technician, done in a way that does not impose an undue hardship on the employer/agency.

Supervisor

Under 5 USC§ 7103, an individual employed full-time by an agency having authority to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees; adjust their grievances or to effectively recommend such action. The performance of one or more of these duties qualifies an employee as a –supervisor” for labor relations purposes and excludes the employee from the bargaining unit.

Technician

Dual status and non-dual status technicians defined in 32 USC§ 709(e).

Weingarten rights

Refers to the right of a bargaining unit employee to be represented by the union when (1) the employee is examined in an investigation conducted by one or more representatives; (2) the employee reasonably believes disciplinary action against him or her may result; and (3) the employee requests union representation.