

TSA MD 1100.75-3 Handbook

Addressing Unacceptable Performance and Conduct

Effective: January 2, 2009





This Handbook and all related Attachments and/ or Appendices contain stipulations to implement the provisions of TSA MD 1100.75-3, Addressing Unacceptable Performance and Conduct. Until such time as TSA MD 1100.75-3 is rescinded, the Management Directive, Handbook, and any Attachments or Appendices are considered TSA policy, and must be applied accordingly.

TABLE OF CONTENTS

Section

		Page
A.	Definitions:	4
В.	Non-disciplinary actions:	6
C.	Letters of Guidance and Direction/Letters of Counseling (non-disciplinary action):	6
	(1) Content:	6
	(2) Delivery and Retention:	7
D.	Letters of Leave Restriction (non-disciplinary action):	7
	(1) Content:	7
	(2) Delivery and Retention:	7
E.	SMART Agreements (non-disciplinary action):	8
	(1) Content:	
	(2) Delivery and Retention:	8
F.	Disciplinary Actions:	8
	(1) TSA Pre-Decision Process:	8
	(2) Penalty Determination:	9
G.	Letters of Reprimand:	10
	(1) Content:	
	(2) Delivery and Retention:	11
H.	In Lieu of Reprimand:	11
	(1) One-Step Process:	
	(2) Two-Step Process:	
I.	Adverse Actions (Suspensions, including Indefinite Suspensions, Involuntary Demotion for	
	Performance/Conduct, Removals):	
	(1) One-Step Process:	
	(2) Two-Step process	

J. Indefinite Suspensions:	19
(1) Conditions under which Indefinite Suspensions may be imposed:	
(2) General:	
(3) Reconsideration of Indefinite Suspensions Under the One-Step Process:	
K. Appeal and Grievance Rights:	20
(1) Suspensions of 15 days or more (including indefinite suspensions), Removals, a 20	
(2) Suspensions of 14 days or less and Letters of Reprimand	21
Appendix A:	
(1) TSO Offenses For Which Removal Is Required:	
(2) TSO Offenses For Which Removal Is Permitted for the First Offense:	
Appendix B:	23
Delegation of Authority for TSOs	
Appendix C:	24
Delegation of Authority for Non-TSOs:	

A. <u>DEFINITIONS:</u>

- (1) <u>Adverse Action</u>: An official action consisting of a suspension of any length, including an indefinite suspension, an involuntary demotion performance/conduct or a removal.
- (2) <u>Aggravating Factors</u>: Considerations that may enhance the severity of the penalty selected, e.g., the employee's prior disciplinary record.
- (3) <u>Charge</u>: A description or labeling of the specific act(s) of unacceptable conduct or performance that form the basis for a proposed disciplinary or adverse action.
- (4) <u>Corrective Action:</u> Disciplinary or non-disciplinary action that informs an employee about conduct or performance that should be corrected or improved, or any administrative action in furtherance of disposition of the case.
- (5) <u>Day</u>: Calendar day.
- (6) <u>Deciding Official:</u> Generally, a higher level official in the employee's chain of supervision than the official who proposed the action except where the Assistant Secretary proposes the action, in which case the Assistant Secretary may also serve as the deciding official.
- (7) <u>Demotion</u>: Voluntary or involuntary change to a lower pay band or rate of pay.
- (8) <u>Disciplinary Action</u>: An official action taken in response to unacceptable performance or conduct, consisting of Letters of Reprimand, In Lieu of Reprimand, Suspensions of any length, Demotions, and Removals.
- (9) <u>In Lieu of Reprimand</u>: A Reprimand issued in lieu of a suspension of 1 to 14 days. In Lieu of Reprimands are used in situations where a suspension would not be practical (e.g., for excessive absences or AWOL), or in rare instances where the employee's absence during a suspension would create an extreme hardship on the agency's mission. In Lieu of Reprimands serve the purpose of establishing a record of progressive discipline.

(10) Legal Sufficiency:

- (a) A preponderance of the evidence supports that the unacceptable conduct or performance occurred;
- (b) There is a nexus or connection between a legitimate government interest and the misconduct/matter that is the basis for the disciplinary action; and
- (c) The penalty is reasonable.
- (11) <u>Letter of Reprimand:</u> The least severe form of disciplinary action that may be issued to address unacceptable performance or conduct. A letter of reprimand must be placed in the employee's electronic Official Personnel Folder (eOPF) for a specified time, not to exceed

two years from the date the letter was issued. A supervisor may maintain a copy for his/her files after it is removed from eOPF.

- (12) <u>Mitigating Factors:</u> Considerations that may lessen the severity of the penalty selected, e.g., the employee's superior work record.
- (13) Nexus: For the purposes of a disciplinary action, it is a connection between a legitimate government interest and the employee' unacceptable performance, conduct, or matter that is the basis for the disciplinary action. Nexus is presumed when the basis for disciplinary action is an employee's unsatisfactory job performance or on-duty misconduct, or in the case of criminal activity or other egregious or especially notorious misconduct. However, actions also may be taken against an employee because of off-duty misconduct where there is a nexus between the conduct and the TSA mission and/or effective operation of the agency.
- (14) <u>Notice Period</u>: Time frame provided to the employee in order to provide a response to the proposed disciplinary or adverse action.
- (15) <u>Non- Disciplinary Action:</u> Administrative action that management officials may initiate to address performance or conduct problems such as a Letter of Counseling, a Letter of Guidance and Direction, a Letter of Leave Restriction, or a SMART Agreement.
- (16) <u>One-Step Process:</u> The expedited process in which an Adverse Action is issued without a written notice of the proposed action. The one-step process may be used for Suspensions three-days or less, Removals and Indefinite Suspensions for specific cases (for TSOs only).
- (17) Pay Band: A level in TSA's compensation and position classification framework that sets a minimum and maximum rate of basic pay for an occupation based on position category (e.g., Professional, Technical, Specialized, etc.), duties, competencies, and level of responsibility. TSA uses 13 pay bands representing all of its occupations.
- (18) <u>Preponderance of the Evidence:</u> That degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a purported fact is more likely to be true than untrue.
- (19) <u>Proposing Official</u>: Generally, an official in the employee's chain of supervision with the authority to recommend a disciplinary or adverse action.
- (20) Rate of Basic Pay: The rate of pay in the Core Compensation or Transportation Security Executive Service System for the position to which the employee is or will be newly appointed. An employee's rate of basic pay includes a retained rate, but excludes additional pay of any kind (e.g., locality pay, overtime, others form of premium pay, etc.). Basic pay is also commonly known as base salary.
- (21) <u>Removal</u>: Involuntary separation from TSA employment in order to promote the efficiency of the federal service.

- (22) <u>SMART agreement</u>: An agreement in which the acronym that stands for Specific, Mutually acceptable, Appropriate, Realistic and Time-based. SMART agreements can be used as an alternative to discipline or to hold in abeyance a decision to take a disciplinary action.
- (23) <u>Specification</u>: The factual narrative describing the details of the unacceptable performance or conduct identified by the charge.
- (24) <u>Two-Step Process:</u> The procedure in which a Notice of Proposed action and Notice of Decision are issued to the disciplined employee.
- (25) <u>Suspension:</u> Placement of an employee in a non-duty, non-pay status for disciplinary reasons or pending certain investigative, judicial, or law enforcement proceedings. A suspension may be imposed for a specified time or for an indefinite period.

B. NON-DISCIPLINARY ACTIONS:

Prior to issuing any non-disciplinary action, management officials may meet with the employee to discuss the incident or allegation, advise the employee of possible consequences, and provide an opportunity to respond orally or in writing. Such actions include a Letter of Counseling, a Letter of Guidance and Direction, or a Letter of Leave Restriction.

C. <u>LETTERS OF GUIDANCE AND DIRECTION/LETTERS OF COUNSELING (NON-DISCIPLINARY ACTION):</u>

- (1) Content:
 - (a) A description of the employee's unacceptable performance or conduct;
 - (b) The supporting facts;
 - (c) A statement of performance or conduct expectations; i.e., what the employee should do to correct the problem;
 - (d) A statement that the action is not disciplinary. However, in Letters of Counseling, a statement is included informing the employee that if he or she does not correct the performance or misconduct, more severe action may be initiated, including discipline up to and including removal;
 - (e) A statement that a copy of the letter <u>will not</u> be placed in the employee's eOPF, but that a copy may be retained by the supervisor in his/her local files to document that the employee has been placed on notice regarding the unacceptable performance or conduct:
 - (f) A statement that the letter may not be grieved; and

- (g) The signature of the management official who issued the letter.
- (2) Delivery and Retention:
 - (a) A letter normally should be delivered in person by the management official who signed the letter. The employee should be asked to sign an acknowledgment of receipt. If the employee elects not to sign the acknowledgment, the supervisor's copy should be annotated with the delivery time and date, the supervisor's signature, and a statement that the employee received the letter, but elected not to acknowledge receipt.
 - (b) A copy is retained in the employee's local files, but no copy is filed in the employee's eOPF.

D. LETTERS OF LEAVE RESTRICTION (NON-DISCIPLINARY ACTION):

- (1) Content:
 - (a) A description of the circumstances forming the basis for placing the employee on a Letter of Leave Restriction;
 - (b) The requirements of the leave restriction;
 - (c) A statement that management will review the employee's use of leave within a particular time period, no earlier than 90 days from the date issued, and no later than 180 days from the date issued, and rescind or amend the leave restriction if warranted at that time. If there is a failure to review and amend at that time, the letter will lapse;
 - (d) Contact information for the Employee Assistance Program;
 - (e) A statement that the employee has the right to grieve the Letter of Restriction under the grievance procedure established by <u>TSA MD 1100.77-2</u>, *Grievance Procedures*, and must file such grievance within 15 calendar days of receipt of the letter; and
 - (f) The signature of the management official who issued the letter.
- (2) Delivery and Retention:
 - (a) The letters normally should be delivered in person by the supervisor who signed the letter. The employee should be asked to sign an acknowledgment of receipt. If the employee elects not to sign the acknowledgment, the supervisor's copy should be annotated with the delivery time and date, the supervisor's signature, and a statement that the employee received the letter, but elected not to acknowledge receipt.

(b) A copy is retained in the employee's local files. It is not filed in the employee's eOPF.

E. SMART AGREEMENTS (NON-DISCIPLINARY ACTION):

- (1) Content:
 - (a) Identification of the parties to the agreement;
 - (b) A brief description of the incident or disciplinary decision that is the basis for the agreement;
 - (c) A list of the actions or steps the employee has agreed to take or comply with to ensure the unacceptable performance or conduct described above is not repeated;
 - (d) The actions management will take or hold in abeyance in exchange for the employee's agreement;
 - (e) A notice of what action may be taken if the employee fails to comply with the terms of the agreement;
 - (f) A statement of any grievance or appeal rights or, if applicable, an agreement to waive those rights as they pertain to an action being held in abeyance;
 - (g) A statement regarding how long the agreement will remain in effect. The length shall be relevant to the underlying factors as determined by management officials and field counsel/OCC; and
 - (h) The signature of the employee and management official who have agreed to the terms.
- (2) Delivery and Retention:
 - (a) The agreement normally should be delivered in person by the supervisor who signed the letter.
 - (b) A copy is retained in the employee's local files. It is not filed in the employee's eOPF.

F. DISCIPLINARY AND ADVERSE ACTIONS:

- (1) TSA Pre-Decision Process: Management officials must follow the following steps prior to proposing <u>any</u> disciplinary or adverse action. If the action taken is a one-step action, the pre-decisional process is required prior to issuing a decision.
 - (a) Assess the incident/allegation/matter;

- (b) Engage in relevant fact-finding to the extent necessary to make an informed decision (e.g., obtain related evidence, witness statements, etc.);
- (c) Review all relevant evidence to ensure that the action meets standards of proof (e.g. by the preponderance of the evidence);
- (d) In a one-step process, management must meet and discuss the incident/allegation with the employee, advise the employee of the allegation and possible consequences, and provide the employee an opportunity to respond orally and/or in writing. In a 2-step process, supervisors or managers are encouraged, but not required, to engage the employee in a pre-decisional meeting as described; and
- (e) Determine whether corrective and/or disciplinary action is appropriate.
- (2) Penalty Determination: The following factors should be considered in determining an appropriate penalty. Not all of the factors are relevant in all cases, and other factors relevant to the case may also be considered.
 - (a) The nature and seriousness of the offense, and its relationship to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.
 - (b) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position. For example, certain employees such as supervisors or law enforcement officers may be held to higher standards than other employees.
 - (c) The employee's past disciplinary record. If past discipline is used, it must be mentioned in the notice of proposed action.
 - (d) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.
 - (e) The effect of the offense upon the employee's ability to perform at a satisfactory level, and its effect upon supervisors' confidence in the employee's ability to perform assigned duties.
 - (f) Consistency of the penalty with those imposed upon similarly situated employees for the same or similar offenses.
 - (g) The notoriety of the offense or its impact upon the reputation of the agency.
 - (h) The clarity with which the employee was on notice of any rules violated in committing the offense or had been warned about the conduct in question.

- (i) The clarity with which the employee was on notice of performance expectations and problems with his or her performance.
- (j) Potential for the employee's rehabilitation.
- (k) 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.
- (l) The adequacy and effectiveness of alternative actions to deter such conduct or improve performance in the future by the employee or others.

Note: These factors do not apply to mandatory removals described in Appendix A or removals involving failure to meet performance standards.

G. <u>LETTERS OF REPRIMAND:</u>

- (1) Content:
 - (a) A description of the unacceptable performance or conduct that is the basis for the Letter or Reprimand;
 - (b) The supporting facts;
 - (c) A statement that repetition of the unacceptable performance or conduct may lead to additional, more severe disciplinary action, up to and including removal;
 - (d) A statement that the letter will be placed in the employee's eOPF for up to two years, and that it may be cited as a prior formal disciplinary action in any future disciplinary matter;
 - (e) A statement that, following removal of the letter from the employee's eOPF, the supervisor may retain a copy of the document in his/her local files as documentation that the employee was on notice regarding the performance or conduct referenced in the letter, or to rebut a claim that the employee had no prior history of conduct or performance problems;
 - (f) A statement that the employee has the right to grieve the Letter of Reprimand under the grievance procedure established by <u>TSA MD 1100.77-2</u>, *Grievance Procedures*, and must file such grievance within 15 calendar days of receipt of the letter; and
 - (g) The signature of the management official who issued the letter.

- (2) Delivery and Retention:
 - (a) Letters of Reprimand normally should be delivered in person. The employee should be asked to sign an acknowledgment of receipt. If the employee elects not to sign the acknowledgment, the file copy should be annotated with the delivery time and date, the supervisor's (or other deliverer's) signature, and a statement that the employee received the letter, but elected not to acknowledge receipt.
 - (b) A copy may be retained in the employee's eOPF for up to two years, and upon removal from the eOPF, may be retained by the supervisor.
- **H.** <u>IN LIEU OF REPRIMAND:</u> Since In Lieu of Reprimands have the weight of suspensions, the notification procedures for suspensions apply. Specifically, one-step actions may be taken as described below in section I(1) for In Lieu of Reprimands for suspensions of one to three days for TSO employees, and the two-step process must be used in all other In Lieu of Reprimands.
 - One-Step Process: A one-step process may be used to affect a Letter of Reprimand In Lieu of suspensions of one to three days for TSOs. Prior to imposing a one-step In Lieu of Reprimand, management must ensure that the pre-decisional discussion described in F(1)(d) is held with the employee and the employee is afforded the opportunity to respond to the allegations orally and/or in writing.
 - (a) Prior to affecting an In Lieu of Reprimand under this process, management <u>must</u> follow the procedures outlined in section 6(F) of the accompanying MD, and sections F(1) and F(2) above.
 - (b) After conducting the pre-decisional discussion required in section F(1)(d) and engaging in the procedures outlined in sections 6(F) in the MD, and F(1) and F(2) above, a decision will be issued in accordance with the procedures set forth in sections H(2)(c) and H(2)(d).
 - (2) Two-Step Process: The two-step process requires the issuance of a written notice of proposed action and notice of decision. A pre-decisional meeting is optional under this process.
 - (a) Content of Proposal: The notice of proposed adverse action must include the following information:
 - (i) The charge(s) and specification(s) for each charge including a description of the evidence that supports the charge(s);
 - (ii) The proposed penalty (e.g. a Letter of Reprimand In Lieu of a Seven Day Suspension);

- (iii) A discussion of any aggravating factors that were considered in determining the proposed penalty, including prior non-disciplinary corrective action such a letter of counseling or disciplinary actions;
- (iv) A discussion of mitigating factors that were taken into consideration in determining the proposed penalty, e.g., the length of service with TSA, past/present satisfactory performance record, awards, remorse if shown;
- (v) A statement that the employee has the right to present an oral and/or written reply to the proposal within seven calendar days. This time limit may be extended for good cause shown. A request for reconsideration may be presented orally, in writing, or both;
- (vi) A statement that the employee may be represented by an individual of the employee's choosing in preparing and presenting any reply. If the employee elects to have a representative, the employee must provide the name of his/her representative to the deciding official in writing, and must provide written notice of any subsequent change in representation;
- (vii) A statement that the employee's chosen representative may be disallowed if the representation creates a conflict of interest or position, e.g., the representative may not in the employee's chain of command. If the representative is another TSA employee, he/she also may be disallowed if he/she cannot be spared because of critical TSA work. (Note: The deciding official will make this determination in consultation with the Office of Human Capital and/or a TSA attorney.) Refer to TSA MD 1100.63-3, Employee Representation for additional information;
- (viii) A statement that costs associated with the employee's representation, including any travel expenses, will be borne by the employee;
- (ix) A statement that the employee and the representative (if a TSA employee) will be allowed a reasonable amount of official time to review the material relied upon, and to prepare and to present the reply(ies);
- (x) A statement that the employee will be provided a copy of the material relied upon to support each charge and specification with the proposal letter. Alternatively, if the material is voluminous or contains Security Sensitive Information (SSI), the employee shall be given the opportunity to review the material at a designated TSA location;
 - Note: Any release or review of SSI documents must be coordinated with the SSI Office and with field counsel/OCC.
- (xi) A statement that the material relied upon will be released only to the employee and/or the employee's designated representative;

- (xii) The name of the deciding official and the individual the employee may contact to make arrangements for a reply or to ask any questions;
- (xiii) A statement that the action will not be taken until after any reply is received and considered; or, if no reply is received, after the reply period expires; or until after the employee informs management that he/she does not intend to reply;
- (xiv) A statement informing the employee of any change in duty status; and
- (xv) A listing of all the documents relied upon which supported the action.
- (b) Duty Status: Except in extremely rare situations, the employee will remain in a duty status during the response period.
- (c) The Deciding Official:
 - (i) Is normally a higher-level official in the employee's chain of command. Exceptions may be warranted depending on extenuating circumstances.
 - (ii) Will consider the charges and specifications contained in the proposal notice, the supporting documentation the employee had an opportunity to review, and the employee's reply. If the deciding official is or becomes aware of additional evidence other than the evidence the employee had an opportunity to review, and wishes to consider such evidence in reaching a determination, the deciding official must inform the employee and provide an opportunity to review such material and reply to the additional evidence before reaching a decision on the proposed action.
 - (iii) Will consider the employee's written and/or oral reply, unless circumstances prevent him or her from doing so. If the deciding official's designee hears the oral reply, he or she shall prepare written notes or a written summary of the reply which will be given due consideration by the deciding official.
 - (iv) Will decide the appropriate penalty after considering the applicable factors listed in section F(2).

(d) Content of Decision:

- (i) The decision must address each charge and inform the employee of the deciding official's determination on each charge including the basis for the determination;
- (ii) The decision should inform the employee that the employee's reply was considered and should discuss any defenses raised by the employee;

- (iii) If the decision is to impose the proposed action, the notice will discuss the penalty determination including any relevant mitigating and aggravating factors considered, as appropriate;
- (iv) The decision must provide the effective date of the action; and
- (v) The decision must state applicable grievance rights including time limits, and where to send the grievance, and must include a copy of any procedures or regulations where required.
- (e) Delivery of Proposal and Decision Notices:
 - (i) Both the proposal and decision notices should be delivered in person, and the employee should be asked to sign an acknowledgment of receipt. If the employee elects not to sign, the file copy shall be annotated with the delivery time and date, the signature of the individual who delivered the notice, and a statement that the employee received the notice, but elected not to acknowledge receipt.
 - (ii) If the employee is not on duty or otherwise available to receive it in person, the notice should be delivered both by first class mail and by a delivery method where a signed receipt is requested (e.g., express mail delivery or certified mail with a return receipt requested). TSA will consider that the employee received a regular mailing five days from the date on which the notice was sent, and may use that date as the delivery date or the date on which the employee signed for the express delivery or certified notice, whichever is earlier

I. <u>ADVERSE ACTIONS (SUSPENSIONS, INCLUDING INDEFINITE SUSPENSIONS, INVOLUNTARY DEMOTION FOR PERFORMANCE/CONDUCT, REMOVALS):</u>

TSA has both "one-step" or "two-step" processes for adverse actions. As described below, the one-step process may only be used for specified actions **for TSOs only**. The two-step process must be used for all other adverse actions and may be used for those actions allowed under the one-step procedure. All adverse actions must undergo a legal sufficiency review.

- (1) One-Step Process: A one-step process may be used against TSOs to effect adverse actions for issues described in section I(1)(c) below. Prior to imposing a one-step adverse action, management must ensure that the pre-decisional discussion described in section F(1)(d) is held with the employee and the employee is afforded the opportunity to respond to the allegations orally and/or in writing.
 - (a) Prior to effecting an adverse action under this process, management <u>must</u> follow the procedures outlined in section 6(F) of the accompanying MD, and sections F(1) and F(2) above. A pre-decisional discussion must be held with the employee and the

- employee must be afforded the opportunity to respond to the allegations orally and/or in writing.
- (b) The decision must be issued in accordance with the procedures set forth in sections I(2)(d) and I(2)(e).
- (c) The one-step process may be used only for the following actions issued to TSOs:
 - (i) In Lieu of Reprimand (with the limitations described in section H above).
 - (ii) Suspensions of three days or less.
 - (iii) Removals involving the use of drugs, alcohol, or theft. Examples of these offenses include, but are not limited to:
 - (a) Validated failure of drug test;
 - (b) Validated failure of alcohol test (on duty);
 - (c) Refusal to submit to drug or alcohol testing; and
 - (d) Cases involving clear and convincing evidence of theft, illegal drug use, on-duty alcohol use, or being under the influence of drugs or alcohol while on duty.
 - (iv) Indefinite suspensions relating to misconduct by TSOs that necessitate immediate action under the conditions set forth in section J.
- (2) Two-Step process: The two-step process requires the issuance of a written notice of proposed action and notice of decision. A pre-decisional meeting is optional under this process.
 - (a) Content of Proposal: The notice of proposed adverse action must include the following information:
 - (i) The charge(s) and specification(s) for each charge including a description of the evidence that supports the charge(s);
 - (ii) The proposed penalty;
 - (iii) A discussion of any aggravating factors that were considered in determining the proposed penalty;
 - (iv) A discussion of mitigating factors that were taken into consideration in determining the proposed penalty;

- (v) A statement that the employee has the right to present an oral and/or written reply to the proposal within seven calendar days. This time limit may be extended for good cause shown. A request for reconsideration of the extension may be presented orally, in writing, or both;
- (vi) A statement that the employee may be represented by an individual of the employee's choosing in preparing and presenting any reply. If the employee elects to have a representative, the employee must provide the name of his/her representative to the deciding official in writing, and must provide written notice of any subsequent change in representation;
- (vii) A statement that the employee's chosen representative may be disallowed if the representation creates a conflict of interest or position, e.g., the representative may not in the employee's chain of command. If the representative is another TSA employee, he/she also may be disallowed if he/she cannot be spared because of critical TSA work. (Note: The deciding official will make this determination in consultation with the Office of Human Capital and/or a TSA attorney.) Refer to TSA MD 1100.63-3, Employee Representation for additional information;
- (viii) A statement that costs associated with the employee's representation, including any travel expenses, will be borne by the employee;
- (ix) A statement that the employee and the representative (if a TSA employee) will be allowed a reasonable amount of official time to review the material relied upon, and to prepare and to present the reply(ies);
- (x) A statement that the employee will be provided a copy of the material relied upon to support each charge and specification with the proposal letter. Alternatively, if the material is voluminous or contains SSI, the employee shall be given the opportunity to review the material at a designated TSA location;
 - Note: Any release or review of SSI documents must be coordinated with the SSI Office and with field counsel/OCC.
- (xi) A statement that the material relied upon will be released only to the employee and/or the employee's designated representative;
- (xii) The name of the deciding official and the individual the employee may contact to make arrangements for a reply or to ask any questions;
- (xiii) A statement that the action will not be taken until after any reply is received and considered; or, if no reply is received, after the reply period expires; or until after the employee informs management that he/she does not intend to reply;

- (xiv) A statement informing the employee of any change in duty status; and
- (xv) A listing of all the documents relied upon which supported the action.
- (b) Duty Status: The following applies to duty status during the notice period for proposed adverse actions.

In most cases, the employee will remain in a duty status during the notice period. However, if the proposing official determines that keeping the employee in his or her current duty status would be a threat to life, property, safety or the efficient operation of the organization, one of the following alternatives may be used:

- (i) If the employee requests, allow the employee to use accrued annual leave, compensatory time off, or leave without pay. Additionally, if appropriate, and in accordance with <u>TSA MD 1100.63-1</u>, *Absence and Leave*, the employee may use accrued sick leave.
- (ii) The employee remains in duty status to include being detailed to another work unit; or
- (iii) Place the employee on administrative leave using current approval guidelines.

(c) The Deciding Official:

- (i) Is generally a higher-level official than the proposing official and is in the employee's chain of supervision. Exceptions may be warranted depending on extenuating circumstances.
- (ii) Will consider the charges and specifications contained in the proposal notice, the supporting documentation that was provided to the employee with the proposal or which the employee was provided an opportunity to review, and the employee's reply. If the deciding official is or becomes aware of additional evidence other than the evidence the employee had an opportunity to review, and is considering such evidence in reaching a determination, the deciding official must inform the employee and provide an opportunity to review such material and to reply to the additional evidence before reaching a decision on the proposed action.
- (iii) Will consider the employee's oral reply, if any. However, if the deciding official is unable to hear the employee's oral reply, the deciding official's designee will hear the oral reply, and prepare written notes or a written summary of the reply that will be considered by the deciding official.
- (iv) Will consider the employee's written reply, if any.

(v) Will decide the appropriate penalty after considering all the evidence of record and the applicable factors listed in section F(2).

(d) Content of Decision:

- (i) The decision must address each charge and inform the employee of the deciding official's determination on each charge including the basis for the determination;
- (ii) The decision should inform the employee that the employee's reply was considered and should discuss defenses raised by the employee;
- (iii) If the decision is to impose an adverse action, the notice will discuss the penalty determination including any relevant mitigating and aggravating factors considered, as appropriate;
- (iv) If the decision is to suspend (including indefinitely suspend), remove or involuntarily demote for performance/conduct, the decision must provide the effective date of the action:
- (v) The decision must contain any applicable appeal or grievance rights including time limits, and where to send the appeal or grievance.
 Additionally, the decision must include a copy of any procedures or regulations where required; and
- (vi) If the decision is a removal, the decision must include statements regarding the employee's obligation to protect Sensitive Security Information, and directions to return all TSA property and uniforms.

(e) Delivery of Proposal and Decision Notices:

- (i) Both the proposal and decision notices should be delivered in person, and the employee should be asked to sign an acknowledgment of receipt. If the employee elects not to sign, the file copy shall be annotated with the delivery time and date, the signature of the individual who delivered the notice, and a statement that the employee received the notice, but elected not to acknowledge receipt.
- (ii) If the employee is not on duty or otherwise available to receive it in person, the notice should be delivered both by first class mail and by a delivery method where a signed receipt is requested (e.g., express mail delivery or certified mail with a return receipt requested). TSA will consider that the employee received a regular mailing five days from the date on which the notice was sent, and may use that date as the delivery date or the date on

which the employee signed for the express delivery or certified notice, whichever is earlier.

- **J.** <u>INDEFINITE SUSPENSIONS:</u> An Indefinite Suspension is appropriate when evidence (i.e., more than a mere suspicion or allegation) exists to demonstrate misconduct.
 - (1) Conditions under which Indefinite Suspensions may be imposed:
 - (a) Employee has been indicted, or there is equivalent legal process (such as a criminal information or bench appearance), for a crime for which a sentence of imprisonment may be imposed; or
 - (b) Employee has been arrested pursuant to a warrant issued by a judge or magistrate for a crime for which a term of imprisonment may be imposed; or
 - (c) An investigation is being conducted on an employee regarding conduct that TSA believes may have been committed by the employee, which is so serious that if it proves to be true, the employee's continued presence at the worksite would represent a threat to life, property, safety or the effective operation of the workplace. This could include investigation into or allegations of theft, fraud or falsification, for example, where these is substantial evidence, and removal is the likely outcome; or
 - (d) An employee's security clearance has been suspended, denied, or revoked, and a security clearance is a condition of employment or is otherwise required for the employee's position.

Note: Once an indefinite suspension is imposed, management must determine if subsequent action, i.e., removal, is justified. If justified, management should initiate appropriate action to propose the removal. If it is determined that further action is not warranted, the indefinite suspension will be terminated and the employee returned to duty.

(2) General:

- (a) TSA may take action to discharge an employee during the period of an indefinite suspension whether or not criminal charges have been resolved, and whether or not such charges have been resolved in favor of the employee. Such action must be for cause, and is subject to the requirements of section 6(E) in the related MD.
- (b) All Indefinite Suspensions, under either the one or two-step process, <u>must</u> be reviewed for legal sufficiency by a TSA counsel and may be coordinated with a designated Employee Relations Specialist prior to issuance. As these actions often are connected with on-going investigations (administrative, civil, or criminal) it is important not to disclose information or evidence that could undermine or jeopardize any ongoing investigation or potential criminal prosecution.

- (3) Reconsideration of Indefinite Suspensions Under the One-Step Process:
 - (a) Once an indefinite suspension has been imposed under the one-step process, the employee has seven calendar days from the effective date to submit a written request for reconsideration. This time limit may be extended for good cause shown. The reconsideration must include any supporting evidence. A request for reconsideration may be made orally and/or in writing.
 - (b) Upon receipt of a timely request for reconsideration, the deciding official has seven calendar days to determine if the indefinite suspension should be continued, or if the employee should be returned to duty status.
 - (c) If the decision is to return the employee to duty, the deciding official will also determine if back pay for the suspension period, or any portion thereof, is appropriate. Back pay may be appropriate if failure to pay back pay would result in an injustice to the employee because of the employee's lack of culpability in the incident for which he/she was suspended. AA/OHC shall determine if back pay is appropriate. Indefinite suspensions based on a criminal indictment or an arrest warrant normally will not result in payment of back pay.
 - (d) The decision regarding the reconsideration shall be prepared and issued in accordance with the procedures set forth in sections I(2)(d) and I(2)(e) above.
 - (e) An employee may request reconsideration of an indefinite suspension at any time based upon newly acquired information that was not available at the time of the decision to impose the indefinite suspension.

K. APPEAL AND GRIEVANCE RIGHTS:

- (1) Suspensions of 15 days or more (including indefinite suspensions), Removals, and Demotions based on Performance/Conduct:
 - (a) Non-TSOs with veterans' preference who have at least one year of current continuous service in the same or similar position may appeal to the Merit Systems Protection Board (MSPB).
 - (b) Non-TSOs (non-preference eligible) who have at least two years of current continuous service in the same or similar position may appeal to the MSPB.
 - **Note:** MSPB regulations are at Part 1201 of title 5 of the Code of Federal Regulations and on the MSPB website at www.mspb.gov.
 - (c) TSOs with veterans' preference who have at least one year of current continuous service in the same or similar position may appeal to the TSA Disciplinary Review Board (DRB), in accordance with TSA MD 1100.77-1, Disciplinary Review Board or HCM 771-3, Peer Review, where appropriate.

- (d) TSOs (non-preference eligible) who are not serving in a trial period or who have completed two years or more in a time-limited appointment of more than two years, may appeal to the DRB or Peer Review, where appropriate.
- (2) Suspensions of 14 days or less and Letters of Reprimand: TSOs and non-TSO employees may grieve a suspension of 14 days or less and letters of reprimand in accordance with the process outlined in TSA MD 1100.77-2, *Grievance Procedures* or HCM 771-3, *Peer Review* where appropriate.

APPENDIX A: TSO OFFENSES FOR WHICH REMOVAL IS REQUIRED/PERMITTED

- (1) TSO Offenses For Which Removal Is Required: *
 - (a) Removals involving the use of drugs, alcohol or theft; and
 - (b) Failure to maintain TSO certification requirements.

*An FSD may seek an exception to mandatory removal by submitting a written request explaining the exculpatory facts and circumstances through the appropriate Area Director to the Deputy Assistant Administrator for the Office of Security Operations.

- (2) TSO Offenses For Which Removal Is Permitted for the First Offense:
 - (a) Knowingly operating checkpoint and baggage equipment that is either not working or not turned on;
 - (b) Intentionally conducting improper screening procedures or intentionally allowing persons or property to bypass required screening;
 - (c) Falsification of security logs;
 - (d) Failure to conduct an operational check at the start of a shift;
 - (e) Sleeping on duty while assigned to a security activity;
 - (f) Any intentional act that undermines security operations and the trust and confidence of the traveling public in the integrity of the nation's transportation system;
 - (g) Interference with air navigation, 49 U.S.C. § 46308;
 - (h) Aircraft piracy, 49 U.S.C. § 46502;
 - (i) Interference with flight crewmembers or flight attendants, 49 U.S.C. § 46504;
 - (j) Carrying a weapon or explosive aboard an aircraft, 49 U.S.C. § 46505;
 - (k) Unlawful entry into an aircraft or airport area that serves air carriers or foreign air carriers contrary to established security requirements, 49 U.S.C. § 46314; and
 - (l) Any felony conviction regardless of nexus to employment.

APPENDIX B: DELEGATION OF AUTHORITY FOR TSOS

Federal Security Directors (FSDs) have the authority to impose suspensions, including indefinite suspensions, involuntary demotions for performance/conduct, and removals for any TSO in the FSD's chain of supervision.

An FSD <u>may</u> delegate certain authority related to non-disciplinary, disciplinary actions, and adverse actions as summarized below:

Letter of Leave Restriction	Delegated to a Supervisory TSO (STSO), but not
	below.
Letter of Guidance/Direction,	Delegated to a STSO, but not below.
Letter of Counseling, and	
Letter of Reprimand	Delegated to a STSO, but not below.
In Lieu of Reprimand	Delegated to the employee's Transportation
	Security Manager (TSM), or equivalent, but not
	below.*
Deciding Official (suspensions of 1-3 days)	Delegated to the employee's Transportation
	Security Manager (TSM), or equivalent, but not
	below.*
Proposing Official (suspensions of 4-14 days)	Delegated to a STSO.*
Deciding Official (suspensions of 4-14 days)	TSM or above.
Proposing Official (Suspensions of 15 days or	Delegated to the employee's TSM or above.*
more, Involuntary Demotions for	
Performance /Conduct, and Removals)	
Deciding Official (Suspensions of 15 days or	Anyone in a higher payband than the proposing
more, Reduction in Pay/Pay Band and	official, normally someone in the employee's
Removals)	chain of supervision in a higher position. For
	one-step removals and indefinite suspensions,
	delegated to a Deputy FSD, Assistant FSD, but
	not below.*

^{*} An FSD may request to delegate this authority to the next lower level by contacting the Assistant Administrator for TSA Human Capital.

APPENDIX C: DELEGATION OF AUTHORITY FOR NON-TSOs

AAs, FSDs, and SACs have the authority to impose suspensions, including indefinite suspensions, involuntary demotions for performance/conduct, and removals.

AAs, FSDs, and SACs **may** delegate certain authority related to non-disciplinary, disciplinary, and adverse actions, as summarized below.

Letter of Guidance/Direction, Letter of Counseling, and Letter of Leave Restriction	Delegated to the employee's immediate supervisor or other designated official.
Letter of Reprimand	Delegated to the employee's immediate supervisor or designated official.
In Lieu of Reprimand	Delegated to the employee's immediate supervisor or designated official.
Proposing Official (Suspensions of 14 days or less)	Delegated to employee's immediate supervisor or other designated official.
Proposing Official (Suspensions of 15 days or more, Reduction in Pay/Pay Band and Removals)	Anyone in the employee's chain of supervision or other designated official.
Deciding Official	Anyone in the employee's chain of supervision but above the Proposing Official or other designated official equal to the Proposing Official.