

PROLOGUE

Do not skip this section. Yes, we know, most prologues are full of meaningless drivel about the authors or unnecessary ruminations about the meaning of life. However, this prologue is different because you need to keep some very timely matters in mind as you read this text.

Evolving Philosophies

This text is current as of its publication date. For the past decade or more, there has been quite a bit of back-and-forth related to federal employees, including:

- New legislation implemented at the VA in 2017, which lessened the amount of proof needed and shortened the timeframe for firing an employee—legislation that was then revoked in 2022.
- Executive Orders (EOs) from Presidents Trump and Biden involving:
 - timelines for making decisions on proposed removals;
 - clarifications about whether progressive discipline is required prior to removing an employee for misconduct;
 - clarifications about whether a prior act of discipline (e.g. a reprimand for insubordination) can be considered a prior act of discipline for the purpose of applying the principle of progressive discipline even if the subsequent act of misconduct is of another type (e.g. the second act of misconduct is disrespectful conduct);
 - clarifications on who is a proper comparator employee for the purposes of penalty consistency;
 - timelines on performance improvement plans (PIPs), and the steps agencies must take prior to implementing a PIP; and
 - the politicization of certain policy-related career positions, and the ability of an administration to remove those employees at will (known as Schedule F).
- Corresponding OPM regulations that adopted various aspects of these Executive Orders.
- Philosophies (and proposed legislation) on the amount of in-person work vs. expanded telework and remote work flexibilities.

These are the most tumultuous times we have had in civil service employment law in over 40 years. We are seeing attempted changes to employee rights and management obligations in some agencies via legislation, changing emphases

and instruction via EO, and an ongoing active dialogue as to just what our civil service should look like. Should federal employees have significant rights that hinder the ability of their agencies to hold them accountable? Or, should federal supervisors be provided procedures that allow for the prompt low-effort removal of misbehaving or non-productive civil servants?

Answers to these questions will be made in the future by officials at higher pay grades than that held by the author of this textbook. As will always be the advice in challenging times like these, find advisors you can trust and rely on them to keep you current on the law.

A Note on Personal Pronouns

The English language lacks a third person singular pronoun universally interpreted to be sex neutral. Although we are not comfortable with the convention, this text will default to using “he” and related pronouns as other options are often distracting, and because that is the convention currently used by many courts and administrative bodies. We welcome suggestions regarding pronoun use for future editions.

QUICK START

Firing a government employee can be very complicated and time-consuming if you do not know what you are doing. Much of this text is devoted to helping you understand those complexities so you can deal with them in a straightforward efficient manner. However, with the many permutations and options aside, there is a single direct way that any government employee can be fired.

In some ways, we hesitate to present this section to you because a supervisor really needs to know the theory of discipline and the various tools that are available for dealing with a problem employee that make up the bulk of this text. At the same time, we realize that many of you will benefit from knowing a guaranteed simplified approach for dealing with a problem employee that will withstand review in any forum (as long as your motives are above reproach and your heart is pure). You may have grievances and complaints filed against you, but just consider them part of the job of being a supervisor. Although we highly recommend you study and understand the substantive chapters of this book before embarking on a course to remove a government employee, below is the most direct path to dealing with a problem employee that will always result in a successful removal. Some might call this the chapter the “Keys to the Kingdom,” but we steal a concept from the computer world and just call it Quick Start:

Step One: Give the employee an order. Put it in writing, be specific, and set a deadline for compliance.

Step Two: If the employee obeys the order in the time specified, you don’t have a problem employee, at least not as far as this order is concerned. Go find something else to do with your leadership skills. Assuming that the employee is a problem, though, he will not comply within the time frame you established, so Step Two is: Issue a Letter of Reprimand for “failing to comply with an order.”

Step Three: Give the employee another order with a deadline for compliance. When the employee does not obey, propose a one to five work day suspension for “failure to comply with an order—second offense.” The length of the suspension will be determined by the harm the agency suffered because of the failure to comply. Consult your management advisers and utilize the *Douglas* Factors you will find discussed in [Chapter Two](#) to select an appropriate suspension length.

Step Four: Give the employee a third order with a deadline for compliance. When the employee does not comply, propose his removal. His pattern of disrespect for authority coupled with your patience and your pattern of progressive discipline will be viewed with respect and admiration by

most any arbitrator or administrative judge who hears the appeal of the removal, and the removal will be sustained.

My gosh, this is a lot of steps isn't it? Can't a government employee be fired without having to go through all these reprimands and suspensions? Oh yes... yes he can. To make it stick on appeal, however, you will have to convince an arbitrator or other impartial adjudicator that the harm caused by just one or two incidents of misconduct warrants removal from government service. Removals based on only one or two incidents are affirmed all the time. However, they also are occasionally mitigated to a lower level of discipline because the reviewing judge decides that removal just isn't warranted based on the misconduct.

Take that risk if you must and the chances are decent that the removal will be sustained if the single incident of misconduct is serious. If you have the patience and perseverance, following the four-step Quick Start will avoid you having to convince a third party that the misconduct is serious enough to warrant a first-offense removal because the very pattern of misconduct itself warrants removal regardless of what the actual harm to the agency might be.

See the [Appendix](#) for a collection of sample documents to implement a misconduct removal.

As for employees who engage in unacceptable performance rather than misconduct, a Quick Start guide would look just like a full-service guide as performance actions are extremely expedient and efficient, if you know what you are doing. And you will know what you are doing by the time you finish that chapter later in this book.

Now that you know the basic approach to misconduct, the next chapters will give you the procedural and philosophical details and some recommended strategies for dealing with a variety of complicated situations.

CHAPTER ONE

GETTING STARTED

If just showing up is half the battle, the other half is getting started. In this chapter, we will take you through the steps you should consider, in the order in which you should consider them, when first coming to realize that you have a problem civil servant in your organization.

I. TRY EVERYTHING ELSE FIRST

Although this is a book on how to fire employees who do bad things, we hope that you will never have to fire anyone. That is because the removal of a career government employee takes time, resources, and emotional involvement that would be better spent on other endeavors. When you fire someone, you adversely affect his employability perhaps for the rest of his life, plus you have to go through the trouble and expense of hiring a replacement. That's why we say we hope you never have to fire anybody. So before you start the disciplinary process in earnest, we suggest that you try everything else first. It is easier on you and perhaps you will be able to convert an unacceptable employee into an employee who is at least doing a minimally adequate job. Of course, some misconduct or poor performance is so bad that a single incident warrants immediate removal. The employee who leaves the door open to the safe with all the secret documents and highly explosive materials probably warrants a quick goodbye. For most situations, once you realize that you have a problem employee, you will want to consider one or more of the following options:

- *Coaching.* Periodic informal instruction and feedback given by you or a seasoned coworker (a mentor) may help a minimal performer improve without having to resort to formal procedures.
- *Counseling.* While coaching can work with unacceptable performers, misconduct warrants a direct discussion between you and the misbehaving employee. Tell him what he did wrong and that you want him to do it right.
- *Training.* Sometimes, low performance can be improved through formal classroom or online training. Although the government usually does not have an obligation to train its employees, a three-day course in computer maintenance that helps your information resources technician improve to a point where he is being productive is a trivial expense compared to having to fire him for unacceptable performance. Sometimes just asking the employee what training would be helpful gives valuable insight.

- *Reassignment.* Every job is made up of three components: the employee, the supervisor, and the work itself. If the employee is not working satisfactorily on a particular assignment, perhaps reassigning him to a new supervisor and/or a new position description will allow him the opportunity to become productive.

Although we could spend many pages devoted to discussing these techniques, doing so would be beyond the purpose of this book. Our objective is to help you to know what to do when all your best leadership skills are unsuccessful, and you have reached the point of asking yourself, “What do I do next?”

II. ASK YOURSELF: QUESTION ONE

The answer about what to do next requires that you ask yourself a series of questions:

Question One: What is the employment status of the problem employee (e.g., has the employee just barely begun working for the government or has he been employed here for years)?

Most government agencies have more than one category of worker. When confronted with a problem employee, the first thing to do is to determine the employee’s status in order to establish what procedures and rights apply.

A. TYPICAL CATEGORIES OF EMPLOYEE STATUS

Here are some typical categories of employment and how to handle a problem employee who falls into each category:

Probationer—Most government agencies have a probationary period for new employees to give management the opportunity to observe the employee in the work setting and to make a final determination about whether the individual is a good fit for the job. During probation, it is easier to summarily terminate an employee for unacceptable performance or misconduct without a lot of procedures and without a lot of proof.

In the private sector, companies that utilize a probationary period generally only allow a few weeks or months to determine whether to retain the employee. In the federal government, by comparison, the standard probationary period is one year from the first day of employment. If your problem employee is a probationer, the most you will need to do is to give the employee a letter stating that you have decided to terminate him and give the effective date (usually at the close of business the day of the letter). Local policy will determine the exact wording and timing of the letter, but the bottom line is that this is a very simple process, at least compared to what you will encounter with a career employee.

There are three traps to avoid when terminating a probationary employee.

1. A federal probationary period is over at the end of the last scheduled work shift that precedes the one-year anniversary of initial employment. Removals are effective at midnight on the day stated in the notification letter. If today is the last day before the one-year anniversary of initial employment, and the employee's shift is over at 4:30 this afternoon, your probationary termination letter dated today will be effective at midnight, several hours after the employee's probationary period is over. A probationary termination letter under these circumstances would be defective and set aside because the employee is entitled to the full notice and appeal rights of a career employee as of 4:31 P.M. Either make the termination effective on a date prior to the last day of the probationary period, or set a specific time for the removal to be effective on the last day, a time that is earlier than the end of the shift.

2. As a general rule, an employee who occupies a position identified as "probationary" may still have rights to file an appeal with the U.S. Merit Systems Protection Board (MSPB or the Board) if that employee has completed more than a year of current continuous employment with the government in any positions other than temporary positions limited to one year or less. Be careful of the "probationary" employee who has come to work for you directly from employment with another component of the government without any break in service. That person might well be entitled to the full protections of a non-probationary employee.

3. Employees in the federal civil service have a variety of ways that they can challenge a management action and "push back" against their supervisor. For example, an employee can file a claim of civil rights discrimination regarding just about anything that a supervisor might do to him. When that happens, you will want to be ready to defend yourself, to prove that you have valid reasons for your actions.

The law does not demand any proof for you to terminate an employee during probation. Because a terminated probationer can challenge you through the discrimination complaint process (or in some other manner), always have a legitimate, *bona fide*, business-related reason for the removal. At a minimum, write down, date, and sign your rationale for the termination, and store that piece of paper somewhere you can retrieve it if needed. Be as specific as possible about your reasons, with dates and witnesses, if relevant. A statement that says, "I terminated John Doe because he turned in the Smith report a week late on September 9, 20XX" is much better than a statement that says, "Doe was always late with reports." Always have a *bona fide* reason for doing what you do.

As a side note, although it is permissible to reprimand or suspend a probationary employee (or a temporary employee) few agencies do. That's because if a probationary employee has engaged in misconduct that warrants any discipline,