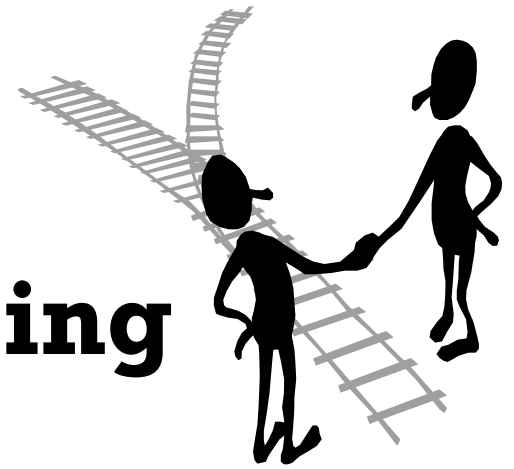


Alternative Approaches to Addressing Misconduct



U.S. Office of Personnel Management

Sarah S. Tuck

USDA, APHIS, Marketing and Regulatory Programs

Business Services

May 20, 2014



OBJECTIVES

- Understand what alternative discipline is, to include last chance agreements and exit agreements.
- Understand how to draft a durable, legal agreement that avoids problem terms.

OVERVIEW

- **Traditional vs. Alternative Discipline.**
- **Employee Rights.**
- **Drafting Agreements.**
- **Agency Best Practices.**

Types of Agreements

There *is* more than one way to handle misconduct (and performance) issues:

- **Traditional Discipline.**
- **Agreements:**
 - Alternative Discipline.
 - Last Chance Agreements.
 - “Exit” Agreements.



When Can We Discuss Agreements?

- Before or after a proposed removal.
- Under 5 CFR 1201.22, usually 30 days to appeal
- Agency/employee can now extend 30 more days (in writing) to attempt to resolve their dispute.
- After appeal is filed with MSPB.
- In EEOC cases, during counseling and throughout processing. 29 C.F.R. § 1614.504(a).



When Can We Discuss Agreements?

- Arguably, can be done at any time. *Swink v. U.S. Postal Service*, 111 M.S.P.R. 620, (2009); aff'd, 372 F. App'x 90 (Fed.Cir. 2010). *Mahoney v. Dept. of Labor*, 56 MSPR 69 (1992). But see *Cook v. Dept. of Defense*, 63 MSPR 270 (1994).
- Good cause must exist, however. *Evans v. Merit Systems Protection Board*, 206 Fed. Appx. 587 (Fed. Cir. 2009 , unpublished); *Wyatt v. USPS*, 101 MSPR, 28 (2006); *Law v. USPS*, 77 MSPR 30 (1997).

Case Study on ADA Ideas



Exercise #1

Joe is a GS-14 Supervisor who recently became retirement eligible. His supervisor retired and Joe applied for the GS-15 job. He was not selected; a young, minority female was selected. Joe filed an EEO complaint based on sex, race and age. Recently, a coworker showed Joe's Facebook message to others at work wherein Joe said: "Now that I have joined the KMA club, I can say this without worry; my new boss, Komeka Stuart, is a *"unqualified for anything but making babies, and is a good-for-nothing pencil pusher."*

Exercise #1

- Traditional
 - ADA Ideas?
- a. Warning.
 - b. Letter of Reprimand.
 - c. Suspension.
 - d. Demotion.
 - e. Removal.

Exercise #1

- Will return to this – be thinking of ADA terms!



Traditional Discipline

- Formal processing.
- Formal consequence.
- Designed to correct unacceptable behavior that has a negative impact on the efficiency of the service.
- Includes reprimands, suspensions, demotions, and removals.



Alternative Discipline (AD)

Alternative discipline is characterized by what it is not—namely traditional discipline.

- Serves as a non-traditional or lesser consequence.
- Intended to modify unacceptable behavior.
- Agreed upon by both the agency and the employee.
- May avoid future misconduct.
- May be used as evidence of rehabilitation attempts.
- Avoids or reduces litigation if done correctly.

Advantages of AD

- Helps you provide more options/be a better consultant.
- Helps to re-establish or keep a good relationship between employee and supervisor.
- Helps supervisor address problems when reluctant to take more formal actions.
- Achieves desired results with less time and agency resources.
- No *Stone v. FDIC*, 179 F.3d 1368, 1374-75 (1999) or *Ward v. USPS*, 634 F.3d 1274 (Fed. Cir. 2011) issues.

Advantages of AD

- Usually effective.
- Places the responsibility on the employee to correct the misconduct.
- Encourages speedy resolution of issues.
- Employee can be disciplined if misconduct occurs within the agreed upon timeframe.
- EEO offenses and liability.



Advantages of ADAs

- May reduce or eliminate comparisons under Douglas Factor #6. *Dunbar v. USPS*, SF-0752-09-0788-B-1 (ID 2010); *Boland v. Dept. of Veterans Affairs*, CH-0752-11-0537-I-1 (nonprecedental 2014); *Portner v. Department of Justice*, 119 M.S.P.R. 365, ¶ 20 n.4 (2013). **But see** *Boucher v. U.S. Postal Service*, 2012 MSPB 126 (MSPB 2012; *Figueroa v. Department of Homeland Security*, DA-0752-12-0001-I-1, (2013).
- No Double Jeopardy problems. *Cooper v. VA*, 2012 MSPB 23 (MSPB 03/01/12).
- If properly written, greatly reduces or avoids litigation.



Possible Disadvantages of AD

- Employee may still repeat misconduct.
- Is Agency serious about discipline?
- Possible EEO comparatives. *Spahn v. Justice*, 93 MSPR 195 (2003).
- May need to involve union. *Social Security Administration and AFGE, Local 1923*, 55 FLRA 978(1999).



Possible Disadvantages of AD

- Ambiguous agreement language will be construed in favor of the party not drafting the agreement. *Bables v. Department of the Army*, 86 MSPR 171 (2000).
- Inconsistent MSPB holdings; sometime allowing comparisons. *Boucher v. U.S. Postal Service*, 2012 MSPB 126 (2012); *Portner v. Department of Justice*, 119 M.S.P.R. 365, ¶ 20 n.4 (2013); *Davis v. USPS*, DA-0752-12-0306-I-1 (2013).



When Alternative Discipline May Not be Appropriate

- Employee refuses to admit any wrongdoing.
- Reasons for the misconduct indicate conduct may reoccur.
- Past attempts ineffective.
- “Which method is more appropriate for a particular situation will depend greatly on the nature of the offense and the individual who committed the misconduct. “



Last Chance Agreements (LCA)

- Alternative form of discipline.
- Voluntary contract between an agency and an employee, usually in proposed removal situations (performance-based or adverse action).
- Employee must knowingly and voluntarily waive his or her rights in exchange for non-imposition of an immediate removal.

Rice v. MSPB, 522 F.3d 1311 Fed. Cir. (2008);

Scott v. Dept. of Agriculture, 2012-3050 (Fed. Cir. np, 2012)

Rhett v. USPS, 113 MSPR 178 (2010)

Last Chance Agreements (LCA)

- A special kind of last-straw situation.
- Arbitrators have held that last-chance agreements, as a general rule, are not subject to the usual requirements of just cause. To put it another way, violation of the last-chance agreement provides the "just cause" required for discharge.
- When encountering a last-chance settlement, an arbitrator can presume its validity even though it places the subject employee at a distinct disadvantage.

Last Chance Agreements (LCA)

- The arbitrator should recognize that there was a trade-off for the advantage -- relinquishment of certain employment rights
- An employer would have no reason to enter into them if they were illusory or unenforceable

USPS and American Postal Workers Union, AFL-CIO, F98C-1F-D 01054630(2001 Nauyokas)



Remember Exercise #1 (slides 7-9)?

Alternative vs. Traditional

Traditional

- Three-day suspension of pay.

Alternatives

- Serves three day suspension during non-work days.
- Serves suspension in increments.
- Donates 24 hours of annual leave to a leave bank.
- Performs 24 hours of community service.
- Receives a “Paper” Suspension.
- Suspends one day suspension with two days held in abeyance.



Alternative vs. Traditional

Example of Broader Options

Traditional

- Three-day suspension of pay

Alternatives

- Researches particular misconduct and provides training.
- Issues a public apology.
- Works less desirable shift/duties for a period of time.
- Attends EAP sessions.
- Employee promises not to repeat behavior.
- Reassignment.



Rights of the Employee

- The employee knowingly and voluntarily waives rights they would ordinarily receive through traditional discipline. *Williams v. Treasury*, 52 MSPR 344 (1991).
- The employee has to voluntarily agree to waive those rights as a condition of the alternative discipline agreement. *McCall v. U.S.P.S.*, 839 F. 2d 664 (Fed. Cir 1988).
- If broad waivers not written, employee can still challenge AD. *Burgard v. USPS*, 01973616 (1998).
- No future EEO rights can be waived. *Kannikal v. Justice*, 01A24572 (2003).




Rights of the Employee in LCAs

May still establish MSPB jurisdiction if s/he:

- did not breach the agreement.
- proves the agency breached it.
- did not knowingly and voluntarily enter into the agreement.
- proves the agreement resulted from fraud or mutual mistake.

Lizzio v. Department of the Army, 534 F.3d 1376 (Fed. Cir. 2008); *Link v. Dep't of the Treasury*, 51 F.3d 1577, 1581 (Fed. Cir. 1995);
Smith v. Department of the Interior, 113 M.S.P.R. 592, ¶6 (2010).



Exercise #2-Careful Drafting is KEY!

- senior law enforcement ranger
- executed an LCA which reduced the proposed removal to a 60-day suspension.
- agreement: appellant would be removed if he committed "any offense requiring discipline"; he also waived his MSPB rights.
- appellant then failed to wear his seat belt during his pursuit of a suspect, resulting in his ejection from a "send rail" vehicle, in violation of agency policy and procedures.
- agency removed the appellant for failure to use proper safety equipment (failure to wear seat belt).
- "requiring discipline."

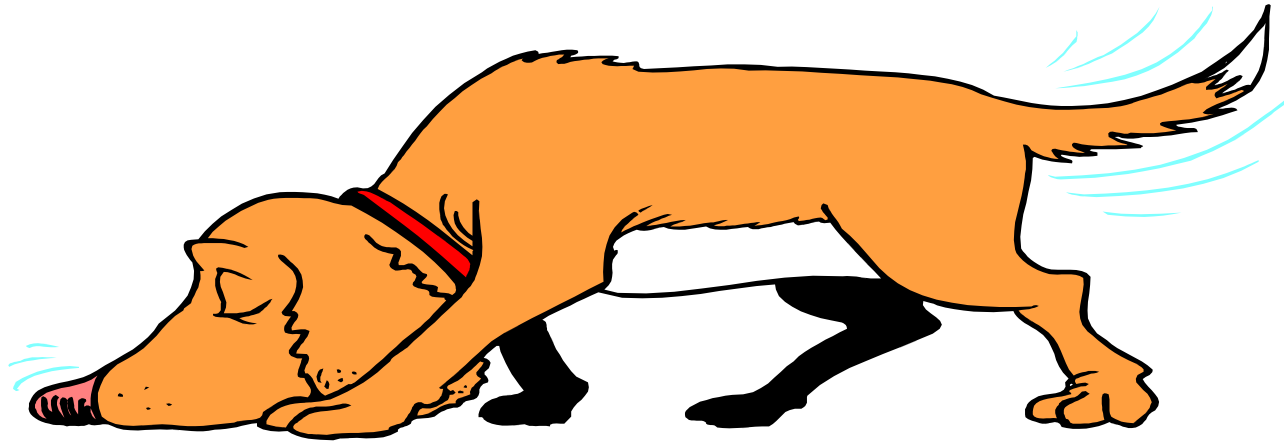


Exercise #2 --cont

- Executive Order 12566 requires seatbelts be worn.
- Agency policy required seatbelts be worn.
- Table of Penalties in the Department of Interior Departmental Manual suggests various penalties.
- But, none of the above “required discipline.”

Smith v. Dept. of the Interior, 113 MSPR 592 (2010)

Carefully Follow Terms





How much did the word “no” cost?

- Original 28-day suspension
- Settled with this provision before the MSPB:

“The AGENCY agrees that inquiries or job references regarding the APPELLANT'S work performance, reason for resignation, or other employment matters will be referred to the AGENCY Personnel Operations Branch in Minneapolis, Minnesota. Information provided in connection with such inquiries will be of a neutral nature, and limited to employment data reflected in the OPF and the Employee Performance Folder (Fully Successful rating).”



How much did the word “no” cost?

- Litigated from 1997-2005 (20 hits in Cyberfeds).
- Reinstated with back pay from 1995-2005.
- Attorneys fees.
- Total backpay: **\$389,599.42** (after deducting other earnings during the period).
- 28 day suspension mooted: \$1,996.32.
- Still employed.

Poett v. Dept. of Agriculture, 98 MSPR 628 (2005)



Drafting Agreements

Contract Law--

- Four corners of agreement.
- Meeting of the minds.
- Avoid terms of art.
- Mutual consideration.
- Complete waivers to cover all forums.



Drafting Agreements

Principles to follow to avoid ambiguity

- Use plain language.
- Make sure words are not subject to multiple interpretations. Define any term that could mean more than one thing. *Gose v. USPS*, 451 F.3d 831 (2006).
- Obtain agency legal counsel or other expert assistance in drafting and review of finalized document.



Drafting Agreements

Covenant of Good Faith

- There is an implied covenant of good faith in every ADA.
- The agency is promising the employee it is dealing with the employee honestly.
- The party acting in bad faith has breached the ADA and the terms could be unenforceable.

Stewart v. U.S. Postal Service., 926 F.2d 1146, 149 (Fed. Cir. 1991); *Thrash v. Dept. of Army*, 0120092905 (2009); *Willis v. Dept. of Defense*, 105 MSPR 466 (2007).

Drafting Agreements

ADAs must not violate public policy –

- Agencies cannot waive future EEO rights. *Kannikal v. Justice*, 01A24572 (2003).
- Agencies cannot waive Whistleblowing rights. See Whistleblower Protection Enhancement Act of 2012.
- Agencies can not threaten or coerce employees to enter into an ADA. *Staats v. U.S. Postal Service*, 99 F. 3d 1120, (Fed. Cir. 1996).

Drafting Agreements

- Agencies can not promise to conceal or fail to report criminal conduct to proper authorities. *Fomby-Denson v. Department of the Army*, 247 F. 3d 1366 (Fed. Cir. 2001).
- Agencies should be sure to include the due process rights being waived to include the appeal rights the employee would have had. *Perry v. Department of Commerce*, DC-0752-12-0486-I-1 (June 12, 2013) citing *Gutierrez v. USPS*, 90 MSPR 604, ¶ 9 (2002).



Danger Areas in Drafting Agreements

- Confidentially clauses for agency.
- Clean record clauses.
- Oral agreements.
- Duration of AD record too short/Expunging record. *Callicutt v. Department of the Army*, DA-0752-12-0514-I-1 (August 9, 2013).
- Reference clauses (write with care!).
- Clauses that have not been researched.
- Not writing broad, clear and appropriate waivers (e.g. for those over 40).
- Binding third parties to agreement's terms. *Parker v. OPM*, 93 MSPR 529 (2003)



Waivers in Agreements

- Settlement reached before the EEOC.
- Ensure you explicitly state the rights being forfeited in agreements.
- Remanded for jurisdictional hearing.

Perry v. Dept. of Commerce, DC-0752-12-0486-I-1 DC-0752-12-0487-I-1 (June 12, 2013) (non precedential).



Beware!

- Criminal investigator for the OPM.
- Terminated.
- Case settled with clean record provision.
- He got a contractor job as an investigator.
- MSPB determined a breach, but no monetary damages available.
- He filed with Court of Federal Claims, who found jurisdiction but declared case *res judicata*.
- Fed. Cir. held that case was not *res judicata* since the MSPB lacked ability to award damages.

***Cunningham v. United States*, Fed Cir. 2013-5055, April 9, 2014**



Best Practices

- Make managers aware of AD and provide training to them.
- Establish a formal policy.
- Empower either management or the employee to initiate a request for AD.
- Track results – is AD working in most cases?
- Check agency collective bargaining agreements to ensure policy or use of AD is consistent with those requirements.

Best Practices

- Ensure employee waivers are clear, unambiguous, and voluntary so that they are upheld by the MSPB and EEOC.
- In CBAs, don't agree to make ADA a requirement. (Simmons v. VA DA-0752-11-0571-I-1, 3/1/13).
- Ensure you give employees accurate information.
- Avoid bad faith in process.
- Do not waive future EEO rights.
- In LCAs or ADAs involving appealable actions, DO waive future MSPB rights.

Best Practices

- Use Older Worker Benefit Protection Act waivers for those 40 and older.
- Negotiate collective bargaining agreements to allow effective use of AD without unnecessary limitations on managers.
- Include waivers in all agreements, to include to the Federal Court of Claims.
- Research all terms.
- Write terms and waivers with care.

Resources

- Resources that may be of use are:
 - Networking with other agencies with success at ADAs.
 - Office of Personnel Management/networking
 - MSPB law.
 - Merit Systems Protection Board law and studies.
<http://www.mspb.gov/studies/index.htm>
 - Equal Employment Opportunity Commission law citing ADAs, LCAs and Exit agreements.

QUESTIONS?

