

Responding to Proposed Disciplinary Actions

September 8, 2017

For federal government employees, most proposed disciplinary or adverse actions typically fall under three general categories: (1) proposed suspension actions based on allegations of misconduct; (2) proposed removal actions based on allegations of misconduct; and (3) proposed removal actions based on alleged performance deficiencies (i.e., the failure of a Performance Improvement Plan [PIP]). There are other types of federal agency-based disciplinary actions, but these generally constitute the majority of the types of proposed disciplinary actions that a federal employee may receive.

Receipt of Proposed Disciplinary or Adverse Action

If a federal employee receives a notice of proposed disciplinary action (i.e., suspension of 14 days or less covered under 5 C.F.R. § 752.203) or a proposed adverse action (i.e., ranging from suspension of more than 14 days to removal covered under 5 C.F.R. § 752.404), there are a number of important issues that the employee must immediately consider before submitting a response. A federal employee who receives a notice of proposed disciplinary action should remain calm and then first read the document very carefully before deciding what action to take.

Make Sure to Calendar Important Deadlines

Each federal agency, within reason and the existing statutory framework, sets its own particular deadlines for submitting a response and these deadlines are generally strict. Each proposal for discipline will generally list the time limits for requesting the evidence file (or investigative/performance files), requesting an oral response, and submitting a written response. Some federal agencies require a response within 10 days, and some 7 days, and other 15 days. Each federal agency varies.

Some federal agencies may include additional deadlines as well. It is important to pay careful attention to each deadline as an employee can lose the right to contest a proposed disciplinary action if he or she allows a time period to expire without taking action. A federal employee can also request an extension to respond, if necessary. A request for an extension must generally include a supporting basis for the additional time (i.e., time to review the volume of materials in the evidence file).

Request the Materials Relied Upon

When the notice of proposed disciplinary action is issued, the federal agency sometimes provides the federal employee with a copy of the materials in the evidence file (e.g., documents, reports, emails, recordings, video, photographs, etc.) that it relied upon in proposing the disciplinary action. Many federal agencies, however, will not provide the materials with the notice of proposed disciplinary action to the employee but will indicate

in the notice that the materials can be requested or reviewed within a certain number of days. It is critical for a federal employee to request these materials. There are often key statements in the evidence file that can assist with the written and oral responses.

Filing a Written Response

The written response should address all of the allegations raised in the proposed discipline, in addition to providing records of the employee's good performance record and other positive attributes for use in potential mitigation of any penalty. It is important to both rebut and respond to the allegations in addition to making arguments under the Douglas factors for purposes of mitigation of the penalty (i.e., reducing a proposed removal to a suspension).

Preparing for the Oral Response

In responding to the proposed disciplinary action, it is important for a federal employee to not only submit a written response, along with documentation (affidavits and/or other evidence) refuting the charges and specifications, but to also request and schedule an oral response. It is generally much easier for a Deciding Official to make an adverse decision if he or she is just reviewing a written submission. Requesting an oral response adds an important personal aspect to the response that can potentially mitigate proposed discipline. While this may be uncomfortable, it is important to request an oral response to help refute the charges and specifications.

In addition, the oral response should be straightforward and to the point. An oral response generally lasts anywhere between 30 minutes to an hour and a half depending on the nature and number of allegations made. A federal employee should generally not repeat or read from his or her written response but rather highlight key arguments before the Deciding Official as to why the disciplinary action is not warranted and to focus on potential mitigation arguments. In addition, some Deciding Officials (roughly half of them) like to ask the federal employee questions about the allegations in the proposed discipline. If the federal employee's attorney has prepared him or her for the oral response, the attorney should recommend that the employee answer the questions because it can help to potentially mitigate discipline. It is also helpful for the federal employee to present his or her response in a manner that is not defensive.

When we represent federal employees during the oral response stage, we generally lead the federal employee through the oral response, outline their legal defenses at the beginning of the response, and focus the employee on key factual allegations as we respond to the charges and specifications. Having an attorney present at the oral response is important as it enables a federal employee to have a strong voice prior to a decision being issued. In our experience, when a federal employee is not represented, Deciding Officials generally seem to take such responses less seriously.

Issuance of Decision

Following the response stage, the Deciding Official will eventually issue a decision on the proposed discipline. The time period to receive a final decision varies significantly, usually anywhere from 2 weeks to 12 weeks. The average wait time for most federal employees seems to be about four weeks. Usually, when the decision on the proposed discipline has been made, the federal employee is called into the Deciding Official's office and given a copy of the decision along with a description of any appeal rights in the decision. It is important to consult with an attorney when a decision is received, because sometimes the federal agency does not list all of the appeal rights that are available to the federal employee.

Appeals from Adverse Decision

Depending on the severity of the discipline issued by the Deciding Official, along with the underlying basis for it, a federal employee may have one or more avenues to appeal. Some federal employees may be able to file an appeal at the Merit Systems Protection Board (MSPB), through the grievance/arbitration procedure, through the Equal Employment Opportunity (EEO) process, or perhaps file a whistleblower defense. There are additional avenues for appeal; however, federal employees should consult with an attorney as soon as possible because once an employee elects one type of appeal, he or she may not be able to pursue another type later.

Conclusion

When a federal employee is facing proposed discipline, it is important to seek legal advice and representation from an attorney who is experienced in federal proposed disciplinary and adverse actions. Our law firm advises and represents federal employees in proposed disciplinary and adverse actions throughout the United States and abroad. Please contact us at www.berrylegal.com or by telephone at (703) 668-0070 to schedule a consultation.

Attorneys

John V. Berry

Practice Areas

Federal Adverse and Disciplinary Actions