



July 2018

# FEDERAL EMPLOYEE MISCONDUCT

## Actions Needed to Ensure Agencies Have Tools to Effectively Address Misconduct

# GAO Highlights

Highlights of [GAO-18-48](#), a report to congressional requesters

## Why GAO Did This Study

Misconduct is generally considered an action by an employee that impedes the efficiency of the agency's service or mission. Misconduct incidents can affect other aspects of employee morale and performance and impede an agency's efforts to achieve its mission.

GAO was asked to examine how executive branch agencies address employee misconduct. This report (1) describes the process agencies are required to follow in responding to employee misconduct; (2) identifies alternative approaches to the formal process that agencies can use and assesses what factors affect agencies' responses to misconduct; (3) describes trends in removals and other adverse actions resulting from misconduct; and (4) identifies key practices agencies can use to help them better prevent and address misconduct. To address these objectives, GAO reviewed relevant sections of title 5 of the U.S.C.; analyzed MSPB and OPM data, and interviewed, among others, agency officials and subject-matter experts.

## What GAO Recommends

GAO recommends that OPM, working with the Chief Human Capital Officers Council, (1) take steps to improve the quality of data collected on misconduct; (2) leverage lessons learned to help agencies address misconduct; and (3) improve guidance on training supervisors and human resources staff on addressing misconduct. OPM partially concurred with two recommendations, and disagreed with the first, stating that its guidance has been successfully relied upon by agencies. GAO maintains the action is needed to help strengthen oversight.

View [GAO-18-48](#). For more information, contact Robert Goldenkoff at (202) 512-2757 or [goldenkoff@gao.gov](mailto:goldenkoff@gao.gov).

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### What GAO Found

Chapter 75 of title 5 of the U.S. Code specifies the formal legal process that most agencies must follow when taking adverse actions, i.e., suspensions, demotions, reductions in pay or grade, and removals, for acts of employee misconduct. Chapter 75 details the built-in procedural rights certain federal employees are entitled to when faced with adverse actions.

Depending on the nature of misconduct, an agency may use utilize alternative discipline approaches traditionally used in government to correct behavior. Alternative discipline is an approach to address misconduct that is available to agencies in lieu of traditional penalties (e.g., letters of reprimand and suspensions of 14 days or less). An example is a last chance agreement, whereby an employee recognizes the agency's right to terminate him or her should another act of misconduct occur.

Based on the data collected by the Office of Personnel Management (OPM), agencies formally discipline an estimated 17,000 employees annually under Chapter 75, or less than 1 percent of the federal workforce, for misconduct. Based on OPM data, in 2016, agencies made 10,249 suspensions, 7,411 removals, and 114 demotions for misconduct. However, because of weaknesses in OPM's data on employee misconduct, which is provided by the agencies, OPM is unable to accurately target supervisory training to address misconduct, and decision-makers do not know the full extent or nature of this misconduct.

Key lessons learned can help agencies better prevent and respond to misconduct. For example, tables of penalties provide a list of the infractions committed most frequently by agency employees, along with a suggested range of penalties for each to ensure consistent treatment for similar offenses. However, not all agencies have a table of penalties, including OPM, nor are agencies required by statute, case law or OPM regulations. Subject-matter experts we contacted identified additional promising practices that agencies can use to respond employee misconduct. Some of these are presented below.

### Key Practices That Can Help Agencies Better Prevent and Respond to Misconduct

Senior Agency Officials Must Set Positive Conduct Examples (tone at the top)	Senior leaders must exhibit positive workplace behavior as an example to agency employees.
Additional Training Could Help Supervisors Identify and Deal with Misconduct	Conduct on-going training for supervisors and hold them accountable for addressing misconduct in a timely manner when it occurs
Internal Collaboration is Key to Effectively Address Employee Misconduct	Maintaining effective lines of communication and collaboration with the human resources office staff, line-level management, and agencies' legal counsel
Set Clear Expectations and Engaging Employees	Setting and communicating clear rules and expectations regarding employee conduct and assuring that employees conform to any applicable standards of conduct

Source: GAO analysis of expert testimony. | GAO-18-48

Agencies are accountable for providing required training to their managers. However, agency officials and subject-matter experts we interviewed said federal managers may not address misconduct because they are unfamiliar with the disciplinary process, have inadequate training, or receive insufficient support from their human resources offices.

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**Abbreviations:**

ADR	alternative dispute resolution
CBA	collective bargaining agreement
CFO Act	Chief Financial Officers Act
CHCO	Chief Human Capital Officer
CSRA	Civil Service Reform Act of 1978
EEOC	Equal Employment Opportunity Commission
EHRI	Enterprise Human Resources Integration database
EPA	Environmental Protection Agency
MSPB	Merit Systems Protection Board
NOA	nature of action
OI	Office of Inspector General Office of Investigations
OPM	Office of Personnel Management
OSC	Office of Special Counsel
PFR	petition for review
SF-50	Standard Form 50

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July 16, 2018

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs and Federal Management  
Committee on Homeland Security and Governmental Affairs  
United State Senate

The Honorable Elijah E. Cummings  
Ranking Member  
Committee on Oversight and Government Reform  
House of Representatives

An average of less than 1 percent of the federal government's 2.1 million employees are formally disciplined for misconduct annually, according to our analysis of the Office of Personnel Management's (OPM) data.<sup>1</sup> While this number is relatively small, even a few cases of employee misconduct can have significant impacts on workplace morale and impede an agency's efforts to achieve its mission. Indeed, according to a 2008 study by the Merit System Protection Board (MSPB), "Misconduct affects not only the employee and the supervisor; it also impacts those who interact with the employee."<sup>2</sup> To that end, it is important for agencies to timely and effectively address cases of employee misconduct while simultaneously respecting employees' procedural and due process rights.

The term "employee misconduct" does not have a general definition in a statute or government-wide regulations. Agencies may elaborate on types of misconduct in handbooks and other internal guidance. However, according to OPM, there is a large body of decisional law by MSPB addressing discipline for employee misconduct in the federal government that contains definitions of various forms of misconduct, such as "insubordination," "excessive absence," and "misuse of government property," as well as instances where specific types of misconduct are

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<sup>1</sup>Formal discipline refers to the legal process under Chapter 75 of Title 5 of the U.S. Code.

<sup>2</sup>Merit Systems Protection Board, *Alternative Discipline: Creative Solutions for Agencies to Effectively Address Employee Misconduct*. (Washington, D.C.: July 2008).

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referenced concerning appointment into the competitive service.<sup>3</sup>

According to OPM officials, the lack of a general definition of misconduct gives agencies flexibility in the manner in which they address misconduct. Ultimately, when an agency needs to take an adverse action<sup>4</sup> against an employee for inappropriate workplace behavior, it must do so “for such cause as will promote the efficiency of the service” as provided for in 5 U.S.C. Chapter 75.<sup>5</sup> Such actions could include, but are not limited to, instances of misconduct. The efficiency of the service standard provides managers with maximum flexibility to pursue adverse actions whether the impetus was a conduct issue, a failure to perform, or something else.

Activities that may be considered misconduct can vary from agency to agency. According to agency officials and subject-matter experts we interviewed, examples of misconduct include

- time and attendance infractions;
- intoxication;
- workplace violence;
- physical aggression toward an employee;
- improper use of a government-issued credit card;
- misuse of government equipment (such as viewing pornography or gambling);
- use of public position for private gain; and
- behavior that affects national security.

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<sup>3</sup>5 U.S.C. §§ 7301-7363. There are instances in law and regulation where specific types of misconduct are referenced concerning appointment into the competitive service. 5 U.S.C. Chapter 73 (Suitability, Security, and Conduct) addresses certain types of misconduct of executive branch employees.

<sup>4</sup>Adverse actions can be taken for any reason to promote the efficiency of the service. Such reasons can include, but are not limited to insubordination, excessive absence, and misuse of government property.

<sup>5</sup>5 U.S.C. § 7503(a); 5 U.S.C. § 7513(a). The purpose of Chapter 75 was to establish procedures that must be followed when an agency determines to pursue certain forms of actions against an employee that would, if taken, have an impact upon their pay, i.e., “adverse actions.”

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It should be noted that the law differentiates misconduct from substandard performance.<sup>6</sup> Poor performance can generally be described as an employee's inability to carry out work responsibilities, while misconduct can be described as an employee, willfully or otherwise, violating stated policies or norms. In certain cases, however, employee performance and misconduct can overlap, combining the two issues. Sleeping on the job, for example, is both a failure to abide by norms of conduct an agency would expect of an employee on duty and a failure to perform.

Our prior work on poor performers found that adverse actions, including suspensions, demotions, and removals, take time to resolve and because of a lack of internal support, concerns over litigation and other factors, supervisors may be hesitant to initiate required procedures outlined in the United States Code (hereinafter U.S.C.).<sup>7</sup> Supervisors can address misconduct through alternative discipline approaches which can shorten the timeline and eliminate costly litigation if the employee decides to appeal an adverse action. When used under the right circumstances, alternative discipline may be more efficient and effective than traditional discipline.<sup>8</sup>

You asked us to examine the process for addressing misconduct and to identify any challenges to removing employees for misconduct. Our objectives were to (1) describe the process that agencies are required to follow in responding to employee misconduct in the federal service; (2) identify alternative approaches to the formal legal process that agencies can use to respond to misconduct, and assess what factors affect agencies' responses; (3) describe trends in removals and other adverse

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<sup>6</sup>See 5 U.S.C. §§ 7501-7514; 5 U.S.C. §§ 4301-4306. According to OPM, poor performance and misconduct often overlap; nevertheless, it is important to recognize the difference between the two. OPM describes misconduct as a failure to follow a workplace rule (e.g., tardiness and absenteeism) and poor performance as the failure of an employee to do his or her job at an acceptable level. OPM, *Addressing and Resolving Poor Performance: A Guide for Supervisors* (Washington, D.C.: March 2017) <https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/performance-based-actions/toolkit.pdf>.

<sup>7</sup>GAO, *Federal Workforce: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance*, [GAO-15-191](#) (Washington, D.C.: Feb. 6, 2015).

<sup>8</sup>Merit Systems Protection Board, *Alternative Discipline: Creative Solutions for Agencies to Effectively Address Employee Misconduct* (Washington, D.C.: July 2008).

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actions resulting from misconduct; and (4) identify key practices agencies can use to help them better prevent and address misconduct.

To address the first objective, we reviewed relevant sections of Title 5 chapter 75 of the U.S.C. (hereinafter chapter 75) which contains the statutory process for taking such adverse actions as are necessary to promote the efficiency of the service, which would include adverse actions to address misconduct.<sup>9</sup> We also reviewed OPM regulations implementing chapter 75 adverse action procedures and describing employee grievance and appeal rights.<sup>10</sup> Additionally, we reviewed 5 U.S.C. §§ 7701 and 7702 (hereinafter chapter 77), which contain the statutory process for adverse action appeals to the MSPB and subsequent appeals to the Equal Employment Opportunity Commission (EEOC) when the employee has alleged that an adverse action within the jurisdiction of the MSPB was taken on account of discrimination within the jurisdiction of the EEOC.<sup>11</sup> To provide context for our review of Chapters 75 and 77, we interviewed current and former practitioners, subject-matter experts, and academics. We selected our subject-matter experts based on our guidance for selecting experts, including their depth of experience on this issue and their present and past employment history, the subject-matter experts' practical experience in applying and practicing administrative law related to employee misconduct, and academicians who have conducted research on employee misconduct.

To address the second objective, we interviewed OPM and MSPB officials and reviewed MSPB documents to obtain alternative discipline approaches agencies may use to address employee misconduct. We reviewed OPM regulations and documents to determine the legal framework within which most agencies address employee misconduct in the federal service, including formal procedural and employee appeal rights. To describe and assess factors that affect an agency's response to employee misconduct, we interviewed a panel of chief human capital officers (CHCO) from selected agencies as well as current and former human capital practitioners and other individuals and organizations with

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<sup>9</sup>See generally, 5 U.S.C. §§ 7501-7514. Other adverse that may be taken under Chapter 75 include, for example, a furlough of 30 days or less for the purpose of keeping the agency's spending within appropriation limits.

<sup>10</sup>OPM regulations implementing Chapter 75 are found in 5 C.F.R. subpart D of part 752.

<sup>11</sup>5 U.S.C. § 7701(a)-(b); 5 U.S.C. § 7702(b).

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expertise in working on employee misconduct issues.<sup>12</sup> These interviews helped us to gain insight into the agency perspective on addressing employee misconduct.

To address the third objective, we analyzed data from OPM's Enterprise Human Resources Integration (EHRI) database and MSPB data from fiscal years 2006 to 2016 to describe trends in misconduct-related personnel actions and determine the number of adverse actions that agencies take against employees government-wide.<sup>13</sup> Some agencies are excluded from the EHRI database, such as those in the intelligence community. For this report, the term 'adverse action' refers to non-appealable and appealable personnel actions listed under chapter 75, which includes reductions in grade or pay, suspensions, and removals.<sup>14</sup> Adverse actions can be taken for reasons that will promote the efficiency of the service. Such actions include, but are not limited to, misconduct.

To address the fourth objective, we conducted a literature review to identify promising practices and lessons learned associated with employee misconduct in the federal sector. We interviewed officials from OPM, MSPB, the EEOC, and the Office of Special Counsel (OSC), to obtain their perspectives on responding to employee misconduct through alternative approaches. We also interviewed officials from the Environmental Protection Agency (EPA) to obtain their perspectives on recent efforts to better coordinate with EPA's Inspector General to address cases of employee misconduct. We obtained the perspectives of a panel of CHCOs from selected agencies through the CHCO Council. We also interviewed former human capital practitioners and other subject-matter experts with extensive experience working on employee misconduct issues identified through literature reviews and recommendations from other experts. For further information on our scope and methodology, see appendix I.

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<sup>12</sup>The Chief Human Capital Officers Act of 2002, enacted as part of the Homeland Security Act of 2002 (Pub. L. No. 107-296) required the heads of 24 Executive Departments and agencies to appoint or designate Chief Human Capital Officers (CHCOs). The CHCO Act also established a CHCO Council to advise and coordinate the activities of members' agencies on such matters as the modernization of human resources systems, improved quality of human resources information, and legislation affecting human resources operations and organizations.

<sup>13</sup>EHRI contains information on personnel actions and other data, and is the primary government-wide source for information on federal employees.

<sup>14</sup>5 U.S.C. §§ 7502 and 7512.

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We conducted this performance audit from July 2016 to July 2018 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We independently assessed OPM and MSPB's data by determining data checks and quality control steps taken on entering and maintaining the data. We determined the data from both agencies to be sufficient and reliable for our purposes. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Background

Misconduct can occur in any workplace. When employee misconduct happens, an agency may incur a number of direct and indirect costs depending on how the agency chooses to address misconduct. For the agency, direct costs can mean potentially significant time and resource investments, including investigations, adversarial relationships between management and the employee, costs to the agency as a result of the misconduct committed (e.g., time and attendance or credit card fraud), and reduced employee engagement. The subject-matter experts we interviewed told us that, based on their experiences, the time it takes to address a case of misconduct may range from a couple of weeks to years. The time range depends on whether the employee appeals their case and other factors.

Agencies may also incur litigation expenses if an employee decides to appeal an adverse action. While there are costs to addressing misconduct, agencies also incur indirect costs when misconduct goes unaddressed in the workplace. These indirect costs include corrosive effects on other employees' morale, higher employee turnover, reduced productivity, and lower employee commitment to their work or agency. Indirect costs also include redirecting management's attention away from achieving the agency's mission.

Employee misconduct in the federal government is regulated by a well-developed body of statutes and regulations as well as decisions from MSPB and U.S. Court of Appeals for the Federal Circuit and Supreme Court. While there is no general definition of the term "employee misconduct" in a statute or government-wide regulation, Standards of Ethical Conduct are prescribed by the Office of Government Ethics at 5 CFR Part 2635 and agencies may also elaborate on types of misconduct in handbooks, tables of penalties (listings of some of the most common

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offenses with recommended ranges of penalties), and other internal guidance. There is a large body of law by MSPB addressing discipline for employee misconduct in the federal government that contains criteria of various forms of misconduct, such as, “insubordination,” “excessive absence,” and “misuse of government property.” According to OPM officials, there are instances in law and regulation where types of misconduct are referenced concerning appointment into the competitive service. Chapter 73 (Suitability, Security, and Conduct) addresses certain types of misconduct of executive branch employees.

Generally speaking, an employee’s violation of an agency’s regulation or policy may cause the agency to take disciplinary or corrective action. Ultimately, if an agency needs to take an adverse action for inappropriate workplace behavior, it must do so “for such cause as will promote the efficiency of the service” as provided for in Title 5, Chapter 75.<sup>15</sup> OPM has also prescribed some regulations on employee responsibilities and conduct.<sup>16</sup> One of the nine Merit System Principles set forth by the Civil Service Reform Act of 1978 that govern the management of the federal workforce states that federal employees “should maintain high standards of integrity, conduct, and concern for the public interest.”<sup>17</sup>

According to MSPB, when there is misconduct by a federal employee, management’s goal should be to either persuade the employee to behave properly or to remove the employee if the conduct is serious enough.<sup>18</sup> Moreover, OPM maintains that supervisors have a responsibility to set clear rules and expectations for employees in the workplace.<sup>19</sup> It is imperative that federal agencies manage their workforces effectively, which includes the effective use of discipline when addressing employee misconduct. In addition, employees may be disciplined for conduct that

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<sup>15</sup> 5 U.S.C. § 7503(a) and 5 U.S.C. § 7513(a). Chapter 75 provides the procedures agencies must follow for actions that affect pay (e.g., suspensions and removals).

<sup>16</sup> 5 C.F.R. Part 735.

<sup>17</sup> 5 U.S.C. § 2301(b)(4).

<sup>18</sup> Merit Systems Protection Board, *Alternative Discipline: Creative Solutions for Agencies to Effectively Address Employee Misconduct* (Washington, D.C.: July 2008).

<sup>19</sup> For the purpose of this report, we apply MSPB’s definition of supervisors as first-line supervisor who do not supervise other supervisors; typically those who are responsible for employees’ performance appraisals and approval of their leave.

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that they knew or should have known was unacceptable.<sup>20</sup> Similarly, federal executive branch employees have a responsibility to adhere to principles of ethical conduct and should avoid any actions that appear to violate the law or ethical standards.<sup>21</sup>

Overall, the objective of discipline is to deal with employees who are unwilling or unable to behave properly, and, where management deems it possible and appropriate, correct deficiencies in employee conduct. When management decides to take an action short of removal, discipline can deter misconduct and correct situations interfering with productivity. Conduct-based actions are important tools designed to aid supervisors in maintaining an efficient and orderly work environment.

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## Agencies Must Follow Statutory and Regulatory Procedures When Taking Adverse Actions for Employee Misconduct Under Chapter 75 of Title 5

Most agencies are required to adhere to formal, statutorily established guidelines under chapter 75 when taking adverse actions against an employee for misconduct. Chapter 75 of Title 5 includes two subsections that outline the requirements for (1) non-appealable adverse actions such as suspensions of 14 days or less<sup>22</sup> or (2) appealable adverse actions such as reductions in pay or grade, suspensions of more than 14 days, and removals (see figure 1).<sup>23</sup> Subchapter I actions are covered by sections 5 U.S.C. 7501-7504 (Subsection I) and are referred to as “non-appealable actions,” while Subchapter II actions covered by sections 5 U.S.C. 7511-7514 are referred to as “appealable actions” based on whether or not they can be appealed to the MSPB.<sup>24</sup>

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<sup>20</sup> As the Supreme Court observed in *Arnett v. Kennedy*, 416 U.S. 134 (1974), a case addressing the Constitutionality of the “efficiency of the service” in connection with an employee’s removal for impugning his supervisors, “[I]t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation.... The most conscientious of codes that define prohibited conduct of employees include ‘catchall’ clauses prohibiting employee ‘misconduct,’ ‘immorality,’ or ‘conduct unbecoming.’ We think it is inherent in the employment relationship as a matter of common sense if not [of] common law that [a Government] employee . . . cannot reasonably assert a right to keep his job while at the same time he inveighs against his superiors in public with intemperate and defamatory [cartoons]... [Dismissal in such circumstances does not come] as an unfair surprise ....” 416 U.S. at 158-164.

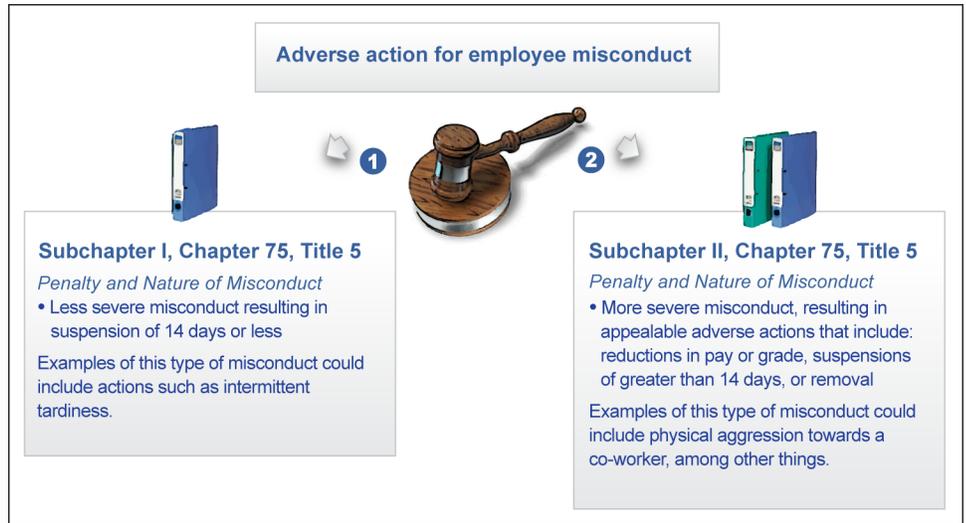
<sup>21</sup> 5 C.F.R. § 2635.101 (2011).

<sup>22</sup> 5 U.S.C. §§ 7501-7504.

<sup>23</sup> 5 U.S.C. §§ 7511-7514.

<sup>24</sup> 5 U.S.C. § 7701.

**Figure 1: Adverse Actions for Employee Misconduct Under Subchapters I and II of Chapter 75, Title 5 of the U.S. Code**



Source: GAO analysis of Chapter 75 of Title 5. | GAO-18-48

Note: Outside of taking adverse actions under Subchapter I or II of chapter 75, Title 5 of the U.S. Code, agencies may take less severe actions to address misconduct, such as letters of counseling or oral admonishments, as well as official reprimands which are placed in an employee's official personnel file for a period of time.

According to a MSPB report, through the Civil Service Reform Act of 1978 (CSRA), "Congress sought to ensure that agencies could remove employees who engage in misconduct while protecting the civil service from the harmful effects of management acting for improper reasons, such as discrimination or retaliation for whistleblowing."<sup>25</sup> OPM regulations specify the process agencies must pursue to take adverse actions.<sup>26</sup> These regulations also specify the procedural and appeal rights to which employees facing adverse actions are entitled.<sup>27</sup> According to OPM officials, agency policies usually cover lesser disciplinary actions, such as oral and written reprimands, letters of warning, and letters of counseling. Employees may grieve these actions depending on the agency's administrative or negotiated grievance processes. According to

<sup>25</sup>MSPB, *What is Due Process in Federal Civil Service Employment?* (Washington, D.C.: May 2015).

<sup>26</sup>5 C.F.R. §§ 752.203; 752.404; 752.604 (2012).

<sup>27</sup>See 5 CFR 752.405.

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OPM, agencies may issue these actions without following the procedural requirements for adverse actions under 5 U.S.C. Chapter 75.

The procedural rights due to employees subject to adverse actions covered by Chapter 75 are derived both from Chapter 75 and from the U.S. Constitution. In 1985, the U.S. Supreme Court held that tenured or post-probationary public employees who may be terminated only for cause have a constitutional property interest in continued employment and cannot be deprived of their jobs without due process of law. The process that was due in that case was notice of the proposed removal before it occurred and the opportunity to present reasons why the proposed action should not be taken.<sup>28</sup> Chapter 75 and OPM regulations promulgated thereunder establish additional procedural requirements extending to actions other than removal that go beyond what the Due Process Clause of the U.S. Constitution would itself require under current precedent. For example, they require that employees be given advance notice of a suspension or a reduction in pay with the opportunity to respond in writing with supporting affidavits.

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### Subchapter I of Chapter 75 and Corresponding Regulations Describe Procedures for a Suspension of 14 Days or Less

An agency may take an adverse action under Subchapter I of Chapter 75 only for such cause as will promote the efficiency of the service. When proposing to suspend an employee for 14 days or less, an agency must give the employee advance written notice stating the reasons for the proposed suspension. The agency must also inform the employee of his or her right to review the material which is relied on to support the reasons for the action. The agency must give the employee a reasonable time (no less than 24 hours) to answer orally and in writing, to furnish affidavits and other documentary evidence in support of the answer, and to be represented by an attorney or other representative. Lastly, the agency is to give the employee a written decision with the specific reasons for the suspension on or before the effective date of the action.<sup>29</sup>

An employee may challenge a suspension of 14 days or less through an agency administrative grievance procedure, if applicable. If the employee is represented by a union with a collective bargaining agreement (CBA) with the agency that includes an applicable grievance procedure, the

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<sup>28</sup>*Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); see also *Gilbert v. Homar*, 520 U.S. 924 (1997).

<sup>29</sup>5 U.S.C. § 7503(b)(1)-(4); 5 CFR § 752.203(a)-(e).

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employee may challenge the suspension only under the CBA unless the employee is alleging that the suspension was discriminatory.<sup>30</sup> If the employee wishes to challenge the suspension as discriminatory or retaliatory under the EEO laws, the employee may file an EEO complaint with agency followed by a request for a hearing with the EEOC. The employee may also file a complaint with the OSC and then, if necessary, an Individual Right of Action appeal with the MSPB, to assert that the suspension was in retaliation for the employee's whistleblower activity. If the employee is represented by a union that has a collective bargaining agreement with the agency that includes an applicable negotiated grievance procedure, the employee may only file a grievance under the agency's collective bargaining agreement.<sup>31</sup>

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## Subchapter II of Chapter 75 Describes Steps Agencies Must Take to Address More Significant Cases of Employee Misconduct Than Those Addressed Under Subchapter I

Subchapter II of Chapter 75 addresses steps agencies must follow to take the four adverse actions listed below. These following actions are referred to as appealable adverse actions:

- suspensions longer than 14 days;
- reductions in grade;
- reductions in pay; and
- removals.<sup>32</sup>

An agency may take an adverse action under Subchapter II only for such cause as will promote the efficiency of the service. Subchapter II and OPM regulations contain more extensive procedural requirements for removals, reductions in pay or grade, and suspensions of over 14 days.<sup>33</sup> The employee is entitled to at least 30 days advanced written notice of the proposed action, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment

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<sup>30</sup>5 CFR § 751.103(f).

<sup>31</sup>*Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); see also *Gilbert v. Homar*, 520 U.S. 924 (1997).

<sup>32</sup>5 U.S.C. § 7512(1)-(5). Subchapter II also applies to furloughs of 30 days or less. A "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other non-disciplinary reasons.

<sup>33</sup>5 U.S.C. §7511-7514 and 5 C.F.R. 752.404.

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may be imposed.<sup>34</sup> The notice must state the reasons for the action and inform the employee of their right to review the material on which the reasons stated in the notice are based.<sup>35</sup> Agencies typically provide the material supporting the proposal to the employee with the notice. The proposal is usually prepared by the employee's supervisor in consultation with human resources and, sometimes, the agency's legal staff.

The agency must give the employee a reasonable amount—no less than 7 days—of official time to review the supporting material, to prepare an answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer.<sup>36</sup> According to OPM and MSPB officials, normally the agency designates an official other than the person who proposes the adverse action to review the employee's response and make the decision. The employee is entitled to be represented by an attorney or other representative, including a union steward if the employee is a bargaining unit member. The employee is entitled to a written decision on or before the effective date specifying the reasons for the decision and advising the employee of any appeal and grievance rights under 5 CFR § 752.405.<sup>37</sup>

An employee may challenge discipline under Subchapter II through an agency administrative grievance procedure, if applicable, or by filing a grievance under an applicable CBA. An employee may also appeal adverse actions covered by Subchapter II to the MSPB unless the employee first filed a grievance challenging the action under the CBA.<sup>38</sup> Accordingly, a large number of MSPB decisions address the elements and relative seriousness of various kinds of misconduct.

According to OPM, if the employee wishes to challenge an appealable adverse action under subchapter II as discriminatory or retaliatory under the EEO laws, the employee may file a "mixed case" EEO complaint with agency. The agency then issues a final agency decision that may be appealed to the MSPB. An employee affected by an appealable action (removal, suspension for more than 14 days, reduction in pay or grade)

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<sup>34</sup>See 5 CFR 752.404(d).

<sup>35</sup>5 CFR § 752.404(b)(1).

<sup>36</sup>5 CFR § 752.404(c)(1).

<sup>37</sup>5 C.F.R. § 752.404(c)-(e) and (g) (2012).

<sup>38</sup>5 U.S.C. 7511-7512, 7514; 5 C.F.R. 752.405(a).

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who believes that the action was motivated by prohibited discrimination, such as a person's race, color, religion, sex, national origin, age or disability, may also file a "mixed case" appeal directly with MSPB and raise the discrimination claim in that forum. The employee may seek review of MSPB's decision on the discrimination claim before the EEOC. If MSPB and EEOC disagree on the discrimination claim and MSPB does not defer to EEOC's view, then a special panel of the EEOC and MSPB will be convened to resolve the disagreement.<sup>39</sup>

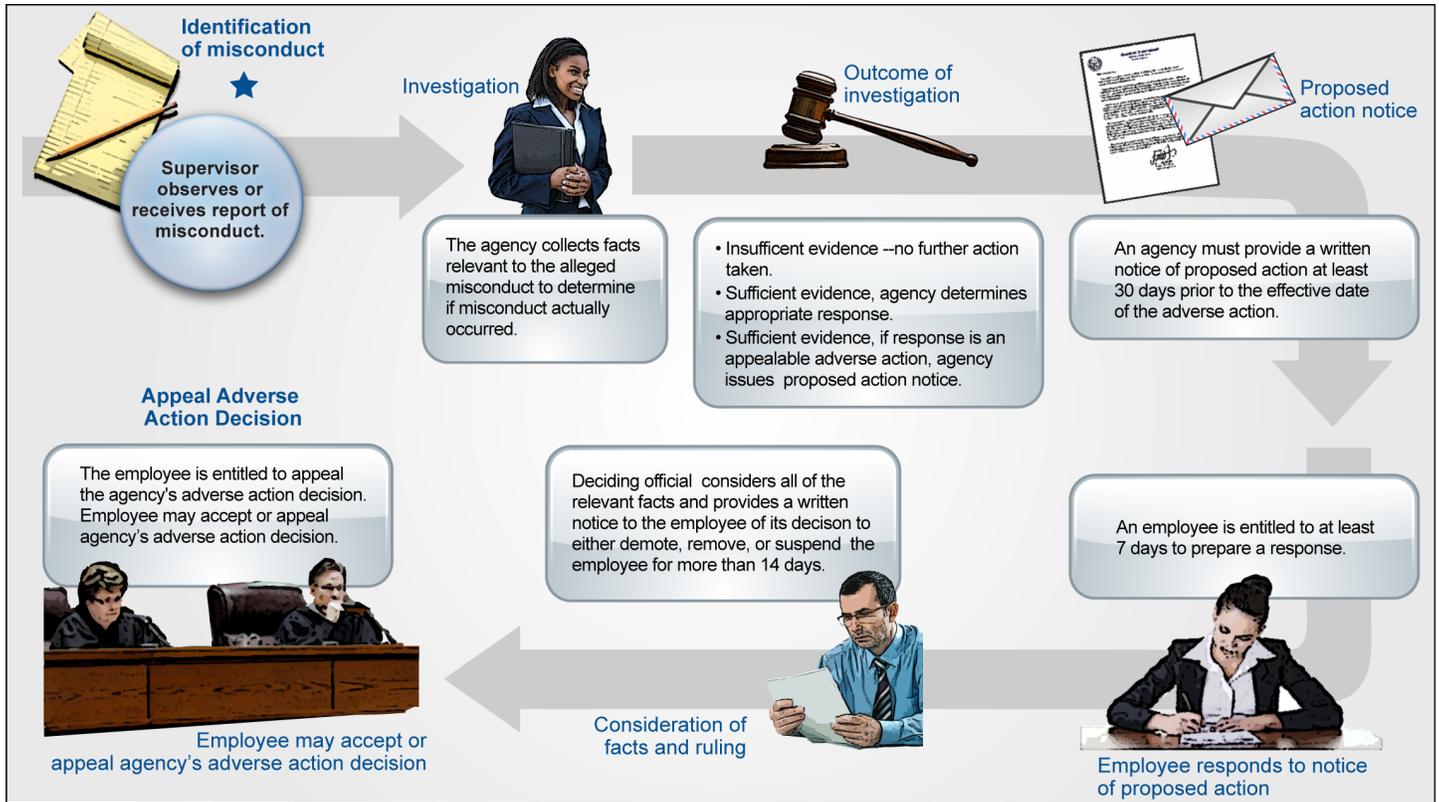
When deciding an appropriate penalty for misconduct, agency officials are to make decisions on a case-by-case basis, taking into consideration all relevant circumstances. Deciding officials within the agency should consult the Douglas Factors –12 criteria developed by MSPB to guide such decisions (see appendix II). In the *Douglas vs. Veterans Administration* decision, MSPB found that a penalty will be sustained as long as "managerial judgment has been properly exercised within tolerable limits of reasonableness."<sup>40</sup> The list of Douglas Factors is not exhaustive. According to MSPB, weighing all relevant aggravating and mitigating factors and the totality of the circumstances is critical in any disciplinary case. The process agencies use to identify and address employee misconduct is illustrated in figure 2.

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<sup>39</sup>5 U.S.C. § 7702(d)(2)(A)

<sup>40</sup>MSPB, in its often cited decision, *Douglas vs. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981), established criteria that supervisors must consider in determining an appropriate penalty to impose for an act of employee misconduct. The Board examined past court rulings and Civil Service Commission decisions regarding penalties and then summarized them into twelve (12) factors that it would look at to determine if a penalty was unreasonable. These factors are collectively known as the Douglas factors for the case that articulated them and they are still in use today.

**Figure 2: Process for Identifying and Addressing Employee Misconduct Using Chapter 75, Subchapter II and Chapter 77 of the U.S. Code**



Source: GAO illustration of the process for addressing employee misconduct under Chapter 75 and 77 of Title 5. | GAO-18-48

Agencies may use progressive discipline to help determine which course of action to take when responding to misconduct. OPM officials define progressive discipline as the “imposition of the least serious disciplinary or adverse action applicable to correct the issue or misconduct with penalties imposed at an escalating level for subsequent offenses.” The Douglas factors incorporate the concept of using a lesser penalty in appropriate circumstances. For instance, if an employee commits a first offense, the agency may choose to suspend the employee for 14 days or less. After that, the employee might learn from his or her mistake or correct the action, and not commit another offense, and therefore the agency will not discipline the employee again. However, the President has now prescribed that “supervisors and deciding officials should not be required to use progressive discipline”, and that “the penalty for an instance of misconduct should be tailored to the facts and

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circumstance.”<sup>41</sup> This will affect how agencies will determine appropriate penalties going forward.

Alternatively, if the employee commits the same offense a second time, the agency may choose to suspend the employee for longer, or impose stronger adverse actions, including removal. According to OPM officials, progressive discipline is not defined or required by civil service law, rules or regulations.

Chapter 75 provides that an employee with appeal rights who wants to contest an agency decision to remove, suspend for over 14 days, or reduce in pay or grade may appeal the agency’s decision with MSPB.<sup>42</sup> If that employee is a member of a collective bargaining unit, the employee also has the option of pursuing a grievance under negotiated grievance procedures if the appeal has not been excluded from coverage by the collective bargaining agreement. The employee may pursue either option, but not both.<sup>43</sup> The employee may seek review of an arbitrator’s decision before the U.S. Court of Appeals for the Federal Circuit. If the employee is challenging an adverse action within the jurisdiction of the MSPB and also alleged unlawful discrimination before the arbitrator or was prevented from doing so by the negotiated grievance procedure, the employee may appeal the arbitrator’s decision to the MSPB. In addition, the union may appeal an arbitration award concerning a suspension of 14 days or less to the Federal Labor Relations Authority (FLRA) on behalf of the employee.<sup>44</sup> See figure 3 for the collective bargaining unit appeals process for major disciplinary actions.

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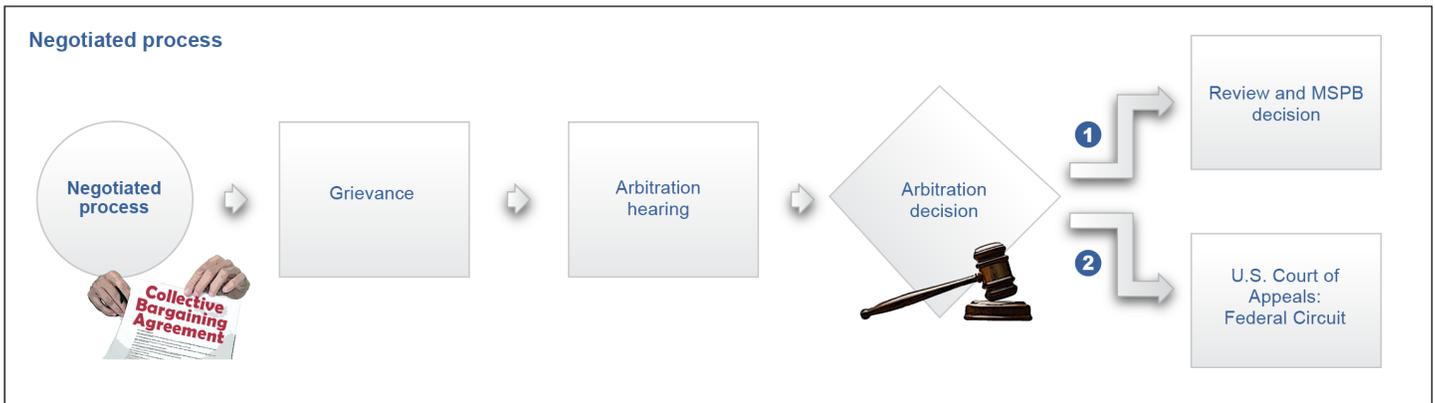
<sup>41</sup>Section 2(b) of *Executive Order 13839: Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles* (Washington, D.C.: May 25, 2018).

<sup>42</sup>5 U.S.C. § 7513(d).

<sup>43</sup>5 U.S.C. § 7121(e)(1); 5 C.F.R. § 752.405(b).

<sup>44</sup>See 5 C.F.R. Part 2425.

**Figure 3: Collective Bargaining Unit Appeals Process**



Source: GAO illustration of MSPB's flowchart of the Federal Employee Negotiated Review Process for major disciplinary actions. | GAO-18-48

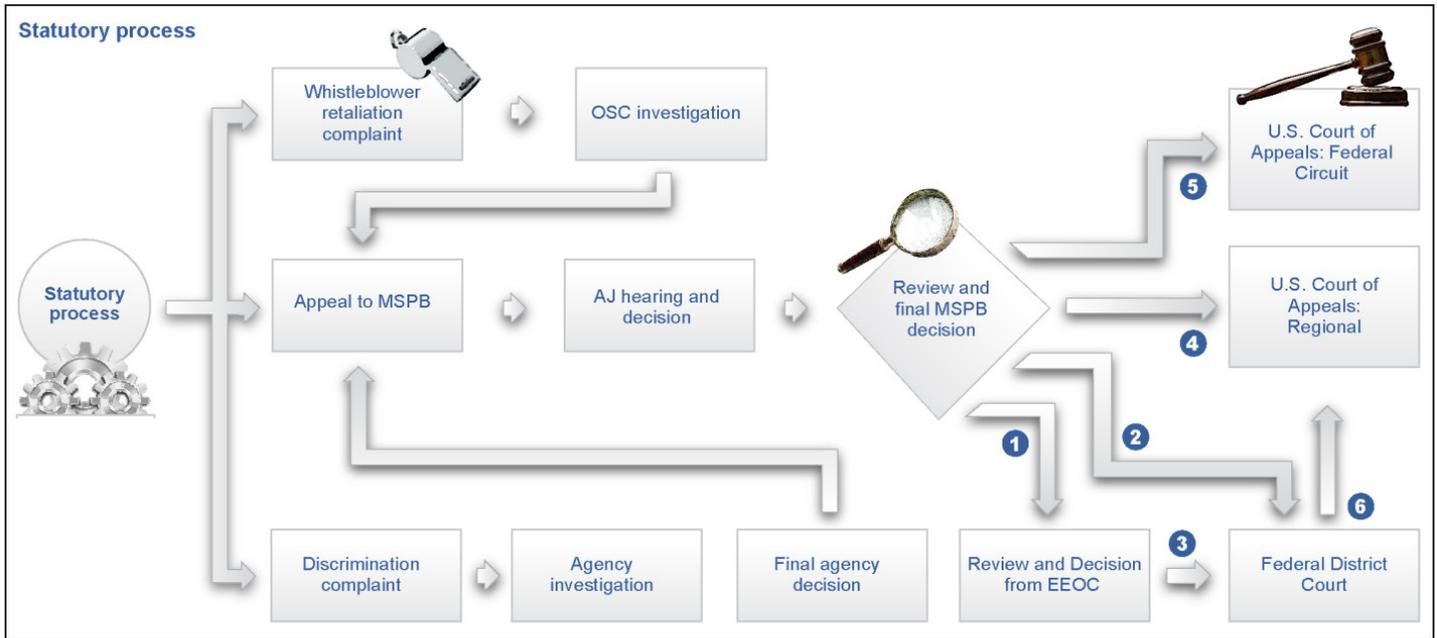
<sup>1</sup> An employee who claimed discrimination before an arbitrator or who was precluded by the negotiated grievance procedure from raising discrimination before the arbitrator may seek review of the arbitrator's decision before the MSPB. 5 U.S.C. § 7121(d); 5 C.F.R. § 1201.155(c).

<sup>2</sup> An employee may seek review of an arbitrator's decision before the U.S. Court of Appeals for the Federal Circuit. 5 U.S.C. §§ 7121(f), 7703.

Employees may use several avenues if they elect to appeal adverse actions through the statutory appeals process for such actions (removal, suspension of more than 14 days, and reduction in grade or pay).<sup>45</sup> If the employee believes the disciplinary action was motivated by unlawful discrimination, he or she may file a discrimination complaint with the agency or file an appeal directly with MSPB. If the employee believes the disciplinary action was taken in retaliation for whistleblowing, he or she may choose to file a whistleblower retaliation complaint before deciding to appeal to the MSPB. If the employee or agency does not agree with the decision rendered by a MSPB administrative judge (AJ), he or she may seek review before the full MSPB. See figure 4 for statutory appeals process.

<sup>45</sup> See 5 CFR 752.405.

**Figure 4: Statutory Appeals Process for Appealable Adverse Actions**



Source: GAO illustration of MSPB's flowchart of the Federal Employee Statutory Review Process for major disciplinary actions. | GAO-18-48

- <sup>1</sup> An employee who claimed discrimination in an appeal to the MSPB or in a grievance may seek review of the final MSPB decision before the EEOC. 5 U.S.C. § 7702(b).
- <sup>2</sup> An employee who claimed discrimination in an appeal to the MSPB or in a grievance may file a civil action in federal district court. 5 U.S.C. § 7703(b)(2).
- <sup>3</sup> An employee may file a civil action in federal district court following a final decision by the EEOC. See authorities cited in 5 U.S.C. § 7702(a) & (b)(5)(A) and 29 C.F.R. §§ 1614.407 & 1614.408.
- <sup>4</sup> An employee who filed a whistleblower complaint may obtain judicial review of a final decision of the MSPB before the U.S. Court of Appeals for the appropriate regional circuit 5 U.S.C. § 7703(b)(1)(B).
- <sup>5</sup> An employee may obtain judicial review of a final decision of the MSPB before the U.S. Court of Appeals for the Federal Circuit. Such review may include a claim of whistleblower retaliation but may not include a claim of discrimination. 5 U.S.C. § 7703(b)(1)(A) & (B); *Kloeckner v. Solis*, 133 S. Ct. 596 (2012).
- <sup>6</sup> An employee who pursued a civil action in federal district court may seek judicial review of the district court in the U.S. Court of Appeals for the relevant regional circuit. 28 U.S.C. § 1291.

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## Initial Appeals to MSPB Take Around 100 Days to Resolve

We analyzed MSPB's data and found initial appeals at MSPB generally take from 63 to 152 days to render a decision.<sup>46</sup> MSPB has a policy goal of resolving cases by an administrative judge on or before 120 days after the filing of the appeal. An employee or agency can appeal an initial MSPB decision in a process called petition for review (PFR). PFR cases are reviewed by the full MSPB, and range from an additional 99 to 251 days, based on our analysis of the MSPB's data. The time that it takes to resolve cases at MSPB is consistent for demotions, suspensions of greater than 14 days, and removals. According to MSPB officials, the system is designed to require an individual to choose a path of review to the exclusion of other paths. Depending on the claims raised, there may be multiple levels of review of a single action before multiple fora. However, there is only one hearing at the administrative level; therefore, the timeline to resolve an adverse action appeal can be longer than the initial appeal and PFR.

According to MSPB officials, the selected CHCOs, and the subject-matter experts we interviewed, agencies most often make the following errors which may cause MSPB to reverse the adverse action decision<sup>47</sup>:

- **Failure to follow procedures by agency:** MSPB may overturn an adverse action decision if the agency did not adhere to the processes set out in statute and regulation. This most often means that the agency did not give the employee a chance to respond to the adverse action charge or did not notify them of their rights to an attorney.
- **Failure to follow procedures by deciding official:** An action may be vulnerable to a modification or reversal upon appeal if the deciding official did not fulfill their role appropriately in weighing the evidence through a Douglas Factors analysis.
- **Ex parte communications:** A challenge may be overturned if a deciding official gave consideration to any issue not in the proposal letter.
- **Incorrect labeling (or charge):** Nothing in law or regulation requires an agency to attach a label to a charge of misconduct. However, if labels are used, they must be proven. An example used by MSPB

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<sup>46</sup>Range is based on the 25<sup>th</sup> and 75<sup>th</sup> percentiles.

<sup>47</sup>Penalties imposed may vary depending on how agencies label different types of misconduct.

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provides that if an agency uses the label of “theft” as its charge, then the agency must prove that the employee “intended to permanently deprive the owner of possession” of the item in question.<sup>48</sup> Experts told us that MSPB requires agencies to prove all legal aspects of a misconduct label.

Federal courts have held that it is impermissible to allow the official who makes the final decision in a removal proceeding to rely on aggravating factors regarding either the alleged offense or the proposed penalty that were not contained in the notice, and to which the employee did not have an opportunity to respond.<sup>49</sup> MSPB is bound by this precedent.

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## Alternative Disciplines Can Help Agencies in Determining the Appropriate Response to Misconduct but Several Factors Affect How Agencies Respond

Alternative discipline is an approach to address misconduct that is available to agencies in lieu of traditional penalties (e.g., letters of reprimand and suspensions of 14 days or less). According to MSPB, agencies may choose to offer alternative discipline at any stage of the disciplinary process. OPM officials said alternative disciplines tend to be more focused on taking a corrective or remedial response rather than punitive actions against an employee. In a report on alternative discipline, MSPB states that alternative discipline can take many forms and is an effort undertaken by an employer to address employee misconduct using a method other than traditional discipline.<sup>50</sup>

As an alternative discipline approach, it is recommended by MSPB that agencies may consider entering into an agreement with an employee. In general, such an approach involves a legally binding written agreement between the employee and the agency addressing an act of misconduct. If the employee violates the agreement, the agency will proceed with additional or more serious forms of discipline, up to and including removal. MSPB also recommends that managers and human resources personnel consult with legal counsel when drafting and implementing an alternative discipline agreement that requires the employee’s consent, adding that it is extremely important for agreements to meet certain legal requirements to form a valid agreement.

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<sup>48</sup>*King v. Nazelrod*, 43 F.3d 663, 666-67 (Fed. Cir. 1994).

<sup>49</sup>Aggravating factors could include prior disciplinary actions, poor work record, lack of rehabilitative potential, etc. See *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011); *Stone v. F.D.I.C.*, 179 F.3d 1368 (Fed. Cir. 1999).

<sup>50</sup>*Alternative Discipline: Creative Solutions for Agencies to Effectively Address Employee Misconduct* (July 2008).

We compiled a non-exhaustive list of alternative discipline based on a literature review and interviews. Subject-matter experts, including the panel of CHCOs, reviewed this list and they cited benefits and drawbacks to some of the approaches (see table 1).

**Table 1: List of Alternative Discipline Approaches and Details of the Approach**

Alternative discipline	Details of approach
Additional training	Employee attends training designated by the agency that addresses specific acts of misconduct, such as time and attendance infractions.
Involvement in process improvement	The employee can develop or lead training in proper employee behavior for that specific area of misconduct in which the employee engaged.
Rescinding telework or alternate work schedule agreement	Preventing a telework eligible employee from teleworking or eliminating an alternative work schedule as part of the disciplinary action.
Counseling	Employee attends counseling for problems that are causing him or her to act inappropriately; types of counseling may include anger management, drug and alcohol treatment, and more. If the employee agrees to counseling, the penalty can be held in abeyance or laid out in the last chance agreement.
Community service	Employee agrees to complete a specific number of community service hours equal to the amount of time spent on a suspension.
Alternative dispute resolution (ADR)	A third-party mediator is used to settle disputes between two or more parties. ADR is more cost-effective than going to litigation before an adjudicating board.
Last chance agreements	In the event of an ongoing disciplinary history or egregious first-offense misconduct, an agency can hold a removal action in abeyance by entering into a written agreement with an employee. The agreement should state that the employee will not repeat the act of misconduct or any similar act of misconduct and should remain in effect for a set period of time. If the employee engages in the same or similar misconduct again, he or she can be removed without further procedural rights or appeal rights.
Abeyance agreements	Management holds a disciplinary action in abeyance, meaning that the discipline is not immediately enacted, for a set period of time or only imposes a portion of the disciplinary action, e.g., a suspension. This agreement is also in writing. If the employee commits another act of misconduct during this set period of time, then management enacts discipline. If an employee commits an infraction that he or she is unaware is misconduct, then an abeyance agreement might be appropriate. The employee agrees to waive grievance or appeal rights if applicable.
Paper suspension agreement	An employee receives a suspension on paper, which is documented on their permanent or temporary record, but the employee is not actually suspended on a non-pay status. The paper agreement states that the paper suspension is counted as progressive discipline and is of the same weight as a traditional suspension if there is additional misconduct. Employee agrees to waive appeal rights.
Clean-slate agreements	In lieu of disciplinary action or removal, the employee voluntarily agrees to separate, and waives appeal rights. In return, the agency agrees that the employee will have a clean slate, meaning the misconduct will not be permanently recorded in his or her personnel file. The employee must be honest about the reason prompting the separation in applying for future employment, filling out forms for background investigations, or responding to investigators' inquiries in connection with background investigations. Agencies must follow ethical requirements with respect to providing references.
Financial agreements	If an agency proposes an adverse action and the employee in question responds with a complaint, the agency is authorized to buy out the employee, meaning the agency will pay the employee a sum of money to separate from the agency. Employee agrees to waive appeal rights as part of the buyout process.

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**Added approaches from subject-matter experts**

Leave donation in lieu of formal discipline	An employee voluntarily agrees to donate annual leave to the agency's leave bank in lieu of disciplinary action.
Reassignment of employee or manager	Employee or manager is reassigned to a new team or different part of the agency. Must be mutually agreed upon and consistent with any collective bargaining agreements that the employee is under.
Financial restitution for cases involving misuse of government property	This would require a full investigation and the agency would specify how the employee would be required to make restitution.
Employee issues a public apology to affected individuals and or agency	Employee issues a public apology to the agency or individuals affected by the misconduct.

Source: GAO summary of feedback provided by agency officials and subject-matter experts. | GAO-18-48

MSPB noted in its 2008 report that the specific alternative discipline approach an agency decides to use should be based on the nature and severity of the misconduct. According to OPM officials, alternative discipline approaches are not appropriate for egregious acts of misconduct or when the employee is remorseless but rather lower level offenses where an employee may show remorse for the misconduct and demonstrate that she or he can be rehabilitated. Egregious acts of misconduct may involve discrimination, reprisal or retaliation, or sexual harassment. Alternative discipline approaches are also not appropriate when the employee's continued presence in the workplace would pose a threat to the employee or others.

On a case by case basis, an agency may decide to provide counseling or additional training as appropriate, depending on the facts and circumstances that address specific acts of minor misconduct. Additionally, agencies have flexibility in using alternative discipline as a final effort before taking formal action such as suspension or removal. However, in its 2008 report, MSPB found that managers had applied alternative discipline approaches ineffectively, resulting in further inefficiencies in the civil service. Specifically, MSPB recommended that managers and human resources personnel consult with legal counsel when drafting and implementing an alternative discipline agreement that requires the employee's consent, adding that it is extremely important for agreements to meet certain legal requirements to form a valid agreement. CHCOs and subject-matter experts said managers and supervisors should coordinate internally with human resources staff, employee relations, and legal counsel when assessing whether an alternative

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discipline approach would result in correcting improper behavior and ultimately improve their workforce.

Some subject-matter experts we interviewed expressed concern that workforces would view alternative discipline measures as providing opportunities for employees to avoid accountability or encouraging similar negative behaviors from coworkers rather than penalizing the employee more stringently through a formal adverse action process. These subject-matter experts identified community service, buy-outs, involvement in process improvements, and clean-slate agreements as approaches that had this kind of effect. Additionally, some subject-matter experts told us that alternative discipline approaches such as community service and paper suspension agreements could have the unintended effect of benefiting the employee being disciplined. For example, community service may allow the employee to serve the alternative discipline during their scheduled duty time instead of performing their regularly assigned duties. This may require the employee's co-workers to take on additional work while the employee serves the alternative discipline. Additionally, while a paper suspension limits interruption to work production, it also allows the employee to work in a pay status while carrying out the suspension. According to feedback we received from the CHCOs, some of these alternative discipline approaches were used more often than others and some approaches were more effective at addressing employee misconduct. We did not evaluate how often or the extent to which any of these approaches are used at agencies, nor did we consider the propriety or legality of these approaches.

According to the CHCOs and subject-matter experts, agency managers and supervisors may be able to effectively resolve employee misconduct cases through the use of alternative approaches, which can shorten the timeline and simplify the adverse action process in a manner that has the most potential to prevent additional harm to the workplace and avoid the potentially high costs of litigating a misconduct case.

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## Several Factors Can Affect Whether and How an Agency Addresses Employee Misconduct

Current and former agency officials and subject-matter experts we interviewed told us in interviews that several factors can affect whether and how an agency responds to misconduct. Both agency officials and subject-matter experts told us that supervisors may not report misconduct due to fear that an employee could counter with their own complaint. Several CHCOs and subject-matter experts told us that an agency's approach to dealing with misconduct can influence how first-line supervisors act. In a recently released MSPB publication that highlighted

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selected results of its 2016 Merit Principle survey of managers and supervisors about challenges to addressing employee misconduct, 80 percent of managers and supervisors agree to some extent or a great extent that their agency's culture poses a challenge when attempting to remove an employee for serious misconduct.<sup>51</sup> Additionally, MSPB's report provided the perspectives of managers and supervisors regarding the factors that affect how agencies address misconduct, including

- 77 percent of managers/supervisors agree to some extent or a great extent that they do not feel supported by their agencies' senior leadership in their actions to remove an employee for serious misconduct.
- 88 percent of managers/supervisors somewhat or strongly agree that some supervisors do not manage their employees' conduct because the supervisors want to avoid conflict.
- 64 percent of managers/supervisors agree to some extent or a great extent that they do not fully understand the process to remove an employee for misconduct.

MSPB's 2016 survey findings were consistent with what agency officials and subject-matter experts told us during interviews.

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## Removal Actions for Misconduct Taken Under Chapter 75 Are Relatively Rare

Our analysis of OPM data from fiscal year 2006 to 2016 shows that, on average, agencies disciplined approximately 17,000 or less than 1 percent of the federal workforce per year under Subchapter II of Chapter 75.<sup>52</sup> The number of employees who separate from the federal workforce for misconduct under alternative means, such as settlements, is not known and would not be recorded as misconduct in OPM's EHRI database, according to agency officials and experts. Many of the CHCOs and subject-matter experts we interviewed told us that while data around such cases are not collected government-wide, they believe internal

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<sup>51</sup>The MSPB 2016 Merit Principles survey is a government wide survey of federal employees and supervisors that covered a variety of workforce issues, prohibited personnel practices, and selected aspects of their work experience and work environment. Merit Systems Protection Board, *Addressing Misconduct in the Federal Civil Service: Management Perspectives* (Washington, D.C.: December 2016).

<sup>52</sup>For our analysis of EHRI data, the observational unit is an adverse action, such as removal, suspension, or demotion, rather than an individual employee because employees may have multiple adverse actions recorded in EHRI.

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resolutions using alternative approaches to address misconduct occur frequently.

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### Trends in Misconduct Removals Are Associated with Fluctuations in Probationary Employee Numbers

According to EHRI data, as the number of probationary employees fluctuated over time, the number of terminations generally followed the same trend. One of the likely reasons for this fluctuation is that probationary employees are more likely to be terminated than career employees who are no longer in a probationary status because probationary employees are not yet subject to the Chapter 75 process protection afforded career employees.

Similar to addressing performance issues, it is generally easier to terminate employees for misconduct during the probationary period. As we previously reported, the probationary period is an important management tool to evaluate the conduct and performance of an employee and should be treated as the last step in the hiring process. According to OPM, appropriate actions taken within the probationary period are the best way to avoid long-term problems.

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### The Most Widely Used Form of Formal Discipline for Misconduct Is Suspension; Approximately One-Fourth of Suspended Employees Have Multiple Suspensions

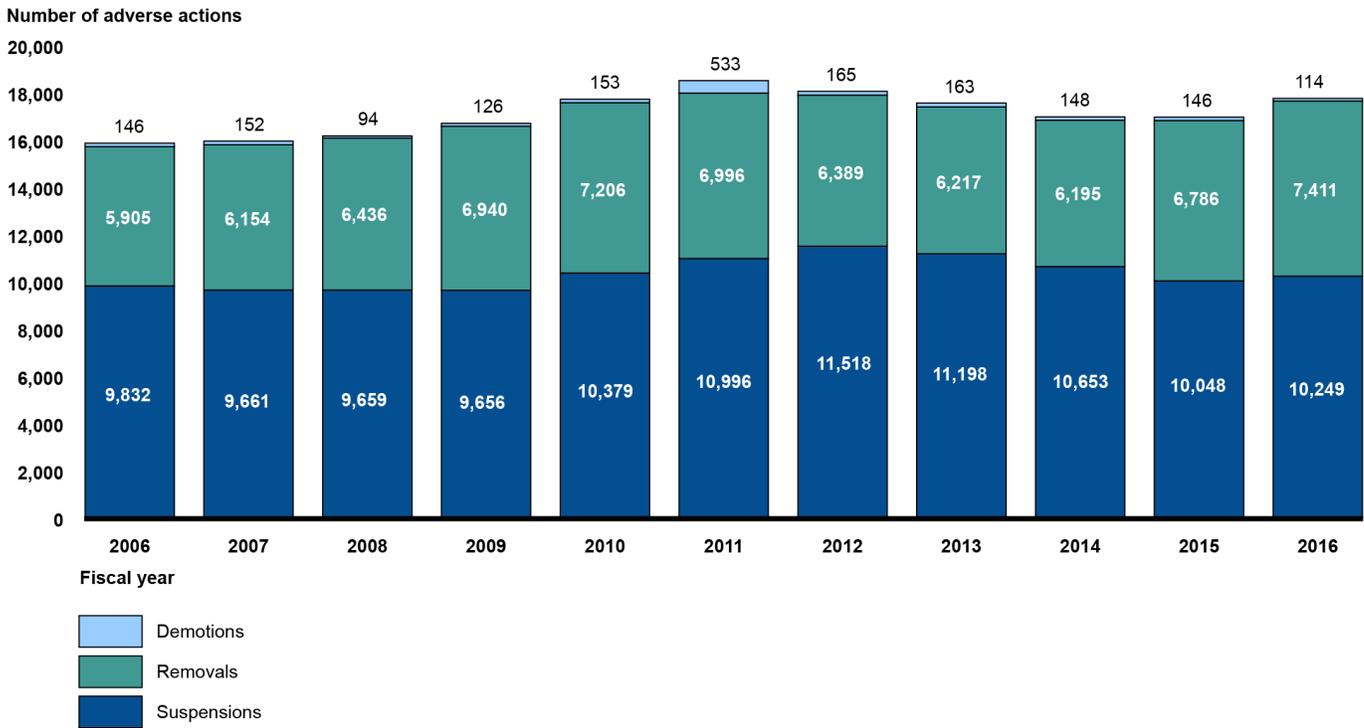
Our data analysis of personnel actions against employees for misconduct shows that the most common form of discipline is suspension. In 2016, agencies made 10,249 suspensions, 7,411 removals, and 114 demotions for misconduct (the numbers refer to the number of adverse actions that agencies made in 2016, not the number of employees that received adverse actions; one employee can be suspended multiple times, and each suspension is recorded as a separate personnel action in the employee's SF-50).<sup>53</sup> The data we analyzed indicated that approximately one-fourth of suspended employees have multiple suspensions. According to OPM officials, third parties such as the MSPB will review whether disciplinary actions are taken "only for such cause as will promote the efficiency of the service" which includes the assessment of the relevant Douglas factors.

Figure 5 shows how many suspensions, demotions, and removals took place from fiscal years 2006 to 2016 according to EHRI data.

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<sup>53</sup>2016 is the most recent year for which data were available.

**Figure 5: Number of Suspensions, Demotions, and Removals Per Year, Fiscal Years 2006 to 2016**



Source: GAO analysis of Enterprise Human Resource Integration data. | GAO-18-48

Note: For our analysis of EHRI data, the observational unit is an adverse action, such as removal, suspension, or demotion, rather than the individual employee because employees may have multiple adverse actions recorded in EHRI.

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## Better Data on Employee Misconduct Could Strengthen OPM's Oversight and Provide Clarity to Agencies Regarding How to Address Misconduct

OPM collects data on personnel actions reported by most agencies and stores this information in the EHRI database, but these data could be improved to provide OPM with better information to help agencies address misconduct.<sup>54</sup> Because not all misconduct data are entered into the database, the data presented in this report do not represent the entirety of employee misconduct instances that occur in the federal government.<sup>55</sup> Personnel actions in the EHRI database originate from data that agencies send to OPM through the Standard Form 50 (SF-50), a form that documents personnel actions. OPM officials told us that lesser disciplinary actions such as a letter of reprimand are not documented by an SF-50. Without maintaining comprehensive data regarding the extent and nature of misconduct in the federal government, OPM risks missing opportunities to provide agencies with guidance and other tools, such as targeted training to help agencies better address cases of misconduct. Indeed, better data could help OPM and agencies identify systemic misconduct issues, such as misuse of government property or physical aggression toward a co-worker, as well as emerging problems that benefit from early detection and/or more comprehensive approaches.

It should be noted that for the codes that indicate performance or misconduct as the underlying cause for the adverse action, it is not possible to make a clear distinction between whether the action was specifically related to misconduct, performance, or a mix of the two. Therefore, some cases include a mix of employee poor performance and misconduct. OPM officials said they do not have a sense of how frequently agencies use these (and other non-specific) nature of action (NOA) codes for misconduct-related actions. According to OPM officials, by establishing rules in terms of improving the efficiency of the service and the types of actions that will require specific procedures, Congress provided managers with maximum flexibility to pursue adverse actions whenever it would promote the efficiency of the service, whether the underlying impetus was a conduct issue or a failure to perform.

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<sup>54</sup>Our analysis of the data does not represent a minimum or maximum of misconduct cases. Rather, it represents the number of adverse disciplinary actions taken under Subchapters I and II of Chapter 75 that agencies took and reported to OPM through the EHRI database.

<sup>55</sup>EHRI captures actions that generate an SF-50 such as suspensions, removals, reduction in grade, and reduction in pay. It does not capture lesser penalties for which OPM does not regulate.

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OPM officials told us the Guide to Processing Personnel Actions directs agencies to indicate the nature of personnel actions in the EHRI database through the NOA codes. These codes indicate the employee type, the nature of the personnel action to be recorded in EHRI, as well as the underlying cause (e.g., conduct or performance) for the personnel action. OPM performs validity checks on the NOA codes and legal authorities to assure the agencies are compliant with OPM reporting requirements. OPM also periodically reviews agencies' use of NOA codes and legal authorities in general.

The EHRI database does not collect or store the specific type of misconduct—only that the personnel action belongs in the misconduct category. Several CHCOs and subject-matter experts who we interviewed agreed this flexibility is helpful to agencies. For example, officials said that while common types of misconduct exist, such as time-and-attendance infractions, many unique types of misconduct cannot be placed into easily identifiable categories. The officials added that it would be easy for agencies to mislabel misconduct. For instance, OPM officials said that disobeying an agency's policy or rules could manifest itself in many different ways.

Moreover, we found inconsistencies in the data OPM provided. For example, during this review, we initially used stored EHRI data from previous audits for fiscal years 2006 to 2014. We used NOA codes provided by OPM officials to analyze employee misconduct data in the executive branch. When we compared the results of our data analysis for this period to the data OPM provided for the same period, we found their data identified approximately 500 more adverse actions per year. Though we consulted with OPM, we were unable to resolve these differences. OPM officials noted that agencies submit data on a rolling basis and may later correct it, and, some SF-50 forms are filed after the fiscal year ends, so our stored data may not include these actions.

According to OPM officials, agencies generally have day-to-day oversight for determining use of NOA codes and legal authorities. Agencies are required to report a valid NOA code and legal authorities that is found in OPM's Guide to Data Standards. Guidance to agencies for classifying misconduct into the correct nature of action codes is provided in *The Guide to Processing Personnel Actions*. Although OPM verifies that agencies provide valid NOA codes in their data, they assert that agencies have responsibility for determining which NOA codes to use for each personnel action based on OPM documentation.

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As we noted in a 2017 report on federal human resources data, OPM developed EHRI to (1) provide for comprehensive knowledge management and workforce analysis, forecasting, and reporting to further strategic management of human capital across the executive branch; (2) facilitate the electronic exchange of standardized human resources data within and across agencies and systems and the associated benefits and cost savings; and (3) provide unification and consistency in human capital data across the executive branch.<sup>56</sup>

An important part of OPM's role is to support federal agencies' human capital management activities, which includes ensuring that agencies have the data needed to make staffing and resource decisions to support their missions. EHRI data are essential to government-wide human resource management and evaluation of federal employment policies, practices, training, and costs. The ability to capitalize on this information is dependent, in part, on the reliability and usefulness of the collected data. According to Federal Internal Control Standards, management is to obtain relevant data from reliable internal and external sources in a timely manner based on the identified information requirements.<sup>57</sup>

More specific guidance from OPM to agencies on which NOA codes to use for misconduct cases will increase confidence in the data, without requiring practitioners to capture and tabulate the type of misconduct. More importantly, enhanced data on the extent and nature of misconduct will improve OPM's oversight ability and agencies' ability to target management training and identify specific trends in misconduct.

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<sup>56</sup>GAO, *Federal Human Resources Data: OPM Should Improve the Availability and Reliability of Payroll Data to Support Accountability and Workforce Analytics*, [GAO-17-127](#) (Washington, D.C.: Oct. 7, 2016).

<sup>57</sup>Internal controls help agency program managers achieve desired results and provide reasonable assurance that program objectives are being achieved through, among other things, effective and efficient use of agency resources. GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: September 2014); effective in fiscal year 2016.

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## Most MSPB Appeals Are Resolved by the Parties, Which Benefits Both the Agency and Appellant, According to Officials

Our analysis of MSPB data found that the most frequent appeal outcome is a settlement. MSPB said settlements often benefit both the agency and the appellant because they manage risk. The officials said that when entering an adverse action appeal with MSPB, both the agency and the appellant face a risk: the agency is at risk of spending time and money for litigation only to, in some cases, have its decision overturned; the appellant is at risk of being removed from his or her position with a permanent mark on his or her record, which may make finding another job difficult. To avoid these outcomes for both parties, an agency may offer the employee a variety of settlement options to incentivize them to willingly leave. Settlement options may include, but are not limited to

- back-pay for the time that the employee was out of work, but still litigating the appeal; and
- paying the employee's attorney fees.

OPM notes, on the other hand, that the MSPB's data might not always reflect voluntary settlements. According to OPM officials, the MSPB has a large caseload and typically strives to induce the agency to settle. OPM officials noted that the pressure to settle cases regardless of merit after the agency has made the determination that discipline is necessary and has gone through the procedure to carry it out may be one of the most significant deterrents to dealing with misconduct or performance under Chapter 75.

Figure 6 shows the number of MSPB appeals that were filed from fiscal years 2006 to 2016 that were affirmed, reversed, settled, or dismissed.

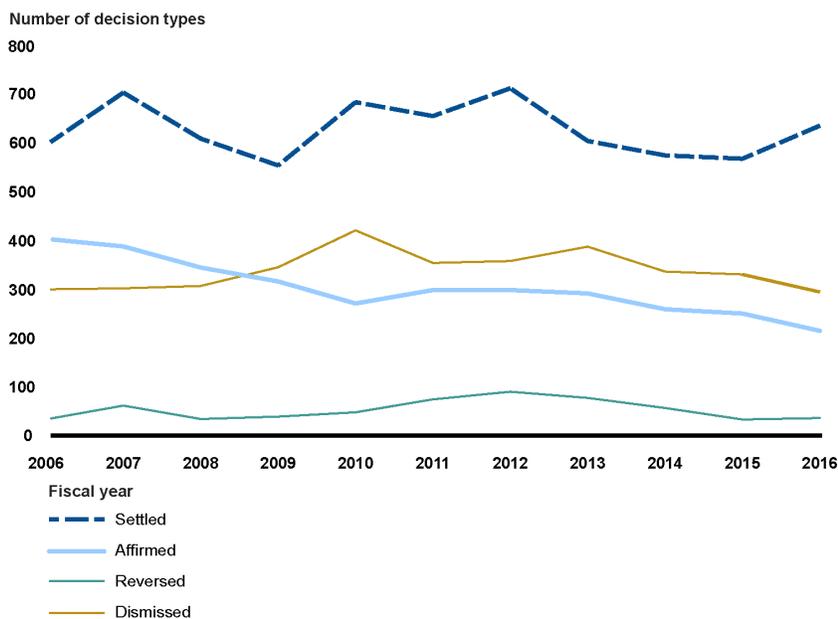
We also analyzed data from MSPB's database of appeals cases.<sup>58</sup> MSPB hears appeals from those adverse actions that Congress made appealable under Subchapter II of chapter 75, including suspensions of greater than 14-days, demotions, and removals. These actions can be taken for performance problems as well as misconduct under Chapter 75—MSPB does not differentiate between performance and misconduct in its database. Rather, the agency categorizes its cases by legal authority. Therefore, similar to OPM's EHRI data, any analysis with

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<sup>58</sup>When we refer to adverse actions regarding MSPB data, we are referring to suspensions longer than 14 days, demotions, and removals.

MSPB’s data may include performance appeals as well as misconduct appeals under Chapter 75.

**Figure 6: Outcomes of Merit Systems Protection Board Appeals, Fiscal Years 2006 to 2016**



Source: GAO analysis of Merit Systems Protection Board appeals data. | GAO-18-48

Note: For our analysis of MSPB data, the observational unit is an appeal action such as affirmed, reversed, settled, or dismissed, rather than the unit being an individual employee because employees may appeal cases several times to MSPB. We omitted “mitigated” and “other” as observational units because very few cases are mitigated by MSPB and the other category covered a wide range of outcomes.

## Key Steps Agencies Can Take to Better Prevent and Address Employee Misconduct

On the basis of our literature review, as well as interviews with CHCOs and subject-matter experts, we identified key promising practices and lessons learned that can help agencies better prevent and address employee misconduct. These key practices include tables of penalties, engaging employees, making full use of the probationary periods, and maintaining effective lines of communication and collaboration between the human resources office staff, line-level management, and agencies’ legal counsel. Going forward, it will be important for OPM and agencies, in concert with the CHCO Council to examine each of these practices and lessons learned, refine, as appropriate, and share how best to implement these practices.

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## Tables of Penalties Can Help Guide Responses to Misconduct

We found that tables of penalties—a list of recommended disciplinary actions for various types of misconduct—though not required by statute, case law, or OPM regulations, nor used by all agencies, can help ensure the appropriateness and consistency of a penalty in relation to an infraction. Further, tables of penalties can help ensure the disciplinary process is aligned with merit principles because they make the process more transparent, reduce arbitrary or capricious penalties, and provide guidance to supervisors.

According to the panel of CHCOs and the subject-matter experts we interviewed, a table of penalties may also provide information on the period over which offenses are cumulative, for purposes of assessing progressively stronger penalties. The officials described tables of penalties as a listing of common infractions committed most frequently by agency employees, along with a suggested range of penalties for first, second and third offenses; however, the range of penalties should not be too broad, and the penalties should be progressive, meaning that they increase in harshness with each subsequent offense committed by the employee. The CHCOs and subject-matter experts said a table of penalties should also provide sufficient flexibility in the penalty range (e.g., 1-day to 5-day suspensions for a first offense) to consider mitigating and aggravating factors when considering discipline for misconduct. OPM officials stated that where an agency elects to have a table of penalties, it should serve as a guide in addressing misconduct, noting that it does not serve as a substitute for management's judgment. According to OPM officials, management must take into account the applicable Douglas Factors, and must consider other appropriate circumstances not covered by the Douglas Factors. Neither OPM nor MSPB provide any written guidance to agencies in developing their tables of penalties. However, OPM officials told us their agency is available to provide assistance upon request to agencies that elect to use a table of penalties.

Views on the usefulness of the tables of penalties were mixed among agency officials and subject-matter experts. On the one hand, some agency officials and other subject-matter experts told us the table of penalties can assist agencies in determining an appropriate penalty and ensure consistency of penalty selection from case to case. For that reason, they said the tables can also help ensure the action taken is legally defensible based on past similar cases. MSPB officials told us that they believe table of penalties, which rely on the Douglas Factors, can help human capital practitioners when making decisions about employee misconduct cases. On the other hand, several subject-matter experts and

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agency officials, including OPM, indicated that table of penalties tend to be too broad in the range of penalties for individual offenses, which they said ultimately limited their usefulness in the decision-making process.

OPM officials said their agency does not use a table of penalties nor does it support encouraging agencies to establish tables of penalties. According to OPM officials, where table of penalties exist, they are established at an agency's discretion and not under OPM's auspices. OPM officials believe agencies have the ability to address misconduct appropriately without a table of penalties and with sufficient flexibility to determine the appropriate penalty for each instance of misconduct. Further, OPM officials said that agencies that adopt a table of penalties will be required to consider its table of penalties, if applicable, as part of the MSPB's Douglas Factors analysis which, in their view, imposes an additional condition on the agency's ability to defend its actions. Finally, OPM said there is no substitute for management judgment and that tables of penalties should not be applied so inflexibly as to impair consideration of other factors relevant to the individual case.

In short, tables of penalties, if drafted at an appropriate level of detail and used in conjunction with the Douglas Factors and other case-specific forms of discretion, could provide agencies with reasonable assurance that similar cases of misconduct are addressed with similar penalties as appropriate, and can reduce the risk of inconsistently and potentially unfairly applying remedial measures.

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## Set Clear Expectations and Engage Employees

Agency officials and subject-matter experts told us that having effective agency policies and programs that set clear expectations around behavior and that engage employees may help reduce the number of misconduct incidents that occur. These policies and programs may also mitigate the damage when an incident does occur. Several subject-matter experts said that agencies should set formal expectations early and reinforce these expectations throughout an employee's career. To this point, as we discussed in our 2015 report on addressing substandard employee performance, when addressing misconduct agencies should help

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managers and supervisors take appropriate action if misconduct occurs during an employee's probationary period.<sup>59</sup>

Some subject-matter experts indicated that agencies may also consider conducting more thorough job screening and hiring processes which could help determine if the individual is a good fit for their agency. Specifically, the subject-matter experts mentioned that agencies should take a closer look at a prospective employee's work history and carefully check references. We also learned from our interviews that, as a deterrent, agencies must clearly communicate that an employee will be held accountable for any acts of misconduct.

According to OPM, agencies can mitigate the risks of these difficulties by establishing a well-trained, experienced, and empowered employee and labor relations staff. OPM said these individuals play a crucial role in educating supervisors and managers in taking appropriate and sustainable disciplinary actions. CHCOs and subject-matter experts provided a number of key promising practices that an agency can use to mitigate and address employee misconduct, including:

- Demonstrating positive conduct at the agency's senior leadership (tone at the top): Through policies and their own individual actions, senior leaders must exhibit positive workplace behavior as an example to agency employees.
- Maintaining a good workplace atmosphere: Agencies should take steps to monitor workforce morale and initiate programs that encourage respect and community.
- Engaging employees by connecting them directly to the agency's mission: Employees should have a sense of purpose and commitment toward their employer and its mission which can lead to better organizational performance.
- Making full use of the probationary period for employees: Supervisors should use probationary periods as an opportunity to evaluate an employee's performance and conduct to determine if an appointment to the civil service should become final.

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<sup>59</sup>GAO, *Federal Workforce: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance*, [GAO-15-191](#) (Washington, D.C.: Feb. 6, 2015).

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- Setting and communicating clear rules and expectations regarding employee conduct: Agencies should set expectations about appropriate conduct in the workplace and communicate consequences of inappropriate conduct at the earliest possible time after on-boarding an employee.
  - Assuring that employees conform to any applicable standards of conduct: Supervisors and managers, with the support of their agencies' leadership and human resources staff, should train and monitor employee compliance with its stated conduct policies.
  - Maintaining effective lines of communication and collaboration with the human resources office staff, line-level management, and agencies' legal counsel: Agencies should establish clear lines of communication across relevant offices to ensure misconduct cases are addressed effectively and consistently.
  - Conducting on-going training for supervisors and holding them accountable for addressing misconduct in a timely manner when it occurs: Supervisors should be trained in identifying employee misconduct cases and knowledgeable about the process for addressing such cases.

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### More Effective Training Could Help Supervisors Identify and Deal with Misconduct

MSPB and OPM officials as well as subject-matter experts said human resources staff and line-level supervisors and managers would benefit from additional training in how to address employee misconduct. The subject-matter experts told us that managers do not receive sufficient training in how to identify and subsequently deal with misconduct in the workplace. Specifically, subject-matter experts told us that many supervisors and managers do not understand the requirements needed to remove an employee for misconduct, including misconceptions about the standard of proof required. Many subject-matter experts repeated observations MSPB made in its 2008 report that without sufficient training managers and supervisors may find it difficult to engage in challenging one-on-one conversations with an employee about misconduct.

Agency officials and subject-matter experts also told us that supervisory training varies by agency. Our subject-matter experts said some agencies are more structured and provide staff with training curricula with required timetables to complete, while others rely on staff to self-guide the training they need. We found many agencies contract out specific training or provide learning opportunities to staff on their intranet sites via e-learning tools. Most subject-matter experts said that misconduct training is likely

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more effective when delivered in-person, due to the broad range of issues related to misconduct.

OPM officials told us that supervisors and managers are responsible for observing and enforcing applicable laws in the federal workplace. OPM officials also indicated that training, resource allocation, skills, and knowledge all have a bearing on the administration of the disciplinary process. According to OPM, good communication and partnerships are also critical to processing a solid, sustainable response related to misconduct. OPM guidelines require that agencies provide training when employees make critical career transitions, for instance from nonsupervisory to manager or from manager to executive. Further, OPM's Supervisory and Managerial Curriculum Framework highlights human resources technical areas and leadership competencies necessary for success. The curriculum framework includes employee and labor relations with supporting learning objectives.

OPM has specific regulatory requirements for training and development of supervisors, managers, and executives under 5 CFR § 412.202, including to

- provide training within 1 year of an employee's initial appointment to a supervisory position and follow up periodically, but at least once every 3 years, by providing each supervisor and manager additional training on the use of appropriate actions, options, and strategies:
- to mentor employees;
- improve employee performance and productivity;
- conduct employee performance appraisals in accordance with agency appraisal systems; and
- identify and assist employees with unacceptable performance.<sup>60</sup>

According to 5 U.S.C. § 4103, it is the responsibility of each agency to train its employees. According to OPM officials, it is not responsible under the CSRA for providing training for the federal workforce. However, while agencies are accountable for providing required training for their supervisors, OPM has a key role in ensuring the training meets the government-wide needs of supervisors. By taking steps to help agencies

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<sup>60</sup>5 CFR 412.202(b)(1)-(4).

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improve the training they provide supervisors and managers on addressing misconduct, OPM could help those managers ensure they have the knowledge and skills to effectively deal with misconduct in the workplace. For example, OPM could consider the feasibility of developing more in-person training modules designed to provide interactive or role play scenarios around addressing employee misconduct. Furthermore, subject-matter experts said if an agency is not training new supervisors to equip them with the appropriate skills to address misconduct, there may be inconsistencies in how an agency handles misconduct across the agency. Without sufficient training, supervisors and managers may not be addressing misconduct appropriately, if at all.

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### Internal Collaboration Can Help Agency Components Better Communicate about Misconduct Cases

Many of the subject-matter experts we interviewed said that it is important that the primary stakeholders—first-level supervisors and managers and human resources and general counsel offices—collaborate on the agency's approach to dealing with misconduct.

We found agencies vary in how collaboration takes place. For example, some subject-matter experts and CHCOs told us that an agency may choose to handle a case by having their human resources staff and management work closely together. The subject-matter experts we interviewed said this collaboration can sometimes include general counsel staff, if necessary. For example, at EPA, the human resources office collaborates with the office of general counsel and the agency's Office of Inspector General Office of Investigations (OI). EPA officials told us that their agency's human resources office, OI, general counsel, and labor relations meet bi-weekly to discuss ongoing misconduct investigations to provide a report of investigations to EPA's senior management on the facts surrounding allegations of employee misconduct.

According to EPA, OI also provides real-time notification whenever OI receives information concerning serious misconduct, before the investigation is completed, so EPA management can take appropriate immediate mitigating steps, should it be necessary. However, OI does not have a role in determining the type of discipline, if any, to be imposed upon the employee, nor does OI have any role in helping to prevent misconduct in EPA's workplace. We did not obtain data to verify that this process has been successful, but agree that enhanced communication among key stakeholders is important to addressing misconduct.

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## An Agency's Culture and Mission Can Impact How Agencies Approach and Respond to Misconduct

Most of our subject-matter experts told us an agency's culture and the nature of its work play a significant role in how the agency addresses employee misconduct. For example, several subject-matter experts told us law enforcement and defense-related agencies or other particular jobs where injuries may occur or lives may be at risk often have significantly less tolerance for employee misconduct than other agencies. In addition, OPM officials said that according to MSPB past studies, if an agency views federal employee due process procedural rights as burdensome and restrictive, this may discourage supervisors from addressing misconduct as it occurs. An MSPB report addressed concerns that the culture in many federal agencies prevents them from effectively dealing with problem employees.<sup>61</sup> Many of the subject-matter experts we interviewed indicated that if an agency's culture is risk averse, it may be less aggressive in pursuing adverse actions, and instead either ignore misconduct or reassign an employee without holding him or her accountable for the misconduct.

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## Conclusions

The process for dismissing an employee for misconduct can be complex and lengthy. However, many of these process challenges can be avoided or mitigated with effective performance management. Supervisors who take performance management seriously and have the necessary training and support to address misconduct can help employees either change their conduct or be subject to removal from the federal workforce.

OPM has a role in ensuring that agencies have the tools and guidance they need to effectively address misconduct and maximize the productivity of their workforces. Though OPM already provides a variety of tools, guidance, and training to help agencies address issues related to misconduct, we found opportunities to do more to identify the nature of employee misconduct, improve training tools for managers, and make tools and guidance available for agencies when and where they need it.

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<sup>61</sup> Merit Systems Protection Board, *The Changing Federal Workplace: Employee Perspectives* (Washington, D.C.: March 1998).

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## Recommendations for Executive Action:

We are making the following three recommendations to the Director of OPM:

- The Director of OPM, after consultation with the CHCO Council, should explore the feasibility of improving the quality of data on employee misconduct by providing additional guidance to agencies on how to record instances of misconduct in OPM's databases. (Recommendation 1)
- The Director of OPM, after consultation with the CHCO Council, should broadly disseminate to agencies the promising practices and lessons learned, such as those described in this report, as well as work with agencies through such vehicles as the CHCO Council, to identify any additional practices. (Recommendation 2)
- The Director of OPM, after consultation with the CHCO Council, should provide guidance to agencies to enhance the training received by managers/supervisors and human capital staff to ensure that they have the guidance and technical assistance they need to effectively address misconduct and maximize the productivity of their workforces. (Recommendation 3)

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## Agency Comments and Our Evaluations

We provided a draft of this product to the Acting Chairman of MSPB and Acting Director of OPM for comment. The Acting Chairman of MSPB provided technical comments on the draft. We incorporated these comments, as appropriate. MSPB did not comment on the recommendations.

OPM's Associate Director for Employee Services provided written comments on the draft, and these comments are reproduced in appendix III. In its comments, OPM noted that while we had made many of the changes OPM suggested, the changes still did not reflect all of OPM's feedback, and also contained what it believed to be inaccurate information and incomplete representations of OPM's views. To the contrary, we maintain that our report contains accurate factual information and represents the views of OPM that we collected through reviewing documents, interviewing OPM officials, and incorporating OPM's written feedback. Of our three recommendations, OPM partially concurred with two recommendations, and did not concur with one recommendation. For those recommendations OPM partially concurred with, OPM described the steps it planned to take to implement them. We stand by our recommendations which we maintain would give OPM and Congress

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better visibility over the extent and nature of employee misconduct in the federal government, as well as help strengthen agencies' capacity to address misconduct.

With respect to OPM's overall comments, OPM noted that Chapter 75 is a set of procedural requirements that must be met when certain actions are contemplated that would impact an employee's pay, specifying that it was never intended to encompass or catalogue all forms of action an agency could take to address misconduct. On this issue, we agree with OPM on the purpose of Chapter 75 and noted as much in our description of the statutorily established guidelines and procedures throughout this report. OPM also noted that there is no general statutory definition of misconduct, and that managers need maximum flexibility to pursue adverse actions, whether the underlying impetus is a conduct issue, a failure to perform, or any other reasons related to federal employment. We also agree with OPM on this point, as our report makes clear that, in certain cases, employee performance and misconduct can overlap, conflating the two issues.

As indicated in this report, OPM believes a table of penalties creates additional conditions and restrictions on an agency's ability to address misconduct and does not improve the agency's ability to address misconduct effectively. Accordingly, OPM does not require or encourage agencies to adopt tables of penalties. Our report recognizes both the pros and cons of an agency having a table of penalties and the circumstances under which they could be effective. However, we believe the use of a table of penalties ensures the appropriateness and consistency of a penalty in relation to the charge. It also ensures merit system principles guide the process by providing penalty transparency, reducing arbitrary or capricious penalties, and serve as a guide for managers and supervisors who deal with these issues.

With respect to our recommendations, OPM did not concur with our first recommendation to explore the feasibility of improving the quality of data on employee misconduct by providing additional guidance to agencies on how to record instances of misconduct in OPM's databases. Specifically, OPM noted that the OPM Guide to Processing Personnel Actions is a thorough resource that has been and continues to be successfully relied upon by agencies to document adverse actions as expressly defined in Chapter 75. We acknowledge OPM's view that NOA codes were never intended or designed to allow reporting of adverse actions down to the degree of a particular kind of misconduct involved, but we maintain that our recommendation would increase confidence in the data on

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misconduct and make it more useful to OPM and agencies. Further, OPM's non-concurrence with this recommendation seems inconsistent with the Administration's own initiatives, including the May 2018 *Executive Order Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles*, which was released after OPM commented on our draft report.<sup>62</sup> Specifically, the Executive Order requires all federal agencies, beginning in FY18, and for each fiscal year thereafter, to provide a report to the OPM Director containing detailed data about how it addressed issues of misconduct. For example, agencies will need to report out on

- (i) the number of civilian employees in a probationary period or otherwise employed for a specific term who were removed by the agency;
- (ii) the number of adverse personnel actions taken against civilian employees by the agency, broken down by type of adverse personnel action, including reduction in grade or pay (or equivalent), suspension, and removal; and
- (iii) the number of decisions on proposed removals by the agency taken under chapter 75 of title 5, United States Code, not issued within 15 business days of the end of the employee reply period.

We maintain that enhanced data on the extent and nature of misconduct will help strengthen OPM and congressional oversight and better position agencies to address misconduct through management training and other approaches.

OPM partially concurred with our second recommendation to broadly disseminate to agencies the promising practices and lessons learned, such as those described in this report, as well as work with agencies through such vehicles as the CHCO Council, to identify any additional practices to help agencies better address employee misconduct. Indeed, the *President's Management Agenda* (PMA) for 2018 states, "Aligning and managing the Federal workforce of the 21st Century means spreading effective practices among human resources specialists."<sup>63</sup> In response to this recommendation, OPM noted that some of the key

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<sup>62</sup>*Executive Order 13839: Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles* (Washington, D.C.: May 25, 2018).

<sup>63</sup>*The President's Management Agenda 2018: Modernizing Government for the 21st Century* (Washington, D.C.: March 20, 2018).

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practices and lessons discussed in this report are already part of OPM's comprehensive accountability toolkit in addressing employee misconduct across the federal government and are frequently communicated through on-going educational outreach to federal agencies and available on OPM's website. Specifically, OPM said it will decide which appropriate measures it should take to obtain examples of practices agencies believe are promising and will broadly disseminate any of these practices and lessons learned as identified by OPM. We acknowledge OPM's existing efforts to develop and disseminate promising practices and lessons learned, and also maintain that OPM should also be open to considering additional practices from other sources.

OPM also partially concurred with our third recommendation to provide guidance to agencies to enhance the training received by managers/supervisors and human capital staff to ensure that they have the guidance and technical assistance they need to effectively address misconduct and maximize the productivity of their workforces. In its response, OPM said it will continue to play its statutory role under 5 U.S.C. Chapter 41 and will support agencies on a cross-agency priority goal, which it believes could be read to encompass training, pursuant to the PMA, for example by providing guidance to agencies on training requirements for managers, supervisors and human resources staff. However, OPM notes that it is not responsible under current statute for providing training to the federal workforce. As stated in the report, while agencies are accountable for providing required training for their supervisors, OPM has a key role in ensuring the training meets the needs of supervisors. Further, OPM's position on this recommendation seems inconsistent with the Administration's own initiatives, including the May 2018 Executive Order which states that "the OPM Director and the Chief Human Capital Officers Council shall undertake a Government-wide initiative to educate Federal supervisors about holding employees accountable for unacceptable performance or misconduct under those rules," following any final rules issued pursuant to parameters set in the Order. Indeed, the PMA states, "In order to best leverage the workforce to achieve our mission efficiently and effectively, Government needs to remove employees with the worst performance and conduct violations." By taking steps to help agencies improve the training they provide supervisors and managers on addressing misconduct, OPM could help those managers ensure they have the knowledge and skills to effectively deal with misconduct in the workplace.

OPM also provided technical comments, which we have incorporated as appropriate.

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As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the Director of the Office of Personnel Management, the Chairman of the Merit Systems Protection Board, as well as to the appropriate congressional committees and other interested parties. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report please contact me at (202) 512-2757 or [goldenkoffr@gao.gov](mailto:goldenkoffr@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix IV.



Robert Goldenkoff  
Director  
Strategic Issues

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# Appendix I: Objectives, Scope, and Methodology

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You asked us to examine the process for addressing misconduct and to identify any challenges in removing employees for misconduct. Our objectives were to (1) describe the process that agencies are generally required to follow in responding to employee misconduct in the federal service; (2) identify alternative approaches to the formal legal process that agencies can use to respond to misconduct, and assess what factors affect agencies' responses; (3) describe trends in removals and other adverse actions resulting from misconduct; and (4) identify key steps agencies can take to help them better prevent and address misconduct.

To describe the process that most agencies are generally required to follow in responding to employee misconduct in the federal service, we reviewed relevant sections of Title 5 Chapter 75 of the U.S.C. (herein Chapter 75) which contains the statutory process for formally disciplining employees for misconduct and performance.<sup>1</sup> We also reviewed the Civil Service Reform Act and OPM regulations to describe and determine the authority agencies have to address employee misconduct in the federal service, including formal procedural and employee appeal rights.<sup>2</sup> Additionally, we reviewed 5.U.S.C. §§ 7701 and 7702 (herein Chapter 77), which contains the statutory process for employee appeals with the Merit Systems Protection Board (MSPB) subsequent appeals to the Equal Employment Opportunity Commission (EEOC).<sup>3</sup> To contextualize our review of Chapters 75 and 77, we interviewed current and former practitioners, subject-matter experts, and academics. We selected our subject-matter experts based on our guidance for selecting experts, including their depth of experience on this issue and their present and past employment history, the subject-matter experts' practical experience in applying and practicing administrative law related to employee misconduct, and academicians who have conducted research on employee misconduct.

To identify the time it takes to resolve appeals by employees of adverse actions, we analyzed MSPB appeals data. Specifically, we counted the appeals for each type of adverse action from 2006-2016, by year and in aggregate, calculated the average number of days that it took the MSPB to resolve cases for initial appeals and for petitions for review (PFRs), and

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<sup>1</sup>5 U.S.C. §§ 7501-7514.

<sup>2</sup>OPM regulations implementing Chapter 75 are found in 5 C.F.R. subpart D of part 752.

<sup>3</sup>5 U.S.C. § 7701(a)-(b); 5 U.S.C. § 7702(b).

counted the outcomes of the cases from 2006-2016, by year and in aggregate (e.g. out of the total number of cases, how many were reversed, upheld, mitigated, or settled). For the purpose of our analysis, we used the following nature of action (NOA) code categories in OPM's EHRI database: (1) codes directly attributed to misconduct; and (2) codes that indicate a mix of misconduct or poor performance. Based on data limitations in both databases, we did not make any evaluative assessments from our data analysis.

To identify alternative approaches to the formal legal process, we reviewed documentation provided by the Merit System Protection Board (MSPB) on alternative discipline approaches used by agencies to address employee misconduct. We also reviewed OPM regulations and documents to determine the authority agencies have to address employee misconduct in the federal service, including formal procedural and employee appeal rights. We interviewed current and former practitioners, subject-matter experts, and academics to identify alternative approaches that they were aware of or were commonly used at agencies to address employee misconduct.

To develop our list of alternative discipline approaches to addressing employee misconduct, we conducted a literature review and reviewed reports and documents to identify alternative discipline approaches commonly used to address employee misconduct in the federal sector. After compiling our non-exhaustive list of alternative approaches, we contacted our previously interviewed subject-matter experts and asked them to provide their final thoughts or suggestions to our alternative discipline approaches. We included those additional approaches to the list. We interviewed human capital experts from academia, unions, and former and current human resources practitioners. We also interviewed a panel of CHCOs to gain insight into the agency perspective on addressing employee misconduct. To identify CHCO members, we asked the Director of the CHCO council to select CHCOs that have knowledge and experience in addressing employee misconduct. Agency size and mission were also considered as part of the selection process to gain a range of perspectives. Our panel of CHCOs was from the Departments of Commerce, Defense, and Housing and Urban Development, the National Science Foundation, and the Nuclear Regulatory Commission. We also reviewed prior work by MSPB in developing our list of commonly used alternative discipline approaches to employee misconduct in the federal sector.

To describe and assess the factors that can affect an agency's response to employee misconduct, we interviewed:

- OPM officials and representatives from Employee Services, Human Resources Solutions, Planning and Policy Analysis, and the Office of the Chief Information Officer
- MSPB officials from the Office of the acting Chairman & Vice Chairman, Office of Information Resources Management, and the Office of Policy & Evaluation;
- Panel of Chief Human Capital Officers (CHCO)
- National Treasury Employees Union officials;
- American Federation of Government Employees officials;
- Federal Managers Association officials;
- Individual members of the Federal Employees Lawyers Group;
- Partnership for Public Service officials;
- Senior Executives Association officials; and
- Selected individuals with expertise in human capital management, specifically focused on employee misconduct, from academia and the private sector.

We selected our list of interviewees based on GAO's guidance for selecting experts, the interviewees' practical experience in applying and practicing administrative law, and for academics in their specific areas of research. To assess the factors that agencies use to deal with employee misconduct, we analyzed the interviewee responses and identified key themes that were common throughout our interviews and, we counted the frequency of those key themes.

To describe the trends in removals and adverse actions resulting from misconduct at Chief Financial Officer (CFO) Act agencies, we analyzed OPM's Enterprise Human Resource Integration (EHRI) data from fiscal

years 2006 to 2016.<sup>4</sup> In OPM's EHRI database, personnel actions, such as separations, demotions, and suspensions, are assigned nature of action (NOA) and legal authority codes that describe the action and the legal or regulatory authority for the action. Some of these codes co-mingled performance and misconduct as causes for the personnel action. In these cases, we counted the action as misconduct-related to capture the potential magnitude of personnel actions taken for misconduct. Thus, some cases may instead be exclusively related to poor performance or reflect both issues. We reviewed OPM's "The Guide to Processing Personnel Actions" to determine which NOA/legal authority combinations could cover misconduct-related actions. We worked with OPM officials to determine the appropriate NOA codes and legal authorities that indicate misconduct.

Specifically, we analyzed OPM's EHRI data to count the adverse actions that agencies take against employees, government-wide.<sup>5</sup> For this draft report, the term "adverse action" refers to personnel actions listed under 5 U.S.C. chapter 75 which includes demotions in grade or pay, suspensions, and removals.<sup>6</sup>

To determine the trends in the number of adverse actions at agencies associated with probationary employees, we identified the number of removals at these agencies. While direct comparisons to the total employee population are not appropriate, we identified the number of

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<sup>4</sup>The 24 CFO Act agencies are listed at 31 U.S.C. § 901(b) and include: U.S. Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, the Interior, Justice, Labor, Transportation, the Treasury, Veterans Affairs, and State, as well as the U.S. Agency for International Development, Environmental Protection Agency, General Services Administration, National Aeronautics and Space Administration, National Science Foundation, Nuclear Regulatory Commission, Office of Personnel Management, Small Business Administration, and the Social Security Administration. These agencies account for a very high proportion of the total federal labor force.

<sup>5</sup>For reporting purposes, we only provide data on the number of adverse actions rather than use the number of employees subject to an adverse action, because one employee may be subject to more than one adverse action. This can be a result of progressive discipline or could indicate issues related to data reliability. As part of our analysis, we identified all employees subject to each type of adverse action (removal, suspension, and demotion) and quantified the number of similar adverse actions taken against the same person.

<sup>6</sup>5 U.S.C. §§ 7502 and 7512.

probationary employees to provide some relative statistics.<sup>7</sup> To show trends in misconduct removals associated with probationary employees, we identified the number of adverse actions taken against probationary employees (overall and by type of action).

To determine the trends in employee appeals to MSPB, we analyzed MSPB's appeals data, on adverse actions taken under Chapter 75 from fiscal years 2006 to 2016. To understand what types of adverse actions are driving appeals to MSPB, we calculated the underlying adverse action for each case by fiscal year of appeal filing.<sup>8</sup> To determine how appeals were resolved by MSPB, we identified the number of appeals that were settled, mitigated, dismissed, reversed, affirmed, or otherwise resolved. We calculated overall trends by fiscal year as well as trends by fiscal year for each type of underlying adverse action. To determine how long the appeals process takes, we calculated the mean time for resolution along with other statistics (minimum, maximum, 25th percentile, 75th percentile) for different types of adverse action. Additionally, because appellants can file a Petition for Review (PFR) to the larger MSPB body, we looked at the time for the initial appeal, the PFR, and the total time from filing through final decision.

To assess the reliability of both EHRI and MSPB data, we reviewed past GAO data reliability assessments, interviewed relevant agency officials, and conducted electronic testing to evaluate the accuracy and completeness of the data used in our analyses. We determined the data used in this report to be sufficiently reliable for our purposes, subject to the constraints identified in our report.

To identify and provide key promising practices and lessons learned at agencies from encountering and responding to employee misconduct, we conducted a literature review to identify practices and lessons learned associated with employee misconduct in the federal sector. We interviewed officials from OPM, MSPB, the Equal Employment Opportunity Commission (EEOC), and the Office of Special Counsel (OSC), to obtain their perspectives on responding to employee

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<sup>7</sup>Due to fluctuations in employment, it is GAO's policy to compute a 2-year average level of employment.

<sup>8</sup>Some people file several appeals related to the same adverse action. To avoid overcounting the underlying adverse action, we deleted all but the first case (identified as having the same case family key and case key) in this table. We do not do this for the other tables, because outcomes may vary for each appeal.

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misconduct through alternative approaches. We interviewed officials from the Environmental Protection Agency (EPA) to obtain their perspectives on recent efforts to better coordinate with their Inspector General to address cases of employee misconduct.<sup>9</sup> We also obtained the perspectives of a panel of CHCOs from selected agencies as well as former human capital practitioners and other subject-matter experts with extensive experience working on employee misconduct issues.

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<sup>9</sup>We met with EPA officials because of the agency's relatively unique process for addressing employee misconduct.

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# Appendix II: Douglas Factors –12 Criteria Developed by the MSPB to Guide Agency Decisions on Employee Misconduct

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The Merit Systems Protection Board in its landmark decision, *Douglas vs. Veterans Administration*, 5 M.S.P.R. 280 (1981), established non-exclusive criteria that supervisors must consider, as appropriate, in determining an appropriate penalty to impose for an act of employee misconduct (“The Douglas Factors”). The following relevant factors must be considered in determining the severity of the discipline:

1. The nature and seriousness of the offense, and its relation 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;
2. the employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3. the employee’s past disciplinary record;
4. the employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. 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 work ability to perform assigned duties;
6. consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. consistency of the penalty with any applicable agency table of penalties;
8. the notoriety of the offense or its impact upon the reputation of the agency;
9. the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10. the potential for the employee’s rehabilitation;
11. 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; and
12. the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. The list was not intended to be exhaustive.

# Appendix III: Comments from the Office of Personnel Management



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT  
Washington, DC 20415

Employee Services

**MAY 30 2018**

Mr. Robert Goldenkoff  
Director, Strategic Issues  
U.S. Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Dear Mr. Goldenkoff:

Thank you for providing us the opportunity to respond to the U.S. Government Accountability Office (GAO) draft report, *Federal Employee Misconduct: Actions Needed to Ensure Agencies Have Tools to Effectively Address Misconduct*, GAO-18-48, GAO job code number 101023.

We acknowledge that GAO made many of the changes we suggested, and we appreciate that effort. In significant areas, however, the report does not reflect the full import of our feedback and retains both substantive inaccuracies and what we believe to be inaccurate or incomplete representations of OPM's views. We have attached technical comments to this letter. However, we highlight below substantive concerns regarding the report.

More generally, we believe it is important to note that the recommendations GAO has made appear to proceed, in part, from misunderstandings about the nature of discipline generally, and the purpose of Chapter 75 more specifically. The purpose of Chapter 75 was not to describe modes of "formal discipline." The authority to undertake discipline predates the enactment of Chapter 75, which was intended to establish certain statutory limitations on the plenary authority to impose discipline, not to create the authority in the first instance. Chapter 75 established procedures that must be followed when an agency wishes to take certain actions against an employee that would have an impact upon his or her pay, *i.e.*, "adverse actions." Adverse actions can be taken for any reason that would promote the efficiency of the service. Such reasons could include, but are not limited to, misconduct. For example, an adverse action may be used to remove an employee who is not performing at the fully successful level or to remove or demote an employee who has lost eligibility for access to classified information in a position that requires such eligibility, or to effectuate an administrative furlough.

There is no general statutory definition of misconduct, and Congress has not asked or authorized OPM to define or list forms of misconduct. By establishing procedures for effectuating adverse actions, and supplying a general substantive standard for doing so (the efficiency of the service), Congress provided managers with maximum flexibility to pursue adverse actions, whether the underlying impetus is a conduct issue, a failure to perform, or any other reasons related to Federal employment. GAO's focus on capturing and tabulating forms of misconduct (and misconduct alone) would undermine this

flexibility and the discretion Congress continued to allow agency heads by forcing managers to cabin adverse actions in terms of specific definitions that may not capture the full scope of the considerations involved. OPM does not fully understand why GAO believes this is necessary or desirable for successful workforce management or why it is seemingly troubling to GAO that some agencies take adverse actions for reasons described as both disciplinary and performance-related. In some situations, the two will overlap. Sleeping on the job, for example, is both a failure to abide by norms of conduct an agency would expect of an employee on duty and a failure to perform. OPM does not see that precisely defining “sleeping on the job” as an official form of misconduct does anything to advance an agency’s ability to effectively address the behavior and promote the efficiency of the service. Further, OPM does not understand how collecting and aggregating granular data on instances of low level offenses across a large Federal workforce would be instructive to overall enterprise workforce management matters. For example, we would question the value of tabulating how many employees across the 2 million person enterprise may have received verbal counseling for failing to follow a supervisor’s instruction on accomplishing a work task, or for wearing attire that is considered outside of norms for the local workplace.

As we noted above, Chapter 75 is a set of procedural requirements that must be met when certain actions are contemplated. It was never intended to encompass or catalogue *all* forms of action an agency could take to address misconduct, and, in OPM’s experience, agencies readily understand that other forms of actions, such as counseling or reprimands, are available to them in dealing with employees who are not comporting themselves appropriately. These other forms of disciplinary actions are not subject to OPM regulation. For that reason, it is likely that the number of employees who were subjected to some form of discipline, as GAO uses that term, is much larger than the number reflected in the draft report as Chapter 75 actions.

Regarding tables of penalties, the draft refers on the first page to tables of penalties as an example of “key lessons learned” and elsewhere in the draft as a “key promising practice” that can “help agencies better prevent and respond to misconduct.” The report does not, however, explain how having a table of penalties will help an agency to prevent misconduct or respond to it. To the extent GAO is assuming that the existence of a table of penalties will serve as a warning to employees or compel supervisors to carry out more disciplinary actions for the conduct identified in the table, it is equally likely that the table of penalties will de-emphasize constructive early intervention in favor of a more punitive approach that focuses only on the offenses the table covers. It may also be read or understood to induce or worse, require, managers in some cases to impose a lesser penalty where a greater penalty is warranted.

Although the draft report references some of OPM’s concerns about tables of penalties, neither the summary observation on the first page of the report, nor the overall report, contains a serious discussion of the disadvantages of a table of penalties, which we believe are important considerations in assessing their value. In addition to concerns referenced above, OPM has emphasized, for example, that it is vital for effective workforce management consistent with the CSRA and merit system principles that

supervisors use independent judgment, take appropriate steps in gathering facts, and conduct a thorough analysis to decide the appropriate penalty in individual cases. Further, we explained that applying a label to an act of misconduct (which is a practice that is encouraged by a table of penalties) can lead – and has led - to reversals of adverse actions by the MSPB on extremely technical grounds, (e.g., by finding that a charge of “theft” of an inmate’s petty cash by a corrections officer could not be sustained where the agency could not prove that the officer intended to keep the cash permanently). We also noted that the MSPB will sometimes invoke an agency’s own table of penalties against it to support the MSPB’s decision to mitigate a penalty, (from, for example, a removal to a suspension), while treating a table of penalties as merely advisory if it supports the agency’s decision. An agency might decide to define inappropriate conduct in its policies rather than in a table of penalties to avoid these pitfalls. Accordingly, OPM believes it would be preferable to include a more balanced discussion of tables of penalties in the GAO report.

Responses to your recommendations are provided below.

**Recommendation #1:**

The Director of OPM, after consultation with the CHCO Council, should explore the feasibility of improving the quality of data on employee misconduct by providing additional guidance to agencies on how to record instances of misconduct in OPM’s databases.

**Management Response:**

**We do not concur.** The draft report does not identify any basis or clear rationale for how collecting and aggregating granular data on specific instances of misconduct across a large Federal workforce would be instructive to overall enterprise workforce management matters. The OPM Guide to Processing Personnel Actions is a thorough resource that has been and continues to be successfully relied upon by agencies to document adverse actions as expressly defined in Chapter 75.

GAO articulated a concern about OPM’s inability to accurately identify misconduct cases in the Enterprise Human Resources Integration (EHRI) system because of nature of action (NOA)/legal authority codes that are a combination of both conduct and performance. We acknowledge that there is an instance where a particular NOA could be used for different reasons, and accordingly, our data collection does not always differentiate between actions strictly for performance, actions for misconduct, or both. While we note that agencies use this code infrequently, and, therefore, we believe the impact on the overall data is negligible, we plan to review this NOA for possible changes to address GAO’s concern.

The draft states, that “[w]ithout maintaining comprehensive data regarding the extent and nature of misconduct in the Federal government, OPM risks missing opportunities to provide agencies with guidance and other tools, such as targeted training to help agencies

better address cases of misconduct.” Further, the draft asserts that “these data could be improved to provide OPM with better information to help agencies address misconduct.” NOA codes were never intended or designed to allow reporting of adverse actions to the degree of specificity envisioned in the GAO report. In particular, they do not break down adverse actions by the particular kind of misconduct involved, and in light of the enormous array and complexity of types of misconduct that could potentially be encountered across a large workforce, it would seem neither practicable nor useful to attempt to precisely define and count each type of misconduct, let alone the many permutations that could occur when a particular instance of misconduct is multifaceted. The development of NOA codes proposed by GAO would require not only extensive changes in recordkeeping and reporting requirements throughout the Government, but would also add enormous complexity, room for error, and burden as agency HR staff would have to sort through and select from potentially hundreds of codes or combinations thereof.

The draft report acknowledges that EHRI does not capture the various types of informal actions managers may take that do not generate an SF-50, such as counseling letters or letters of reprimand, which may correct an issue before it escalates into a formal adverse action. Although there may be some value in broadly enumerating the numbers of certain types of disciplinary actions, we do not believe these types of actions warrant the processing of a personnel action for every instance for purposes of tracking in EHRI. GAO also appears to suggest that OPM needs to collect data on types of misconduct resulting in discipline that do not impact pay (and consequently does not require that an SF-50/personnel action be processed) such as letters of reprimand or counseling, which OPM does not regulate. Although a particular agency may potentially be interested in quantifying such types of activity, we question the substantive value in collecting such granular data at an enterprise level. Furthermore, by establishing additional administrative requirements for supervisors to report the entirety of instances of misconduct (which presumably would include lower-level offenses such as verbal counseling when an employee fails to follow instructions related to accomplishing a task, or for wearing attire that is considered outside of norms for the local workplace) this could have the effect of discouraging supervisors from taking action in the first instance to attempt to correct behavior before it worsens.

Another important factor is that the recommendation appears to be based on the incorrect premise that OPM is responsible for developing and delivering supervisory training. The draft states that “because of weaknesses in OPM’s data on employee misconduct, which is provided by the agencies, OPM is unable to accurately target supervisory training to address misconduct, and decision-makers do not know the full extent or nature of this misconduct.” As discussed above, the draft also states that, without maintaining comprehensive data on misconduct, OPM may not be able to provide agencies tools such as training to aid in addressing misconduct.

As discussed more fully under Recommendation 3, below, each agency, and not OPM, has responsibility for developing and delivering training to its supervisors. OPM provides guidance and technical assistance which agencies are expected to apply in

developing their own training. Given the fact that longstanding, comprehensive guidance exists for agencies to use in successfully coding misconduct actions, and the questionable value of significantly expanding data collection and reporting to the extent the GAO proposal suggests, OPM respectfully requests this recommendation be deleted from the final report.

Finally, the strategic management of human capital is primarily an OPM function. See, e.g., 5 U.S.C. § 1103(a)(5) and (7) and (c). We note that the statute creating the CHCO Council stated that the role of the CHCO was to “advise and assist *the head of the agency* and other agency officials in carrying out the agency’s responsibilities for selecting, developing, training, and managing a high-quality, productive workforce in accordance with merit system principles,” and to “implement the rules and regulations of the President and the Office of Personnel Management and the laws governing the civil service within the agency.” 5 U.S.C. § 1401(1), (2). (Emphasis supplied). And, according to the CHCO Act, the function of the CHCO Council meetings was “to advise and coordinate *the activities of the agencies of its members* on such matters as modernization of human resources systems, improved quality of human resources information, and legislation affecting human resources operations and organizations.” Pub. L. 107-296, § 1303(b). (Emphasis supplied). Although the Director is, of course, free to consult with the CHCO Council as he chooses -- and may well wish to consult with the CHCO Council on these matters -- it is not appropriate for GAO to attempt to impose such extra-statutory requirements on the Director through recommendations in connection with an engagement.

**Recommendation #2:**

The Director of OPM, after consultation with the CHCO Council, should broadly disseminate to agencies the promising practices and lessons learned, such as those described in this report, as well as work with agencies through such vehicles as the CHCO Council, to identify any additional practices.

**Management Response:**

**We partially concur only to the extent that OPM agrees to continue its ongoing efforts through the accountability toolkit and related outreach.** OPM already has a mandate under the Civil Service Reform Act to identify policies which may be implemented to promote an efficient civil service and a systematic application of merit system principles, and will continue to fulfill its responsibilities under the Act. Although OPM may choose to solicit (and in fact has solicited) from agencies examples of practices they believe are promising and to broadly disseminate to agencies any promising practices and lessons learned as identified by OPM, it must be free to do so on its own terms consistent with its own authority. OPM is not willing to abdicate its authority to determine what constitutes a promising practice and how it communicates those practices. Accordingly OPM cannot concur in this recommendation to the extent it commits OPM to broadly disseminate “promising practices” as identified by GAO. We note that some of the key practices and lessons discussed in the draft are already part of

OPM's comprehensive accountability toolkit in addressing employee misconduct across the Federal government and are frequently communicated through on-going educational outreach to Federal agencies and available on OPM's website. OPM provided this information to GAO on January 12, 2017. OPM does not agree that all the practices outlined in GAO's report are promising practices which should be disseminated to agencies. For example, GAO's report suggests that tables of penalties are "key lessons learned" and "key promising practices." OPM has articulated to GAO the various challenges and pitfalls associated with application of tables of penalties, and we believe that an agency should take careful heed of these admonitions in considering whether a table of penalties actually helps them prevent or respond more effectively to employee misconduct or impedes their efforts. For that reason, we believe the characterization of tables of penalties as a "key lesson learned" and a "key promising practice" is problematic in that it seems to encourage adoption without fully articulating the downsides. For the foregoing reasons, OPM must partially concur. OPM respectfully requests the recommendations regarding table of penalties as a key lesson learned and key promising practice be deleted from the final report or OPM's views be entirely included to ensure our concerns are represented. As for the role of the CHCO Council, please see the discussion at the end of our response to Recommendation # 1.

**Recommendation #3:**

The Director of OPM, after consultation with the CHCO Council, should provide guidance to agencies to enhance the training received by managers /supervisors and human capital staff to ensure that they have the guidance and technical assistance they need to effectively address misconduct and maximize the productivity of their workforces.

**Management Response:**

**We partially concur only to the extent that OPM will continue to play its statutory role under 5 U.S.C. chapter 41 and will support agencies on a cross agency priority goal, which could be read to encompass training, pursuant to the President's Management Agenda.** This recommendation and some of the rationale provided in GAO's report are not consistent with the clearly defined responsibilities of OPM and Federal agencies with regard to training and how it is delivered and funded. As we previously explained, OPM is not responsible under current statute for providing training to the Federal workforce. In accordance with its general oversight and policy responsibilities for the Federal personnel system, and in accordance with 5 U.S.C. chapter 41, OPM gives guidance to agencies on training requirements for managers, supervisors and human resources staff. Agencies are responsible for applying this guidance when developing and delivering their own training. OPM otherwise provides technical assistance and other support to agencies, as needed. To the extent OPM is involved in delivering training, OPM does so through OPM's human capital consultants, Human Resources Solutions, on a fee-for-service basis. In this case, OPM provides a service akin to what a contractor might otherwise perform.

The President's Management Agenda (PMA) includes a cross agency priority goal regarding the "Workforce for the 21<sup>st</sup> Century." One sub-goal is to "Improve Employee Performance Management and Engagement." One of the key milestones under this subgoal is to ensure that managers are appropriately trained on performance management (including misconduct) and are provided with support to address performance and conduct issues. OPM will be supporting agencies in these efforts, consistent with the clearly defined responsibilities of OPM and Federal agencies with regard to training and how it is delivered and funded. OPM will also continue to provide agencies with guidance and technical assistance regarding misconduct matters. Therefore, OPM believes that actions taken in conjunction with chapter 41 and the PMA will appropriately address the concerns and issues raised by GAO regarding training received by managers/supervisors and human capital staff. As for the role of the CHCO Council, please see the discussion at the end of our response to Recommendation # 1.

Unless otherwise noted, the suggested revisions we recommend in the attached technical comments are meant to provide technical accuracy and correct statements of position that may be attributable to OPM.

I appreciate the opportunity to respond to this draft report. If you have any questions regarding our response, please contact Ms. Janet Barnes, Director, Internal Oversight and Compliance, (202) 606-3207 or Janet.Barnes@opm.gov.

Sincerely,



Mark D. Reinhold  
Associate Director for Employee Services

Enclosure

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# Appendix IV: GAO Contact and Staff Acknowledgments

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## GAO Contact:

Robert Goldenkoff, (202) 512-2757 or [goldenkoffr@gao.gov](mailto:goldenkoffr@gao.gov).

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## Staff Acknowledgments:

In addition to the contact named above, Tom Gilbert, Assistant Director, and Anthony Patterson, Analyst-in-Charge, supervised the development of this report. Isabel Band, Crystal Bernard, Jehan Chase, Sara Daleski, Shirley Jones, Serena Lo, Krista Loose, Amanda Miller, and Kayla Robinson made major contributions to all aspects of this report. Robert Gebhart and Robert Robinson provided additional assistance.

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