



defamation he suffered, in violation of [a] specific agency rule,” and if OSC makes a “positive determination” about the alleged defamation, then to refer the allegation to the Secretary of Energy pursuant to 5 U.S.C. § 1214(e).<sup>1</sup> See Petitioner’s Motion to Supplement the Relief Requested, p. 1 (June 20, 2005). Despite his efforts, petitioner simply cannot will into existence any non-discretionary duty by OSC to determine whether he was defamed or to submit a § 1214(e) report to the Department of Energy about his defamation allegation because his request rests entirely on the Special Counsel performing a discretionary action. Mandamus is not an appropriate remedy where the relief sought is a discretionary action. See, e.g., Heckler v. Ringer, 466 U.S. 602, 616 (1984); Weber v. United States, 209 F.3d 756, 760 (D.C. Cir. 2000)<sup>2</sup>; Wilder v. Prokop, 846 F.2d 613, 620 (10<sup>th</sup> Cir. 1988); Jarecki v. United States, 590 F.2d 670, 674 (7<sup>th</sup> Cir. 1979), reh’g and reh’g en banc denied (1979), cert. denied, 444 U.S. 829 (1979).

**I. OSC has not failed to perform any non-discretionary duty under § 1214(e).**

Section 1214(e) provides:

If, in connection with any investigation under [subchapter 12 of title 5, United States Code], the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in [§ 1214(b) – *i.e.*, a prohibited personnel practice] or [§ 1214(d) – *i.e.*, a crime], the Special Counsel shall report such violation to the head of the agency involved. \*\*\*

<sup>1</sup> In his brief, petitioner defines the allegation at issue as being whether Department of Energy officials violated DOE Order 3750.1, “Work Force Discipline” by failing to comply with a 1994 order from the Merit Systems Protection Board. See, e.g., Petitioner’s Opposition to Respondent’s Motion to Dismiss Petition for Writ of Mandamus and Cross Motion to Issue Writ of Mandamus, p. 10. Petitioner mischaracterizes his allegation. Petitioner’s June 20, 2005, motion to supplement was explicit and limited to the defamation allegation he made during OSC’s investigation of MA-05-0820. See Petitioner’s Motion to Supplement the Relief Requested, p. 1 (June 20, 2005). Moreover, his allegations regarding DOE compliance with the 1994 order were raised in relation to MA-03-1288 and were dismissed by this Court, a decision affirmed by the Circuit Court.

<sup>2</sup> In his brief, petitioner devotes an entire section of argument to Weber, which did not address 5 U.S.C. § 1214(e), and posits what the Circuit Court *would have held* if the issue had been before it. See Petitioner’s Opposition to Respondent’s Motion to Dismiss Petition for Writ of Mandamus and Cross Motion to Issue Writ of Mandamus, p. 17. Since § 1214(e) was not at issue in Weber and since the Circuit Court’s decision did not address it, petitioner’s *post hoc* re-drafting of the decision to read the way he wants it to read could not be more immaterial.

5 U.S.C. § 1214(e).

OSC's reporting obligation under § 1214(e) is not triggered unless and until the Special Counsel determines that there is reasonable cause to believe that some law, rule, or regulation outside of OSC's enforcement authority has been violated.<sup>3</sup> Here, even if DOE Order 3750.1 is a law, rule, or regulation, whether there is reasonable cause to believe it was violated when petitioner was allegedly defamed by DOE employees is left to the sound discretion of the Special Counsel, and that discretionary determination is not subject to mandamus relief. The Special Counsel has not determined that there is reasonable cause to believe that DOE Order 3750.1 has been violated, and therefore, the triggering event for a mandatory § 1214(e) report has not occurred. Accordingly, the mandamus relief requested by petitioner must be denied.<sup>4</sup>

<sup>3</sup> Petitioner devotes a large portion of his brief to his argument that § 1214(e) applies to all violations of law, rule, or regulation that the Special Counsel reasonably believes have occurred, instead of only those non-criminal violations of law, rule, or regulation that the Special Counsel does not otherwise have authority to attempt to remedy. First, neither OSC, the Magistrate Judge, nor this Court have adopted his strained interpretation of § 1214(e). Moreover, this issue need not be resolved here because the Special Counsel has not determined that there is reasonable cause to believe that any other violation of law, rule, or regulation has been violated. Finally, petitioner's interpretation is untenable. When § 1214(e) is read in context with the entirety of § 1214, and in conjunction with the remainder of subchapter 12, it is clear that the subsection is an ancillary authority given to the Special Counsel to address circumstances when an OSC investigation reveals a violation of law, rule, or regulation over which OSC has not been granted specific enforcement authority. Subchapter 12 is part of a comprehensive enforcement scheme originally crafted by Congress in 1978 under the Civil Service Reform Act (CSRA). The CSRA created OSC and conferred upon it the authority and obligation to investigate prohibited personnel practices (PPPs), *inter alia*. The CSRA also provided specific mechanisms for addressing violations of law found during an OSC PPP investigation; these provisions were codified in 5 U.S.C. § 1206(c). Thus, the resolution of PPPs was governed by § 1206(c)(1); criminal violations were governed by § 1206(c)(2); and non-personnel, non-criminal violations were governed by § 1206(c)(3). Substantively, this scheme was left in place when the Whistleblower Protection Act was enacted and these provisions were re-codified in 5 U.S.C. § 1214. Section 1214(e) succeeded § 1206(c)(3), and thus currently governs non-personnel, non-criminal violations of law, rule, or regulation revealed during an OSC PPP investigation – *i.e.*, when, in investigating a matter within OSC's jurisdiction, the Special Counsel determines that there is reasonable cause to believe that a violation of a law, rule, or regulation outside OSC's jurisdiction has occurred. See also S. REP. NO. 969 (95<sup>th</sup> Cong., 2d Sess.), 1978 U.S.C.C.A.N. 2723, 2756 (July 10, 1978).

<sup>4</sup> Under §§ 1214 and 1216, OSC's investigative authority/obligation is limited to allegations of prohibited personnel practices, Hatch Act violations, arbitrary and capricious withholdings of information requested under the Freedom of Information Act prohibited under 5 U.S.C. § 552, activities prohibited by any civil service law, rule, or regulation, and involvement by any employee in any prohibited discrimination under specified circumstances. 5 U.S.C. §§ 1214(a)(1)(A) and (a)(5), and 1216(a). On the other hand, § 1214(e) "does not authorize the Special Counsel to conduct investigations of non-personnel related laws. It provides for an appropriate referral system for further investigation of possible non-personnel or criminal violations which the Special Counsel may discover during the course of his authorized investigations." S. REP. NO. 969 (95<sup>th</sup> Cong., 2d Sess.), 1978 U.S.C.C.A.N. 2723, 2756 (July 10, 1978) (discussing the provision now codified at 5 U.S.C. § 1214(e)).

**II. OSC's non-discretionary investigative responsibilities under 5 U.S.C. § 1216(a)(4) were not triggered by petitioner's defamation allegation.**

A. DOE Order 3750.1 is not a civil service rule.

Petitioner attempts to avoid the limitations of § 1214(e) discussed above by arguing that DOE Order 3750.1 is a civil service rule that prohibits defamation and that OSC was therefore required to investigate his defamation allegation as part of MA-05-0820, pursuant to 5 U.S.C. § 1216(a)(4).<sup>5</sup> Not every directive, guidance document or procedure issued or published by an agency is a civil service rule, however. That is certainly the case with DOE Order 3750.1, an internal DOE directive that provides guidance and delineates responsibility within DOE for maintaining work force discipline. OSC Exhibit 1.

Unlike the types of rules that courts have found to constitute interpretative and/or procedural rules, DOE Order 3750.1 is merely internal agency guidance about the agency's responsibilities under Chapters 43 and 75 of title 5, United States Code (which govern performance-based and conduct-based disciplinary actions, respectively, against civil service employees). See, e.g., Alcaraz v. Block, 746 F.2d 593 (9<sup>th</sup> Cir. 1984) (rules for gathering social security numbers under school lunch programs administered by Department of Agriculture were interpretive); Powderly v. Schweiker, 704 F.2d 1092 (9<sup>th</sup> Cir. 1983) (Social Security Act claims manual published by Secretary of Health and Human Services contained interpretive rules); Rivers v. Department of the Interior, 2006 WL 2841929 (W.D. Wash. 10/3/06) (slip copy)

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<sup>5</sup> On January 21, 2005, OSC notified petitioner that it had opened MA-05-0820 in response to a complaint he filed against his employer, the Department of Energy, and specifically stated the allegation under investigation was whether DOE knowingly and willfully failed to comply with an MSPB order. On April 11, 2005, while OSC was investigating this allegation, petitioner requested that OSC make a referral under 5 U.S.C. § 1214(e) based on his allegation that he had been defamed by DOE officials. He did not allege that any civil service law, rule, or regulation had been violated, and he did not request that OSC investigate this allegation under 5 U.S.C. § 1216(a)(4).

(procedures for conducting agency trial-type hearings under the Energy Policy Act were interpretive/procedural rules).<sup>6</sup>

B. Defamation is not an activity prohibited by DOE Order 3750.1.

Even if this Court were to conclude that DOE Order 3750.1 is a civil service rule, petitioner has nevertheless failed to present an allegation that would trigger OSC's investigative obligations under 5 U.S.C. § 1216(a)(4). OSC must investigate an allegation "concerning activities *prohibited* by any civil service law, rule, or regulation." 5 U.S.C. § 1216(a)(4) (emphasis added).

Petitioner has identified DOE Order 3750.1 as the rule he believes was violated when DOE officials purportedly defamed him. However, DOE Order 3750.1 does not, as the petitioner claims, actually prohibit the "[m]aking [of] false, unfounded or highly irresponsible statements against other employees ... with the intent to destroy or damage the reputation, authority or official standing of those concerned."<sup>7</sup> (Defendant Exhibit 1, Attachment 1 – "Guide to Selecting Corrective Action in Discipline Cases" – p. 8). Rather, it instructs agency officials about what types of discipline are appropriate to take against an employee who has engaged in this type of conduct. It is essentially a table of penalties that does not confer any rights to a third party.

In short, petitioner did not, and has not, made an allegation that would trigger OSC's investigative obligations under 5 U.S.C. § 1216(a)(4). Accordingly, OSC is entitled to dismissal.

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<sup>6</sup> Furthermore, there is nothing in the legislative history of the CSRA or Whistleblower Protection Act (WPA) that suggests that Congress intended for OSC to take on auditor-like responsibilities in relation to an agency's compliance with its own internal personnel directives. Instead, other entities, such as an agency's Office of Inspector General and the U.S. Office of Personnel Management's Office of Merit Systems Oversight and Effectiveness, are charged with such responsibility.

<sup>7</sup> Petitioner generally refers to this type of conduct as defamation, which is a common law tort, as opposed to an activity prohibited by civil service law, rule, or regulation.

**CONCLUSION**

This case is simply not the type of clear and compelling case for which the extraordinary relief of mandamus is appropriate. Petitioner has failed to show that OSC's non-discretionary obligations under 5 U.S.C. §§ 1214(e) or 1216(a)(4) were triggered by his defamation allegation in MA-05-0820, and consequently, he cannot show that OSC failed to perform any non-discretionary action. Thus, petitioner has failed to establish that he has a clear and indisputable right to the relief that he requested concerning MA-05-0820. Accordingly, mandamus is not an appropriate remedy, and petitioner's Petition for a Writ of Mandamus regarding MA-05-0820 should be dismissed with prejudice.

Respectfully submitted,

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**Certificate of Service**

I hereby certify that the foregoing Reply was mailed to Petitioner on this 7th day of April, 2008 to the following address:

Joseph P. Carson  
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**U.S. Department of Energy  
Washington, D.C.**

**PAGE CHANGE**

DOE 3750.1 Chg 4  
8-24-90

SUBJECT: WORK FORCE DISCIPLINE

1. PURPOSE. To transmit revisions to Attachment 1 of DOE 3750.1, WORK FORCE DISCIPLINE, of 3-23-83.
2. EXPLANATION OF CHANGE. To revise assessments of corrective action against employees who sell drugs or intoxicants on duty or DOE property or who report for duty drunk or impaired by drugs or intoxicants.
3. FILING INSTRUCTIONS.

a. <u>Remove page</u>	<u>Dated</u>	<u>Insert Page</u>	<u>Dated</u>
Atch 1, pages 7 and 8	3-23-83	Atch 1, pages 7 and 8	8-24-90
		Atch 1, pages 8A (and 8B)	3-23-83
Atch 1, pages 11 thru 13 (and 14)	3-21-89	Atch 1, pages 11 and 12	8-24-90

b. After filing the attached pages, this transmittal may be discarded.

BY ORDER OF THE SECRETARY OF ENERGY:



JIM E. TARRO  
Director of Administration and  
Human Resource Management



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Office of Personnel and  
Career Development



DOE 3750.1 Chg 4  
8-24-90Attachment 1  
Page 7

	<u>CAUSE</u>	<u>ACTION</u>		
		<u>First Breach</u>	<u>Second Breach</u>	<u>Third Breach</u>
13.	Deliberate misrepresentation; falsification, exaggeration, or concealment of a material fact in connection with any official document; or withholding of material facts in connection with matters under official investigation.	Reprimand to Removal	Reprimand to Removal	5-Day Suspension to Removal
14.	Rude, boisterous play which adversely affects production, discipline, or morale; use of abusive or offensive language; quarreling or interfering with the production of others.	Reprimand to 5-Day Suspension	Reprimand to Removal	Reprimand to Removal
15.	Fighting, threatening of inflicting bodily harm on another, physical resistance to competent authority or indecent or immoral conduct.	Reprimand to Removal	Reprimand to Removal	5-Day Suspension to Removal
16.	Gambling during working hours.	Reprimand	Reprimand to 5-Day Suspension	Reprimand to Removal
17.	Promotion of or assisting in operation of organized gambling on premises.	Reprimand to Removal	5-Day Suspension to Removal	10-Day Suspension to Removal
18.	Abusing or unauthorized possession, use, or distribution of drugs or intoxicants:			

Vertical line denotes change.

	<u>CAUSE</u>	<u>ACTION</u>		
		<u>First Breach</u>	<u>Second Breach</u>	<u>Third Breach</u>
	a. Selling, providing, or possessing any illegal drug while on DOE property or while on official duty.	Reprimand to Removal	Removal	
	b. Selling other intoxicants or drugs while on DOE property or while on duty.	Reprimand to Removal	5-Day Suspension to Removal	Removal
	c. Reporting for duty drunk or impaired by drugs or intoxicants. 3/	Reprimand to Removal	5-Day Suspension to Removal	5-Day Suspension to Removal
19.	Being on duty so intoxicated as to be unable to properly perform assigned duties, or to be a hazard to self or others. 3/	Reprimand to Removal	5-Day Suspension to Removal	5-Day Suspension to Removal
20.	Failure to honor acknowledged or adjudicated debts or legal obligations. (In determining whether a breach has occurred, consider whether extenuating circumstances have developed after the employee incurred the obligation and the employee's previous record.) 4/	Reprimand	Reprimand	Reprimand

Vertical line denotes change.

DOE 3750.1  
3-23-83Attachment 1  
Page 8A (and 8B)

CAUSE	<u>ACTION</u>		
	<u>First Breach</u>	<u>Second Breach</u>	<u>Third Breach</u>
21. Making false, unfounded, or highly irresponsible statements against other employees, supervisors, other officials, or subordinates with the intent to destroy or damage the reputation, authority or official standing of those concerned.	Reprimand to Removal	5-Day Suspension to Removal	10-Day Suspension to Removal
22. Any action or failure to take action based on race, color, religion, sex (including sexual harassment), age or national origin of an employee, former employee, or applicant which affects his or her rights, privileges, benefits, dignity, and equality or economic opportunity. Consider circumstances and the effect on the person discriminated against, use of abusive language, violent treatment, or insulting demeanor. 5/	Reprimand to 5-Day Suspension	Reprimand to 14-Day Suspension	10-Day Suspension to Removal
If the discriminatory practice was deliberate. 5/	Reprimand to 14-Day Suspension	14-Day Suspension to Removal	Removal



DOE 3750.1 Chg 4  
8-24-90

Attachment 1  
Page 11

employment receiving lower salary. A voluntary gift of a minimal value or a donation in a minimal amount is not prohibited when made on a special occasion.

	29. Discourteous conduct to the public confirmed by an immediate supervisor's report. Suggested penalties remain the same after the third breach within a one year period.	Reprimand to 5-Day Suspension	5-Day to 14-Day Suspension	14-Day Suspension to Removal
	30. Failure to work in a safe manner and to use required safety equipment.	Reprimand to 5-Day Suspension	5-Day Suspension to Removal	14-Day Suspension to Removal
	31. Failure to carry out safety responsibility.	Reprimand	10-Day Suspension to Removal	Removal
	32. A verified positive result to any test, administered under Departmental Authority, for use of illegal drugs.	Reprimand to Removal 6/	Removal	

Vertical line denotes change.

NOTES.

- 1/ Normally an oral admonishment is used for the first breach. Maximum penalty for a third breach within 2-year period is 1-day suspension and for a fourth breach in the period is a 5-day suspension.
- 2/ When an employee fails to report for duty or to return from leave or furlough and fails to notify management of his or her intentions, and after attempting to do so the activity has been unable to ascertain his or her intention concerning his or her return to duty, a removal may be initiated in accordance with merit and procedural requirements of this regulation after the passage of a reasonable time (a minimum of 10 calendar days).
- 3/ If allegations charging such conduct are supported by a verified positive drug test administered under Departmental authority, procedures and penalties cited under cause 32 shall be applied. Any action taken under this paragraph shall be coordinated with appropriate Departmental Employee Assistance Program Personnel .
- 4/ There is no breach unless (a) the validity of the debt is established; (b) there has been a failure to either arrange for or comply with a repayment schedule; and (c) there is a current complaint from the creditor. Suspension is not an authorized correction action. Maximum corrective for third and fourth offenses within a 2-year period is reprimand with the added warning that a "continuation of breaches could result in removal."
- 5/ If a supervisor or manager has engaged in an act of discrimination, in an unfair labor practice, or in a prohibited personnel practice, an evaluation will be made of the manner in which is or she generally discharges his/her management responsibilities to determine the appropriate action to be taken.
- 6/ An employee having a verified positive test result for use of an illegal drug must be relieved of sensitive duties until cleared for return by appropriate authorities. Such employees may be issued a notice of removal from employment if he/she cannot be retained in his/her position because of a specific job requirement to perform such sensitive duties and there is no alternate work assignment available. A "Verified Positive Test Result" means a test result that has been screened positive by a Food and Drug Administration approved immunoassay test, confirmed by a Gas Chromatography/Mass Spectrometry assay, (or other confirmatory test approved by the Department of Health and Human Services), and evaluated by a Medical Review Officer.

Because of the serious nature of the impact that illegal drug activity can have on the Department's mission and its employees, supervisors should strongly consider taking the most firm action believed necessary to prevent further misconduct.

For further guidance on personnel actions concerning employee involvement in the use of illegal drugs see DOE 3792.3, DRUG-FREE FEDERAL WORKPLACE TESTING IMPLEMENTATION PROGRAM, Chapter III, paragraph 5d(3) and 5e(1) through 5e(4).

Vertical line denotes change

**U.S. Department of Energy  
Washington, D.C.**

**PAGE CHANGE**

3750.1 Chg 5

3-9-92

**SUBJECT: WORK FORCE DISCIPLINE**

1. PURPOSE. To transmit revised pages to DOE 3750.1, WORK FORCE DISCIPLINE, of 2-23-83.
2. EXPLANATION OF CHANGE. To add appropriate corrective actions to Attachment 1, Guide to Selecting Action in Discipline Cases, for cases where an employee has violated environmental laws, rules or regulations.
3. FILING INSTRUCTIONS.
  - a.

<u>Remove Pages</u>	<u>Dated</u>	<u>Insert Pages</u>	<u>Dated</u>
Attachment 1, Pages 11 & 12	8-24-90	Attachment 1, Pages 11 - 13	3-9-92
  - b. After filing the attached pages, this transmittal may be discarded.

BY ORDER OF THE SECRETARY OF ENERGY:



JOHN J. NETTLES, JR.  
Director of Administration  
and Human Resource Management

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DOE 3750.1 Chg 5  
3-9-92

Attachment 1  
Page 11

CAUSE	ACTION		
	First Breach	Second Breach	Third Breach
employment receiving lower salary. A voluntary gift of a minimal value or a donation in a minimal amount is not prohibited when made on a special occasion.			
29. Discourteous conduct to the public confirmed by an immediate supervisor's report. Suggested penalties remain the same after the third breach within a 1-year period.	Reprimand to 5-Day Suspension	5-Day to 14-Day Suspension	14-Day Suspension to Removal
30. Failure to work in a safe manner and to use required safety equipment.	Reprimand to 5-Day Suspension	5-Day Suspension to Removal	14-Day Suspension to Removal
31. Failure to carry out environmental or safety responsibility.	Reprimand	10-Day Suspension to Removal	Removal
132. Failure to obey environmental law, rule, or regulation.	Reprimand	10-Day Suspension to Removal	Removal
a. When consequences are extreme, or there is possible or actual danger to public health or safety.	Reprimand to 10-Day Suspension	14-Day Suspension to Removal	Removal
b. If violation was deliberate, or an attempt is made to conceal the violation.	10-Day Suspension to Removal	Removal	

Vertical line denotes change

Attachment 1  
Page 12

DOE 3750.1 Chg 5  
3-9-92

CAUSE	ACTION		
	First Breach	Second Breach	Third Breach
33. A verified positive result to any test for use of illegal drugs administered under Departmental Authority.	Reprimand to Removal 6/	Removal	

Vertical line denotes change

DOE 3750.1 Chg 5  
2-9-92

Attachment 1  
Page 13 (and 14)

NOTES:

- 1/ Normally an oral admonishment is used for the first breach. Maximum penalty for a third breach within 2-year period is 1-day suspension and for a fourth breach in the period is a 5-day suspension.
- 2/ When an employee fails to report for duty or to return from leave or furlough and fails to notify management of his or her intentions, and after attempting to do so the activity has been unable to ascertain his or her intention concerning his or her return to duty, a removal may be initiated in accordance with merit and procedural requirements of this regulation after the passage of a reasonable time (a minimum of 10 calendar days).
- 3/ If allegations charging such conduct are supported by a verified positive drug test administered under Departmental authority, procedures and penalties cited under cause 32 shall be applied. Any action taken under this paragraph shall be coordinated with appropriate Departmental Employee Assistance Program Personnel.
- 4/ There is no breach unless (a) the validity of the debt is established; (b) there has been a failure to either arrange for or comply with a repayment schedule; and (c) there is a current complaint from the creditor. Suspension is not an authorized correction action. Maximum corrective for third and fourth offenses within a 2-year period is reprimand with the added warning that a "continuation of breaches could result in removal."
- 5/ If a supervisor or manager has engaged in an act of discrimination, in an unfair labor practice, or in a prohibited personnel practice, an evaluation, will be made of the manner in which is or she generally discharges his/her management responsibilities to determine the appropriate action to be taken.
- 6/ An employee having a verified positive test result for use of an illegal drug must be relieved of sensitive duties until cleared for return by appropriate authorities. Such employees may be issued a notice of removal from employment if he/she cannot be retained in his/her position because of a specific job requirement to perform such sensitive duties and there is no alternate work assignment available. A "Verified Positive Test Result" means a test result that has been screened positive by a Food and Drug Administration approved immunoassay test, confirmed by a Gas chromatography/Mass Spectrometry assay, (or other confirmatory test approved by the Department of Health and Human Services), and evaluated by a Medical Review Officer.

Because of the serious nature of the impact that illegal drug activity can have on the Department's mission and its employees, supervisors should strongly consider taking the most firm action believed necessary to prevent further misconduct.

For further guidance on personnel actions concerning employee involvement in the use of illegal drugs see DOE 3792.3, DRUG-FREE FEDERAL WORKPLACE TESTING IMPLEMENTATION PROGRAM, Chapter III, paragraph 5d(3) and 5e(1) through 5e(4).

Vertical line denotes change.



**U.S. Department of Energy  
Washington, D.C.**

**PAGE CHANGE**

DOE 3750.1 Chg 6

8-21-92

**SUBJECT: WORK FORCE DISCIPLINE**

1. PURPOSE. To transmit revised pages to DOE 3750.1, WORK FORCE DISCIPLINE, of 3-23-83.
2. EXPLANATION OF CHANGE. To make only organizational title and routing symbol changes required by Notices in the SEN-6 series. No substantive changes have been made.
3. FILING INSTRUCTIONS.

<u>a.</u>	<u>Remove Page</u>	<u>Dated</u>	<u>Insert Page</u>	<u>Dated</u>
	1	3-23-83	1	8-21-92
	2	3-21-89	2	3-21-89
	3 and 4	3-21-89	3 and 4	8-21-92
	II-1 thru II-4	3-23-83	II-1	3-23-83
			II-2	8-21-92
			II-3	8-21-92
			II-4	3-23-83
	II-5 and II-6	3-21-89	II-5 and II-6	8-21-92
	IV-1	3-23-83	IV-1	3-23-83
	IV-2	1-6-86	IV-2	8-21-92

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BY ORDER OF THE SECRETARY OF ENERGY:



**DOLORES L. ROZZI**  
Director of Administration  
and Human Resource Management

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Office of Personnel



**U.S. Department of Energy**  
**Washington, D.C.**

**ORDER**

DOE 3750.1  
3-23-83  
Change 6: 8-21-92

SUBJECT: WORK FORCE DISCIPLINE

- 
1. PURPOSE. To provide guidance and procedures and state responsibilities for maintaining work force discipline in the Department of Energy (DOE).
  2. REFERENCE.
    - a. Title 5, Code of Federal Regulations, parts 432, 735, and 752, which provides the statutory procedures for adverse actions and establishes ethical and other conduct standards and responsibilities for Federal employees.
    - b. Federal Personnel Manual (FPM) chapters 751 and 752, which state the Office of Personnel Management regulations and requirements for disciplinary and adverse actions.
    - c. DOE 3710.1A, LABOR-MANAGEMENT RELATIONS PROGRAM FOR FEDERAL EMPLOYEES, of 9-30-86, which outlines procedures for the administration of the Federal employee labor relations program.
    - d. DOE 3771.1, GRIEVANCE POLICY AND PROCEDURES, of 7-2-81, which provides guidance and instructions for establishing and administering the grievance system of the DOE.
  3. COVERAGE AND EXCLUSIONS. This Order applies to all paid employees within the Department except:
    - a. Employees covered by sections 621(b) and (d) of Public Law 95-91, Department of Energy Organization Act;
    - b. Administrative Law Judges;
    - c. Experts and consultants;
    - d. Employees occupying positions above the GS-15 or GM-15 grade level;
    - e. Employees in the Senior Executive Service;
    - f. Presidential appointees;
    - g. Employees occupying positions in schedule C of part 213 of Title 5, Code of Federal Regulations.

Vertical line denotes change.

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**INITIATED BY:**  
Office of Personnel

2

DOE 3750.1 Chg 3  
3-21-89

4. POLICY.

- a. Disciplinary actions shall be taken only for the purposes of correcting: unacceptable conduct, behavior on the job, or situations that adversely affect job performance; violations of laws, rules, or regulations.
- b. Actions shall be taken for unacceptable performance or nonperformance of assigned duties and failure to properly discharge inherent or assigned responsibilities.
- c. Unless proposed by the Secretary, all final decisions to take adverse actions (including reductions in grade and removals based on unacceptable performance) must be made by a higher level official in the chain of command than the official who proposed the action.

5. DEFINITIONS.

- a. Adverse Action. A personnel action which reduces an employee's basic pay or grade, or which involuntarily separates the employee from the Federal service, or which involuntarily places the employee in a nonpay, nonduty status. Adverse actions may result from disciplinary or nondisciplinary situations. Adverse actions are:
  - (1) Suspension. An action which places an employee, for disciplinary reasons, in a temporary status without duties and pay.
  - (2) Reduction in Grade or Pay. Actions taken that change an employee from a position at one grade and rate of basic pay to another position at a lower grade and rate of basic pay. (See Attachment 9 for reductions in grade or pay excluded from coverage of this Order.)
  - (3) Furlough. The placing of an employee in a temporary status, without duties and pay because of lack of work or funds or for other nondisciplinary reasons.
  - (4) Removal. The separation of an employee from his or her position in the department for cause.
- b. Board. Merit Systems Protection Board.
- c. Cause. A recognizable offense against the employee-employer relationship. May be reasons that are personal to the employee such as on or off the job misconduct, inefficiency, or physical or mental inability to perform the duties of the position. There may also be impersonal reasons such as an emergency situation necessitating a short furlough or the need to correct a merit promotion error. Some causes have been specified by rules, Executive order, or regulation. A cause must also promote the efficiency of the service.

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- d. Days. Calendar days.
- e. Deciding Official. The management official designated to make the final decision on a notice of proposed action issued by a Department official at a lower management level.
- f. Proposing Official. The supervisor or manager who issues a notice of proposed adverse action to an employee. (The supervisor or manager who issues an admonishment or reprimand to an employee is an issuing official.)
- g. Oral Admonishment. A disciplinary discussion between a management official or supervisor having the authority to take disciplinary action and an employee subject to that authority.
- h. Reprimand. A formal disciplinary action notice issued to an employee by a management official or supervisor having disciplinary authority with respect to that employee.

6. RESPONSIBILITIES.

- a. Heads of Departmental Elements with Delegated Personnel Authority shall:
  - (1) Administer a fair, impartial uniform, and regulatory proper work force discipline program within their jurisdictions.
  - (2) Assure that the rules and other conditions of employment are readily available to all employees under their jurisdiction.
  - (3) Assure that supervisors and management officials consider the guide contained in Attachment 1, and when the limitation on corrective actions is to be exceeded, assure that it is properly authorized.
  - (4) Issue notices of decision on adverse actions proposed by subordinate officials against employees under their jurisdiction.
  - (5) Approve or disapprove requests to extend the time to answer notices of proposed actions.
  - (6) Approve or disapprove requests to extend the notice of proposed action, not to exceed 30 additional days, in cases of reduction in grade and in cases of removal based on unacceptable performance.
  - (7) Advise the servicing personnel office whenever any of the above authorities are redelegate. All redelegations must be in writing.
- b. Director of Administration and Human Resource Management provides overall direction and administration of the Department's work force discipline program.

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- c. General Counsel shall review all petitions for payment of attorney fees for compliance with statutory and regulatory requirements and will concur on all DOE responses.
- d. General Counsel or Chief Counsel of a Field Organization shall provide legal advice and assistance to servicing personnel offices. In coordination with servicing personnel offices, represents or participates in the preparation for representation of the DOE before the Board.
- e. Director of Personnel shall:
  - (1) Develop the work force discipline program of the Department and provide staff assistance and advice on matters covered by this Order.
  - (2) Implement actions directed by the Office of Personnel Management and other outside authorities.
  - (3) Determine whether or not to seek review of initial decisions issued by presiding officials of the Board.
  - (4) Request approval of the Office of Personnel Management to extend the notice period for a reduction in grade or removal based upon unacceptable performance beyond the additional 30 days granted by officials in paragraph 6a.
- f. Servicing Personnel Offices shall:
  - (1) Provide technical advice and assistance to supervisors and management officials in the implementation of this program.
  - (2) Review all disciplinary actions for consistency with rules, regulations, and Departmental procedures.
  - (3) Inform employees of their employment obligations.
  - (4) Provide advice and assistance on procedures to employees who are subject to disciplinary or adverse actions.
  - (5) After giving advance notice to the Director of Personnel, coordinate with the General Counsel or chief counsel of a field organization in order to provide for representation of the Department at hearings before the Board.
- g. Supervisors and Managers shall:
  - (1) Keep employees informed of rules, regulations, and standards of conduct, and maintain order and discipline within the framework of established procedures.

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CHAPTER 11

TYPES OF DISCIPLINARY ACTIONS, COVERAGE, AND PROCEDURES

1. ORAL ADMONISHMENT.

- a. Coverage. All employees within the scope of this Order are covered by this paragraph.
- b. Use. There is no prescribed format for an oral admonishment. It is particularly suitable to situations which can be corrected by the employee and is used where it is anticipated that it will achieve the required changes in conduct, habit, or work method.

2. NOTICE OF REPRIMAND.

- a. Coverage. All employees within the scope of this Order are covered by this paragraph.
- b. Use. The notice of reprimand should be used in those situations which require an action more stringent than an oral admonishment, such as where an employee has not responded constructively to oral admonishments for the same or similar breaches. In some situations a notice of reprimand may be the last step in a progression of penalties before removal if the employee has been given a clear warning that a further offense could lead to removal.
- c. Contents. Notices of reprimand shall specify clearly the nature of the infraction or transgression, including specific information related to that reason such as times, dates, and circumstances that required corrective action to be taken. It should inform the employee of all time limits, the right to grieve, where to seek assistance regarding the grievance procedure, of the right to representation, and that the notice will be filed in the OPF for a period of 1 year unless the employee leaves the DOE sooner. (Attachment 2 contains an example of a notice of reprimand.)

3. SUSPENSION FOR 14 DAYS OR LESS.

- a. Coverage. The following DOE employees are covered by this paragraph:
  - (1) All employees in the competitive service.
  - (2) All employees who occupy a position in schedule A or schedule B of part 213 of Title 5, Code of Federal Regulations, and FPM chapter 213.

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b. Procedures.

(1) Notice of Proposed Suspension for 14 Days or Less. The notice must indicate clearly that it is a proposal rather than a final decision, and that the final decision will not be made until after receipt of the employee's reply or after the expiration of the time period for reply if no reply is made. It shall also inform the employee where and to whom the reply shall be directed and the right to:

(a) Review the material supporting the action proposed in the notice. While not required, proposing officials are encouraged to attach to the notice of proposal copies of all supporting material.

(b) A reasonable time to answer (but not less than 24 hours) orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer.

(c) Be represented by an attorney or other representative. (See FPM chapter 752, DOE 3710.1A, and the labor management agreement if the employee is included in a bargaining unit.) (Attachment 3 contains an example of a notice of proposal.)

(2) Notice of Decision.

(a) The notice of decision shall be issued at the earliest practicable date after the receipt of the employee's reply, or after expiration of the time allocated for the employee's answer. In arriving at the written decision, only the reason(s) specified in the notice of proposed action and any answer of the employee or his or her representative will be considered.

(b) The decision shall state which reason(s) were relied upon and which were not (tell the employee which reasons in the proposal notice were determined to be valid and which were dismissed and why) and, if the proposed suspension is determined to be warranted, the effective date of the action. No new reasons may be added to the letter of decision.

(c) The notice must state the employee's grievance rights and whom to contact regarding these rights. (Attachment 4 contains an example of a notice of decision.)

4. REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, OR REDUCTION IN GRADE. This paragraph applies to, but is not limited to, disciplinary action; based on conduct related factors or disciplinary actions that involve both conduct and performance related factors. An employee may be removed or reduced in grade for misconduct or for unacceptable performance. The regulatory and procedural requirements are different in each case. For procedures on

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reduction in grade or removal of an employee based solely on unacceptable performance, see page 11-5, paragraph 5. When an employee is removed, suspended for more than 14 days, or reduced in grade based on unacceptable performance and for misconduct, or for misconduct alone, this paragraph applies. However, such actions must promote the efficiency of the service.

a. Coverage. The following Departmental employees are covered by this paragraph:

- (1) All employees in the competitive service who are not serving a probationary or trial period under an initial appointment, or who have completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less.
- (2) All employees who are preference eligibles in the excepted service who have completed 1 year of current continuous service in the same or similar positions.
- (3) An employee with competitive status who occupies a position in schedule 8 of part 213 of Title 5, Code of Federal Regulations, and FPM chapter 213.

b. Procedures.

(1) Notice of Proposed Action.

- (a) The notice of proposed action must state clearly the reason(s) for proposing the action and include the specific information that supports that reason, such as times, dates, and circumstances. It shall inform the employee that if the proposed action is taken, it will not become effective earlier than 30 days from the date of receipt of the notice. Additionally, the employee shall be informed of the right to:
  - 1 Review the material supporting the reasons for the action proposed in the notice. While not required, proposing officials are encouraged to attach to the notice of proposal copies of all supporting material.
  - 2 A reasonable time, but not less than 7 days, to answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer.
  - 3 Be represented by an attorney or other representative. (See FPM chapter 752, DOE 3710.1A, and the labor management agreement if the employee is included in a bargaining unit.)
- (b) The notice of proposed action must indicate clearly that the notice is a proposal and that a final decision will not be made until after receipt of the employee's reply or after expiration

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of the time period for reply. It must also inform the employee where and to whom to direct a reply. (Attachment 5 contains an example of a notice of proposal.)

- (c) The person designated to hear the employee's oral answer shall have the authority to either make or recommend a final decision on the proposed adverse action.

(2) Exception.

- (a) The following exception to the 30-day notice period is authorized.

- 1 The 30-day advance notice period is not required when there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. This exception shall not be invoked solely on evidence of the employees arrest. However, in those instances where there is evidence that the employee was arrested and held for further legal action by a magistrate or was indicted by a grand jury there would be reasonable cause for believing the employee committed a crime.

- 2 If this exception is invoked, the employee may be required to furnish any answer to the proposed action and affidavits and other documentary evidence in support of the answer within such time as under the circumstances would be reasonable, but not less than 7 days.

- 3 When the circumstances require immediate action, the employee may be placed in a nonduty status with pay for such time, not to exceed 10 days, as is necessary to effect the action.

- (b) Currently, the above is the only exception to the 30-day notice period. In disciplinary situations involving a need to keep the employee away from his or her position, a temporary reassignment during the 30-day advance notice period may be advisable.

- (c) In emergency, nondisciplinary situations involving the need to remove the employee from the premises immediately, the employee should be required to take sick or annual leave, as appropriate, or leave without pay, if the employee has exhausted his/her sick and annual leave. However, after the immediate emergency passes, the employee must be returned to duty if he or she is able to perform. If subsequent adverse action is to be initiated, the employee must be maintained in a pay status during the notice period.

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| (d) Before taking any action in the above situations, consult with the employee/labor relations policy staff of the Office of Personnel.

(3) NOTICE OF DECISION.

- (a) The notice of decision shall be issued at the earliest practicable date after receipt of the employee's reply or expiration of the time allocated for the employee's answer. In arriving at the decision, only the reasons specified in the notice of proposed action and any answer of the employee or his or her representative made to the designated official will be considered.
- (b) The decision shall state which reason(s) were relied upon (tell the employee which reasons in the proposal notice were determined to be valid and which were dismissed and why), and if the proposed action is determined to be warranted, the effective date of the action. No new reasons may be added to the notice of decision.
- (c) It shall contain information regarding appeal and representation rights and the name of the individual who the employee may contact concerning appeal rights and procedures.
- (d) It shall be delivered to the employee at or before the time the action becomes effective. (Attachment 6 contains an example of a notice of decision.)

5. REDUCTION IN GRADE OR REMOVAL BASED ON UNACCEPTABLE PERFORMANCE. An employee may be reduced in grade or removed at any time during the performance appraisal cycle that the employee's Performance in one or more critical elements of the job becomes unacceptable. The procedures and requirements for such actions are separate from those contained in paragraph 4.

- a. Coverage. This paragraph applies to all employees, except those excluded in paragraph 3 of Attachment 9.
- b. Reasonable Time. Before proposing a reduction in grade or removal under this paragraph, the employee shall be informed of the critical element(s) for which performance is unacceptable, and given a reasonable time to demonstrate acceptable performance for the critical element(s) identified as unacceptable. Reasonable time means an amount of time commensurate with the duties and responsibilities of the employee's job which is sufficient to allow the employee to show whether he or she can meet minimum performance standards.
- c. One-year Limitation. Title 5, United States Code, section 4303(c)(2) places a 1-year time restriction on the age of instances used to support the demotion or removal of an employee for unacceptable performance.

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d. Procedures.

- (1) Notice of Proposed Action. An employee whose reduction in grade or removal is proposed under this paragraph is entitled to 30 days advance written notice of the proposed action. The notice shall identify the specific instances of unacceptable performance by the employee on which the proposed action is based and the critical elements of the employee's position involved in each instance of unacceptable performance. It shall inform the employee of the right to:
  - (a) Be represented by an attorney or other representative. (See FPM chapter 752, DOE 3710.1A, and the labor management agreement if the employee is included in a bargaining unit.)
  - (b) A reasonable time to answer orally and in writing.
- (2) Extension of Notice Period. The 30-day advance notice period may be extended for not more than 30 additional days by an authorized Departmental official (see page 3, paragraph 6a(6)). Requests to extend further the notice period shall be referred by the deciding official to the Director of Personnel, who may request prior approval from the Office of Personnel Management.
- (3) Notice of Decision. The written decision to retain, reduce in grade, or remove an employee shall be issued within 30 days after the date of expiration of the advance notice. In the case of a reduction in grade or removal under this paragraph, the written decision shall specify the instances of unacceptable performance by the employee on which the reduction in grade or removal is based. Instances of unacceptable performance more than 1-year old as of the date of the notice of proposal may not be used as a basis for action in connection with the decision. It shall contain information regarding appeals and representation rights and the name of the individual who the employee may contact concerning appeal rights and procedures. It shall be delivered to the employee at or before the time the action becomes effective.
- (4) Performance Improvement. If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any Departmental records relating to the employee.

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CHAPTER IV

REPRESENTATION, APPEALS, AND GRIEVANCES

1. REPRESENTATION.

- a. Employees who have received a notice of proposed disciplinary action are entitled to be represented by an attorney or other representatives. In addition, employees may be accompanied by a representative when making an oral reply to a notice or proposed adverse action. If an employee of the Department is selected as a representative and that person is willing to serve, the representative's supervisor, acting independently or in concert with the supervisor of the selecting employee, may disallow the employee's choice on the basis that the:
  - (1) Individual's activities as a representative would cause a conflict of interest or position; or
  - (2) Release of the employee from his or her official position would give rise to unreasonable costs to the Government; or
  - (3) Individual's priority work assignments preclude his or her release from official duties.
- b. The terms of any applicable" collective bargaining agreement govern representation for employees in an exclusive bargaining unit.
- c. This paragraph does not apply to representation during appeals before the board and in cases of disciplinary actions that are grieved. (See title 5, Code of Federal Regulations, section 1201.31, for procedures governing representation during appeals before the board and DOE 3771.1 concerning representation during grievances.)

2. APPEALS.

- a. Employees in the Competitive Service or Who Are Preference Eligibles. Employees are entitled to appeal the following actions to the board beginning with the day after the effective date of the action until not later than 20 calendar days after the effective date:
  - (1) Adverse actions, except suspensions of 14 days or less;
  - (2) Reduction in grade or removal based on unacceptable performance;
  - (3) Adverse actions or reduction in grade or removal based on unacceptable performance coupled with an allegation of prohibited discrimination.

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- b. When a decision letter is issued to an employee on a matter appealable to the board, the employee shall be provided:
    - (1) Notice of the time limits for appealing to the board and the address of the appropriate board office for filing the appeal;
    - (2) A copy of the board's regulations;
    - (3) A copy of the Merit Systems Protection Board Form 20, "Merit Systems Protection Board Appeals Form"; and
    - (4) Notice of any applicable rights to a grievance procedure.
  - c. Petitions for Review. A request to the board to review the initial decision of a presiding official shall be recommended by the servicing personnel office to the Director of Personnel and arrive as soon as possible after receipt of the initial decision. Such recommendations shall establish that:
    - (1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
    - (2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.
  - d. Prohibited Personnel Practice. Any employee who believes that a disciplinary or corrective action taken against him or her is a prohibited personnel practice under Title 5, United States Code, section 2302, may file a complaint with the special counsel of the board.
3. GRIEVANCES. See DOE 3771.1 concerning grievances.
4. ATTORNEY FEES. If a presiding official or the full Board fails to sustain a DOE action on appeal, the appellant may request payment of attorney fees under title 5, Code of Federal Regulations, section 1201.37, pursuant to the authority in title 5, United States Code, section 7701(g), or under title 42, United States Code, section 2000e-5(k) if discrimination is found under title 5, United States Code, section 2302(b)(1). Title 5, United States Code, section 7701(g) authorizes payment of reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interest of justice. The Office of General Counsel will review all petitions for payment of attorney fees for statutory and regulatory compliance and will concur in all DOE responses. Accordingly, all such petitions will be forwarded immediately to the Assistant General Counsel for General Law; the petitions will be accompanied by proposed Departmental responses and by supporting documentation, such as local attorney fee schedules or other comparative data. The General Counsel will inform the Director of Personnel of DOE responses and the subsequent findings of the Board.