

Representing Employees Who are Offered Alternative Discipline (including “Last Chance Agreements”)

Prepared by the NFFE Forest Service Council Training and Grievance Committees

When the Agency believes an employee has committed an act of misconduct, the Agency may propose traditional discipline, such as a letter of reprimand, a suspension, demotion, or removal, to correct the behavior, or they may offer an alternative discipline (AD) agreement. Alternative discipline can take many forms, and it generally results in a reduction or complete abeyance of the traditional discipline that the Agency would have taken if there were no AD agreement. In exchange for the reduction or abeyance of the traditional penalty, the employee acknowledges the wrongdoing, and agrees to perform other actions as specified in the agreement (for example, donating leave to the leave share program, attending alcohol treatment, taking LWOP instead of being suspended, etc.), and agrees not to appeal the action. Under the Master Agreement, the Union and the Forest Service encourage the use of (AD) whenever appropriate, but there is no requirement that a manager or supervisor offer AD in lieu of traditional discipline. When an employee is offered alternative discipline, the option to enter into an AD agreement is voluntary on the part of the employee.

Alternative discipline may be offered by the Forest Service at any point during the disciplinary process, even before formal discipline is proposed. If alternative discipline is offered before the traditional discipline process is started (i.e. before giving the employee a proposal for disciplinary action), the FS must prepare an analysis of the employee’s misconduct including what law, rule, regulation, or policy was violated and what the penalty would have been, if traditional discipline were imposed. If the employee elects alternative discipline, the traditional penalty identified in the written analysis is used as the penalty that will be imposed if the employee does not meet the conditions of the agreement. If the Forest Service offers alternative discipline after issuing a proposal for discipline or a final decision for discipline, the proposed or final decision penalty, respectively, becomes the penalty cited in the alternative discipline agreement as the consequence for the employee's failure to satisfy the terms and conditions of the alternative discipline agreement.

The following are important points to remember when there is an AD agreement being proposed:

- Alternative discipline cannot be used when the final decision is that the misconduct warrants a penalty of removal ([DPB 751-3](#) and MA 22.2(d)).
- Discipline is intended to correct behavior, and it is USDA policy to impose the minimum penalty to correct the behavior and maintain discipline and morale among employees ([DPB 751-3](#)). The Agency may not use alternative discipline as a vehicle to inflate a proposed penalty under traditional discipline to pressure employees to agree to alternative discipline.
- When offered an Alternative Discipline agreement, the employee must be informed by management in writing that they may discuss the Alternative Discipline agreement with a Union Representative before signing (MA Article 22.2(c)).
- Employees have the right to review the written analysis of their case in order to make an informed choice between traditional and alternative discipline ([DPB 751-3](#)).
- The employee must admit that he or she engaged in the misconduct ([DPB 751-3](#)).
- The employee must agree to waive any and all grievance, appeal, and/or EEO complaint rights with respect to the particular action. This includes a waiver of filing of an appeal if the agreement is violated and the original penalty is imposed. However, employees retain the right to file an appeal, if the Agency alleges that they have violated the agreement, and the employee does not believe they have violated the terms of the agreement. In this case a grievance/MSPB

appeal would only review the question of whether the employee violated the agreement (See for example: Tackett v. Dept. of Air Force, [80 MSPR 624](#), (1999).

- Negotiating an alternative discipline agreement with an employee, without notifying the Union and giving them an opportunity to be present, is an unfair labor practice ([55 FLRA No. 160](#)).
- The agreement should be very clear about what is expected from the employee, and any actions that management has to take. Don't let fuzzy language persist in the agreement.
- An AD agreement should not limit an employee's right to file future grievances or appeals if disciplinary action is taken for an offense unrelated to the discipline in the agreement. It is not uncommon for management to try to put in the agreement that *any* future disciplinary action will be covered under the agreement during the term of the agreement.

A well-designed AD agreement can be of great benefit to both the Agency and the employee, by reducing administrative costs, lessening hard feelings, and effectively correcting improper behavior. However, there are times when AD agreements are offered to employees in improper circumstances and in an atmosphere of coercion. It is important that Union officials and employees be aware of the proper procedures for using AD agreements. For further information, refer to the USDA Department Personnel Bulletin [751-3](#) and the Master Agreement [Article 22](#).

ALTERNATIVE DISCIPLINE AGREEMENTS

All agreements in the USDA must include the following (See Dept. Personnel Bulletin 751-3):

1. A description of the misconduct and a statement that the agency's analysis resulted in a determination that a specified "traditional" penalty is warranted under formal disciplinary procedures. If applicable, attach copies of the proposal and decision letters to the agreement.
2. A statement that the employee admits he or she engaged in the improper conduct, recognizes the misconduct was unacceptable, and promises that these acts will not occur in the future.
3. A description of the terms and conditions that must be met for the employee to satisfactorily fulfill the agreement. The terms must include the timeframe(s) within which the employee must satisfy the agreement.
4. An acknowledgment that the case file and agreement will be retained in the employee relations office for a period to be determined by the mission area/agency, but not to exceed 4 years.
5. A statement that if the employee fails to satisfy the terms and conditions of the agreement, the penalty specified in the agreement will be effected immediately.
6. A statement that the agreement was voluntarily entered into and that the employee waives all grievance, appeal, and/or complaint rights.
7. If applicable, an acknowledgment that no salary or wage compensation can be requested for any off-duty volunteer service and that such service is not covered by Workers' Compensation.
8. A statement that the misconduct addressed through the alternative discipline agreement and admitted to by the employee constitutes an offense and may be used to support any future progressive disciplinary action(s), alternative or traditional.
9. A statement that the terms and conditions of the agreement are not confidential and may be discussed with parties with a need to know.
10. A statement that the terms and conditions of the agreement are nonprecedential, meaning they are specific to the employee, and they cannot be cited, for any reason, including comparison, in another employee's alternative discipline agreement or traditional disciplinary documents.
11. The signatures of the parties to the agreement. Normally this will include the employee, the employee's representative, the supervisor or other management official authorized to enter into such an agreement, and if desired, any other interested party, such as the mission area/agency human resource specialist.