



Department of Energy
Washington, DC 20585

JM CHRONOLOGY

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AUG 6 2014

MEMORANDUM FOR: INGRID KOLB
DIRECTOR, OFFICE OF MANAGEMENT

THROUGH: KEVIN T. HAGERTY
DIRECTOR, OFFICE OF INFORMATION RESOURCES

FROM: KENNETH T. VENUTO
DIRECTOR, OFFICE OF HUMAN CAPITAL MANAGEMENT

SUBJECT: Notice of Intent to Cancel DOE O 3750.1, *Work Force Discipline* and
Replace with DOE 333.1, *Employee Management Relations*
(*Workforce Discipline*)

PURPOSE: To provide guidance and procedures and state responsibilities for maintaining consistent workforce discipline within the Department of Energy (DOE).

JUSTIFICATION: The proposed new Order would cancel DOE O 3750.1, dated 3-23-1983, which is severely outdated and deficient in addressing Genetic Information Non-discrimination Act (GINA), addressing Reprisal (verify), protections and entitlements under the Whistle Blower Act, 2014 Hatch Act changes, Nepotism, Executive Memorandums regarding issues such as texting while driving and current workforce issues as well as Merit Systems Protection Board (MSPB) preferred standards. The Order is to improve workforce discipline across all organizations within the DOE by clarifying responsibilities, documentation and reporting, as well as obligations. The antiquity of the current Order does not address current workforce issues like that of cybersecurity nor does it provide relevant and updated case laws, updated discrimination laws, updated offenses related to intoxication, cybersecurity, texting, etc.

MSPB in its landmark decision, Douglas vs. Veterans Administration, 5 M.S.P.R. 280 (1981), established criteria which provides guidance to proposing and deciding officials which they must consider in determining an appropriate penalty to impose for an act of employee misconduct. The MSPB is highly in favor of standardized and consistently applied workforce discipline across each federal agency in the form of a Table of Penalties. To aid and assist proposing and deciding officials within the DOE, the Table of Penalties represents coherent and appropriate standards of discipline enforcement by offense for most frequent workplace offenses. In MSPB appeals, oftentimes there are issues that arise with respect to the disciplinary penalty imposed by a federal agency. In cases involving more significant disciplinary or adverse actions (i.e. removals or suspensions exceeding 14 days), a federal agency's Table of Penalties is the main document used to determine disciplinary actions and is cited in the proposed removal or suspension action.



Justification Memorandum (Continued)

There are no valid external, consensus or other "Standards (e.g., ISO, VPP, etc.) available which can be used in place of this directive.

IMPACT: The proposed directive does not duplicate existing laws, regulations, or national standards and it does not create undue burden on the Department.

Properly administered workforce discipline affords DOE employees proper and suitable corrective action that is consistently enforced and maintains high standards of employee integrity, conduct, effectiveness, and service to the public.

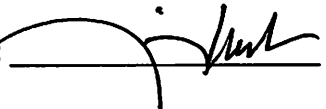
The measures of success for this directive will be the outcomes of the corrective actions, themselves (did they have the desired corrective effect with the offending employee and/or did they pass review by a third party when applicable). If the internal controls are implemented, 1) DOE will have set forth guidelines for its managers and supervisors and specified the range of sanctions for representative acts of misconduct, 2) employees have a complete list of guidelines to understand the range of punishments for identified misconduct, 3) and proposing and deciding officials will have a roadmap and consistent standards to apply should particular infractions occur.

DOE should see a more effectively managed discipline process, and managers and supervisors should be more confident and competent in confronting and correcting employees' misconduct in a measured and timely manner rather than waiting until the employee-employer relationship has been so damaged that it is too late for the positive impact of progressive penalties.

WRITER: Jennifer Carter (202-586-9407)

OPI/OPI CONTACT: Jennifer Ackerman

Ingrid Kolb, Director, Office of Management (MA-1):

Concur:  Nonconcur: _____ Date: 8-21-14

<u>Standard Schedule for Directives Development</u>	<u>Days</u>
Draft Development	Up to 60 days
Review and Comment (RevCom)	30
Comment Resolution	30
Final Review	30
Total	150

Risk Identification and Assessment

Cancellation DOE O 3750.1, Work Force Discipline and Replace with DOE 333.1, Employee Management Relations (Workforce Discipline)

Risk	Probability	Impact	Risk Level
People			
1. Failure to provide clearly identified parameters of conduct could result in safety, security, discrimination, failures and other costs to the Department.	Likely	Medium	Significant
2. Failure to provide clearly identified parameters of conduct creates an uncertain environment which can result in lowered morale.	Likely	Medium	Significant
Mission			
3. Failure for the Department to provide requirements and responsibilities for administering workforce discipline that includes disciplinary, adverse, and alternative corrective actions, will drastically impede the mission of the Department and create long lasting third party litigation.	Certain	High	Extreme
4. Failure for the Department to maintain high standards of employee integrity, conduct, effectiveness, and service to the public will drastically impede the mission of the Department.	Likely	High	Extreme
5. Failure for the Department to ensure prompt and just corrective action be taken in order to promote standards of conduct and efficiency that will promote the best interest of the service will drastically impede the mission of the Department.	Certain	High	Extreme
6. Failure for the Department to ensure disciplinary and adverse actions are governed by three basic principles will drastically impede the mission of the	Certain	High	Extreme

<p>Department.</p> <p>(a) An employee must be informed in writing honestly and specifically why a disciplinary or adverse action is being brought against him or her;</p> <p>(b) An employee must be given a reasonable opportunity to present his or her side of the case, through procedural employee reply when applicable, and/or employee grievance when properly and timely filed;</p> <p>(c) The employee and representative must be free from restraint, interference, coercion, discrimination, or reprisal in discussing, preparing, and presenting the defense to a case and/or a grievance.</p>			
Assets			
7. Failures for the Department to provide disciplinary controls to protect its assets will likely result in losses to the Department.	Likely	High	Extreme
Financial			
8. Failure for the Department to provide disciplinary controls and instruction is certain to result in third party litigation which can be costly to the Department.	Certain	High	Extreme
Customer and Public Trust			
9. Failure for the Department to provide disciplinary controls is likely to result in misconduct and bad acts that are certain to affect the trust and political environment at DOE (e.g. IRS Hatch Act violations, VA fraud/waste/abuse; BPA veterans preference violations)	Certain	High	Extreme

Gap Analysis of Existing Risks and Controls

Laws	<ul style="list-style-type: none"> • Executive Order/Memoranda • Statute • Regulation • OPM Guidance
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External Regulation	<ul style="list-style-type: none"> • Case law • Arbitration • Settlement Agreements
DOE Regulation	<ul style="list-style-type: none"> • DOE Regulation is severely outdate and does not cover updates in Executive Order/Memoranda, law, regulation in last 20+ years
DOE Orders	<ul style="list-style-type: none"> • DOE Orders are severely outdate and does not cover updates in Executive Order/Memoranda, law, regulation in last 20+ years
Contract Controls	<ul style="list-style-type: none"> • Discipline Order not applicable to Contractors
External Assessments	<ul style="list-style-type: none"> • MSPB studies, case law decisions and legal standards/tests, Arbitration decisions, etc.

Risk Mitigation Techniques

[Use the risk mitigation techniques and guidance within the attached reference to fill out the chart below. List all risks that have been identified in the gap analysis. When examining the relative cost-benefit of a proposed control be careful to notice situations where a risk-specific control may also (directly or indirectly) address a separate risk identified in the gap analysis.]

Risk Assessment for [Directive Number, Directive Title]					
Risk/Opportunity	Risk Level	Potential Cost/Benefit	External Control(s)	Proposed Mitigation Technique	Internal Control (if needed)
1. Failure to provide clearly identified parameters of conduct could result in safety, security, discrimination, failures and other costs to the Department.	Significant	Legality/Defensibility of conduct actions. High standards of employee integrity, conduct, effectiveness, and service to the public. Prompt and just corrective action. Promotion of standards of conduct and efficiency that will promote the best interest of the service.	Executive Order/Memoranda; Statute; Regulation; OPM Guidance; Case Law-concern is consistency of application within the Department which creates a litigious matter	Avoidance	Prohibition of activities or operations/misconduct Regulation/Directive

2. Failure to provide clearly identified parameters of conduct creates an uncertain environment which can result in lowered morale.	Significant	Legality/Defensibility of conduct actions. High standards of employee integrity, conduct, effectiveness, and service to the public. Prompt and just corrective action. Promotion of standards of conduct and efficiency that will promote the best interest of the service.	Executive Order/Memoranda; Statute; Regulation; OPM Guidance; Case Law-concern is consistency of application within the Department which creates a litigious matter	Avoidance	Prohibition of activities or operations/misconduct Regulation/Directive
3. Failure for the Department to provide requirements and responsibilities for administering workforce discipline that includes disciplinary, adverse, and alternative corrective actions, will drastically impede the	Extreme	Legality/Defensibility of conduct actions. High standards of employee integrity, conduct, effectiveness, and service to the public. Prompt and just corrective action. Promotion of standards of	Executive Order/Memoranda; Statute; Regulation; OPM Guidance; Case Law-concern is consistency of application within the Department which creates a litigious matter	Avoidance	Prohibition of activities or operations/misconduct Regulation/Directive

mission of the Department and create long lasting third party litigation.		conduct and efficiency that will promote the best interest of the service.			
4. Failure for the Department to maintain high standards of employee integrity, conduct, effectiveness, and service to the public will drastically impede the mission of the Department.	Extreme	Legality/Defensibility of conduct actions. High standards of employee integrity, conduct, effectiveness, and service to the public. Prompt and just corrective action. Promotion of standards of conduct and efficiency that will promote the best interest of the service.	Executive Order/Memoranda; Statute; Regulation; OPM Guidance; Case Law-concern is consistency of application within the Department which creates a litigious matter	Avoidance	Prohibition of activities or operations/misconduct Regulation/Directive
5. Failure for the Department to ensure prompt and just corrective action be taken in order to promote standards of	Extreme	Legality/Defensibility of conduct actions. High standards of employee integrity, conduct, effectiveness, and	Executive Order/Memoranda; Statute; Regulation; OPM Guidance; Case Law-concern is	Avoidance	Prohibition of activities or operations/misconduct Regulation/Directive

conduct and efficiency that will promote the best interest of the service will drastically impede the mission of the Department.		service to the public. Prompt and just corrective action. Promotion of standards of conduct and efficiency that will promote the best interest of the service.	consistency of application within the Department which creates a litigious matter		
<p>6. Failure for the Department to ensure disciplinary and adverse actions are governed by three basic principles will drastically impede the mission of the Department.</p> <p>(a) An employee must be informed in writing honestly and specifically why a disciplinary or adverse action is being brought against him or her;</p> <p>(b) An employee</p>	Extreme	<p>Legality/Defensibility of conduct actions. High standards of employee integrity, conduct, effectiveness, and service to the public. Prompt and just corrective action. Promotion of standards of conduct and efficiency that will promote the best interest of the service.</p>	<p>Executive Order/Memoranda; Statute; Regulation; OPM Guidance; Case Law-concern is consistency of application within the Department which creates a litigious matter</p>	Avoidance	Prohibition of activities or operations/misconduct Regulation/Directive

must be given a reasonable opportunity to present his or her side of the case, through procedural employee reply when applicable, and/or employee grievance when properly and timely filed;

(c) The employee and representative must be free from restraint, interference, coercion, discrimination, or reprisal in discussing, preparing, and presenting the defense to a case and/or a grievance.

7.Failure for the Department to provide disciplinary controls to protect its assets will likely result in losses to

Extreme

Legality/Defensibility of conduct actions. High standards of employee integrity, conduct,

Executive Order/Memoranda; Statute; Regulation; OPM Guidance; Case

Avoidance

Prohibition of activities or operations/misconduct Regulation/Directive

the Department.		effectiveness, and service to the public. Prompt and just corrective action. Promotion of standards of conduct and efficiency that will promote the best interest of the service.	Law-concern is consistency of application within the Department which creates a litigious matter		
8. Failure for the Department to provide disciplinary controls and instruction is certain to result in third party litigation which can be costly to the Department.	Extreme	Legality/Defensibility of conduct actions. High standards of employee integrity, conduct, effectiveness, and service to the public. Prompt and just corrective action. Promotion of standards of conduct and efficiency that will promote the best interest of the service.	Executive Order/Memoranda; Statute; Regulation; OPM Guidance; Case Law-concern is consistency of application within the Department which creates a litigious matter	Avoidance	Prohibition of activities or operations/misconduct Regulation/Directive

9. Failure for the Department to provide disciplinary controls is likely to result in misconduct and bad acts that are certain to affect the trust and political environment at DOE (e.g. IRS Hatch Act violations, VA fraud/waste/abuse; BPA veterans preference violations)	Extreme	Legality/Defensibility of conduct actions. High standards of employee integrity, conduct, effectiveness, and service to the public. Prompt and just corrective action. Promotion of standards of conduct and efficiency that will promote the best interest of the service.	Executive Order/Memoranda; Statute; Regulation; OPM Guidance; Case Law-concern is consistency of application within the Department which creates a litigious matter	Avoidance	Prohibition of activities or operations/misconduct Regulation/Directive
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References

Risk/Opportunity Categories

- People – Risks that affect the individual well being.
- Mission – Risks that impede the ability of the department or offices to accomplish their mission.
- Assets – Risks that impact federal land, buildings, facilities, equipment, etc.
- Financial – Risks that may incur costs or obligations outside of DOE's control.
- Customer and Public Trust – Risks that affect the trust and political environment around DOE.

Probability Ratings

- Rare – even without controls in place, it is nearly certain that event would not occur
- Unlikely – without controls in place, it is unlikely the event would occur
- Possible – without controls in place, there is an even (50/50) probability that the event will occur
- Likely – without controls in place, the event is more likely than not to occur
- Certain – without controls in place, the event will occur

Impact Ratings

Rating	Risk	Opportunity
Negligible	Events of this type have very little short-term or long-term impact and whatever went wrong can be easily and quickly corrected with little effect on people, mission, assets, finances, or stakeholder trust.	A benefit with little or no improvement of operations or utilization of resources.
Low	Events of this type may have a moderate impact in the short term, but can be easily and quickly corrected with no long term consequences.	A benefit with minor improvement of operations or utilization of resources.
Medium	Events of this type have a significant impact in the short term and the actions needed to recover from them may take significant time and resources.	A benefit with somewhat major improvement of operations or utilization of resources.
High	Events of this type are catastrophic and result in long-term impacts that significantly affect the ability of the Department to complete its mission.	A benefit with major improvement of operations or utilization of resources.

Risk Level Ratings

Impact					
Probability		Negligible	Low	Medium	High
	Certain	Minor	Moderate	Extreme	Extreme
	Likely	Minor	Moderate	Significant	Extreme
	Possible	Minor	Moderate	Significant	Extreme
	Unlikely	Minor	Minor	Moderate	Significant
	Rare	Minor	Minor	Minor	Moderate

Risk Mitigation Options and Guidance

- Acceptance
- Monitoring
- Mitigation
- Avoidance

Unmitigated Risk / Strategy	Extreme	Significant	Moderate	Minor
Acceptance	<ul style="list-style-type: none"> • Not Appropriate 	<ul style="list-style-type: none"> • Not Appropriate 	<ul style="list-style-type: none"> • Not Appropriate 	<ul style="list-style-type: none"> • Risks can be handled through performance feedback and accountability
Monitoring	<ul style="list-style-type: none"> • Mandatory Contractor independent assessments • Federal oversight with a mandatory periodicity • Mandatory, periodic reporting 	<ul style="list-style-type: none"> • Mandatory Contractor Self-assessments with a minimum periodicity • Federal oversight with a periodicity that is based on performance • Mandatory, periodic reporting 	<ul style="list-style-type: none"> • Limited Federal oversight based on performance • Mandatory reporting of threshold events 	<ul style="list-style-type: none"> • Federal oversight on a for-cause basis • Standard performance evaluation processes
Mitigation	<ul style="list-style-type: none"> • Federal approvals of individual transactions • Detailed performance or process requirements • Detailed design requirements 	<ul style="list-style-type: none"> • Federal approvals of systems and programs • Detailed performance or process requirements • Detailed design requirements 	<ul style="list-style-type: none"> • Detailed performance requirements 	<ul style="list-style-type: none"> • General Performance Requirements
Avoidance	<ul style="list-style-type: none"> • Prohibition of activities or operations 	<ul style="list-style-type: none"> • Prohibition of activities or operations 	<ul style="list-style-type: none"> • Prohibition of activities or operations 	<ul style="list-style-type: none"> • Guidance