

**THE  
SOUTHWESTERN  
DIVISION  
CORPS OF ENGINEERS**

**ALTERNATIVE  
DISCIPLINE PROGRAM**

# **THE ALTERNATIVE DISCIPLINE PROGRAM GENERAL GUIDELINES**

## **Background**

In July 2008 the U.S. Merit Systems Protection Board issued a report to the President and Congress entitled “Alternative Discipline: Creative Solutions for Agencies to Effectively Address Employee Misconduct” (hereinafter “MSPB Report”). The MSPB Report encouraged federal agencies to develop guidance on the use of alternative discipline “in order to ensure that human resources staff can properly advise managers on the issues to consider when determining if alternative discipline is appropriate and, if so, what approaches should be considered.”

## **What is Alternative Discipline (AD)?**

AD is a form of alternative dispute resolution (ADR) that can be used effectively to resolve, reduce, or even eliminate workplace disputes that might come from a circumstance where disciplinary action is appropriate. As the term suggests, AD is an alternative to traditional discipline, which is imposed without the employee’s consent or agreement.

For example, what if a supervisor has an employee who is regularly absent without approved leave (AWOL)? The employee has already suffered a self-inflicted loss of pay for those days when he/she did not come to work to perform the duties of his/her position. Is sending the employee home with no duties and no pay likely to positively alter the employee’s conduct? Does imposing discipline that causes the same result as the misconduct adequately send the message that the conduct must cease? This is a good example where the supervisor may want to try a method other than a suspension without loss of duties and pay.

## **When can AD be offered?**

- AD may be offered in any employee’s misconduct case that warrants traditional penalty up to and including removal. However, not every situation is appropriate for AD, and it is management’s sole discretion as to when to use AD. AD should not be used if management has reason to believe traditional discipline is more appropriate. AD will also not be offered when an employee’s misconduct requires a certain penalty by statute.
- AD can be offered or discussed at varying stages, including before or after a proposed letter of discipline, or even in conjunction with a decision letter, if management chooses. Management is encouraged to enter into AD discussion with their Human Resource (HR) Specialist, and Office of Counsel (OC); and, if appropriate, enter into an AD agreement as early in the process as possible. The most likely stage to engage in AD discussion is after a determination has been made as to the employee’s wrong-doing. Either management or the employee can opt to engage in AD discussion. At management’s discretion, AD can also be offered in conjunction or after a proposed action has been given. However, parties are encouraged to enter into the AD process as early as possible to prevent the time, administrative requirements, and workplace tension that can occur with traditional discipline.

- Consultation with the servicing Civilian Personnel Advisory Center (CPAC) and local Office of Counsel is a requirement to offer AD. The HR Specialist and/or OC will provide guidance regarding the AD, appropriate traditional discipline, and reasonable AD options. The HR Specialist may also serve as the facilitator for the AD discussion between the employee and management, and may assist OC with the preparation of the AD agreement. OC will prepare and finalize the AD Agreement, as it is a legal contract.

### **What are the advantages of participating in the AD Program?**

1. It strengthens the supervisor and employee relationship because the AD process is less confrontational than the traditional process. Unlike traditional discipline, the employee and supervisor agree upon the terms of the discipline and the employee commits to corrective behavior in the future.
2. It is more rehabilitative than punitive. It promotes the employee's rehabilitative behavior in that the employee takes ownership for his or her offense. One of the key components of an AD agreement is that the employee acknowledges his/her wrong-doing, and willingly accepts corrective measures. Moreover, often the corrective measures relate to the offense committed by the employee, which further rehabilitates the employee and can also be a benefit to the organization.
3. The organization retains the services of an employee instead of losing productivity in cases where the employee would have been given a traditional suspension. In these situations, there is little to no interruption to the organization's daily work productivity, and little to no need to have other employees work harder or extra hours to perform the duties of the suspended employee.
4. The AD process saves processing time and paperwork, in that management can bypass the proposed and decision letters of traditional discipline. Likewise, the employee's preparation, need for official time, and presentation of his or her reply is also diminished. Through AD, management and the employee agree upon the corrective actions, and the agreement is all inclusive of the offenses, and conditions of the AD. Even if the AD Agreement is not implemented until after the proposed action has been given, it still saves the time of decision action and potential litigation.
5. Lastly, the administrative and legal costs are significantly reduced since the employee waives his/her grievance, EEO complaint, and appeal rights with respect to the particular action. AD also helps to avoid the lost time and productivity that supervisors, deciding officials, witnesses and others have to spend preparing for and attending hearings or other dispute resolution proceedings when traditional discipline is used.

### **What are the requirements for choosing AD?**

- Generally, the employee acknowledges responsibility for the misconduct giving rise to the need for corrective/disciplinary action, and expresses remorse for such conduct, agreeing not to repeat the misconduct.

- The manager with input from OC and HR determine that AD has a good probability of preventing further misconduct by the employee.
- The employee agrees to waive all grievance, MSPB appeal and/or EEO complaint rights with respect to the particular action. The employee also agrees to waive grievance and appeal rights in connection with the particular instance of misconduct, even if traditional discipline is later imposed because the employee fails to fulfill the terms of the alternative discipline agreement. However, an employee may not waive prospective EEO rights.
- The use of AD in cases involving bargaining unit employees must not be precluded by any applicable union's Collective Bargaining Agreement. Note: Where a term of an AD agreement affects a condition of employment of one or more bargaining unit employees (other than the employee whose conduct is at issue), management is obligated to notify the Union and give it the opportunity to exercise its representational rights.

### **What are some examples of AD options?**

1. Employee donates annual leave to a leave bank or leave transfer program equal to the amount of time that would have been spent on a suspension under the traditional disciplinary program.
2. Employee performs hours of community service equal to the amount of time that would have been spent on a suspension under the traditional disciplinary program.
3. Employee performs hours of volunteer service in a drug and alcohol center, if offense is drug or alcohol related.
4. Employee performs research on the issue of the particular misconduct to better understand the harm it causes to the work unit and then provides training or a briefing to others to share the knowledge.
5. Employee issues a public apology to individuals affected by the misconduct.
6. Employee agrees to work less desirable duty shifts for a particular period of time (provided there is no Collective Bargaining Agreement prohibition on this).
7. Employee attends an appropriate program approved by the Employee Assistance Program (EAP) (e.g. for misuse of a travel card, the employee attends debt management classes; for shouting at a supervisor or co-worker, the employee attends anger management classes; or for substance abuse, the employee enters a substance abuse program).
8. Employee serves the suspension on a weekend or other non-duty days to enable the agency to continue the use of the employee's services and to prevent a financial impact on the employee, while still recording a suspension in the employee's record.
9. Employee serves a suspension in smaller pieces over the course of multiple pay periods to soften the financial impact.
10. Employee's suspension is recorded as LWOP so that there will be no permanent record of the disciplinary action.
11. Employee agrees to save up a specified amount of sick and annual leave to be used for emergency purposes.

12. Employee receives a lower level action or lesser penalty. (AD should not be used to require an employee to waive any rights in order to obtain a lesser penalty when that lesser penalty was already the appropriate degree of discipline. However, it may be used to reduce the penalty below the level management believed was otherwise appropriate if the employee offers something in exchange, such as an acceptance of responsibility and an acknowledgement that the behavior was inappropriate).
13. Employee's penalty is held in abeyance; if there is another incidence, the penalty takes effect, if there are no future incidences for the life of the agreement, the penalty will not take effect.

### **What are the procedures to offer AD?**

*The steps below are not absolutes, but represent the general steps that may occur when disciplinary action is deemed warranted and alternative discipline is considered.*

**Step 1.** The immediate supervisor will determine if misconduct has occurred which warrants a formal disciplinary action. The supervisor will obtain information from witnesses and will discuss the matter with the employee. The supervisor will also consider the employee's response/explanation and determine if disciplinary action is warranted.

**Step 2.** If the supervisor regards disciplinary action to be warranted, the immediate supervisor will work with their HR Specialist and Office of Counsel (OC) to discuss the issue and the evidence obtained. The HR Specialist and/or OC will provide information regarding traditional and alternative discipline and will consult with OC. The supervisor and HR Specialist together with OC will determine if AD would be appropriate, and consider various AD options.

#### **Step 3.**

a. If the supervisor chooses AD, the supervisor will discuss his or her findings with the employee and advise regarding traditional penalties for the misconduct. Bargaining Unit employees will be notified of this meeting and offered union representation as consistent with the applicable bargaining unit agreement. The supervisor will then offer to engage in AD discussion. If the supervisor opposes AD, he/she will proceed with traditional disciplinary action and the employee will be afforded due process.

b. If management originally felt that AD should not be offered; management may reconsider if the employee specifically requests it and acknowledge his/her wrong-doing; barring a required penalty by law. If the supervisor still considers AD to be inappropriate, the supervisor will advise the employee and provide his or her reasons. The supervisor will then proceed with traditional disciplinary action and the employee will be afforded due process.

**Step 4.** If AD is offered, the supervisor and HR specialist will meet with the employee in person or telephonically. Union representation for bargaining unit employees will be in accordance with the negotiated contract. The employee will be presented with the AD offer and will have the opportunity to discuss the proposed penalty, provide accuracy of the offense, and to counter the

proposed AD offer. Ultimately, the decision to grant AD and the terms of the AD offer will be management's decision in conjunction with OC and HR.

**Step 5.** If a tentative AD Agreement is reached, OC will draft the Agreement and the employee will be given a copy for his/her review, additional consideration, and consultation with his/her attorney. After the period of consideration, the supervisor will meet with the employee, OC, and HR to finalize the AD Agreement. A copy of the signed final Agreement will be provided to each of the parties, and the original will be maintained in the Civilian Personnel Advisory Center (CPAC), unless otherwise stated, and the required Personnel action, if applicable, will be processed by the CPAC.

**Step 6.** If a tentative or final agreement is not reached, as AD is a voluntary process, management will continue with the traditional disciplinary action, and the employee will be given full due process, including the proposed and decision letters, opportunity to respond to the proposed letter, and opportunity to file his/her grievance, MSPB appeal, if applicable, or EEO complaint against any decision action that the employee deems unwarranted.

**In Summary:** If a determination is made by management, working in conjunction with the CPAC, that disciplinary action is warranted, AD may be considered. OC will be consulted. If it is determined that AD may be appropriate, the matter will be discussed with the employee. If the employee is a bargaining unit employee, all actions will be in accordance with the bargaining unit agreement. AD is voluntary and is only by mutual agreement. If all parties agree to AD, the terms of the AD agreement will be discussed, with both employee and management given time to review the terms of the agreement and have a legal review completed. If all parties agree to the terms of the AD agreement, it will be executed and implemented. If not, the traditional disciplinary process will continue, and the employee will be given full due process.

**Where can I find additional guidance related to AD?**

**Office of Personnel Management**

[http://www.opm.gov/er/adrguide\\_2002/section2-alt\\_discipline.asp](http://www.opm.gov/er/adrguide_2002/section2-alt_discipline.asp)

**Merit Systems Protection Board.** Click on Recently Released Studies dated October 15, 2008, then "Alternative Discipline: Creative Solution for Agencies to Effectively Address Employee Misconduct" found at: <http://www.mspb.gov/sites/mspb/pages/MSPB%20Studies.aspx>

**SAMPLE ALTERNATIVE DISCIPLINE AGREEMENT**

**1. Voluntary acceptance of Agreement.**

I, \_\_\_\_\_, voluntarily choose to accept the terms of this Agreement. I willingly admit to my misconduct described below and I accept responsibility for my behavior. I understand that if I do not choose to accept the terms of this Agreement, management will propose a specific penalty under the *traditional discipline* process, and I may have the right to contest the action under grievance, equal employment opportunity (EEO), Merit Systems Protection Board (MSPB), or other appeal procedures, as appropriate.

**2. Description of the offense(s):**

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**3. Employee agreement and commitment:**

a. I, (employee name) agree that my conduct as described in paragraph 2 was inappropriate, and that disciplinary action was warranted.

b. I will improve my behavior in the future by (list appropriate actions).

c. In lieu of the traditional penalty that could have been issued against me, I hereby voluntarily agree to the following as Alternative Discipline

(AD): \_\_\_\_\_

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d. *Other employee commitments:* As applicable.

e. I understand that \_\_\_\_\_ could have been my traditional penalty and I could have elected to proceed with the traditional penalty. I further understand that if I had elected to proceed with the traditional penalty that I would have incurred rights to obtain all documentation supporting the disciplinary action, provide a response, receive a decision, and file a grievance, complaint, or appeal against the action, as applicable. I acknowledge that by accepting this AD Agreement, I freely waive the above rights to the traditional process and penalty.

f. I acknowledge I have been afforded reasonable time to consider the terms of this Agreement and to seek advice from an attorney or representative of my choice, at no cost to the Federal Government. I waive any and all claims for attorney fees.

g. I freely agree to waive all grievances, EEO, MSPB appeal, or other appeal rights over matters related to this Agreement, the AD conditions imposed within it, and any disciplinary action reinstated and taken as a result of my violating the terms of this agreement. This waiver includes, but is not limited to, MSPB appeals, Department of Defense (DoD) grievance procedure, and non-prospective EEO complaints. I willingly waive any and all right to grieve, appeal, file a complaint, or otherwise contest actions taken in relation to the conditions of this agreement. In signing this agreement, I hereby withdraw any and all of my current appeals, grievances, MSPB appeals, and/or EEO complaints relating to this matter.

h. I affirm that I have not been subjected to duress or coerced into entering into this Agreement, and that my decision to enter into this Agreement is completely voluntary. I also affirm that I fully understand the nature of the waivers contained in this Agreement.

i. I affirm that I have read this entire Agreement and understand all terms of this Agreement. I have consulted with an attorney or have freely decided not to consult with an attorney. I affirm that I have not been induced to enter into this Agreement by any promises or representations other than those expressly stated in this Agreement.

*(If employee is alleging age discrimination, applicable Older Worker Benefit Protection Act (OWBPA) language will be added).*

#### **4. Agency agreement and commitment:**

In consideration of the employee's acknowledgement of the misconduct and the employee's commitment to refrain from future misconduct, the agency agrees to limit the proposed traditional penalty of \_\_\_\_\_  
to an alternate action of \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Other agency commitments: As applicable.*

#### **5. Duration, Effect and Amendment.**

a. Parties agree that there are no terms or conditions to this Agreement other than those terms and conditions expressly stated in writing herein. This Agreement may be modified only by a written agreement signed by all parties of this Agreement.

b. Parties agree that this Agreement shall not serve as precedent for resolving any other complaints, grievances, appeals or actions that have been or may be filed, by Employee, or any other person or entity.

c. This Agreement "may be" relied upon to support more progressive disciplinary actions while it remains in effect. Employee violation of these terms, by commission of further misconduct, or failure to successfully complete all agreed upon terms, conditions, and commitments, will trigger implementation of the traditional penalty, without advanced notice or further due process. The

employee will also forfeit any costs already incurred in meeting the AD commitments of the Agreement.

d. This Agreement will remain in effect for a period of \_\_\_\_\_ years from the effective date of this agreement. Should the employee leave the organization or agency prior to final disposition of this agreement, (*identify what will happen to all records of the action*).

e. The effective date of this Agreement is the last date it is signed by all the parties. The parties hereby agree to the above terms, without additional modification or amendment.

I HAVE CAREFULLY READ THE FOREGOING AGREEMENT. I UNDERSTAND THE TERMS OF THIS AGREEMENT AND I SIGN THE SAME AS MY OWN FREE AND VOLUNTARY ACT AND CONSIDER MYSELF SOLEMNLY BOUND BY THE PROVISIONS CONTAINED THEREIN.

|            |       |                           |       |
|------------|-------|---------------------------|-------|
| _____      | _____ | _____                     | _____ |
| Employee   | Date  | Employee's Representative | Date  |
| _____      | _____ | _____                     | _____ |
| Supervisor | Date  | Office of Counsel         | Date  |

## **ALTERNATIVE DISCIPLINE DESCRIPTION OF THE AGREEMENT CONTENT**

**Each item listed below corresponds to the AD agreement by item number.**

**Item 1. Voluntary acceptance of Agreement.** The employee will not be forced or coerced into signing the agreement or induced by incentives not reflected in its terms. If the employee chooses to decline the offer of AD, the AD process ends. The immediate supervisor will pursue traditional discipline.

**Item 2. Description of the offense(s).** This part of the agreement describes the charges or issues of misconduct that the immediate supervisor believes will sustain a disciplinary action. An addendum may be used if additional space is required, but must be referenced in the body of the agreement.

**Item 3. Employee agreement and commitment.** The standard terms of the alternative discipline, along with the employee's agreement and commitment are provided in item 3. The immediate supervisor, in conjunction with the HR Specialist and Office of Counsel determines what the traditional penalty would have been, and what AD options will be offered. The employee will have the opportunity discuss the AD options offered, request different AD options, and request changes to other terms of the AD agreement. However, the final decision for the terms of the alternate discipline will rest with the supervisor, but should be made in agreement with the employee. The traditional penalty and the alternate discipline commitments are documented in the spaces provided in item 3.

The employee may commit to other conditions of behavior improvement, such as that identified below. An addendum may be used if necessary, but must be referenced in the body of the agreement. **Prospective (future) Equal Employment Opportunity (EEO) rights cannot be waived by the employee. The employee may waive EEO rights related to the immediate action. Additionally, certain situations (i.e., age discrimination complaints) require specific statutory waiver language under the Older Worker Benefit Protection Act (OWBPA) or they are not considered valid. If an employee is alleging age discrimination, but is voluntarily entering into the AD Agreement, additional waiver clauses and time periods to review or revoke the Agreement may be included in the Agreement. The OC will determine the appropriate OWBPA language that is needed, and include it in the Agreement.**

Some examples of employee commitments that can be incorporated into an AD agreement at section 3c are as follows:

**a.** I agree to contact the Employee Assistance Program Counselor within 48 hours after signing this agreement to arrange a personal evaluation. If recommended, I agree to participate in and successfully complete counseling identified by the EAP Counselor. No duty time will be authorized beyond the initial EAP evaluation. I will sign consent form authorizing my supervisor to be informed by the EAP Counselor of my attendance and progress.

b. I agree to comply with the regulatory requirements for securing proper supervisory approval of leave.

c. I will accumulate at least 40 hours of annual leave for emergency situations within six months from the effective date of this Agreement, barring an expressed through an Amendment to this Agreement, and signed by all the parties to this Agreement.

d. I agree to research and develop on my own time, a training program governing the appropriate use of the government travel charge card and completion of travel vouchers. I will present this training to my co-workers during the regularly scheduled staff meeting.

**The following websites are provided for employee reference.**

Regulatory guidance governing various employee relations matters  
<http://cpol.army.mil/cgi-bin/permis/tree.cgi?MainSection=MERP>

The Department of Army Table of Penalties :  
<http://cpol.army.mil/library/permis/5a111.html>

The Joint Ethics Regulation, DoDD 5500.7-R  
[http://www.dod.mil/dodgc/defense\\_ethics/ethics\\_regulation/](http://www.dod.mil/dodgc/defense_ethics/ethics_regulation/)

**Item 4. Agency agreement and commitment.**

**Penalties** –The traditional penalty and the alternate discipline penalty are documented in the spaces provided in item 4.

There are various different penalties that can be offered, such as:

a. The immediate supervisor could propose a traditional penalty of a one or two-day suspension without duty and pay for a misconduct offense and offer an employee an alternate penalty of a one-year reprimand. The Agreement would serve as the reprimand document.

b. The immediate supervisor could propose a traditional penalty of a three-day suspension but offer the employee the option of recording three days of LWOP on his/her time and attendance for specified dates, or to donate up to 24 hours of annual leave in lieu of a three day suspension.

c. The supervisor could propose the traditional penalty of a removal, but offer the employee a suspension, such as a seven to fourteen day (7 – 14 day) suspension, along with other employee commitments.

**Other agency commitments** –Some examples of agency commitments that can be incorporated into an AD agreement at item 4 are as follows:

a. The supervisor can commit to approve leave related to attending treatment programs, such as drug and alcohol, anger management, or stress management.

b. The supervisor can commit to restoring leave or changing leave without pay (LWOP) or absence without leave (AWOL) to paid leave or advanced leave.

c. The supervisor can commit to providing additional training, if applicable.

**Other considerations** – *Care must be exercised when agreeing to purge certain records, e.g., law enforcement investigative reports and files cannot be purged. Also note that agreeing to a “clean record” is problematic and needs to be specifically defined, i.e., the Agency agrees to remove the following specific documents from the employee’s Official Personnel Folder (OPF). Once agreement has been reached between the immediate supervisor and the employee, in conjunction with HR and OC, the action is complete and there is no need to involve a deciding official. If agreement cannot be reached, then traditional discipline is pursued with a proposal notice, the employee’s response, if any; and a decision memo based upon the case merits and any mitigating facts. The employee would be afforded complete due process.*

**Item 5. Duration, Effect and Amendment.** The agreement duration is determined and documented at this item. The date of the last individual’s signature completes the Agreement and makes it effective. There will be no changes after the final signature, and the agreement will be considered complete after the last signature. The Agreement may be considered a form of past discipline for the purposes of establishing progressive discipline, particularly if the employee was informed of the disciplinary action in writing; the disciplinary action is a matter of record; and the employee was given the opportunity to dispute the charges to a higher level than the authority that imposed the discipline. This Agreement will be maintained in the servicing Civilian Personnel Advisory Center disciplinary files, and will remain there until the duration of the Agreement has been fulfilled.