NEVADA DEPARTMENT OF CORRECTIONS
ADMINISTRATIVE REGULATION
341

EMPLOYEE MISCONDUCT AND PERFORMANCE ADJUDICATION

Supersedes: AR 341 (Temporary, 10/25/09)
Effective date: 08/13/10

AUTHORITY: NRS 199.325, 284.383, 284.385, NAC 284.638, 284.642, 284.646, 284.648, 284.670, 284.474, 284.478

RESPONSIBILITY

1. The Warden/Division Heads are responsible to review misconduct complaint investigations and adjudicate subordinate employee culpability and make recommendations for corrective or disciplinary action. Warden/Division Heads are further responsible to ensure compliance with this Administrative Regulation (AR).

2. The Training Manager is responsible to develop and deliver training on this AR.

341.01 ADJUDICATING COMPLAINTS

1. Adjudications are based upon a review of the completed misconduct investigation report and upon factual reasonable consideration of the evidence and statements presented in the investigation. Determining whether misconduct occurred precludes the consideration of mitigating factors.

A. If appropriate, mitigate the penalty, not the misconduct.

2. The Warden/Division Head should first, determine whether misconduct did in fact occur, and second, assess the appropriate corrective /disciplinary action recommendation. These are two distinctly different processes.

3. The first task is to decide whether misconduct occurred. A determination of culpability is based upon a standard of "Substantial Evidence."

A. A standard less than "Beyond a Reasonable Doubt" or "Preponderance."

B. **"Substantial Evidence" is any evidence to cause a reasonable person to conclude the alleged activity occurred. The Department should demonstrate that any action is not arbitrary or capricious, but rather based on facts.**

4. The Warden/Division Head should review each allegation individually and separately and arrive at a conclusion based upon the standard of "Substantial Evidence" for each allegation or issue investigated.

A. Traditionally, much emphasis has been placed on so-called independent witnesses. Wardens/Division Heads should understand that a lack of bias is but one element in assessing credibility.

B. Further, adjudications are not based upon a popular vote (five say it happened and one says it did not.) The relevant issue is credibility not quantity.

5. Adjudications should be based upon the totality of the evidence. It is the Warden/Division Head's responsibility to determine believability and credibility of witnesses.

6. The Warden/Division Head may consider anything that has a reasonable tendency to prove or disprove the truthfulness of testimony. Some factors to consider in making this determination may include:

A. The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of the matter about which the witness provided statements.

B. The ability of the witness to remember or communicate information given in any statement.

C. The character or quality of the statement provided.

D. The demeanor and manner of the witness while providing the statement.

E. The existence or non-existence of any fact stated by the witness.

F. The attitude of the witness toward the investigation or toward giving a statement.

G. Prior consistent or inconsistent witness statements concerning the matter.

H. The character of a witness for honesty and truthfulness or the opposite. For example, patterns of conduct identified through documented work and misconduct histories or performance evaluations might be relevant in weighing employee credibility.

I. An admission by the witness of untruthfulness.

J. The existence or nonexistence of bias or motive.

K. The witness has a felony conviction.

7. The above enumerated factors should be considered collectively rather that as separate, unrelated factors

8. The Warden/Division Head should make a finding for each allegation and that finding should fall into one of the following categories:

A. **Sustained** – Investigation and evidence supports that the accused committed all or part of the alleged act.

B. **Not Sustained** – Investigation produced insufficient evidence or information to clearly prove or disprove the alleged act. This category is justified when there is a lack of witnesses or other objective and persuasive proof.

C. **Exonerated** – The conduct or act occurred but was justified, legal and proper.

D. **Unfounded** – The alleged act did not occur.

341.02 ASSESSING CORRECTIVE/DISCIPLINARY ACTION

1. In every instance of sustained allegations, the Warden/Division Head shall consult AR 339 for Class of Offense Guidelines and Chart of Corrective/Disciplinary Action to determine the appropriate Prohibition and Penalty for each Sustained allegation in order to arrive at the recommended Corrective/Disciplinary action.

2. Corrective/Disciplinary Action should be progressive, i.e., except in cases of serious violations of law or regulations, less severe measures are applied first, after which more severe measures are applied only if the previous measures have failed to correct the deficiencies.

3. Appropriateness of disciplinary action is determined by the severity of the offense and any past Corrective/Disciplinary Action for related offenses by the employee. In arriving at an appropriate recommendation, the Warden/Division Head should consider all factors relevant to the circumstances of the misconduct, including mitigating and aggravating factors. Those factors might include:

A. Motive – self interest vs. public interest.

B. Damage – degree of harm caused by the behavior, security violations.

C. Experience – the lack of it and the expectations for those who have it.

D. Intent – intentional contempt, malice or disregard of rules vs. momentary lapses or carelessness.

4. In cases involving more than one sustained violation:

A. Corrective/Disciplinary action can begin with the most serious violation. Other related violations may then be considered as aggravating circumstances when determining the appropriate penalty from within the minimum and maximum recommended range.

B. Or, each violation may be individually considered and the penalties cumulated.

5. The Warden/Division Head should consult with the Department Personnel Office regarding the affected employee's prior disciplinary history, and any documentation regarding past personnel actions imposed for like offenses.

6. Once the Warden/Division Head determines the recommended Corrective/Disciplinary Action, the Deputy Director shall be contacted and apprised of the recommendation.

A. Issues presented as aggravating or mitigating factors justifying variance from AR 339 guidelines should also be discussed with the Deputy Director.

7 Prior to proceeding, the Warden/Division Head must obtain concurrence from the Deputy Director for the Corrective/Disciplinary Action recommendation.

8 Following concurrence, the Warden/Division Head should prepare the Adjudication Report. The concurrence date should be included in the Adjudication Report.

341.03 ADJUDICATION REPORT

1. The Adjudication Report should be completed according to the format prescribed in this regulation. Reports submitted in other than the prescribed format will be returned to the concerned Warden/Division Head for corrections.

2. The Office of the Inspector General will assign a specific due date for completion of the Adjudication Report and any related documents (Specificity, Letter of Reprimand, etc.) The Warden/Division Head shall ensure compliance with that due date. In the event of a delay due to unusual or unforeseen circumstances, the involved Warden/Division Head should contact the Office of the Inspector General for an extension.

3. The Adjudication Report is completed in the standard Memo format using Times New Roman 12 pt. font. Pages should have a header (disabled on the first page) that includes on line 1 the title "Adjudication Report – IA-xxxx-xx" and on line 2 the page number. Margins should be 1", all around, for all pages. (See the attached "Adjudication Report Sample")

4. The Adjudication Report should be from the concerned Warden/Division Head, to the Inspector General.

5. The Adjudication Report is divided into seven sections, separated by the following headings: (See the attached "Adjudication Report Sample")

A. ADJUDICATION

B. ALLEGATION

C. CLASSIFICATION

D. RATIONALE

E. CORRECTIVE ACTION/DISCIPLINARY RECOMMENDATION

F. DEPUTY DIRECTOR CONCURRENCE

G. EMPLOYEE NOTIFICATION

6. The **ADJUDICATION** section provides a short introduction with the following information from the investigation.

A. Complainant fully identified

B. IA number

C. Number of allegations

D. Number of employees accused

E. Employees fully identified

7. The **ALLEGATION** section specifically identifies each allegation and should read exactly as it read in the investigation report, including the Allegation reference number. **(DO NOT RE-NUMBER THE ALLEGATIONS FOR THE ADJUDICATION REPORT.)** Each entire allegation should be **bolded** to make it stand out from other text. The first allegation follows immediately from the lead-in sentence on a new line. (See the attached "Adjudication Report Sample")

8. The **CLASSIFICATION** section follows each Allegation. A single line should follow the heading, recommending one of the following classifications: (See the attached "Adjudication Report Sample")

A. Sustained

B. Not Sustained

C. Exonerated

D. Unfounded

9. The **RATIONALE** section follows each Classification section. The rationale should be a concise discussion which weighs the evidence (e.g. statements, witness credibility, physical evidence, test results, etc.) in support of the recommended classification. **(Personal opinions, comments, editorials on the merits of the case should not be included in the Rationale.)** Rationales should be based upon factual, reasonable consideration of the evidence and statements presented during the investigation. (See the attached "Adjudication Report Sample")

10. Each subsequent Allegation would follow, using the same format: Allegations in **bold**, then the Classification and Rationale sections following. (See the attached "Adjudication Report Sample")

11. If during the adjudication process, the Warden/Division Head identifies that the investigation supports misconduct as an included offense that is not formally addressed in one of the existing allegations, the Warden/Division Head may add a heading to the Adjudication Report, **MISCONDUCT NOT BASED ON ORIGINAL COMPLAINT.** When adding this heading, the Warden/Division Head shall formulate the appropriate allegation using "Prohibitions and Penalties" outlined in AR 339. A Classification and Rationale shall be prepared for the additional allegation following the guidelines above.

12. The **CORRECTIVE ACTION/DISCIPLINARY RECOMMENDATION**
This section should follow the last Rationale section of the last Allegation addressed. If there are no Sustained allegations, there will be no recommendation. For Sustained allegations, the Corrective Action/Disciplinary Recommendation section should include a discussion of each employee against whom a classification of Sustained was recommended. Include the following elements in the discussion:

A. Recommended penalty

B. Rationale for recommending the penalty, which should include a discussion of progressive discipline, the Class of Offense, Chart of Corrective/Disciplinary Guideline, the intent/motivation of each employee, the employee's experience, and appropriate prior Corrective/Disciplinary history.

13. The **DEPUTY DIRECTOR CONCURRENCE** section should include the name of the Deputy Director with whom the recommended Corrective Action/Disciplinary Recommendation was discussed, the date of the discussion, and the fact that the Deputy Director concurs with the recommendation. This step is necessary only on sustained allegations.

14. The **EMPLOYEE NOTIFICATION** section should include the date(s) the Warden/ Division Head met with each accused employee concerning the adjudication of the complaint. The section should also include information that the employee was provided a

"Result of Adjudication Report". The "Result of Adjudication Report" can be located on the Department shared drive.

15. In those instances where Adjudication results in a Sustained allegation and a Disciplinary action recommendation involving a Letter of Reprimand, the Warden/Division Head should prepare those documents and forward them with the Adjudication Report.

16. Imposition of any recommended Disciplinary action involving Specificity of Charges should occur only after appropriate final review by the Warden/Division Head and/or the Office of the Attorney General in compliance with the provisions of AR 343.

17. When using the Short Form Investigation Report, the Adjudication Report can be completed as part of the investigation report as outlined in the Office of the Inspector General's Complaint Investigation Guide. (See Section 8, Complaint Investigations, A Guide for Investigators.)

341.04 EMPLOYEE MEETING

1. At the conclusion of the Adjudication process, the Warden/ Division Head should meet with all accused employee(s) and advise them of the findings and recommendations.

   A. Ensure the employee understands this is only a recommended action, subject to Deputy Attorney General review.

2. During this meeting, the accused employee(s) should be given the "Result of Adjudication Report" (DOC-1096).

3. This meeting should not to be confused with any subsequent pre-disciplinary hearing and should not be used to question the employee or conduct further investigation. The purpose of this meeting is to apprise the employee(s) of the findings and recommendations only.

341.05 REPORTING AND ADJUDICATING EMPLOYEE PERFORMANCE ISSUES

1. Employee Performance issues should be addressed at the lowest appropriate level of supervision and adjudicated using progressive corrective or disciplinary action from Verbal Counseling through Specificity of Charges.

2. All actions should be properly documented using appropriate Department forms. (i.e. Performance Cards, Letter of Instruction, Letter of Reprimand, etc.)

341.06 NRS 289 – FILE REVIEW

1. For sustained allegations which will result in disciplinary action, employees may request copies of the Investigative file.

2. Requests to review or copy the Investigative file shall be submitted by utilizing form DOC-1066.

3. Requests should be forwarded to the Department Personnel Division.

APPLICABILITY

1. This regulation applies to investigations of all classified and unclassified Department employees.

2. This regulation does not require an audit.

REFERENCES:

ACA Standards 4-4048, 4-4050, 4-4051, 4-4052, 4-4058, 4-4061, 4-4062, 4-4063 and 2008 Supplement

Howard Skolnik, Director

7/20/10
Date