



Disciplining Employees Facing Criminal Charges

This guidance is provided for situations where agencies are called upon to investigate and/or discipline employees who have been charged with criminal misconduct

At the outset, it should be clear that basing disciplinary decisions on the filing of criminal charges is risky because it links the outcome of the disciplinary action to the disposition of the criminal charges, a matter over which we have little control. For this reason, the Office of Management & Budget/Human Resource Management advises agencies to decouple any disciplinary action from pending criminal charges. The reasons for this approach are as follows.

Criminal cases may be pled down, or defendants may be acquitted or receive probation before judgment (which is not technically a conviction). Alternatively, cases may be *nol prossed*, i.e., no further action is taken in the case by the prosecution. Ultimately, if the prosecution decides that there is insufficient evidence (or a lack of resources) to justify the criminal prosecution, the underlying basis for the disciplinary action falls, and we are left with no proof of misconduct. In all of these situations, the disciplinary action will be seriously—if not fatally—undermined because it is based on charges that did not result in a finding of guilt.

For all of these reasons, agencies must, therefore, conduct their own administrative investigation to determine whether an employee's conduct meets the just cause standard for discipline. In such cases, the decision to discipline must rise or fall on the outcome of that investigation.

Occasionally, employees facing criminal charges for workplace misconduct will attempt to avoid cooperating with our administrative investigation. Some employees may even invoke their Fifth Amendment right against self-incrimination. In such circumstances, we have directed employees to cooperate so that we can fulfill our responsibility as an employer to fully investigate allegations of misconduct on the job. The Department of Justice has recognized and acknowledged our obligation to do so.

Failing to follow this guidance may seriously inhibit our ability to hold employees accountable, and may also create avoidable cost liability in the form of back pay, plus unwanted, negative attention on the agency and the State.