




U.S. Department of Justice

Civil Division

Washington, DC 20530

MEMORANDUM

TO: Civil Division Employees

FROM: 
Catherine V. Emerson
Executive Officer

SUBJECT: Consideration of Misconduct in Making Favorable Personnel Action Decisions

DATE: OCT 15 2018

On April 30, 2018, former Deputy Assistant Attorney General for Human Resources and Administration Mari Barr Santangelo issued a memorandum¹ to all Department of Justice components, which put forth the requirement to consider alleged and substantiated misconduct in making decisions regarding awards, public recognition, and other favorable personnel actions for employees. Pursuant to the Department's directive, Civil Division supervisors shall take into account any alleged misconduct that is the subject of a pending investigation by the Office of Inspector General (OIG), Office of Professional Responsibility (OPR), Civil Division management, or other investigative authority, as well as any misconduct that has resulted in disciplinary action, when making such decisions.

This memorandum provides the Civil Division's guidelines and procedures for the consideration of misconduct when making favorable personnel action decisions. For purposes of this memorandum, a favorable personnel action means a cash award, quality step increase, time-off award, honorary award, career ladder promotion, or other form of public recognition.

These guidelines and procedures apply to all Civil Division employees. Non-Civil Division employees nominated for Civil Division awards will be subject to the applicable policies and procedures of their employing office.

¹ April 30, 2018 Memorandum from the Deputy Assistant Attorney General for Human Resources and Administration and Chief Human Capital Officer: "Consideration of Misconduct in Making Decisions Regarding Awards, Public Recognition, and Favorable Personnel Actions."

I. Consideration of Misconduct

Misconduct is an employee's failure to adhere to a workplace rule, code, standard of behavior or professional conduct, whether written or unwritten. When employees engage in misconduct, it can lower employee productivity and morale, as well as disrupt their co-workers' performance and agency operations.

A. Substantiated misconduct that resulted in formal disciplinary action

Substantiated misconduct that resulted in formal disciplinary action² will make an employee ineligible to receive a favorable personnel action other than a career ladder promotion. Such *per se* ineligibility for favorable personnel actions shall extend for the time periods listed below.

Formal Action	Duration of Ineligibility for Favorable Personnel Action
Letter of Reprimand placed in Official Personnel Folder (OPF)	12 months from the effective date of the Letter of Reprimand (not the date the Letter is placed in OPF)
Suspension from duty and pay for 14 days or less	12 months from the effective date of the suspension
Suspension from duty and pay for 15 days or more	24 months from the effective date of the suspension
Demotion (change to a lower grade)	24 months from the effective date of the demotion

Following these time periods, the bar on eligibility for favorable personnel actions will be lifted, and the misconduct will no longer be subject to the internal vetting procedures below.

B. Pending investigations into alleged misconduct or substantiated misconduct that has not resulted in formal disciplinary action

A pending investigation into alleged misconduct or substantiated misconduct that has not resulted in formal disciplinary action, does not *automatically* make an employee ineligible to receive a favorable personnel action. However, any alleged or substantiated misconduct must be taken into consideration by supervisors as discussed in the next section and may impact a supervisor's determination as to whether to nominate or approve a favorable personnel action.

II. Procedures

When making recommendations for and decisions on favorable personnel actions, supervisors must consider the potential impact on the workplace if a person engages in misconduct and then receives a favorable personnel action. Supervisors should contact the Office of Management Programs' Human Resources Office (HR) to determine if there is any alleged or substantiated misconduct to be taken into consideration prior to finalizing a nomination.

² Any grievance or appeal of a formal disciplinary action does not delay the implementation or effective date of the action and will not impact ineligibility for a favorable personnel action.

A. Favorable personnel actions (excluding career ladder promotions³)

Favorable personnel actions (excluding career ladder promotions) are subject to internal HR vetting procedures. The following steps will apply when nominating an employee for an award:

1. Upon receipt of an individual or group award nomination, HR will vet the candidate(s) for the following:
 - a. Unresolved concerns related to an employee's responsiveness to background investigation inquiries/issues that have been referred to the Branch or Office Director within the past six months;
 - b. Substantiated misconduct for which (1) formal discipline has been imposed; (2) no formal discipline has been imposed (includes matters that resulted in verbal counseling, counseling memoranda, leave restriction, and absence without leave [AWOL]) within the past six months); or (3) a final decision is pending on a proposed disciplinary action; and
 - c. Alleged misconduct that is under investigation by Civil Division management, the Office of Inspector General, Office of Professional Responsibility, or other investigative authority.
2. Upon completion of the vetting process, HR will report to the nominating officials and the following actions will occur:
 - a. if no negative information is identified, HR will notify the nominating supervisor that the candidate has been cleared and HR will forward the nomination to the approving official and/or process the favorable personnel action;
 - b. if there has been substantiated misconduct that resulted in formal disciplinary action within the timeframes outlined in Section I(A), HR will notify the nominating supervisor and, for *individual* nominations, will not forward the nomination to the approving official for consideration nor process the favorable personnel action;
 - c. if there has been substantiated misconduct that resulted in formal disciplinary action within the timeframes outlined in Section I(A), HR will notify the nominating supervisor and, for *group* nominations, will remove the candidate from consideration and will forward the revised group nomination to the approving official; or

³ Career ladder refers to the range of grades to which the employee may be promoted non-competitively up to the classified full-performance level of the position (e.g., paralegal, GS-950-7/9, or attorney, GS-905-12/13/14/15).

- d. if there is a pending investigation into alleged misconduct, or substantiated misconduct that has not resulted in formal disciplinary action, HR will notify the nominating supervisor and the following will occur, as appropriate:
 - i. The nominating supervisor will confirm in writing to HR whether they want to proceed with the nomination, modify the nomination, or withdraw the nomination from consideration. The nominating supervisor should take into account the factors discussed below in Section II(A)(3)(a)-(d).
 - ii. If the nominating supervisor confirms they want to proceed with the nomination, they will certify that they have taken the alleged or substantiated misconduct into consideration, and HR will forward the vetting results and the supervisor's written confirmation to the approving official.
3. The approving official will take the vetting results into consideration. In making determinations regarding whether to approve the nomination when there is an allegation of misconduct or substantiated misconduct, the approving official should consider the following factors:
 - a. the seriousness of the alleged or substantiated misconduct;
 - b. when the alleged or substantiated misconduct occurred;
 - c. whether the alleged or substantiated misconduct was job-related or affected an employee's ability to perform the duties of the position;
 - d. whether the alleged or substantiated misconduct occurred during on-duty or off-duty hours; and
 - e. the nominating supervisor's written confirmation.
4. The approving official will notify HR in writing of their decision to approve, deny, or modify the award.

B. Career ladder promotions

Career ladder promotions differ from other favorable personnel actions because 1) career ladders are established based upon a classification analysis that sufficient work exists for employees on a regular and recurring basis at the full performance level to support the grade, and 2) promotions are based on an employee's demonstrated ability to successfully perform the next higher level duties and responsibilities in the career ladder. Career ladder promotions will be vetted by HR only upon request.

Career ladder promotions are not automatic, and alleged or substantiated misconduct may impact a supervisor's decision to recommend or approve a career ladder promotion. Supervisors must take into consideration alleged or substantiated misconduct when determining whether to

recommend or approve a career ladder promotion. In making this determination, supervisors are to consider the following factors when there is alleged or substantiated misconduct:

1. the seriousness of the alleged or substantiated misconduct;
2. when the alleged or substantiated misconduct occurred;
3. whether the alleged or substantiated misconduct was job-related or affected an employee's ability to perform the duties of the position;
4. the impact of the alleged or substantiated misconduct on co-workers' ability to perform their duties or the office environment generally; and
5. whether the alleged or substantiated misconduct occurred during on-duty or off-duty hours.

Supervisors recommending a career ladder promotion must include the following statement in their promotion recommendation: "I certify that I have taken misconduct into consideration, if applicable and as appropriate, in determining whether to recommend the employee for a promotion."

III. Training

The Civil Division HR office will provide training for supervisors on considering alleged and substantiated misconduct when making decisions on favorable personnel actions.

IV. Record Keeping and Reporting

The Civil Division HR office will maintain records tracking the number of employees who are subjects of pending investigations or who have been disciplined for misconduct, and who receive an award, form of public recognition, or other favorable personnel action.

The Civil Division will conduct an annual review of the guidelines, procedures, and practices for monitoring and evaluating consideration of misconduct when granting awards and taking favorable personnel actions. The review period will encompass the calendar year (January 1 to December 31).

For questions regarding awards and favorable personnel actions, contact Michelle Ackley of HR on (202) 507-6074 or Michelle.M.Ackley@usdoj.gov. For guidance regarding misconduct and other employee relations matters, contact Lhatoya Reed of HR on (202) 507-6079 or Lhatoya.K.Reed@usdoj.gov.