STATECIVILSERVICE

# JOB AIDS AND RESOURCES

## FAQs – Notice of Proposed Action; Employee's Opportunity To Respond

*Revised 3/6/19*

***The examples and best practices listed here are illustrative only, and are intended only for use as general advice. An appeal decision is the product of applying the Civil Service Rules, Article and Constitutional principles of Due Process to the unique facts of each case. Accordingly, these FAQ's and the HR Handbook do not predict or guarantee a particular result.***

**Q. What is required?**
A. Oral or written notice to the employee of the proposed action, the factual basis for and a description of the evidence to support the proposed action, and a reasonable opportunity to respond.

**Q. Why is this necessary?**
A. Because the U.S. Supreme Court held that it is a matter of due process.

**Q. What is the purpose of the procedure?**
A. To help the agency avoid making a wrong decision by determining if there are reasonable grounds to believe the charges are true and support the proposed action.

**Q. Is this process required for non-disciplinary removals under Rule 12.6?**
A. Yes.

**Q. When is this process required?**
A. After the agency has received information leading it to consider disciplining or removing a permanent employee and before the appointing authority makes a final decision.

**Q. For a suspension pending criminal proceedings, who provides the employee notice of the proposed action and an opportunity to respond?**
A. The Commission.

**Q. Is this process required for non-permanent or unclassified employees?**
A. No.

**Q. What is the best method of providing notice of the proposed action?**
A. Written notice.

**Q. Why?**
A. Oral notice invites controversy over the charges and the proposed penalty.

**Q. How can an agency give notice of the proposed action if it has not decided on a penalty?**
A. The notice should advise the employee the most severe action under consideration. Many agencies advise the employee that "disciplinary action up to and including dismissal" is proposed. NOTE: to report a resignation as one to avoid dismissal, the employee must have been on notice that his dismissal was proposed.

**Q. What does "the factual basis" for the proposed action mean?**

A. The facts (including pertinent dates, times, places, and names) that support the proposed action, not the conclusions to be drawn from those facts. Generally, the factual basis includes who, what, when, where, why, and how.

**Q. Examples?**
A. "I propose to discipline you because on May 29, 2013, you did not comply with your supervisor's directive to place the completed XYZ report on her desk by 4:30 p.m." NOT "I propose to discipline you because you were insubordinate."

"I propose to discipline you because on May 30, 2013, in the day room at about 9:30 a.m., you pushed Client #45098 into the wall." NOT "I propose to discipline you because you abused a client."

"I propose to discipline you because on your application dated April 12, 2013, you indicated that you had not been convicted of a felony, but a criminal background check reveals that you were convicted of arson on May 10, 2011. NOT "I propose to discipline you because you falsified your application."

**Q. What does "a description of the evidence" supporting the proposed action mean?**
A. A list of whatever the agency has to support the charges – witnesses' statements, time sheets, log entries, copies of work product, copies of directives, complaint letters, computer reports, recorded meetings, etc.

**Q. Does the employee get to choose how he will respond?**
A. No. It is the agency's choice.

**Q. Does this mean the agency has to give the employee a hearing with witnesses?**
A. No. The employee is only entitled to an opportunity to respond.

**Q. What are the options for allowing the employee to respond?**
A. The agency can give the employee an opportunity to respond in writing, via email, orally over the phone, orally at a meeting, or any other communication method the agency chooses, so long as the employee is capable of communicating in the method chosen.

**Q. What is the best method?**
A. Written response.

**Q. Why?**
A. It eliminates a host of issues. First, with a written response there is no question what the employee said; an oral response invites controversy. Second, a written response is easy to convey to the decision-maker, especially if the decision-maker is a multi-member entity. The only way an agency can accurately convey an oral response to the decision-maker is for the agency to record it. For multi-member entities, this entails making multiple recordings or playing the recording during a meeting. Third, the employee can consult an attorney for assistance in preparing the written response without interfering with agency operations; a face-to-face meeting invites the "I want my attorney present" issue. Finally, the employee may be hostile; a face-to-face meeting could be dangerous.

**Q. What is a reasonable opportunity to respond?**
A. It depends on several factors: how many charges there are, how complicated the charges are, how recent the charges are, whether the employee needs access to records to prepare the response, etc.

Giving an employee one workweek from delivery of the notice of proposed action will usually be reasonable. Giving an employee fewer than three workdays to respond would rarely be reasonable. The purpose of the process is to get complete and accurate information from the employee so the appointing authority can make an intelligent decision. Rushing the employee defeats this purpose.

**Q. If both the notice and the response will be mailed, how many days should the agency give the employee to respond?**
A. 21 days from the date on the notice.

**Q. What should an agency do if the employee asks for clarification of the charges?**
A. Provide it.

**Q. What should the agency do if the employee asks for additional time to respond?**
A. Grant it unless it is unduly burdensome to agency operations.

**Q. Who should review the employee's response?**
A. The appointing authority making the decision.

**Q. Must the agency give the employee an opportunity to respond to all charges?**
A. Yes. On appeal, the agency will be limited to proving the charges to which it allowed the employee to respond. NOTE: this problem cannot arise if the agency requires the employee to submit a written response.

**Q. Is the notice of proposed action the same as the written notice of removal or discipline?**
A. No, the notice of proposed action/opportunity to respond is the preliminary step.

**Q. What are the problem areas?**
A. Mailing the disciplinary/removal letter before the employee's time to respond is up; failing to consider the employee's response, advising the employee that the decision has already been made.

**Q. What are the consequences of failing to provide this notice and opportunity to respond?**
A. If the employee appeals the action, the Commission or Referee will reverse the action and order the agency to pay back pay with interest and attorney's fees. The employee can raise this defect at any time, even for the first time at the Court of Appeal.

**Q. What if the agency realizes it did not provide the required notice and opportunity?**
A. The agency should seek approval under Rule 15.10 to rescind the action and start over.

**Q. If the agency rescinds the action for failure to provide the notice of proposed action/opportunity to respond, can it use the same charges in a new action?**
A. Yes.

**Q. What if the employee reveals additional disciplinable conduct in his response to the proposed action?**
A. If the agency wants to include the additional charges, it has to issue another notice of proposed action/opportunity to respond.

**Q. If the employee's response reveals that there were errors in the charges, does the agency have to issue another notice of proposed action to correct the errors?**
A. No. If the employee pointed out the errors, he was obviously aware of what conduct was at issue. However, the agency should correct the errors when it issues the disciplinary/removal letter.

**Q. What if the appointing authority decides to impose a penalty not listed in the notice of proposed action/opportunity to respond?**
A. The agency should reissue the notice of proposed action/opportunity to respond.

**Q. If the agency rescinds an action or loses an appeal on a procedural issue, must it issue a new notice of proposed action/opportunity to respond when it re-takes the action?**
A. The law on this is not well established. Therefore, issuing a new notice of proposed action is the safer course.