



1. **PURPOSE:** This directive sets forth the Transportation Security Administration (TSA) policies and procedures on the use of disciplinary and adverse actions to address employee performance and conduct problems. These policies and procedures recognize that TSA employees have the responsibility to perform functions critical to the safety and security of the United States. HRM Letter No. 752-1, "Interim Policy for Addressing Performance and Conduct Problems," dated July 29, 2002, was cancelled and superseded by MD 1100.75-1, issued on March 4, 2004. This directive rescinds MD 1100.75-1.
2. **SCOPE:** This directive applies to all TSA organizational elements.
3. **AUTHORITIES:**
 - A. Sections 101 and 111(d) of the Aviation and Transportation Security Act.
 - B. Sections 403(2) and 423, of the Homeland Security Act of 2002.
 - C. Applicable TSA and U.S. Department of Homeland Security delegations of authority.
4. **DEFINITIONS:**
 - A. Adverse Action: A suspension (of any length), including an indefinite suspension; a removal; or a reduction in pay band or rate of pay.
 - B. Day: Calendar day.
 - C. Disciplinary Action: A letter of reprimand or an adverse action.
 - D. Letter of Counseling/Letter of Guidance and Direction: A non-disciplinary written notice that sets forth management expectations and documents that an employee has been informed about conduct or performance that should be corrected or improved and what must be done to correct the deficiency(ies).
 - E. Letter of Reprimand: The least severe form of disciplinary action that may be issued to address a conduct or performance problem. A letter of reprimand may be placed in the employee's Official Personnel Folder (OPF) for a specified time, not to exceed two years. A supervisor may maintain a copy for their files.
 - F. Pay Band: The scale in which an employee's basic rate of pay is set.
 - G. Rate of Pay: The basic pay fixed by law or administrative action for the position held by the employee; that is, the rate of pay before any deductions and exclusive of additional pay of any kind, e.g., locality pay, night differential, or other premium pay.

H. Screener: An employee (Transportation Security Screener (TSS), Lead TSS, and Supervisory TSS) who occupies a position in the SV-0019 series.

I. Suspension: The placement of an employee in a non-duty, non-pay status for disciplinary reasons or during the pendency of certain investigatory or law enforcement proceedings (includes Indefinite Suspensions).

5. RESPONSIBILITIES: As necessary and appropriate, supervisors and managers are responsible for employing the personnel actions and procedures set forth in this directive to assist in maintaining workplace order, efficiency and productivity.

6. POLICIES & PROCEDURES:

A. Coverage:

1. **Employees Covered**: For the purpose of initiating appropriate disciplinary action, the requirements and procedures of this directive apply to all TSA employees (screeners and non-screeners), including those employees in Transportation Senior Executive Service (TSES) positions.

2. **Employees Not Covered**: The requirements and procedures of this directive do not apply to screener personnel while serving an initial period of training or orientation.

3. **Actions Covered**:

- a. Letter of counseling or a letter of guidance and direction;
- b. Letter of reprimand;
- c. Suspension of any length, including indefinite suspension;
- d. Removal; and
- e. Reduction in pay band or rate of pay.

4. **Actions Not Covered**:

- a. Reduction in force, including furlough of any length;
- b. Reduction in pay band or rate of pay of a supervisor or manager serving a supervisory or managerial trial period as provided in TSA MD No. 1100.31-1, if the reduction is to a pay band or rate of pay no lower than that held by the employee before entering the supervisory or managerial position;
- c. Termination of a time-limited promotion at any time and return of the employee to a position at a pay band or rate of pay no lower than the one from which promoted;
- d. Placement of an employee serving on an intermittent or seasonal basis in non-duty and non-pay status in accordance with the conditions of the appointment;
- e. Termination during a trial period other than supervisory or managerial trial period;

Note: Generally, employees who were hired prior to March 4, 2004, are subject to a one-year probationary period, and employees hired on or after March 4, 2004, are subject to a two-year trial period. See MD 1100.31-1, to determine trial period status.

- f. Termination of a reemployed annuitant;
 - g. Termination at any time of a time-limited appointment of two years or less;
 - h. Expiration of a time-limited appointment of more than two years;
 - i. Correction of an erroneous personnel action, including correction of a pay band or rate of pay that is contrary to law, regulation, or TSA policy;
 - j. Action directed by a court or other competent authority; and
 - k. Voluntary action initiated by the employee.
5. **Matters Reviewed by the Professional Review Board (PRB):** Where conduct of an employee covered by MD 1100.75-2, is the subject of an investigation or management inquiry by a TSA line component, by the Office of the Assistant Administrator for Internal Affairs and Program Review, or by the Office of the Inspector General, the PRB will review the report of investigation and may propose any action it deems appropriate in accordance with MD 1100.75-2.
6. **Consequences:** In addition to demonstrating that the employee was on notice about the performance or conduct in question, or to rebut a claim that the employee had no prior history of conduct or performance problems, actions covered by this Directive may have adverse collateral consequences, such as when making decisions on awards, promotions, or workforce reductions.

B. Cause:

1. **Efficiency of the Service Standard:** An employee may be suspended, removed, or reduced in pay band or rate of pay for such cause as will promote the efficiency of the service. This standard generally means that the action against an employee must be taken to further a legitimate government interest, e.g. because of the employee's (1) failure to accomplish his or her duties or fulfill his or her employment obligations satisfactorily, (2) interference with other employees' performance of their duties, or (3) detrimental effect on the agency's ability to accomplish its mission.
2. **Nexus:** Disciplinary action may be taken when there is a nexus, or connection, between a legitimate government interest and the employee misconduct or matter that is the basis for the disciplinary action. Nexus is presumed when the basis for disciplinary action is an employee's unsatisfactory job performance or on-duty misconduct, or in the case of criminal activity or other egregious or especially notorious misconduct. However, actions also may be taken against an employee because of off-duty misconduct where there is a nexus between the conduct and the TSA mission and/or effective operation of the agency.
3. **Actions Not Involving Misconduct:** Certain actions by an employee that are not considered misconduct or poor performance may also promote the efficiency of the service. For example, if an employee declines to accept a directed reassignment or transfer of function to another commuting area, the declination would not be considered misconduct, but the employee's termination would nevertheless be taken "for such cause as will promote the efficiency of the service."

4. **Performance Based Actions:** Actions based on deficient or unacceptable performance may be taken under the authority of this directive. In determining the appropriate action, consideration should be given to whether the performance problem is because of a refusal or failure to perform acceptably, inattention to duty, negligence, inability to perform, etc., if the cause can be determined. For example, a suspension may be appropriate in the case of refusal to perform properly, but may be inappropriate if the employee is unable to perform acceptably. In either case, reduction in pay band or rate of pay or a removal may be appropriate.
- C. Consequences: In addition to demonstrating that the employee was on notice about the performance or conduct in question, or to rebut a claim that the employee had no prior history of conduct or performance problems, actions covered by this directive may have adverse collateral consequences. For example, such actions may be considered by management when making decisions on awards, promotions, or workforce reductions.
- D. Progressive Discipline:
1. Management shall take the appropriate level of action that is likely to correct the problem and is consistent with such considerations as effective security operations, the nature and severity of the offense, and the performance and conduct history of the particular employee. When appropriate, TSA will take progressively more severe action until the problem is corrected or the employee is removed.
 2. As noted in the Attachment to this directive, removal is required for specific offenses listed and removal is a permitted penalty for the first violation for other offenses listed in the Attachment. Any exception to the required removal for listed offenses requires the approval of the Deputy Assistant Administrator for Aviation Operations, or designee.
 3. Nothing in this section prevents removal as the first action taken against any employee where the misconduct, performance or other circumstances are so serious as to warrant removal, such as engaging in any activity that seriously undermines security interests, poses a threat or danger to the traveling public, or results in great monetary loss.
 4. TSA has also developed a “One-Step process” to address specific employee issues and disciplinary issues that are not properly the subject of progressive discipline. This process allows management to impose appropriate disciplinary action in an expedited manner. As described herein, this process only applies to specific actions, must be imposed only after engaging in the process described in Section 6.E. below, and can be used as progressive discipline.

E. TSA Pre-Decision Process:

Prior to taking any disciplinary action, management must follow these steps:

1. Assess the incident or allegations;
2. Engage in relevant fact-finding to the extent necessary to make an informed decision (obtain related evidence, witness statements, etc.);
3. Review all relevant evidence to ensure that the action meets standards of proof;
4. Meet and discuss the matter with the employee, advise the employee of the allegation and possible consequences, and provide the employee an opportunity to respond orally and/or in writing; and
5. After meeting with the employee, management must determine if corrective and/or disciplinary action will be taken.

F. Penalty Determination:

The following factors should be considered to determine an appropriate penalty. These considerations are often referred to as the “Douglas factors,” based on a Merit Systems Protection Board (MSPB) case where these considerations were set forth. See Douglas v. Veteran’s Administration, 5 M.S.P.R. 280 (1981). Not all of the factors are relevant in all cases, and other factors relevant to the case may also be considered.

- The nature and seriousness of the offense, and its relationship to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.
- The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position. For example, certain employees such as supervisors or law enforcement officers may be held to higher standards than other employees.
- The employee's past disciplinary record. If past discipline is used, it must be mentioned in the notice of proposed action.
- The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.
- The effect of the offense upon the employee's ability to perform at a satisfactory level, and its effect upon supervisors’ confidence in the employee's ability to perform assigned duties.

- Consistency of the penalty with those imposed upon other employees for the same or similar offenses.
- The notoriety of the offense or its impact upon the reputation of the agency.
- The clarity with which the employee was on notice of any rules violated in committing the offense or had been warned about the conduct in question.
- The clarity with which the employee was on notice of performance expectations and problems with his or her performance.
- Potential for the employee's rehabilitation.
- Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter.
- The adequacy and effectiveness of alternative actions to deter such conduct or improve performance in the future by the employee or others.

G. Legal Sufficiency Requirement:

Actions greater than letters of reprimand must be reviewed by legal counsel to determine legal sufficiency. Legal sufficiency means:

1. A preponderance of the evidence supports that the misconduct or performance deficiency occurred;
2. There is a nexus or connection between a legitimate government interest and the misconduct/matter that is the basis for the disciplinary action;
3. The misconduct/matter is in violation of law, statute, rule, TSA policy or procedure; and
4. The disciplinary action is reasonable.

H. Procedures for Corrective and Disciplinary Actions:

1. **Letters of Counseling or Letters of Guidance and Direction:**

a. Content

Letters of Counseling and Letters of Guidance and Direction should contain the following information:

- (1) Description of the performance or conduct about which the employee is being counseled;
- (2) Supporting facts;
- (3) A description of the correct, required conduct or performance; i.e., what the employee should have done or should do to correct the problem or avoid it in the future;
- (4) Statement that the letter is not a disciplinary action, but if the employee does not correct the performance or misconduct, formal disciplinary action may be initiated which may result in discipline up to and including removal;
- (5) Statement that a copy will not be placed in the employee's OPF, but that a copy may be retained by the supervisor to demonstrate that the employee has been placed on notice regarding the misconduct or performance;
- (6) Statement that the letter may not be grieved.
- (7) A letter of counseling or a letter of guidance and direction must be signed by the supervisor or manager who issues the letter.

b. Delivery and Retention:

- (1) The letters should normally be delivered in person by the supervisor who signs the letter. The employee should be asked to sign an acknowledgment of receipt. If he or she refuses to sign, the supervisor's copy should be annotated with the delivery time and date, the supervisor's signature, and a statement that the employee received the letter, but refused to acknowledge receipt.
- (2) A copy is retained in the local files, but no copy is filed in the employee's OPF.
- (3) An employee has no right to grieve a letter of counseling or a Letter of Guidance and Direction.

2. Letters of Reprimand:

a. Content:

Letters of Reprimand should contain the following:

- (1) Description of the reasons why the reprimand is being issued;
- (2) Supporting facts;
- (3) Statement that repetition of the misconduct or deficient performance may lead to further, more severe disciplinary action, up to and including removal;
- (4) Statement that the letter may be placed in the employee's OPF for up to two years, and that it may be cited as a prior formal disciplinary action in any future disciplinary matter;
- (5) Statement that, following removal from the OPF, the supervisor may retain a copy of the document as evidence that the that the employee was on notice regarding the performance or conduct in question, or to rebut a claim that the employee had no prior history of conduct or performance problems;

- (6) Statement that the employee has the right to grieve the Letter of Reprimand under the grievance procedure established by HRM Letter 771-1, and must file within 15 calendar days of receipt of the letter; and
- (7) A Letter of Reprimand should be signed by the supervisor or manager who issues the letter.

b. Delivery and Retention:

- (1) Letters of Reprimand should normally be delivered in person. The employee should be asked to sign an acknowledgment of receipt. If he or she refuses to sign, the file copy should be annotated with the delivery time and date, the supervisor's (or other deliverer's) signature, and a statement that the employee received the letter, but refused to acknowledge receipt.
- (2) A copy may be retained in the employee's OPF for up to two years and upon removal from the OPF, may be retained by the supervisor.

3. **Adverse Actions** (Suspensions, including Indefinite Suspensions, Reductions in Pay Band or Rate of Pay, Removals):

Important Note: Adverse Actions are initiated under a "One-Step" or "Two-Step" process. As described below, the One-Step process is used for specific actions. The One-Step process is not mandatory. The Two-Step process can be used for any action, excluding Letters of Reprimand.

a. Two-Step process

The Two-Step process requires the issuance of a proposal and a final written decision.

(1) Content of Proposal:

The notice of proposed adverse action must include the following information:

- (a) The charge(s) and specification(s) for each charge, and describe the evidence that supports the charge(s).
- (b) The proposed penalty.
- (c) A discussion of any aggravating factors that were considered in determining the proposed penalty, including the employee's disciplinary history (Note: The letters should also discuss any mitigating factors that may have been considered).
- (d) The employee has the right to present an oral and/or written reply to the proposal within seven calendar days. This time limit may be extended for good cause shown. A request for reconsideration may be presented orally, in writing, or both.

- (e) The employee may be represented by an individual of the employee's choosing in preparing and presenting any reply. If the employee elects to have a representative, the employee must provide the name of the representative to the deciding official in writing and must provide written notice of any change in representation.
 - (f) The employee's chosen representative may be disallowed if the representation creates a conflict of interest or position or, where the representative is another TSA employee, he/she may also be disallowed if he/she cannot be spared because of critical TSA work. (Note: The deciding official will make this determination in consultation with the Office of Human Resources and/or a TSA attorney.)
 - (g) Costs associated with the employee's representation, including any travel expenses, will be borne by the employee.
 - (h) The employee and the representative (if a TSA employee) will be allowed a reasonable amount of official time to review the material relied upon, prepare and present the reply(ies).
 - (i) The employee should be provided a copy of the material relied upon to support each charge and specification with the letter. Alternatively, if the material is voluminous or contains sensitive information, the employee shall be given the opportunity to review the material at a designated TSA location.
 - (j) Material relied upon will be released only to the employee and/or the designated representative.
 - (k) The name of the deciding official and the individual the employee may contact to make arrangements for a reply or to ask any questions.
 - (l) The action will not be taken until after the reply is received and considered; or, if no reply is received, after the reply period expires; or until after the employee informs management that he/she does not intend to reply.
 - (m) Statement informing the employee of any change in employment status.
- (2) Employee status during the notice period for proposed removals and proposed indefinite suspensions:

In most cases the employee will remain in a duty status during the notice period. However, if the proposing official determines that keeping the employee in his or her current duty status would be a threat to life, property, safety or the efficient operation of the organization, one of the following alternatives may be used:

- (a) If the employee requests, and it is appropriate, allow the employee to use annual or sick leave, compensatory time, or leave without pay;

- (b) Detail the employee to another work unit;
 - (c) Place the employee on administrative leave using current approval guidelines; or
 - (d) Continue the employee on an indefinite suspension if one has previously been effected.
- (3) The Deciding Official:
- (a) Must be a higher level official in the employee's chain of command than the official who proposed the action except (i) for actions proposed by the Chair of the PRB or (ii) where the Assistant Secretary proposes the action, in which case the Assistant Secretary may also serve as the deciding official.
 - (b) May consider only charges and evidence contained in the proposal notice and the employee's reply. However, if the deciding official is or becomes aware of additional evidence other than the evidence provided to the employee, and wishes to consider such evidence in reaching a determination, the deciding official must inform the employee and give him or her additional time to reply to the additional evidence before reaching a decision on the proposed action.
 - (c) Shall hear the oral reply, unless circumstances prevent him or her from doing so. If the deciding official's designee hears the oral reply, he or she shall prepare written notes or a written summary of the reply.
 - (d) Should decide the appropriate penalty after considering the factors listed in section 6.F., "Penalty Determination".
- (4) Content of Decision:
- (a) The decision must address each charge and inform the employee of the deciding official's determination on each charge including the basis for the determination.
 - (b) The decision should inform the employee that the employee's reply was considered and should discuss any defenses raised by the employee.
 - (c) If the decision is to impose an adverse action, the notice should discuss the penalty determination including any relevant mitigating and aggravating factors considered, as appropriate.
 - (d) If the decision is to suspend (including indefinitely suspend), remove or reduce payband/rate of pay, the decision must provide the effective date of the action.

- (e) The decision must state any applicable appeal or grievance rights including time limits, where to send the appeal or grievance, and include a copy of any procedure or regulations where required.
 - (f) The decision must include a statement of Equal Employment Opportunity rights.
 - (g) If a removal, the decision must include statements regarding the obligation to protect Sensitive Security Information, and a direction to return all TSA property and uniforms.
- (5) Delivery of proposal and decision notices:
- (a) Both the proposal and decision notices should be delivered in person, and the employee should be asked to sign an acknowledgment of receipt. If the employee refuses to sign, the file copy should be annotated with the delivery time and date, the signature of the individual who delivered the notice, and a statement that the employee received the notice, but refused to acknowledge receipt.
 - (b) If the employee is not on duty or otherwise available to receive it in person, the notice should be delivered both by first class mail and by a delivery method where a signed receipt is requested (e.g., express mail delivery or certified mail with a return receipt requested). TSA will consider that the employee received a regular mailing five days from the day on which the notice was sent, and may use that date as the delivery date or the date on which the employee signed for the express delivery or certified notice, whichever is earlier.

(6) Indefinite Suspensions

An indefinite suspension is appropriate where evidence (more than a mere suspicion or allegation) exists to demonstrate misconduct. Indefinite Suspensions may be imposed only under the following conditions:

- a. Employee has been indicted, or there is equivalent legal process, for a crime for which a sentence of imprisonment may be imposed;
- b. Employee has been arrested pursuant to a warrant issued by a judge or magistrate for a crime for which a term of imprisonment may be imposed; or
- c. TSA is conducting an investigation of conduct that it reasonably believes was committed by the employee and is so serious that if it proves to be true, the employee's continued presence at the worksite would represent a threat to life, property, safety or the effective operation of the workplace.

Note: Once an indefinite suspension is imposed, management must determine if subsequent action, i.e., termination, is justified. If justified, management should initiate appropriate action to propose the termination.

b. One-Step Process

(1) Prior to effecting a disciplinary action under this process management **must** follow the procedures outlined in sections 6.E, F, and G.

(2) After engaging in the procedures outlined in section 6.E, F, and G, a final decision will be prepared and issued in accordance with the procedures set forth in sections 6.H.3.a.(4) and (5) above.

(3) The One-Step process may be used only for the following actions:

(a) Suspensions of three days or less (Screener Personnel Only).

(b) Terminations involving the use of Drugs, Alcohol, and Theft (Screener Personnel Only). Examples of these offenses include, but are not limited to:

(i) Validated failure of drug test;

(ii) Validated failure of alcohol test (on duty);

(iii) Refusal to submit to drug or alcohol testing; and

(iv) Cases involving clear and convincing evidence (e.g., video surveillance, credible witness statements, admissions) of theft.

(c) Any suspension, removal, or reduction in pay band or rate of pay for any employee serving in a trial period.

(d) Indefinite Suspensions relating to serious misconduct by screeners that necessitate immediate action under the conditions set forth in section 6.H.3.a(6).

[Note: All Indefinite Suspensions, under either the One or Two-Step process, **MUST** be reviewed for legal sufficiency by a TSA counsel and may be coordinated with a designated Employee Relations Specialist prior to issuance. As these actions often are connected with on-going investigations (administrative, civil, or criminal) it is important not to disclose information or evidence that could undermine or jeopardize any ongoing investigation or potential criminal prosecution.]

(4) Reconsideration of Indefinite Suspensions under the One-Step process:

(a) Once an indefinite suspension has been imposed under the One-Step process, the employee has seven calendar days to submit a written request for reconsideration. The reconsideration must also include any supporting evidence. This time limit may be extended for good cause shown. A request for reconsideration may be made orally and/or in writing.

(b) Upon receipt of a timely request for reconsideration, the deciding official has seven calendar days to determine if the indefinite suspension should be continued, or if the employee should be returned to duty status.

(c) If the decision is to return the employee to duty, the deciding official will also determine if back pay for the suspension period, or any portion thereof, is appropriate. Back pay may be appropriate if failure to pay back pay would result in an injustice to the employee because of the employee's lack of culpability in the incident for which he/she was suspended. Indefinite suspensions based on an indictment or an arrest warrant will not normally result in an award of back pay.

(d) The decision will be prepared and issued in accordance with the procedures set forth in sections 6.H.3.a (4) and (5) above.

(e) An employee may request reconsideration of an indefinite suspension at any time based upon newly acquired information that was not available at the time of the decision to impose the indefinite suspension.

H. Appeal and Grievance Rights:

1. Suspensions of 15 days or more (including indefinite suspensions), Removals, and Reductions in pay and/or pay band.
 - a. Non-screener personnel with veterans' preference who have at least one year of current continuous service in the same or similar position may appeal to the MSPB.
 - b. Other non-screener personnel (non-preference eligible) who have at least two years of current continuous service in the same or similar position may appeal to the MSPB.

Note: MSPB regulations are at Part 1201 of title 5 of the Code of Federal Regulations and on the MSPB website at www.mspb.gov.

- c. Screener personnel who are not serving in a trial period or who have completed two years or more in a time-limited appointment of more than two years, may appeal to the TSA Disciplinary Review Board (DRB), in accordance with TSA MD No. 1100.77-1.
2. Suspensions of 14 days or less and Letters of Reprimand

Screener and non-screener employees may obtain review in accordance with the process outlined in HRM Letter 771-1 (Grievance Procedures).

3. TSES

Members of the TSES may appeal adverse actions to the TSES Executive Review Board (ERB).

7. EFFECTIVE DATE AND IMPLEMENTATION:

This policy is effective immediately upon signature.



Richard A. Whitford
Assistant Administrator for Human Resources

9-17-2004
Date

Filing Instructions: File with OHR Management Directives
This directive rescinds MD 1100.75-1, dated March 4, 2004. HRM Letter
No. 752-1 dated July 29, 2002 was previously cancelled and superseded.

Effective Date:
Review Date:
Distribution: TSA Affiliated HR Offices, Associate Administrators,
Assistant Administrators, and Office Directors
Point of Contact: PG&S/OHR, Paul H. Sheldon, 571-227-2828

Attachment: Screener Offenses For Which Removal Is Permitted for the First Offense

Attachment

Screener Offenses For Which Removal Is Required*

Terminations involving the use of Drugs, Alcohol, and Theft

*An FSD may seek an exception to removal by submitting a written request explaining the exculpatory facts and circumstances to the Deputy Assistant Administrator for Aviations Operations.

Screener Offenses For Which Removal Is Permitted for the First Offense

- Knowingly operating checkpoint and baggage equipment that is either not working or not turned on;
- Intentionally conducting improper screening procedures or allowing persons or property to bypass required screening;
- Falsification of security logs;
- Failure to conduct an operational check at the start of a shift;
- Sleeping on duty while engaged in a security activity;
- Failure to pass annual re-certification requirement (Annual Proficiency Review);
- Any intentional act that undermines security operations and the trust and confidence of the traveling public in the integrity of the nation's transportation system;
- Interference with air navigation, 49 U.S.C. § 46308;
- Aircraft piracy, 49 U.S.C. § 46502;
- Interference with flight crewmembers or flight attendants, 49 U.S.C. § 46504;
- Carrying a weapon or explosive aboard an aircraft, 49 U.S.C. § 46505;
- Unlawful entry into an aircraft or airport area that serves air carriers or foreign air carriers contrary to established security requirements, 49 U.S.C. § 46314; and
- Any felony conviction regardless of nexus to employment.