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Training for Supervisors

Discipline for Misconduct

October 2002

Prepared by the Law Department
United States Postal Service



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Training for Supervisors

Discipline for Misconduct

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Training for Supervisors

Discipline for Misconduct

A. Two general areas of discipline

Misconduct

Failure to comply with workplace rules,
standards of conduct

Performance

Performing the duties of the job

B. Goals of discipline

- Employees who can be responsible should be given the chance to correct behavior that interferes with postal mission.
- Those who cannot or will not do so should be removed through means that withstand challenge.
- Postal Service should not waste resources on unhelpful paperwork and litigation.

C. "Rules" **1. No absolute rules for taking discipline; only guidelines**

- There are *no absolute rules* for taking discipline, only guidelines for the exercise of judgment.
- Evaluate each case on its own fact situation.
- Apply common sense and sound judgment.
- ☞ If at all possible, prior to discipline, always check with available resources:
 - ✓ Labor Relations
 - ✓ Managers
- ☞ The Law Department is available to consult with Labor Relations and/or postal supervisors as complex legal questions arise.

C. "Rules"
(cont'd)

2. Three near-absolute rules

- a. **Communicate** expectations and job requirements to all employees.
- b. Discipline must be **corrective**.
- c. Be **consistent** both in communication and discipline.

a. **Communication**

- Assure employees understand what is expected of them in terms of attendance, performance, and other job requirements
- Expectations should be specific
- How:
 - ✓ Orientation
 - ✓ Postings
 - ✓ Rules available
 - ✓ When rule or requirement is not followed, *tell* them
 - ✓ Direct your communication at the problem, not the person

C. "Rules"
(cont'd)

b. Corrective discipline

- Discipline must be corrective, not punitive.
- Discharge is not the first step unless there is an extremely serious breach.
- Try to take the minimum action necessary to correct the problem.
- Selecting penalties: more correction – less litigation
- ☞ Where the employee maintains he or she cannot correct the problem because of physical or personal problems, consider other options, such as a referral to EAP or fitness for duty.

c. Consistency

- To the extent possible, treat employees in similar situations similarly.
- To the extent the situation is different, different actions may be required. Tailor discipline to the individual situation.

- D. **A few words about performance**
- Performance
- More complex to analyze
 - Different causes
 - ✓ Lack of ability
 - ✓ Lack of knowledge
 - ✓ Organizational problems
 - ✓ Motivational problems
 - Different causes – Different solutions
 - ✓ May vary by employee

E. Legal context

Be aware of legal context

What is needed to minimize the chances of someone who has the ability to change the outcome second-guessing your judgment

☞ Remember:

- Postal Service will have to prove that the discipline was warranted
- Credibility may be involved: Different individuals, different versions of "the truth"

F. Steps to take

- Notice, Now, Not later
 - ✓ The employee must be made completely aware of expectations for work performance and behavior.
 - ✓ When the employee fails to meet those expectations, he or she must be advised right away.
 - ✓ Supervisors should not ignore unsatisfactory performance or misconduct.
- Consider nature of misconduct
 - ✓ What is the problem? How serious is it?
 - ✓ What are all of the options that might correct the problem?
- Consider where employee can appeal

G. Appeal avenues

- Means for contesting discipline
- How you may get second-guessed

1. EEOC
2. Collective bargaining agreement
3. MSPB

1. EEOC (Equal Employment Opportunity Commission)

- Treated differently because of:
 - ✓ race
 - ✓ sex
 - ✓ color
 - ✓ religion
 - ✓ age
 - ✓ national origin
 - ✓ disability that could have been accommodated
 - ✓ harassment on the basis of protected status
 - ✓ reprisal for pursuing an EEO complaint
- Complaint filing procedures
 - ✓ Contact EEO Counselor/Investigator
 - ✓ Informal investigation
 - ✓ Formal complaint and investigation
 - ✓ Hearing and agency/EEOC decisions
 - ✓ Right to *de novo* review in district court
- Also raised in other forums

G. Appeal
avenues (cont'd)

2. Collective bargaining agreement

Grievance-arbitration process

- Who: Bargaining unit employees
- Notifying Papers: Article 16, Notice, Decision
- Appeal route: Article 15, grievance-arbitration procedure
- Standard for arbitrator: Postal Service must prove "just cause"

Types of Discipline

- Letters of warning
- Suspension
- Removal
- Emergency placement
- Indefinite suspension

Just Cause

- Minimum disciplinary action you can take to correct deficiency

☞ Check:

- ✓ Was grievant afforded due process?
- ✓ Is the discipline corrective in nature?
- ✓ Is the penalty appropriate?

G. Appeal
avenues (cont'd)

**2. Collective bargaining agreement
(cont'd)**

Additional points regarding
discipline covered by collective
bargaining agreement

- Review
 - ✓ Suspension and removals of bargaining unit employees must be reviewed and concurred in by the installation head or designee
 - ✓ Proposing and concurring official cannot be same person

- Elements of past record
 - ✓ Prior disciplinary actions more than two years old must not be cited as prior elements of discipline, unless there has been subsequent discipline initiated against the employee during the two-year period. Article 16.
 - ✓ Don't cite discussions as elements of past record

G. Appeal
avenues (cont'd)

3. Merit Systems Protection Board

Who:

- Preference eligible
- Employee with one year current continuous service in:
 - ✓ Supervisor or management position
 - ✓ Position involving personnel work in other than purely nonconfidential clerical capacity

NOTE: Reprisal for military service under USERRA

Notifying Papers:

- Notice of Proposed Action (Suspension, Reduction in Grade, Reduction in Pay, Removal)
- Letter of Decision

Appeal route:

- MSPB Regional or Field office – Hearing
- Two levels of review
 - ✓ Board
 - ✓ Court of Appeals (Federal Circuit)

Standard for MSPB

- Promotes the efficiency of the service
- Penalty fits the circumstances

G. Appeal
avenues (cont'd)

3. Merit Systems Protection Board (cont'd)

Types of discipline

- Suspension, 14-days or more
- Reduction in grade
- Reduction in pay
- Removal

Promotes the efficiency of the service:

- The grounds for the action relate either to employee's failure to accomplish duties satisfactorily or to some other legitimate government interest

Nexus:

- There must be a connection between any misconduct and service efficiency.
- Misconduct adversely affects:
 - ✓ employee's or co-workers' job performance, or
 - ✓ management's trust and confidence in employee's job performance, or
 - ✓ agency's mission

G. Appeal avenues (cont'd)

3. Merit Systems Protection Board (cont'd)

Postal Service's burden of proof:
Preponderance of the evidence

- that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue
- ☞ One way of thinking of it: More than 50 percent of the evidence.

Deciding the Penalty: Factors to
consider (*Douglas* Factors)

Individualized inquiry is necessary in each case.

Douglas Factors (Board's language, page G-8, 9):

- Nature and seriousness of offense
- Job level and type
- Past discipline
- Past work record/Length of service
- Supervisor's confidence in employee's ability to perform duties
- Consistency of the penalty
- Notoriety of the offense
- Employee on notice about deficiencies in question
- Potential for rehabilitation
- Mitigating circumstances
- Alternative sanctions

G. Appeal avenues (cont'd)

3. Merit Systems Protection Board (cont'd)

Additional points regarding
discipline subject to MSPB appeal:

- Certain extremely egregious misconduct:
presumed nexus
 - ✓ violence
 - ✓ crimes
 - ✓ fraud; theft
 - ✓ perhaps sexual misconduct
- Use the *Douglas* factors when you are making a penalty decision. See next page for Board's language.
- When you are assessing similar cases, focus on postal cases involving similar circumstances.
- ☞ Consult with Labor Relations to obtain information on what discipline has been implemented in similar cases.

CAVEAT: While managers should try to be consistent:

- One aberration does not change overall policy.
- Managers may change policy / practices by clarifying that certain behavior will no longer be tolerated.

G. Appeal
avenues (cont'd)

3. Merit Systems Protection Board (cont'd)

Douglas Factors (Board language)

1. The nature and seriousness of the offense, and its relation 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.
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.
3. The employee's past disciplinary record.
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.
5. 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.
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses.

G. Appeal
avenues (cont'd)

3. Merit Systems Protection Board (cont'd)

Douglas Factors (cont'd)

7. Consistency of the penalty with any applicable agency table of penalties. [Not applicable to Postal Service.]
8. The notoriety of the offense or its impact upon the reputation of the agency.
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.
10. Potential for the employee's rehabilitation.
11. 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.
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

H. Charge writing

Parts of notice of proposed action:

- Charge – label
- Specifications – story
- Aggravating factors – *Douglas* factors
- Past elements – prior record
- Penalty, including mitigating factors
- Nexus – how affects USPS

☞ Charge = label

what the employee did wrong in plain English

H. Charge
writing (cont'd)

Avoid the following in writing charges:

- Compound charges
 - ✓ Keep charge to single concept. If charging two discrete things in one charge, be sure both are provable.
 - ✓ Example: unauthorized use for other than official purposes
- Charging with crime/statutory violation
 - ✓ Charge with the underlying misconduct
 - ✓ Don't charge with a crime unless the conviction cannot be appealed and there is no other way to get the same result.
 - ✓ Don't charge with a violation of Title VII; instead, charge with a violation of USPS policy against sexual harassment.
- Citing regulation in charge
- Stacking series of charges
 - ✓ Limit charges to those for which sufficient evidence is available
- Attaching extremely minor charges to major charge
- Making multiple identical charges out of same wrongdoing
- Attaching old offenses to current similar offense

H. Charge writing (cont'd)

Specifications: Clear story of what happened, in plain English

- Be precise.
- Avoid adjectives, unless can be proved.
- Say what you mean: e.g., punch, hit, shove.
- Avoid terms associated with legal significance/burdens of proof (e.g., threat, assault).

Penalty: Aggravating and mitigating factors

- Consider *Douglas* factors as to penalty (aggravating and mitigating factors)
- Aggravating factors: Consequences of action; impact on organization

Past elements

- Only if they are a matter of record and the employee had a prior opportunity to dispute

I. Checklist

- 9 Have I taken all steps I can to **investigate** what happened?
- 9 Have I **sought the advice** of Labor Relations? A manager?
- 9 Have I gathered all the **documentation** I need to support the action?
- 9 Was the **employee aware** or should the employee have been aware that the conduct was improper?
- 9 How can I **prove** the employee was aware or should have been aware that the conduct was improper?
- 9 Is the discipline **corrective**?
- 9 What **other disciplinary action** could I take and why is that discipline inappropriate?
- 9 Have I considered where the employee can **appeal**?
- 9 Are there any **EEO problems**?
 - 9 Have I treated this employee the same as I have **treated similarly situated** employees of a different race, sex, color, religion, age, and national origin?
 - 9 Does the employee have a **disability** that the Postal Service needs to evaluate?

I. Checklist
(cont'd)

- 9 Can the employee pursue the ***grievance-arbitration*** process?
- 9 Is there ***just cause*** for the discipline?
- 9 Did I afford the employee ***due process***?
- 9 Can the employee pursue an ***MSPB appeal***?
- 9 Do the ***grounds for the action*** relate to the employee's failure to accomplish duties satisfactorily or to some other legitimate governmental interest? (Does the discipline promote the efficiency of the service?)
- 9 Have I considered all ***relevant factors*** in deciding on the penalty?
 - 9 Nature, seriousness of offense
 - 9 Job level and type
 - 9 Past discipline
 - 9 Past work record / Length of service
 - 9 Supervisor's confidence in employee's ability to perform duties
 - 9 Consistency of the penalty with others in my area
 - 9 Notoriety of offense
 - 9 Employee on notice about deficiencies in question
 - 9 Potential for rehabilitation
 - 9 Mitigating circumstances
 - 9 Alternative sanctions

Training for Supervisors

Discipline for Misconduct

I. Checklist (cont'd)

- 9 Does the **charge** state what the employee did wrong in **plain English**?
- 9 Did **Labor Relations draft or review** the charge?

Training for Supervisors

Discipline for Misconduct

J. A few
caveats

Standards change:
Always Check

K. Threats and fighting

1. Guidelines for attacks or threats of violence

- Remove perpetrator(s)
 - ✓ Emergency placement in nonduty status **or** administrative leave
 - ✓ If two or more employees are involved, identity of perpetrator may not be clear until after investigation
- Investigate: What happened
 - ✓ Inspection Service or Management
 - ✓ Obtain statements, if possible
 - ✓ Where there are discrepancies, investigate further to find verification of statements
- Determine appropriate action

K. Threats
and fighting
(cont'd)

2. Threats

Threat:

- ✓ A communicated intent
- ✓ to inflict physical or other harm
- ✓ on any person or on property,
- ✓ presently or in the future.

☞ **Question:** Would a reasonable person interpret statement/action to be a threat?

Consider the following factors:

- ✓ speaker's intent
- ✓ listener's reaction
- ✓ listener's apprehension of harm
- ✓ nature of statements – any conditional nature of threat
- ✓ attendant circumstances

K. Threats and fighting (cont'd)

2. Threats (cont'd)

Listener's reaction and
apprehension of harm

- Does it indicate
 - ✓ fear?
 - ✓ calling for assistance?
 - ✓ attempting to leave area?
 - ✓ reporting incident?

Nature of statements

- Conditional nature of the threat?
- Statement *may* constitute a threat even though it is subject to a condition in the maker's control.

Consider:

- Behavior preceding the threat
- Words
- Actions
- Stature of parties
- Position of parties
- Whether weapons were involved
- Whether the incident caused disruption to workroom floor
- Evidence that the employee has made hostile remarks in the past concerning the same person

K. Threats and fighting (cont'd)

3. Other violent conduct

Charge employee with what he actually did,
e.g.:

- Fighting while on duty
- Physical altercation resulting in injury
- Disorderly conduct
- Striking another employee
- ☞ Avoid charging with assault and/or battery unless you have proof of intent.

Assault

- Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm.

K. Threats
and fighting
(cont'd)

3. Other violent conduct (cont'd)

Aggravating factors

- Inflicting serious injury
- Use of a weapon
- Insubordination
- Whether fighting with a supervisor or law enforcement officer
- Past record: Propensity for violence

Mitigating factors

- Incidental / inadvertent
- Response to excessive force/self-defense
- Provocation

K. Threats
and fighting
(cont'd)

3. Other violent conduct (cont'd)

Self-defense

- Employee is entitled to defend self when it would appear to a reasonable person under similar circumstances that there is immediate danger of bodily harm
- ☞ May only use such force as appears to be reasonably necessary to resist attack

How to determine whether force is reasonably necessary

- Amount of force exerted
- Means or instrument used
- Manner or method of applying force
- Circumstances under which force was applied

L. Misconduct
involving
taking

Postal context

- Money
- Credit cards
- Mail
- Postal equipment, supplies, and other property, including other employees' property

Theft

- Charge with "theft" or "stealing" only when you can prove intent to permanently deprive the owner of possession and use of property.
- Avoid "misappropriation" unless theft can be proved. Board has suggested that "misappropriation" may be synonymous with theft.

L. Misconduct
involving
taking (cont'd)

If there is no intent to permanently deprive the owner of property, charge the employee with what he did:

- Unauthorized possession of postal property
- Improper use of postal property
- Failure to use proper procedures for receipt of postal property
- Improper use of postal credit card
- Improper handling of mail matter
- Throwing away of mail
- Removing uncancelled postage stamps from package
- Obstruction of mails
- Unauthorized opening/tampering with mail

L. Misconduct
involving
taking (cont'd)

Where employee claims to have taken items from "trash", ask:

- ✓ Were employees on notice not to take such items, even undeliverable mail or items loose in mail?
- ✓ Did employee reasonably believe he or she was permitted to take item?
 - C If you conclude **no**, what do you base this on?
 - C If you confirm **yes**, taking not unauthorized.

L. Misconduct
involving
taking (cont'd)

Taking of any mail or temporary use of any funds is **improper!**

- Mailer has interest
 - ✓ Must get service it paid for.
 - ✓ Property interest:
 - Ⓒ If an employee takes a free sample not intended for him or her, won't buy one; mailer loses profit
- Postal Service has business interest:
 - ✓ Loss of mailer trust damages competitive position
 - ✓ Personal loan from the till deprives the Postal Service of the use of funds; interest earnings help hold down postal rates
- ☞ REMINDER: When assessing penalty, consider all circumstances, including:
 - Whether the employee had a position involving control or custody over items taken: If so, violated trust.
 - Employee's contrition
 - Any policies or practices of discipline for similar takings

M. Falsification

- Knowingly supplying incorrect information with the intent to deceive the agency
- May be an affirmative incorrect statement or indirect (leaving blank)

Where falsification may arise:

- Employment applications
 - Claims for compensation or reimbursement
 - ✓ Overtime
 - ✓ Travel vouchers
 - OWCP claims
 - Time-keeping and leave records
 - Misrepresentations in investigations
- ☞ Falsity alone is not enough: must show intent.
- Intent to make a false statement may be inferred where reckless disregard for the truth is established.
 - Fact that an employee has no personal gain from a false statement in itself does not demonstrate no intent.

Postal Service need not show it actually relied on statement.

M.
Falsification
(cont'd)

Employee's denial of factual basis of charge of misconduct may not be used as a basis for a falsification charge.

But separate falsification charges are appropriate for:

- false statement that goes beyond denial of charge or facts supporting charge
- false statements when an agency is investigating misconduct prior to any charges being brought
- false statements during investigations of conduct of other employees
- falsifying documents to conceal other misconduct

N.
Attendance-
related
misconduct

Types of attendance-related misconduct

- AWOL (absence without leave)
- Leave abuse: Excessive leave; Unsatisfactory attendance

General rule

Don't take adverse action based upon leave that is approved.

- Discipline may be warranted for unscheduled leave – leave that is not requested or approved in advance.
- Discipline for unscheduled but approved leave only if:
 - ✓ Leave is not requested in accordance with leave-requesting procedures
 - ✓ Employee is on notice that unscheduled absences may result in discipline

Leave-requesting procedures

- Request and obtain approval in advance.
- Emergency annual leave: Still unscheduled; may be the subject of discipline unless an emergency prohibited the employee from requesting leave in advance.

N.
Attendance-
related
misconduct
(cont'd)

Notice

Put the employee on notice that unscheduled absences, even if approved for pay purposes, are not acceptable, and are likely to lead to discipline for continued infractions (ELM 511.4)

- Mark box on Form 3971 (whether requested in advance)
- Inform the employee in discussions

☞ Charge should be consistent with records:

- ✓ Annual Leave – ELM 512
- ✓ Sick Leave – ELM 513
- ✓ LWOP – ELM 514
- ✓ Absence without leave

N.
Attendance-
related
misconduct
(cont'd)

AWOL

- Employee is absent from the location to which he or she is supposed to report
- and
 - Ⓒ Absence is not authorized
 - or
 - Ⓒ Employee's request for leave was properly denied
- ☞ Employee must have some fault:
Don't charge with AWOL if illness prohibited the employee from complying with reporting or medical certification requirements.
- Back up with a charge of failure to follow leave procedures, if there is any question that there may be evidence of a viable reason for sick leave; make certain denial is legitimate and appropriate
- If AWOL cannot be proved, charge with what you can prove:
 - ✓ Failure to follow leave-requesting procedures
 - ✓ Failure to report as scheduled
 - ✓ Failure to maintain a regular schedule
 - ✓ Failure to be regular in attendance

N.
Attendance-
related
misconduct
(cont'd)

Penalty

Be able to show impact on operations

- Reduces productivity
- Mail delivery delays
- Disrupts schedules
- Customer complaints
- Increased costs (overtime)
- Causes morale problems

N.
Attendance-
related
misconduct
(cont'd)

Discipline not lawful if contrary to:

- Rehabilitation Act
- FMLA (Family Medical Leave Act)

Rehabilitation Act

- Employee has disability that substantially limits major life activity
- Employee is qualified to do position with or without reasonable accommodation
- Employer has duty to provide requested reasonable accommodation

N.
Attendance-
related
misconduct
(cont'd)

FMLA

- Provides eligible employees with up to 12 work weeks of leave for qualifying reasons
- Restoration to equivalent position upon returning to work
- No discipline based upon properly certified absence
- Four conditions are covered:
 - ✓ Birth of son or daughter and care during first year after birth
 - ✓ Placement with employee of son or daughter for adoption or foster care
 - ✓ Serious health condition of employee's spouse, son, daughter, or parent which requires the employee's care
 - ✓ Serious health condition of employee which renders him/her unable to work

N.
Attendance-
related
misconduct
(cont'd)

FML is not a separate leave category.

- Employee using FML is also on one of the Postal Service's approved leave types:
 - ✓ Annual
 - ✓ Sick
 - ✓ LWOP
 - ✓ COP/OWCP

FMLA leave requesting procedures:

- Fill out a PS 3971 and turn in to supervisor.
- Give a 30-day notice, or as soon as practical when the need for leave is known.
- Provide certification that allows PS to determine whether request is for qualifying reason.
- Provide information regarding anticipated date of return to work.
- Employee has a reasonable period of no less than 15 days to respond to a request for documentation.

O. Alcohol
and
drug-related
misconduct

- Discipline for:
 - ✓ Alcohol / drug use on duty or on postal premises
 - ✓ Drug sale on duty or on postal premises
 - ✓ Misconduct occurring while under the influence of alcohol/drugs
 - ✓ Off-duty misconduct
- Where to be cautious:
 - ✓ Drugs/drinking off-duty, off-premises (nexus issue)
 - ✓ Misconduct caused by alcoholism (discrimination issue)
- Off-duty alcohol/drug misconduct – Factors indicating nexus:
 - ✓ Transaction initiated at work
 - ✓ Telephone contacts while on postal premises
 - ✓ Existence of serious drug problem at facility
- When evaluating appropriate penalty, consider:
 - ✓ extent of drug use
 - ✓ where drugs were used
 - ✓ nature of job
 - ✓ rehabilitation
 - ✓ whether offense extends to possession, use, distribution, and/or sale
 - ✓ Postal Service's mission

O. Alcohol
and
drug-related
misconduct
(cont'd)

Be aware: Alcoholism is a disability.

- If Postal Service knows that individual is an alcoholic:

Must accord employee reasonable accommodation under the Rehabilitation Act

- Not a protected disability:
 - ✓ Isolated or casual use of drugs or alcohol
 - ✓ Current use of illegal drugs
- Postal Service may discipline an alcoholic employee for misconduct related to alcoholism, as long as discipline is justified and consistent with normal practice for similar misconduct.
- Although the Postal Service is not required to delay or waive discipline until offering employee a firm choice between rehabilitation and further discipline, we must assess any need for accommodation as soon as we are aware of it, not just after discipline.

- P. Insubordination =
- Insubordination
- ✓ Willful and intentional
 - ✓ refusal to obey
 - ✓ an authorized order of a superior officer
 - ✓ which the officer is entitled to have obeyed
- If it is not a willful refusal to obey, or the employee ultimately does comply, charge with actual misconduct:
 - ✓ Disrespectful conduct
 - ✓ Impermissible delay in performing duty
 - ✓ Failure to perform duty
 - ✓ Failure to follow instructions
 - If the employee believes the order is improper, the employee must first obey the order and then pursue a grievance (ELM 666.5).
- ☞ **Only exceptions:**
- ✓ where the employee would be placed in a clearly dangerous situation if he or she complied (ELM 666.51)
 - ✓ when the employer's order is unconstitutional or illegal

p.
Insubordination
(cont'd)

Caution: Make sure the charge of insubordination is not confused with:

- inability to perform work
- inability to follow unclear directives
- attempt to comply but failure because of unreasonable workload