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(10) An employee described in section 5102(c)(11) of title 5, United States Code, who is an alien or noncitizen occupying a position outside the United States;

(11) A nonpreference eligible employee serving a probationary or trial period under an initial appointment in the excepted service pending conversion to the competitive service; and

(12) An employee whose agency or position has been excluded from the appointing provisions of title 5, United States Code, by separate statutory authority in the absence of any provision to place the employee within the coverage of chapter 75 of title 5, United States Code.

[53 FR 21622, June 9, 1988, as amended at 58 FR 13192, Mar. 10, 1993]

§ 752.402 Definitions.

(a) *Day* means a calendar day.

(b) *Current continuous employment* means a period of employment or service immediately preceding an adverse action in the same or similar postions without a break in Federal civilian employment of a workday.

(c) *Furlough* means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(d) *Grade* means a level of classification under a position classification system.

(e) *Indefinite suspension* means the placing of an employee in a temporary status without duties and pay pending investigation, inquiry, or further agency action. The indefinite suspension continues for an indeterminate period of time and ends with the occurrence of the pending conditions set forth in the notice of action which may include the completion of any subsequent administrative action.

(f) *Pay* means the rate of 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.

(g) *Similar positions* mean positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbent could be interchanged between the positions without significant training or undue interruption to the work.

(h) *Suspension* means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay for more than 14 days.

[53 FR 21623, June 9, 1988]

§ 752.403 Standard for action.

(a) An agency may take an adverse action, including a performance-based adverse action, under this subpart only such cause as will promote the efficiency of the service.

(b) An agency may not take an adverse action against an employee on the basis of any reason prohibited by 5 U.S.C. 2302.

[45 FR 46778, July 11, 1980, as amended at 53 FR 21623, June 9, 1988]

§ 752.404 Procedures.

(a) *Statutory entitlements.* An employee against whom action is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7513(b).

(b) *Notice of proposed action.* (1) The notice of proposal shall inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The agency may not use material that cannot be disclosed to the employee of his or her representative or designated physician under § 297.204(c) of this chapter to support the reasons in the notice.

(2) When some but not all employees in a given competitive level are being furloughed, the notice of proposal shall state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough.

(3) Under ordinary circumstances, an employee whose removal or suspension, including indefinite suspension, has been proposed shall remain in a duty status in his or her regular position during the advance notice period. In those rare circumstances where the agency determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the

agency may elect one or a combination of the following alternatives:

(i) Assigning the employee to duties where he or she is no longer a threat to safety, the agency mission, or to Government property;

(ii) Allowing the employee to take leave, or carrying him or her in an appropriate leave status (annual, sick, leave without pay, or absence without leave) if the employee has absented himself or herself from the worksite without requesting leave;

(iii) Curtailing the notice period when the agency can invoke the provisions of § 752.404(d)(1) of this part, the ''crime provision.'' This provision may be invoked even in the absence of judicial action if the agency has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed; or

(iv) Placing the employee in a paid, nonduty status for such time as is necessary to effect the action.

(c) *Employee's answer.* (1) The agency shall give the employee a reasonable amount of official time to review the material relied on to support its proposal and to prepare an answer and to secure affidavits, if he or she is otherwise in an active duty status.

(2) The agency shall designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action. The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides one in its regulations in accordance with paragraph (g) of this section.

(3) If the employee wishes the agency to consider any medical condition which may contribute to a conduct, performance, or leave problem, the employee shall be given a reasonable time to furnish medical documentation (as defined in § 339.102 of this chapter) of the condition. Whenever possible, the employee shall supply such documentation within the time limits allowed for an answer. After its review of the medical documentation supplied by the employee, the agency may, if authorized, require a medical examination under the criteria of § 339.301(a)(3) and the procedures of § 339.302 of this chapter, or otherwise, at its option, offer a medical examination in accordance with the criteria of § 339.301(d) and procedures of § 339.302 of this chapter. If the employee has the requisite years of service under the Civil Service Retirement System or the Federal Employees Retirement System, the agency shall provide information concerning disability retirement. The agency shall be aware of the affirmative obligations of the provisions of 29 CFR 1613.704, which require reasonable accommodation of a qualified employee who is handicapped.

(d) *Exceptions.* (1) Section 7513(b) of title 5 of the United States Code authorizes an exception to the 30 days' advance written notice when the agency has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed and is proposing a removal or suspension (including indefinite suspension). The agency may require the employee to furnish any answer to the proposed action, and affidavits and other documentary evidence in support of the answer, within such time as would be reasonable, but not less than 7 days. When the circumstances require that the employee be kept away from the worksite, the agency may place him or her in a nonduty status with pay for such time as is necessary to effect the action.

(2) The advance written notice and opportunity to answer are not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

(e) *Representation.* Section 7513(b)(3) of title 5 of the United States Code provides that an employee covered by this part is entitled to be represented by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as representative would cause a conflict of interest or position, or an employee of the agency whose release from his or official position would give rise to unreasonable costs or whose priority work assignments preclude his or her release.

(f) *Agency decision.* In arriving at its decision, the agency shall not consider any reasons for action other than those specified in the notice of proposed action. It shall consider any answer of the employee and/or his or her representative made to a designated official and any medical documentation furnished under paragraph (c) of this section. The agency shall deliver the notice of decision to the employee at or before the time the action will be effective, and advise the employee of appeal rights.

(g) *Hearing.* Under 5 U.S.C. 7513(c), the agency may in its regulations provide a hearing in place of or in addition to the opportunity for written and oral answer.

(h) *Applications for disability retirement.* Section 831.501(d) of this chapter provides that an employee's application for disability retirement shall not preclude or delay any other appropriate personnel action. Section 831.1203 of this chapter sets forth the basis under which an agency shall file an application for disability retirement on behalf of an employee.

[45 FR 46778, July 11, 1980, as amended at 48 FR 19349, Apr. 29, 1983; 48 FR 45526, Oct. 6, 1983; 49 FR 1330, Jan. 11, 1984; 53 FR 21623, June 9, 1988]

§ 752.405 Appeal and grievance rights.

(a) *Appeal rights.* Under the provisions of 5 U.S.C. 7513(d), an employee against whom an action is taken under this subpart is entitled to appeal to the Merit Systems Protection Board.

(b) *Grievance rights.* As provided at 5 U.S.C. 7121(e)(1), if a matter covered by this subpart falls within the coverage of an applicable negotiated grievance procedure, and employee may elect to file a grievance under that procedure or appeal to the Merit Systems Protection Board under 5 U.S.C. 7701, but not both. 5 U.S.C. 7114(a)(5) and 7121(b)(3), and the terms of an applicable collective bargaining agreement, govern representation for employees in an exclusive bargaining unit who grieve a matter under this subpart through the negotiated grievance procedure.

[45 FR 46778, July 11, 1980, as amended at 53 FR 21624, June 9, 1988]

§ 752.406 Agency records.

The agency shall maintain copies of the items specified in 5 U.S.C. 7513(e) and shall furnish them upon request as required by that subsection.

Subpart E—Principal Statutory Requirements for Taking Adverse Actions Under the Senior Executive Service

§ 752.501 Principal statutory requirements.

This subpart sets forth for the benefit of the user the statutory requirements of subchapter V of Chapter 75 for suspension for more than 14 days and removal from the civil service. (5 U.S.C. 7541–7543)

''§ 7541. DEFINITIONS

''For the purpose of this subchapter—

''(1) 'employee' means a career appointee in the Senior Executive Service who—

''(A) has completed the probationary period prescribed under section 3393(d) of this title; or

''(B) was covered by the provisions of subchapter II of this chapter immediately before appointment to the Senior Executive Service; and

''(2) 'suspension' as the meaning set forth in section 7501(2) of this title.

''§ 7542. Actions covered

''This subchapter applies to a removal from the civil service or suspension for more than 14 days, but does not apply to an action initiated under section 1206 of this title, to a suspension or removal under section 7532 of this title, or to a removal under section 3592 or 3595 of this title.

''§ 7543. Cause and procedure

''(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

''(b) An employee against whom an action covered by this subchapter is proposed is entitled to—

''(1) at least 30 days' advance written notice, unless there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment can be imposed, stating specific reasons for the proposed action;

''(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to