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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 752

RIN 3206-AL39

#### Adverse Actions

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) is issuing final regulations governing Federal adverse actions. The final regulations clarify the adverse action rules regarding reductions in pay. In addition, the final regulations remove unnecessary subparts pertaining to statutory requirements, make a number of technical corrections, and utilize consistent language for similar regulatory requirements. The changes also include various revisions to make the regulations more readable.

**DATES:** *Effective Date:* The rule is effective February 2, 2010.

**FOR FURTHER INFORMATION CONTACT:** Sharon Hall by telephone at (202) 606-2930; by FAX at (202) 606-2613; or by e-mail at [CWRAP@opm.gov](mailto:CWRAP@opm.gov).

#### SUPPLEMENTARY INFORMATION:

##### Introduction

On September 18, 2008, OPM published at 73 FR 54075 (2008) proposed amendments to the regulations in part 752 of title 5, Code of Federal Regulations (CFR), to clarify the adverse action rules regarding reductions in pay and indefinite suspension, remove unnecessary subparts pertaining to statutory requirements, make technical corrections, utilize consistent language for similar regulatory requirements, and make the regulations more readable. The public comment period on the proposed amendments ended on November 17,

2008. OPM received comments from four Federal agencies or departments, four unions, an employment law attorney, and a professional organization of attorneys specializing in employment law. OPM has carefully considered the comments received.

#### Amendment To Clarify Adverse Action Rules Regarding Reduction in Pay

OPM proposed to amend 5 CFR 752.401(b)(15), to clarify that a reduction in an employee's rate of basic pay resulting from the application of The Federal Workforce Flexibility Act (Pub. L. 108-411, October 30, 2004) and implementing regulations is excluded from adverse action coverage. We received no comments on this proposed change. One agency recommended that we also modify 5 CFR 752.401(b)(2) to substitute the term "pay" for "grade" and thereby extend the exclusion to pay-banded systems as well as systems using grades. This recommendation is outside the scope of the current proposed regulation and therefore has not been considered.

#### Amendment To Clarify Adverse Action Rules Regarding Indefinite Suspension

OPM proposed to revise the regulations to clarify that the "crime provision" at 5 U.S.C. 7513(b)(1) is an exception only to the general 30-day notice requirement for taking adverse actions and that it does not set a higher or separate standard of proof for indefinite suspensions.

OPM also proposed a "Standard for Action" to list examples of serious misconduct for which an indefinite suspension could be an appropriate action. These examples were the types of misconduct that would pose a specific significant and ongoing risk.

We received comments regarding the proposed clarification of OPM regulations on this topic. Several commenters stated that OPM's interpretation of the law represented an unwarranted expansion of the grounds for indefinite suspension based on an overreaching interpretation of the Federal Circuit Court of Appeals' decision in *Perez v. Department of Justice*, 480 F.3d 1309 (Fed. Cir. 2007). While not within the scope of the proposed regulations, two commenters urged that agencies be required to meet the "reasonable cause" standard specified in 5 U.S.C. 7513(b)(1) in all

indefinite suspensions involving allegations of criminal activity.

One comment asserted that OPM was giving agencies license to suspend employees indefinitely, without pay, for virtually any serious misconduct. This comment focused on duration and control—that is, agencies would have the power to suspend employees indefinitely for a duration solely within the agency's control, unbounded by any external event, such as a criminal investigation resulting in a criminal charge or other disposition.

Focusing on the agencies' burden of proof, this comment also asserted that the proposed regulations did not make clear what an agency would have to show to a reviewing body to justify its action. That is, although OPM clarified that the correct standard is "preponderance of the evidence" rather than a universally applied and, in the commenter's view, more appropriate "reasonable cause" standard, it is unclear exactly what OPM contemplates that the agency would be required to prove by a preponderance of the evidence.

Several commenters also took issue with the enumeration of types of categories that would warrant an indefinite suspension. They described the list as vague and overbroad.

One commenter suggested additional language be added to sections 752.403(a), 752.404(b)(1), and 752.404(g) to state that regardless of whether the agency invokes the "crime provision" and shortens the notice period under 5 U.S.C. 7513(b)(1), action taken under this subpart must satisfy the requirement of 5 U.S.C. 7513(a) to prove that the suspension promotes the efficiency of the service.

Finally, one commenter suggested a change in the regulation at 5 CFR 752.404(b)(3)(ii) to require that when the provisions of 5 U.S.C. 7513(b)(1) are invoked to curtail the 30-day notice period, the employee will continue to receive pay and benefits for up to 30 days with no charge to his or her accrued leave.

After reviewing the comments, OPM has decided not to make any changes in the current regulations relating to indefinite suspensions.

The comments regarding standards and procedures for using indefinite suspensions persuade us that the issues raised are quite complex. These include

the amount of evidence needed to justify use of indefinite suspensions, issues relating to the absence of external events limiting the duration of investigations, and the types of misconduct that would justify the indefinite suspension action. Accordingly, we have determined that we should await further delineation of the law by MSPB and the Court of Appeals for the Federal Circuit before deciding whether to propose substantive regulations on this subject.

#### Miscellaneous Comments

One commenter expressed concern that the slow processing of security clearance appeals can leave employees on an indefinite suspension in limbo for months or years. The commenter recommended that OPM promulgate a new regulation to require that employees who have had their clearance suspended either be placed in another position not requiring a clearance or be provided back pay for the period of suspension if no such position exists. In addition, an agency proposed additional text be added to sections 752.404(c)(3), 752.404(f), 752.604(c)(3), and 752.604(f) to clarify that any request for medical information must be consistent with the Rehabilitation Act of 1973 [29 U.S.C. 791]. Since no change in the substantive content of the regulations in these areas was proposed, these suggestions are outside the scope of the current proposed regulation and therefore have not been considered.

Another agency recommended amendment of § 752.404(f) to clarify what they described as a new obligation to provide disability retirement information to employees with the requisite years of service for disability retirement even if the medical documentation is unrelated to the proposed adverse action. While the text in this area was reorganized for clarity, no change to the substantive content of the regulations in this area was proposed. Accordingly, this suggestion is outside the scope of the current proposed regulation and therefore has not been considered.

One commenter recommended changing the provisions governing appeals of adverse actions to the Merit Systems Protection Board (MSPB). They recommended that MSPB be authorized to issue summary judgment decisions without a hearing where the MSPB administrative judge finds there are no material facts in dispute or genuine issues of credibility. One agency recommended deletion of 5 CFR 752.401(c)(6), arguing that as written, it conflicts with case law, specifically *Van Wersch v. DHHS*, 197 F.3d 1144 (Fed.

Cir. 1999), and the line of cases that followed. One union recommended that 5 CFR 752.201(b)(2) should be amended because it is inconsistent with 5 U.S.C. 7501. Since no change in the substantive content of the regulations in these areas was proposed, these suggestions are outside the scope of the current proposed regulation and therefore have not been considered.

#### Executive Order 12866, Regulatory Review

The Office of Management and Budget has reviewed the final rule in accordance with Executive Order 12866.

#### Regulatory Flexibility Act

I certify that these regulations will not have significant economic impact on a substantial number of small entities because they will affect Federal agencies, employees, and applicants only.

#### E.O. 13132

This regulation will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

#### E.O. 12988—Civil Justice Reform

This regulation meets the applicable standard set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private section, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### Congressional Review Act

This action pertains to agency management, personnel and organization, and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting

requirement of 5 U.S.C. 801 does not apply.

#### List of Subjects in 5 CFR Part 752

Administrative practice and procedure, Government employees.

U.S. Office of Personnel Management.

John Berry,

Director.

■ Accordingly, OPM is revising part 752 of title 5, Code of Federal Regulations, to read as follows:

#### PART 752—ADVERSE ACTIONS

Sec.

##### Subpart A—[Reserved]

##### Subpart B—Regulatory Requirements for Suspension for 14 Days or Less

- 752.201 Coverage.
- 752.202 Standard for action.
- 752.203 Procedures.

##### Subpart C—[Reserved]

##### Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

- 752.401 Coverage.
- 752.402 Definitions.
- 752.403 Standard for action.
- 752.404 Procedures.
- 752.405 Appeal and grievance rights.
- 752.406 Agency records.

##### Subpart E—[Reserved]

##### Subpart F—Regulatory Requirements for Taking Adverse Actions Under the Senior Executive Service

- 752.601 Coverage.
- 752.602 Definitions.
- 752.603 Standard for action.
- 752.604 Procedures.
- 752.605 Appeal rights.
- 752.606 Agency records.

Authority: 5 U.S.C. 7504, 7514, and 7543.

##### Subpart A—[Reserved]

##### Subpart B—Regulatory Requirements for Suspension for 14 Days or Less

###### § 752.201 Coverage.

(a) *Adverse actions covered.* This subpart covers suspension for 14 days or less.

(b) *Employees covered.* This subpart covers:

- (1) An employee in the competitive service who has completed a probationary or trial period;
- (2) An employee in the competitive service serving in an appointment which requires no probationary or trial period, and who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less;

(3) An employee with competitive status who occupies a position under Schedule B of part 213 of this chapter;

(4) An employee who was in the competitive service at the time his or her position was first listed under Schedule A, B, or C of the excepted service and still occupies that position;

(5) An employee of the Department of Veterans Affairs appointed under section 7401(3) of title 38, United States Code; and

(6) An employee of the Government Printing Office.

(c) *Exclusions.* This subpart does not apply to a suspension for 14 days or less:

(1) Of an administrative law judge under 5 U.S.C. 7521;

(2) Taken for national security reasons under 5 U.S.C. 7532;

(3) Taken under any other provision of law which excepts the action from subchapter I, chapter 75, of title 5, U.S. Code;

(4) Of a reemployed annuitant; or

(5) Of a National Guard Technician.

(d) *Definitions.* In this subpart—

*Current continuous employment* means a period of employment immediately preceding a suspension action without a break in Federal civilian employment of a workday.

*Day* means a calendar day.

*Similar positions* means 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.

*Suspension* means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

#### § 752.202 Standard for action.

(a) An agency may take action under this subpart for such cause as will promote the efficiency of the service as set forth in 5 U.S.C. 7503(a).

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

#### § 752.203 Procedures.

(a) *Statutory entitlements.* An employee under this subpart whose suspension is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7503(b).

(b) *Notice of proposed action.* The notice must state the specific reason(s) for the proposed action, and 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.

(c) *Employee's answer.* The employee must be given a reasonable time, but not less than 24 hours, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer.

(d) *Representation.* An employee covered by this subpart 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 her official position would give rise to unreasonable costs or whose priority work assignments preclude his or her release.

(e) *Agency decision.* (1) In arriving at its decision, the agency will consider only the reasons specified in the notice of proposed action and any answer of the employee or his or her representative, or both, made to a designated official.

(2) The agency must specify in writing the reason(s) for the decision and advise the employee of any grievance rights under paragraph (f) of this section. The agency must deliver the notice of decision to the employee on or before the effective date of the action.

(f) *Grievances.* The employee may file a grievance through an agency administrative grievance system (if applicable) or, if the suspension falls within the coverage of an applicable negotiated grievance procedure, an employee in an exclusive bargaining unit may file a grievance only under that procedure. Sections 7114(a)(5) and 7121(b)(1)(C) of title 5, U.S. Code, and the terms of any collective bargaining agreement, govern representation for employees in an exclusive bargaining unit who grieve a suspension under this subpart through the negotiated grievance procedure.

(g) *Agency records.* The agency must maintain copies of, and will furnish to the Merit Systems Protection Board and to the employee upon their request, the following documents:

(1) Notice of the proposed action;

(2) Employee's written reply, if any;

(3) Summary of the employee's oral reply, if any;

(4) Notice of decision; and

(5) Any order effecting the suspension, together with any supporting material.

#### Subpart C—[Reserved]

#### Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

##### § 752.401 Coverage.

(a) *Adverse actions covered.* This subpart applies to the following actions:

(1) Removals;

(2) Suspensions for more than 14 days, including indefinite suspensions;

(3) Reductions in grade;

(4) Reductions in pay; and

(5) Furloughs of 30 days or less.

(b) *Actions excluded.* This subpart does not apply to:

(1) An action imposed by the Merit Systems Protection Board under the authority of 5 U.S.C. 1215;

(2) The reduction in grade of a supervisor or manager who has not completed the probationary period under 5 U.S.C. 3321(a)(2) if such a reduction is to the grade held immediately before becoming a supervisor or manager;

(3) A reduction-in-force action under 5 U.S.C. 3502;

(4) A reduction in grade or removal under 5 U.S.C. 4303;

(5) An action against an administrative law judge under 5 U.S.C. 7521;

(6) A suspension or removal under 5 U.S.C. 7532;

(7) Actions taken under any other provision of law which excepts the action from subchapter II of chapter 75 of title 5, United States Code;

(8) Action that entitles an employee to grade retention under part 536 of this chapter, and an action to terminate this entitlement;

(9) A voluntary action by the employee;

(10) Action taken or directed by the Office of Personnel Management under part 731 of this chapter;

(11) Termination of appointment on the expiration date specified as a basic condition of employment at the time the appointment was made;

(12) Action that terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different position of equivalent grade and pay, if the agency informed the employee that it was to be of limited duration;

(13) Cancellation of a promotion to a position not classified prior to the promotion;

(14) Placement of an employee serving on an intermittent or seasonal basis in a temporary nonduty, nonpay status in accordance with conditions

established at the time of appointment; or

(15) Reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation, including a reduction necessary to comply with the amendments made by Public Law 108-411, regarding pay-setting under the General Schedule and Federal Wage System and regulations implementing those amendments.

(c) *Employees covered.* This subpart covers:

(1) A career or career conditional employee in the competitive service who is not serving a probationary or trial period;

(2) An employee in the competitive service who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(3) An employee in the excepted service who is a preference eligible in an Executive agency as defined at section 105 of title 5, United States Code, the U.S. Postal Service, or the Postal Regulatory Commission and who has completed 1 year of current continuous service in the same or similar positions;

(4) A Postal Service employee covered by Public Law 100-90 who has completed 1 year of current continuous service in the same or similar positions and who is either a supervisory or management employee or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity;

(5) An employee in the excepted service who is a nonpreference eligible in an Executive agency as defined at section 105 of title 5, United States Code, and who has completed 2 years of current continuous service in the same or similar positions under other than a temporary appointment limited to 2 years or less;

(6) An employee with competitive status who occupies a position in Schedule B of part 213 of this chapter;

(7) An employee who was in the competitive service at the time his or her position was first listed under Schedule A, B, or C of the excepted service and who still occupies that position;

(8) An employee of the Department of Veterans Affairs appointed under section 7401(3) of title 38, United States Code; and

(9) An employee of the Government Printing Office.

(d) *Employees excluded.* This subpart does not apply to:

(1) An employee whose appointment is made by and with the advice and consent of the Senate;

(2) An employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character by the President for a position that the President has excepted from the competitive service; the Office of Personnel Management for a position that the Office has excepted from the competitive service (Schedule C); or the President or the head of an agency for a position excepted from the competitive service by statute;

(3) A Presidential appointee;

(4) A reemployed annuitant;

(5) A technician in the National Guard described in section 8337(h)(1) of title 5, United States Code, who is employed under section 709(a) of title 32, United States Code;

(6) A Foreign Service member as described in section 103 of the Foreign Service Act of 1980;

(7) An employee of the Central Intelligence Agency or the Government Accountability Office;

(8) An employee of the Veterans Health Administration (Department of Veterans Affairs) in a position which has been excluded from the competitive service by or under a provision of title 38, United States Code, unless the employee was appointed to the position under section 7401(3) of title 38, United States Code;

(9) A nonpreference eligible employee with the U.S. Postal Service, the Postal Regulatory Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, the National Security Agency, the Defense Intelligence Agency, or any other intelligence component of the Department of Defense (as defined in section 1614 of title 10, United States Code), or an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10, United States Code;

(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, unless he or she meets the requirements of paragraph (c)(5) of this section;

(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; and

(13) An employee in the competitive service serving a probationary or trial period, unless he or she meets the requirements of paragraph (c)(2) of this section.

#### § 752.402 Definitions.

In this subpart—

*Current continuous employment* means a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday.

*Day* means a calendar day.

*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.

*Grade* means a level of classification under a position classification system.

*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.

*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.

*Similar positions* means 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.

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

#### § 752.403 Standard for action.

(a) An agency may take an adverse action, including a performance-based adverse action or an indefinite suspension, under this subpart only for 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.

#### § 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) An employee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. The notice must state the specific reason(s) for the proposed action, and 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.

(2) When some but not all employees in a given competitive level are being furloughed, the notice of proposed action must 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 will 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 paragraph (d)(1) of this section; 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) An employee may answer orally and in writing except as provided in paragraph (c)(2) of this section. The agency must give the employee a reasonable amount of official time to review the material relied on to support its proposed action, to prepare an answer orally and in writing, and to secure affidavits, if the employee is in an active duty status. 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.

(2) The agency will 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 for such hearing in its regulations. 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.

(3) If the employee wishes the agency to consider any medical condition which may contribute to a conduct, performance, or leave problem, the employee must be given a reasonable time to furnish medical documentation (as defined in § 339.104 of this chapter) of the condition. Whenever possible, the employee will supply such documentation within the time limits allowed for an answer.

(d) *Exceptions.* (1) Section 7513(b) of title 5, U.S. 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. This notice exception is commonly referred to as the "crime provision." This provision may be invoked even in the absence of judicial action.

(2) The advance written notice and opportunity to answer are not required 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, U.S. 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 her official position would give rise to unreasonable costs or whose priority work assignments preclude his or her release.

(f) *Agency review of medical information.* When medical information is supplied by the employee pursuant to paragraph (c)(3) of this section, the agency may, if authorized, require a medical examination under the criteria of § 339.301 of this chapter, or otherwise, at its option, offer a medical examination in accordance with the

criteria 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 must provide information concerning disability retirement. The agency must be aware of the affirmative obligations of the provisions of 29 CFR 1614.203, which require reasonable accommodation of a qualified individual with a disability.

(g) *Agency decision.* (1) In arriving at its decision, the agency will consider only the reasons specified in the notice of proposed action and any answer of the employee or his or her representative, or both, made to a designated official and any medical documentation reviewed under paragraph (f) of this section.

(2) The notice must specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights under § 752.405 of this part. The agency must deliver the notice of decision to the employee on or before the effective date of the action.

(h) *Applications for disability retirement.* Section 831.1204(e) of this chapter provides that an employee's application for disability retirement need not delay any other appropriate personnel action. Section 831.1205 and § 844.202 of this chapter set forth the basis under which an agency must file an application for disability retirement on behalf of an employee.

#### **§ 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, an 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. Sections 7114(a)(5) and 7121(b)(1)(C) of title 5, U.S. Code, 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.

#### **§ 752.406 Agency records.**

The agency must maintain copies of, and will furnish to the Merit Systems Protection Board and to the employee upon his or her request, the following documents:

- (a) Notice of the proposed action;
- (b) Employee's written reply, if any;
- (c) Summary of the employee's oral reply, if any;
- (d) Notice of decision; and
- (e) Any order effecting the action, together with any supporting material.

#### Subpart E—[Reserved]

#### Subpart F—Regulatory Requirements for Taking Adverse Action Under the Senior Executive Service

##### § 752.601 Coverage.

(a) *Adverse actions covered.* This subpart applies to suspensions for more than 14 days and removals from the civil service as set forth in 5 U.S.C. 7542.

(b) *Actions excluded.* (1) An agency may not take a suspension action of 14 days or less.

(2) This subpart does not apply to actions taken under 5 U.S.C. 1215, 3592, 3595, or 7532.

(c) *Employees covered.* This subpart covers the following appointees:

(1) A career appointee—

(i) Who has completed the probationary period in the Senior Executive Service;

(ii) Who is not required to serve a probationary period in the Senior Executive Service; or

(iii) Who was covered under 5 U.S.C. 7511 immediately before appointment to the Senior Executive Service.

(2) A limited term or limited emergency appointee—

(i) Who received the limited appointment without a break in service in the same agency as the one in which the employee held a career or career-conditional appointment (or an appointment of equivalent tenure as determined by the Office of Personnel Management) in a permanent civil service position outside the Senior Executive Service; and

(ii) Who was covered under 5 U.S.C. 7511 immediately before appointment to the Senior Executive Service.

(d) *Employees excluded.* This subpart does not cover an appointee who is serving as a reemployed annuitant.

##### § 752.602 Definitions.

In this subpart—

*Career appointee, limited term appointee, and limited emergency appointee* have the meaning given in 5 U.S.C. 3132(a).

*Day* means calendar day.

*Suspension* has the meaning given in 5 U.S.C. 7501(2).

##### § 752.603 Standard for action.

(a) An agency may take an adverse action under this subpart only for

reasons of misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

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

##### § 752.604 Procedures.

(a) *Statutory entitlements.* An appointee against whom action is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7543(b).

(b) *Notice of proposed action.* (1) An appointee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. The notice must state the specific reason(s) for the proposed action, and inform the appointee of his or her right to review the material that is relied on to support the reasons for action given in the notice.

(2) Under ordinary circumstances, an appointee whose removal has been proposed will 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 appointee's continued presence in the work place during the notice period may pose a threat to the appointee 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 appointee to duties where he or she is no longer a threat to safety, the agency mission, or Government property;

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

(iii) Curtailing the notice period when the agency can invoke the provisions of paragraph (d) of this section; or

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

(c) *Appointee's answer.* (1) The appointee may answer orally and in writing except as provided in paragraph (c)(2) of this section. The agency must give the appointee a reasonable amount of official time to review the material relied on to support its proposed action, to prepare an answer orally and in writing, and to secure affidavits, if the appointee is in an active duty status. The agency may require the appointee 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.

(2) The agency will designate an official to hear the appointee's oral answer who has authority either to make or to 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 for such hearing in its regulations. Under 5 U.S.C. 7543(c), the agency may in its regulations provide a hearing in place of or in addition to the opportunity for written and oral answer.

(3) If the appointee wishes the agency to consider any medical condition that may have affected the basis for the adverse action, the appointee must be given reasonable time to furnish medical documentation (as defined in § 339.104 of this chapter) of the condition. Whenever possible, the appointee will supply such documentation within the time limits allowed for an answer.

(d) *Exception.* Section 7543(b)(1) of title 5, U.S. Code, authorizes an exception to the 30 days' advance written notice when the agency has reasonable cause to believe that the appointee has committed a crime for which a sentence of imprisonment may be imposed and is proposing a removal or suspension. This notice exception is commonly referred to as the "crime provision." This provision may be invoked even in the absence of judicial action.

(e) *Representation.* Section 7543(b)(3) of title 5, U.S. Code, provides that an appointee covered by this part is entitled to be represented by an attorney or other representative. An agency may disallow as an appointee'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 her official position would give rise to unreasonable costs or whose priority work assignments preclude his or her release.

(f) *Agency review of medical information.* When medical information is supplied by the appointee pursuant to paragraph (c)(3) of this section, the agency may, if authorized, require a medical examination under the criteria of § 339.301 of this chapter, or otherwise, at its option, offer a medical examination in accordance with the criteria of § 339.302 of this chapter. If the appointee has the requisite years of service under the Civil Service Retirement System or the Federal

Employees' Retirement System, the agency must provide information concerning disability retirement. The agency must be aware of the affirmative obligations of the provisions of 29 CFR 1614.203, which require reasonable accommodation of a qualified individual with a disability.

(g) *Agency decision.* (1) In arriving at its decision, the agency will consider only the reasons specified in the notice of proposed action and any answer of the appointee or the appointee's representative, or both, made to a designated official and any medical documentation reviewed under paragraph (f) of this section.

(2) The notice must specify in writing the reasons for the decision and advise the appointee of any appeal rights under § 752.605 of this part. The agency must deliver the notice of decision to the appointee on or before the effective date of the action.

(h) *Applications for disability retirement.* Section 831.1204(e) of this chapter provides that an appointee's application for disability retirement need not delay any other appropriate personnel action. Section 831.1205 and § 844.202 of this chapter set forth the basis under which an agency must file an application for disability retirement on behalf of an appointee.

#### § 752.605 Appeal rights.

(a) Under 5 U.S.C. 7543(d), a career appointee against whom an action is taken under this subpart is entitled to appeal to the Merit Systems Protection Board.

(b) A limited term or limited emergency appointee who is covered under § 752.601(c)(2) also may appeal an action taken under this subpart to the Merit Systems Protection Board.

#### § 752.606 Agency records.

The agency must maintain copies of, and will furnish to the Merit Systems Protection Board and to the appointee upon his or her request, the following documents:

- (a) Notice of the proposed action;
- (b) Appointee's written reply, if any;
- (c) Summary of the appointee's oral reply, if any;
- (d) Notice of decision; and
- (e) Any order effecting the action, together with any supporting material.

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## DEPARTMENT OF AGRICULTURE

### Natural Resources Conservation Service

#### 7 CFR Part 662

RIN 0578-AA44

#### Regional Equity

**AGENCY:** Natural Resources Conservation Service, United States Department of Agriculture.

**ACTION:** Final rule.

**SUMMARY:** The Natural Resources Conservation Service (NRCS) is issuing a final rule on the procedures for implementing the Regional Equity provision of section 1241(d) of the Food Security Act of 1985, 16 U.S.C. 3841(d). The Regional Equity provision ensures that each State receives a \$15 million minimum annual aggregate level of conservation program funding. NRCS published an interim final rule for Regional Equity in the **Federal Register** on January 13, 2009, with request for public comment. This final rule responds to comments received on the January 13, 2009, interim final rule, and makes minor adjustments to the Regional Equity regulation at 7 CFR part 662 in response to these comments.

**DATES:** Effective December 4, 2009.

**FOR FURTHER INFORMATION CONTACT:** Geno Bulzomi, Acting Team Leader, Program Allocations and Management Support Team, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 5208 South Building, Washington, DC 20250; telephone (202) 690-0547; e-mail: [PAMS@wdc.usda.gov](mailto:PAMS@wdc.usda.gov), Attention: Regional Equity.

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, *etc.*) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

#### SUPPLEMENTARY INFORMATION:

##### Regulatory Certifications

###### *Executive Order 12866*

The Office of Management and Budget (OMB) has determined that this rule is not significant and will not be reviewed by OMB under Executive Order 12866.

###### *Regulatory Flexibility Act*

It has been determined that the Regulatory Flexibility Act is not applicable to this final rule because NRCS is not required by 5 U.S.C. 553, or any other provision of law, to publish a notice of final rulemaking with respect to the subject matter of this rule.

#### *Civil Rights Assessment*

NRCS has determined through a Civil Rights Impact Analysis that the issuance of this final rule discloses no disproportionately adverse impact for minorities, women, or persons with disabilities. The data presented indicates producers who are members of the historically underserved groups have participated in NRCS programs at parity with other producers. Extrapolating from historical participation data, it is reasonable to conclude that NRCS programs, including Regional Equity, will continue to be administered in a non-discriminatory manner. Outreach and communication strategies are in place to ensure all producers will be provided the same information to allow them to make informed compliance decisions regarding the use of their lands that will affect their participation in the Department of Agriculture (USDA) programs. Regional Equity funding applies to all persons equally regardless of their race, color, national origin, gender, sex, or disability status. Therefore, the Regional Equity rule portends no adverse civil rights implications. Copies of the Civil Rights Impact Analysis may be obtained from Geno Bulzomi, Acting Team Leader, Program Allocations and Management Support Team, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 5208 South Building, Washington, DC 20250.

#### *Environmental Analysis*

The Regional Equity final rule establishes procedures for implementing this provision at part 662 of this title and will not directly impact the environment. This rule falls within the categories of activities that have been determined not to have a significant individual or cumulative effect on the human environment and are excluded from the preparation of an environmental assessment or environmental impact statement as set forth in the USDA National Environmental Policy Act regulations in 7 CFR part 1b.3. Regional Equity is an administrative function that relates to the funding of programs and fund disbursements. These activities are categorically excluded based upon 7 CFR 1b.3(a)(1) and 7 CFR 1b.3(a)(2) of USDA regulations.

#### *Paperwork Reduction Act*

Section 2904 of the Food, Conservation, and Energy Act of 2008 (2008 Act) requires that implementation of programs authorized by Title II of the