

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

### § 7533. Effect on other statutes

This subchapter does not impair the powers vested in the Atomic Energy Commission by chapter 23 of title 42, or the requirement in section 2201(d) of title 42 that adequate provision be made for administrative review of a determination to dismiss an employee of the Atomic Energy Commission.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 529.)

#### HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 22-2.	Aug. 26, 1950, ch. 803, § 2, 64 Stat. 477.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

#### TRANSFER OF FUNCTIONS

Atomic Energy Commission abolished and functions transferred by sections 5814 and 5841 of Title 42, The Public Health and Welfare. See, also, Transfer of Functions notes set out under those sections.

### SUBCHAPTER V—SENIOR EXECUTIVE SERVICE

#### § 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” has the meaning set forth in section 7501(2) of this title.

(Added Pub. L. 95-454, title IV, § 411(2), Oct. 13, 1978, 92 Stat. 1174.)

#### EFFECTIVE DATE

Subchapter effective 9 months after Oct. 13, 1978, and congressional review of provisions of sections 401 through 412 of Pub. L. 95-454, see section 415 of Pub. L. 95-454, set out as a note under section 3131 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 1215 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.

(Added Pub. L. 95-454, title IV, § 411(2), Oct. 13, 1978, 92 Stat. 1174; amended Pub. L. 97-35, title XVII, § 1704(d)(1), Aug. 13, 1981, 95 Stat. 758; Pub. L. 101-12, § 9(a)(2), Apr. 10, 1989, 103 Stat. 35.)

#### AMENDMENTS

1989—Pub. L. 101-12 substituted “1215” for “1206”.

1981—Pub. L. 97-35 inserted reference to section 3595 of this title.

#### EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101-12 effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101-12, set out as a note under section 1201 of this title.

#### EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by Pub. L. 97-35 effective June 1, 1981, with certain exceptions and conditions, see section 1704(e) of Pub. L. 97-35, set out as an Effective Date note under section 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 furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, and a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee’s request.

(Added Pub. L. 95-454, title IV, § 411(2), Oct. 13, 1978, 92 Stat. 1174; amended Pub. L. 97-35, title XVII, § 1704(d)(2), Aug. 13, 1981, 95 Stat. 758; Pub. L. 98-615, title III, § 304(c), Nov. 8, 1984, 98 Stat. 3219.)

#### AMENDMENTS

1984—Subsec. (a). Pub. L. 98-615 inserted reference to failure to accept a directed reassignment or to accompany a position in a transfer of function.

1981—Subsec. (a). Pub. L. 97-35 substituted “misconduct, neglect of duty, or malfeasance” for “such cause as will promote the efficiency of the service”.

#### EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-615 effective Nov. 8, 1984, see section 307 of Pub. L. 98-615, set out as a note under section 3393 of this title.

## EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by Pub. L. 97-35 effective June 1, 1981, with certain exceptions and conditions, see section 1704(e) of Pub. L. 97-35, set out as an Effective Date note under section 3595 of this title.

## CHAPTER 77—APPEALS

Sec.	
7701.	Appellate procedures.
7702.	Actions involving discrimination.
7703.	Judicial review of decisions of the Merit Systems Protection Board.

## AMENDMENTS

1978—Pub. L. 95-454, title II, §205, Oct. 13, 1978, 92 Stat. 1138, substituted “Appellate procedures” for “Appeals of preference eligibles” in item 7701, and added items 7702 and 7703.

## § 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

- (1) to a hearing for which a transcript will be kept; and
- (2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless—

- (i) the deciding official determines that the granting of such relief is not appropriate; or
- (ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and
- (II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of em-

ployment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.