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(d) A pledge of confidentiality, if granted, extends only to the identity of the source, and to any information furnished by the source that would reveal the identity of the source.

§ 736.103 Protecting the identity of a source.

When a source is granted a promise that the source's identity will be kept confidential, the investigative agency and all other agencies that receive information obtained under the promise are required to take all reasonable precautions to protect the source's identity. Each agency will prepare for its investigators and agents implementing instructions consistent with this part.

§ 736.104 Public availability of investigative files.

(a) Investigative files are records subject to the Privacy Act and the Freedom of Information Act and are made available to requesters in accordance with the provisions of those Acts.

(b) Requests for investigative records are to be submitted to the Office of Personnel Management, Federal Investigations Processing Center, FOI/PA, Boyers, Pennsylvania 16018.

Subpart B—Investigative Requirements

§ 736.201 Responsibilities of OPM and other Federal agencies.

(a) Unless provided otherwise by law, the investigation of persons entering or employed in the competitive service, or by career appointment in the Senior Executive Service, is the responsibility of OPM.

(b) Requests for delegated investigating authority. Agencies may request delegated authority from OPM to conduct or contract out investigations of persons entering or employed in the competitive service or by career appointment in the Senior Executive Service. Such requests shall be made in writing by agency heads, or designees, and specify the reason(s) for the request.

(c) Timing of investigations. Investigations required for positions must be initiated within 14 days of placement in the position except for: Positions designated Critical-Sensitive

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under part 732 of this chapter must be completed preplacement, or post-placement with approval of a waiver in accordance with § 732.202(a) of this chapter; and for positions designated Special-Sensitive under part 732 of this chapter must be completed preplacement.

PART 752—ADVERSE ACTIONS

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Subpart A —Discipline of Supervisors Based on Retaliation Against Whistleblowers

SOURCE: 85 FR 65983, Oct. 16, 2020, unless otherwise noted.

§ 752.101 Coverage.

(a) *Adverse actions covered.* This subpart applies to actions taken under 5 U.S.C. 7515.

(b) *Definitions.* In this subpart—
Agency—

(1) Has the meaning given the term in 5 U.S.C. 2302(a)(2)(C), without regard to whether any other provision of this chapter is applicable to the entity; and

(2) Does not include any entity that is an element of the intelligence community, as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 3003).

Day means a calendar day.

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

Insufficient evidence means evidence that fails to meet the substantial evidence standard described in 5 CFR 1201.4(p).

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.

Prohibited personnel action means taking or failing to take an action in violation of paragraph (8), (9), or (14) of 5 U.S.C. 2302(b) against an employee of an agency.

Supervisor means an employee who would be a supervisor, as defined in 5 U.S.C. 7103(a)(10), if the entity employing the employee was an agency.

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

[85 FR 65983, Oct. 16, 2020, as amended 87 FR 67782, Nov. 10, 2022]

§ 752.102 Standard for action and penalty determination.

(a) Except for actions taken against supervisors covered under subchapter V of title 5, an agency may take an action under this subpart for such cause as will promote the efficiency of the

service as described in 5 U.S.C. 7503(a) and 7513(a). For actions taken under this subpart against supervisors covered under subchapter V of title 5, an agency may take an action based on the standard described in 5 U.S.C. 7543(a).

(b) Subject to 5 U.S.C. 1214(f), if the head of the agency in which a supervisor is employed, an administrative law judge, the Merit Systems Protection Board, the Special Counsel, a judge of the United States, or the Inspector General of the agency in which a supervisor is employed has determined that the supervisor committed a prohibited personnel action, the head of the agency in which the supervisor is employed, consistent with the procedures required under this subpart—

(1) For the first prohibited personnel action committed by the supervisor—

(i) Shall propose suspending the supervisor for a period that is not less than 3 days; and

(ii) May propose an additional action determined appropriate by the head of the agency, including a reduction in grade or pay; and

(2) For the second prohibited personnel action committed by the supervisor, shall propose removing the supervisor.

§ 752.103 Procedures.

(a) *Non-delegation.* If the head of an agency is responsible for determining whether a supervisor has committed a prohibited personnel action for purposes of § 752.102(b), the head of the agency may not delegate that responsibility.

(b) *Scope.* An action carried out under this subpart—

(1) Except as provided in paragraph (b)(2) of this section, shall be subject to the same requirements and procedures, including those with respect to an appeal, as an action under 5 U.S.C. 7503, 7513, or 7543; and

(2) Shall not be subject to—

(i) Paragraphs (1) and (2) of 5 U.S.C. 7503(b);

(ii) Paragraphs (1) and (2) of subsection (b) and subsection (c) of 5 U.S.C. 7513; and

(iii) Paragraphs (1) and (2) of subsection (b) and subsection (c) of 5 U.S.C. 7543.

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(c) *Notice.* A supervisor against whom an action is proposed to be taken under this subpart is entitled to written notice that—

(1) States the specific reasons for the proposed action;

(2) Informs the supervisor about the right of the supervisor to review the material that is relied on to support the reasons given in the notice for the proposed action; and

(d) *Answer and evidence.* (1) A supervisor who receives notice under paragraph (c) of this section may, not later than 14 days after the date on which the supervisor receives the notice, submit an answer and furnish evidence in support of that answer.

(2) If, after the end of the 14-day period described in paragraph (d)(1) of this section, a supervisor does not furnish any evidence as described in that clause, or if the head of the agency in which the supervisor is employed determines that the evidence furnished by the supervisor is insufficient, the head of the agency shall carry out the action proposed under § 752.102 (b), as applicable.

[85 FR 65983, Oct. 16, 2020, as amended at 87 FR 67782, Nov. 10, 2022]

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, or 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, including such an employee who is moved involuntarily into the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(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, including such an employee who is moved involuntarily into the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(3) An employee with competitive status who occupies a position under Schedule B of part 213 of this chapter, including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(4) An employee who was in the competitive service and had competitive status as defined in § 212.301 of this chapter at the time the employee's position was first listed involuntarily under any schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(5) An employee of the Department of Veterans Affairs appointed under 38 U.S.C. 7401(3), including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily; and

(6) An employee of the Government Publishing Office, including such an employee who is moved involuntarily into the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily.

(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 re-employed annuitant;

(5) Of a National Guard Technician;

(6) Taken under 5 U.S.C. 7515; or

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(7) Of an employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character, as defined in § 210.102 of this subchapter by—

(i) The President for a position that the President has excepted from the competitive service unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (b) of this section;

(ii) The Office of Personnel Management for a position that the Office has excepted from the competitive service unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (b) of this section; or

(iii) The President or the head of an agency for a position excepted from the competitive service by statute unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (b) of this section.

(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.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65985, Oct. 16, 2020; 89 FR 25047, Apr. 9, 2024]

§ 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.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65985, Oct. 16, 2020; 87 FR 67782, Nov. 10, 2022]

§ 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. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Public Law 115-91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

(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.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65985, Oct. 16, 2020; 87 FR 67782, Nov. 10, 2022]

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;

(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

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System and regulations in this subchapter implementing those amendments;

(16) An action taken under 5 U.S.C. 7515.; or

(17) An action taken against a technician in the National Guard concerning any activity under 32 U.S.C. 709(f)(4), except as provided by 32 U.S.C. 709(f)(5).

(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, including such an employee who is moved involuntarily into the excepted service;

(2) An employee in the competitive service—

(i) Who is not serving a probationary or trial period under an initial appointment, including such an employee who is moved involuntarily into the excepted service; or

(ii) Except as provided in the former section 1599e of title 10, for individuals hired prior to December 31, 2022 (the date that section was otherwise repealed by Public Law 117–81, section 1106), who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less, including such an employee who is moved involuntarily into the excepted service;

(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, including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(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, including such an employee who is moved involuntarily into a dif-

ferent schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(5) An employee in the excepted service who is a nonpreference eligible in an Executive agency as defined at 5 U.S.C. 105, 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, including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(6) An employee with competitive status who occupies a position in Schedule B of part 213 of this chapter, including such an employee whose position is moved involuntarily into a different schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(7) An employee who was in the competitive service and had competitive status as defined in § 212.301 of this chapter at the time the employee's position was first listed involuntarily under any schedule of the excepted service and who still occupies that position or occupies any other position to which the employee is moved involuntarily;

(8) An employee of the Department of Veterans Affairs appointed under 38 U.S.C. 7401(3), including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily; and

(9) An employee of the Government Publishing Office, including such an employee who is moved involuntarily into the excepted service.

(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;

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(2) An employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character, as defined in §210.102 of this chapter by—

(i) The President for a position that the President has excepted from the competitive service unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (c) of this section;

(ii) The Office of Personnel Management for a position that the Office has excepted from the competitive service unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (c) of this section; or

(iii) The President or the head of an agency for a position excepted from the competitive service by statute unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (c) of this section;

(3) A Presidential appointee;

(4) A reemployed annuitant;

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

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

(7) 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;

(8) 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;

(9) An employee described in section 5102(c)(11) of title 5, United States Code, who is an alien or noncitizen oc-

cupying a position outside the United States;

(10) 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;

(11) 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

(12) 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.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65986, Oct. 16, 2020; 87 FR 67783, Nov. 10, 2022; 89 FR 25048, Apr. 9, 2024]

§ 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.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65986, Oct. 16, 2020; 87 FR 67783, Nov. 10, 2022]

§ 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.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65986, Oct. 16, 2020; 87 FR 67783, Nov. 10, 2022]

§ 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. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Public Law 115-91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

(2) When some but not all employees in a given competitive level are being furloughed, the notice of proposed ac-

tion 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 notice leave status for a period not to exceed the duration of the notice period, provided that the criteria set forth in § 630.1503(b) of this title are met.

(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.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65986, Oct. 16, 2020; 87 FR 67783, Nov. 10, 2022; 89 FR 102295, Dec. 17, 2024]

§ 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

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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, 7532, or 7515.

(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.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65987, Oct. 16, 2020]

§ 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).

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65987, Oct. 16, 2020; 87 FR 67783, Nov. 10, 2022]

§ 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.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65987, Oct. 16, 2020; 87 FR 67783, Nov. 10, 2022]

§ 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. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Public Law 115–91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

(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 employee in a notice leave status for a period not to exceed the duration of the notice period, provided that the criteria set forth in § 630.1503(b) of this title are met.

(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 af-

fidavits, 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.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65987, Oct. 16, 2020; 87 FR 67783, Nov. 10, 2022; 89 FR 102295, Dec. 17, 2024]

§ 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.

PART 754—COMPLAINT PROCEDURES, ADVERSE ACTIONS, AND APPEALS FOR CRIMINAL HISTORY INQUIRIES PRIOR TO CONDITIONAL OFFER

Subpart A—Complaint Procedures

Sec.

- 754.101 Coverage.
- 754.102 Agency complaint process.
- 754.103 Applicant representatives.

Subpart B—Adverse Actions

- 754.201 Coverage.
- 754.202 Penalty determination.
- 754.203 Procedures.
- 754.204 Appeal rights.
- 754.205 Agency records.

AUTHORITY: 5 U.S.C. 554(a)(2), 1103(a)(5)(A), 1104(a)(2), 9201–9205, and Pub. L. 116–92, sec. 1122(b)(1).

SOURCE: 88 FR 60330, Sept. 1, 2023, unless otherwise noted.

Subpart A—Complaint Procedures

§ 754.101 Coverage.

(a) *Actions covered.* A complaint, or any other information, submitted by an applicant for an appointment to a civil service position relating to compliance with section 9202 of title 5, United States Code.

(b) *Definitions.* In this subpart, *Agency*, *applicant*, *appointing authority*, *conditional offer*, *criminal history record information*, and *employee* have the meanings set forth in 5 CFR 920.101.