

Provisions similar to those in this section were contained in former section 210(b)(3) of this title prior to repeal by Pub. L. 102-83, § 2(a).

#### AMENDMENTS

1996—Subsec. (d). Pub. L. 104-316 inserted “, upon request of either of such Committees,” after “the Comptroller General shall” in first sentence.

1994—Subsec. (d). Pub. L. 103-446 substituted “committees” for “Committees”.

### **[§ 712. Repealed. Pub. L. 107-103, title V, § 509(a)(1), Dec. 27, 2001, 115 Stat. 997]**

Section, added Pub. L. 103-446, title XI, § 1102(a), Nov. 2, 1994, 108 Stat. 4680; amended Pub. L. 104-262, title III, § 303, Oct. 9, 1996, 110 Stat. 3194; Pub. L. 105-33, title VIII, § 8023(e), Aug. 5, 1997, 111 Stat. 667; Pub. L. 105-368, title X, § 1005(b)(1), Nov. 11, 1998, 112 Stat. 3364, limited reduction of full-time equivalent positions in the Department of Veterans Affairs during the period beginning on Nov. 2, 1994, and ending on Sept. 30, 1999.

#### Editorial Notes

##### PRIOR PROVISIONS

A prior section 712 was renumbered section 1912 of this title.

### **§ 713. Senior executives: removal, demotion, or suspension based on performance or misconduct**

(a) **AUTHORITY.**—(1) The Secretary may, as provided in this section, reprimand or suspend, involuntarily reassign, demote, or remove a covered individual from a senior executive position at the Department if the Secretary determines that the misconduct or performance of the covered individual warrants such action.

(2) If the Secretary so removes such an individual, the Secretary may remove the individual from the civil service (as defined in section 2101 of title 5).

(b) **RIGHTS AND PROCEDURES.**—(1) A covered individual who is the subject of an action under subsection (a) is entitled to—

(A) advance notice of the action and a file containing all evidence in support of the proposed action;

(B) be represented by an attorney or other representative of the covered individual's choice; and

(C) grieve the action in accordance with an internal grievance process that the Secretary, in consultation with the Assistant Secretary for Accountability and Whistleblower Protection, shall establish for purposes of this subsection.

(2)(A) The aggregate period for notice, response, and decision on an action under subsection (a) may not exceed 15 business days.

(B) The period for the response of a covered individual to a notice under paragraph (1)(A) of an action under subsection (a) shall be 7 business days.

(C) A decision under this paragraph on an action under subsection (a) shall be issued not later than 15 business days after notice of the action is provided to the covered individual under paragraph (1)(A). The decision shall be in writing, and shall include the specific reasons therefor.

(3) The Secretary shall ensure that the grievance process established under paragraph (1)(C) takes fewer than 21 days.

(4) A decision under paragraph (2) that is not grieved, and a grievance decision under paragraph (3), shall be final and conclusive.

(5) A covered individual adversely affected by a decision under paragraph (2) that is not grieved, or by a grievance decision under paragraph (3), may obtain judicial review of such decision.

(6) In any case in which judicial review is sought under paragraph (5), the court shall review the record and may set aside any Department action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with a provision of law;

(B) obtained without procedures required by a provision of law having been followed; or

(C) unsupported by substantial evidence.

(c) **RELATION TO OTHER PROVISIONS OF LAW.**—Section 3592(b)(1) of title 5 and the procedures under section 7543(b) of such title do not apply to an action under subsection (a).

(d) **DEFINITIONS.**—In this section:

(1) The term “covered individual” means—

(A) a career appointee (as that term is defined in section 3132(a)(4) of title 5); or

(B) any individual who occupies an administrative or executive position and who was appointed under section 7306(a), section 7401(1), or section 7401(4) of this title.

(2) The term “misconduct” includes neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

(3) The term “senior executive position” means—

(A) with respect to a career appointee (as that term is defined in section 3132(a) of title 5), a Senior Executive Service position (as such term is defined in such section); and

(B) with respect to a covered individual appointed under section 7306(a) or section 7401(1) of this title, an administrative or executive position.

(Added Pub. L. 113-146, title VII, § 707(a)(1), Aug. 7, 2014, 128 Stat. 1798; amended Pub. L. 115-41, title II, § 201(a), June 23, 2017, 131 Stat. 868.)

#### Editorial Notes

##### PRIOR PROVISIONS

A prior section 713 was renumbered section 1913 of this title.

#### AMENDMENTS

2017—Pub. L. 115-41 amended section generally. Prior to amendment, section related to removal of senior executives based on performance or misconduct.

### **Statutory Notes and Related Subsidiaries**

#### CONSTRUCTION

Pub. L. 113-146, title VII, § 707(d), Aug. 7, 2014, 128 Stat. 1801, provided a rule of construction related to appeal of a removal, transfer, or other personnel action that was pending before Aug. 7, 2014, and provided that the authority provided by former section 713 of this title would be in addition to the authority provided by section 3592 or subchapter V of chapter 75 of title 5.

#### ESTABLISHMENT OF EXPEDITED REVIEW PROCESS

Pub. L. 113-146, title VII, § 707(b), Aug. 7, 2014, 128 Stat. 1800, related to the establishment by the Merit

Systems Protection Board of a process to conduct expedited reviews in accordance with former subsec. (d) of this section.

TEMPORARY EXEMPTION FROM CERTAIN LIMITATION ON INITIATION OF REMOVAL FROM SENIOR EXECUTIVE SERVICE

Pub. L. 113-146, title VII, §707(c), Aug. 7, 2014, 128 Stat. 1800, provided for a 120-day exemption, starting on Aug. 7, 2014, from certain limitations on the initiation of removals from the Senior Executive Service.

**§ 714. Employees: removal, demotion, or suspension based on performance or misconduct**

(a) IN GENERAL.—(1) The Secretary may remove, demote, or suspend a covered individual who is an employee of the Department if the Secretary determines the performance or misconduct of the covered individual warrants such removal, demotion, or suspension.

(2) If the Secretary so removes, demotes, or suspends such a covered individual, the Secretary may—

(A) remove the covered individual from the civil service (as defined in section 2101 of title 5);

(B) demote the covered individual by means of a reduction in grade for which the covered individual is qualified, that the Secretary determines is appropriate, and that reduces the annual rate of pay of the covered individual; or

(C) suspend the covered individual.

(b) PAY OF CERTAIN DEMOTED INDIVIDUALS.—(1) Notwithstanding any other provision of law, any covered individual subject to a demotion under subsection (a)(2) shall, beginning on the date of such demotion, receive the annual rate of pay applicable to such grade.

(2)(A) A covered individual so demoted may not be placed on administrative leave during the period during which an appeal (if any) under this section is ongoing, and may only receive pay if the covered individual reports for duty or is approved to use accrued unused annual, sick, family medical, military, or court leave.

(B) If a covered individual so demoted does not report for duty or receive approval to use accrued unused leave, such covered individual shall not receive pay or other benefits pursuant to subsection (d)(5).

(c) PROCEDURE.—(1)(A) The aggregate period for notice, response, and final decision in a removal, demotion, or suspension under this section may not exceed 15 business days.

(B) The period for the response of a covered individual to a notice of a proposed removal, demotion, or suspension under this section shall be 7 business days.

(C) Paragraph (3) of subsection (b) of section 7513 of title 5 shall apply with respect to a removal, demotion, or suspension under this section.

(D) The procedures in this subsection shall supersede any collective bargaining agreement to the extent that such agreement is inconsistent with such procedures.

(2) The Secretary shall issue a final decision with respect to a removal, demotion, or suspension under this section not later than 15 business days after the Secretary provides notice,

including a file containing all the evidence in support of the proposed action, to the covered individual of the removal, demotion, or suspension. The decision shall be in writing and shall include the specific reasons therefor.

(3) The procedures under chapter 43 of title 5 shall not apply to a removal, demotion, or suspension under this section.

(4)(A) Subject to subparagraph (B) and subsection (d), any removal or demotion under this section, and any suspension of more than 14 days under this section, may be appealed to the Merit Systems Protection Board, which shall refer such appeal to an administrative judge pursuant to section 7701(b)(1) of title 5.

(B) An appeal under subparagraph (A) of a removal, demotion, or suspension may only be made if such appeal is made not later than 10 business days after the date of such removal, demotion, or suspension.

(d) EXPEDITED REVIEW.—(1) Upon receipt of an appeal under subsection (c)(4)(A), the administrative judge shall expedite any such appeal under section 7701(b)(1) of title 5 and, in any such case, shall issue a final and complete decision not later than 180 days after the date of the appeal.

(2)(A) Notwithstanding section 7701(c)(1)(B) of title 5, the administrative judge shall uphold the decision of the Secretary to remove, demote, or suspend an employee under subsection (a) if the decision is supported by substantial evidence.

(B) Notwithstanding title 5 or any other provision of law, if the decision of the Secretary is supported by substantial evidence, the administrative judge shall not mitigate the penalty prescribed by the Secretary.

(3)(A) The decision of the administrative judge under paragraph (1) may be appealed to the Merit Systems Protection Board.

(B) Notwithstanding section 7701(c)(1)(B) of title 5, the Merit Systems Protection Board shall uphold the decision of the Secretary to remove, demote, or suspend an employee under subsection (a) if the decision is supported by substantial evidence.

(C) Notwithstanding title 5 or any other provision of law, if the decision of the Secretary is supported by substantial evidence, the Merit Systems Protection Board shall not mitigate the penalty prescribed by the Secretary.

(4) In any case in which the administrative judge cannot issue a decision in accordance with the 180-day requirement under paragraph (1), the Merit Systems Protection Board shall, not later than 14 business days after the expiration of the 180-day period, submit to the Committee on Veterans' Affairs of the Senate and the Committee on Veterans' Affairs of the House of Representatives a report that explains the reasons why a decision was not issued in accordance with such requirement.

(5)(A) A decision of the Merit Systems Protection Board under paragraph (3) may be appealed to the United States Court of Appeals for the Federal Circuit pursuant to section 7703 of title 5 or to any court of appeals of competent jurisdiction pursuant to subsection (b)(1)(B) of such section.

(B) Any decision by such Court shall be in compliance with section 7462(f)(2) of this title.