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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 occupying 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]

§ 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 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. After publication of regulations for 5 U.S.C. 6329b, and the subsequent agency implementation period in accordance with 5 U.S.C. 6329b, an agency may place the employee in a notice leave status when applicable.

(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]

§ 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.