

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 752

RIN 3206-AL39

Adverse Actions

AGENCY: Office of Personnel Management.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of Personnel Management (OPM) proposes to amend its regulations governing Federal adverse actions. The proposed amendments would clarify the adverse action rules regarding reductions in pay and indefinite suspension. In addition, OPM proposes to remove unnecessary subparts pertaining to statutory requirements, make a number of technical corrections, and utilize consistent language for similar regulatory requirements. OPM also proposes various revisions to make the regulations more readable.

DATES: Submit comments on or before November 17, 2008.

ADDRESSES: Send or deliver written comments to Ana A. Mazzi, Deputy Associate Director for Workforce Relations and Accountability Policy, Office of Personnel Management, 1900 E Street, NW., Room 7H28, Washington, DC 20415; by FAX to 202-606-2613; or by e-mail to CWRAP@opm.gov.

FOR FURTHER INFORMATION CONTACT: Sharon L. Mayhew by telephone at (202) 606-2930; by FAX at (202) 606-2613; or by e-mail at CWRAP@opm.gov.

SUPPLEMENTARY INFORMATION: Sections 7504, 7514, and 7543(a) of title 5, United States Code (U.S.C.), provide the statutory authority for OPM to prescribe regulations pertaining to adverse actions. These regulations are found at title 5, Code of Federal Regulations (CFR), part 752, and are the subject of this proposed rule.

Amendment To Clarify Adverse Action Rules Regarding Reduction in Pay

A reduction in pay is an adverse action covered by chapter 75 of title 5, United States Code. (See 5 U.S.C. 7512(4).) Under current adverse action regulations, “pay” is defined as the rate of basic pay exclusive of additional pay of any kind. (See definition of “pay” in 5 CFR 752.402.) Thus any pay supplement, such as a locality payment or special rate supplement is not considered part of basic pay in determining whether a reduction in pay and thus an adverse action has occurred.

The Federal Workforce Flexibility Act of 2004 (the Act) (Pub. L. 108-411, October 30, 2004) created new pay administration rules for Federal employees covered by chapter 53 of title 5, United States Code—i.e., employees in the General Schedule (GS) pay system and the Federal Wage System (FWS). Among other purposes, this Act modified pay administration rules to correct anomalies that created unwarranted pay increases or reductions for certain employees. The Act also established the principle that, in cases where an employee’s official duty station is moved to a new location where different pay schedules apply, the employee’s pay will be treated as if the position he or she is leaving were at the new location, before processing other pay actions. (See 5 U.S.C. 5305(i), 5334(g), and 5363(c) and OPM regulations published on May 31, 2005, 70 FR 31278.)

Implementation of the Act’s provisions on locality pay, special rates, and pay retention resolves the problem of unwarranted increases and reductions. However, in certain limited situations, the new pay rules established under the Act, by design, can result in a reduction of an employee’s “basic” or base rate of pay even while protecting the employee’s total salary rate. Such a reduction may occur when a personnel action changes an employee’s pay entitlement from a rate of basic pay without any supplement to an adjusted rate of basic pay consisting of a base rate and a basic pay supplement (i.e., locality payment or special rate supplement for a GS employee).

For example, an employee may change positions and move from the Federal Wage System (FWS), in which the locality pay adjustment is

essentially incorporated within the rate of basic pay, to the GS pay system, which often provides a separate supplement (locality payment or special rate supplement) on top of the rate of basic pay. Under the new pay administration rules in effect as a result of Public Law 108-411, the FWS rate (after applying geographic pay conversion as necessary) is compared to GS supplement-adjusted rates. If an FWS-to-GS movement is involuntary, pay retention would apply and the GS total pay rate (including any supplement) would be set at a rate equal to or greater than the FWS rate.

However, the new GS basic rate excluding the supplement may be lower than the FWS rate.

Another example involves a change of pay entitlements within the same pay system. A GS employee may be entitled to a retained rate, which is a rate of basic pay without any supplement, and then, as the result of a personnel or pay action, the employee may cease to be entitled to the retained rate. In such case, the employee would receive an adjusted rate consisting of a base rate and a supplement. If the supplement is not considered, the employee could be viewed as having a reduction in basic pay—even though there is no reduction in the total rate of pay and the rate is being correctly set in accordance with the new applicable pay administration rules.

Public Law 108-411 also provided that pay retention would no longer apply when an FWS employee is involuntarily reassigned to a different geographic location where a lower wage schedule applies. While the FWS employee keeps the same grade and step, the employee’s wage rate will be lower. Under 5 U.S.C. 5363, as amended by Public Law 108-411, the FWS employee is not entitled to pay retention when the reduction is attributable to a geographic move. This is consistent with the treatment of GS employees who may become entitled to a lower locality payment due to a geographic move and who are also not entitled to pay retention. Thus, the FWS employee’s pay reduction occurs by operation of law as a result of geographic pay conversion.

In the examples cited above, pay is being correctly set under the new law and applicable pay administration rules. While paragraph (b)(15) of 5 CFR

752.401 currently excludes from adverse action coverage any “[r]eduction of an employee’s rate of basic pay from a rate that is contrary to law or regulation,” we believe the clarity of the regulations would be enhanced by specifically excluding from coverage those actions that result from compliance with the new pay-setting requirements of Public Law 108–411.

Accordingly, we are proposing 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 Public Law 108–411 and implementing regulations is excluded from adverse action coverage.

Amendments To Clarify Adverse Action Rules Regarding Indefinite Suspension

Background

Indefinite suspensions involve the placing of an employee in a temporary status without duties and pay pending an investigation, inquiry, or further agency action. An indefinite suspension continues for an indeterminate period of time and ends with the completion of the pending condition subsequent set forth in the notice of proposed action. That pending condition may include, for example, a criminal or administrative investigation and any subsequent administrative action taken.

An indefinite suspension is an infrequently utilized but critical option when public employees are being investigated or charged with serious criminal offenses, or are under investigation for other serious or egregious misconduct. With these regulations and supplementary materials, OPM clarifies that a portion of 5 U.S.C. 7513(b)(1), frequently referred to as the “crime provision,” is exclusively a notice provision. It does not set a higher standard for indefinite suspensions than for other adverse actions.

Specifically, in the vast majority of adverse actions, thirty (30) days’ advance written notice to the employee is required. However, the law carves out a narrow exception to that 30 days’ advance notice requirement in those limited situations where there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed. This notice exception has sometimes been erroneously interpreted to establish an entirely new and different “reasonable cause” review standard for indefinite suspensions in general. That standard, however, only applies to the determination of whether the 30-day notice period may be shortened. Like all other adverse

actions, indefinite suspensions must meet the statutory requirement of promoting the efficiency of the service. Moreover, indefinite suspensions are not restricted to occasions when employees have been indicted for a criminal offense. Indefinite suspensions may also be warranted when an employee is under investigation for other serious misconduct that, if proven to be true, would warrant removal when, for example, the employee is under investigation for an allegation of conduct posing a significant risk to the life, health or safety of others, government or public property, the effective accomplishment of the agency’s operations, national security or privacy interests. An indefinite suspension with a 30-day notice period in these instances may be appropriate to ensure the efficiency of the service by maintaining public trust in the Federal workforce. It may also be appropriate when, for example, the employee is under investigation based on an allegation that the employee poses a risk to the health or safety of others, the employee’s security clearance has been suspended or revoked, or the employee’s fitness-for-duty examination or determination is pending.

OPM’s interpretation of the “crime provision” in 5 U.S.C. 7513(b) recently was affirmed by the U.S. Court of Appeals for the Federal Circuit in *Perez v. Department of Justice*, 480 F.3d 1309, 1313 (Fed.Cir. 2007). In this case, the Court held that section 7513(b) “is solely a notice provision, and it provides an exception to the 30-day notice requirement for all the types of adverse actions specified in 5 U.S.C. 7512(2) if the agency has reasonable cause to believe an employee has committed a crime for which imprisonment may be imposed.” *Id.* Thus, reasonable cause is only required if the agency provides the employee less than a 30-day notice period in its notice of proposed action. *Id.* The Federal Circuit further confirmed that adverse actions, including indefinite suspensions, must “promote the efficiency of the service,” noting that arbitrary action against an employee would not satisfy that standard. *Id.*

Accordingly, to clarify that the “crime provision” is only an exception to the general 30-day notice requirement for taking adverse actions and is not a separate standard of proof for indefinite suspensions, OPM therefore proposes to specify in paragraph (a) of 5 CFR 752.403 that an indefinite suspension is an adverse action an agency may take to promote the efficiency of the service. OPM also proposes to include the term “indefinite suspension” in paragraph

(b)(1) of 5 CFR 752.404, “Notice of proposed action,” to emphasize that an indefinite suspension is to be taken in the same manner as any other adverse action under that subpart. Additionally, OPM proposes to add a new paragraph (c) to 5 CFR 752.403, “Standard for Action,” to clarify the applicable standard for indefinite suspensions when 30 days notice is provided to the employee.

Amendments To Modify and Clarify Adverse Actions Rules Under the Senior Executive Service

Section 752.604 sets forth the procedures to be followed for SES adverse actions under 5 U.S.C. chapter 75. Revising the regulations to make them more comprehensible, OPM proposes to delete redundant sections and change the placement of some information to make it more clear and accessible to agencies and employees.

We further propose four additional amendments to the SES regulations. First, we propose to add a new § 752.604(f), “Agency review of medical information,” to explain agency authority and responsibilities in obtaining and reviewing medical information as provided under 5 CFR 339.301 and 339.302. Second, we propose to add a new § 752.604(h) to address applications for disability retirement and their effect on adverse actions. These two sections mirror the provisions currently provided in the regulations applicable to non-SES employees. Third, as a result of adding these new sections, we have redesignated the former § 752.604(f) as § 752.604(g), and added language to clarify procedural rights. Fourth, we propose to modify § 752.606 *Agency Records* to specify the documentation that should be maintained in the agency’s record, and we are proposing a similar modification to the provisions applicable to non-SES employees (§ 752.406).

Amendments To Update Definitions Formatting

The *Federal Register Document Drafting Handbook* recommends a particular format for CFR definitions sections. Accordingly, we take this opportunity to propose revising §§ 752.201 and 752.402 by removing the letter designations and placing the terms in alphabetical order.

Amendments To Correct Statutory and Regulatory References

Section 752.201 addresses actions excluded from coverage under 5 U.S.C. chapter 75. Section 752.201(c)(2) excludes actions taken for national

security reasons but erroneously cites 5 U.S.C. 7531 as the authority under which an agency may take action. Section 7531 of title 5, U.S. Code, addresses the definition of “agency.” The correct citation is 5 U.S.C. 7532, which describes suspensions and removals for national security reasons. Accordingly, we propose to correct the citation.

In addition, section 752.201(c)(3) excluded actions taken under a provision of statute, *other* than one codified in title 5, U.S. Code, which excepts the action from subchapter I, chapter 75 of title 5, U.S. Code. In light of recent statutory amendments authorizing establishment of alternative personnel systems *within* title 5, U.S. Code, such as for the Department of Homeland Security and the Department of Defense, this exclusion is too narrow. We propose to modify this section to exclude actions excepted by law, regardless of whether such law is codified in title 5, U.S. Code. For the same reason, we propose to make the same modification in § 752.401(b)(7).

Section 752.203 describes procedures for actions taken under 5 U.S.C. chapter 75. Section 752.203(f), “Grievances,” erroneously cites 5 U.S.C. 7121(b)(3) as governing representation for an employee in an exclusive bargaining unit. Section 7121(b)(3) was removed when the law was amended in 1997. The correct citation is 5 U.S.C. 7121(b)(1)(C). This correction also applies to § 752.405(b). Accordingly, we propose to correct these citations.

Section 752.401(b) sets forth actions excluded from coverage under 5 U.S.C. chapter 75. Section 752.401(b)(1) excludes actions “imposed by the Merit Systems Protection Board,” and it erroneously cites 5 U.S.C. 1206 as the authority under which the Board may take actions. Instead, 5 U.S.C. 1206 addresses the annual reporting requirement for the MSPB. The correct citation is 5 U.S.C. 1215. Accordingly, we propose to correct the citation.

The current § 752.401(c)(3) references covered employees in the Postal Rate Commission. The Postal Accountability and Enhancement Act (Pub. L. 109–435) which was signed into law on December 20, 2006, changed the name of the Postal Rate Commission to the Postal Regulatory Commission. We propose to reflect the current name in the regulations at paragraph (c)(3) and in paragraph (d)(9) of section 752.401.

Section 752.401(d) describes employees excluded from coverage under 5 U.S.C. chapter 75. Section 752.401(d)(5) excludes technicians in the National Guard from coverage, and it erroneously cites 32 U.S.C. 709(b) as

the authority for the exclusion. The correct citation is 32 U.S.C. 709(a). Similarly, § 752.401(d)(8) excludes employees of the Veterans Health Administration (Department of Veterans Affairs) from coverage and it erroneously cites 5 U.S.C. 7401(3) as an exception to the exclusion. Section 7401(3) does not exist. The correct citation is 38 U.S.C. 7401(3).

Accordingly, we propose to correct these citations. Finally, § 752.401(d)(9) excludes nonpreference eligibles in specified Department of Defense intelligence components or activities. This exclusion was based on 5 U.S.C. 7511(b)(8) which was amended in 1996 by Public Law 104–201 to modify the reference to title 10, U.S. Code. We propose to amend § 752.401(d)(9) to reflect the current statutory provision.

Section 752.404 explains the procedures for actions taken under 5 U.S.C. chapter 75. Section 752.404(b)(1) makes reference to a prohibition against releasing certain medical information to an employee. That prohibition no longer exists. Accordingly, we propose to remove this language. For the same reason we propose to make the same modification in § 752.604(b). The requirement in §§ 752.404(b)(1) and 752.604(b) that an employee be informed of his or her right to review the material relied on to support the action is retained. Section 752.404(c)(3) addresses medical documentation submitted as a part of the employee’s answer and erroneously cites 5 CFR 339.102 for the definition of medical documentation. Section 339.102 states the purpose and effect of acquiring medical documentation. Instead, § 339.104 defines “medical documentation” and is the correct cite. Similarly, § 752.404(h) addresses applications for disability retirement and erroneously cites § 831.501(d), which does not exist. The correct citation is § 831.1204(e).

In addition, 5 CFR 752.404(h) erroneously cites § 831.1203 as providing the basis under which agencies shall file an application for disability retirement on behalf of an employee. Section 831.1203 describes the basic requirements for disability retirement. The correct citation is § 831.1205, which addresses agency-filed disability retirement applications. Accordingly, we propose to correct these citations.

Section 752.601 addresses coverage under 5 U.S.C. chapter 75. Section 752.601(a)(2) excludes actions taken under other authorities in title 5, United States Code, and erroneously cites 5 U.S.C. 1206(g) as one of the exclusions. This section, however, does not exist.

The correct citation is 5 U.S.C. 1215. Section 1215 describes disciplinary actions imposed by the MSPB. Accordingly, we propose to correct this citation.

Amendment To Remove Subparts A, C, and E

In an effort to streamline and make more readable our regulations at 5 CFR part 752, OPM proposes to remove three superfluous subparts. Subparts A, C, and E merely reprint the sections of the United States Code that are the basis of the regulations found at 5 CFR part 752, subparts B, D, and F. OPM proposes to remove this material and reserve subparts A, C, and E.

Amendments to Adverse Action Procedures

Section 752.404 sets forth the procedures to be followed for adverse actions under 5 U.S.C. chapter 75. Revising the regulations to make them more comprehensible, OPM proposes to delete redundant sections and change the placement of some information to make it more clear and accessible to agencies and employees.

In addition, we propose to modify § 752.406, *Agency Records*, to clearly identify the documentation that should be maintained in the agency’s record consistent with the law. An identical modification is proposed for §§ 752.203 and 752.606.

Amendments To Adopt Regulatory Language

In addition to the above substantive changes, OPM proposes to rewrite the regulations in 5 CFR part 752 to replace most instances of the word “shall” with appropriate regulatory equivalents, such as “must” or “will.” This is undertaken in an effort to differentiate regulatory from legislative language. In no case do these modifications change the meaning or intent of the regulation.

Amendments To Adopt Consistent Language for Similar Provisions

Similar regulatory provisions were stated somewhat differently throughout the various sections of the regulations (e.g., subparts B, D, and F). Where applicable, we have proposed to utilize consistent language for similar regulatory requirements without altering the intent of the regulations.

Public Participation

OPM invites interested persons to participate in this proposed rulemaking by submitting written comments, data, or views.

Before finalizing these proposed amendments, we will consider all

comments received on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these proposed amendments in light of the comments we receive.

E.O. 12866, Regulatory Review

The Office of Management and Budget has reviewed this rule in accordance with E.O. 12866.

Regulatory Flexibility Act

OPM has determined these amendments will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

List of Subjects in 5 CFR Part 752

Administrative practice and procedure, Government employees.

Office of Personnel Management.

Michael W. Hager,

Acting Director.

Accordingly, OPM proposes to revise part 752 of title 5, Code of Federal Regulations, as follows:

PART 752—ADVERSE ACTIONS

Subpart A—[Removed and Reserved]

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

Sec.

752.201 Coverage.

752.202 Standard for action.

752.203 Procedures.

Subpart C—[Removed and 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

Sec.

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—[Removed and Reserved]

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

Sec.

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—[Removed and 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—[Removed and 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.

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.

(c) An agency may indefinitely suspend an employee, without invoking the crime provision in § 752.404(d)(1) of this part when, for example—

(1) The employee's fitness-for-duty examination or determination is pending; or

(2) The employee is under investigation for serious misconduct that, if proven to be true, would warrant removal, such as when the employee is alleged to have engaged in conduct posing a significant, ongoing risk to:

- (i) The life, health or safety of self or others;
- (ii) Government or public property including, but not limited to, information technology systems;
- (iii) The effective accomplishment of the agency's operations;
- (iv) National security; or
- (v) Privacy interests.

§ 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, including an indefinite suspension, is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to § 752.404(d) of this part. 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 § 752.404(d)(1) of this part; 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, or otherwise, at its option, offer a medical examination in accordance with the criteria of § 339.302. 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 section 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 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) Agency notice of decision; and
- (5) Any order effecting the action, together with any supporting material.

Subpart E—[Removed and 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, including indefinite 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 § 752.604(d) of this part. 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 employee 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 § 752.604(c)(2) of this part. 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 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.

(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, or otherwise, at its option, offer a medical examination in accordance with the criteria of § 339.302. 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 or grievance 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 section 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 employee upon his or her 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) Agency notice of decision; and
- (5) Any order effecting the action, together with any supporting material.

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. APHIS-2006-0153]

RIN 0579 AC25

South American Cactus Moth; Availability of an Environmental Assessment and Reopening of Comment Period

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability and request for comments; reopening of comment period.

SUMMARY: We are advising the public that an environmental assessment has been prepared by the Animal and Plant Health Inspection Service relative to the establishment of domestic quarantine regulations for the South American cactus moth, *Cactoblastis cactorum*. The environmental assessment documents our review and analysis of environmental impacts associated with the proposed rulemaking. We are making this environmental assessment available to the public for review and