ORAL ARGUMENT NOT SCHEDULED
No. 22-5154

In the United States Court of Appeals for the District of Columbia Circuit

JASON PAYNE,
Plaintiff-Appellant,
v.
JOSEPH R. BIDEN, JR., PRESIDENT; OFFICE OF PERSONNEL MANAGEMENT; KIRAN AHUJA, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT; GENERAL SERVICES ADMINISTRATION; ROBIN CARNAHAN, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION; OFFICE OF MANAGEMENT AND BUDGET; SHALANDA YOUNG, ACTING DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET; SAFER FEDERAL WORKFORCE TASK FORCE; JEFFREY ZIENTS, CO-CHAIR, SAFER FEDERAL WORKFORCE TASK FORCE; UNITED STATES DEPARTMENT OF DEFENSE; LLOYD J. AUSTIN, III, SECRETARY, UNITED STATES DEPARTMENT OF DEFENSE; UNITED STATES DEPARTMENT OF THE NAVY; CARLOS DEL TORO, SECRETARY, UNITED STATES DEPARTMENT OF THE NAVY,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia, Case No. 21-cv-3077
The Hon. James E. Boasberg, U.S. District Judge

BRIEF OF PLAINTIFF-APPELLANT JASON PAYNE

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

A. Parties

The Plaintiff-Appellant is Jason Payne.

The Defendants-Appellees are:

- Joseph R. Biden, Jr., in his official capacity as President of the United States;
- The United States Office of Personnel Management;
- Kiran Ahuja, in her official capacities as Director of the Office of Personnel Management and co-chair of the Safer Federal Workforce Task Force;
- The General Services Administration;
- Robin Carnahan, in her official capacities as Administrator of the General Services Administration and co-chair of the Safer Federal Workforce Task Force;
- The Office of Management and Budget;
- Shalanda Young, in her official capacity as Director of the Office of Management and Budget;
- The Safer Federal Workforce Task Force;

- Ashish K. Jha, in his official capacity as co-chair of the Safer Federal Workforce Task Force (automatically substituted for his predecessor Jeffrey Zients under Fed. R. App. P. 43(c)(2));
- The United States Department of Defense;
- Lloyd J. Austin, III, in his official capacity as Secretary of Defense;
- The United States Department of the Navy; and
- Carlos Del Toro, in his official capacity as Secretary of the Navy.

B. Ruling Under Review

The rulings under review are the district court's order (J.A. 121) and opinion (J.A. 122), entered by Judge James A. Boasberg on May 12, 2022, dismissing Mr. Payne's complaint without prejudice. The opinion is unreported and may be found at CV 21-3077 (JEB), 2022 WL 1500563 (D.D.C. May 12, 2022).

C. Related Cases

This case has not previously been before this Court or any court other than the district court nor are there any related cases. Cases raising certain issues decided below are pending before the Third Circuit (*Smith v. Biden*, No. 21-3091) and the Fifth Circuit (*Feds for*

Medical Freedom v. Biden, 30 F.4th 503 (5th Cir. 2022), *pet. reh'g en banc granted*, *opinion vacated*, 37 F.4th 1093 (5th Cir. 2022), and one was decided by the Fourth Circuit (*Rydie v. Biden*, No. 21-2359, 2022 WL 1153249 (4th Cir. Apr. 19, 2022)).

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Asterisks mark the authorities upon which we chiefly rely.

GLOSSARY OF ABBREVIATIONS

"CSRA" means the Civil Service Reform Act of 1978

"MSPB" means the Merit Systems Protection Board

"OSC" means the Office of Special Counsel

JURISDICTIONAL STATEMENT

A. The basis for the district court's subject-matter jurisdiction

28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 702 (granting judicial review for a person suffering wrong because of agency action) provide the bases for the district court's subject-matter jurisdiction.

B. The basis for the court of appeals' jurisdiction

28 U.S.C. § 1291 is the basis for the court of appeals' jurisdiction.

C. Filing dates

The order and opinion dismissing Mr. Payne's case for lack of subject-matter jurisdiction were entered on May 12, 2022. Mr. Payne timely filed his notice of appeal on June 9, 2022.

D. This appeal is from a final order

The order dismissing Mr. Payne's case for lack of subject-matter jurisdiction is a "final decision of the district court" under 28 U.S.C. § 1291 and a "final order" that "disposes of all [his] claims" under Fed. R. App. P. 28(a)(4)(D).

STATEMENT OF ISSUE FOR REVIEW

Does the Civil Service Reform Act of 1978 preclude district court jurisdiction over Mr. Payne's complaint?

STATUTES AND REGULATIONS

Pursuant to Fed. R. App. P. 28(f) and D.C. Cir. Rule 28(a)(5), an addendum containing the pertinent provisions of the Civil Service Reform Act of 1978 and implementing regulations are submitted with this brief.

STATEMENT OF THE CASE

Mr. Payne is a federal civilian employee of the Department of the Navy. J.A. 10. He has contracted and recovered from COVID-19, and he has thereby acquired natural immunity against the disease. *Id.*

Without statutory authority, the Defendants-Appellees have ordered that Mr. Payne and approximately 2.1 million other federal workers receive a COVID-19 vaccine. J.A. 8-11, 14-18, 25-29. Mr. Payne does not believe he needs, does not want, and does not intend to receive the COVID-19 vaccine. J.A. 10, 23.

Mr. Payne has not completed the required Department of Defense form (DD-3175) to report whether he has received a vaccine, although he has informed his direct supervisors that he does not wish to receive one. J.A. 23. Mr. Payne's agency has neither taken nor proposed any personnel action against him, although he believes the President's promises that—eventually—they will do so, citing him for "failure to follow a direct order." J.A. 19-24, 61-64, 74, 76, 81, 103-105, 107, 111-112.

On November 22, 2022, Mr. Payne filed this pre-enforcement suit, alleging that the vaccination orders issued by the President and the

Secretary of Defense are *ultra vires* and violate the separation of powers. J.A. 9, 13-17, 25-29. He further alleges that the requirement that he submit to these unnecessary injections violates his fundamental Due Process rights and the unconstitutional conditions doctrine. J.A. 29-32.

Before the district court, Mr. Payne moved for summary judgment. The Defendants moved to dismiss Mr. Payne's lawsuit for a lack of jurisdiction, arguing that Congress provides jurisdiction over Mr. Payne's claims only through the process set forth in the Civil Service Reform Act of 1978 ("CSRA"). The court below ordered both motions fully briefed and decided the issue on cross motions. J.A. 122, 125.

Despite the fact that Mr. Payne's agency has neither taken nor proposed any personnel action against him, the district court nevertheless held that the CSRA attached to Mr. Payne's claims and precludes federal court review. J.A. 121, 127, 139-141. The district court accepted the Defendants' argument that "the CSRA precludes challenges of this kind to the Executive Order" mandating vaccination, and therefore did not "take up" Mr. Payne's Motion for Summary Judgement. J.A. 127.

In *Elgin v. Department of Treasury*, 567 U.S. 1, 5 (2012), the Supreme Court held that the CSRA provides "the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional." Citing *Elgin*, the district court concluded that—at least for some claims—the CSRA provides the exclusive avenue for judicial review. J.A. 130-134. The district court then proceeded to consider whether Mr. Payne's claims fall within the CSRA's preclusive ambit, and the district court concluded that they did. J.A. 131-141.

Mr. Payne argued that this second question—whether he can bring his challenges in district court—is settled law in the D.C. Circuit and that it is settled in his favor. Mr. Payne pointed to multiple cases holding that pre-enforcement challenges to government-wide policies do not fall within the CSRA's exclusive jurisdiction. J.A. 136. The district court rejected these "several decades-old D.C. Circuit cases" as "effectively overruled." J.A. 136-137. Characterizing Mr. Payne's claims as either "a challenge to his working conditions," J.A. 132, or as a "challenge to a termination decision," J.A. 134, the district court held that both were within the ambit of the CSRA's preclusive regime. J.A.

135-141. Mr. Payne timely filed a notice of appeal on June 8, 2022, within thirty (30) days after the district court's order. J.A. 142-143.

SUMMARY OF ARGUMENT

The district court incorrectly precluded pre-enforcement judicial review of any federal employment-related executive order, no matter how patently unconstitutional that order might be or how significant the ongoing harms that it might impose. The district court cast aside decades of this Court's precedents, deeming them overruled by *Elgin v. Department of Treasury,* 567 U.S. 1, 5 (2012) and by *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200 (1994). But neither *Elgin* nor *Thunder Basin* disturb the central holdings of those cases, and under the *Thunder Basin* test properly applied, the district court's jurisdiction over Mr. Payne's case is not precluded.

If the district court's ruling stands, then no federal civilian worker could ever obtain immediate judicial review of executive orders requiring, *inter alia*, all federal civilian employees, under threat of removal, to surrender personal firearms; use or abstain from birth control; or to take mandatory weight-reduction measures and surgeries. While some employees would certainly resist these policies, many would

feel no choice but to comply to save their livelihoods, allowing the government to carry out an *in terrorem* campaign in full knowledge that judicial review has been effectively eviscerated.

Based on the CSRA's text and structure, in accordance with persuasive and controlling authorities, and to maintain the Nation's "long history of judicial review of illegal executive action", *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015), the district court should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

The court should assume the truth of all material factual allegations in Mr. Payne's complaint, construe them liberally, grant him "the benefit of all inferences that can be derived from the facts alleged," and upon such facts determine jurisdiction. *Am. Nat. Ins. Co. v. F.D.I.C.*, 642 F.3d 1137, 1139 (D.C. Cir. 2011).

Legal determinations should be made *de novo*, *see id.* and *Rosenkrantz v. Inter-Am. Dev. Bank*, 35 F.4th 854, 861 (D.C. Cir. 2022), and the CSRA must be interpreted in accord with the ordinary public meaning of its terms at the time of its enactment. *Bostock v. Clayton*

Cnty., Georgia, 140 S. Ct. 1731, 1738 (2020). Any ambiguity in the statutory scheme with respect to preclusion should be resolved in favor of judicial review. *Salinas v. United States R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021).

Finally, if there is a conflict within the relevant circuit precedent, then the earlier decision controls. *United States v. Old Dominion Boat Club*, 630 F.3d 1039, 1045 (D.C. Cir. 2011).

II. INTRODUCTION

28 U.S.C. § 1331 provides district courts with jurisdiction over "all" federal-question suits, and the federal courts have an obligation to exercise the jurisdiction given them. *200 Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 415 (1964). The judiciary has a particularly strong interest in protecting the separation of powers. *See Freytag v. Commissioner,* 501 U.S. 868, 878-99 (1991); *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962). "The doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995).

The issue on appeal is whether Mr. Payne's pre-enforcement constitutional challenge to the federal worker COVID-19 vaccine mandate is precluded by the CSRA. The district court has been inconsistent on the question of and standard for preclusion. Recently, Chief Judge Howell affirmed pre-enforcement constitutional challenges are justiciable. *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 362-66, 68-70 (D.D.C. 2020) *appeal dismissed,* No. 20-5374, 2021 WL 2201669 (D.C. Cir. May 17, 2021). However, in Mr. Payne's case, the district court followed recent panel decisions from the Fourth and Fifth Circuits, the former unpublished and the latter now facing *en banc* review, to hold that his pre-enforcement constitutional challenge to the vaccine mandate is precluded.

The district court below was wrong. Its view of CSRA preclusion has been labeled "discredited," "meritless," and "completely baseless" by judges ranging from Ruth Bader Ginsburg and Harry Edwards to Robert Bork and Antonin Scalia. *NFFE v. Weinberger*, 818 F.2d 935, 940 (D.C. Cir. 1987); *NTEU v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984). It is one thing to say the CSRA's detailed scheme of administrative protection for defined employment rights means that

claims that invoke these employment rights must proceed through the process created by Congress to protect these rights. It is quite another to conclude the CSRA impliedly precludes all pre-enforcement judicial review of structural constitutional challenges. *Devine*, 733 F.2d at 117 n.8; *see also NTEU v. Horner*, 854 F.2d 490, 497 (D.C. Cir. 1988).

This Court should apply the two-part framework set forth in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). *See Jarkesy v. S.E.C.*, 803 F.3d 9, 15 (D.C. Cir. 2015). At step one, this Court should examine the CSRA's text, structure, and purpose to determine whether it is "fairly discernible" that Congress intended litigants to proceed exclusively under the CSRA when the claim does not arise out of a prohibited personnel practice or an adverse personnel action. *See Elgin v. Dep't of Treasury*, 567 U.S. 1, 10 (2012). At step two, this Court should consider whether Mr. Payne's claims challenging the vaccine mandate "are of the type Congress intended to be reviewed within the statutory structure." *Jarkesy*, 803 F.3d at 15.

Mr. Payne's complaint does not challenge either a "personnel action" under 5 U.S.C. Chapter 23, or an "adverse action" under 5 U.S.C. Chapter 75. Rather, he has filed a pre-enforcement challenge to

an illegal government-wide employment policy on separation of powers and other constitutional grounds. This Court should be faithful to the statutory text, affirm the viability of its longstanding pre-enforcement precedent, hold that Mr. Payne's claims fit squarely within that precedent, and then reverse the decision below and remand Mr. Payne's claims for adjudication on the merits.

III. *THUNDER BASIN* STEP ONE: THE CSRA'S TEXT, STRUCTURE, AND PURPOSE DO NOT REFLECT A "FAIRLY DISCERNABLE" CONGRESSIONAL INTENTION TO PRECLUDE MR. PAYNE'S CASE

The CSRA's text and structure do not reflect a "fairly discernable" Congressional intention to preclude Mr. Payne's case. The CSRA is designed for individualized discipline and even constitutional challenges to employee-specific personnel actions fall within its ambit. *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012). But the CSRA was never intended to preclude pre-enforcement constitutional challenges to an executive order imposing a government-wide vaccine mandate—that is, to constitutional claims arising from issues "totally unrelated" to the CSRA's structure and procedures. *Turner,* 502 F. Supp. 3d at 370; *Nat'l Fed'n of Fed. Emps. v. Weinberger*, 818 F.2d 935, 938-39 (D.C. Cir. 1987); *Devine*, 733 F.2d at 117 n.8; *Cochran v. U.S. Sec. & Exch.*

Comm'n, 20 F.4th 194, 208 (5th Cir. 2021) *cert. granted sub nom. Sec. & Exch. Comm'n v. Cochran*, No. 21-1239, 2022 WL 1528373 (U.S. May 16, 2022).

A. The Textual Framework

Congress "does not expressly limit the jurisdiction that other statutes confer on district courts" in the CSRA. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010). Because Mr. Payne's complaint does not challenge either a "personnel action" under 5 U.S.C. Chapter 23, or an "adverse action" under 5 U.S.C. Chapter 75, preclusion lacks textual basis.

1. Chapter 23

CSRA Chapter 23 governs "prohibited personnel practices." Only three provisions are relevant: First, under "merit system principles," the CSRA mandates that "employees … should receive fair and equitable treatment … with proper regard for their privacy and constitutional rights." 5 U.S.C. § 2301(b)(2). Second, the CSRA's definition of "personnel action" includes adverse actions under Chapter 75 and "any … significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2)(A)(xii). Third, among various

"prohibited personnel practices," the CSRA proscribes any "personnel action" that would violate a law concerning its merit system principles. 5 U.S.C. § 2302(b)(12). Accordingly, any adverse action or significant change in "working conditions" that violates a covered employee's constitutional rights is a "prohibited personnel practice." *See Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1432 (D.C. Cir. 1996).

To challenge a prohibited personnel practice, the employee must file a complaint with the U.S. Office of Special Counsel ("OSC"), which has authority to investigate and report violations and remedial recommendation to the Merit Systems Protection Board ("MSPB") and the agency. *See* 5 U.S.C. § 1214(b). If the agency ignores its recommendations, the OSC may—but need not—petition the MSPB for corrective action. *Id.* § 1214(b)(2)(C); *Weaver*, 87 F.3d at 1433. If OSC files such a petition, then the employee can appeal that MSPB decision to the Federal Circuit. 5 U.S.C. §§ 1214(c), 7703(b). "[I]f OSC declines to petition the MSPB," however, "the CSRA does not grant the employee any further administrative or judicial review." *Turner*, 502 F. Supp. 3d at 363.

2. Chapter 75

Chapter 75 governs "adverse actions." A minor adverse action under the CSRA is a suspension for 14 days or less. 5 U.S.C. § 7502. A major adverse action is a removal, suspension of more than 14 days, reduction in grade or pay, or furlough of 30 days or less. 5 U.S.C. § 7512. An agency may take adverse action only "for such cause as will promote the efficiency of the service." 5 U.S.C. §§ 7503(a), 7513(a). And in determining what adverse action (if any) to take, an agency must conduct a highly individualized review of the employee's circumstances. 5 C.F.R. §§ 752.202(c), (d), (e); 752.403(c), (d), (e).

The CSRA requires an agency proposing adverse action to provide advance written notice "stating the specific reasons for the proposed action" and give the employee time to answer orally and in writing. 5 U.S.C. §§ 7503(b), 7513(b). For most proposed major actions, the CSRA requires at least 30 days advance notice and seven days to respond. 5 U.S.C. § 7513(b). Then, the CSRA requires that the agency make its decision based solely on the reasons specified in its notice of proposed action and the employee's answer. 5 C.F.R. §§ 752.203(e), 752.404(g).

An employee may appeal a major adverse action to the MSPB, and then to the Federal Circuit. 5 U.S.C. §§ 7513(d), 7701, 7703; 28 U.S.C. § 1295(a)(9). An employee cannot appeal a minor adverse action directly to the MSPB. Instead, he or she can attempt to challenge it as a "prohibited personnel practice" under Chapter 23. *See Turner*, 502 F. Supp. 3d at 363.

B. The District Court Misapplied The CSRA

1. The vaccination mandate is not a "working condition"

The district court erroneously classified Mr. Payne's case as a challenge to changed "working conditions" under 5 U.S.C. § 2302(a)(2)(A)(xii). Therefore, it reasoned the vaccination mandate was a "personnel action" under Chapter 23. J.A. 132-133. The district court's classification, however, conflicts with controlling authorities.

First, the CSRA does not specially define the term "working condition" so the term must be interpreted in accordance with its ordinary public meaning at the time of its enactment. *Bostock*, 140 S. Ct. at 1738. Construing the Federal Labor Relations Act, 5 U.S.C. § 7103(a)(14), the Supreme Court said that the term "more naturally refers, in isolation, only to the 'circumstances' or 'state of affairs'

attendant to one's performance of a job," not to the agreed-upon terms of employment. *Fort Stewart Schs. v. Fed. Lab. Rels. Auth.*, 495 U.S. 641, 645 (1990). That is, the daily, concrete parameters of a job, for example, hours, discrete assignments, and the provision of necessary equipment and resources, not vaccination status. *See Turner,* 502 F. Supp. 3d at 367.[1]

Second, the notion that vaccination is a "working condition" directly conflicts with *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022). There, the Secretary of Labor, acting under the Occupational Safety and Health Act, imposed a vaccine mandate. *Id.* at 662. Congress's express purpose in enacting the Occupational Health and Safety Act was to "assure so

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[1] The district court asserted that 5 U.S.C. § 2302(b)(12) also provides Mr. Payne with a road to judicial review. J.A. 134. This section provides:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

The district court's assertion is improper as this section applies only to a "personnel action," which has not happened in this case.

far as possible every working man and woman in the Nation safe and healthful *working conditions*." 29 U.S.C. § 651(b) (emphasis added); *see also id.* at §§ 651(b)(1) and (b)(2). The Occupational Health and Safety Act, like the CSRA, does not define the term "working conditions." But to the Court the term's meaning is clear: "OSHA is tasked with ensuring occupational safety—that is, 'safe and healthful *working conditions*.'" *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 663 (citation omitted) (emphasis added).

The Court held that the Occupational Safety and Health Act empowers the government to set only *occupational* safety and health standards—that is, standards governing working conditions. *Id.* at 665. Then, it held that the COVID-19 vaccination mandate is a broad public health measure, not a workplace safety standard. *Id.* Therefore, the vaccine mandate challenged by Mr. Payne should be similarly classified as a public health measure and not a "working condition" under the CSRA.

This conclusion is strongly supported by separation of powers principles and a practical understanding of legislative intent, both of which require "clear congressional authorization" for the mandate here.

W. Virginia v. Env't Prot. Agency, 597 U.S. ___, ___ (2022) (slip op., at 19); *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665 ("The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not."), 668 ("By any measure, [the vaccination mandate] is a claim of power to resolve a question of vast national significance. Yet Congress has nowhere clearly assigned so much power to OSHA.") (Gorsuch, J., concurring). In the rare instances when Congress has mandated vaccinations, it has done so expressly. *See, e.g.*, 8 U.S.C. § 1182(a)(1)(A)(ii); 10 U.S.C. §§ 1580, 1580a. There is nothing like that in this case. Consequently, the district court's classification of the vaccination mandate as a "working condition" will, if allowed to stand, inappropriately expand the government's authority.

Third, the district court cited Mr. Payne's allegation in paragraph 56 of his complaint that he was treated differently than employees who complied with the vaccination mandate as proof that he was challenging changed CSRA "working conditions." J.A. 133. However, Mr. Payne's complaint must be construed liberally, and he must be granted the benefit of all inferences that can be derived from the facts alleged. *Am. Nat. Ins. Co. v. F.D.I.C.*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (citations

omitted). Fairly read, Mr. Payne's complaint is not about a mask requirement or anything similar. It is about the constitutional violations caused by the government's mandated vaccinations. J.A. 8-14, 16, 18-22, 24-32. This simply is not a "working conditions" case. *Turner*, 502 F. Supp. at 368 (citations omitted).

2. The vaccination mandate is not a "proposed action"

The district court also erroneously classified Mr. Payne's complaint as a challenge to a termination decision under 5 U.S.C. § 7513. J.A. 134. Because 5 U.S.C. Chapter 75 provides process for a federal civilian worker who has received a notice of a removal, a suspension of more than 14 days, a reduction in grade, a reduction in pay, and/or a furlough, the district court concluded that Mr. Payne's complaint was precluded. It reasoned "while § 7513(b) does not define the scope of a 'proposed' action, Payne never argues no such action looms … [his] allegations suffice to establish that a covered action has been proposed, and he thus can obtain meaningful review before a removal transpires." J.A. 135-136; *see also Rydie v. Biden*, No. 21-2359, 2022 WL 1153249, at *6 (4th Cir. Apr. 19, 2022).

Mr. Payne indeed alleged that the government had threatened discipline and termination for anyone who refused injection. J.A. 18-22. The government's threats, based on its unlawful executive orders, give Mr. Payne standing to challenge the separation of powers and other constitutional violations at issue here. *See Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1647 (2022).

But Mr. Payne did not allege that he was facing a "proposed action" covered by Chapter 75. *See* 5 U.S.C. § 7512; 5 C.F.R. § 752.404. Although the term is not specially defined by statute, it has a clear meaning under federal employment law, one the district court erroneously ignored.

Chapter 75 authorizes most federal agencies to suspend, demote, furlough, or remove employees for "such cause as will promote the efficiency of the service." These "adverse actions" are typically based on misconduct, unacceptable performance, or a combination of both. They may also be based upon non-disciplinary reasons such as medical inability to perform or furlough.

The Office of Personnel and Management's regulations at 5 C.F.R. Part 752 implements the law. *See* Office of Personnel Management,

Policy, Data, Oversight Employee Relations, 'Adverse Actions' (last accessed June 24, 2022), https://bit.ly/3NnYvHA. Specifically, the regulatory requirements of a "proposed action" are found at 5 C.F.R. Chapter I, Subchapter B, Part 752, titled "Adverse Actions." Subpart D covers employee terminations (a "removal" in federal employment parlance). *See* 5 C.F.R. § 752.401. The process is highly individualized. *See* 5 C.F.R. § 752.403 (c), (d), (e) (standards for action and penalty determination) 5 C.F.R. § 752.404 (b), (c), (g); *see also* U.S. Merit Systems Protection Bd., *What is Due Process in Federal Civilian Employment? A Report to the President and the Congress of the United States by the U.S. Merit Systems Protection Board* at i, 10, 26-28, 45-46, 62 (May 2015), https://bit.ly/3OiYR3J.

The district court ignored all of this. It declared that "in positing that it would be illogical to have to raise a pre-enforcement challenge via the CSRA's review scheme, Payne gets things exactly backwards" because a plaintiff who would have to proceed through the CSRA "*after* suffering an adverse personnel action could circumvent this process and obtain immediate federal-court review once the action is proposed but before it is executed." J.A. 137-138 (emphasis in original).

However, the regulatory *sine qua non* of a proposed action under Chapter 75 is a *specific* written notice from a *specific* agency to a *specific* employee offering *specific* reasons for a *specific* adverse action (charges and penalty). *See* U.S. Merit Systems Protection Bd., *What is Due Process in Federal Civilian Employment? A Report to the President and the Congress of the United States by the U.S. Merit Systems Protection Board* at 10, Appendix B. Here, there was no written notice to Mr. Payne *because there was no proposed action*.

Contra the district court, an executive order imposing a government-wide vaccine mandate cannot be a "proposed action." Because adverse action always "looms" for disobedience, the district court's opinion means federal workers can *never* mount a pre-enforcement challenge to the constitutionality of any government-wide employment policy. This would mean no federal civilian worker could obtain pre-enforcement judicial review of executive orders requiring them, *inter alia,* to surrender personal firearms; to use or abstain from birth control; or to undergo mandatory weight-reduction measures and surgeries. While some employees might resist these policies, the

government's *in terrorem* campaign would exist with knowledge that judicial review has been eviscerated.

C. The District Court Wrongly Declared Controlling Precedent "Effectively Overruled"

As noted *supra,* this Court has repeatedly refused to preclude pre-enforcement constitutional claims by federal workers in a variety of cases ranging from a pre-publication review requirement, *Weaver*, 87 F.3d at 1431-32, 1434; to a Department of Defense urinalysis drug-testing requirement under various constitutional theories, *Weinberger*, 818 F.2d at 938-39; to a Department of Justice urinalysis drug-testing program, *Harmon v. Thornburgh*, 878 F.2d 484, 485-87, 396 (D.C. Cir. 1989).[2] Time and again this Court has affirmed the right of civil servants to seek equitable relief against an agency in vindication of their constitutional rights. *Spagnola v. Mathis*, 859 F.2d 223, 229-30 (D.C. Cir. 1988) (en banc); *cf. Bush v. Lucas*, 462 U.S. 367, 385 n.28 (1983) ("[C]ertain actions by supervisors against federal employees, such as wiretapping, warrantless searches, or uncompensated takings,

[2] CSRA preclusion was not raised in *Harmon*. But the Supreme Court did not question jurisdiction when it considered the challenge by Customs-Service employees to that agency's drug-testing program. *See Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989).

would not be defined as 'personnel actions' within the statutory scheme."). *See also Jarkesy v. S.E.C.*, 803 F.3d 9, 23 (D.C. Cir. 2015) ("The result might be different if a constitutional challenge were filed in court before the initiation of any administrative proceeding.").

The district court disposed of these and other relevant circuit authorities by declaring them "effectively overruled" by *Elgin* and *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994). J.A. 136-137. But neither *Elgin* nor *Thunder Basin* involved a pre-enforcement challenge to a government-wide employment policy. *Elgin* answered only the question "whether the CSRA provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action" seeking, for instance, "the compensation they would have earned." *Elgin,* 567 U.S. at 5, 22; *see also Fed. L. Enf't Officers Ass'n v. Cabaniss*, No. 19-cv-735 (CKK), 2019 WL 5697168, at *6 (D.D.C. Nov. 4, 2019).

In *Thunder Basin*, 510 U.S. at 202, the operator of a surface coal mine sued in district court to preempt enforcement of certain Mine Act requirements. The Court held that "the Mine Act's administrative structure was intended to preclude district court jurisdiction over [the]

petitioner's claims." *Id.* at 218. However, it resolved the constitutional claim on the merits. *Elgin*, 567 U.S. at 31–32 (Alito, J., dissenting).

Accordingly, these cases do not "effectively overrule" or "eviscerate" the law of this circuit. Because Mr. Payne is challenging the constitutionality of the vaccine mandate, rather than an agency personnel action (*Elgin*) or the CSRA itself (*Thunder Basin*), the district court had jurisdiction over his case. *Turner,* 502 F. Supp. 3d at 365-66, 68-70; *see also Free Enter. Fund*, 561 U.S. at 487, 490-91; *Cochran*, 20 F.4th at 208 (harmonizing *Free Enter. Fund, Elgin,* and *Thunder Basin*).

D. Preclusion Of Mr. Payne's Case Would Be Contrary To An Essential CSRA Purpose

Before the CSRA, "widespread judicial review, which included appeals in all of the Federal Courts of Appeals[,] produced wide variations in the kinds of decisions issued on the same or similar matters and a double layer of judicial review that was wasteful and irrational." *Elgin*, 567 U.S. at 14 (cleaned up). Congress designed the CSRA to avoid this "inconsistent decisionmaking and duplicative judicial review." *Id.* Precluding Mr. Payne's case will frustrate this

essential purpose by causing a flood of CSRA claims and litigation that will overwhelm the federal personnel system.

The latest publicly available figures suggest that the Biden Administration stated that as of December 8, 2021, "92.5% of employees hav[e] received at least one COVID-19 vaccination dose." The White House, *Press Release: Update on Implementation of COVID-19 Vaccination Requirement for Federal Employees* (Dec. 19, 2021), https://bit.ly/3wDruRn. The federal government employs approximately 2.1 million civilian workers, meaning approximately 157,500 people face the promise of adverse action. And as of April of 2021, the MSPB had a several-year backlog, totaling approximately 3,200 petitions for review. *See Annual Performance Report for FY 2020 and Annual Performance Plan for FY 2021 (Final) & FY 2022 (Proposed)*, U.S. Merit Systems Protection Board, May 28, 2021, available at https://bit.ly/3yPPl30 (last visited June 30, 2022).

Even assuming only one out of every five individuals at risk of termination would bring an action to protect his livelihood, the federal employment system may be facing over *thirty thousand* new claims, each requiring individualized adjudication including specific notice,

counsel, an opportunity to respond, a written decision, and an appeal to the MSPB. *See* 5 U.S.C. § 7513. By contrast, district court litigation offers a far more efficient mechanism for resolving the constitutional issues raised by Mr. Payne with respect to the illegal executive orders mandating injections for nearly all 2.1 million federal workers, for these issues do not depend on the circumstances of a particular employee.

IV. *THUNDER BASIN* STEP TWO: MR. PAYNE'S CLAIMS ARE NOT OF THE TYPE CONGRESS INTENDED TO BE REVIEWED WITHIN THE CSRA'S STRUCTURE

At step two, a court should "presume that Congress wanted the district court to remain open to a litigant's claims if a finding of preclusion could foreclose all meaningful judicial review; if the suit is wholly collateral to a statute's review provisions; and if the claims are outside the agency's expertise." *Id.* at 17 (quoting *Free Enter. Fund*, 561 U.S. at 489-90). These considerations are not a "strict mathematical formula," but rather, "general guideposts useful for channeling the inquiry into whether the particular claims at issue fall outside an overarching congressional design." *Id.* In Mr. Payne's case, these guideposts all point toward district-court jurisdiction over his pre-enforcement constitutional claims.

A. The Federal Vaccine Mandate Is A Major Question And Therefore Both Wholly Collateral To The CSRA's Review Provisions And Outside Any Agency's Expertise

It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be "shaped, at least in some measure, by the nature of the question presented"—whether Congress in fact meant to confer the power the agency has asserted. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, (2000).

Extraordinary grants of regulatory authority, such as the vaccine mandate, are rarely accomplished through "modest words," "vague terms," or "subtle devices." *See W. Virginia*, 597 U.S. at ___ (slip op., at 18). It is telling that the government has never before adopted a broad public health regulation of this kind addressing a threat that is untethered, in any causal sense, from the workplace. "This 'lack of historical precedent,' coupled with the breadth of authority that the [government] now claims, is a 'telling indication' that the mandate

extends beyond the [government's] legitimate reach." *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666. More telling still is that President Biden specifically denied this authority, both as a candidate and again as President. J.A. 13, 15.

The CSRA is not an "open book" to which the government may add pages and change the plot line. And the presumption is that Congress intends to make major policy decisions itself, not leave those decisions to agencies. *W. Virginia,* 597 U.S. at ___ (slip op., at 19). When it comes to vaccinations, this is what Congress has done. *See, e.g.,* 8 U.S.C. § 1182(a)(1)(A)(ii); 10 U.S.C. §§ 1580, 1580a.

The government here has asserted highly consequential power solely by way of executive order and administrative fiat, going far beyond the authority Congress could reasonably be understood to have granted it in the CSRA. Indeed, the federal worker vaccination mandate is a paradigmatic, major question. *See W. Virginia*, 597 U.S. at ___ (slip op., at 20). Consequently, the idea that Congress somehow impliedly intended to preclude district court review of a pre-enforcement constitutional claim challenging executive branch overreach implicating the major questions doctrine, or that the MSPB has the expertise to

decide such a thing, is contrary to separation of powers principles and a practical understanding of legislative intent. *See Carr v. Saul,* 141 S. Ct. 1352, 1361 (2021); *Free Enter. Fund*, 561 U.S. at 491.

B. Even If The Vaccine Mandate Is Not A Major Question, Mr. Payne's Suit Is "Wholly Collateral" To The CSRA's Review Provisions

Mr. Payne's pre-enforcement constitutional challenges are "wholly collateral" to the CSRA's review provisions. First, as discussed above, his claims are unrelated to the CSRA procedures and not "claims, that, while framed as constitutional challenges, are in truth a disguised 'vehicle' to challenge CSRA-covered personnel actions or practices." *Turner*, 502 F. Supp. 3d at 366.[3]

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[3] Mr. Payne has alleged that the Defendants threaten discipline and termination for anyone who refuses injection. J.A. 17-24. The government's threats, based on an unlawful executive order, provided Mr. Payne standing to challenge the separation of powers violation and other unconstitutional conduct at issue in this case. *See Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1647 (2022). However, these threats are not "proposed" adverse actions under the CSRA. And should the government be tempted to argue the lack of "proposed" adverse action defeats Mr. Payne's standing:

> [T]he injury in fact requirement [of Article III standing] is satisfied by the plaintiff's demonstration of an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by government policy. The injury is deemed sufficiently imminent … upon a credible statement by the plaintiff of intent to commit violative acts and a conventional

Second, the district court suggested Mr. Payne was alleging a significant change in his "working conditions," which he could have characterized as a "prohibited personnel practice" by complaining to OSC. *See also Feds for Med. Freedom v. Biden*, 30 F.4th 503, 510 (5th Cir. 2022), *reh'g en banc granted, opinion vacated*, No. 22-40043, 2022 WL 2301458 (5th Cir. June 27, 2022). But OSC and the MSPB lack the authority to invalidate the vaccine mandate on separation of powers grounds, even if they were of a mind to do so.

Mr. Payne is not claiming the agency's masking and testing requirements violate his constitutional rights.[4] Nor is he seeking independent relief from these requirements. Instead, Mr. Payne is seeking relief from the unconstitutional vaccine mandate and to stop a separation of powers violation.

OSC and the MSPB are not in the business of adjudicating pre-enforcement separation of powers challenges to executive branch

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> background expectation that the government will enforce the law or its policies.

Turner, 502 F. Supp. 3d at 359 (quotation marks, brackets, and citations omitted).

[4] Even if he were, such claims might fall outside the CSRA's preclusive ambit. *See generally Von Raab*, 489 U.S. 656; *Bush v. Lucas*, 462 U.S. at 385 n.28.

overreach. Furthermore, the Court has consistently recognized a futility exception to exhaustion requirements because, as in the instant case, it makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested. Such a "vain exercise" will rarely protect administrative agency authority or promote judicial efficiency. *Carr,* 141 S. Ct. at 1361 (citations omitted). Strip away the mask requirement from Mr. Payne's complaint, and his constitutional claim remains unaltered. *Compare Elgin*, 567 U.S. at 22; *Jarkesy*, 803 F.3d at 23.

C. Even If The Vaccine Mandate Is Not A Major Question, The CSRA Scheme Does Not Provide For Meaningful Review Of Mr. Payne's Claims

A statutory scheme does not provide a "meaningful" avenue of relief if it requires a plaintiff to "bet the farm" and violate a rule before challenging the rule's validity. *Free Enter. Fund*, 561 U.S. at 490-91; *Jarkesy*, 803 F.3d at 20. Here, Mr. Payne is being told to "bet the farm" by refusing to comply with the vaccine mandate until the agency proposes an adverse action against him.

The district court held that Mr. Payne was not required "to bet the farm, the ranch, or anything else." J.A. 137. This holding was wrong for

two reasons. First, the district court suggested Mr. Payne could challenge his changed "working conditions" via OSC without risking proposed termination. However, as discussed above, Mr. Payne could *not* have challenged the unconstitutional vaccine mandate on this basis.

Second, the district court reasoned Mr. Payne was "insulate[d] from having to bet the farm" by the CSRA's "procedures afforded to a covered employee facing a proposed termination." *Id.* But this reasoning is bizarre. It suggests an employee facing proposed termination is somehow playing with house money. To the contrary, once termination is proposed, the employee's "farm and ranch" are on the table. If he does not prevail, the "farm and ranch" are gone.

Perhaps the district court went astray because it fundamentally misunderstood Mr. Payne's claims. It reasoned Mr. Payne is "preemptively challenging his termination." But Mr. Payne is challenging an unconstitutional vaccine mandate, not, as he has explained at length, an actual or proposed adverse personnel action.

Regardless, in *Thunder Basin* the Court explained that there should be no preclusion in a "situation in which compliance is sufficiently onerous and coercive penalties [are] sufficiently potent that

a constitutionally intolerable choice" is presented. 510 U.S. at 218. Government-imposed vaccine mandates impose just such an intolerable choice by threatening Mr. Payne and the other federal civilian workers with the choice of choosing between a job and a jab of unwanted and unneeded medication based on an *ultra vires* and unconstitutional executive order. This unquestionably constitutes a cognizable burden and irreparable injury, especially as an injection cannot be undone. *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009); *see also BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Labor*, 17 F.4th 604, 618 (5th Cir. 2021).

D. Even If The Vaccine Mandate Is Not A Major Question, Mr. Payne's Claims Are Outside The Expertise Of The Agency And The MSPB

The district court held against Mr. Payne because the "employing agencies and the MSPB no doubt have experience adjudicating employee challenges to a range of personnel actions." J.A. 140-141. The court suggested that Mr. Payne's agency might moot some of his claims during the review process, or that the agency or MSPB might decide adverse action against Mr. Payne was unwarranted.

Yet again, the district court's reasoning comes up short. Unlike in *Elgin*, threshold questions within the agency's or MSPB's expertise do not accompany Mr. Payne's constitutional claims. Whatever the agency's and MSPB's experience evaluating personnel actions, that experience is immaterial here, because Mr. Payne is not challenging a personnel action. And because the agency has neither proposed nor taken adverse action against him, the avoidance of constitutional claims during the CSRA review process is hypothetical and contingent. This again distinguishes *Elgin*, 567 U.S. at 7, where the plaintiffs had been discharged or allegedly constructively discharged.

CONCLUSION

Congress did not intend to preclude Mr. Payne's pre-enforcement constitutional challenge to the unlawful federal worker vaccine mandate. The order below should be reversed, and this case remanded for a merits determination.

Dated: July 8, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned counsel certifies compliance with the requirements of Fed. R. App. P. 32. The brief is 6,578 words in length and follows the required font and formatting regulations.

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CERTIFICATE OF SERVICE

I, Reed D. Rubinstein, certify that on July 8, 2022, I caused the foregoing document to be filed with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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ADDENDUM

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§1214. Investigation of prohibited personnel practices; corrective action

(a)(1)(A) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(B) Within 15 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall provide written notice to the person who made the allegation that-

(i) the allegation has been received by the Special Counsel; and

(ii) shall include the name of a person at the Office of Special Counsel who shall serve as a contact with the person making the allegation.

(C) Unless an investigation is terminated under paragraph (2), the Special Counsel shall-

(i) within 90 days after notice is provided under subparagraph (B), notify the person who made the allegation of the status of the investigation and any action taken by the Office of the Special Counsel since the filing of the allegation;

(ii) notify such person of the status of the investigation and any action taken by the Office of the Special Counsel since the last notice, at least every 60 days after notice is given under clause (i); and

(iii) notify such person of the status of the investigation and any action taken by the Special Counsel at such time as determined appropriate by the Special Counsel.

(D) No later than 10 days before the Special Counsel terminates any investigation of a prohibited personnel practice, the Special Counsel shall provide a written status report to the person who made the allegation of the proposed findings of fact and legal conclusions. The person may submit written comments about the report to the Special Counsel. The Special Counsel shall not be required to provide a subsequent written status report under this subparagraph after the submission of such written comments.

(2)(A) If the Special Counsel terminates any investigation under paragraph (1), the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of-

(i) the termination of the investigation;

(ii) a summary of relevant facts ascertained by the Special Counsel, including the facts that support, and the facts that do not support, the allegations of such person;

(iii) the reasons for terminating the investigation; and

(iv) a response to any comments submitted under paragraph (1)(D).

(B) A written statement under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement under subparagraph (A).

(3) Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee, former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee, or applicant seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) from the Special Counsel and-

(A)(i) the Special Counsel notifies such employee, former employee, or applicant that an investigation concerning such employee, former employee, or applicant has been terminated; and

(ii) no more than 60 days have elapsed since notification was provided to such employee, former employee, or applicant for employment that such investigation was terminated; or

(B) 120 days after seeking corrective action from the Special Counsel, such employee, former employee, or applicant has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, former employee, or applicant.

(4) If an employee, former employee, or applicant seeks a corrective action from the Board under section 1221, pursuant to the provisions of paragraph (3)(B), the Special Counsel may continue to seek corrective action personal to such employee, former employee, or applicant only with the consent of such employee, former employee, or applicant.

(5) In addition to any authority granted under paragraph (1), the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred, exists, or is to be taken.

(6)(A) Notwithstanding any other provision of this section, not later than 30 days after the date on which the Special Counsel receives an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel may terminate an investigation of the allegation without further inquiry if the Special Counsel determines that-

(i) the same allegation, based on the same set of facts and circumstances, had previously been-

(I)(aa) made by the individual; and

(bb) investigated by the Special Counsel; or

(II) filed by the individual with the Merit Systems Protection Board;

(ii) the Special Counsel does not have jurisdiction to investigate the allegation; or

(iii) the individual knew or should have known of the alleged prohibited personnel practice on or before the date that is 3 years before the date on which the Special Counsel received the allegation.

(B) Not later than 30 days after the date on which the Special Counsel terminates an investigation under subparagraph (A), the Special Counsel shall provide a written notification to the individual who submitted the allegation of a prohibited personnel practice that states the basis of the Special Counsel for terminating the investigation.

(b)(1)(A)(i) The Special Counsel may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice.

(ii) Any member of the Board requested by the Special Counsel to order a stay under clause (i) shall order such stay unless the member determines that, under the facts and circumstances involved, such a stay would not be appropriate.

(iii) Unless denied under clause (ii), any stay under this subparagraph shall be granted within 3 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date of the request for the stay by the Special Counsel.

(B)(i) The Board may extend the period of any stay granted under subparagraph (A) for any period which the Board considers appropriate.

(ii) If the Board lacks the number of members appointed under section 1201 required to constitute a quorum, any remaining member of the Board may, upon request by the Special Counsel, extend the period of any stay granted under subparagraph (A).

(C) The Board shall allow any agency which is the subject of a stay to comment to the Board on any extension of stay proposed under subparagraph (B).

(D) A stay may be terminated by the Board at any time, except that a stay may not be terminated by the Board-

(i) on its own motion or on the motion of an agency, unless notice and opportunity for oral or written comments are first provided to the Special Counsel and the individual on whose behalf the stay was ordered; or

(ii) on motion of the Special Counsel, unless notice and opportunity for oral or written comments are first provided to the individual on whose behalf the stay was ordered.

(E) If the Board grants a stay under subparagraph (A), the head of the agency employing the employee who is the subject of the action shall give priority to a request for a transfer submitted by the employee.

(2)(A)(i) Except as provided under clause (ii), no later than 240 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(ii) If the Special Counsel is unable to make the required determination within the 240-day period specified under clause (i) and the person submitting the allegation of a prohibited personnel practice agrees to an extension of time, the determination shall be made within such additional period of time as shall be agreed upon between the Special Counsel and the person submitting the allegation.

(B) If, in connection with any investigation, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved and to the Office of Personnel Management, and may report such determination, findings and recommendations to the President. The Special Counsel may include in the report recommendations for corrective action to be taken.

(C) If, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice, the Special Counsel may petition the Board for corrective action.

(D) If the Special Counsel finds, in consultation with the individual subject to the prohibited personnel practice, that the agency has acted to correct the prohibited personnel practice, the Special Counsel shall file such finding with the Board, together with any written comments which the individual may provide.

(E) A determination by the Special Counsel under this paragraph shall not be cited or referred to in any proceeding under this paragraph or any other administrative or judicial proceeding for any purpose, without the consent of the person submitting the allegation of a prohibited personnel practice.

(3) Whenever the Special Counsel petitions the Board for corrective action, the Board shall provide an opportunity for-

(A) oral or written comments by the Special Counsel, the agency involved, and the Office of Personnel Management; and

(B) written comments by any individual who alleges to be the subject of the prohibited personnel practice.

(4)(A) The Board shall order such corrective action as the Board considers appropriate, if the Board determines that the Special Counsel has demonstrated that a prohibited personnel practice, other than one described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), has occurred, exists, or is to be taken.

(B)(i) Subject to the provisions of clause (ii), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), the Board shall order such corrective action as the Board considers appropriate if the Special Counsel has demonstrated that a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action which was taken or is to be taken against the individual.

(ii) Corrective action under clause (i) may not be ordered if, after a finding that a protected disclosure was a contributing factor, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(c)(1) Judicial review of any final order or decision of the Board under this section may be obtained by any employee, former employee, or applicant for employment adversely affected by such order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

(d)(1) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that a criminal violation has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

(2) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel shall proceed with any investigation or proceeding unless-

(A) the alleged violation has been reported to the Attorney General; and

(B) the Attorney General is pursuing an investigation, in which case the Special Counsel, after consultation with the Attorney General, has discretion as to whether to proceed.

(e) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require, within 30 days after the receipt of the report by the agency, a certification by the head of the agency which states-

(1) that the head of the agency has personally reviewed the report; and

(2) what action has been or is to be taken, and when the action will be completed.

(f) During any investigation initiated under this subchapter, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

(g) If the Board orders corrective action under this section, such corrective action may include-

(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).

(h) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

(i) The Special Counsel may petition the Board to order corrective action, including fees, costs, or damages reasonably incurred by an employee due to an investigation of the employee by an agency, if the investigation by an agency was commenced, expanded, or extended in retaliation for a disclosure or protected activity described in section

2302(b)(8) or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9), without regard to whether a personnel action, as defined in section 2302(a)(2)(A), is taken.

(Added Pub. L. 101–12, §3(a)(13), Apr. 10, 1989, 103 Stat. 23 ; amended Pub. L. 103–424, §§3(c), (d), 8(a), Oct. 29, 1994, 108 Stat. 4362 , 4364; Pub. L. 112–199, title I, §§101(b)(1)(A), (2)(A), 104(c)(1), 107(b), 114(a), Nov. 27, 2012, 126 Stat. 1465 , 1468, 1469, 1472; Pub. L. 115–42, §1, June 27, 2017, 131 Stat. 883 ; Pub. L. 115–73, title I, §102(a), Oct. 26, 2017, 131 Stat. 1236 ; Pub. L. 115–91, div. A, title X, §1097(c)(3)(A), (4), (f), (j), Dec. 12, 2017, 131 Stat. 1619 , 1622, 1625.)

Editorial Notes

Amendments

2017-Subsec. (a)(6). Pub. L. 115–91, §1097(f), added par. (6).

Subsec. (b)(1)(B). Pub. L. 115–42 designated existing provisions as cl. (i) and added cl. (ii).

Subsec. (b)(1)(B)(ii). Pub. L. 115–91, §1097(j), struck out "who was appointed, by and with the advice and consent of the Senate," after "member of the Board".

Subsec. (b)(1)(E). Pub. L. 115–91, §1097(c)(3)(A), added subpar. (E) and struck out former subpar. (E) which read as follows: "If the Merit Systems Protection Board grants a stay under this subsection, the head of the agency employing the employee shall give priority to a request for a transfer submitted by the employee."

Pub. L. 115–73 added subpar. (E).

Subsec. (i). Pub. L. 115–91, §1097(c)(4), added subsec. (i).

2012-Subsecs. (a)(3), (b)(4)(A). Pub. L. 112–199, §101(b)(1)(A), inserted "or section 2302(b)(9)(A)(i), (B), (C), or (D)" after "section 2302(b)(8)".

Subsec. (b)(4)(B)(i). Pub. L. 112–199, §101(b)(1)(A), (2)(A), inserted "or section 2302(b)(9)(A)(i), (B), (C), or (D)" after "section 2302(b)(8)" in two places and inserted "or protected activity" after "disclosure".

Subsec. (b)(4)(B)(ii). Pub. L. 112–199, §114(a), inserted ", after a finding that a protected disclosure was a contributing factor," after "ordered if".

Subsec. (g)(2). Pub. L. 112–199, §107(b), substituted "any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs)." for "and any other reasonable and foreseeable consequential damages."

Subsec. (h). Pub. L. 112–199, §104(c)(1), added subsec. (h).

1994-Subsec. (a)(1)(D). Pub. L. 103–424, §3(c)(1), added subpar. (D).

Subsec. (a)(2)(A)(iv). Pub. L. 103–424, §3(c)(2), added cl. (iv).

Subsec. (b)(2). Pub. L. 103–424, §3(d), added subpars. (A) and (E) and redesignated former subpars. (A) to (C) as (B) to (D), respectively.

Subsec. (g). Pub. L. 103–424, §8(a), added subsec. (g).

Statutory Notes and Related Subsidiaries

Effective Date of 2012 Amendment

Amendment by Pub. L. 112–199 effective 30 days after Nov. 27, 2012, see section 202 of Pub. L. 112–199, set out as a note under section 1204 of this title.

Termination Statement

Pub. L. 103–424, §12(b), Oct. 29, 1994, 108 Stat. 4367 , provided that: "The Special Counsel shall include in any letter terminating an investigation under section 1214(a)(2) of title 5, United States Code, the name and telephone number of an employee of the Special Counsel who is available to respond to reasonable questions from the person regarding the investigation or review conducted by the Special Counsel, the relevant facts ascertained by the Special Counsel, and the law applicable to the person's allegations."

5 USC 2301: Merit system principles
Text contains those laws in effect on July 5, 2022

From Title 5-GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III-EMPLOYEES
Subpart A-General Provisions
CHAPTER 23-MERIT SYSTEM PRINCIPLES
Jump To:

§2301. Merit system principles

(a) This section shall apply to-
(1) an Executive agency; and
(2) the Government Publishing Office.

(b) Federal personnel management should be implemented consistent with the following merit system principles:
(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.
(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.
(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.
(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.
(5) The Federal work force should be used efficiently and effectively.
(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.
(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.
(8) Employees should be-
(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and
(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences-
(A) a violation of any law, rule, or regulation, or
(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) In administering the provisions of this chapter-
(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority otherwise available under this title, take any action, including the issuance of rules, regulations, or directives; and
(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules, regulations, or directives;

which is consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.

(Added Pub. L. 95–454, title I, §101(a), Oct. 13, 1978, 92 Stat. 1113 ; amended Pub. L. 101–474, §5(c), Oct. 30, 1990, 104 Stat. 1099 ; Pub. L. 113–235, div. H, title I, §1301(b), Dec. 16, 2014, 128 Stat. 2537 .)

5 USC 2302: Prohibited personnel practices
Text contains those laws in effect on July 5, 2022

From Title 5-GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III-EMPLOYEES
Subpart A-General Provisions
CHAPTER 23-MERIT SYSTEM PRINCIPLES
Jump To:

§2302. Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).
(2) For the purpose of this section-
(A) "personnel action" means-
(i) an appointment;
(ii) a promotion;
(iii) an action under chapter 75 of this title or other disciplinary or corrective action;
(iv) a detail, transfer, or reassignment;
(v) a reinstatement;
(vi) a restoration;
(vii) a reemployment;
(viii) a performance evaluation under chapter 43 of this title or under title 38;
(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
(x) a decision to order psychiatric testing or examination;
(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and
(xii) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;
(B) "covered position" means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action-
(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or
(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration;

(C) "agency" means an Executive agency and the Government Publishing Office, but does not include-
(i) a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D);
(ii)(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and
(II) as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a personnel action; or
(iii) the Government Accountability Office; and

(D) "disclosure" means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing

the disclosure reasonably believes that the disclosure evidences-

(i) any violation of any law, rule, or regulation; or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-

(1) discriminate for or against any employee or applicant for employment-

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of-

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of-

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences-

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences-

(i) any violation (other than a violation of this section) of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or

(C) any disclosure to Congress (including any committee of Congress) by any employee of an agency or applicant for employment at an agency of information described in subparagraph (B) that is-

(i) not classified; or

(ii) if classified-

(I) has been classified by the head of an agency that is not an element of the intelligence community (as defined by section 3 of the National Security Act of 1947 (50 U.S.C. 3003)); and

(II) does not reveal intelligence sources and methods.[1]

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of-

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation-

(i) with regard to remedying a violation of paragraph (8); or

(ii) other than with regard to remedying a violation of paragraph (8);

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);

(C) cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) refusing to obey an order that would require the individual to violate a law, rule, or regulation;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement;

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title;

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement-

(A) does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General or the Office of Special Counsel of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."; or

(B) prohibits or restricts an employee or applicant for employment from disclosing to Congress, the Special Counsel, the Inspector General of an agency, or any other agency component responsible for internal investigation or review any information that relates to any violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or any other whistleblower protection; or

(14) access the medical record of another employee or an applicant for employment as a part of, or otherwise in furtherance of, any conduct described in paragraphs (1) through (13).

This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress. For purposes of paragraph (8), (i) any presumption relating to the performance of a duty by an employee whose conduct is the subject of a disclosure as defined under subsection (a)(2)(D) may be rebutted by substantial evidence, and (ii) a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.

(c)(1) In this subsection-

(A) the term "new employee" means an individual-

(i) appointed to a position as an employee on or after the date of enactment of this subsection; and

(ii) who has not previously served as an employee; and

(B) the term "whistleblower protections" means the protections against and remedies for a prohibited personnel practice described in paragraph (8) or subparagraph (A)(i), (B), (C), or (D) of paragraph (9) of subsection (b).

(2) The head of each agency shall be responsible for-

(A) preventing prohibited personnel practices;

(B) complying with and enforcing applicable civil service laws, rules, and regulations and other aspects of personnel management; and

(C) ensuring, in consultation with the Special Counsel and the Inspector General of the agency, that employees of the agency are informed of the rights and remedies available to the employees under this chapter and chapter 12, including-

(i) information with respect to whistleblower protections available to new employees during a probationary period;

(ii) the role of the Office of Special Counsel and the Merit Systems Protection Board with respect to whistleblower protections; and

(iii) the means by which, with respect to information that is otherwise required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs, an employee may make a lawful disclosure of the information to-

(I) the Special Counsel;

(II) the Inspector General of an agency;

(III) Congress (including any committee of Congress with respect to information that is not classified or, if classified, has been classified by the head of an agency that is not an element of the intelligence community and does not reveal intelligence sources and methods); or

(IV) another employee of the agency who is designated to receive such a disclosure.

(3) The head of each agency shall ensure that the information described in paragraph (2) is provided to each new employee of the agency not later than 180 days after the date on which the new employee is appointed.

(4) The head of each agency shall make available information regarding whistleblower protections applicable to employees of the agency on the public website of the agency and on any online portal that is made available only to employees of the agency, if such portal exists.

(5) Any employee to whom the head of an agency delegates authority for any aspect of personnel management shall, within the limits of the scope of the delegation, be responsible for the activities described in paragraph (2).

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under-

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

(e)(1) For the purpose of this section, the term "veterans' preference requirement" means any of the following provisions of law:

(A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701.

(B) Sections 943(c)(2) and 1784(c) of title 10.

(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act.

(D) Section 301(c) of the Foreign Service Act of 1980.

(E) Sections 106(f),[1] 7281(e), and 7802(5)[1] of title 38.

(F) Section 1005(a) of title 39.

(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations as being a veterans' preference requirement for the purposes of this subsection.

(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

(2) Notwithstanding any other provision of this title, no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11). Nothing in this paragraph shall be considered to affect any authority under section 1215 (relating to disciplinary action).

(f)(1) A disclosure shall not be excluded from subsection (b)(8) because-

(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);

(B) the disclosure revealed information that had been previously disclosed;

(C) of the employee's or applicant's motive for making the disclosure;

(D) the disclosure was not made in writing;

(E) the disclosure was made while the employee was off duty;

(F) the disclosure was made before the date on which the individual was appointed or applied for appointment to a position; or

(G) of the amount of time which has passed since the occurrence of the events described in the disclosure.

(2) If a disclosure is made during the normal course of duties of an employee, the principal job function of whom is to regularly investigate and disclose wrongdoing (referred to in this paragraph as the "disclosing employee"), the disclosure shall not be excluded from subsection (b)(8) if the disclosing employee demonstrates that an employee who has the authority to take, direct other individuals to take, recommend, or approve any personnel action with respect to the disclosing employee took, failed to take, or threatened to take or fail to take a personnel action with respect to the disclosing employee in reprisal for the disclosure made by the disclosing employee.

(Added Pub. L. 95–454, title I, §101(a), Oct. 13, 1978, 92 Stat. 1114 ; amended Pub. L. 101–12, §4, Apr. 10, 1989, 103 Stat. 32 ; Pub. L. 101–474, §5(d), Oct. 30, 1990, 104 Stat. 1099 ; Pub. L. 102–378, §2(5), Oct. 2, 1992, 106 Stat. 1346 ; Pub. L. 103–94, §8(c), Oct. 6, 1993, 107 Stat. 1007 ; Pub. L. 103–359, title V, §501(c), Oct. 14, 1994, 108 Stat. 3429 ; Pub. L. 103–424, §5, Oct. 29, 1994, 108 Stat. 4363 ; Pub. L. 104–197, title III, §315(b)(2), Sept. 16, 1996, 110 Stat. 2416 , Pub. L. 104–201, div. A, title XI, §1122(a)(1), title XVI, §1615(b), Sept. 23, 1996, 110 Stat. 2687 , 2741; Pub. L. 105–339, §6(a), (b), (c)(2), Oct. 31, 1998, 112 Stat. 3187 , 3188; Pub. L. 108–271, §8(b), July 7, 2004, 118 Stat. 814 ; Pub. L. 110–417, [div. A], title IX, §931(a)(1), Oct. 14, 2008, 122 Stat. 4575 ; Pub. L. 112–199, title I, §§101(a), (b)(1)(B), (2)(B), (C), 102–104(b)(1), 105, 112, Nov. 27, 2012, 126 Stat. 1465–1468 , 1472; Pub. L. 112–277, title V, §505(a), Jan. 14, 2013, 126 Stat. 2478 ; Pub. L. 113–235, div. H, title I, §1301(b), Dec. 16, 2014, 128 Stat. 2537 ; Pub. L. 114–113, div. J, title II, §238, Dec. 18, 2015, 129 Stat. 2700 ; Pub. L. 115–40, §2, June 14, 2017, 131 Stat. 861 ; Pub. L. 115–73, title I, §§103, 107(a)(1), Oct. 26, 2017, 131 Stat. 1236 , 1238; Pub. L. 115–91, div. A, title X, §1097(b)(1)(B), (c)(1), Dec. 12, 2017, 131 Stat. 1616 , 1618; Pub. L. 116–92, div. E, title LVII, §5721, Dec. 20, 2019, 133 Stat. 2175 ; Pub. L. 116–283, div. A, title XI, §1138, Jan. 1, 2021, 134 Stat. 3905 .)

Editorial Notes

References in Text

Section 1308(b) of the Alaska National Interest Lands Conservation Act, referred to in subsec. (e)(1)(C), is classified to section 3198(b) of Title 16, Conservation.

Section 301(c) of the Foreign Service Act of 1980, referred to in subsec. (e)(1)(D), is classified to section 3941(c) of Title 22, Foreign Relations and Intercourse.

Section 106(f) of title 38, referred to in subsec. (e)(1)(E), was enacted subsequent to the enactment of subsec. (e) of this section.

Section 7802(5) of title 38, referred to in subsec. (e)(1)(E), was redesignated section 7802(e) of title 38 by Pub. L. 108–170, title III, §304(b)(3), Dec. 6, 2003, 117 Stat. 2059 .

Amendments

2021-Subsec. (b)(13). Pub. L. 116–283 substituted "agreement-" for "agreement", designated remainder of existing provisions as subpar. (A), inserted "or the Office of Special Counsel" after "Inspector General", and added subpar. (B).

2019-Subsec. (b)(8)(C). Pub. L. 116–92, §5721(1), added subpar. (C).

Subsec. (c)(2)(C)(iii)(III). Pub. L. 116–92, §5721(2), inserted "(including any committee of Congress with respect to information that is not classified or, if classified, has been classified by the head of an agency that is not an element of the intelligence community and does not reveal intelligence sources and methods)" after "Congress".

2017-Subsec. (b)(9)(C). Pub. L. 115–91, §1097(c)(1)(A), inserted "(or any other component responsible for internal investigation or review)" after "Inspector General".

Subsec. (b)(9)(D). Pub. L. 115–40 struck out "for" after "(D)" and inserted ", rule, or regulation" after "a law".

Subsec. (b)(14). Pub. L. 115–73, §103, added par. (14).

Subsecs. (c) to (f). Pub. L. 115–91, §1097(b)(1)(B), added subsec. (c) and redesignated former subsecs. (c) to (e) as (d) to (f), respectively.

Pub. L. 115–73, §107(a)(1), redesignated subsecs. (d) to (f) as (c) to (e), respectively, and struck out former subsec. (c) which read as follows: "The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title, including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General

5 USC 7502: Actions covered
Text contains those laws in effect on July 5, 2022

From Title 5-GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III-EMPLOYEES
Subpart F-Labor-Management and Employee Relations
CHAPTER 75-ADVERSE ACTIONS
SUBCHAPTER I-SUSPENSION FOR 14 DAYS OR LESS

Jump To:

§7502. Actions covered

This subchapter applies to a suspension for 14 days or less, but does not apply to a suspension under section 7521 or 7532 of this title or any action initiated under section 1215 of this title.

(Added Pub. L. 95–454, title II, §204(a), Oct. 13, 1978, 92 Stat. 1135 ; amended Pub. L. 101–12, §9(a)(2), Apr. 10, 1989, 103 Stat. 35 .)

Editorial Notes

Amendments

1989-Pub. L. 101–12 substituted "1215" for "1206".

Statutory Notes and Related Subsidiaries

Effective Date of 1989 Amendment

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

Effective Date

Section effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95–454, set out as an Effective Date of 1978 Amendment note under section 1101 of this title.

5 USC 7503: Cause and procedure
Text contains those laws in effect on July 5, 2022

From Title 5-GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III-EMPLOYEES
Subpart F-Labor-Management and Employee Relations
CHAPTER 75-ADVERSE ACTIONS
SUBCHAPTER I-SUSPENSION FOR 14 DAYS OR LESS

Jump To:
Source Credit
Miscellaneous
Effective Date

§7503. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct).

(b) An employee against whom a suspension for 14 days or less is proposed is entitled to-

(1) an advance written notice stating the specific reasons for the proposed action;

(2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

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

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

(c) Copies of the notice of proposed action, the answer of the employee if written, a summary thereof if made orally, the notice of decision and reasons therefor, and any order effecting [1] the suspension, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee's request.

(Added Pub. L. 95–454, title II, §204(a), Oct. 13, 1978, 92 Stat. 1135 .)

Statutory Notes and Related Subsidiaries

Effective Date

Section effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95–454, set out as an Effective Date of 1978 Amendment note under section 1101 of this title.

Information on Appeal Rights

Pub. L. 115–91, div. A, title X, §1097(b)(2), Dec. 12, 2017, 131 Stat. 1617 , provided that:

"(A) In general.-Any notice provided to an employee under section 7503(b)(1), section 7513(b)(1), or section 7543(b)(1) of title 5, United States Code, shall include detailed information with respect to-

"(i) the right of the employee to appeal an action brought under the applicable section;

"(ii) the forums in which the employee may file an appeal described in clause (i); and

"(iii) any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file an appeal.

"(B) Development of information.-The information described in subparagraph (A) shall be developed by the Director of the Office of Personnel Management, in consultation with the Special Counsel, the Merit Systems Protection Board, and the Equal Employment Opportunity Commission."

[1] *So in original. Probably should be "affecting".*

5 USC 7512: Actions covered
Text contains those laws in effect on July 5, 2022

From Title 5-GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III-EMPLOYEES
Subpart F-Labor-Management and Employee Relations
CHAPTER 75-ADVERSE ACTIONS
SUBCHAPTER II-REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS

Jump To:

§7512. Actions covered

This subchapter applies to-
(1) a removal;
(2) a suspension for more than 14 days;
(3) a reduction in grade;
(4) a reduction in pay; and
(5) a furlough of 30 days or less;

but does not apply to-
(A) a suspension or removal under section 7532 of this title,
(B) a reduction-in-force action under section 3502 of this title,
(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,
(D) a reduction in grade or removal under section 4303 of this title,
(E) an action initiated under section 1215 or 7521 of this title, or
(F) a suitability action taken by the Office under regulations prescribed by the Office, subject to the rules prescribed by the President under this title for the administration of the competitive service.

(Added Pub. L. 95–454, title II, §204(a), Oct. 13, 1978, 92 Stat. 1136 ; amended Pub. L. 101–12, §9(a)(2), Apr. 10, 1989, 103 Stat. 35 ; Pub. L. 114–92, div. A, title X, §1086(f)(9), Nov. 25, 2015, 129 Stat. 1010 .)

Editorial Notes

Prior Provisions

A prior section 7512, Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 528 , related to adverse action against a preference eligible employee and procedures applicable to such adverse action, prior to repeal by Pub. L. 95–454, §204(a).

Amendments

2015-Par. (F). Pub. L. 114–92 added par. (F).
1989-Par. (E). Pub. L. 101–12 substituted "1215" for "1206".

Statutory Notes and Related Subsidiaries

Effective Date of 1989 Amendment

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

Effective Date

Section effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95–454, set out as an Effective Date of 1978 Amendment note under section 1101 of this title.

5 USC 7513: Cause and procedure
Text contains those laws in effect on July 5, 2022

From Title 5-GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III-EMPLOYEES
Subpart F-Labor-Management and Employee Relations
CHAPTER 75-ADVERSE ACTIONS
SUBCHAPTER II-REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS

Jump To:
Source Credit
Miscellaneous
Effective Date

§7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to-

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

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

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

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

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

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

(Added Pub. L. 95–454, title II, §204(a), Oct. 13, 1978, 92 Stat. 1136 .)

Statutory Notes and Related Subsidiaries

Effective Date

Section effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95–454, set out as an Effective Date of 1978 Amendment note under section 1101 of this title.

5 USC 7701: Appellate procedures
Text contains those laws in effect on July 5, 2022

From Title 5-GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III-EMPLOYEES
Subpart F-Labor-Management and Employee Relations
CHAPTER 77-APPEALS
Jump To:

§7701. Appellate procedures

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

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

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

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

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

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

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

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

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

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

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

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

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

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

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

(d)(1) In any case in which-

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

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

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

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

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

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

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

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may-

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

5 USC 7703: Judicial review of decisions of the Merit Systems Protection Board
Text contains those laws in effect on July 5, 2022

From Title 5-GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III-EMPLOYEES
Subpart F-Labor-Management and Employee Relations
CHAPTER 77-APPEALS

Jump To:

§7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1)(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(B) A petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be-

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(2) obtained without procedures required by law, rule, or regulation having been followed; or
(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d)(1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management. The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(2) This paragraph shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D). The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction if the Director determines, in the discretion of the Director, that

the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.

(Added Pub. L. 95–454, title II, §205, Oct. 13, 1978, 92 Stat. 1143 ; amended Pub. L. 97–164, title I, §144, Apr. 2, 1982, 96 Stat. 45 ; Pub. L. 101–12, §10, Apr. 10, 1989, 103 Stat. 35 ; Pub. L. 105–311, §10(a), Oct. 30, 1998, 112 Stat. 2954 ; Pub. L. 112–199, title I, §108, Nov. 27, 2012, 126 Stat. 1469 ; Pub. L. 113–170, §2, Sept. 26, 2014, 128 Stat. 1894 ; Pub. L. 115–195, §2(a), (b), July 7, 2018, 132 Stat. 1510 .)

Editorial Notes

Amendments

2018-Subsec. (b)(1)(B). Pub. L. 115–195, §2(a), substituted "A petition" for "During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, a petition".

Subsec. (d)(2). Pub. L. 115–195, §2(b), substituted "This paragraph" for "During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, this paragraph".

2014-Subsecs. (b)(1)(B), (d)(2). Pub. L. 113–170 substituted "5-year" for "2-year".

2012-Subsec. (b)(1). Pub. L. 112–199, §108(a), added par. (1) and struck out former par. (1) which read as follows: "Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board."

Subsec. (d). Pub. L. 112–199, §108(b), amended subsec. (d) generally. Prior to amendment, subsec. (d) read as follows: "The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals."

1998-Subsec. (b)(1). Pub. L. 105–311, §10(a)(1), substituted "within 60 days" for "within 30 days".

Subsec. (d). Pub. L. 105–311, §10(a)(2), in first sentence, inserted ", within 60 days after the date the Director received notice of the final order or decision of the Board," after "filing".

1989-Subsec. (a)(2). Pub. L. 101–12 amended par. (2) generally. Prior to amendment, par. (2) read as follows: "The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent."

1982-Subsec. (b)(1). Pub. L. 97–164, §144(1), substituted "United States Court of Appeals for the Federal Circuit" for "Court of Claims or a United States court of appeals as provided in chapters 91 and 158, respectively, of title 28".

Subsec. (c). Pub. L. 97–164, §144(2), substituted "Court of Appeals for the Federal Circuit" for "Court of Claims or a United States court of appeals".

Subsec. (d). Pub. L. 97–164, §144(3), substituted "United States Court of Appeals for the Federal Circuit" for "United States Court of Appeals for the District of Columbia".

Statutory Notes and Related Subsidiaries

Effective Date of 2018 Amendment

Pub. L. 115–195, §2(c), July 7, 2018, 132 Stat. 1510 , provided that: "The amendments made by this section [amending this section] shall take effect as if enacted on November 26, 2017."

8 USC 1182: Excludable aliens
Text contains those laws in effect on January 4, 1995

From Title 8-ALIENS AND NATIONALITY
CHAPTER 11-NATIONALITY
SUBCHAPTER II-IMMIGRATION
Part II-Admission Qualifications for Aliens; Travel Control of Citizens and Aliens

Jump To:

§1182. Excludable aliens

(a) Classes of excludable aliens

Except as otherwise provided in this chapter, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States:

(1) Health-related grounds

(A) In general

Any alien-

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome,

(ii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)-

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict,

is excludable.

(B) Waiver authorized

For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g) of this section.

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),

is excludable.

(ii) Exception

10 USC 1580a: Emergency essential employees: notification of required participation in anthrax vaccine immunization program
Text contains those laws in effect on July 7, 2022

From Title 10-ARMED FORCES
Subtitle A-General Military Law
PART II-PERSONNEL
CHAPTER 81-CIVILIAN EMPLOYEES
Jump To:
Source Credit

§1580a. Emergency essential employees: notification of required participation in anthrax vaccine immunization program

The Secretary of Defense shall-

(1) prescribe regulations for the purpose of ensuring that any civilian employee of the Department of Defense who is determined to be an emergency essential employee and who is required to participate in the anthrax vaccine immunization program is notified of the requirement to participate in the program and the consequences of a decision not to participate; and

(2) ensure that any individual who is being considered for a position as such an employee is notified of the obligation to participate in the program before being offered employment in such position.

(Added Pub. L. 106–398, §1 [[div. A], title VII, §751(c)(1)], Oct. 30, 2000, 114 Stat. 1654 , 1654A-194.)

29 USC 651: Congressional statement of findings and declaration of purpose and policy
Text contains those laws in effect on July 7, 2022

From Title 29-LABOR
CHAPTER 15-OCCUPATIONAL SAFETY AND HEALTH
Jump To:

§651. Congressional statement of findings and declaration of purpose and policy

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources-

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this chapter and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

(Pub. L. 91–596, §2, Dec. 29, 1970, 84 Stat. 1590 .)

Editorial Notes

References in Text

This chapter, referred to in subsec. (b)(3), (11), and (12), was in the original "this Act", meaning Pub. L. 91–596, Dec. 29, 1970, 84 Stat. 1590 . For complete classification of this Act to the Code, see Short Title

note set out under this section and Tables.

Statutory Notes and Related Subsidiaries

Effective Date

Pub. L. 91–596, §34, Dec. 29, 1970, 84 Stat. 1620 , provided that: "This Act [enacting this chapter and section 3142–1 of Title 42, The Public Health and Welfare, amending section 553 of this title, sections 5108, 5314, 5315, and 7902 of Title 5, Government Organization and Employees, sections 633 and 636 of Title 15, Commerce and Trade, section 1114 of Title 18, Crimes and Criminal Procedure, and section 1421 of former Title 49, Transportation, and enacting provisions set out as notes under this section and section 1114 of Title 18] shall take effect one hundred and twenty days after the date of its enactment [Dec. 29, 1970]."

Short Title of 1998 Amendment

Pub. L. 105–197, §1, July 16, 1998, 112 Stat. 638 , provided that: "This Act [amending section 670 of this title] may be cited as the 'Occupational Safety and Health Administration Compliance Assistance Authorization Act of 1998'."

Short Title

Pub. L. 91–596, §1, Dec. 29, 1970, 84 Stat. 1590 , provided: "That this Act [enacting this chapter and section 3142–1 of Title 42, The Public Health and Welfare, amending section 553 of this title, sections 5108, 5314, 5315, and 7902 of Title 5, Government Organization and Employees, sections 633 and 636 of Title 15, Commerce and Trade, section 1114 of Title 18, Crimes and Criminal Procedure, and section 1421 of former Title 49, Transportation, and enacting provisions set out as notes under this section and section 1114 of Title 18] may be cited as the 'Occupational Safety and Health Act of 1970'."

(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; or

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

(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]

§ 752.202 Standard for action and penalty determination.

(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.

(c) An agency is not required to use progressive discipline under this subpart. The penalty for an instance of misconduct should be tailored to the facts and circumstances. In making a determination regarding the appropriate penalty for an instance of misconduct, an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness. Within the agency, a proposed penalty is in the sole and exclusive discretion of a proposing official, and a penalty decision is in the sole and exclusive discretion of the deciding official. Penalty decisions are subject to appellate or other review procedures prescribed in law.

(d) Employees should be treated equitably. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. An agency should consider appropriate comparators as the agency evaluates a potential disciplinary action. Appropriate comparators to be considered are primarily individuals in the same work unit, with the same supervisor, who engaged in the same or similar misconduct. Proposing and deciding officials are not bound by previous decisions in earlier similar cases, but should, as they deem appropriate, consider such decisions consonant with their own managerial authority and responsibilities and independent judgment. For example, a supervisor is not bound by his or her predecessor whenever there is similar conduct. A minor indiscretion for one supervisor based on a particular set of facts can amount to a more serious offense under a different supervisor. Nevertheless, they should be able to articulate why a more or less severe penalty is appropriate.

(e) Among other relevant factors, agencies should consider an employee's disciplinary record and past work record, including all applicable prior misconduct, when taking an action under this subpart.

(f) A suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or demoted before a proposing official may propose removal, except as may be appropriate under applicable facts.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65985, Oct. 16, 2020]

§ 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.

(h) *Settlement agreements.* (1) An agency shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action.

(2) The requirements described in paragraph (h)(1) of this section should not be construed to prevent agencies from taking corrective action should it come to light, including during or after the issuance of an adverse personnel action that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual

report to the OPM Director required by Section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF–50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action or an employee performance appraisal.

(3) Corrective action based on discovery of material information prior to final agency action. When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency records. The requirements described in paragraph (h)(1) of this section would, however, continue to apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65985, Oct. 16, 2020]

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 System and regulations implementing those amendments; or

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.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65986, Oct. 16, 2020]

§ 752.402 Definitions.

In this subpart—

Business day means any day other than a Saturday, Sunday, or legal public holiday under 5 U.S.C. 6103(a).

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]

§ 752.403 Standard for action and penalty determination.

(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 is not required to use progressive discipline under this subpart. The penalty for an instance of misconduct should be tailored to the facts and circumstances. In making a determination regarding the appropriate penalty for an instance of misconduct, an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness. Within the agency, a proposed penalty is in the sole and exclusive discretion of a proposing official, and a penalty decision is in the sole and exclusive discretion of the deciding official. Penalty decisions are subject to appellate or other review procedures prescribed in law.

(d) Employees should be treated equitably. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. An agency should consider appropriate comparators as the agency evaluates a potential disciplinary action. Appropriate comparators to be considered are primarily individuals in the

same work unit, with the same supervisor, who engaged in the same or similar misconduct. Proposing and deciding officials are not bound by previous decisions in earlier similar cases, but should, as they deem appropriate, consider such decisions consonant with their own managerial authority and responsibilities and independent judgment. For example, a supervisor is not bound by his or her predecessor whenever there is similar conduct. A minor indiscretion for one supervisor based on a particular set of facts can amount to a more serious offense under a different supervisor. Nevertheless, they should be able to articulate why a more or less severe penalty is appropriate.

(e) Among other relevant factors, agencies should consider an employee's disciplinary record and past work record, including all applicable prior misconduct, when taking an action under this subpart.

(f) A suspension or a reduction in grade or pay should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or reduced in pay or grade before a proposing official may propose removal, except as may be appropriate under applicable facts.

[74 FR 63532, Dec. 4, 2009, as amended at 85 FR 65986, Oct. 16, 2020]

§ 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. However, to the extent an agency in its sole and exclusive discretion deems practicable, agencies should limit a written notice of an adverse action to the 30 days prescribed in section 7513(b)(1) of title 5, United States Code. Advance notices of greater than 30 days must be reported to the Office of Personnel Management. 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.

(3) To the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to

respond under paragraph (c) of this section.

(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]

§ 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.

§ 752.407 Settlement agreements.

(a) *Agreements to alter official personnel records.* An agency shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action.

(b) *Corrective action based on discovery of agency error.* The requirements described in paragraph (a) of this section should not be construed to prevent agencies from taking corrective action, should it come to light, including during or after the issuance of an adverse personnel action that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF–50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action or an employee performance appraisal.

(c) *Corrective action based on discovery of material information prior to final agency action.* When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may