Chapter 752

Adverse Actions

Contents

For related information on	See
Civil Service laws, Executive orders, and regulations	Supplement 990–1
Corrective actions	Chapter 274
Separation for medical unfitness	Chapter 339
Reduction in force	Chapter 351
Suitability	Chapter 731
Personnel security program	Chapter 732
Employee responsibilities and conduct	Chapter 735
Discipline	Chapter 751
Federal employees occupational health program	Chapter 792
Retirement	Chapter 831

CHAPTER 752

Adverse Actions

Subchapter 1. General Provisions

NOTE: In this chapter, all references to the law are printed in lightface italics. Regulatory references are printed in boldface italics.

1-1. SCOPE AND PURPOSE OF CHAPTER

a. **Scope.** This chapter replaces, but does not duplicate the functions of, the former Supplement 752-1, revoked effective January 11, 1979, which contained many requirements beyond those of law or regulation. This chapter contain guidance and information only; no discussion in it is considered to set a required practice. Law and OPM regulations continue to be the only requirements, aside from those of agency regulation and/or negotiated agreement, for taking adverse actions.

b. **Purpose.** The chapter has been developed for the express purpose of helping managers and personnel officials who have a need to interpret and apply the provisions of law and OPM regulations relating to adverse actions in the Federal service. On the basis of OPM's interest and experience in this area, and the decisions of the courts in contested cases, this chapter explains and illustrates the requirements of law and regulation. The chapter has some guidance on determining whether a proposed adverse action is warranted on its merits, i.e., whether it is for "such cause as will promote the efficiency of the service." The chapter does not attempt to help agencies decide when and under what circumstances adverse actions may be appropriate. Chapter 751 has some guidance of this type. Agency guides to discipline and OPM publications discuss principles and techniques of good personnel management for avoiding the need for adverse personnel actions. Even in the best-run organizations, however, situations occur where adverse action is unavoidable. The guidance in this chapter is provided to help agency personnel in processing necessary actions promptly, fairly, and effectively, and to serve as reference material for others with an interest in the area.

Because Merit Systems Protection Board decisions, arbitrators' awards, decisions of the Federal Labor Relations Authority, or those of the courts may apply the requirements for taking adverse actions in different ways, we suggest that agency officials contact their personnel office to obtain the most recent information. In some cases, the general counsel's office may be involved.

1-2. ARRANGEMENT OF CHAPTER

The applicable provisions of law and regulation are quoted section by section. After each portion of this legal and regulatory material, specific provisions of it are referred to and followed with narrative material explaining exactly what the provisions require. In addition, references are included to pertinent or illustrative decisions of the courts or the Comptroller General, and cross-references to other applicable legal or regulatory requirements. An appendix to the chapter contains names and citations of currently pertinent court or Comptroller General decisions in the area of adverse actions.

1-3. USE OF CHAPTER

(1) The laws and regulations governing adverse action give basic rights to employees against whom adverse action is being proposed and prescribe certain procedural requirements which agencies must observe when taking actions. The major overall purposes of

these legal and regulatory provisions are to require that adverse actions be taken only for "such cause as will promote the efficiency of the service", and to establish fair, orderly, and uniform procedures for effecting actions which are warranted on their merits. Beyond these requirements, whether or not a particular action is warranted on its merits is always a matter of judgment. Though the basic procedural outlines can be stated quite simply, the people responsible for effecting adverse actions must have a good understanding of what the law and regulations are designed to accomplish, and must have the ability and experience to make sound judgments. With this understanding, OPM believes agencies will find the chapter helpful. However, no publication will be able to serve as a substitute for good judgment.

(2) The law and regulations, and OPM's information and illustration, usually involve minimum requirements. Agencies may find it wise to be more rather than less generous when there is a question in applying procedural protections in an individual situation. Agencies must also be aware that they must satisfy their own regulatory requirements and/or those set by negotiated agreement which may go beyond those of chapter 75 and part 752.

Subchapter 2. Suspensions for 14 Days or Less

2–1. COVERAGE

a. **Actions covered. Law:** *"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."* (5 U.S.C. 7501) "'[S]*uspension' means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay."* (5 U.S.C. 7501(2)) Regulation: ***"Day means calendar day."*** (Section 752.201c. of Subpart B, Part 752.)

(1) Not covered by these procedures are suspensions of administrative law judges, those taken for reasons of national security, or those taken under authorities of the Special Counsel.

(2) While suspensions for 14 days or less are covered by Subpart B of Part 752, with lesser procedural rights and no appeal rights, days are calendar days, i.e., consecutive days, including weekends, and cannot be chosen to include only work days for the purpose of avoiding the greater procedures of Subpart D. If an agency does choose to suspend on the basis of workdays, we recommend checking to be sure that a working days' suspension does not extend beyond 14 calendar days. Fourteen calendar days equal ten work days of eight hours each, or eighty hours of duty.

(3) In a personal, disciplinary situation, placing an employee on annual or sick leave, or in a nonduty, nonpay status without his or her consent has been held to constitute a suspension. This is true when enforced leave is used as a disciplinary action, as part of a disciplinary action, or as a prelude to a disciplinary action. It is not true when the use of leave is required because the employee is not ready, willing and able to perform assigned duties or in an emergency situation when the agency has not yet determined whether disciplinary action may be appropriate. Chapter 751 contains more guidance on the correct use of enforced leave in emergency and nondisciplinary situations. Here are several decisions by the courts and the Comptroller General which agencies may wish to consider:

(a) In *Hart* v. *U.S.*, the court held that an employee who had been placed on enforced annual leave after a dispute as to whether she had refused to perform work which was properly hers to do, was recalled to duty, given a notice of proposed removal and ultimately removed, was entitled to back pay for the period of enforced leave because the leave was in fact a suspension taken without procedures.

(b) The courts have also held that an agency may not force an employee to take annual leave as a disciplinary measure during an advance notice period of a proposed disciplinary action if the employee is ready, willing and able to work. (*Armand* v. *U.S.*, *Kenny* v. *U.S.*, *Taylor* v. *U.S.*)

(c) Enforced annual leave situations such as the administrative closing of an office for a period of time during which employees are required to take annual leave, or instances when employees' requests for annual leave are denied and the employees are instructed to take annual leave at other specific times, are not personal, disciplinary types of situations. Rather, they come under the Comptroller General rulings that the head of an agency may require any individual employees or class of employees to take annual leave at any time and for any period within the limitations of the annual and sick leave provisions of law. (40 Comp. Gen. 312. and 3a *id* 611).

(d) The Comptroller General has held that placing an employee on sick leave who was capable of performing the duties of his position was an erroneous suspension. (39 Comp. Gen. 154).

(e) An agency's action placing an employee, without his or her consent, in a paid leave status and then a nonduty, nonpay status after annual and sick leave are exhausted, on the basis of its medical officers' reports that the employee was incapable of performing the official duties of the job, is not considered a suspension. The action of the agency in continuing the employee in a nonduty, nonpay status, however, after receiving notice from the former Civil Service Commission that its application for the employee's dis-

ability retirement had been rejected, *was* equivalent to suspension. Instead, the agency should have either returned the employee to duty or, if it felt it could not safely do so, placed him or her in a nonduty, pay status, without charge to leave, while taking appropriate action. (41 Comp. Gen. 774 and 38 Comp. Gen 203). It should be noted that this issue is currently before the Merit Systems Protection Board. OPM has taken the position that under appropriate circumstance, enforced leave is not equivalent to a suspension. Nonetheless, because of the uncertainties involved in any case in litigation, agencies may wish to determine the status of this issue before placing an employee on enforced leave.

b. *Employees Covered.* Law: " *'Employee' means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed one year of current continuous employment in the same or similar positions under other than a temporary appointment limited to one year or less.*" (5 U.S.C. 7501(1)) Regulation: ***"The following employees are covered by this subpart: (1) An employee covered by the definition in 5 U.S.C. 7501(1), including an employee of the Government Printing Office; and (2) An employee with competitive status who occupies a position under Schedule B of Part 213 of this chapter."*** (Section 752.201(b)).

(1) Some employees may have served a probationary period in one position but still be required to serve a second probationary period, during which time they would again not be covered by the provisions of Part 752. This later probationary period may be occasioned when a current or former employee who had completed probation is again appointed based on selection from a competitive register which requires a new probationary period.

(2) The definition of employee in section 7501(1) is intended to provide coverage, formerly provided by section 752.301 (c)(1) of the Civil Service Commission's regulation, of employees in the competitive service who are in *status quo* or are serving in types of appointments which involve no probationary period, e.g., TAPER or special tenure appointments. (See *Ainsworth* v. *United States*) It is not intended to exclude from coverage employees who have served a probationary or trial period, left the Federal service for a time, and have been reinstated, but who have not completed one year of service since their reinstatement. Current continuous employment in a position in the competitive service with no probationary or trial period may be either employment in one position without a break of a workday, or employment in more than one position in the same line of work in the same agency without a break of a workday. All employment, whether in the competitive service or in the excepted service, is creditable. Employment is credited for this purpose in the same manner that it is credited toward the completion of a probationary period (see appendix A of chapter 315).

(3) Employees in temporary appointments limited to one year or less are not covered by the provisions of adverse action law and regulation even when their appointments may inadvertently be extended past one year or when they have served more than a year in two or more temporary appointments.

(4) Some employees who would usually be in the excepted service are in the competitive service because they have status in their positions. Employees have status in their positions when they are in the competitive service at the time the Office first lists their positions under Schedules A, B, or C of Part 213, and they continue to occupy those same positions. (*Roth* v. *Brownell* and FPM chapter 212 provide further information on employees who retain status in their positions while occupying those positions.)

(5) Schedule B employees with competitive status serving under nontemporary appointments are covered by Subpart B of Part 752, regardless of whether they are preference eligibles or have completed one year of current continuous employment in that appointment.

(6) Competitive service employees of the District of Columbia are not covered under Part 752 after January 1, 1980, since they are covered by their own personnel system.

2-2. STANDARD FOR ACTION

Law: "*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).*" 5 U.S.C. 7503(a)) Regulation: ***"(a) An agency may take action under this***

[illegible] forth in 5 U.S.C. 7503(a). (b) [illegible] take a suspension against an employee or [illegible] of any reason prohibited by [illegible] section 752.202)

[illegible] disciplinary adverse action is a [illegible] against the employee-employer [illegible] constitutes a proper and valid [illegible] for the agency to decide. Only [illegible] conduct toward the public, is specified by the provisions of 5 U.S.C. 7503(a). Having [illegible] not by itself enough to warrant [illegible] action, the suspension must be for [illegible] promote the efficiency of the service. [illegible] is the sole test of the merits of every [illegible] under Part 752. See also the discussion of [illegible] under section 3–1a.

(2) [illegible], dealing with prohibited personnel practices, includes under personnel actions an action taken under chapter 75 of title 5, and prohibits taking of personnel actions for several specific reasons, e.g., [illegible]ed discrimination, reprisal for legitimate whistleblowing activity or the exercise of any appeal rights granted by law, rule, or regulation, or an action based on the basis of conduct which does not adversely affect the employee's performance or that of [illegible] workers, except that an agency may take into account in determining the employee's fitness the conviction of that employee for any crime under the laws of any State, of the District of Columbia, or the United States. Agencies must assure that the reasons for their actions do not inadvertently fall under the prohibitions.

2–3. PROCEDURES

a. *Advance written notice.* Law: *"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;"* (5 U.S.C. 7503(b)(1)) Regulation: ***"The notice of proposal shall 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."*** (Section 752.203(b))

(1) The agency will wish to make an intelligent and diligent effort to get the notice to the employee on a timely basis. For a discussion of the methods of delivering notices, see paragraph 3–3a(6).

(2) The specific reasons for the action include those the agency has relied on to support its proposal for action, but the agency need not include every reason that *might* have been used to support its action. (*Saggau* v. *Young, DeNigris* v. *U.S*).

b. *Employee's Answer.* Law: *". . . a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer."* (5 U.S.C. 7503(b)(2)) Regulation: *"The employee shall be given a reasonable length of time to answer but not less than 24 hours"*. (Section 752.203(c))

(1) The law does not specify any minimum time for the advance notice period under Subpart B. The regulation requires at least 24 hours. It is good practice, which most agencies follow, to provide for a longer period except in extraordinary situations.

(2) Employees have the right to make both oral and written answers, or either. For a complete discussion of the right to answer, see Sec. 3–3g (3) through (5).

c. *Right to representation.* Law: *". . . be represented by an attorney or other representative."* (5 U.S.C. 7503(b)(3)) Regulation: ***"5 U.S.C. provides that an employee covered by this part is entitled to be represented in a suspension action by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as a representative could cause a conflict of interest or position; or an employee of the agency whose release from his or her position could give rise to unreasonable costs to the Government or whose priority work assignments preclude his or her release. 5 U.S.C. 7114(a)(5)) and the terms of any applicable collective bargaining agreement govern representation for employees in an exclusive bargaining unit."*** (Section 752.203(d))

(1) Employees who are not part of a bargaining unit have the right to be represented by the person of their choice. Their selection is subject to agency disallowance only for certain reasons defined in regulation:

(a) "Conflict of interest or position" can take many forms and is usually best determined on a case-by-case basis. One example of conflict of interest, but not by any means the only one, would be representation of a supervisor or management official (who may not be included in the bargaining unit under the provisions of 5 U.S.C. 7112(b)(1)) by (1) an official of a labor organization that represents or has pending a petition to represent employees under the supervisor's or management official's direction or control, or with whom he or she has substantial contact and dealings, or (2) an officer or an employee of an as-

sociation, federation, or council with whom such a labor organization is affiliated. Conflict of position refers to an incompatibility between the representative functions and an employee's official duties. One, again not the only, example would be a professional personnel employee serving as an employee's representative in a case concerning a personnel action over which the employing personnel office has control, has participated in, or has in any other way been involved.

(b) "Unreasonable cost to the Government" will have to be determined based on the individual situation. Considerations here might be excess transportation costs, if the agency pays these, or time away from the job if an employee's representative is not at the worksite.

(c) "Priority work assignments" are official assignments with high priority or a short deadline from which an employee cannot be spared.

(2) Employees who are members of a bargaining unit must select their representatives in accordance with the provisions of 5 U.S.C. 7114(a)(5)), governing representation rights, and of an applicable agreement.

d. *Agency decision.* Law ". . . *a written decision and the specific reasons therefor at the earliest practicable date.*" (5 U.S.C. 7503 (b)(4)) Regulation: ***"In arriving at its decision, the agency shall consider only the reasons specified in the notice of proposed action and shall consider any answer of the employee and/or his or her representative made to a designated official. The agency shall deliver the notice of decision to the employee at or before the time the action will be effective."*** (Section 752.203(e))

(1) The written decision must state which reasons are relied on in the decision. A reference to the proposal notice and mention of which reasons are sustained would be sufficient. The regulation requires that agencies consider only those reasons given to employees in notices of proposed action. (See also *Urbina* v. *United States*) Introduction of new reasons into the notice of decision could deprive the employees of any chance to answer these additional reasons for action. By the same token, agencies are required to consider any and all answers made by the employee or the employee's representative. Though there is no requirement that the employee's answer and the agency's consideration of it be specifically mentioned in the notice of decision, it is good practice to include a statement to the effect that the employee answered orally and/or in writing and that the agency considered the answer, or that he or she didn't answer, as the case may be.

(2) Neither the law nor the regulation has set an exact minimum time period within which agencies must issue final decisions on whether to suspend employees. The regulation requires that agencies must inform employees at or before the time the actions become effective. Even the most careful and correctly prepared notice of decision will be of no use to an employee in understanding which reasons the agency relied on and whether his or her reply was considered, if the decision reaches the employee after the agency has effected the suspension. (For a discussion of methods of delivering the notice, see Section 3–3a(6).)

e. *Agency records.* Law: "*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 the reasons therefor, and any order effecting 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.*" (5 U.S.C. 7503(c)) Regulation: ***"The agency shall maintain copies of the items specified in 5 U.S.C. 7503(c) and shall furnish them upon request as required by the subsection."*** (Section 752.203(f))

(1) A suspension of 14 days or less is not an action appealable under law or regulation to the Merits System Protection Board, but *is* a personnel action within the meaning of 5 U.S.C. 2302. If the employee later alleges in a complaint to the Special Counsel that a short suspension was actually taken for prohibited reasons, records of the action specified in 5 U.S.C. 7503 (c) will be necessary for that consideration by the Special Counsel of the Merit Systems Protection Board as well as for the employee.

(2) "Any supporting material" is that on which the agency based its notice of proposed action and relied on to support the reasons in the notice. It may include statements of witnesses, affidavits, documents, and investigative reports or extracts from them.

Subchapter 2. SUSPENSIONS FOR 14 DAYS OR LESS

2–3. Procedures.

c. Right to representation.

(3) An employee's choice of representative or change of representative must be designated in writing.

d. Agency decision.

(3) The notice of decision will inform the employee of applicable grievance rights and the time limit for submission of a grievance.

Subchapter 3. Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, and Furlough for 30 Days or Less[1]

3–1. COVERAGE

a. *Actions covered.* Law: *"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;. . ."* (5 U.S.C. 7512(1) through (5)) Regulation: ***"This subpart applies to an action set forth in subchapter II of chapter 75 of title 5, United States Code, including but not limited to: (1) An action based solely on nonperformance related factors; (2) An action that involves both performance and nonperformance related factors; and (3) A solely performance-based action which is taken by an agency that is not included within the definition under subchapter I of chapter 43 of title 5, United States Code."*** (Section 752.401 (a) of Subpart D of Part 752) Following are actions included under coverage of Subpart D:

(1) Removal or reduction in grade based on unsatisfactory performance, inefficiency, or other performance-related reason. The agency must take performance-based action under Part 752 if it does not have a performance appraisal system approved by OPM, or if the performance-based actions are also based in part on nonperformance-related reasons. See the decision of the Merit Systems Protection Board in *Wells* v. *Harris*, MSPB Order No. RR–80–3, December 17, 1979.

(2) Removal or reduction in grade based on unsatisfactory performance and misconduct.

(3) Removal resulting from an agency's decision to separate an employee who refuses to transfer with his or her function. Failure to accompany one's position in a transfer of function does not automatically terminate an employee's service, nor make any resulting separation voluntary. It is necessary to comply with appropriate adverse action procedures in removing the employee. (*Colbath* v. *U.S.*)

(4) Removal based on an employee's refusal to accept a new assignment when the agency has found it necessary to reassign the employee to a position in a different geographical location or organization or which would carry out terms of an established rotation policy. (*Burton* v. *United States, Handler* v. *Secretary of Labor.*) However, the courts have found that reassignment to induce an "undesirable" employee to resign is not for such cause as will promote the efficiency of the service. (*Motto* v. *General Services Administration, McClelland* v. *Andrus*) See the decision of the Merit Systems Protection Board in *Frazier, et al and Hall, et al,* MSPB Order Number SCC–80–1, December 17, 1979 with regard to prohibited personnel practices.

(5) Separation for failure to perform satisfactorily during the probationary period is an action not covered by subpart D of Part 752. However, if the agency delays effecting the action until the employee has completed the probationary period, the separation action is covered by Subpart D of Part 752. The agency will wish to take into account the discussion of the timing of such separations found in subsection 8–4f of subchapter 8, chapter 315. Subsection 8-4f points out that the agency must have effected its action the day before the end of the last tour of duty within the probationary period in order to separate the employee under the procedures of Part 315.

(6) Termination of an employee for failure to qualify for conversion to the career appointment under Section 315.704, within 90 calendar days after he or she completes three years of qualifying service. This termination may be required by the finding of the OPM or the agency that the employee does not qualify for conversion.

(7) Reduction in basic pay not requested by the employee for personal reasons and for his or her own benefit.

[1] Note. This subchapter does not address adverse actions under the Senior Executive Service which are subject to subchapter V of chapter 75 of title 5, U.S.C. However, to the extent that the statutory and regulatory requirements for adverse actions under the Senior Executive Service are identical with the requirements for similar actions under the competitive service, agencies may follow the guidance contained in this subchapter.

(8) Reduction in grade of an employee whose position is downgraded because of a classification decision after it had been classified at the higher grade for less than one year. Such an employee would not be covered by the grade and pay provisions of 5 U.S.C. 5366, thus he or she would actually be reduced in grade. (Note: While the employee will not be entitled to grade retention, he or she will be entitled to pay retention in accordance with section 536.212.) See chapter 351 for circumstances when the downgrading of the position would constitute a RIF.

(9) Furlough for a period of 30 calendar days or less based on a decision of an administrative officer. Military furlough or other similar types of furlough required by law or regulation are not actions based on the decision of an administrative officer, but rather are actions required by established facts and are not adverse actions. Furloughs for more than 30 calendar days are reduction-in-force actions covered by Part 351.

(10) Enforced leave in a personal, disciplinary type of situation constitutes a suspension. (See section 2–1a(3) for a complete discussion of enforced leave)

b. *Actions not covered.* Law: "*. . . 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, or (E) an action initiated under section 1206 ot 7521 of this title.*" (5 U.S.C. 7512, (A) through (E)) Regulation: ***"This subpart does not apply to actions and employees excluded by 5 U.S.C. . . . 7512, or the following: (1) Action taken under provisions of statute, other than one codified in title 5, United States Code, which excepts the action from subchapter II of chapter 75 of title 5, United States Code; (2) Action which entitles an employee to grade retention under Part 536 of this title, and an action to terminate this entitlement; (3) Voluntary action initiated by the employee; (4) Action taken or directed by the Office of Personnel Management under Part 731 or Part 754 of this title; (5) Involuntary retirement because of disability under Part 831 of this title; (6) Termination of appointment on the expiration date specified as a basic condition of employment at the time the appointment was made; (7) Action which terminates a temporary promotion within a maximum period of two years and returns the employee to the position from which temporarily promoted, or reassigns or demotes the employee to a different position not at a lower grade or level than the position from which temporarily promoted; (8) Action which terminates a term promotion at the completion of the project or specified period or at the end of a rotational assignment in excess of two years but not more than five years, and returns the employee to the position from which promoted or to a position of equivalent grade and pay. (9) Cancellation of a promotion to a position not classified prior to the promotion; (10) Placement of an employee serving on an intermittent, part-time, or seasonal basis in a nonduty, nonpay status in accordance with conditions established at the time of appointment; (11) Reduction of an employee's rate of pay from a rate which is contrary to law or regulation to a rate which is required or permitted by law or regulation; . . .***" (Section 752.401(c), (1) through (11))

(1) Some examples of actions excluded by law are:

(a) Those taken under authority of the National Security Act of 1947, Public Law 80–253;

(b) Certain actions against Foreign Service employees under authority of section 637 of the Foreign Act of 1946 (22 U.S.C. 1007); and

(c) Actions taken under section 10 (a) of the Central Intelligence Act of 1949, as amended (63 Stat. 212, 50 U.S.C. 403j).

(2) Under 5 U.S.C. 7512(c), the term "reduction in grade" of a supervisor or manager encompasses reduction in pay as well. Any return of a supervisor or manager to his or her previous position or an equivalent one within the probationary period under section 3321 (e)(2) of 5 U.S.C. is an action excluded from adverse action procedures if it is done for reasons of supervisory or managerial performance. However, any action based on performance *and* misconduct would be covered by Part 752.

(3) "A reduction in grade or removal under section 4303 of this title" is an action for unacceptable performance of one or more critical elements of the position, taken under Part 432 after the agency has a

performance appraisal system approved by OPM which meets the requirements of Part 430, either for the agency as a whole or for a component of the agency. The agency may not take an action for "unacceptable performance" under Part 752, since the law specifically prohibits this. See section 3–a(1) and (2) for those performance-based actions which may be taken under Part 752.

(4) Subpart D of Part 752 does not cover actions initiated under the authorities of the Special Counsel, or those taken against an administrative law judge.

(5) Some actions are required by facts or by OPM determinations which leave the agency no choice of action, e.g., separations specifically ordered by OPM because of an employee's disqualification for Federal service, military separation, optional and discontinued service retirement and voluntary actions including abandonment of position. These actions are not covered by the adverse action procedures except as discussed in paragraph (6) below. When OPM merely orders that corrective action be taken, any adverse action the agency takes as part of the corrective action is its own choice.

(6) (a) Separations and reductions in grade or pay voluntarily initiated by employees are by their nature not actions requiring the use of adverse action procedures. On the other hand, a normally voluntary action has under some circumstances been held by the courts to be an adverse action taken without procedural protections. In *Christie* v. *United States*, the court held that the element of voluntariness of a resignation by a Federal employee is vitiated only when the resignation is submitted under duress brought on by Government action. It held that resignations are presumed to be voluntary unless the employee comes forward with enough evidence to establish that the resignation was involuntarily extracted. It also held that when an employee, faced with an agency decision to separate for cause, had a choice of whether to contest the action or to resign, the latter choice did not render the resignation involuntary merely because the employee was faced with an inherently unpleasant situation. Again, the fact that the employee may have perceived no viable alternative to resignation did not render the resignation involuntary. *Christie* cites court cases which upheld the voluntariness of resignations when they were submitted to avoid threatened separation for cause. (See *Pitt* v. *United States*, *Cosby* v. *United States*, *Autera* v. *United States*) In several decisions, the courts have held that the test of involuntariness is one of external pressures rather than the internal subjective perception of the employee. (See *Taylor* v. *United States*, *Leone* v. *United States*, *McGucken* v. *United States*, *Pitt* v. *United States)*

(b) [In certain instances, normally voluntary actions may be found to be involuntary. A resignation has been found to be involuntary if obtained by agency misrepresentation.] (*Christie* v. *United States*) An action forced by coercion and duress including time pressure has been found involuntary. (*McGucken* v. *United States*, *Paroczay* v. *Hodges*, *Dabney* v. *Freeman*, *Haine* v. *Googe*, *Farrell* v. *Garden*, *Bell* v. *Groark)* The agency of course may avoid all appearance of time pressure by letting the employee set the effective date.

(c) Chapter 715 provides that an employee who fails to report for duty or return from leave or furlough for 30 days or less may be separated after a reasonable time (ten calendar days or more) for abandonment of position without following the procedures in Part 752 if the agency is unable to determine his or her intentions. However, if the employee asks to return to work after a separation for abandonment of position, it is good practice for the agency to restore the employee unless it has proof of actual intent to abandon the job. In some instances, the employee may not have communicated his or her intent to return to work, perhaps because of illness. Even if the agency has been faced with a continuing pattern of short unexcused absences on the part of an employee, OPM recommends that the agency restore the employee and then take any disciplinary action that appears to be warranted, e.g. a suspension or removal for AWOL, so as that the employee may have due process. (See also *Bond* v. *Vance*)

(7) OPM's regulations (Part 335) now provide an authority for agencies to make term promotions (i.e., ones extending in excess of two years but no more than five years in length) for certain purposes specified in Section 335.102(g), after the agency has entered into a formal agreement with OPM. An action to terminate a term promotion at the completion of the specified period and return the employee to the position from which he or she was promoted or to a position of equivalent grade and pay is now excluded from coverage of Part 752. See Section 335.102(g) for the requirements for term promotions.

c. *Employees covered.* Law: "*For the purpose of this subchapter—(1) 'employee' means—(A) an individual in the competitive service who is not serving*

a probationary or trial period under an initial appointment or who has completed one year of current continuous employment under other than a temporary appointment limited to one year or less; and (B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed one year of current continuous service in the same or similar positions . . ." (5 U.S.C. 7511(a)) Regulation: ***"The following employees are covered by this subpart: (1) An employee covered by the definition in 5 U.S.C. 7511 (a)(1)(A) including an employee of the Government Printing Office and an employee of the United States Courts; (2) An employee covered by the definition in 5 U.S.C. 7511 (a)(1)(B); and (3) An employee with competitive status who occupies a position in Schedule B of Part 213 of this Title.***" (Section 752.401(b))

(1) For a discussion of employees in the competitive service and of current continuous service for competitive service employees, see Section 2–1 of subchapter 2.

(2) The term "preference eligible" has the meaning given in 5 U.S.C. 2108 and includes certain widows, wives, and mothers of veterans.

(3) Current continuous employment in a position outside the competitive service may be either employment in one position without a break of a workday or employment in more than one position in the *same line of work* without a break of a workday. All employment in the excepted service is creditable. All employment in the competitive service is creditable, except *employment in a temporary appointment with a definite time limitation*. Again, employment is credited for this purpose in the same manner that it is credited toward completion of a probationary period. (See appendix A of chapter 315.)

(4) The courts have held that Foreign Service Staff Officers are covered by adverse action procedures of Subpart D of Part 752. (*Born* v. *Allen*)

d. *Employees not covered.* Law: "*This subchapter does not apply to an employee—(1) whose appointment is made by and with the advice and consent of the Senate, (2) whose position has been determined to be of a confidential, policy determining, policy-making or policy-advocating character by (A) the Office of Personnel Management for a position that it has excepted from the competitive service; or (B) the President or the head of an agency for a position which is excepted from the competitive service by statute.*" (5 U.S.C. 7511(b)) Regulation ***"This subpart does not apply to employees excluded by 5 U.S.C. 7511 (b) or the following:. . . (12) A reemployed annuitant; (13) A Presidential appointee; (14) A National Guard Technician: or (15) A physician, dentist, nurse, or other employee in the Department of Medicine and Surgery, Veterans Administration, who is appointed under chapter 73 of title 38, United States Code.***" (Section 752.401, (12) through (15))

(1) See section 2–1b for a discussion of competitive service employees serving a second probationary period.

(2) For a discussion of competitive service employees in temporary appointments, see section 2–1b.

(3) Legislative or judicial branch employees are not covered unless their positions are specifically included in the competitive service. (See *Barger* v. *Mumford*)

(4) Reemployed annuitants whose annuities under the Civil Service Retirement System are continued after September 30, 1956, are not covered by Part 752 because they serve "at the will of the appointing officer" under the terms of 5 U.S.C. 3323(b).

(5) Nonpreference eligible employees in the excepted service without status are excluded from coverage of Part 752. (For a discussion of employees with status, see section 2–1(4)) (See also *Chollar* v. *United States*)

(6) Employees of the District of Columbia, whether competitive service, preference eligible or nonpreference eligible in the excepted service are not covered by Part 752 after January 1, 1980, since they are covered under their own personnel system.

(7) Employees of the Central Intelligence Agency are not covered employees. (*Torpats* v. *McCone*)

3–2 MERIT OF THE ADVERSE ACTION

a. *Cause.* Law: "*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.*" (5 U.S.C. 7513 (a)) Regulation: ***"(a) An agency may take adverse action under this subpart only as set forth in 5 U.S.C. 7513 (a). (b) An agency may not take an adverse action against an employee on the basis of any reasons prohibited by 5 U.S.C. 2302.***" (Section 752.403)

(1) A cause for adverse action rests upon the agency's determination that an unfavorable personnel action covered under Part 752 is necessary in the terms of the employee-employer relationship. Several cases involving the relationships, i.e., the nexus, between off-duty misconduct or employee performance, and an agency's ability to discharge its responsibilities, are pending before the Board currently. These cases involve not only the issue of whether a nexus exists, but also the issue of whether the nexus requirement itself has been changed by 5 U.S.C. 2302(b)(10).

(a) Causes for adverse action may be reasons personal to the employee such as on or off-the job misconduct, inefficiency, or physical or mental inability to perform the duties of the position. OPM has issued a policy statement on sexual harassment which urges agencies to take a leadership role in overcoming such harassment by informing employees of the actions that will be taken against those who violate the Federal Government policy. If the misconduct has occurred off the job, the agency will wish to be aware of the the need to show the nexus, a subject discussed in subsections S1–1 d. and e. of Supplement 731–1. Section 2302 (b)(10) specifically prohibits an action taken on the basis of conduct which does not adversely affect the employee's performance or that of fellow workers, except that the agency, in determining the continued fitness of the employee for employment, may take into consideration his or her conviction for a crime.

(b) There may also be impersonal reasons such as an emergency situation necessitating a short furlough, or the need to correct a merit promotion error.

(c) Some causes for adverse action have been specified by law, Executive order or regulation. Some examples of these appear in Section S2–3 of Supplement 731–1 (grounds for disqualification of an applicant or action against an employee) and in chapter 735 (conflicts of interest, misuse of Government vehicles, etc.). Other, obviously improper adverse actions have been prohibited by law, Executive order, or regulation (for example, prohibited personnel practices). Between required actions and prohibited actions, what constitutes a proper and valid cause is essentially for the agency to decide.

(2) Having an identifiable cause is not by itself enough to warrant adverse action. The action must be for a cause "as will promote the efficiency of the service". Differences in agency missions, in tables of penalties or agency practices, or in other internal regulations, may result in a cause and an action which combine to be proper in one agency but improper in another. For example, an offense involving a violation of law which would warrant removal of a law enforcement employee in an agency with a mission of law enforcement, might not warrant comparable action against a warehouse forklift operator in another agency. The agency must base any action on its conclusions that the action is warranted and reasonable in terms of the circumstances which prompted it, and that it can establish enough evidence concerning the facts which support the reasons for action. The agency's evidence must meet the standard of "preponderance of the evidence" in any action under Part 752. In a decision by the Merit Systems Protection Board, *Parker* v. *Defense Logistics Agency*, (MSPB Order No. PH053199001, 80-47 February 19, 1980), the Board defined this standard as requiring "evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue.

(3) The courts have held consistently that the *determination* of an appropriate penalty for a particular offense is properly made by agency officials. (See *Kandall* v. *United States*, *Indiviglio* v. *United States*, *Harvey* v. *Nunlist*, *Grover* v. *United States*) The agency penalty is a matter left to the discretion of the agency except when it exceeds the limits of permissible penalty specified by statute or regulations, or when it is "so harsh and unconscionably disproportioned to the offense that it amounts to an abuse of discretion." (See *Power* v. *United States*, *Boyce* v. *United States*, *Westmoreland* v. *Laird*) The issue of the burden of proof which must be met by the agency in justifying a penalty is currently before the MSPB. A number of regional field office decisions have required that the agency report its penalty decision by a preponderance of the evidence. OPM has taken the position that this is an incorrect reading of the law and that the agency must only be able to show that its penalty is not arbitrary or capricious or a clear abuse of discretion. An additional issue pending before the Board is the impact of different treatment of similarly situated employees in penalty decisions. Because of the uncertainties of litigation, agencies are advised to check to see whether these issues have been decided before taking action. Agencies may wish to insure that they can support their penalty decisions as adequately as possible under the circumstances.

b. *Insufficient cause*. Some reasons constitute by their nature an insufficient or potentially insufficient cause for action.

(1) The fact that an employee was *arrested* for a crime does not by itself provide a cause for adverse action, even when the fact of the arrest is completely established, since the employee may be innocent of the crime for which the arrest was made. The correct basis for any action would be the misconduct which led to the arrest (or which would warrant suspension pending further investigation.)

(2) Again, the facto of a *criminal indictment* would not constitute by itself a sufficient cause for an adverse action, except for an indefinite suspension pending disposition of criminal action. *Jankowitz* v. *United States* gave judicial sanction to indefinite suspensions pending disposition of criminal indictments. A recent field office decision has questioned the agency's ability to indefinitely suspend an employee based solely on the fact of a criminal indictment. This case currently is on appeal to the Board. OPM has taken the position that the agency must show a nexus between the fact of indictment and the need for the suspension. This showing may be made when the indictment interferes with the agency's ability to perform its mission. Because the matter is in litigation, agencies are advised to check on the status of the litigation before basing an action on an indictment.

(3) Conviction may be cause for removal. However, a subsequent acquittal of the employee on appeal could vacate the cause for action. If the cause relied on is the employee's act or wrong-doing rather than the conviction, generally the administrative action by the agency will not be affected by the subsequent court action on the criminal case. (See *United States* v. *Cox*, *United States* v. *Glaziou*, *Wathen* v. *United States*) However, agencies should also consider 5 U.S.C. 2302(b)(10).

(4) Misuse of leave as a reason for taking adverse action has caused much confusion on the part of agencies. Often, actions for undependability or for excessive use of leave have been based largely on incidents of approved leave.

(a) The general rule, because of the agency's discretion to approve or deny most requests for leave, is that the agency may not take action based on the employee's use of leave which the agency has approved—sick, annual, or leave without pay. An exception to this rule is discussed in (c) below. (Use of accrued sick leave in the absence of fraud or subterfuge, is an entitlement of every employee who is ill or incapacitated by injury. Approval by the agency is contingent, of course, on submission of supporting evidence acceptable to the agency. The right of the employee to take sick leave for nonemergency examinations is subject to requesting this leave in advance, with the approval of the proposed time subject to the need for the employee's services.) When the agency exercises its authority to approve an employee's request for leave, including leave without pay, the approving official has presumably made a determination that the employee's presence on the job is *not* required. The agency may, if it does need the employee's services, deny leave and if the employee does not report for duty, charge an absence to absence without leave (AWOL). A denial of leave and a charge to AWOL is not punitive nor does it mean that the employee has insufficient reason for requesting leave, but rather that the employee's presence is required and that the reason for requesting leave is not one for which leave must be approved. Such a denial of leave and charge to AWOL, however, may form the basis of an adverse action. (For a general discussion of the various types of leave and requests for leave which may not be denied, see Supplement 990–2, Book 630.)

(b) If the agency has in the past approved an employee's leave, but believes that the extent of the leave used is such that the employee is not on duty on a regular, full-time or part-time basis in a position which requires a regular, full-time or part-time employee, or that the employee has consistently failed to obtain advance approval for leave, the agency has the opportunity to establish an appropriate record as part of a basis for further action: by

—informing the employee that his or her attendance record is unsatisfactory and needs to be improved; and

—warning the employee that further sick leave will not be approved without sufficient medical documentation and that annual leave and leave without pay will be approved only if requested in advance and the employee's services are not essential during the period for which the leave is requested.

If the employee is then absent without prior approval or proper medical documentation, OPM recommends that the agency record the absence as AWOL, which *may* serve as a basis for adverse action.

The amount of AWOL sufficient to establish a cause for action will depend on the extent of the leave abuse prior to the warning.

(c) The one exception to the general rule which recent appellate decisions have upheld, is that adverse action may be taken based on a record of excessive unscheduled leave without pay (LWOP) when three criteria are met:

(i) The record showed that the employee was absent for compelling reasons beyond his or her control so that agency approval or disapproval was immaterial because the employee could not be on the job;

(ii) The absence or absences continued beyond a reasonable time and the employee was warned that adverse action might be initiated unless the employee became available for duty on a regular, full-time or part-time basis; and

(iii) The agency showed that the position needed to be filled by an employee available for duty on a regular, full-time or part-time basis.

This exception would be applicable only under certain unusual circumstances, e.g., the inability of an employee to return to duty or to work on a regular basis because of the continuing effects of illness or injury (on or off-the-job). Other circumstances in individual cases may meet these criteria, but OPM believes they are uncommon. For example, repeated absences because of failure to obtain adequate transportation to work or to tend to personal affairs would presumably be situations under the control of the employee, and thus reasons for denial of leave and charges of AWOL. (Agencies with employees who are on leave while receiving employee's compensation will wish to be aware of the positions of chapter 353.)

c. *Court decisions relating to cause for action.* Following are court decisions which deal with causes for action. It should be noted, however, that there may be problems with nexus under the provisions of the CSRA in relying on these cases. As mentioned previously, the Board is currently considering whether Congress, in adopting 5 U.S.C. 2302(b)(10), changed the nature of the nexus requirement. Further, each case must be examined on its own merits and nexus must be established independently in each instance.

(1) Appearance of impropriety: *Camero* v. *United States*, *Lowery* v. *Richardson*, *United States* v. *Drum*, *Womer* v. *Hampton*.

(2) Criminal activity:

(a) Effect of expungement of convictions. *Taylor* v. *Macy*

(b) Effect of subsequent acquittal in court: *Alsbury* v. *United States Postal Service*, *Croghan* v. *United States*, *Finfer* v. *Caplin*, *Finn* v. *United States*, *Holman* v. *United States*, *Kowal* v. *United States*, *Polcover* v. *Secretary of the Treasury*.

(c) Effect of conviction of crime of serious nature: *Gueory* v. *Hampton*

(3) Discourteous, inconsiderate, or disrespectful conduct: *Green* v. *Baughman*, *Halsey* v. *Nitze*, *Perkins* v. *United States*.

(4) Failure to meet conditions of employment: *Baum* v. *Zuckert*, *Sullivan* v. *United States*, *Vogt* v. *United States*.

(5) False statements: *Blake* v. *United States*, *United States* v. *Myers*, *Rodriguez* v. *Seamans*, *Williams* v. *United States*.

(6) Falsification of travel documents: *Delong* v. *Hampton*, *Scanland* v. *United States Army*.

(7) Inefficiency: *Perlstein* v. *United States*, *Boyle* v. *United States*, *Menick* v. *United States*, *Seebach* v. *Gullen*, *Armstrong* v. *United States*, *Angrisani* v. *United States*, *DeFino* v. *McNamara*, *DeBusk* v. *United States*, *Korman* v. *United States*, *King* v. *Hampton*.

(8) Misuse of Government time and property: *Green* v. *Baughman*.

(9) Refusal to accept reassignment: (a) agency right to reassign: *Burton* v. *United States*, *Handler* v. *Secretary of Labor*, *Sexton* v. *Kennedy*.

(b) Improper reassignment to induce resignation: *Motto* v. *General Services Administration*, *McClelland* v. *Andrus*.

(10) Refusal to carry out proper orders: *Erenreich* v. *United States*.

(11) Unauthorized absence: *Chiaverini* v. *United States*, *Chiriaco* v. *United States*, *Rubin* v. *United States*.

(12) Unauthorized use of Government vehicle: *Brownell* v. *United States*, *Clark* v. *United States*, *Murphy* v. *Kelly*.

(13) Violence against coworkers: *Ruffin* v. *United States*.

3–3 PROCEDURES

a. *Thirty days' advance written notice.* Law: "*An employee against whom an action is proposed is en-*

titled to—(1) At least 30 days advance written notice,. . ." (5 U.S.C. 7513(5)(1))

(1) The law requires at least 30 full calendar days before a proposed action is effected. A calendar day is the 24-hour period between 12 midnight and 12 midnight. In computing the advance notice, the day on which the notice is delivered is not counted since it is not a full calendar day. (See *Stringer* v. *Uniteed States* and section 1-1b (3) of chapter 210.) The last day of the notice period is counted when it is a full calendar day; ordinarily for removals (See paragraph (2) below) it is a full calendar day since the action will not become effective until 12 midnight. Twelve midnight is considered to be the end of the day. (See *Englehardt* v. *United States*) As the term "day" is defined in section 1-1b(3) of chapter 210, a Saturday, Sunday, or a legal holiday may not be designated as the last day of a notice period. Except for these restrictions on the last day of a minimum notice period, the agency may effect an adverse action on any day. If the agency has any question as to whether it has met the requirements for the minimum number of days' notice to be given, the Office recommends a longer rather than a shorter notice period.

(2) Removals become effective at 12 midnight (i.e., the end of the day) on the date specified in the notice of decision, unless the agency specifies some other particular time earlier than midnight. For example, if the affected employee's tour is at night and includes portions of two calendar days, the agency may make the action effective as of the time the employee completes his or her tour of duty on the morning of the effective date. However, if the agency specifies a time earlier than midnight for effecting the removal, it may not count the effective date itself as a day in the notice period, since it is not a full calendar day.

(3) Reductions in grade or pay, furloughs, and suspensions become effective at 12:01 a.m. (i.e., the beginning of the day), of the date specified in the notice of decision, except in the case of an employee whose hours of duty are at night and include portions of two calendar days. In such cases, the actions take effect at the beginning of the employee's tour of duty at the time specified.

(4) Since the time when an adverse action is made effective will apply uniformly, an agency need not (and the OPM recommends that it does not) set any particular time for the action to become effective unless that agency has a specific reason for setting another time.

(5) If the agency amends a notice to include new, additional reasons, it will need to make certain that the employee is given sufficient time to answer to added reasons, and that no action is taken until at least 30 full calendar days have elapsed from the date the added reasons are delivered to the employee.

(b) If the employee alleges harmful procedural error in an appeal of an action under Subparts C and D of Part 752, the agency will have to show that the employee received the full 30 days' advance notice: either that the employee received the notice on a timely basis or that the agency's action to accomplish delivery constituted an intelligent and diligent effort, under the circumstances, to get the notice to the employee on a timely basis. The method of delivery is thus an important consideration:

(a) The best and most direct route for delivering advance and final notices is to hand them to the employee at work, and to obtain a written acknowledgement of receipt. It is good practice to have two people deliver the notice, or get a witness to certify that the notice was delivered if the employee refuses to sign. Personal delivery may be preferable even when the employee is not at work. For example, an employee on authorized annual leave, brief sick leave, or official travel status ordinarily will be back to work soon. There is usually no compelling reason why the delivery of the notice cannot be delayed until the employee returns. However, an employee on authorized sick leave for an extended period in a serious condition usually is immobilized at home or in a hospital. The agency may decide to delay initiation of its action because of consideration for the employee or to avoid the appearance of overzealousness in taking action against a seriously ill employee. If the agency decides that it ought not to postpone delivery, delivery of the notice by a visitor or agency messenger may be an effective method and will provide proof of delivery. Agencies would be wise to weigh the problems which may develop from delivering a notice under these circumstances against the actual need to take immediate action.

(b) Agencies will have cases which warrant every effort to complete the action within the shortest time permitted by law and regulation, and in which the employee is not in a duty status. The mails may offer the best means of effecting prompt delivery in these

cases. This method of delivery works satisfactorily in most instances. It is important for an agency to keep in mind the fact that if it proceeds with its action on the assumption that the employee has received a mailed notice promptly, there is always the chance of failure of delivery. Going on this basis, therefore, represents a calculated risk. The degree of risk depends largely on the type of mail chosen:

(i) An agency may use *return receipt registered mail for delivery to and receipt by the addressee only,* to make certain an absent employee actually receives a notice before the agency takes further action under the terms of the notice. However, when delivery fails, the returned letter will provide documentary evidence of the employee's nonreceipt of the notice.

(ii) Again, the agency may use *ordinary registered mail.* The Postal Service will leave this type of mail with any adult at the address shown who will sign for it. Thus, the nonreturn of a letter mailed this way does not establish that the addressee actually received it. This type of mail does offer a way of establishing that the letter actually reached the address to which it was sent and of establishing the approximate time it was delivered.

(iii) The use of *unrestricted first class mail* does not provide any method by which the sender can establish when, if ever, the letter was delivered to the addressee or to the place where it was sent. However, in the absence of evidence to the contrary, proof that a letter was properly addressed, stamped, and mailed in the regular course of business raises a presumption that the addressee received it. Thus, it is good practice to document these facts for the record.

b. *Exceptions to the 30 days' notice period.* Law "*. . . unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. . .*" (5 U.S.C. 7513(b)(1) Regulation: "***(1) 5 U.S.C. 7513(b) authorizes an exception to the 30 days' advance written notice when the crime provision is involved. 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 under the circumstances would be reasonable, but not less than seven days. When the circumstances require immediate action, the agency may place the employee in a nonduty status with pay for such time, not to exceed ten calendar days, as is necessary to effect the action. (2) The advance written notice and opportunity to answer are not necessary 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.***" (Section 752.404 (d)(1) and (2)).

(1) The so-called "crime provision" of 5 U.S.C. 7513(b)(1) is concerned solely with the duration of the advance notice period and the opportunity to answer. It does not deal with the employee's duty status during the advance notice period nor the merits of the action.

(a) The agency may take an action with a shortened notice period only when it has reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. If the agency has any doubts as to whether a "crime" for which a "sentence of imprisonment" can be imposed, OPM believes it would ordinarily be better practice to resolve those doubts in favor of the employee.

(b) An agency cannot invoke the "crime provision" solely on evidence of the employee's arrest. However, if the agency had evidence that the employee was arrested *and* held for further legal action by a magistrate or was indicted by a grand jury, the agency would have reasonable cause for believing the employee had committed a crime. If the agency through its own independent investigation has acquired evidence which connects an employee with the commission of a crime, it must determine whether all the facts and circumstances uncovered constitute reasonable cause of believing the employee has committed the crime.

(c) Generally, to invoke the crime provision and process a removal or indefinite suspension with a curtailed notice period, the agency would:

(i) Notify the employee that he or she is being put immediately in a nonduty status with pay for no longer than ten calendar days.

(ii) Give the employee a notice either of proposed indefinite suspension pending disposition of the criminal action or of proposed removal when the agency has sufficient evidence to warrant removal. The notice will tell the employee of the reasonable period for an answer (not less than seven calendar days.)

(iii) Issue a decision on the action after the employee has had an opportunity to answer and the agency has considered any answer.

(iv) Complete the action before the employee has

been in a nonduty status for more than ten calendar days.

(2) The 30-day notice period is not required for emergency furloughs due to unforeseen circumstances. In these situations, there is no minimum time allowed for a reply since the agency will be powerless to avoid a sudden and general work stoppage. Aside from the waiver of the advance notice requirement and the right to answer, the employee is entitled to the other requirements provided by law and regulation, including the right to appeal. The agency must be prepared to show that the stoppage was caused by conditions which no level of agency management having responsibility for the activity could change.

(3) The Merit Systems Protection Board has issued a decision (*Cuellar* v. *United States Postal Service*, MSPB Dkt. No. SF075299045, November 13, 1981) which held that OPM's regulatory provision for emergency suspensions exceeded OPM's statutory authority to regulate and is illegal. Therefore, agencies may no longer use these procedures. When an agency believes that the employee cannot be kept on his or her regular job during the period of an adverse action proposal, OPM recommends the following alternatives:

(a) If the employee is absent from the job for reasons which do not originate with the agency (annual leave, incarceration, sick leave, etc.), carrying the employee on appropriate leave—annual, sick, leave without pay, or absence without leave.

(b) Assigning the employee to other duties in which the problems that make his or her absence from the job necessary will not exist.

(c) Placing the employee on leave with *his or her consent*, except when the agency has medical evidence that the employee is unable to work. The employee may not be placed on enforced leave when he or she is ready, willing, and able to work since the courts have found that in connection with a disciplinary action, enforced leave constitutes a suspension taken without procedures.

c. *Specific reasons for the action*. Law: "*. . .written notice. . .stating the specific reasons for the proposed action.*" 5 U.S.C. 7513(b)(1). The specific reasons for the action include those reasons the agency has relied on to support its proposal for action, but the agency need not include every reason that *might* have been used to support its action. (*Saggau* v. *Young*, *DeNigris* v. *United States*) The requirement for the specific reasons is to afford the employee a fair opportunity to refute the reasons for the action. The amount of detail needed to meet the requirement is that which will enable the employee to respond to the reasons. If the employee is not given all the specific reasons in the notice, he or she will be unable to respond to those which he or she does not know about or does not understand. (*Burkett* v. *United States*, *Englehardt* v. *United States*, *Norden* v. *Royall*) The employee's exhaustive reply to a notice indicates that he or she has understood the reasons for the proposed action. (*Baughman* v. *Green*, *Cohen* v. *McNamara*, *Greenway* v. *United States*)

d. *Material relied on*. Regulation: "***The notice of proposal shall 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 agency may not use material which cannot be disclosed to the employee or his or her representative or designated physician under Section 297.108 (c)(1) of part 297 of this title to support the reasons in the notice.***" (Section 752.404(b))

(1) The material to be made available for the employee's review may include, but is not limited to, statements of witnesses, documents, and investigative reports or extracts from these reports. The agency need not wait until obtaining all the evidence in a case before it proposes adverse action; it may issue a notice whenever it believes it has enough evidence to justify the action. Any additional supporting material may be introduced at a later stage in the proceeding, but the employee must be able to review and respond to it. When a case is one which may involve a crime, the requirement is not intended to extend the shortened notice period nor to force the agency to disclose prematurely the evidence that could hamper proper law enforcement. In a crime case, the agency may make available the material on hand which supports the action proposed, e.g., a record or report of arrest and arraignment. In such cases, general good practice is to obtain the best evidence possible, which would be certified official copies of the police report and arrest and court records. In addition to supporting the use of the crime provision to shorten the notice period, there will need to be sufficient material to support the reason used (i.e., the actual misconduct involved as distinguished from the fact of arrest) to justify the proposed adverse action.

(2) The agency may not support its reasons for action with restricted material which cannot be disclosed to the employee or his or her representative or designated physician under Part 297. (OPM recommends in such situations that the notice contain the specifics of service deficiencies but not specific medical diagnosis. All the

supporting material on the service deficiencies must be made available to the employee and/or his or her representative except the medical information which the agency believes can be released only to a physician.) Again, the agency may not use material to support reasons in the notice which would violate a pledge of confidence if disclosed or which is restricted or classified. If the agency wishes to use information in a restricted, classified or confidential document, it will obtain this information in a form which can be made available for the employee's review. A copy of the material relied upon may be enclosed with the advance notice, if the agency chooses to do so. In this circumstance, OPM recommends that the advance notice contain the following or a similar statement: You have the right to review the material which is relied on to support the reasons for the action given in this notice. A copy of that material is enclosed for your convenience.

e. *Preparation of notice.* (1) It may not be harmful error if the notice does not always state specifically that the proposed action will promote the efficiency of the service (*DeBusk* v. *United States*) or to explain why it believes the action will promote the efficiency of the service (*Begendorf* v. *United States*), although this may be the wisest course to follow. If the agency's proposal for action is based on misconduct which does not directly affect the performance of the employee's job tasks, the agency will bolster its case by an express explanation of how the efficiency of the service will be promoted by its action, i.e., establish the nexus.

(2) To prevent errors, OPM recommends that the agency have an employee who is trained in the technical requirements of processing adverse actions prepare, or at the very least review before issuance, the notice of proposed action. Employees who prepare or review notices will wish to describe correctly the reasons for action. (Note: In the event the agency does commit a procedural error in taking the action, it may not be harmful error, depending upon the subsequent course of the proceedings. See *Parker* v. *Defense Logistics Agency*, cited in section 3-2a(2), for the Merit System Protection Board's criteria for determining harmful error.)

(a) Ordinarily, it is preferable to specify in the notice what the employee did that was wrong without using legal terms. The agency need only set forth the employee's misconduct (what he or she did) and why the acts justify adverse action (the reason or cause for the action). If the agency proposes adverse action for reasons which are stated in legal terms connoting crime, such as "grand larceny", "theft" or "gross negligence", it may have to prove *all* the elements necessary to establish that the crime has been committed, including felonious intent.

(b) To avoid errors, the agency may label the offense or offenses, if the label fits the facts, is not a strictly legal term, and is not relied on by itself to support the agency's action, since a charge or reason for action is not self-validating.

(i) It is good practice to label an incident of misconduct so that there will be no question when the action is proposed or at any time in the future whether it is a first, second, or third offense of the same nature. This is especially appropriate when the proposing official is guided by an agency table of penalties under which the nature of the offense and the number or times occurring are used to determine the appropriate range of penalties. The agency must be careful to select a label which fits the facts and not to distort the facts to fit a specified offense in a table of penalties.

(ii) Labeling an offense will also show the employee how serious his or her conduct is considered, and enable the agency to know what misconduct it must prove. An employee's failure to comply with a proper order may merit the label "insubordination", if the offense reflects deliberate, willful, and knowing intent. Or, the agency may conclude that the offense resulted from nelgigence, or that there is not sufficient evidence to prove "insubordination" and label the offense "failure to follow instructions."

(iii) When the agency concludes on the basis of a repetition of irresponsible acts or failures to act on the part of the employee, (not only on the basis of the most recent misconduct,) that a proposed action is proper, it is good practice to give one single basic reason and to cite all of the employee's offenses pertinent to supporting the basic reason. In some cases, the offenses are of the same general sort; e.g., repeated unauthorized absence, tardiness, or failure to carry out assignments. In other cases, the offenses are varied, such as failure to carry out orders added to previous instances of unauthorized absence and misbehavior on the job. These offenses might be properly labeled "repeated acts of misconduct". OPM recommends that the agency assure that there is indeed a pattern of misconduct or failures to act before grouping actions under a single label.

* U.S. GOVERNMENT PRINTING OFFICE: 1983-380-851:1377

(3) The agency may wish to consider prior disciplinary actions (reprimands, suspensions, etc.) in determining the severity of the appropriate remedy to be set for the current charges. The court in *Henkel* v. *Campbell* held that if the employee has been given the entitlement to a full review of the prior disciplinary action, i.e., due process, the agency may properly consider the prior actions in setting the appropriate remedy.

(4) The notice must make it clear, in order to meet the requirements of law and regulation, that the action is proposed but not yet decided. (See *Elchibegoff* v. *United States*) Usually, a statement that the notice is of proposed action only and that the agency will consider any answer before making its decision will suffice. It is good practice, even with such a statement, to be sure that the proposal in no way suggests that the decision is a foregone conclusion. However, the agency will be wise to avoid making any statements in the advance notice which could be construed as indicating it has already made a decision.

(5) The advance notice must state specifically the most severe action proposed, so that the employee will be able to answer the notice properly. The agency may of course lessen the action; a proposed notice of removal would not bar a subsequent decision to suspend or demote instead of removing. (See *Collins* v. *United States*) If an agency decides that a more severe action than originally proposed is appropriate in a case, it must give the employee a new advance notice to propose the more severe action, so that again the employee may have a chance to defend himself or herself.

(6) The following items are recommended but not required in the advance notice: telling the employee of the right to answer both orally and in writing and to furnish affidavits and other documentary evidence in support of the answer; the right to representation, where the material relied on in proposing the action, as well as the regulations and procedures on which the proposal is based, may be reviewed; the amount of time to be given for his or her answer; and identification of the person or office to receive any oral or written answer. OPM recommends telling the employee, if he or she is in an active duty status, of the amount of official time allowed to review the material relied on, to secure affidavits and other documentary material, and to prepare an answer to the notice, and the identity of person with whom to make arrangements for the use of official time.

f. *Notice of furlough for 30 days or less.* Regulation: "*When some but not all employees in a given competitive level are being furloughed, the notice of proposal shall state the basis for selecting a particular employee for furlough as well as the reasons for the furlough.*" (Section 752.404(b)(2)). The regulatory requirement is set so that an employee will have the requisite information for answering the notice, or for appealing an action with no advance notice period.

g. *Employee's answer.* Law "*. . . a reasonable time, but not less than seven days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer.*" (5 U.S.C. 7513 (b)(2)) Regulation: "***(1) The agency shall give the employee a reasonable amount of official time to review the material relied on to support its proposal and to prepare an answer and to secure affidavits, if he or she is otherwise in an active duty status. (2) The agency shall 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 one in its regulations in accordance with subsection (g) of this section.***" (Section 752.404(c))

(1) The law requires at least a seven-day period for the employee to answer; that is only a minimum which the agencies may modify upward to suit their own situations.

(a) There is no maximum time set by law or regulation for an employee to submit an answer, but it would be good practice for the agency to estimate what constitutes a reasonable time in a particular case and advise the employee in the notice of proposal that it expects an answer within that time. Some stated limitation, even though tentative, is usually necessary to keep the proposed action moving as expeditiously as possible to a conclusion. The agency might find it desirable to accompany a specific time limit with a statement that it will consider extension of the time limit if the employee provides reasons for a requested extension.

(b) When an employee, under criminal indictment for the same act for which removal has been proposed, asserts that submission of an answer to the notice of proposal within the time allowed would prejudice his or her defense, the agency may wish to determine whether the record supports this contention. If the

agency decides that the record does support the contention, it would be a good practice, supported by court decisions, to delay further action on the removal until action under the indictment has been completed. (See *Silver* v. *McCamey*, *Wathen* v. *United States*, *Polcover* v. *Secretary of the Treasury*, *Peden* v. *United States*, *Cohen* v. *United States*) In most cases agencies will probably not be able to proceed with the administrative case without prejudicing the employee's rights. If the agency does delay action on the removal under these circumstances, it may wish to consider indefinite suspension of the employee pending disposition of the criminal action. Whatever the agency decides to do, it is good practice to tell the employee of its decision to delay further processing, to avoid any question of whether the agency was neglecting to take any action.

(c) Employees sometimes submit an answer after the time the agency allowed for an answer but before the agency has issued its final decision. It is better practice, when possible, for the agency to give full consideration to a delayed answer, e.g., when it was received late because of slow mail delivery, the agency has not issued its final decision, and has no compelling reason for completion of the action in the shortest possible time.

(2) The Office's regulations provide for a reasonable but not specific amount of official time for the employee who is otherwise in a duty status to review the material relied on by the agency and to prepare an answer to it. Each agency will have to set an amount consonant with its own situation, perhaps on a case-by-case basis. Agencies are reminded of their obligation to negotiate or consult, as appropriate, with recognized unions concerning the amount of official time to be granted.

(3) An employee has the right to make both an oral and a written answer. If he or she requests the opportunity to make an oral answer, the employee is entitled to have the answer heard. *La Marche* v. *United States*, *Long* v. *United States*, *Stevenson* v. *United States*, *Vaughn* v. *United States*) Denial of an employee's request to answer orally is contrary to law. (*Mallow* v. *United States*, *McKamey* v. *United States*, *Wittner* v. *United States*) OPM points out that a timely reply must be accepted.

(4) The oral answer may include any plea the employee believes may influence the decision in his or her favor or reduce the penalty. The agency may not restrict the answer solely to matters relating to the agency's reasons for proposing adverse action. The court said in *Washington* v. *United States*: "To 'answer' to charges, or claims, one need not necessarily plead the general issue, denying that he did the things which he is alleged to have done. He may plead in confession and avoidance, and that is an answer, in law, and in life. In employment relations particularly, mitigating circumstances, often of a highly personal nature, may save a job for a person who, but for these circumstances, would and should be discharged. Whether, if the plaintiff had been permitted to make this kind of a personal appeal to his superior, it would have saved his job, we do not know. But when Congress gave to the veteran the right to appeal personally, it must have intended to give him the chance of succeeding in such an appeal. The naked facts, without the personal appeal, could just as well be stated in writing. And Congress knew as we all know, that bureaucratic superiors, like other human beings, are susceptible to the effects of personal pleas."

(5) The law is silent on whom the agency may designate to hear an employee's oral answer The Office's regulations require that the person designated be one who has delegated authority in the agency to make or recommend a decision. Several court decisions have defined more clearly the type of employee or official who can properly be designated:

(a) In *Ricucci* v. *United States*, the court held that the oral reply officer ". . .must play a role other than as presiding over a recording and transcribing medium." Such officers, the court stated, should be ones who are familiar with the area involved and would normally make recommendations in that area. In *Ricucci*, the court specifically indicated that trained investigators of any kind should not serve as oral reply officers because they negate the feedback an employee must receive to have a proper oral answer.

(b) The right to answer orally is not met by an appearance before an investigator charged with the duty of developing the facts to support the reasons for action, when the investigator is not the employee's supervisor or even superior (see (c) below for a discussion of "superior") in the chain of command. (*Patterson* v. *United States*)

(c) The law does not guarantee an interview with any particular official as long as the employee is given the opportunity to answer a superior with authority to recommend or take final action. (*O'Brien* v. *United States*) OPM's interpretation of the term "superior" is that an official duly authorized to judge an em-

ployee's case and either decide or recommend a decision is in that respect a superior to the employee.

h. *Right to representation.* Law: "*. . . be represented by an attorney or representative.*" (5 U.S.C. 7513(b)(3)) Regulation: "***5 U.S.C. 7513(b)(3) 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. 5 U.S.C. 7114(a)(5) and the terms of any applicable collective bargaining agreement govern representation for employees in an exclusive bargaining unit.***" (Section 752.404(e)) For a complete discussion of the right to representation, see section 2-3c of subchapter 2.

i. *Agency decision.* Law: "*. . . a written decision and the specific reasons therefore at the earliest practical date.*" (5 U.S.C. 7513(b)(4)) "Regulation: "***In arriving at its written decision, the agency shall consider only the reasons specified in the notice of proposed action and shall consider any answer of the employee and/or his or her representative made to a designated official. The agency shall deliver the notice of decision to the employee at or before the time the action will be effective. The notice shall tell the employee of his or her appeal rights.***" (Section 752.404(f))

(1) In making its decision, an agency is required by the regulation to give *bona fide* consideration to any answer of the employee or the employee's representative. Though there is no requirement that the employee's answer and the agency's consideration of it be specifically mentioned in the notice of decision, it is good practice to include a statement to the effect that the employee answered orally and/or in writing and that the agency considered the answer, or that he or she didn't answer, as the case may be. The agency will need to resolve any doubts about its reasons for action or the propriety of the action raised by the employee's answer before it makes its decision. When it believes it appropriate, the agency may withdraw its action or substitute a lesser action without issuing a new notice of proposal.

(2) The law requires an agency to state specifically its reasons for deciding to take action. The regulation requires that an agency consider only those reasons given to an employee in a notice of proposed action. (See also *Urbina* v. *United States*) Introduction of new reasons into the notice of decision could deprive the employee of any opportunity to answer these additional reasons for action. If, however, the error is harmless or it has been cured by subsequent agency action—an additional opportunity to answer the new charge—the Board decisions indicate that the agency action will be upheld. See *Parker* v. *Defense Logistics Agency*, cited in section 3-2a(2), and *Graham* v. *U.S. Postal Service*, (MSPB No. NY07529908. 6/6/80).

(3) When the reasons sustained are valid and sufficient, one or more invalid reasons will not invalidate an adverse action. (*Baughman* v. *Green*, *Deviny* v. *Campbell*, and *Finnegan* v. *Daly*) The agency of course will have to decide whether the reasons sustained will support the action originally proposed.

(4) A rather brief notice of decision can fulfill the requirements for stating the reasons relied on in reaching an adverse decision. (*Baughman* v. *Green* and *Kenny* v. *United States*). If all the reasons stated in the notice of proposal are sustained and all are relied on to support the action, OPM believes that a clear statement to that effect will be sufficient and that the agency need not repeat each reason. It is good practice to mention each reason in the notice of proposal, whether relied on in the decision or not.

(5) Sometimes the agency will have stated in the notice of proposed action that it is considering the employee's past disciplinary record in proposing a particular action. It is good practice for the agency to tell the employee whether the agency relied on the past record in deciding on the action to be taken.

(6) The agency must comply with all applicable requirements of the Merit Systems Protection Board (including providing a copy of the MSPB regulations and the appeal form) in telling the employee of applicable appeal rights. (See Sec. 1201.21, *Notice of appeal rights*, in chapter 1200 of 5 CFR)

(7) For a discussion of ways of delivering the decision, see paragraph 3-3a(6).

j. *Agency hearing.* Law: "*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.*" (5 U.S.C. 7513(c)) Regulation: "***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.***" (Section 752.404(g)) Any hearing, including the opportunity to examine witnesses,

which the agency provides is part of the decision, not of the appellate process. The hearing will thus take place before the decision to effect the adverse action.

k. *Appeal and grievance rights.* Law: *"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."* (5 U.S.C. 7513(d) Regulation: ***"(a) Appeal rights. Under the provisions of 5 U.S.C. 7513(d) an employee against whom an action is taken under this support is entitled to appeal to the Merit Systems Protection Board. (b) Grievance rights. 5 U.S.C. 7121 (e)(1) requires an aggrieved employee to elect to appeal under this subpart or, where applicable, to file a grievance under the negotiated grievance procedure, but not both."*** (Section 752.405)

(1) An employee who is not a member of an bargaining unit has only one avenue (other than a complaint of discrimination under an agency complaints procedure) to request review of an agency action taken under Subparts C and D of Part 752: the appeal provided by 5 U.S.C. 7513(d) to the Merit Systems Protection Board. The applicable procedures for filing such an appeal are found in the regulations of the Board. (See Section 1201.22 through 1201.24 of Part 1200, 5 CFR)

(2) A member of a bargaining unit under a negotiated agreement which provides for coverage under the negotiated grievance procedure of actions taken under Subparts C and D of Part 752 has the choice[1] of appealing to the Merit Systems Protection Board or of filing a grievance under the negotiated grievance procedures, but the employee may not file both an appeal and a grievance on the same action. (However, an employee alleging discrimination in connection, with an appealable action may appeal to the MSPB after first using the negotiated grievance procedure. If the employee has both appeal and negotiated grievance rights, the agency must inform him or her of both.)

l. *Agency records.* Law: *"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."* (5 U.S.C. 7513 (e)) Regulation: ***"The Agency shall maintain copies of the items specified in 5 U.S.C. 7513(e) and shall furnish them upon request as required by that subsection."*** (Section 752.406)

(1) The agency is required only to maintain a *summary* of the employee's oral answer. If the agency makes a *transcript*, OPM believes it meets the legal requirement.

(2) "Any supporting material" is that on which the agency based its notice of proposed action and relied on to support the reasons in the notice. It may include statements of witnesses, affidavits, documents, and investigative reports or extracts from them. OPM emphasizes that these agency records are extremely important since the agency bears the burden of proof. It is good practice to have these records sufficient in themselves for any subsequent appeal.

(3) The required records will, of course, be necessary if the employee appeals the action to the Merit Systems Protection Board. The agency is not required to furnish the records either to the Board or to the employee absent a specific request.

[1] This election applies only to members of bargaining units established under the provisions of chapter 71 of 5 U.S.C.

Subchapter 3. REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, AND FURLOUGH FOR 30 DAYS OR LESS

3–1. Coverage. *a. Actions covered.*

(3) Failure to accompany activity to another location. The provisions of this subchapter must be followed when it is nessary to remove an employee who refuses to accompany his or her position to a new location, or to an organization having a different appointing officer because of a transfer of function or activity. This applies also when an employee accepts a specific position as a part of a transfer of function and later declines to move. The advance notice in such cases will, besides citing the employee's initial refusal to accompany the position, or subsequent declination of an offer to move to the new location, explain the circumstances that make separation necessary because of such refusal or declination.

(4) Failure to accept new assignment. If the employee refuses a new assignment and decision is made to propose separation, the full job protection requirements prescribed in this subchapter must be observed. This includes a separate advance notice of the proposed separation. The proposal to separate can be made any time after the employee refuses to accept the new assignment. The advance notice of separation will, besides citing the employee's refusal to accept the assignment, explain the circumstances that make separation necessary as a result of such refusal. This provision also applies to those cases in oversea areas when the employee fails to register in a DOD Priority Placement Program or exercise reemployment rights.

(11) Separation for disability—See paragraph 3–2*a*(4) and (5).

b. Actions not covered.

(6)(*b*) Refusal to permit withdrawal of resignation. Any rejection of a request to withdraw a resignation before the effective date must conform with chapter 715.2–3. Otherwise the action must be processed according to this subchapter.

c. Employees covered. Any personnel action effecting the involuntary separation or change to lower grade of an employee occupying a position in the Senior Executive Service, a GS–16, GS–17, GS–18, or 10 USC 1581 position (PL 313) requires the prior approval of the Secretary or Under Secretary of the Army or the Assistant Secretary having functional responsibility over the position. Requests for prior approval of such actions will be transmitted by letter to HQDA(DAPE-CPZ-BE), WASH DC 20310, with complete information on the basis for the proposed action so that the required approval may be obtained.

(5) An employee who served in the Canal Zone immediately before 19 January 1959 with competitive status in a position which was in the competitive service and who, since that date, continued to be employed without a break in service in positions in the Canal Zone or Republic of Panama. Non-veterans in this group do not have appeal rights to the Merit Systems Protection Board.

d. Employees not covered.

(5) Although nonpreference eligible employees in the excepted service are not covered by this regulation, the procedures of this regulation may be followed in effecting adverse actions. When these procedures are extended, such action is a matter of courtesy rather than a matter of right. Nonpreference eligibles in the excepted service do not have appeal rights to the Merit Systems Protection Board. However, they may file a grievance under the appropriate grievance system.

3–2. Merit of the adverse action. *a. Cause.*

(4) *Mental disability.* An employee will not be separated for mental disability until there is a final determination that such employee cannot be retired for disability. (See FPM Suppl 831–1, S10; FPM Chap. 330.1; and FPM Chap. 306.8.)

(5) *Physical Disability*

(a) An employee may be separated for disability at any time. Action should not be initiated unless—

—The employee is unable to perform the duties of his or her position efficiently and

safely because of disease or injury.

—Efforts to reassign the employee to a vacant position for which he or she qualifies at the same grade level in the commuting area prove unsuccessful.

—The employee declines to accept assignment to a vacant position at a lower grade for which he or she qualifies.

—After being advised of the right to file an application for disability retirement, the employee fails to do so.

—There is insufficient cause to doubt the employee's mental competence.

(b) Action should not be initiated to separate an employee for physical disability when the employee has been receiving compensation from the Office of Worker's Compensation Programs unless the following additional criteria are met:

—The employee has been in LWOP status for a continuous period of at least 1 year.

—Available medical evidence or prognosis establishes no definite prospect of return to duty within the next 6 months or on a definite date within 1 year, and retention would require an extension of the currently authorized LWOP which would result in a period of LWOP of 18 or more continuous months.

(c) When processing separation for disability, sufficient LWOP should be granted, as needed to finalize the action. (If the employee's disability is one which impairs his or her judgment and ability to make decisions, action should be initiated in accordance with FPM Supplement 831–1, S10–10). Before effecting separation action, however, the employee must be notified of the option to apply for disability retirement if the employee has 5 years of Federal civilian service and appears to meet the medical requirements for disability retirement.

(6) *Alcohol and drug abuse.* The Department of the Army Alcohol and Drug Abuse Prevention and Control Program (AR 600–85) provides nondisciplinary procedures by which an employee with alcohol or other drug-related problems is offered rehabilitation assistance. Initiation of reduction in grade or removal actions for absenteeism and misconduct resulting from alcohol and/or other drug abuse will be postponed for 90 days for employees enrolled in and satisfactorily progressing in an approved rehabilitation program. This provision may be suspended when retention in a duty status might result in damage to Government property or personal injury to the employee or others. See AR 600–85 before considering any adverse actions against employees for offenses related to alcohol or other drug abuse.

3–3. Procedures. *a. Thirty days' advance written notice.*

(6) Oversea employees. Employees serving under a transportation agreement returning from an oversea assignment for separation for any reason will be carried in a duty status during a period of return travel at Government expense. In all such cases, the effective date of separation will be the date (actual or constructive) of arrival at the point of authorized destination in the United States.

(a) To establish the effective date of an involuntary separation, a constructive date of arrival will be used. Notation to this effect will be made under remarks on the Standard Form 50 so that, if it is later found that there was a significant difference between the constructive and actual dates of arrival, a corrected Standard Form 50 can be issued. For example:

—An employee is to be separated on a constructive date of 16 January 1982. The actual date of arrival is 12 January 1982. Since the period between the actual and constructive dates can be charged to annual leave or leave without pay, as appropriate, the difference is not significant and no change in the SF 50 is required.

—An employee is to be separated on a constructive date of 16 January 1982. Because of delays in transportation through no fault of the employee, the actual date of arrival is 17 January 1982. Since the difference is the result of Government action, it is a significant difference and a change in the SF 50 is required.

—An employee is to be separated on a constructive date of 16 January 1982. Because of a delay en route for personal convenience, the actual date of arrival is 23 January 1982. In this case, since the delay was the result of the em-

ployee's action, no change in the SF 50 is required. If, however, the employee requested annual leave or leave without pay in advance of the delay, the separation date will be extended accordingly.

e. Preparation of notice.

(3) In the absence of any rationale in the letter of proposed adverse action or letter of decision, presiding officials of the Merit Systems Protection Board may interpret the agency's reasons for penalty selection in whatever light they deem appropriate. In order to avoid erroneous interpretations, the reasons for selection of the specific penalty should be clearly and succinctly stated in the letter of proposed adverse action. The reasons should include prior disciplinary record relied on in establishing the penalty as well as any mitigating or militating factors considered. When the penalty is consistent with the Table of Penalties (Chap. 751, app A) the notice should so state; when it is not consistent, an explanation for the deviation should be provided. If the penalty is mitigated in the letter of decision, the reasons for mitigation should be included in the decision letter.

h. Right to representation. An employee's choice of representative or change of representative must be designated in writing.

j. Agency hearing. Within the Department of the Army, hearings will not be used in connection with actions under this subchapter.

k. Appeal and grievance rights. The notice of decision will inform the employee of applicable grievance and/or appeal rights and the time limits for filing. It will include, as an attachment, a copy of the rules and regulations of the Merit Systems Protection Board.

Appendix A.

Court Cases and Comptroller General Decisions Cited in Chapter