



DEPARTMENT OF VETERANS AFFAIRS
ASSISTANT SECRETARY FOR HUMAN RESOURCES AND ADMINISTRATION
WASHINGTON DC 20420

August 24, 2017

HUMAN RESOURCES MANAGEMENT LETTER NO. 05-17-05

**Adverse Action Procedures
(Non-Bargaining Unit Title 5/Full-time Hybrid/Canteen Employees and other
employees not excluded below)**

1. Purpose. To provide procedures regarding the implementation of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Public Law 115-41), Title I, Section 101, "Establishment of Office of Accountability and Whistleblower Protection" and Title II, Section 202, of the "Improved Authorities of Secretary of Veterans Affairs to Improve Accountability of Employees." The content of this memorandum applies to both Misconduct and performance that results in the Secretary of the Department of Veterans Affairs (VA), or his or her designee, (hereinafter referred to as "the Secretary") determining to remove, demote, or suspend a Covered Employee, as defined below.

2. Background. The Secretary may suspend, demote, or remove a Covered Employee of the Department of Veterans Affairs if the Secretary determines the Covered Employee's performance or Misconduct warrants such action. In general, an adverse action taken against a Covered Employee due to performance or Misconduct will be taken under the provisions of the Act unless determined by the Office of General Counsel (OGC) that such action is not covered or should not be taken under these procedures. The procedural entitlements contained in VA Directive and Handbook 5021 do not apply to actions taken pursuant to this authority, unless otherwise indicated in this guidance. Additionally, in accordance with the Act, the discipline process for Supervisory Employees who have been determined to have committed a Prohibited Personnel Action under 38 U.S.C. § 731 is described herein.

3. Scope. These procedures apply to all non-bargaining unit VA employees (including Canteen employees if the provisions of the Act are used), except:

- a. an individual occupying a senior executive position as defined in section 713(d) of Title 38;
- b. an individual appointed pursuant to sections 7306, 7401(1), 7401(4), or 7405 of Title 38;
- c. an individual who has not completed a probationary or trial period; or
- d. a political appointee.

NOTE: Part-time/intermittent and temporary Hybrid employees appointed under 38 U.S.C. § 7405 to positions listed in 38 U.S.C. § 7401(3) are not Covered Employees.

4. References.

- a. Title I, Section 101 and Title II, Section 202, of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017(Public Law 115-41).
- b. VA Directive and Handbook 5013
- c. VA Handbook 5021
- d. 38 U.S.C., chapters 73 and 74.

5. Delegation. The Secretary's authority to take actions under this authority may be delegated.

6. Definitions. For the purpose of the Act and this policy, the following terms apply:

a. "Accompany a Position in a Transfer of Function" is the movement of a Covered Employee when a continuing function transfers from one competitive area to one or more other competitive areas where the function was not being performed, or the movement of the entire competitive area to another Commuting Area.

b. "Act" refers to the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Public Law 115-41), "Improved Authorities of Secretary of Veterans Affairs to Improve Accountability of Employees."

c. "Business days" refers to weekdays, which are Monday through Friday in Washington, D.C., except when such a day is designated as a Federal holiday by OPM.

d. "Closeout rating" refers to the rating assigned by a Rater when a Covered Employee changes positions or transfers to another agency.

e. "Commuting Area" refers to the geographic area surrounding a work site that encompasses the localities where people live and reasonably can be expected to travel daily back and forth to work.

f. "Covered Employee" means for the purposes of this process an individual occupying a position within the Department of Veterans Affairs (including Canteen employees if the provisions of the Act are used), who is not a bargaining unit employee, except:

- (1) an individual occupying a senior executive position as defined in 38 U.S.C. § 713(d);
- (2) an individual appointed pursuant to §§ 7306, 7401(1), 7401(4), or 7405 of Title 38;
- (3) an individual who has not completed a probationary or trial period; or
- (4) a political appointee.

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NOTE: Part-time/intermittent and temporary Hybrid employees appointed under 38 U.S.C. § 7405 to positions listed in 38 U.S.C. § 7401(3) are not Covered Employees.

g. "Deciding Official" means those individuals delegated authority to decide an action as described in the Act in accordance with the provisions of VA Handbook 5021, Part I, Chapter 1, Paragraph 6.

h. "Decision" refers to a written memorandum from the Deciding Official to the Covered Employee that:

- (1) states the decision of the Deciding Official in response to a Proposal;
- (2) states the basis of that decision;
- (3) states the discipline, if any, to be imposed, and the effective date of the discipline;
- (4) states the right to appeal to the MSPB; and
- (5) states the requirement that any MSPB appeal must be filed no later than 10 Business days after the decision is issued.

i. "Demotion" or "demote" refers to the involuntary transfer of a Covered Employee with a reduction in grade and annual rate of pay to a position that the Deciding Official determines is appropriate, and for which the Covered Employee is qualified.

j. "Directed Reassignment" means the management directed reassignment of a Covered Employee, while serving continuously within the same agency, from one position to another without promotion or Demotion.

k. "Final rating" refers to the annual rating of record that a Covered Employee received preceding the proposed action.

l. "Malfeasance" is defined as an act that is unjustified, harmful, or contrary to law, rule, or regulation. It includes, but is not limited to:

- (1) conduct, actions, or inactions that are unbecoming a civil service employee;
- (2) conduct, actions, or inactions that negatively impact VA or detract from VA's mission;
- (3) intentionally or negligently violating the law, regulation, or VA policy; or
- (4) insubordination.

m. "MSPB" refers to the U.S. Merit Systems Protection Board.

n. "Misconduct" refers to, but is not limited to:

- (1) "Neglect of Duty," as such term is defined herein;
- (2) "Malfeasance," as such term is defined herein;

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(3) "Failure to Accept a Directed Reassignment," as the term "Directed Reassignment" is defined herein;

(4) "Failure to Accompany a Position in a Transfer of Function," as the term "Accompany a Position in a Transfer of Function" is defined herein; or

(5) Retaliation against a "whistleblower" for making a lawful "Whistleblower disclosure" as those terms are defined by 38 U.S.C. § 323(g).

o. "Neglect of Duty" includes, but is not limited to, failure to provide appropriate oversight, supervision, or control over matters or personnel that are assigned to or are the responsibility of the Covered Employee; and failure of supervisors to follow the guidance herein to address in a timely manner performance and/or disciplinary issues of their subordinates.

p. "OAWP" refers to the VA Office of Accountability and Whistleblower Protection, as represented by the Assistant Secretary for Accountability and Whistleblower Protection, or his or her designee.

q. "OGC" refers to the VA Office of General Counsel, as represented by the General Counsel, or his or her designee.

r. "OHRA" refers to the VA Office of Human Resources and Administration, as represented by the Assistant Secretary for Human Resources and Administration, or his or her designee.

s. "OIG" refers to the VA Office of Inspector General, as represented by the Inspector General, or his or her designee.

t. "OPM" refers to the U.S. Office of Personnel Management.

u. "Organization" refers to the VA administration or staff office to which a Covered Employee is assigned.

v. "OSC" refers to the U.S. Office of Special Counsel.

w. "PPA" refers to Prohibited Personnel Action, as described in 38 U.S.C. § 733(c) (to be renumbered to 38 U.S.C. § 731(c)).

x. "Progress review" refers to a Rater's communication with a Covered Employee regarding his or her performance prior to the Final rating. Such communication is required to be documented at least once during the appraisal period in accordance with VA Handbook 5013.

y. "Proposal" refers to a memorandum from the Proposing Official to the Covered Employee that:

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- (1) states the proposed action;
- (2) states the basis of the proposed action;
- (3) provides the evidence supporting the proposed action;
- (4) notifies the Covered Employee that the action is being taken pursuant to 38 U.S.C. § 714;
- (5) notifies the Covered Employee of the opportunity to provide a written reply to the Deciding Official within 7 Business days and the means of transmitting such reply; and
- (6) notifies the Covered Employee of the ability to be represented by an attorney or other representative of the Covered Employee's choice.

z. "Proposing Official" means those individuals delegated authority to propose an action as described in the Act in accordance with the provisions of VA Handbook 5021, Part I, Chapter 1, Paragraph 6.

aa. "Rater" refers to the official, usually the Covered Employee's immediate supervisor, who is responsible for developing the Covered Employee's performance plan, appraising the Covered Employee's performance, and assigning a rating.

bb. "Removal" refers to the involuntary separation of a Covered Employee from the civil service.

cc. "Retaliation" refers to a personnel action taken, threatened to be taken, or not taken by a supervisor against a "whistleblower" for making a lawful "Whistleblower disclosure" as those terms are defined by 38 U.S.C. § 323(g).

dd. "Secretary" refers to the Secretary of Veterans Affairs, or his or her designee.

ee. "Standard of Proof" refers to the degree of evidence necessary to sustain an action taken under 38 U.S.C. § 714. For actions taken under this authority, Substantial Evidence is the Standard of Proof.

ff. "Substantial Evidence" means relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree, or evidence that a reasonable mind would accept as adequate to support a conclusion.

gg. "Supervisory Employee" means a Covered Employee who is a supervisor as defined in 5 U.S.C. § 7103(a)(10).

hh. "Suspension" or "suspend" means placing a Covered Employee, for reasons of Misconduct, in a temporary status without duties and pay for a period in excess of 14 calendar days.

ii. "Title 5" refers to Title 5 of the United States Code.

jj. "Title 38" refers to Title 38 of the United States Code.

kk. "VA" refers to the U.S. Department of Veterans Affairs.

II. "Whistleblower disclosure" means any disclosure of information by a VA employee, or individual applying to become a VA employee, which the employee or individual reasonably believes evidences:

- (1) a violation of a law, rule, or regulation; or
- (2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

mm. "Work unit" means the lowest level within the Organization to which the Covered Employee is assigned, e.g. division or service at a facility.

7. Procedures.

a. Actions Based on Misconduct.

(1) Investigation: Any allegation or other evidence of Misconduct will be promptly and thoroughly reviewed and, as necessary, investigated by OAWP or the respective Organization using appropriate processes, such as fact-finding inquiries or administrative investigation boards. Appropriate matters, including any information about actual or possible violations of criminal laws, will be referred to the OIG. Unless the circumstances of the investigation make it impossible, unreasonable, or unnecessary to do so, a Covered Employee who is the subject of an investigation or review should be given an opportunity to address and provide evidence relating to the matters under investigation. Any statement or evidence provided by the Covered Employee will be included in the evidence file.

(2) Whistleblower Disclosure Retaliation: When an allegation or other evidence of Misconduct involves a contention that a Supervisory Employee retaliated against an employee for making a whistleblower disclosure, the respective Organization head or designee will provide initial notification to OAWP.

b. Actions Based on Performance.

(1) A performance-based action taken under the Act may be based upon a Covered Employee's deficiencies noted in an issued Final rating, Closeout rating, or recent Progress review. A performance-based action can also be taken under the Act if

written communication (e.g., an email or memorandum) about his or her performance deficiency was provided to the Covered Employee at least once during the rating cycle.

(2) A performance-based action taken under the Act must be supported by Substantial Evidence documenting a significant performance deficiency. A significant performance deficiency will normally involve at least one of the following:

- i. the failure of a critical element in a Covered Employee's performance plan;
- ii. a reasonable belief that the Covered Employee's performance deficiency is so serious that it cannot be improved;
- iii. the deficiency poses a clear danger to the employee or others;
- iv. the deficiency presents a risk to important services provided to Veterans, e.g., health care or benefits; or
- v. the repeated failure of non-critical elements in a Covered Employee's performance plan.

(3) The requirements of Chapter 43 of Title 5 regarding taking a performance-based action are not applicable under the Act. Specifically, there is no requirement for a Covered Employee to serve a minimum of 90 calendar days under a performance appraisal plan. Additionally, a Performance Improvement Plan (PIP) as described in Chapter 43 of Title 5 or VA Handbook 5013, Part I will not be used to address the performance deficiencies of a Covered Employee under the Act or prior to imposing a performance-related Removal or Demotion under the Act.

c. Acting on the Investigation/Evidence.

(1) Whistleblower Disclosure Retaliation. Upon conclusion of an investigation involving allegations of a Supervisory Employee retaliating against another employee for making a Whistleblower disclosure, the OAWP will submit a recommendation to the Secretary for disciplinary action, if warranted, or "no action."

i. Recommendation of Disciplinary Action. If the Secretary concurs with a recommendation for disciplinary action from the OAWP, the Proposing Official will review the available evidence, including the findings of any investigation, to determine whether a Suspension, Demotion, or Removal should be proposed.

NOTE: 38 U.S.C. § 731 requires no less than a Suspension of 12 calendar days and no more than a Removal for the first offense as described in subsection (c)(1) of this paragraph, and no less than Removal for a second offense of same. A Suspension of 14 calendar days or less may not be taken under the Act, and must be taken under 5 U.S.C. Chapter 75 procedures.

ii. Recommendation of No Action. A recommendation for "no action" may be made if all of the allegations against the employee are not substantiated.

iii. Any recommendation resulting in proposing a disciplinary action must be initiated no later than 60 calendar days after the Secretary receives the recommendation from the OAWP.

(2) For all other cases, the Proposing Official will review the available evidence, including the findings of any investigation, to determine whether a Suspension, Demotion, or Removal should be proposed against a Covered Employee under the provisions of the Act. (NOTE: A Covered Employee cannot be admonished, reprimanded or suspended for 14 calendar days or less under the authority of the Act.)

(3) The Proposing Official will propose discipline that is reasonable and commensurate with the facts of the case. The rationale for determining the appropriate level of discipline, including the consistency of the level of discipline imposed under this authority for the same or similar infractions within the Work unit, will be included in the Proposal.

d. Inter-office Coordination. Prior to proposing an action under this policy, the Proposing Official will work with the servicing Human Resources Office to draft a Proposal. The draft Proposal with all the supporting evidence will be provided to OGC, the servicing Human Resources Office, and, in cases involving alleged Retaliation for making a Whistleblower disclosure, the OAWP for review before the action is proposed. See paragraph titled Whistleblower Protections for further information about Covered Employees that have sought corrective action with the OSC or the OAWP.

e. Processing an Action under the Act.

(1) The aggregate period for notice, reply, and decision on a proposed action under this authority may **not exceed 15 Business days, even if an extension to the reply period is granted.**

(2) The Proposing Official will provide the Covered Employee with a Proposal, which includes a copy of the evidence file. The Proposal will comply with the requirements outlined in paragraph 6(y) of this document. In cases in which a Demotion is being proposed, the Proposal shall state the position, title, grade, salary, and location of the position to which the Covered Employee shall be demoted.

A Proposal template, drafted in collaboration with OGC and OAWP, will be made available on the Office of Human Resources Management, Employee Relations and Performance Management website.

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(3) The Covered Employee will have up to 7 Business days after receiving the Proposal to respond in writing to the Deciding Official.

(4) Extensions to the 7 Business day reply period may be granted by the Deciding Official after consultation with OGC and, when applicable, OAWP. Extensions will only be granted in the most exigent circumstances, recognizing that the statutory requirement to issue a Decision within 15 Business days after issuance of the Proposal is still required if an extension to the reply period is granted.

(5) The Deciding Official will give full and impartial consideration to the Covered Employee's reply, if any, and all information in the evidence file that supported the Proposal.

(6) After receipt of the Covered Employee's reply, or after the expiration of the 7 Business day reply period, the Deciding Official will determine whether the Proposal is supported by Substantial Evidence.

(7) The Deciding Official will impose discipline that is reasonable and commensurate with the facts of the case. The rationale for determining the appropriate level of discipline, including the consistency of the level of discipline imposed under this authority for the same or similar infractions within the Work unit, will be included in the Decision.

(8) The Decision will comply with the requirements outlined in paragraph 6h of this document. A Decision template, drafted in collaboration with OGC and OAWP, will be made available on the Office of Human Resources Management, Employee Relations and Performance Management website.

(9) The Decision will be issued on or before the 15th Business day after the issuance of the Proposal to the Covered Employee.

(10) If a decision is made to demote a Covered Employee in lieu of a proposed Removal, the Decision shall state the position, title, grade, salary, and location of the position to which the Covered Employee shall be demoted. The Covered Employee may receive pay only if the Covered Employee reports for duty to his/her new position.

8. Whistleblower Protections.

a. If a Covered Employee has sought corrective action from OSC, or corrective action is sought from OSC on a Covered Employee's behalf, based on an alleged prohibited personnel practice described in 5 U.S.C. § 2302(b), the Secretary may not remove, demote, or suspend such Covered Employee without the approval of OSC under 5 U.S.C. §1214(f). Questions about the applicability of this protection in a given case should be directed to OGC.

b. If a Covered Employee has made a Whistleblower disclosure to the OAWP, the Secretary may not remove, demote, or suspend such employee until a final decision has been made with respect to the Whistleblower disclosure. Questions about the applicability of this protection in a given case should be directed to the OAWP.

c. If a Whistleblower disclosure made to OSC or OAWP is raised by a Covered Employee in connection with a proposed action, the Deciding Official must consult with OGC or OAWP prior to issuing a Decision.

9. Appeals.

a. A Covered Employee who elects to file an MSPB appeal must do so no later than 10 Business days after the date the Decision is issued.

b. If a Covered Employee appeals to the MSPB, the Secretary shall, to the maximum extent practicable, provide such information and assistance to the MSPB as may be necessary to ensure the appeal is expedited.

c. A Covered Employee demoted under the Act may not be placed on administrative leave during the period in which an appeal (if any) is ongoing, and may only receive pay if the employee reports for duty or is approved to use accrued annual, sick, family medical, military, or court leave.

d. If a Covered Employee demoted under the Act does not report for duty or receive approved leave, the employee will not receive pay or other benefits.

10. Adverse Actions against Supervisory Employees who Commit PPAs under 38 U.S.C. § 731:

a. If a Supervisory Employee is determined by the Secretary, the OIG, or unless the matter is still pending or under appeal, an administrative judge, the MSPB, the OSC, an adjudicating body provided under a union contract, or a Federal judge, to have committed a PPA, as described in 38 U.S.C. § 731, he or she will face the following proposed discipline:

(1) with respect to the first time such a determination has been made against the Supervisory Employee, a Suspension of no less than 12 calendar days and not more than Removal; and

(2) with respect to the second time such a determination has been made against the Supervisory Employee, Removal.

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b. A Proposal issued to a Supervisory Employee for a PPA, as determined in paragraph 10a of this letter, should state that the proposed discipline is taken under the authority of this policy, as amended by 38 U.S.C. § 731, and the 7 Business days timeframe for reply (as stated in paragraphs 6(n)(5) and 7(e)(3)) for an action taken under this policy is amended to 10 calendar days.

c. For the purposes of paragraph 10:

(1) an “administrative judge” refers to an administrative judge of the Merit Systems Protection Board; and

(2) an “adjudicating body provided under a union contract” refers to an arbitrator who VA and a union have selected to adjudicate a matter described in 5 U.S.C. § 7121(f).

11. Questions. Questions concerning this HRML may be directed to the Director for Employee Relations and Performance Management Service (051), at [VACO 051](mailto:vaco051@va.gov) [ER&PMS OHRM](mailto:vaco051cacgohrm@mail.va.gov) (vaco051cacgohrm@mail.va.gov).

/s/ Peter J. Shelby

Peter J. Shelby