

§ 752.104 Settlement agreements.

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

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

(c) *Corrective action based on discovery of material information prior to final agency action.* When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting

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

Subpart B—Regulatory Requirements for Suspension for 14 Days or Less**§ 752.201 Coverage.**

(a) *Adverse actions covered.* This subpart covers suspension for 14 days or less.

(b) *Employees covered.* This subpart covers:

(1) An employee in the competitive service who has completed a probationary or trial period;

(2) An employee in the competitive service serving in an appointment which requires no probationary or trial period, and who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less;

(3) An employee with competitive status who occupies a position under Schedule B of part 213 of this chapter;

(4) An employee who was in the competitive service at the time his or her position was first listed under Schedule A, B, or C of the excepted service and still occupies that position;

(5) An employee of the Department of Veterans Affairs appointed under section 7401(3) of title 38, United States Code; and

(6) An employee of the Government Printing Office.

(c) *Exclusions.* This subpart does not apply to a suspension for 14 days or less:

(1) Of an administrative law judge under 5 U.S.C. 7521;

(2) Taken for national security reasons under 5 U.S.C. 7532;

(3) Taken under any other provision of law which excepts the action from subchapter I, chapter 75, of title 5, U.S. Code;

(4) Of a re-employed annuitant;

(5) Of a National Guard Technician; or

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

(d) *Definitions.* In this subpart—

Current continuous employment means a period of employment immediately preceding a suspension action without a break in Federal civilian employment of a workday.

Day means a calendar day.

Similar positions means positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbent could be interchanged between the positions without significant training or undue interruption to the work.

Suspension means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

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

§ 752.202 Standard for action and penalty determination.

(a) An agency may take action under this subpart for such cause as will promote the efficiency of the service as set forth in 5 U.S.C. 7503(a).

(b) An agency may not take a suspension against an employee on the basis of any reason prohibited by 5 U.S.C. 2302.

(c) An agency is not required to use progressive discipline under this subpart. The penalty for an instance of misconduct should be tailored to the facts and circumstances. In making a determination regarding the appropriate penalty for an instance of misconduct, an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness. Within the agency, a proposed penalty is in the

sole and exclusive discretion of a proposing official, and a penalty decision is in the sole and exclusive discretion of the deciding official. Penalty decisions are subject to appellate or other review procedures prescribed in law.

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

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

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

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

§ 752.203 Procedures.

(a) *Statutory entitlements.* An employee under this subpart whose suspension is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7503(b).