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Approved for Release

Date

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**DEPARTMENT OF COMMERCE  
OFFICE OF HUMAN RESOURCES MANAGEMENT**

**HUMAN RESOURCES (HR) BULLETIN #251, FY21**

**SUBJECT:** Implementation of Probation Regulations on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade, and Removal Actions and Adverse Actions

**EFFECTIVE DATE:** December 31, 2020

**EXPIRATION DATE:** Effective until cancelled or superseded

**PURPOSE:** To provide guidance to Department of Commerce (Department) employees on the implementation of the Office of Personnel Management's final regulations

**COVERAGE AND EXCLUSIONS:** The bulletin applies to any individual who is defined as an "employee" in 5 United States Code (U.S.C.) § 2105.

**BACKGROUND:** The Office of Personnel Management (OPM) issued final regulations on October 16, 2020 (*Federal Register* Vol. 85 No. 201). These regulations amend Title 5, Code of Federal Regulations (CFR) Parts 315, 432, and 752. Part 315 pertains to Probation on Initial Appointment to a Competitive Position; Part 432 concerns Performance-Based Reduction in Grade; and Part 752 deals with Adverse Actions.

**POLICY:** It is the policy of the Department to implement OPM's final regulations through this HR Bulletin. All other policy documents or past practices that contradict OPM's regulations and this HR Bulletin are considered null and void upon the bulletin's effective date. Nothing in the bulletin shall abrogate any collective bargaining agreement (CBA) in effect on the date of the bulletin.

**I. Notification of Probationary Period Expiring.** Servicing Human Resources Organizations (SHROs) are required to provide written notification to supervisors in their serviced areas, of the expiration of a subordinate employee's probationary period. This notification must be provided **no later than 3 months prior to the expiration date, and then again no later than 1 month prior to the expiration date.** The written notification must advise the supervisor of their responsibility to make an affirmative decision regarding the employee's fitness for continued employment, or otherwise take appropriate action.

**II. Integrity of Personnel Files.** Management may not agree to erase, remove, alter, or withhold information about an employee's performance or conduct in the employee's official personnel record, 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.

However, when persuasive evidence casts doubt on the validity of the action or the ability of management to sustain a proposed personnel action in litigation, management may decide to cancel or vacate the proposed action. To the extent an employee's personnel file or other records contain a proposed action that is subsequently cancelled, management has the authority to remove that action from the employee's personnel file or other agency record.

In addition, when corrective action is based on discovery of agency error, management has the authority to remove that action from the employee's personnel file or other agency record.

The SHRO **must** report the number and key terms of settlements reached by the agency in cases arising out of adverse personnel actions, including the removal of a record pertaining to an employee's performance or conduct for the reasons stated above, as part of its annual report to the OPM Director, required by Executive Order (Order) 13839, Section 6.

**III. Performance Improvement Period.** Performance improvement periods are limited to one single opportunity period for an employee to demonstrate acceptable performance in meeting the required performance standards. No additional performance improvement period, or similar informal period, can be provided prior to or in addition to the opportunity period under Part 432.

The minimum initial time period for a Performance Improvement Plan (PIP) is 30 days,<sup>1</sup> up to a maximum of 60 days, unless there is other specific language contained in a current CBA or a binding past practice that requires a longer PIP period. The Principal Human Resources Managers are delegated the authority to grant exceptions to the maximum 60-day period, for up to an additional 30 days (for a total of 90 days) when warranted.

#### **IV. Discipline Based on Retaliation Against Whistleblowers.**

##### Discipline of Supervisors

For supervisors who are not in the Senior Executive Service (SES) and who have committed a prohibited personnel practice [U.S. Merit Systems Protection Board - Prohibited Personnel Practices \(mspb.gov\)](https://www.mspb.gov), management may take an action for such cause as will promote the efficiency of the service (e.g., suspension of less than 14 days, or as appropriate, an adverse action). Supervisors who are in the SES may be disciplined for the reasons set forth in 5 U.S.C. 7543(a).

For the first prohibited personnel practice committed by the supervisor, management shall propose suspending the supervisor for a period of not less than 3 days, and may propose an additional action determined to be appropriate, including a reduction in grade or pay.

For the second prohibited personnel practice committed by the supervisor, management shall propose removal of the supervisor.

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<sup>1</sup> The word "days" refers to calendar days unless stated otherwise.

A supervisor against whom an action is proposed because of their retaliation against a whistleblower, is entitled to written notice that:

- States the specific reasons for the proposed action; and
- Informs the supervisor about their right to review the material that is being relied upon to support the reasons given in the notice for the proposed action.

That supervisor will have 14 days to submit an answer and furnish evidence in support of that answer. If, after the end of the 14-day period, the supervisor does not furnish any evidence, or if management determines that the evidence furnished by the supervisor is insufficient, management shall carry out the action proposed, as applicable.

To the extent practicable, the decision on a proposed removal should be issued within 15 days of the conclusion of the supervisor's opportunity to respond.

Consistent with Department Administrative Order (DAO) 202-250, "Delegation of Authority for Human Resources Management," the Chief Financial Officer and Assistant Secretary for Administration (CFO/ASA) has delegated authority from the Secretary to approve all actions affecting positions in the SES, including adverse actions.

## **V. Standard for Action and Penalty Determination.**

### **Progressive Discipline**

In accordance with existing law, progressive discipline **is not required**. The penalty for an instance of misconduct should depend on an application of the Douglas factors (Douglas v. Veterans Administration, 5 MSPB (U.S. Merit Systems Protection Board) 280 (1981)) and should be tailored to the particular facts and circumstances.

In accordance with DAO 202-751, "Discipline," Appendix A, preliminary judgment should be made as to an appropriate penalty without regard to any consideration(s) other than the nature of the offense, its seriousness and consequences, the nature of the employee's position, and the disciplinary effect of the penalty.

DAO 202-751, Appendix B also provides a table of offenses and penalties that serve as a guide. Greater or lesser penalties than those suggested may be imposed as circumstances warrant.

Decisions on proposed removals taken under 5 CFR Part 752, Adverse Actions, should be issued within 15 business days from the end of the employee's reply period following a notice of proposed removal. For proposed removals not issued within 15 business days, the SHRO must track, provide justification, and furnish the information to the Director, Office of Human Resources Management, by the last business day of each month. Thirty-calendar-day advance written notice of an adverse action must be provided to an employee unless management has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed. Note: Advance notices of proposed action of greater than 30 calendar days must be reported to OPM.

Note: Any proposed disciplinary action issued to an employee must include any right to appeal the action pursuant to section 1097(b)(2)(A) of Public Law 115-91, the forums in which the

employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

**REFERENCES:**

- Order 13839, “Promoting Accountability, and Streamlining Removal Procedures Consistent with Merit System Principles.”
- Title 5, CFR Parts 315, 432, and 752
- Title 5, U.S.C. Chapters 43 and 75

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