



U.S. MERIT SYSTEMS PROTECTION BOARD

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Chairman

August 21, 2014

The Honorable Jeff Miller
The Honorable Michael H. Michaud
House Committee on Veterans' Affairs
Cannon House Office Building
Room 335
Washington, D.C. 20515

The Honorable Bernard Sanders
The Honorable Richard Burr
Senate Committee on Veterans' Affairs
Russell Senate Office Building
Room 412
Washington, D.C. 20510

REPORT TO CONGRESS PURSUANT TO SECTION 707 OF THE VETERANS ACCESS, CHOICE, AND ACCOUNTABILITY ACT OF 2014

On August 7, 2014, President Obama signed the Veterans Access, Choice, and Accountability Act of 2014 ("the Act") – Public Law 113-146 – into law. Section 707(b) of the Act provides that the United States Merit Systems Protection Board ("MSPB" or "Board") shall, not later than 14 days after the date of enactment of the Act:

[S]ubmit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the actions the Board plans to take to conduct expedited reviews under section 713(d) of title 38, United States Code, as added by subsection (a) [of the Act]. Such report shall include a description of the resources the Board determines will be necessary to conduct such reviews that were not available to the Board on the day before the date of enactment of the Act.

Section 707 of the Act – by adding a new section 713 of title 38, United States Code – made significant changes to existing law addressing the ability of the Department of Veterans Affairs to either remove or transfer senior executive service (SES) employees and "SES-equivalent" employees within that agency ("covered employees"). Section 707 also amended existing law addressing the right of covered employees to appeal these disciplinary actions to the MSPB and the manner in which MSPB must adjudicate those appeals.

Pursuant to Section 707(b) of the Act, the MSPB hereby submits this report to the appropriate committees of Congress. The report addresses:

- The law as it applies to SES employees in the federal government, and which applied to SES employees at the Department of Veterans Affairs prior to enactment of Public Law 113-146;
- A review of the pertinent provisions of Section 707 of the Act;

- A summary of the actions the Board has taken to conduct “expedited” appeals as required by Section 707 of the Act; and
- A description of the resources that will be necessary to conduct expedited review of any appeals filed pursuant to Section 707 of the Act that were not available to the Board on the day before enactment.

I. LAW APPLICABLE TO SENIOR EXECUTIVE SERVICE EMPLOYEES IN THE FEDERAL GOVERNMENT, INCLUDING SENIOR EXECUTIVE SERVICE EMPLOYEES AT THE DEPARTMENT OF VETERANS AFFAIRS, PRIOR TO ENACTMENT OF PUBLIC LAW 113-146

Under applicable provisions of title 5, United States Code, a federal agency may take the following disciplinary actions against SES employees: 1) remove the employee from the civil service altogether; 2) suspend the employee for more than 14 days; or 3) remove the employee from an SES position and transfer him or her into a non-SES position. Generally, the form of discipline will depend upon whether the SES employee’s “conduct” or “performance” is at issue.

A. Removal From the Civil Service or Suspension for More than 14 Days

An agency may only remove an SES employee from the civil service, or suspend such an employee for more than 14 days, for the following “conduct” actions¹: misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of a function. 5 U.S.C. § 7543(a). When an agency takes such action against an SES employee for one of these reasons, the SES employee has the following rights:

- At least 30 days advance written notice before the removal or suspension action is taken;
- A reasonable time, but not less than 7 days to reply to the agency;
- Representation by an attorney or other representative before the agency;
- A written decision (and possibly an internal hearing) from the agency; and
- Appeal rights to the MSPB (including initial review by an MSPB Administrative Judge and the right to a second level of review by the three-member Board at MSPB Headquarters in Washington, D.C.).

5 U.S.C. § 7543(b)-(e).

If the MSPB issues a final order upholding an agency’s decision to either remove the SES employee from the civil service, or suspend the SES employee for more than 14 days, the employee is entitled to appeal the MSPB’s final order to an appropriate federal court. Generally, these appeals are properly filed at the United States Court of Appeals for the Federal Circuit in Washington, D.C. 5 U.S.C. § 7703(b)(1). However, if the SES employee alleges that his or her removal or suspension was the result of illegal discrimination, he or she is required to appeal the MSPB’s final order to an appropriate United States district court. 5 U.S.C. § 7703(b)(2).

¹ Under current law, SES employees in the federal government may not be removed from the civil service for “performance” reasons; they may only be removed from the senior executive service and placed into a non-senior executive service position. 5 U.S.C. § 3592. This is addressed in section I.B of the report.

B. Removal From the Senior Executive Service and Placement into a Non-Senior Executive Service Position

An agency may also remove an SES employee from the senior executive service and transfer the employee into a position outside of the senior executive service. This form of discipline is generally taken based upon an SES employee's "performance" and can be taken: 1) at any point during an SES employee's "probationary" period; or 2) once the probationary period is completed, at any point when the SES employee receives a "less than successful executive performance rating." 5 U.S.C. § 3592(a)(1)-(2). SES employees removed from the senior executive service based on "performance" have significantly limited rights in comparison to SES employees who are subjected to discipline based on "conduct." Specifically, an SES employee's rights in a performance-related action are:

- For SES employees who receive a "less than fully successful" performance rating, an "informal hearing" before the MSPB; however this informal hearing does not constitute a formal appeal to the MSPB and does not result in a decision by the MSPB;
- In certain limited appointments, removal without any MSPB appeals rights; and
- Nothing, including any appeal rights to the MSPB, if the SES employee is transferred out of the senior executive service during his or her probationary period.

5 U.S.C. § 3592.

Additionally, SES employees have no right to appeal to a federal court for performance-related reasons.

II. PERTINENT PROVISIONS OF THE ACT

As stated above, Section 707 of the Act significantly alters the manner in which covered employees can be disciplined for performance or conduct. Section 707 also significantly alters the right of these employees to appeal disciplinary actions to the MSPB.

A. Joint House Senate Conference Agreement

Before summarizing the provisions of Section 707 of the Act, the MSPB notes that the Joint House of Representatives and Senate Conference Committee considered two versions of the so-called "accountability" provisions of the law, which provided the Secretary authority to remove or transfer SES employees.

1. House-Approved Language

Under the legislation initially approved by the House of Representatives on October 13, 2013, the Secretary of the Department of Veterans Affairs ("Secretary") was provided with authority to remove or demote SES employees if the Secretary determined that the performance of the employee warranted removal or demotion. U.S. House. *Veterans Access, Choice, and Accountability Act of 2014, Conference Report* (to Accompany H.R. 3230). (H. Rpt. 113-564). The Secretary's decision was not subject to appeal to the MSPB or a federal court. *Id.* Thus,

under the House-approved version, covered employees could be removed at the will of the Secretary, without further external review of the Secretary's decision.

2. Senate-Approved Language

Under the legislation initially approved by the United States Senate on June 14, 2014, the Secretary was provided the same authority as under the House-approved legislation to remove or demote SES employees, upon his determination that the employee's performance warranted such action. *Id.* However, unlike the House-approved legislation, the Senate-approved legislation provided SES employees with the right to file an appeal of the personnel action to the MSPB within seven days. *Id.* The Senate-approved legislation also required the MSPB to "adjudicate the appeal within 21 days." *Id.*

3. Conference Agreement Language

The Conference Agreement "generally" adopted the Senate-approved legislation, which provided expedited MSPB appeal rights to covered employees upon the Secretary's determination that a covered employee be removed or transferred. However, the Conference Agreement amended the Senate-approved legislation by specifying which MSPB employees could adjudicate appeals filed by covered employees and adding a "finality" provision. *Id.* Specifically, the Conference Agreement provided that the "expedited review by the MSPB be conducted by an Administrative Judge at the MSPB, and if the MSPB Administrative Judge does not conclude their review within 21 days then the removal or demotion is final." *Id.* The Conference Agreement further specified that the three-member Board at MSPB Headquarters in Washington, D.C., which is composed of three presidentially-appointed and Senate-confirmed officers, was prohibited from reviewing the decision of an MSPB Administrative Judge in an appeal covered under the new law. *Id.*

Thus, after considering both the House- and Senate-approved legislation, the Conference Agreement provided covered employees who are either removed or transferred upon the determination of the Secretary, with a right to appeal that personnel action to the MSPB. These appeal rights differ from typical appeal rights for federal employees not covered by the Act in the following ways:

- **Time:** The appeal has to be filed within 7 days. Once filed, the MSPB must adjudicate the appeal and issue a decision within 21 days, or the Secretary's decision shall be become final; and
- **Review:** Decisions of MSPB Administrative Judges cannot be appealed to the three-member Board at MSPB Headquarters in Washington, D.C. or to a federal court for further review.

B. Section 707 of the Act

1. Removal or Transfer as Determined by the Secretary

Section 707 adds a new section 713 to title 38, United States Code. In pertinent part, that section provides that:

The Secretary may remove an individual employed in a senior executive position at the Department of Veterans Affairs from the senior executive position if the Secretary determines the performance or misconduct of the individual warrants removal. If the Secretary so removes such an individual, the Secretary may: A) remove the individual from the civil service (as defined in section 2101 of title 5); or B) ... transfer the individual from the senior executive position to a General Schedule position at any grade of the General Schedule for which the individual is qualified and that the Secretary determines is appropriate.

38 U.S.C. § 713(a)(1)(A)-(B).

2. Appeal Rights to the Merit Systems Protection Board

Upon either removal or transfer, a covered employee may appeal to the MSPB “under section 7701 of title” not later than seven days after the date of such removal or transfer². Once an appeal is filed, the Board shall refer it to an administrative judge “pursuant to section 7701(b)(1) of title 5,” who shall “expedite” such appeal and issue a decision “not later than 21 days after the date of the appeal.” If an MSPB Administrative Judge fails to issue a decision within 21 days, the Secretary’s decision to either remove or transfer the employee is final.

Significantly, and as described above, the decision of the Administrative Judge in any such “expedited” appeal shall be final and shall not be subject to further appeal, either to the three-member Board³ at MSPB Headquarters in Washington, D.C., or to any federal court.

Finally, Section 707 of the Act provides that the Board “may waive any other⁴ regulation in order to provide for the expedited review required under section 713(d) of title 38, United

² Because 38 U.S.C. § 713(d)(2)(A) allows covered employees who are either removed or transferred based upon the Secretary’s determination with respect to their “performance” to appeal to the MSPB, Congress has provided formal MSPB appeal rights to the covered employees which did not previously exist. See 5 U.S.C. § 3592(a) and section I.B. of this report.

³ In the MSPB’s interim final rule, which is addressed in section III of this report, MSPB stated that, as an agency that adjudicates appeals filed by veterans, and employs veterans, it supports any comprehensive legislation that improves conditions for veterans. However, the three Members of the Board – all of whom are presidentially-appointed, Senate-confirmed Officers of the Executive Branch of the Government, have serious concerns regarding the constitutionality of the Act’s prohibition on their participation in appeals filed under 38 U.S.C. § 713(d)(2)(A). A more detailed explanation of the Board Members’ concerns on this issue can be found in their August 1, 2014 correspondence to the president. See: <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1068653&version=1072950&application=ACROBAT>

⁴ Section 707(b)(4) of the Act provides that “Section 1201.22 of title 5, Code of Federal Regulations, as in effect on the day before the act of the enactment of this Act, shall not apply to expedited reviews carried out under section 713(d) of title 38, United States Code.”

States Code” and that, “to the maximum extent practical, the Secretary shall provide to the [MSPB], and to any administrative judge to whom an appeal under this section is referred, such information and assistance as may be necessary to ensure an appeal under this subsection is expedited.”

III. ACTIONS THE MSPB HAS TAKEN TO ENSURE EXPEDITED REVIEW OF AN APPEAL FILED UNDER SECTION 707 OF THE ACT

On August 19, 2014, MSPB published an interim final rule in the Federal Register in which it amended its rules of practice and procedure to adapt the Board’s regulations to the above-referenced changes in the law. The interim final rule took effect on August 19, 2014. Interested parties are permitted to submit comments concerning the interim rule, and the MSPB’s new regulations covering appeals filed under the Act, on or before September 18, 2014. Upon receipt of comments from interested parties, the MSPB will consider necessary changes.

The interim final rule is attached to this report for your convenience and can be found at 79 Fed. Reg. 48,491 (August 19, 2014) (to be codified at 5 C.F.R. pt. 1210). Generally, the new regulations impose procedural requirements on the parties that are necessary for the MSPB to adjudicate an appeal filed by a covered employee in the expedited manner required by the Act. Among other things, the MSPB’s regulations:

- Require the parties to use the MSPB e-appeal electronic filing system;
- Shorten numerous deadlines in order to comply with time limitations provided in the law;
- Require early disclosure of key documents and evidence; and
- Substantially streamline the discovery process, including the setting of deadlines on discovery and other matters.

Moreover, in recognition of the difficulties inherent in deciding appeals within 21 days, the regulations also provide MSPB Administrative Judges the widest possible latitude to take actions necessary to ensure that an appeal is adjudicated, and a decision is issued, within 21 days.

Finally, because the Act prohibits review of an MSPB Administrative Judge’s decision by either the three-member Board at MSPB Headquarters in Washington, D.C. or a federal court, the Board promulgated a regulation⁵ establishing the burden of proof and standard of review that will be applied in appeals filed under Section 707 of the Act. The promulgation of this regulation was necessary for two reasons. First, this regulation will ensure, to the fullest extent possible, uniformity in the application of a new law by the various MSPB Administrative Judges who will adjudicate these appeals without further review. Second, this regulation will provide both the Department of Veterans Affairs and the covered employees who may file appeals with notice of the legal framework that will be applied by MSPB Administrative Judges during the adjudication of appeals filed under 38 U.S.C. § 713(d)(2)(A).

The burden of proof and standard of review in these cases is consistent with the requirements of Section 707 of the Act, most notably because 38 U.S.C. § 713(d), as created by the Act, provides that “any removal or transfer ... may be appealed to the Merit Systems

⁵ The MSPB’s regulation on burden and degree of proof for appeals filed outside of the Act can be found at 5 C.F.R. § 1201.56.

Protection Board *under section 7701 of title 5.*” (emphasis added). Section 7701 of title 5, United States Code, provides in pertinent part that:

The decision of an agency shall be sustained ... only if the agency’s decision ... is supported by a preponderance of the evidence.

5 U.S.C. § 7701(c)(1)(B)⁶. Thus, under MSPB’s regulation on this issue:

- The Department of Veterans Affairs bears the burden to prove that the appellant engaged in misconduct or poor performance, and the Secretary’s determination shall be sustained only if the factual reasons for the charge(s) are supported by the preponderance of the evidence;
- Proof of the misconduct or poor performance shall create a presumption that the Secretary’s decision to remove or transfer the appellant was warranted; and
- The appellant may rebut this presumption by establishing that the imposed penalty was unreasonable under the circumstances of the case.

Additionally, 5 U.S.C. § 7701(c)(2)(B) provides that “an agency’s decision may not be sustained ... if the employee or applicant for employment shows that the decision was based on any prohibited personnel practice described in section 2302(b) [of title 5, United States Code].” Among the “prohibited personnel practices” described in section 2302(b) are illegal discrimination, 5 U.S.C. § 2302(b)(1)(A)-(E), coercion of political activity or reprisal for refusal to engage in political activity, 5 U.S.C. § 2302(b)(3), and reprisal for lawful “whistleblowing,” 5 U.S.C. § 2302(b)(8). Thus, if such issues are raised by appellants in any appeal filed pursuant to 38 U.S.C. § 713(d)(2)(A), MSPB Administrative Judges will be required to consider them before issuing a decision.

IV. DESCRIPTION OF RESOURCES NECESSARY TO CONDUCT EXPEDITED REVIEWS AS REQUIRED BY THE ACT

Finally, Section 707(b) of the Act requires the MSPB to provide “a description of the resources the Board determines will be necessary to conduct such reviews that were not available to the Board on the day before the date of enactment of the Act.”

The resources that the MSPB will need to adjudicate appeals filed under 38 U.S.C. § 713(d)(2)(A), in the manner required by 38 U.S.C. § 713(e), will correlate directly with the number of appeals that are filed. Unfortunately, as of the date of this report, the MSPB cannot state how many appeals, if any, will be filed by covered employees. Consequently, as of this date, the MSPB cannot state with any certainty the resources that will be needed to comply with the Act. The MSPB can approximate, however, that each “expedited” appeal will cost \$4,380 to adjudicate. This figure includes costs associated with employing necessary personnel, court

⁶ 5 U.S.C. § 7701(c)(1)(A) generally provides that an agency’s action based on unacceptable performance “described in section 4303 [of title 5, United States Code]” must be supported by “substantial evidence.” MSPB has determined that the “substantial evidence” burden referred to in Section 7701(c)(1)(A) is not applicable in an appeal filed by a covered employee based on performance because the personnel action taken by the Department of Veterans Affairs will have been taken pursuant to 38 U.S.C. § 713(a), as created by the Act, not 5 U.S.C. § 4303. Additionally, 5 U.S.C. § 4303 does not apply to employees of the senior executive service. 4 U.S.C. § 4301(2)(E).

reporting, and video conferencing. The MSPB also estimates that a one time cost of \$20,000 will be necessary to update its electronic filing system so that it can appropriately track and monitor any appeals filed under the Act. These costs can be explained in greater detail to you or your staff upon your request and at your convenience.

In sum, because the resources the MSPB will need to comply with Section 707 of the Act cannot be known at this time, the MSPB respectfully requests that it be permitted to update your staffs on a monthly basis, so that appropriate consideration can be given to this issue, both by the House and Senate Committees on Veterans Affairs and Appropriations.

Thank you for the opportunity to report to you on this very important issue. Should you or your staff wish to speak with me or any other MSPB official, please do not hesitate to contact me directly.

Sincerely,



Susan Tsui Grundmann

Attachment: Interim Final Rule

c.c.: The Honorable Barbara Mikulski
The Honorable Richard Shelby
The Honorable Harold Rogers
The Honorable Nita Lowey