

an action covered by this subchapter against an employee only for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

(b) An employee against whom an action covered by this subchapter is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment can be imposed, stating specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and specific reasons therefor at the earliest practicable date.

(c) 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.

(d) 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.

(e) Copies of the notice of proposed action, the answer of the employee when written, and 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 Merit Systems Protection Board upon its request and to the employee affected upon the employee's request.

(Added Pub. L. 95-454, title IV, §411(2), Oct. 13, 1978, 92 Stat. 1174; amended Pub. L. 97-35, title XVII, §1704(d)(2), Aug. 13, 1981, 95 Stat. 758; Pub. L. 98-615, title III, §304(c), Nov. 8, 1984, 98 Stat. 3219.)

AMENDMENTS

1984—Subsec. (a). Pub. L. 98-615 inserted reference to failure to accept a directed reassignment or to accompany a position in a transfer of function.

1981—Subsec. (a). Pub. L. 97-35 substituted "misconduct, neglect of duty, or malfeasance" for "such cause as will promote the efficiency of the service".

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-615 effective Nov. 8, 1984, see section 307 of Pub. L. 98-615, set out as a note under section 3393 of this title.

EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by Pub. L. 97-35 effective June 1, 1981, with certain exceptions and conditions, see section 1704(e) of Pub. L. 97-35, set out as an Effective Date note under section 3595 of this title.

CHAPTER 77—APPEALS

Sec.	
7701.	Appellate procedures.
7702.	Actions involving discrimination.
7703.	Judicial review of decisions of the Merit Systems Protection Board.

AMENDMENTS

1978—Pub. L. 95-454, title II, §205, Oct. 13, 1978, 92 Stat. 1138, substituted "Appellate procedures" for "Appeals of preference eligibles" in item 7701, and added items 7702 and 7703.

§ 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless—

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same

standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the de-

cision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during

that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 530; Pub. L. 95-454, title II, §205, Oct. 13, 1978, 92 Stat. 1138; Pub. L. 96-54, §2(a)(45), Aug. 14, 1979, 93 Stat. 384; Pub. L. 99-386, title II, §208, Aug. 22, 1986, 100 Stat. 824; Pub. L. 101-12, §6, Apr. 10, 1989, 103 Stat. 33; Pub. L. 101-194, title V, §506(b)(6), Nov. 30, 1989, 103 Stat. 1758; Pub. L. 101-280, §6(d)(2), May 4, 1990, 104 Stat. 160; Pub. L. 101-376, §3, Aug. 17, 1990, 104 Stat. 462; Pub. L. 102-175, §5, Dec. 2, 1991, 105 Stat. 1223; Pub. L. 102-378, §2(56), Oct. 2, 1992, 106 Stat. 1354; Pub. L. 107-296, title XIII, §1321(a)(3), Nov. 25, 2002, 116 Stat. 2297.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 863 (less 1st 168 words, and less 2d proviso).	June 27, 1944, ch. 287, §14 (less 1st 168 words, and less 2d proviso), 58 Stat. 390. Aug. 4, 1947, ch. 447, 61 Stat. 723.
.....	5 U.S.C. 868 (proviso).	June 22, 1948, ch. 604, 62 Stat. 575.

The application of the section is established by the words "A preference eligible employee as defined by section 7511 of this title". Specific mention of the actions appealable are covered by the reference to "an adverse decision under section 7512 of this title". The words "administrative authority" are substituted for "administrative officer" to avoid conflict with the definitions of "employee" and "officer" in chapter 21 of this title and to include an individual who is employed by the government of the District of Columbia or who is a member of a uniformed service as such an individual could have been an "administrative officer" under former section 863. The words "the date of" in the phrase "after the date of receipt of notice" are omitted as unnecessary. The words "reasonable rules and" in the phrase "reasonable rules and regulations" are omitted as unnecessary. The word "proper" in the phrase "proper administrative officer" is omitted as unnecessary. The word "designated" in the phrase "designated representative" is omitted as unnecessary. Standard changes are made to conform with the definitions applicable and the style of this title outlined in preface to the report.

AMENDMENTS

2002—Subsec. (c)(1)(A). Pub. L. 107-296, which directed the amendment of subpar. (A) by striking "or removal

from the Senior Executive Service for failure to be recertified under section 3393a", was executed by striking out "or a removal from the Senior Executive Service for failure to be recertified under section 3393a" after "section 4303" to reflect the probable intent of Congress.

1992—Subsec. (c)(1)(A). Pub. L. 102-378 amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: "in the case of an action based on unacceptable performance described in section 4303 or a removal from the Senior Executive Service for failure to be recertified under section 3393a of this title, is supported by substantial evidence, or".

1991—Subsec. (b)(3). Pub. L. 102-175 added par. (3).

1990—Subsec. (c)(1)(A). Pub. L. 101-280 amended Pub. L. 101-194, see 1989 Amendment note below.

Subsecs. (j), (k). Pub. L. 101-376 added subsec. (j) and redesignated former subsec. (j) as (k).

1989—Subsec. (b). Pub. L. 101-12 designated existing provisions as par. (1) and added par. (2).

Subsec. (c)(1)(A). Pub. L. 101-194, as amended by Pub. L. 101-280, which directed the substitution of "or a removal from the Senior Executive Service for failure to be recertified under section 3393a of" for "of", was executed by making the substitution for the second reference to "of" as the probable intent of Congress.

1986—Subsec. (i)(2). Pub. L. 99-386 substituted "fiscal" for "calendar".

1979—Subsec. (e)(1). Pub. L. 96-54, §2(a)(45)(A), substituted "administrative" for "administration".

Subsec. (g)(1). Pub. L. 96-54, §2(a)(45)(B), substituted "(as the case may be)" for "as the case may be".

Subsec. (h). Pub. L. 96-54, §2(a)(45)(C), substituted "subsection (e)" for "subsection (d)".

1978—Pub. L. 95-454 substituted "Appellate procedures" for "Appeals of preference eligibles" in section catchline, and in text substituted provisions relating to procedures applicable with respect to the Merit Systems Protection Board for an employee or applicant for employment, for provisions relating to appeals of preference eligible employees.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107-296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107-296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101-376 effective Aug. 17, 1990, and applicable with respect to any appeal or other proceeding brought on or after such date, see section 4 of Pub. L. 101-376, set out as a note under section 4303 of this title.

EFFECTIVE DATE OF 1989 AMENDMENTS

Amendment by Pub. L. 101-194 effective Jan. 1, 1991, see section 506(d) of Pub. L. 101-194, set out as a note under section 3151 of this title.

Amendment by Pub. L. 101-12 effective 90 days following Apr. 10, 1989, see section 11 of Pub. L. 101-12, set out as a note under section 1201 of this title.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-54 effective July 12, 1979, see section 2(b) of Pub. L. 96-54, set out as a note under section 305 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-454 effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95-454, set out as a note under section 1101 of this title.

SAVINGS PROVISION

For effect of Pub. L. 101-12 on orders, rules, and regulations issued before effective date of Pub. L. 101-12, administrative proceedings pending at time provisions of Pub. L. 101-12 take effect, and suits and other proceed-

ings as in effect immediately before effective date of Pub. L. 101-12, see section 7 of Pub. L. 101-12, set out as a note under section 1201 of this title.

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of reporting provisions in subsec. (i)(2) of this section, see section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and page 177 of House Document No. 103-7.

EXECUTIVE ORDER NO. 11787

Ex. Ord. No. 11787, June 11, 1974, 39 F.R. 20675; Ex. Ord. No. 12107, Dec. 28, 1978, 44 F.R. 1055, which provided that the appeals system established by the Merit Systems Protection Board is the sole system of appeal for an employee covered by that appeal system, was revoked by Ex. Ord. No. 12553, Feb. 25, 1986, 51 F.R. 7237.

§ 7702. Actions involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who—

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by—

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves—

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of—

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

(b)(1) An employee or applicant may, within 30 days after notice of the decision of the Board

under subsection (a)(1) of this section, petition the Commission to consider the decision.

(2) The Commission shall, within 30 days after the date of the petition, determine whether to consider the decision. A determination of the Commission not to consider the decision may not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(3) If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and, on the basis of the evidentiary record before the Board, as supplemented under paragraph (4) of this subsection, either—

(A) concur in the decision of the Board; or

(B) issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law—

(i) the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in subsection (a)(1)(B) of this section, or

(ii) the decision involving such provision is not supported by the evidence in the record as a whole.

(4) In considering any decision of the Board under this subsection, the Commission may refer the case to the Board, or provide on its own, for the taking (within such period as permits the Commission to make a decision within the 60-day period prescribed under this subsection) of additional evidence to the extent it considers necessary to supplement the record.

(5)(A) If the Commission concurs pursuant to paragraph (3)(A) of this subsection in the decision of the Board, the decision of the Board shall be a judicially reviewable action.

(B) If the Commission issues any decision under paragraph (3)(B) of this subsection, the Commission shall immediately refer the matter to the Board.

(c) Within 30 days after receipt by the Board of the decision of the Commission under subsection (b)(5)(B) of this section, the Board shall consider the decision and—

(1) concur and adopt in whole the decision of the Commission; or

(2) to the extent that the Board finds that, as a matter of law, (A) the Commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation or policy directive, or (B) the Commission decision involving such provision is not supported by the evidence in the record as a whole—

(i) reaffirm the initial decision of the Board; or

(ii) reaffirm the initial decision of the Board with such revisions as it determines appropriate.

If the Board takes the action provided under paragraph (1), the decision of the Board shall be a judicially reviewable action.

(d)(1) If the Board takes any action under subsection (c)(2) of this section, the matter shall be