

Disciplinary Procedures Applicable to VA Senior Executives

The expedited Department of Veterans Affairs (VA) Senior Executive removal authority codified in section 707 of the Veterans Access, Choice, and Accountability Act of 2014 (Choice Act) has increased Congressional and media interest in VA's employee discipline activities. This White Paper outlines the pre-discipline procedures and post-discipline appeal processes applicable to VA Senior Executive Service (SES) and SES-equivalent removal actions under the new law, including the requirement that such actions be supported by evidence of specific misconduct or poor performance warranting removal.

Background: Unlike many private sector employees who may be terminated "at will," career Federal employees, whether at the VA or other Federal agency, have a constitutionally-protected property interest in continued employment. For that reason, any action to remove a career Federal employee must be supported by evidence of misconduct and preceded by advance notice and an opportunity to respond to the proposed action. Most career Federal employees also have the right to appeal their removal to a neutral third party.

While the specific pre-removal and appeal procedures vary depending on the nature of an employee's appointment authority, most career Federal employees are entitled to receive 30 days' advance written notice of a proposed removal, to have at least seven days' time to review and reply to the evidence supporting the action, and an opportunity to appeal to an independent tribunal called the Merit Systems Protection Board (MSPB). MSPB appeal rights generally include the right to an initial decision by an administrative judge (AJ), a review of adverse AJ decisions by the three-member MSPB Board, and final judicial review of adverse Board decisions by a Federal court. In accordance with statute, MSPB requires Federal agencies to support removals for misconduct with a preponderance of the evidence, meaning evidence that it is more probable than not that the employee engaged in misconduct warranting removal.

Removal actions under these generally-applicable rules can take many months or even years to resolve, beginning with an initial investigation to gather evidence and continuing through the disciplinary proposal and decision process to the end of a Federal Circuit appeal.

Removal of VA Senior Executives under the VA Choice Act: Section 707 of the Choice Act authorizes the VA Secretary to remove¹ a Senior Executive "if the Secretary determines the performance or misconduct of the individual warrants such removal." This new statutory authority excludes VA SES removal actions from the 30-days' notice and 7-days' response requirements, but does not replace those requirements with any other specifics regarding advance notice or time to reply.

¹ The Choice Act removal authority allows the Secretary to either remove a Senior Executive from Federal employment or transfer the executive to a non-SES position.

With respect to MSPB appeals, the Choice Act excludes VA SES removals from the full array of appeal rights, substituting an abbreviated appeal process that ends with an AJ decision issued within 28 days of the decision to remove. Although the Choice Act is silent as to VA's burden of proof on appeal, MSPB's implementing regulations require VA to support removal actions with a preponderance of the evidence and to prove the penalty of removal was reasonable under the circumstances of a given case.

VA's policy implementing the Choice Act removal authority is intended to be fair to employees while also ensuring SES performance and conduct issues are resolved quickly and with finality. The policy provides VA SES 5 days' advance notice of proposed removal and an opportunity to respond in writing to the charges and evidence supporting the action. The policy also provides that removal decisions must be supported by substantial evidence, meaning such relevant evidence as a reasonable mind might accept as adequate to support the action. To sustain a removal on appeal to MSPB, however, VA must meet the higher "preponderance of the evidence" burden set forth in MSPB's implementing regulations.

Taken together, the expedited pre-removal process set out in VA's implementing policy and MSPB's abbreviate appeal process will allow VA to resolve SES removal actions under the Choice Act more quickly than it could under the prior process. However, the agency's evidentiary burden—proving misconduct or poor performance warranting removal by a preponderance of the evidence—remains the same under the new MSPB rules as before. As a result, even under the new expedited process, VA must fully investigate alleged SES performance or conduct issues and compile strong evidence before taking action to remove a senior executive and withstand third party review before MSPB.