



DEPARTMENT OF THE ARMY
HEADQUARTERS, UNITED STATES ARMY, EUROPE, AND SEVENTH ARMY
OFFICE OF THE DEPUTY CHIEF OF STAFF, PERSONNEL
UNIT 29351
APO AE 09014

31 Jan 2000

AEAGA-CE (690-752)

CPD Letter 690-40-00-03

Merit System Protection Board (MSPB) Appeal Rights in Association with
The Correction of Personnel Actions

1. Purpose: To establish minimum requirements for providing MSPB appeal rights to employees covered by 5 CFR 752.401 (e.g. competitive service employees who are not serving a probationary period) and whose grade and/or pay have been reduced as a result of the correction of a personnel action.

2. REFERENCE:

- a. 5 USC 3221
- b. 5 USC 7511
- c. 5 USC 7512
- d. 5 CFR Part 752

3. FILING INSTRUCTIONS: IAW Marks Instruction, file in office file numbered 752.

4. GUIDANCE:

a. Recent cases involving jurisdiction in matters of reduction in grade and/or pay resulting from Agency corrections of personnel actions indicate that MSPB has jurisdiction in some situations. The MSPB will apply a three-part test for jurisdiction in cases involving alleged demotions after cancellations of promotions and appointments:

(1) The employee must raise a non-frivolous allegation that the promotion or appointment actually occurred (that it was approved by an authorized appointing official who was aware that he or she was making the promotion or appointment);

(2) Some action denoting acceptance of the promotion/appointment must have been taken (i.e., employee officially accepted or performed duties), and;

(3) The promotion/appointment must not have been revoked prior to employee's performance in the higher grade.

b. Consequently, employees affected by the correction of personnel actions involving demotions, changes to lower grade, and/or reductions in rate of pay not otherwise excluded from coverage by statute (e.g. employees serving a probationary/trial period) have the right to due process, including the right to appeal to the MSPB.

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c. Due process rights for affected employees includes:

(1) The affected employee must be provided advanced written notice of the proposed correction. This notice must include statements of:

- Right to representation and management's rights to exclude a representative due to conflict of interest considerations;
- Right to review material upon which action is based and applicable regulations
- Who to contact and where regulations and material are located;
- Statement that his/her reply will be considered before a decision is made;
- Fifteen (15) calendar days to reply;
- Entitlement to a reasonable amount of official time to prepare the reply--which must be requested from the employee's supervisor;
- Consideration for extension of reply period and how to request an extension;
- Who to reply to (Deputy Director, Civilian Personnel Operations Center) and his/her address, phone number, etc;
- Statement that the final decision will be in writing; and
- Action will not be made effective earlier than 30 calendar days after the employee receives the written notice of decision.

(2) A copy of the above notice of proposed action must be provided to the employee's supervisor.

(3) A written notice of decision must be delivered to the employee before the effective date of the corrective action. Include the following statement in the notice of decision:

"You have the right to appeal this action to the Merit System Protection Board (MSPB), 5203 Leesburg Pike, Suite 1109, Falls Church, VA 22041. For your convenience, a copy of the MSPB appeal procedures and a copy of the MSPB appeal form are attached. You may be represented by a representative of your choice in filing an appeal. If you elect to appeal, you must file your appeal with the MSPB during the period beginning with the day after the effective date of this corrective action but not later than 30 days after the effective date."

(4) A copy of the notice of decision must be provided to the employee's supervisor.

d. Excluded from coverage of this policy are:

(1) Reduction in grade of an employee who fails to satisfactorily complete a supervisory/managerial probationary period if reduced to the grade held before the probationary supervisory/managerial position.

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- (2) Voluntary reductions in grade and pay.
- (3) The correction of an administrative error in setting within-grade step rates.

FOR THE DEPUTY CHIEF OF STAFF, PERSONNEL:

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TONI B. WAINWRIGHT
Director of Civilian Personnel
United States Army, Europe