



Recommendation 72-8

Adverse Actions Against Federal Employees

(Adopted December 15, 1972)

A critical part of the mission of the Administrative Conference is to study the processes of government to assure the full protection of the rights of private citizens, including the rights of federal employees. At the same time, the Conference is equally concerned about assisting government agencies to devise and implement efficient administrative procedures that will facilitate accomplishment of their varied programs.

The Civil Service Commission and other government agencies each year conduct a large number of formal personnel action proceedings that involve charges of personal misconduct, poor job performance, or other behavior which reflects adversely on the individual employee. Each year several thousand adverse personnel action appeals are decided throughout the Government; the Civil Service Commission alone adjudicates well over 1200 appeals annually. The nature of these cases and the size of the caseload make it imperative both that proceedings be conducted with scrupulous fairness, and that procedures be neither too costly nor time-consuming. While existing adverse action procedures have attempted to meet these objectives, the Conference believes that implementation of this recommendation will yield substantial improvements in many highly significant respects.

This recommendation is intended to apply only to those classes of federal civilian employment currently entitled to adverse action procedures, as identified in Subchapter S2 of Federal Personnel Manual Supplement 752-1.

A. Definitions and Standards

1. *Adverse Action.* In all cases in which an employing agency takes a personnel action adversely affecting an employee on the basis of his conduct or performance, the employee should be afforded an opportunity for an evidentiary hearing and his case should be decided on the basis of the record made at the hearing.

Such procedures are inappropriate, however, for use in situations in which an agency action made on the basis of broad managerial considerations of agency structure or resource allocation (*e.g.*, change in job classification, reduction in force) has incidental adverse effects on



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

certain agency employees. The Civil Service Commission should seek legislation redefining the category of "adverse action" to exclude therefrom personnel actions not based on the individual employee's conduct or performance. However, in any proceeding to effect a personnel action assertedly based on managerial considerations, the employee should retain the right to challenge the bona fides of the agency's action.

2. *Efficiency of the Service.* The Civil Service Commission should publish regulations or interpretive rules elaborating in as much detail as practicable the statutory standard of "efficiency of the service."

B. *Procedures for Agency Hearings*

1. All employing agencies should establish procedures for personally advising an employee who has received a letter of proposed adverse action about the consequences of the action proposed and the procedures available for contesting it, which should continue to include the right to respond to the employing agency's charges prior to an evidentiary hearing.

2. An employee against whom an adverse action is proposed should have an opportunity for a prompt evidentiary hearing before the action becomes effective. However, if the employing agency determines that retention of the employee in his current duty assignment will adversely affect the ability of his office or installation to perform its functions, the employing agency should be able, pending its final decision (a) to reassign the employee; (b) to place the employee on administrative leave with pay; and (c) if, for a cause attributable to the employee, the hearing is not commenced within 30 days after the agency notifies him of its readiness to proceed or has not resulted in a final agency decision within 60 days after such notification, to place the employee on leave without pay.

3. Except in extremely rare cases where an employing agency can establish good cause for keeping the hearing closed, an employee subject to adverse action should have a right to elect a hearing that is open to the public. An employee is entitled to a private hearing, however, at which he may be accompanied by an observer of his choosing, in addition to any representative. This recommendation is not intended to limit the hearing officer's traditional authority to exclude other witnesses during the taking of testimony, or to maintain order and decorum.

4. The Civil Service Commission should assign the hearing officers to conduct hearings before employing agencies. A hearing officer should be suitably equipped by training and



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

experience to conduct such personnel hearings, and, unless he is an administrative law judge, should not be an employee of the charging agency. Ordinarily, hearing officers should be drawn from a pool established and employed by the Civil Service Commission, but when appropriate the Commission should be able to assign as hearing officers other persons with the prescribed qualifications.

5. Civil Service Commission regulations should make clear that at any hearing the employing agency has both the burden of coming forward with evidence and the burden of persuasion.

6. The hearing officer should use a pre-hearing conference or other means to identify and limit the hearing to the trial of material issues of fact as to which the parties genuinely disagree. The hearing officer should also be authorized to resolve summarily those material issues of fact as to which he is satisfied there is no genuine disagreement.

7. The hearing officer should be authorized to order an employing agency to produce witnesses in its employ or documentary evidence that he believes may be relevant to an employee's case. He should be free to call witnesses himself, to question witnesses for both parties, and to provide guidance to employees who are not represented. With the completion of the hearing, the evidentiary record should be considered closed for purposes of the employing agency's decision and any appeal by the employee to the Civil Service Commission.

8. The hearing officer should make factual findings and prepare a proposed decision, which would be submitted to the official designated by the employing agency to make the agency decision and made available to the parties along with the transcript of the hearing. The parties should have an opportunity (*e.g.*, ten days) in which to submit written argument, including objections to the proposed decision, to the deciding agency official. If the deciding official does not accept the hearing officer's proposed decision, he should prepare a formal agency decision that, among other things, states specifically the reasons for rejecting the hearing officer's findings or recommended disposition. The employing agency should be able to make its personnel action fully effective upon the issuance of its decision, and any subsequent appeal should not have the effect of postponing such effectiveness unless the employing agency otherwise directs.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

C. Procedures for Appeals from Agency Decisions

1. Employing agency appeals systems, apart from that required by paragraph B(8) (*i.e.*, a final agency decision following the hearing at a level higher than that proposing the action) should be abolished.

2. An employee against whom adverse action is taken should have an opportunity for a single appeal outside his agency, to a central appellate authority within the Civil Service Commission.

3. The Civil Service Commission's appellate authority should customarily be limited in its review to the record compiled at the employing agency. Upon the motion of an employee, however, the authority should be able to admit, or remand to the hearing officer for the admission of, evidence that the employee could not reasonably have produced at the original hearing, subject to the employing agency's right to respond or rebut.

4. The Commission's appellate authority should have authority to affirm, or to reverse, or to modify the employing agency's disciplinary action in any appeal.

5. The Commission's appellate authority should assign cases for decision by lot or by rotation so far as practicable, and permit announcement of dissenting and concurring views.

6. The Civil Service Commissioners should retain discretionary authority to reopen and decide exceptional cases upon the petition of either the employing agency or the employee.

7. Employing agency and Commission decisions in adverse action cases should be publicly available after minimum editing necessary to protect employee privacy.

D. Ex Parte Communications

1. (a) At no time should officials of the Civil Service Commission who participate in or are responsible for the disposition of employee appeals provide advice to either party or to the hearing officer on the initiation, processing, or disposition of any adverse action.

(b) Other Civil Service Commission officials should not advise or consult with either party, or their representatives, regarding the merits of any case that has been formalized by the issuance of a letter of proposed adverse action.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2. Hearing officers who conduct agency hearings and Civil Service Commission officials who participate in or are responsible for deciding employee appeals should be free from all *ex parte* influence or advice—including communications from employing agencies, employee representatives and other Commission employees—relating to the factual issues or appropriate disposition of any adverse action or appeal. Expert professional advice on the facts or disposition of a case (such as the evaluation of a job classification specialist) should only be received on the record, subject to the right of both parties to respond.

E. Role of the Civil Service Commission

With the additional safeguards of the independence of the Civil Service Commission's appellate authority, proposed under C and D above, it is not necessary to establish a new, independent agency to adjudicate adverse action appeals.

F. Effect on Employee Grievance Procedures

The provisions of this recommendation are not intended to supplant or preclude provision for employee grievance procedures in existing or future collective bargaining agreements.

Citations:

38 FR 19793 (July 23, 1973)

__ FR ____ (2012)

2 ACUS 73