

ACTIONS TAKEN UNDER 38 U.S.C. § 714

1. **PURPOSE.** To provide guidance on the procedures for taking actions under [38 U.S.C. § 714](#), as enacted by the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 ([P.L. 115-41](#)), Title II, Section 202, “Improved Authorities of Secretary of Veterans Affairs to Improve Accountability of Employees” (Accountability Act). (As amended by P.L. 116-61, § 6(1), September 30, 2019, 133 Stat. 1116 (technical amendment correcting a typographical error in 38 U.S.C. § 714(e)(2)(B)).) This Notice establishes Department-wide policy implementing the disciplinary authority provided by Section 714 of the Accountability Act. This Notice applies to misconduct and performance that results in the Secretary of the Department of Veterans Affairs (VA), or his or her designee, proposing to remove, demote, or suspend for 15 calendar days or more a covered employee utilizing the section 714 authority, as defined below. The procedural entitlements contained in VA Directive and Handbook 5021, Employee Management Relations, do not apply to actions taken pursuant to this authority, unless otherwise indicated in this Notice.
2. **POLICY.**
 - a. Under section 714 of title 38, as added by the Accountability Act, the Secretary, or his or her designee, (hereinafter referred to collectively as “the Secretary”) may propose to suspend, demote, or remove a covered employee if the Secretary determines by a preponderance of the evidence the covered employee’s performance or misconduct warrants such action.
 - b. An adverse action taken against a covered employee will be taken under the authority of [38 U.S.C. § 714](#), unless determined by the proposing official, after consultation with the Office of General Counsel (OGC) and the servicing Human Resource (HR) office, that such action is not covered by [38 U.S.C. § 714](#) or that there is clear justification that it should not be taken under these procedures (e.g., the action should be taken under 5 U.S.C. Chapter 75 based on the facts of a particular matter).
 - (1) 5 U.S.C. Chapters [43](#) and [75](#) and 5 C.F.R. Parts [432](#) and [752](#) do not apply to actions taken under [38 U.S.C. § 714](#).
 - (2) For actions based on performance, this means that, absent a clear justification or an applicable collective bargaining agreement (CBA) requirement, performance actions should be taken using the procedures in this Notice without providing an opportunity to improve as required by [5 U.S.C. Chapter 43](#).
 - c. For actions taken pursuant to [38 U.S.C. § 714](#), its statutory procedures replace any inconsistent provisions in any applicable CBA. Memorandums of understanding between VA and unions covering any bargaining unit employees

(BUEs) applicable to [38 U.S.C. § 714](#) will apply. Refer to paragraph 3.b. of this Notice for information regarding implementation to BUEs.

- (1) For covered employees who are BUE, only the provisions of the applicable CBA that are directly inconsistent with [38 U.S.C. § 714](#) (e.g., the timelines and certain procedures) are superseded. Any questions regarding whether a provision in the applicable CBA conflicts with [38 U.S.C. § 714](#) should be directed to the Office of the Chief Human Capital Officer (OCHCO) Labor Management Relations (LMR) and OGC.
- (2) The Federal Labor Relations Authority has held that [38 U.S.C. § 714](#) procedures only apply after VA has initiated a performance-based action. Therefore, if an applicable CBA specifies procedures that must occur prior to a performance-based action being initiated (e.g., an opportunity to improve, also known as a performance improvement plan (PIP)), those procedures must still be followed. Further, after the performance-based action has been initiated, if an applicable CBA specifies procedures that are not in conflict with the Accountability Act, those procedures should also continue to be followed.

3. SCOPE. This Notice applies as follows:

a. Employees Covered.

- (1) Title 5 employees unless otherwise excluded; and
- (2) Preference eligible employees in the Veterans Canteen Service (VCS) appointed under [38 U.S.C. Chapter 78](#). (See [Veterans Canteen Service Procedures, VCS 1008.01](#).)

b. Employees Excluded. The following employees are excluded:

- (1) Senior Executive Service employees appointed under [5 U.S.C. § 3132\(a\)](#).
- (2) Employees appointed pursuant to 38 U.S.C. Chapters [73](#) or [74](#).
- (3) An individual occupying a senior executive position as defined in [38 U.S.C. § 713\(d\)\(3\)](#);
- (4) An individual who has not completed a probationary or trial period in accordance with [Civil Service Rule XI](#);
- (5) A political appointee as defined in 38 U.S.C. § 714(h)(5);
- (6) Any other employee in a position excluded from the competitive service due to its confidential, policy-determining, policy-making, or policy-advocating character (i.e., Schedule Policy/Career and Schedule G); and

- (7) Non-preference eligible employees in the VCS appointed under [38 U.S.C. Chapter 78](#). (See [Veterans Canteen Service Procedures, VCS 1008.01](#).)

NOTE: This Notice will not be implemented for any bargaining unit employee (i.e., employees who are exempt from [Executive Order 14251, Exclusions from Federal Labor-Management Relations Programs](#), dated March 27, 2025, based on their occupation, (i.e., police officers (occupational series 0083), firefighters (occupational series 0081) and security guards (occupational series 0085)) until VA has met its labor obligations under the Federal Service Labor Management Relations Statute and the applicable CBA.

c. **Actions Covered.** The provisions of this Notice apply to the following actions:

- (1) Suspension of 15 days or more.
- (2) Demotion.
- (3) Removal.

d. **Actions Excluded.** The provisions of this chapter do not apply to the following actions:

- (1) Actions taken under different disciplinary authorities (e.g., 5 U.S.C. Chapters [43](#) and [75](#) and 5 C.F.R. Parts [432](#) and [752](#)).
- (2) Reductions in force in accordance with [5 C.F.R. § 351](#).
- (3) Reduction in grade of a supervisor or manager who has not completed the probationary period under [5 U.S.C. § 3321\(a\)\(2\)](#) if such reduction is to the grade held immediately before becoming such supervisor or manager.
- (4) Any action required by the Merit Systems Protection Board (MSPB) under the provisions of [5 U.S.C. § 1215](#).
- (5) Action that entitles an employee to grade retention under [5 C.F.R. Part 536](#) and an action to terminate this entitlement.
- (6) Voluntary action initiated by the employee.
- (7) Suitability action taken or directed by VA or Office of Personnel Management (OPM) under [5 C.F.R. Part 731](#).
- (8) Termination of an appointment on the expiration date specified as a basic condition of employment at the time the appointment was made.
- (9) Action that terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different

position of equivalent grade and pay, if the agency informed the employee that it was to be of limited duration.

- (10) Cancellation of a promotion to a position not classified prior to the promotion.
- (11) Placement of an employee serving on an intermittent, or seasonal basis in a temporary, non-duty, or non-pay status in accordance with conditions established at the time of appointment.
- (12) Reduction of an employee's rate of pay from a rate that is contrary to law or regulation to a rate which is required or permitted by law or regulation.
- (13) Termination of employees during a probationary or trial period in accordance with [Civil Service Rule XI](#).
- (14) Action against a supervisor proposed under the provisions of [5 U.S.C. § 7515](#).

4. DEFINITIONS. For the purpose this Notice, the following definitions apply:

- a. **Accompany a Position in a Transfer of Function.** The movement of a covered employee when a continuing function transfers from one competitive area to one or more other competitive areas where the function was not being performed, or the movement of the entire competitive area to another commuting area.
- b. **Applicable Negotiated Grievance Procedure.** A grievance procedure provided by a CBA that can be utilized by a covered employee who is also a bargaining unit employee to contest their adverse action.
- c. **Bargaining Unit Employee.** An employee covered by a labor organization's unit certification and who are exempt from [Executive Order 14251, titled Exclusions from Federal Labor-Management Relations Programs](#), dated March 27, 2025, based on their occupation, (i.e., police officers (occupational series 0083), firefighters (occupational series 0081) and security guards (occupational series 0085)). BUEs are represented by their applicable labor organization.
- d. **Business Day(s).** Weekdays, which are Monday through Friday, except when such a day is designated as a Federal holiday by OPM, or the employee's assigned facility is closed for regular administrative business (e.g., inclement weather) even if it causes ad hoc/unscheduled telework. For calculation purposes, the period of 15 business days for a decision to be issued when taking an action under the authority of [38 U.S.C. § 714](#) begins on the first business day after the proposal is issued to the employee (i.e., hand-delivered to the employee or, if mailed, the date received or 5 calendar days after mailed).

- e. **Commuting Area.** The geographic area surrounding a work site that encompasses the localities where people live and reasonably can be expected to travel daily back and forth to work.
- f. **Covered Employee.** An individual occupying a position within VA except those excluded under paragraph 3.b. of this Notice.
- g. **Deciding Official.** Those individuals delegated authority to decide an action proposed under [38 U.S.C. § 714](#), as described in paragraph 5 of this Notice.
- h. **Decision Notice.** A written memorandum from the deciding official to a covered employee stating the determination of the deciding official in response to a proposal, as described in paragraph 7 of this Notice.
- i. **Demotion.** The involuntary transfer of a covered employee with a reduction in grade and annual rate of pay to a position that the deciding official determines is appropriate, and for which the covered employee is qualified.
- j. **Directed Reassignment.** The management directed reassignment of a covered employee, while serving continuously within the same agency, from one position to another without promotion or demotion.
- k. **Effective Date.** The first date on which the action is implemented. For example, the effective date of a suspension is the first date on which the employee is suspended.
- l. **Evidence File.** All evidence relied upon to support the reason(s) for the proposed or decided action, which is provided to the employee.
- m. **Malfeasance.** An act that is unjustified, harmful, or contrary to law, rule, or regulation. It includes, but is not limited to:
 - (1) Conduct, actions, or inactions that are unbecoming a civil service employee;
 - (2) Conduct, actions, or inactions that negatively impact VA or detract from VA's mission;
 - (3) Intentionally or negligently violating law, regulation, or VA policy; or
 - (4) Insubordination.
- n. **Misconduct.** Refers to, but is not limited to:
 - (1) Neglect of duty;
 - (2) Malfeasance;
 - (3) Failure to accept a directed reassignment;

- (4) Failure to accompany a position in a transfer of function; or
- (5) Retaliation.
- o. **Neglect of Duty.** Includes, but is not limited to, failure by a covered employee to exercise a reasonable degree of care required under particular circumstances, failure to provide appropriate oversight, supervision, or control over matters or personnel that are assigned to or are the responsibility of the covered employee; or failure of a supervisory employee to follow the guidance herein to address, in a timely manner, performance issues and/or misconduct of their subordinates.
- p. **Organization.** VA Administration or Staff Office to which a covered employee is assigned.
- q. **Preponderance of the Evidence.** The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient evidence to support a conclusion that the reasons for taking action are more likely to be true (i.e., greater than 50% likelihood) than not true.
- r. **Proposal Notice.** A memorandum from the proposing official to a covered employee that states the proposed action, including the basis for it and the rationale for the proposed penalty, as described in paragraph 7 of this Notice.
- s. **Proposing Official.** Those individuals delegated authority to propose an action under [38 U.S.C. § 714](#), as described in paragraph 5 of this Notice.
- t. **Removal.** The involuntary separation of a covered employee from the civil service.
- u. **Retaliation.** A supervisor taking, failing to take, or threatening to take or not to take, a personnel action because of a whistleblower disclosure.
- v. **Standard of Proof.** The degree of evidence necessary to sustain an action, including both the charge and the penalty, taken under [38 U.S.C. § 714](#), as described in paragraph 6.c. of this Notice.
- w. **Supervisory Employee.** A covered employee who is a supervisor as defined in [5 U.S.C. § 7103\(a\)\(10\)](#).
- x. **Suspension.** Placing a covered employee, for reasons of misconduct, in a temporary status without duties and pay for more than 14 days.
- y. **Whistleblower Disclosure.** A disclosure of information by a VA employee, or individual applying to become a VA employee, which the employee or individual reasonably believes evidences:
 - (1) A violation of a law, rule, or regulation; or

- (2) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5. **DELEGATION.** The Secretary's authority to take actions under [38 U.S.C. § 714](#) has been [delegated](#) and will follow the delegations in VA Handbook 5021, Part I, and any applicable effective redelegations, unless otherwise delegated by the Secretary.

6. PROCEDURAL REQUIREMENTS.

a. Determining the Facts.

- (1) Any potential misconduct will be promptly and thoroughly reviewed by the respective organization using appropriate processes under VA policy, such as an administrative investigation under VA Directive and Handbook 0700, Administrative Investigation Boards and Factfindings, VA Directive and Handbook 5979, Harassment Prevention Policy, VA Directive and Handbook 5021, Employee/Management Relations, or VA Directive 0500, Investigation of Whistleblower Disclosures and Allegations Involving Senior Leaders or Whistleblower Retaliation.
- (2) Allegations involving senior leader misconduct, retaliation, or poor performance, or that a supervisory employee retaliated against an employee for making a whistleblower disclosure will be referred to the Office of Accountability and Whistleblower Protection (OAWP) for investigation in accordance with VA Directive 0500, Investigation of Whistleblower Disclosures and Allegations Involving Senior Leaders or Whistleblower Retaliation.
- (3) Appropriate matters, including any information about actual or possible violations of criminal laws, will be referred to the Office of Inspector General in accordance with [38 C.F.R. § 1.204](#).
- (4) Unless the circumstances make it impossible, unreasonable, or unnecessary to do so, a covered employee who is the subject of an action under [38 U.S.C. § 714](#) should generally be given an opportunity to provide a statement and/or evidence relating to the matters under investigation or inquiry prior to the issuance of a proposal notice. Any statement or evidence provided by the covered employee will be included in the evidence file. Refer to VA Handbook 0700 for additional information on collecting evidence from the subject of an administrative investigation, if applicable. Failure to obtain a statement from the employee involved will not, in and of itself, serve to void the action, particularly where sufficient information is otherwise obtained from the employee or when it is impractical or unnecessary to obtain a witness statement.

b. Performance-based Action Considerations.

- (1) A performance-based action taken under [38 U.S.C. § 714](#) may be based upon a covered employee's deficiencies noted in an issued rating of record, summary rating, special rating to withhold a within-grade increase, or progress review. A performance-based action can also be taken under [38 U.S.C. § 714](#) if written communication (e.g., an email or memorandum) was provided to a covered employee about a performance deficiency at least once during the rating cycle. This written communication is intended to provide only notice of the performance deficiency and is not an opportunity to improve period (performance improvement plan) under 5 U.S.C. Chapter 43.
- (2) A performance-based action taken under [38 U.S.C. § 714](#) must be supported by the preponderance of the evidence demonstrating a performance deficiency. A performance deficiency will normally involve at least one of the following:
 - (a) The failure of a critical element in a covered employee's performance plan;
 - (b) A reasonable belief that the covered employee's performance deficiency is so serious that it cannot be improved;
 - (c) The deficiency poses a clear danger to the covered employee or others;
 - (d) The deficiency presents a risk to important services provided to Veterans (e.g., health care or benefits); or
 - (e) The repeated failure of non-critical elements in a covered employee's performance plan.
- (3) The requirements of [5 U.S.C. Chapter 43](#) regarding taking a performance-based action are not applicable to actions taken under [38 U.S.C. § 714](#) unless excepted in this subsection. Specifically, there is no requirement for a covered employee to serve a minimum of 30 calendar days under a performance appraisal plan and no requirement for an opportunity to improve period as described in [5 U.S.C. Chapter 43](#) and VA Handbook 5013, Part I. Therefore, an opportunity to improve period/PIP will not be used to address the performance deficiencies of a covered employee and is not needed prior to imposing a performance-related removal or demotion under [38 U.S.C. § 714](#), except that BUEs may have an entitlement to procedures not required by [38 U.S.C. § 714](#) for performance actions if included in an applicable CBA (e.g., the agreement may require a performance improvement plan). Refer to paragraph 2.c. for additional information.
- (4) When proposing a solely performance-based action, the proposing official may only propose a demotion or removal under the provisions of

[38 U.S.C. § 714](#). A suspension is only appropriate to correct an employee's misconduct; a suspension does not serve to improve an employee's ability to perform his/her job duties if the failure is due to a lack of knowledge, skills and ability. Refer to paragraph 7.g.(16) for information on deciding such actions.

- c. **Standard of Proof and Appropriateness of Penalty.** The agency must prove the following on all actions taken under [38 U.S.C. § 714](#):
- (1) Proof of Charges. The agency must prove the factual basis of the misconduct or performance deficiencies on which the action is based by a preponderance of the evidence.
 - (2) Appropriateness of Penalty. The agency must establish that the penalty selected is supported by preponderance of the evidence. The proposal and decision notices must address the relevant Douglas factors to explain the rationale used to determine the appropriate level of penalty. (For a list of Douglas factors, see VA Handbook 5021, Part I, Appendix A., paragraph 1.c.(7)(a) through (l).)
- d. **Employee Entitlements.** Employees will be afforded the following:
- (1) No less than 7 business days to answer orally and/or in writing and to furnish written witness statements or other documentary evidence in support of the answer. The employee elects the method(s) to utilize in providing their response (i.e., whether written, oral, or both).
 - (2) Right to be represented by an attorney or other representative.
 - (3) Right to receive a copy of the evidence file at the time the proposal notice is issued.
 - (4) A reasonable amount of duty time, if otherwise in a duty status, for reviewing the proposal notice and supporting evidence file, and for preparing and making a written and/or oral reply.
 - (5) Right to have information on the applicable review and appeals rights in the decision notice. Refer to paragraph 7 and 9 for additional information on appeal and grievance rights.
 - (6) Right to make whistleblower disclosures and/or raise allegations of senior leader misconduct, retaliation, or poor performance, or retaliation by any VA supervisor, to OAWP, as described in VA Directive 0500.

7. PROCESSING AN ACTION UNDER 38 U.S.C. § 714.

- a. The proposing official will act promptly to review the available evidence, including the findings of any investigation, and recommendation from OAWP, if

applicable (e.g., from OAWP investigations into allegations of supervisory whistleblower retaliation), to determine whether a suspension of 15 calendar days or more, demotion, or removal should be proposed against a covered employee under [38 U.S.C. § 714](#). If management determines that another penalty is appropriate, e.g., suspension of 15 calendar days or more, demotion, or removal, consult with the servicing HR Office and/or OGC regarding the appropriate authority to use, e.g., 5 U.S.C. Chapter 43 or 75.

- b. The proposing official will propose a level of penalty that is commensurate with the facts of the case. The proposal notice will include any aggravating factors the proposing official considered in the stated rationale supporting the penalty (i.e., Douglas factors). (For a list of Douglas factors, see VA Handbook 5021, Part I, Appendix A., paragraph 1.c.(7)(a) through (l).)
- c. See paragraph 8, Whistleblower Protections, for further information about covered employees that are seeking corrective action from Office of Special Counsel (OSC) or have a pending whistleblower disclosure with OAWP.
- d. The servicing HR Office will review the evidence and provide a technical review. The proposal notice will be written by the servicing HR Office and ensure compliance with applicable statutes, regulations, VA policies, collective bargaining agreements, if applicable, and any other relevant requirements before it is provided to the employee. Consultation with OGC is required prior to the issuance of the proposal notice.
- e. The aggregate period for notice, written reply, and decision on an action proposed under [38 U.S.C. § 714](#) may not exceed 15 business days, even if the reply period is extended, subject to paragraph 8, Whistleblower Protections.
- f. **Proposal Notice.** A sample proposal notice that must be used, with appropriate modifications as needed, is available on the OCHCO Employee Relations and Performance Management SharePoint at <https://dvagov.sharepoint.com/sites/OCHCOER/SitePages/sample-letters.aspx>. The proposal notice, with the provided evidence file, must contain the following information:
 - (1) The nature of the action proposed (e.g., suspension, including the number of days; demotion, including the position, title, grade, and location of the position; or removal) and the rationale for the proposed penalty (i.e., Douglas factors). The proposal notice must notify the covered employee that the action is being taken pursuant to [38 U.S.C. § 714](#).
 - (2) A statement of the specific reasons or charges upon which it is based sufficient to enable the employee to fully understand the reasons and, with the information in the evidence file, to afford the employee a fair opportunity to respond. The charges should include the details and circumstances constituting the basis for action (e.g., names, dates, places,

and other data); such information may be incorporated by reference to the evidence file.

- (3) A statement that the evidence file has been provided to the employee at the time the proposal notice was issued.
- (4) Identification of the name and title of the official who will decide the action and his/her contact information. (See paragraph 5 of this Notice.)
- (5) A statement that the employee has the right to representation by an attorney or other representative and that the designation of a representative must be in writing.
- (6) The right to reply orally or in writing, or both orally and in writing, to the deciding official within 7 business days, including the right to submit written witness statements and other documentary evidence in support of the reply. The proposal notice should notify the employee of the specific deadline and the means of transmitting a reply. The time limit for providing a reply, written and/or oral, is 7 business days.
 - (a) To ensure the time limit is met, it is recommended the proposal notice include a specific date for the oral reply. If a specific date is provided for the oral reply, it will normally be scheduled on the sixth or seventh business day.
 - (b) If a specific date for the oral reply is not provided in the proposal notice, an employee who wants to give an oral response must contact the deciding official as soon as possible to ensure their oral response is scheduled before the expiration of the seventh business day.
- (7) Notification that the employee should inform the deciding official if he/she believes he/she is entitled to the whistleblower protections in paragraph 8 of this Notice.
- (8) A statement that the employee will be allowed a specific number of hours of duty time (if otherwise in an active-duty status) for reviewing the proposal notice, for preparing an oral and/or written reply, and for securing written witness statements. The amount of time allowed will depend on the facts and circumstances of each case. In most cases, 8 hours of duty time will be deemed sufficient but for more complex cases, more than 8 hours may be allowed. Additional time may be granted at management's discretion.
- (9) A statement that identifies the person with whom the employee should make arrangements for the use of duty time.
- (10) A statement that full and impartial consideration will be given to any reply made.

- (11) When an employee's past disciplinary record is to be considered as part of the basis for the proposed action, there are additional procedural rules. A statement will be included that specifically identifies the previous infractions and penalties, which may be incorporated by reference to the evidence file, and advises the employee that he/she may make a statement, in any reply, concerning the consideration to be given to the past record, not to the prior discipline itself, in determining a penalty in the present case.
- (a) If cited, the previous disciplinary record will not be included as a basis for the current action but will be stated in a separate paragraph. Such prior disciplinary actions must meet the following requirements to be considered:
- i The action must have been in writing;
 - ii The action must be a matter of record; and
 - iii The employee must have been given an opportunity to contest the action to a higher authority than the official who imposed it.
- (b) Counselings and charges of absence without leave, without concurrent disciplinary action, are not disciplinary actions and may not be included when citing a past disciplinary record. However, counselings may be cited in a separate paragraph and considered in determining appropriate action, as it may be used to establish the clarity with which the employee was on notice that such conduct was unacceptable. If such counselings are cited, the counseling must have been in writing and must be included in the evidence file. Any references to a counseling in the proposal notice (even those that have expired) must be sufficiently clear to enable the employee to respond to the weight being given to the counseling in determining the penalty.
- (c) Suspensions may not be cited in the past record paragraph unless served by the employee prior to the misconduct upon which this subsequent action is based.
- (d) Letters of alternative discipline (e.g., last chance agreements, abeyance agreements) may be cited depending on the nature of the letter.
- (12) Any other relevant aggravating factors, in addition to the employee's past discipline, considered by the proposing official when determining the appropriate level of penalty.
- (13) A statement that if the employee has any questions about the reasons for the proposed action, he/she may contact the official who signed the

proposal notice or the servicing HR Office for further explanation. Contact information for the servicing HR official should be included.

- (14) A statement that the employee will be given a written decision within 15 business days of the employee's receipt of the proposal notice.
- (15) A statement that if it is decided to take the proposed action, such action will be effective after the oral/written reply is/are received or not less than 7 business days from the date the employee received the proposal notice, if no reply is given.
- (16) A statement advising the employee of the duty and pay status in which he/she will be carried during the reply period until the effective date of the action, if any, or until the date of the decision, if no action is implemented. (See VA Handbook 5011, Hours of Duty and Leave, for information about administrative leave related to investigations and notice period).

g. Employee's Reply.

- (1) See paragraph 8 of this Notice if the employee raises an entitlement to the whistleblower protections in that paragraph during the advance notice period.
- (2) Extensions to the 7-business-day reply period may be granted by the deciding official. The deciding official may consult with OGC prior to granting an extension. Extensions will only be granted in the most exigent circumstances, recognizing that a decision is still statutorily required within 15 business days after issuance of the proposal if an extension is granted.
- (3) The employee may reply orally and/or in writing to the proposal notice, at the employee's discretion.
- (4) A reply made by an authorized representative of the employee on the employee's behalf is an employee's reply.
- (5) Management has the discretion to grant the employee up to a total of 8 hours of duty time, if the employee is in an active-duty status and makes a request, to review the proposal notice and prepare a response.
- (6) Since the time spent by the employee reviewing the evidence and preparing the reply may be spread over several days, documentation should be kept as to how much duty time is used each day, if otherwise in a duty status.
- (7) Management's decision to deny an employee's request for additional duty time may not be grieved.
- (8) Arriving at Final Decision on the Proposed Action.

- (a) See paragraph 8 of this Notice if the employee raises an entitlement to the whistleblower protections in that paragraph during the advance notice period.
- (b) The deciding official, in determining whether any or all of the reason(s) as stated in the proposal notice are sustained and the reasonableness of the penalty, will give full and impartial consideration to:
 - i The employee's oral and/or written reply, if any.
 - ii All evidence of record.
- (9) An employee's failure to reply may be considered; but an employee's failure to reply, by itself, is not an admission to the charges. The burden of proof rests with management to support the charges upon which the action is based.
- (10) In arriving at the decision, the deciding official must not consider any reasons for action other than the reasons stated in the proposal notice. Officials involved in taking an action against an employee must observe the prohibitions against improper "ex parte" communications or information. Ex parte communication or information occurs when a deciding official relies on new and material information as a basis for a decision on a proposed action or when determining a penalty. It may be necessary for management officials to communicate with each other during the decision-making process. However, it is improper for an interested party (e.g., supervisor, proposing official, management officials), to provide or the deciding official to obtain new or material evidence or aggravating factors regarding the charges or penalty proposed, to pressure the deciding official into making a particular decision, or to inform the deciding official that a particular outcome is desired. Such communications may result in the reversal of the action upon appeal if it is determined it was a violation of an employee's right to due process.
- (11) New and material information or evidence acquired after the issuance of a proposal notice can only be considered by the deciding official if it is provided to the employee with the opportunity to reply to it. Additional evidence that forms the basis of a new charge and/or specification or warrants a higher-level of penalty requires the rescission and reissuance of the proposal notice and evidence file. If the additional evidence does not modify the charges or the desired proposed penalty, the employee will be afforded the opportunity to respond (a minimum of 24 hours when possible) to the new evidence before a final decision is made. If the evidence cannot be reasonably reviewed and responded to in the time available under the reply time frame (e.g., it is voluminous, complex) then the action may need to be rescinded and reissued to allow adequate time for a reply. In these

circumstances, management should confer with the servicing HR Office and/or OGC. However, the decision must still be delivered within 15 business days of the receipt of the proposal notice by the employee.

- (12) If none of the charges are sustained, no penalty may be imposed, regardless of any past record cited in the proposal notice.
 - (13) If the deciding official sustains one or more of the charges in the proposal notice by preponderant evidence, the deciding official will determine an appropriate penalty based upon the sustained charge(s). The deciding official will consider the applicable aggravating and mitigating factors (i.e., Douglas factors) to determine the appropriate penalty.
 - (14) Any penalty imposed by the deciding official may not be more severe than the penalty specified in the proposal notice.
 - (15) In a misconduct-based action, the deciding official may sustain the action, decide no action is warranted, or may mitigate the proposed action to a level of penalty lower than that proposed, including suspensions of 14 calendar days or less, a reprimand, admonishment, or counseling.
 - (16) In a performance-based action, the deciding official may sustain the action, decide no action is warranted, reassign the employee to another position without a reduction in grade or pay, or mitigate to a level of penalty lower than that proposed. Generally, suspensions, reprimands, or admonishments do not correct performance deficiencies. However, if the deciding official believes such a penalty is warranted because the basis for the action is more akin to misconduct than incompetence, then they should confer with their servicing HR Office and OGC.
 - (17) If the proposal notice is determined to create a harmful procedural error (i.e., it is procedurally defective to the detriment of the employee's substantive rights such that it may impact the outcome) prior to a decision being issued, the proposal notice will be rescinded, and a new proposal notice will be issued. A harmful procedural error is an error that is determined to be detrimental to the employee's substantive rights, as it is likely to have caused the agency to reach a conclusion different from the one it would have reached absent the error. The new proposal notice will provide for a new notice period (i.e., 15 business days from the time of issuance to the date the decision is to be issued, and a new opportunity to reply both orally and/or in writing).
- h. **Decision Notice.** A sample decision notice that must be used, with appropriate modifications as needed, is available on the OCHCO Employee Relations and Performance Management SharePoint at <https://dvagov.sharepoint.com/sites/OCHCOER/SitePages/sample-letters.aspx>.

These templates incorporate the required information and language referenced herein.

- (1) See paragraph 8 of this Notice if the employee raises an entitlement to the whistleblower protections in that paragraph prior to the issuance of a decision notice.
- (2) If the decision mitigates the penalty to anything other than a removal, demotion, or suspension of 15 calendar days or more, the servicing HR Office can identify the appropriate decision template and appeals rights notice for use. Refer to paragraph 9 for additional information.
- (3) Before the decision is released to the employee, it will be reviewed by the servicing HR Office for compliance with statutes, regulations, VA policies, MSPB decisions, collective bargaining agreements, if applicable, and other relevant requirements. The servicing HR Office will present any comments concerning technical aspects of the case to the deciding official. Consultation with OGC for legal review is recommended prior to the issuance of the decision.
- (4) The decision notice will be dated and signed by the deciding official and will be delivered to the employee prior to the effective date of the action. The decision notice will be issued to the employee no later than the 15th business day from the day the employee received the proposal notice. However, a decision can be issued after an oral/written reply is/are received but not less than seven business days from the date the employee received the proposal notice if no reply is given.
- (5) The written decision notice issued by the deciding official must contain the following:
 - (a) A statement of the specific charges that are sustained by a preponderance of the evidence and those that are not sustained, with the basis for the decision.
 - (b) A statement that consideration has been given to all evidence developed, including any reply, if applicable.
 - (c) A statement of the level of penalty, if any, to be imposed.
 - (d) A statement of the consideration given to any aggravating or mitigating factors (i.e., Douglas factors, including the applicable factors supporting the penalty).
 - (e) If a record of prior disciplinary action was cited in the proposal notice, the decision will state whether the decision takes the cited past record into consideration.

- (f) A statement of the effective date. If the decision is to demote or suspend the employee, the effective date will generally be not less than 7 business days from the date the employee received the proposal notice. In the case of a suspension, the inclusive dates of the suspension will be stated. BUEs may be entitled to additional notice of the action if included in an applicable CBA. Refer to paragraph 2.c. of this Notice for additional information.
- (g) If a decision is made to demote an employee, the decision will state the position, title, grade, and location of the position to which the employee will be demoted. The employee may only receive pay if he/she reports for duty to his/her new position.
- (h) Information about the employee's right to appeal, grieve, or otherwise seek review. Specific details regarding such rights are provided in the appropriate template notice and discussed in paragraph 9.
- (i) A statement in the decision notice that an appeal must be filed with MSPB within 10 business days of the effective date of the adverse action, and the address of the appropriate MSPB Regional Office.
- (j) A statement that a copy of the MSPB regulations and appeal form are attached or the website information is provided as well as the VA representative's name and contact information.
- (k) A statement that the time limit for filing a negotiated grievance, if applicable, is 10 business days after the date of the action.

NOTE: The timelines for filing such a grievance on an action taken under are established in [38 U.S.C. § 714](#) directly, and explicitly supersede the time limits for filing a negotiated grievance in any applicable CBA to the extent that such agreement is inconsistent with the statute. See paragraph 2.c. for additional information.

- (l) A statement that the employee has 45 calendar days from the effective date of the action to file a complaint of discrimination with the Office of Resolution Management (ORM) under [29 C.F.R. § 1614](#).
- (m) A statement advising the employee that a further explanation of their appeal rights may be obtained by consulting the servicing HR Office. Contact information for the HR official should be included.

i. Delivery of Notices.

- (1) It is preferable that a supervisor, but not necessarily the proposing official, deliver a proposal or decision notice to the employee personally and to obtain the employee's dated, written acknowledgment of receipt to show proof the notice was given to the employee. If the employee refuses to sign

a hand-delivered document or refuses to accept the document, the supervisor should so note this on the acknowledgment copy and include the supervisor's name/signature and the date of delivery, or attempted delivery, to the employee.

- (2) For those employees for whom in-person delivery is not feasible, the supervisor should call the employee and then deliver the notice via Government email with a delivery receipt and a read receipt requested. If the employee fails to acknowledge the read receipt, the supervisor should ask the employee to send an email to the supervisor acknowledging receipt of the document. If the employee does not acknowledge receipt of the document, the supervisor should send the employee a follow-up email indicating a conversation about the document occurred, and it was sent to the employee on a specific date and time. These documents should be maintained in Automated Labor and Employee Relations Tracker – Human Resources (ALERT-HR).
- (3) For instances in which in-person or Government email delivery is not feasible, proposal and decision notices may be issued to personal email addresses, only if there is a confirmation of delivery/receipt. Confirmation may include delivery receipts from the email system and/or written confirmation from the employee and/or their representative. This documentation must also be maintained in ALERT-HR.
- (4) In those instances where the notice cannot be personally delivered to the employee, it should be sent by U.S. Postal Service (USPS) certified mail-return receipt requested to establish when the notice was received. A copy should also be sent by regular mail in the event the certified mail is not delivered and/or the employee fails to retrieve it from the USPS. If proof of receipt by certified mail cannot be obtained, the date of delivery to the employee will be presumed to be 5 calendar days after the notice has been deposited in the mail. It is advisable that a certificate of service be completed and signed by the employee mailing the notice both certified mail and regular mail.

8. WHISTLEBLOWER PROTECTIONS WHEN AN ACTION IS PROPOSED UNDER 38 U.S.C. § 714.

- a. While a covered employee who has received a proposed action under [38 U.S.C. § 714](#) is not required to do so, to ensure VA is aware of the potential entitlement to whistleblower protection pursuant to [38 U.S.C. § 714\(e\)](#), he/she should notify the deciding official during the 7-business-day reply period if he/she is seeking corrective action (or if corrective action is being sought on his/her behalf) from OSC or if he/she has a pending whistleblower disclosure with OAWP. This notification will initiate the review of the whistleblower protections; the action is placed on hold and may not proceed until the conditions of [38 U.S.C. § 714\(e\)](#) have been met (i.e., OSC approval or

completion/declination of OAWP's process for the disclosure). Employees will be notified in the proposal notice that he/she should notify the deciding official if he/she believes he/she is entitled to whistleblower protections.

- b. If, after receiving an action proposed under [38 U.S.C. § 714](#), a covered employee has asserted an entitlement to whistleblower protection as outlined in paragraph 8.a. of this Notice, or the agency (e.g., the proposing official, deciding official, HR, OGC) has reason to believe the employee has such an entitlement, the HR liaison must request that OAWP determine whether a hold is needed pursuant to [38 U.S.C. § 714\(e\)](#). The HR liaison's information request to OAWP should be limited to only what OAWP needs to know in order to assess the need for a hold; OAWP's response should be limited to whether a hold is required and instructions as to whether or when the action can proceed.¹ Inquiries by the HR liaison should not be made to OAWP prior to issuing a proposed action under [38 U.S.C. § 714](#). OAWP will only respond to inquiries made after a proposal is issued, as the hold requirement only applies to the issuance of decisions, not the proposal.
- c. Questions about the applicability of whistleblower protections may be submitted to OGC.
- d. An encrypted email message must be sent to OAWP by the HR liaison, with only "714 Hold" in the subject line, to vaoawp714holds@va.gov with the following information included in the body of the email:
 - (1) Employee's name;
 - (2) Employee's occupation;
 - (3) Employee's work location (city and state);
 - (4) Action proposed (attach copy of proposal and employee written response);
 - (5) Date the proposal was issued; and
 - (6) The employee notified VA that he/she filed with OSC or OAWP, if applicable.
- e. Once an inquiry is made to OAWP regarding whether the employee is entitled to a hold under [38 U.S.C. § 714\(e\)](#), the deciding official will not issue a decision to the covered employee until notified by OAWP that the deciding official can proceed with issuing a decision.

¹ Confidential information protected by the Privacy Act of 1974 may be shared among agency employees who need to know the information in order to perform the essential functions of their job. Here, OAWP will have disclosure authority to disclose the information requested by the HR liaison under the Privacy Act's need to know exception found in [5 U.S.C. § 552a\(b\)\(2\)](#).

- f. If the employee reported filing with OSC, then OAWP will seek approval from OSC under [5 U.S.C. § 1214\(f\)](#) for VA to proceed with the proposed action. If the employee reported filing with OAWP, OAWP will review the relevant whistleblower disclosure and make a determination pursuant to [38 U.S.C. § 714\(e\)\(2\)](#). OAWP will notify the HR liaison if or when the deciding official may proceed with issuing a decision.
- g. The 15-business-day period in which a decision must be issued will be suspended effective the date that the email inquiry is submitted to OAWP through the date in which OAWP notifies the HR liaison that the decision may be issued. For example, a covered employee indicates on the seventh business day after the issuance of a proposed adverse action that he has filed a complaint with OSC. The inquiry is sent on the seventh business day to OAWP by the HR liaison and time is suspended. Once OAWP provides notification that a decision may be issued, the deciding official will have 8 remaining business days to issue a decision to the covered employee.
- h. If VA is not aware of an entitlement to whistleblower protection until after the decision letter has been issued but learns of it prior to the effective date of the action (e.g., if a covered employee does not assert a claim to whistleblower protection until after the decision is issued), the action cannot be effected until the HR liaison makes an inquiry to OAWP and OAWP confirms to the HR liaison that a decision can be implemented in accordance with the procedures outlined in this paragraph.

9. GRIEVANCES AND APPEALS.

- a. Covered employees may have several options to file an appeal, complaint, or review regarding an action taken under 38 U.S.C. § 714, depending on the nature of the final action; however, such an appeal or complaint may not be filed with more than one administrative body, except as permitted by law (e.g., filing an EEO complaint and a prohibited personnel practice (PPP) complaint with OSC concurrently). Typically, wherever the employee files first is their binding choice on which challenge avenue to pursue. More information is provided below. Additional information regarding an employee's specific options will be contained in the decision notice as described in paragraph 7. These options include the following, as applicable:
 - (1) Agency Grievances. A covered employee, who is issued a decision mitigating an action to a suspension of 14 calendar days or less, reprimand, or admonishment is entitled to file an agency grievance at the formal stage in accordance with VA Handbook 5021, Part IV, Chapter 2. A grievance examiner shall uphold the decision if the decision is supported by preponderant evidence and cannot mitigate the level of penalty.

- (2) Negotiated Grievance. A covered employee who is a BUE may be entitled to file a negotiated grievance under an appropriate collective bargaining unit agreement.
 - (a) For actions mitigated to a suspension of 14 calendar days or less, reprimand, or admonishment, a negotiated grievance must be filed in accordance with the CBA, including the timelines prescribed therein.
 - (b) For a suspension of 15 calendar days or more, a demotion, or removal, a negotiated grievance must be filed no later than 10 business days after the effective date of the action (e.g., in the case of a suspension, a decision is effected on the first day the covered employee is suspended). Filing a negotiated grievance first is a waiver of the right to file an appeal with the MSPB and vice versa.
- (3) MSPB Appeal. A covered employee who is issued a suspension of 15 calendar days or more, a demotion, or a removal, and elects to file an MSPB appeal, must do so no later than 10 business days after the date the decision is effected (e.g., in the case of a suspension, a decision is effected on the first day the covered employee is suspended). If a covered employee files an appeal with the MSPB, the Secretary, shall to the maximum extent practicable, provide such information and assistance to the MSPB as may be necessary to ensure the appeal is expedited. Filing a MSPB appeal is a waiver of the right to file a grievance under a negotiated grievance procedure in a CBA and vice versa. Refer to paragraph 9.a.3. for additional information on discrimination issues and paragraph 9.a.4. for PPP issues.
- (4) Discrimination Complaints. If the employee believes that the effected action was taken for discriminatory reasons, he/she can file a discrimination complaint with ORM under [29 C.F.R. § 1614](#), which requires filing within 45 calendar days. The employee may either file a formal discrimination complaint with the agency or file an appeal with the MSPB within 30 calendar days of the appealable action, but not both. [5 C.F.R. § 1201.54\(b\)](#). Whichever is filed first is an irrevocable selection. Such matters are processed as “mixed cases” or a “mixed case appeal” and are processed in accordance with [29 C.F.R. § 1614.302](#), [5 C.F.R. § 1201.151](#), and [5 U.S.C. § 7702](#).
- (5) Prohibited Personnel Practices (PPP): If the covered employee believes the action involves a PPP, including whistleblower retaliation, then:
 - (a) If he/she, is not a supervisory employee, they may elect only one of the following options to seek a remedy for that PPP:
 - i Raising the PPP as an affirmative defense in an appeal to the MSPB;

information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. Documents subject to withdrawal or modification could include, for example, a Standard Form 50 issuing performance-based action, a decision memorandum accompanying such action or an employee performance appraisal.

- c. Corrective action based on discovery of material information prior to final agency action. When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, the agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to a final agency decision, including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, the agency would have the authority to remove that action from the employee's personnel file or other agency records. The requirements described in paragraph 10.a. of this Notice would, however, continue to apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.
- d. OGC should be consulted for questions regarding compliance with these provisions.

11. REFERENCES.

- a. Title I, Section 101 and Title II, Section 202, of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 ([P.L. 115-41](#))
- b. [VA Directive and Handbook 5013](#), Performance Management Systems
- c. [VA Handbook 5021](#), Employee/Management Relations
- d. [VA Directive 0500](#), Office of Accountability and Whistleblower Protection: Investigation of Whistleblower Disclosures and Allegations Involving Senior Leaders or Whistleblower Retaliation
- e. [5 U.S.C. § 1214](#), Investigation of prohibited personnel practices; corrective action
- f. [5 U.S.C. § 2302](#), Prohibited Personnel Practices
- g. [5 U.S.C., Chapter 43](#), Performance Appraisal
- h. [5 U.S.C., Chapter 75](#), Adverse Actions
- i. [5 U.S.C. § 7103](#), Definitions; application

- j. [38 U.S.C. § 713](#), Senior executives: removal, demotion, or suspension based on performance or misconduct
- k. [38 U.S.C. § 714](#), Employees: removal, demotion, or suspension based on performance or misconduct

12. RECORD RETENTION. Records related to the actions imposed under [38 U.S.C. § 714](#) will be retained for 7 years from the date the file is closed.

13. RESPONSIBLE OFFICE. Employee Relations and Performance Management Service, Office of the Chief Human Capital Officer (05).

14. RESCISSIONS. This Notice rescinds Human Resource Management Letter (HRML) 05-2017-05, Adverse Action Procedures (Non-Bargaining Unit Title 5/Full-time Hybrid/Canteen Employees and other employees not excluded below), dated August 24, 2017; HRML 05-17-06, Adverse Action Procedures (Title 5/Full-time Hybrid/Canteen Employees and other employees not excluded below), dated August 24, 2017; a memo from the Assistant Secretary for Human Resources and Administration/Operations, Security, and Preparedness titled Ceasing Use of § 714, dated March 5, 2023; OCHCO Bulletin titled Cessation of the Use of 38 U.S.C. § 714 Effective April 3, 2023, dated March 6, 2023; and OCHCO Bulletin, titled Updated Guidance Regarding Employees Covered by 38 U.S.C. § 714, dated January 17, 2023. The Notice will be rescinded when revised VA Handbook 5021, Employee Management Relations, is published.

BY DIRECTION OF THE SECRETARY OF VETERANS AFFAIRS:

/s/
Mark R. Engelbaum
Assistant Secretary for
Human Resources and Administration

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