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Subpart G – Adverse Actions and Subpart H Appeals– If there will continue to be positions and employees covered by current OPM/MSPB rules, where there are similar terms, they should either be defined the same or clearly redefined or explained in order to avoid confusion.

Subpart G – Adverse Actions

Definitions: Section 9901.703. This section does not define: Days (calendar or work days?)

Section 9901.714 Proposal Notice; Section 9901.716 – Decision Notice. Although each section describes the circumstances, for clarification the full phrase (proposal Notice or decision notice) should be used in subsequent paragraphs to avoid confusion. See for example, Section 9901.716 (d).

Section 9901.714 (c) (2) and Section 9901.716 (c) – Under current MSPB case law, placement of an employee on enforced leave is treated as a paid suspension with redress rights commensurate with the length of the “suspension” and requires notification of those rights. Will placement of employees on enforced leave for more than 14 days constitute an appealable suspension under Subpart H, specifically, Section 9901.805?

Section 9901.715 (d) - This provision does not address whether the official who receives the response must be at a level above the proposing official.

Section 9901.715 (f) addresses when the Department may disallow a representative. Subsections (f) (1) and (2) permit disallowance when activities **would** cause a conflict, or **would** give rise to unreasonable costs... However, subsection (f) (3) states **could** compromise security. Is this inconsistency intentional and what is the distinction among the three circumstances?

Subpart H Appeals

Section 9901.804 Definitions – Final Decision and or Final DOD Decision should be defined. Its use in Section 9901.807 (c) is confusing and seems to have a different meaning than in Section 9901.807 (k)(8)(ii). Perhaps a distinction between adverse action decisions and Appeal decisions would reduce confusion.

Section 9901.806 – Alternative Dispute Resolution – Although this provision encourages the use of Alternative Dispute Resolution (ADR), the timeframes set forth in the regulation do not appear to provide the opportunity for ADR. This should be addressed in implementing regulations.

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Section 9901.807 Appellate Procedures - The full procedure should be set forth in this section. There seems to be a portion of the process missing between Sections 9901.807 (b) (2) and (c). Typically, the adverse action has already been effected before the hearing stage before an AJ. Section 9901.807 (c) refers to the final decision of the Department and an order of the full MSPB, which would occur much later in the process. Is “adverse action decision” more accurate in this context? How does this section relate to Section 9901.807 (k)(8)(ii)?

Section 9901.807 (k)(8)(ii). This paragraph is confusing. If a request for review (RFR) has been filed, why is the AJ’s initial decision considered the Department’s final decision (again, the term is ambiguous) and that decision is non-precedential? It would make more sense for the AJ decision to become the Department’s final non-precedential decision, if a timely RFR is not filed. As written, this provision appears to conflict with Section 9901.807 (k)(8)(i).

Section 9901.807- Appellate Procedures. Recommend that a chart or table be included in the regulation to depict the steps in the process. In particular, the steps in Section 9901.807 (k)(8) thru (11) would be easier to understand.

Subparts G and H - Adverse Actions and Appellate Procedures – Take into consideration that some employees may not be represented and be inexperienced in reading complex regulations. These subparts rely on cross-references to OPM and MSPB regulations and rules. Including a Table or Figure depicting the processes and timeframes, a copy of the appeals form or a language indicating that the regulation and form will be provided in the regulation should be considered.