

# INTRODUCTION

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Adverse actions is not a generic term, but a term of art in federal service and refers only to specific actions against certain federal employees. The laws and regulations governing them tell us which actions and employees are covered, for what reasons we may take them, what procedures we must use, and what proof we need to persuade a reviewing body that we complied with all of the above.

This book is for both federal HR specialists and federal managers who will play roles in proposing them, deciding them, or advising those who do. While it contains valuable information about legalities and some practicalities of dealing with problem employees, it is not intended to be a guide for supervisors and HR specialists on discipline or handling problem employees. That guidance is available in the [Dewey Publications books](#) (*Disciplining Federal Employees* and *Management of Problem Employees: Identification, Tools, Legalities, Strategies, and Tricks for the Government Supervisor*).

The book will start by showing how to decide whether a personnel action is indeed an adverse action. Then it will turn to deciding whether you have cause for an adverse action. Following cause comes the related but separate issue of determining the penalty. Next, it will give a primer on proof. Then it will turn to proving your case. Finally, it will close with the separate but similar topic of performance-based actions taken under an agency's performance management system.

Importantly, this book is intended to be primarily a how-to book for those in the trenches, and less a research tool. I want to show readers how to look at a personnel action and decide if it's covered by adverse action laws; how to decide if the employee behavior, condition, or circumstances gives the agency cause to take one; how to pick the right penalty; how process the action and write the letters; how to weigh evidence to see if enough proof exists; and how to take a performance-based action.

To that end, I have deliberately tried to keep this thorough, but concise. If you understand this book, you'll be able to handle the majority of the adverse action situations you'll encounter with only perhaps a phone call or two to an agency lawyer or a quick look at an MSPB or court case for clarification or additional information. For example, in the chapter on cause, we discuss the basic legal standard in fair detail and then we turn to what I feel are the top ten reasons for adverse actions without attempting to prepare the reader for every conceivable adverse action cause. The chapter on proof is written by a layperson for laypeople to show them only what they need to know at the agency decisional stage.

As most readers are aware, Dewey Publications' most prominent work is [Peter](#)

[Broida's](#) seminal work, *A Guide to Merit Systems Protection Board Law and Practice*, a modest 5,020 pages updated and growing each year. About a quarter of Peter's *Guide* is devoted to adverse actions and, without exaggeration, covers, from an appellate perspective, every conceivable issue that arises in an adverse action before the Merit Systems Protection Board (MSPB) and the federal courts. The difference between our two works, besides about twenty pounds, is that his is primarily for practitioners, attorney or non-attorney, before the MSPB while mine is for, again, those in the trenches at the agency decisional levels. Every HR office and agency legal office has a copy, or the CD, therefore if you need to know how the MSPB has ruled on a certain issue, no matter how obscure, you'll find it in Peter's *Guide*.

Last point: I have deliberately left out extensive citations of cases for two reasons. First, I love giving real examples but many of them are from MSPB field office cases which were never precedential in the first place and, if they never went to the full Board, no longer exist. Also, many of my examples were from adverse actions that were never appealed, or that the agency chose not to take for either good or bad reasons. While they obviously don't have any legal force, they are great examples of what to do or not to do, and I love them for that reason.

Second, as I mentioned earlier, if you're an agency representative and need a citation to support your case, go to the *Guide*.

Good luck.

Michael Corum  
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# CHAPTER ONE

## THE LEGAL FRAMEWORK

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Roosevelt: *How many men have you killed?*

Pat Garrett: *Three*

Roosevelt: *How did you come to do it?*

Pat Garrett: *In the discharge of my duty as a public officer.*

Roosevelt: *(looking pleased) Have you ever played poker?*

Pat Garrett: *Yes.*

Roosevelt: *Are you going to do it when you are in office?*

Pat Garrett: *No.*

Roosevelt: *All right, I am going to appoint you. But see that you observe the civil service law.*

— Theodore Roosevelt interviewing Pat Garrett, former Sheriff of Lincoln County, New Mexico and killer of Billy the Kid, for the position of Customs Collectorship of El Paso in November 1901

As TR said to Pat Garrett, “See that you observe the civil service law.” Adverse actions is a highly technical field, which is governed by over two hundred years of civil service law. You do not need to be a lawyer, but if you are involved in them at all, you must have a broad understanding of the infrastructure of laws, regulations, and the case law that governs adverse actions. The legal references we’ll be dealing with are: the Constitution, the U.S. Codes, the Code of Federal Regulations, and precedential court and MSPB decisions.

## THE CONSTITUTION

Although you would not normally think of it, the Constitution, and its interpretations by generations of Supreme Courts, is actually the basis for most of what happens during adverse actions. Two provisions give federal agencies authority and federal employees protection. First, Article II, Section 2 gives the President the power to appoint public officers—meaning all federal employees. The President delegates this authority to the heads of agencies all of who further delegate down the chain of command to whatever levels they choose. Whenever a federal supervisor selects an employee for a position, he or she is acting under delegated constitutional authority to appoint. And with the authority to appoint, of course, comes the authority to dis-appoint (a little adverse actions humor there), or remove employees from federal service.

The second, and more important section, is the Fifth Amendment. You usually think of the Fifth Amendment protecting people from self-incrimination, but it is actually a catch-all amendment that covers a multitude of protections, one of which guarantees that the government cannot take away a person's life, liberty, or property without "due process of law."

In its simplest form, it means that anytime the government (at that time only the federal government, but extended to states with the Fourteenth Amendment) wants to execute you, imprison you, or take away your house, it must follow certain procedures. The Amendment further guarantees certain standards of fairness and provides substantive rights to know what is going on and to challenge the action.

So what does that have to do with federal employees? The Supreme Court ruled in 1974 that non-probationary government employees have a "property" interest in their jobs. If the government takes away the job of a tenured employee, it must create and use a mechanism that gives the employee procedural and substantive rights. And so it is with federal employees who have completed the probationary period. No matter what they have done and no matter how much evidence the government has against them, they have procedural protections that give them certain rights.

So where do we go next? The specifics that implement the Fifth Amendment protection are fleshed out by Congress in federal laws.

## **THE UNITED STATES CODE**

All federal laws passed by Congress are incorporated into various sections, called titles, of what is known as the United States Code. The federal laws that set up and govern the federal personnel system are in Title 5 (Administrative Personnel), further subdivided into chapters, of the U.S. Code. Title 5 covers everything from classification to performance appraisals to firing federal employees. The basic legal requirements for adverse actions are set out in Chapter 75 of Title 5. A related but different section, Chapter 43 of Title 5, covers removals and demotions of employees for failure in their performance standards. Other chapters of Title 5 that affect adverse actions are Chapter 23 (Merit System Principles), Chapter 71 (Labor-Management Relations), and Chapter 77 (Appeals).

The standard method of reference to a federal law is the title number followed by the initials "USC" and then the section number (three to four numerals with subsections in parentheses). The reference "5 USC 7513(a)" means that it is in Title 5 of the USC, section 7513(a), which happens to be the piece that tells us for what cause we may take an adverse action against a federal employee.

If you have not dealt with federal personnel law before, you'll be surprised to see how brief the laws are. Since they're now so easily found online where they're current to the minute, we no longer include them in the book, so Google "US Code" and keep it in front of you while you read the sections where we reference it.

# THE CODE OF FEDERAL REGULATIONS

Often when Congress writes a federal law, it will assign a federal agency in the executive branch responsibility for oversight and for writing supplemental regulations to carry out the congressional mandate. The executive agencies that have the leading roles in adverse actions are the U.S. Office of Personnel Management (OPM) and the U.S. Merit Systems Protection Board (MSPB).

OPM writes personnel regulations and MSPB is an independent appeals body that has jurisdiction over a variety of personnel actions taken by federal agencies. All federal regulations promulgated by agencies with regulatory authority are in the Code of Federal Regulations. The Code of Federal Regulations, abbreviated CFR, is broken into different titles with numbers that correspond to the USC. All of the regulations that implement Title 5 of the USC are in Title 5 of the CFR. The titles of 5 CFR are broken into parts and sections that loosely follow the numbers and sections in the USC. For example, Part 752 of Title 5 CFR is the chapter with the regulations on adverse actions, and Part 432 contains the regulations on Performance-Based Actions. References are similar to the USC references except that they use a decimal. 5 CFR 752.403 is the reference to the section that discusses cause for an adverse action.

The regulations in the CFR are subordinate to the statutes and the Constitution. This rarely is an issue at the operating level of a personnel department, but it is important to keep in mind because from time to time the MSPB or a federal court may declare invalid an OPM or other regulatory agency regulation because it conflicts with a statutory provision in Title 5 USC.

Those of you with experience in federal staffing may remember that some years back the MSPB declared invalid the OPM regulation allowing Distinguished Scholar appointments because OPM had not followed the proper statutory procedures in promulgating the regulations. Or in late 2008, the Court of Appeals for the Federal Circuit declared invalid the OPM regulations on passover of veterans in excepted service appointments because it did not give veterans the full protection that the law required. As with the law, look online to find the electronic CFR ([www.ecfr.gov](http://www.ecfr.gov)).

## COURT DECISIONS AND MSPB DECISIONS

We'll discuss appeals later in [Chapter Eight](#), however, for right now it is worth mentioning that many federal court and administrative decisions have the force of law or regulations. The pre-eminent appeals body is the Merit Systems Protection Board (MSPB), which is an independent government appeals body that handles a broad variety of appeals from government employees. The MSPB appeals process is two-tiered and starts with an initial decision by an administrative judge that may, under certain circumstances, be reviewed by the full three-person Board. Decisions by the regional or field judges only apply to the individual cases at issue, but decisions by the full Board are precedential and are as binding on agencies as regulations in the CFR. When the full Board ruled, for example, in a 1981 case, that agencies may not discipline employees for absenteeism when they have granted the employees approved leave, the holding became binding on all of the regional or field judges who must apply it to their cases as though it were a regulation.

Similarly, precedential federal court decisions are interpretations of law that the MSPB must apply throughout its appeals system. It is not worth going into detail about which federal court decisions are precedential, as it depends upon the level of the court above the district court, the geographic jurisdiction of the appeals court, and the type of decision. However, most MSPB cases go to the Court of Appeals for the Federal Circuit, most of whose decisions are precedential.

## **AGENCIES REGULATIONS AND POLICIES**

Do not confuse agency regulations with government-wide regulations like those issued by OPM and the MSPB. Agency regulations are only binding within the agencies themselves and agencies are required to follow their own regulations. Agency regulations, however, cannot bind an outside party like the MSPB over interpretations of the law. For example, one federal agency wrote in its regulation that removal was a mandatory penalty for a first offense of marijuana possession. This regulation, however, could not prevent the MSPB from reviewing the reasonableness and justification of the penalty because determination of a penalty is one of the issues covered by the legal standard in 5 USC 7513(a), which states that employees may only be removed for “such cause as will promote the efficiency of the service.”

On the other hand, agencies must follow their own regulations. In another case, an agency’s table of disciplinary offenses and penalties, part of its discipline regulations, stated that the maximum penalty for a first offense of possession of illegal drugs on the job was a 30-day suspension. When it fired a mechanic caught with marijuana on the job under no particularly aggravating circumstances, the court mitigated the case to a 30-day suspension because the agency did not follow its own regulations. Without the regulation, of course, the removal would have easily been sustained, especially given the employee’s position.

Your own agency’s regulations can get you into trouble if you do not follow them. However, you cannot bind a third party by trying to restrict what it may and may not consider. Now let’s get started on adverse actions and look at the first concern: whether the action you are taking is indeed an adverse action.

# CHAPTER TWO

## ADVERSE ACTION JURISDICTION

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*Most people, no doubt, when they espouse human rights, make their own mental reservations about the proper application of the word "human."*

— Suzanne LaFollette, U.S. Writer and Editor

Suzanne LaFollette's observation that human rights depends upon whom you call human has a parallel in federal service. While federal employees have rights, just as if they were human, it all depends upon whom you call an employee. Because when it comes to adverse actions, many people who get a paycheck signed by the Treasurer of the United States get rights when Uncle fires, suspends, or demotes against them, while many who get the same signature on a paycheck are, for our purposes in this book, non-humans and get none. When you, either as a manager or HR specialist, are confronted with a personnel action you're about to take that might be an adverse action as defined in the rest of this book, the analytic breakdown follows a sequence of five questions you must answer:

First is the question of jurisdiction, which has two parts: (1) Is the action indeed an adverse action within the legal meaning of the term? and (2) Is the employee one of those to whom the law gives adverse action protection?

Second comes the question of cause. Do you have cause to take the action? A bare eleven words in the law has been interpreted through thousands of federal court and appellate cases that have taught us for what employee behaviors or conditions we may respond with an adverse action.

Third is the issue of penalty. Assuming you have proper cause to take some adverse action, can you justify the specific penalty you chose, e.g. if you're removing somebody, why the death penalty rather than a lesser formal sanction?

Fourth, can you prove the facts you're asserting? Management bears the burden, throughout the process and into the appellate and court system, of proving all the facts upon which it's basing the case under one of the three evidentiary standards used in administrative law.

Last, have you followed the right procedures that gave the employee full due process rights throughout the agency's decisional process?

In this chapter, we'll start with the first element of an adverse action: jurisdiction—who gets all these rights and when do they get them. What agency actions are indeed "adverse?" This jurisdictional element is crucial because we first have to decide whether the situation is even covered by adverse action protections. The significance is that if the