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TITLE 5--ADMINISTRATIVE PERSONNEL

CHAPTER I--OFFICE OF PERSONNEL MANAGEMENT

PART 359_REMOVAL FROM THE SENIOR EXECUTIVE SERVICE; GUARANTEED PLACEMENT
IN OTHER PERSONNEL SYSTEMS

Subpart A [Reserved]

Subpart B-General Provisions

Sec.

359.201 Regulatory requirements.

359.202 Definitions.

Subpart C [Reserved]

Subpart D-Removal of Career Appointees During Probation

359.401 General exclusions.

359.402 Removal: Unacceptable performance.

359.403 Removal: Conduct.

359.404 Removal: Conditions arising before appointment.

359.405 Removal: Reduction in force.

359.406 Restrictions.

359.407 Appeals.

Subpart E- Removal of Career Appointees for Less Than Fully Successful Executive Performance

359.501 General.

359.502 Procedures.

359.503 Restrictions.

359.504 Appeals.

Subpart F-Removal of Career Appointees as a Result of Reduction in Force

359.601 General.

359.602 Agency reductions in force.

359.603 OPM priority placement.

359.604 Removal from the SES and placement rights outside the SES.

359.605 Notice requirements.

359.606 Appeals.

359.607 Records.

359.608 Transfer of function.

Subpart G-Guaranteed Placement

359.701 Coverage.

359.702 Placement rights.

359.703 Responsibility for placement.

359.704 Restrictions.
359.705 Pay.

Subpart H-Furloughs in the Senior Executive Service

359.801 Agency authority.
359.802 Definitions.
359.803 Competition.
359.804 Length of furlough.
359.805 Appeals.
359.806 Notice.
359.807 Records.

Subpart I-Removal of Non-career and Limited Appointees and Reemployed Annuitants

359.901 Coverage.
359.902 Conditions of removal.

Authority: 5 U.S.C. 1302 and 3596, unless otherwise noted.

Source: 54 FR 18876, May 3, 1989, unless otherwise noted.

Subpart A [Reserved]

Subpart B-General Provisions

Sec. 359.201 Regulatory requirements.

This part contains the regulations of the Office of Personnel Management (OPM) that implement subchapter V of chapter 35 of title 5, United States Code, on the Senior Executive Service (SES).

Sec. 359.202 Definitions.

Agency, Senior Executive Service position, senior executive, career appointee, limited emergency appointee, limited term appointee, and non-career appointee, are defined in 5 U.S.C. 3132(a). Probation and probationary period mean the 1-year probation required by 5 U.S.C. 3393(d) upon initial career appointment to the SES.

Reemployed annuitant means an individual who is receiving an annuity under the Civil Service Retirement System or the Federal Employees' Retirement System on the basis of his or her former Federal service. A reemployed annuitant serves at the pleasure of the appointing authority.

Subpart C [Reserved]

Subpart D-Removal of Career Appointees During Probation

Sec. 359.401 General exclusions.

This subpart does not apply to the removal of a career appointee during probation when--

- (a) The action is initiated under 5 U.S.C. 1206(g) or 5 U.S.C. 7542;
- (b) The removal is effected under subpart C of this part for failure to be recertified; or
- (c) The appointee is a reemployed annuitant. See subpart I of this part for removal of a reemployed annuitant.

Sec. 359.402 Removal: Unacceptable performance.

(a) Coverage. This section covers the removal of a career appointee from the SES during the probationary period for unacceptable performance.

(b) Basis for action. A removal under this section need not be based upon a final rating under the agency's SES performance appraisal system established under subpart C of part 430 of this chapter. Even if a removal is based on such a rating, the removal action is taken under this section.

(c) Procedures. The agency shall notify the appointee in writing before the effective date of the action. The notice shall, as a minimum--

- (1) State the agency's conclusions as to the inadequacies of the appointee's performance;
- (2) State whether the appointee has placement rights under Sec. 359.701 and, if so, identify the position to which the appointee will be assigned; and
- (3) Show the effective date of the action.

Sec. 359.403 Removal: Conduct.

(a) Coverage. (1) This section covers the removal of a career appointee from the SES during the probationary period for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function. (2) This section does not apply, however, when the appointee was covered under 5 U.S.C. 7511 immediately before appointment to the SES. In that case, the removal is subject to the provisions of part 752, subpart F, of this chapter.

(b) Procedures. The agency shall notify the appointee in writing before the effective date of the action. The notice shall, as a minimum--

- (1) State the basis for the removal action (including the act(s) of misconduct, neglect of duty, or malfeasance if those factors are involved); and
- (2) Show the effective date of the action.

Sec. 359.404 Removal: Conditions arising before appointment.

(a) Coverage. (1) This section covers the removal of a career appointee from the SES during the probationary period when the action is based in whole or in part on conditions arising before the appointment.

(2) This section does not apply, however, when the career appointee was covered under 5 U.S.C. 7511 immediately before appointment to the SES. In that case, the removal is subject to the provisions of part 752, subpart F, of this chapter.

(b) Procedures. (1) The agency shall give the appointee an advance written notice stating the specific reasons for the proposed removal.

(2) The appointee shall be given a reasonable time to reply.

(3) The agency shall give the appointee a written decision showing the reasons for the action and the effective date. The decision shall be given to the appointee at or before the time the action will be made effective.

Sec. 359.405 Removal: Reduction in force.

(a) Coverage. This section covers the removal of a career appointee from the SES during the probationary period under a reduction in force.

(b) Basis for action. The appointee must have been identified for removal from the SES under competitive procedures established by the agency in accordance with the requirements of 5 U.S.C. 3595(a). Removal action shall be taken under 5 U.S.C. 3592(a).

(c) Procedures. The agency shall notify the appointee in writing before the effective date of the action. The notice shall state, as a minimum--

- (1) Whether the appointee has placement rights under Sec. 359.701 to a position outside the SES and, if so, the position to which the appointee will be assigned;
- (2) The effective date of the action;
- (3) The appointee's appeal rights, including the time limit for appeal and the location of the Merit System Protection Board office to which an appeal should be sent; and
- (4) Such other information as may be required by OPM.

Sec. 359.406 Restrictions.

(a) Removal from the SES under Sec. Sec. 359.402 through 359.404 may not be made effective within 120 days after--

- (1) The appointment of a new agency head; or
- (2) The appointment in the agency of the career appointee's most immediate supervisor who--
 - (i) Is a noncareer appointee; and

(ii) Has the authority to remove the career appointee.

(b) For purposes of this section, a noncareer appointee includes an SES noncareer or limited appointee, an appointee in a position filled by Schedule C, or an appointee in an Executive Schedule or equivalent position other than a career Executive Schedule or equivalent position.

(c) The restrictions in paragraph (a) of this section do not apply--

(1) When the career appointee has received a final rating of unsatisfactory under the performance appraisal system established by the agency under subchapter II of chapter 43 of title 5, United States Code, before the appointment of a new agency head or the appointment of the career appointee's most immediate noncareer supervisor who has the authority to remove the career appointee;

(2) To a disciplinary action initiated before the appointment of a new agency head or the appointment of the career appointee's most immediate noncareer supervisor who has the authority to remove the career appointee;

(3) To a disciplinary action when there is a reasonable cause to believe that the career appointee has committed a crime for which a sentence of imprisonment can be imposed; or

(4) To a disciplinary action when the circumstances are such that retention of the career appointee--

(i) May pose a threat to the appointee or others;

(ii) May result in loss of or damage to Government property; or

(iii) May otherwise jeopardize legitimate Government interests.

(d) The following procedures must be observed when an agency invokes an exception to the 120-day restriction under paragraphs (c)(3) or (c)(4) of this section:

(1) The agency shall include in the notice the reasons for invoking the exception.

(2) The appointee shall be given a reasonable time, but no less than 7 days, to respond regarding the propriety of the use of the exception.

(3) The agency shall give the appointee a notice of decision on the propriety of the use of the exception at or before the time the action will be effective.

(4) When circumstances require immediate action, the agency may place the appointee in a nonduty status with pay for such time as necessary to effect the action.

(e) The imposition of the 120-day moratorium does not extend the probationary period.

Sec. 359.407 Appeals.

(a) Removal under Sec. 359.402, 359.403, or 359.404 is not appealable to the Merit Systems Protection Board under 5 U.S.C. 7701.

(b) Removal under Sec. 359.405 is appealable to the Merit Systems Protection Board under 5 U.S.C. 7701 as to whether the reduction in force complies with the competitive procedures required under 5 U.S.C. 3595(a).

Subpart E-Removal of Career Appointees for Less Than Fully Successful Executive Performance

Sec. 359.501 General.

(a) Coverage. (1) This subpart covers--

(i) A career appointee who has completed the probationary period in the SES; and

(ii) A career appointee who is not required to serve a probationary period in the SES.

(2) This subpart does not cover, however, a career appointee who is serving as a reemployed annuitant. See subpart I of this part for removal of a reemployed annuitant.

(b) Definitions. (1) Final rating means the rating of record made by an appointing authority under the SES performance appraisal system in accordance with the requirements of 5 U.S.C. 4314(c)(3) and part 430, subpart C, of this chapter.

(2) A less than fully successful final rating means a rating of unsatisfactory or minimally satisfactory.

(c) Optional removal from the SES. The agency may remove a career appointee from the SES after the appointee has been given one final rating of unsatisfactory.

(d) Mandatory removal from the SES. The agency must remove a career appointee from the SES after--

(1) The appointee has been given two final ratings of unsatisfactory within 5 consecutive years; or

(2) The appointee has been given two final ratings of less than fully successful within 3 consecutive years.

Sec. 359.502 Procedures.

(a) Notice. The agency shall notify the career appointee in writing at least 30 calendar days before the effective date of the action. The notice shall advise the appointee of--

(1) The basis for the action;

(2) The appointee's placement rights under subpart G of this part--
the position to which the appointee will be assigned shall be identified either in this advance notice or in a supplementary notice issued no later than 10 calendar days before the effective date of the action;

(3) The appointee's right to request an informal hearing from the Merit Systems Protection Board;

(4) The effective date of the removal action; and

(5) When applicable, the appointee's eligibility for immediate retirement under 5 U.S.C. 8336(h) or 8414(a).

(b) Informal hearing. (1) A career appointee being removed from the SES under this section shall, at least 15 days before the effective date of the removal, be entitled, upon request, to an informal hearing before an official designated by the Merit Systems Protection Board. The appointee shall submit the request for an informal hearing to the Board. This request may be made at any time after the appointee has received the notice described in paragraph (a) of this section, but no later than 15 days before the effective date of action. The informal hearing shall be conducted in accordance with the regulations and procedures established by the Board. See 5 CFR 1201.141, Right to hearing, and 5 CFR 1201.142, Hearing procedures; referral of the record.

(2) Neither the granting nor the conduct of an informal hearing shall provide a basis for appeal to the Merit Systems Protection Board under 5 U.S.C. 7701. The removal action need not be delayed because of the granting of an informal hearing.

Sec. 359.503 Restrictions.

(a) Removal from the SES under this subpart may not be made effective within 120 days after--

(1) The appointment of a new agency head; or

(2) The appointment in the agency of the career appointee's most immediate supervisor who--

(i) Is a noncareer appointee; and

(ii) Has the authority to remove the career appointee.

(b) For purposes of this section, a noncareer appointee includes an SES noncareer or limited appointee, an appointee in a position filled by Schedule C, or an appointee in an Executive Schedule or equivalent position other than a career Executive Schedule or equivalent position.

(c) This restriction does not apply when the career appointee has received a final rating of unsatisfactory under the performance appraisal system established by the agency under subchapter II of chapter 43 of title 5, United States Code, before the appointment of a new agency head or the appointment of the career appointee's most immediate noncareer supervisor who has the authority to remove the career appointee.

Sec. 359.504 Appeals.

An action taken under Sec. 359.501 is not appealable to the Merit Systems Protection Board under 5 U.S.C. 7701.

Subpart F-Removal of Career Appointees as a Result of Reduction in Force

Sec. 359.601 General.

(a) Coverage. (1) This subpart covers the removal of a career appointee from the SES as a result of a reduction in force.

(2) This subpart does not cover, however, a career appointee who is serving as a reemployed annuitant. See subpart I of this part for removal of a reemployed annuitant.

(b) Definitions. (1) Probationary period is defined in Sec. 359.202 of this part.

(2) Reduction in force is defined in 5 U.S.C. 3595(d) as including "the elimination or modification of a position due to a reorganization, due to a lack of funds or curtailment of work, or due to any other factor."

(3) Agency in this subpart means an executive department or an independent establishment.

(c) Agency procedures. An agency must have issued written procedures before conducting a reduction in force. A copy of the procedures shall be provided OPM upon issuance.

Sec. 359.602 Agency reductions in force.

(a) Competitive procedures. (1) This paragraph applies to all SES career appointees in the agency, including appointees serving a probationary period.

(2) An agency shall establish competitive procedures in writing to determine who will be removed from the SES in any reduction in force of career appointees within the agency. Such competitive procedures shall be based primarily on performance. When performance ratings are used, they shall be the final ratings under 5 CFR part 430, subpart C.

(3) An appointee who has completed the probationary period must be retained over an appointee who has not completed the probationary period if they both have the same retention standing.

(4) Competitive procedures are not required if an agency is being abolished, without a transfer of functions, and all SES appointees will be separated at the same time or within 3 months of abolishment.

(b) Placement within the agency. (1) This paragraph applies to any SES career appointee who has completed the probationary period, or was not required to serve a probationary period, and who has been identified for reduction in force under paragraph (a) of this section.

(2) The appointee is entitled to be offered any vacant SES position in the agency for which the appointee meets the qualifications requirements. If there is more than one vacancy, the agency has the option of which position to offer the appointee.

(3) An appointee covered by this paragraph is entitled to be placed in a vacant SES position over an appointee who is still serving a probationary period.

Sec. 359.603 OPM priority placement.

(a) Agency certification. (1) If there is no vacant SES position within the agency for which an appointee covered by Sec. 359.602(b) is qualified, the agency head, or the acting agency head in the absence of the agency head, shall certify to OPM in writing that no such position is available. This certification may not be delegated below the Assistant Secretary level in a department, or an equivalent level above the director of personnel in other agencies.

(2) The 45-day period during which OPM will attempt to place the appointee begins on the day the certification is acknowledged by OPM.

(3) It is the continuing responsibility of an agency that has a surplus career appointee to place the appointee in any vacant SES position in the agency for which the appointee is qualified, even after the appointee is certified to OPM.

(4) An individual remains a career SES appointee in his or her agency during the OPM placement period.

(b) OPM authority. As provided by Sec. U.S.C. 3595(b)(3), OPM may require an agency to take any action that OPM considers necessary to carry out a placement.

(c) OPM referrals. (1) OPM may formally refer a career appointee to an agency for a specific SES vacancy or general priority consideration. Such a referral may not become a part of the regular competitive staffing process. The appointee must be considered by the agency for a noncompetitive SES appointment.

(2) Any objection by the agency to the qualifications of the appointee must be based on the professional/technical qualifications in the standard for the position. An agency may not rely solely on lack of agency-specific experience for an objection based on lack of professional/technical qualifications if the appointee is otherwise qualified.

(d) Agency response. (1) In order to expedite placement of surplus career appointees, an agency shall respond to an OPM referral within the time period prescribed by OPM.

(2) If an agency fails to place a referred career appointee in an SES position because of objection to the appointee's qualifications or because of any other reason, the agency response must be in writing and must be signed by the agency head, or the acting agency head in the absence of the agency head. The response may not be delegated below the Assistant Secretary level in a department, or an equivalent level above the director of personnel in other agencies.

(3) If an agency cancels a position while a referral to the position is pending, the appointee will be entitled to priority consideration for the position if it or a successor position is reestablished in the SES within 1 year of the cancellation date and the appointee has not been placed in another SES position.

(e) Corrective action. If an agency fails to provide bona fide priority consideration, OPM may order appropriate corrective action.

(f) Declination by employee. If a career appointee declines a reasonable offer of placement, OPM's placement efforts will cease. The appointee may be removed from the SES at the expiration of the agency notice period.

Sec. 359.604 Removal from the SES and placement rights outside the SES.

(a) If a probationary appointee is identified for reduction in force under Sec. 359.602(a), removal action is taken under Sec. 359.405. Placement rights outside the SES are covered under subpart G of this part.

(b) If a career appointee who has completed the probationary period, or who did not have to serve one, is identified for reduction in force under Sec. 359.602(a) and is not placed elsewhere in the SES under Sec. 359.602(b) or Sec. 359.603, or declines a placement offer under Sec. 359.603, removal action is taken under Sec. 359.604(b). Placement rights outside the SES are covered under subpart G of this part.

Sec. 359.605 Notice requirements.

(a) Each career appointee subject to removal under Sec. 359.604(b) is entitled to a specific, written notice at least 45 calendar days before the effective date of the removal. The notice shall state, as a minimum--

- (1) The action to be taken and its prospective effective date;
- (2) The nature of the competition, including the appointee's competitive area, if less than the agency, and standing on the retention register;
- (3) The place where the appointee may inspect the regulations and records pertinent to the action;
- (4) Placement rights within the agency and through OPM, including how the employee can apply for OPM placement assistance; and
- (5) The appointee's appeal rights, including the time limit for appeal and the location of the Merit Systems Protection Board office to which an appeal should be sent.

(b) A career appointee who has received a notice under paragraph (a) of this section is entitled to a second notice in writing at least 1 day before removal from the SES. The notice shall state, as a minimum--

- (1) The basis for the removal, i.e., 5 U.S.C. 3595(b)(5) if the basis is expiration of the 45-day OPM placement period, or 5 U.S.C. 3595(b)(4) if the basis is declination of a reasonable offer of placement, in which case identify the position offered and the date on which it was declined;
- (2) The effective date of the removal;
- (3) Placement rights outside the SES and, when applicable, the appointee's eligibility for discontinued service retirement in lieu of placement; and
- (4) Reminder of the appointee's appeal rights.

Sec. 359.606 Appeals.

A career appointee may appeal to the Merit Systems Protection Board whether the reduction in force complies with the competitive procedures in Sec. 359.602(a).

Sec. 359.607 Records.

Each agency shall maintain current records needed to determine the retention standing of its competing appointees. The agency shall allow the inspection of its retention registers and related records by an appointee to the extent that they have a bearing on the appointee's situation. The agency shall preserve intact all registers and records relating to a reduction-in-force action for at least 2 years from the effective date of the action.

Sec. 359.608 Transfer of function.

(a) Transfer of function means the transfer of the performance of a continuing function from one agency to one or more other agencies. (b) A career appointee is entitled to accompany his or her function to the new agency without any change in tenure if the alternative is removal from the SES in the current agency under reduction in force.

Subpart G-Guaranteed Placement

Sec. 359.701 Coverage.

This subpart covers career appointees, other than reemployed annuitants, who are removed from the SES under any of the following conditions:

(a) Removal during the probationary period under subpart C of this part or under subpart D of this part for other than misconduct, neglect of duty, malfeasance, or other disciplinary reasons under Sec. 359.403, Sec. 359.404, or part 752, subpart F, of this chapter, if at the time of appointment to the SES the individual held a career or career-conditional appointment or an appointment of equivalent tenure, as determined by OPM. An appointment of equivalent tenure is considered to be an appointment in the excepted service other than an appointment--

- (1) To a Schedule C position established under part 213 of this chapter;
 - (2) To a position that meets the same criteria as a Schedule C position; or
 - (3) To a position where the incumbent is traditionally changed upon a change in Presidential Administrations.
- (b) Removal as the result of:

- (1) Failure to be recertified under subpart C of this part;
- (2) Less than fully successful executive performance under subpart E of this part; or
- (3) A reduction in force under subpart F of this part. The appointee must have completed the required probationary period under the SES or was not required to serve a probationary period.

Sec. 359.702 Placement rights.

(a) An appointee covered by this subpart is entitled to be placed in a vacant civil service position (other than an SES position) in any agency that is--

- (1) A continuing position at GS-15 or above, or equivalent, that will last at least three months; and
- (2) A position for which the appointee meets the qualifications requirements.

(b) A probationary appointee, or a nonprobationary appointee who at the time of appointment to the SES held a career or career-conditional appointment (or an appointment of equivalent tenure, as defined in Sec. 359.701(a)), is entitled to be placed in a position of tenure equivalent to that of the appointment held at the time of appointment to the SES.

This tenure requirement does not apply--

- (1) If the agency taking the removal action does not have a position of equivalent tenure for which the appointee meets the qualifications requirements; or
- (2) If the appointee is willing to accept a position having a different tenure.

Sec. 359.703 Responsibility for placement.

The agency taking the removal action is responsible for placing the appointee in an appropriate position within the agency, or for arranging a transfer to an appropriate position in another agency. Any transfer must be mutually acceptable to the appointee and the gaining agency.

Sec. 359.704 Restrictions.

Placement of an appointee under this subpart shall not cause the separation or reduction in grade of any other employee.

Sec. 359.705 Pay.

(a) An appointee placed under this subpart is entitled to receive basic pay at the highest of--

- (1) The rate of basic pay in effect for the position in which the appointee is being placed;
- (2) The rate of basic pay currently in effect for the position that the appointee held in the civil service immediately before being appointed to the SES; or
- (3) The rate of basic pay in effect for the appointee immediately before removal from the SES.

(b) An employee who is placed under this subpart in a position outside the SES in another agency is entitled to receive basic pay under the provisions of this section.

(c) An employee who is placed under this subpart in a General Schedule position is not subject to the limitation on General Schedule basic pay in 5 U.S.C. 5303(f) of level V of the Executive Schedule. The employee is subject, however, to the limitation on General Schedule basic pay plus locality-based comparability payments in 5 U.S.C. 5304(g)(1) of level IV of the Executive Schedule.

(d) An employee receiving basic pay under paragraph (a)(2) or (a)(3) of this section shall have future pay adjusted in accordance with 5 U.S.C. 3594(c)(2).

(e) Pay received under this section shall terminate if:

- (1) The employee has a break in service of 1 workday or more; or
- (2) The employee is demoted based on conduct or unacceptable performance or at the employee's request.

Subpart H-Furloughs in the Senior Executive Service

Authority: 5 U.S.C. 3133 and 3136.

Source: 48 FR 11925, Mar. 2, 1983, unless otherwise noted.

Sec. 359.801 Agency authority.

This subpart sets the conditions under which an agency may furlough career appointees in the Senior Executive Service. The furlough of a noncareer, limited term, or limited emergency appointee is not subject to this subpart. The furlough of a reemployed annuitant holding a career appointment also is not subject to the subpart.

Sec. 359.802 Definitions.

For the purpose of this subpart, furlough means the placing of an appointee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

Sec. 359.803 Competition.

Any furlough for more than 30 calendar days, or for more than 22 workdays if the furlough does not cover consecutive calendar days, shall be made under competitive procedures established by the agency. The procedures shall be made known to the SES members in the agency.

Sec. 359.804 Length of furlough.

A furlough may not extend more than one year. It may be made only when the agency intends to recall the appointee within one year.

Sec. 359.805 Appeals.

A career appointee who has been furloughed and who believes this subpart or the agency's procedures have not been correctly applied may appeal to the Merit Systems Protection Board under provisions of the Board's regulations.

Sec. 359.806 Notice.

(a) An appointee is entitled to a 30 days' advance written notice of a furlough. The full notice period may be shortened, or waived, only in the event of unforeseeable circumstances, such as sudden emergencies requiring immediate curtailment of activities.

(b) The written notice shall advise the appointee of:

- (1) The reason for the agency decision to take the furlough action.
- (2) The expected duration of the furlough and the effective dates;
- (3) The basis for selecting the appointee for furlough when some but not all Senior Executive Service appointees in a given organizational unit are being furloughed;
- (4) The reason if the notice period is less than 30 days;
- (5) The place where the appointee may inspect the regulations and records pertinent to the action; and
- (6) The appointee's appeal rights, including the time limit for the appeal and the location of the Merit Systems Protection Board office to which the appeal should be sent.

Sec. 359.807 Records.

The agency shall preserve all records relating to an action under this subpart for at least one year from the effective date of the action.

Subpart I-Removal of Noncareer and Limited Appointees and Reemployed
Annuitants

Sec. 359.901 Coverage.

(a) This subpart covers the removal from the SES of--

- (1) A noncareer appointee;
- (2) A limited emergency or a limited term appointee; and
- (3) A reemployed annuitant holding any type of appointment under the SES.

(b) Coverage does not include, however, a limited emergency or a limited term appointee who is being removed for disciplinary reasons and who is covered by 5 CFR 752.601(c)(2).

Sec. 359.902 Conditions of removal.

- (a) Authority. The agency may remove an appointee subject to this subpart at any time.
- (b) Notice. The agency shall notify the appointee in writing before the effective date of the removal.
- (c) Placement rights. An appointee covered by this subpart is not entitled to the placement rights provided for career appointees under subpart G of this part.
- (d) Appeals. Actions taken under this subpart are not appealable to the Merit Systems Protection Board under 5 U.S.C. 7701.