

ORDER

**DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION**

EA 3750.8

EASTERN REGION
JAMAICA, N. Y., 11430

3-6-86

SUBJ: PERFORMANCE AND CONDUCT PROBLEMS INVOLVING MEDICAL CONSIDERATIONS

1. PURPOSE. This order provides guidance for addressing medically related performance and conduct problems.

2. DISTRIBUTION. This order is distributed to all supervisors in the Eastern Region.

3. BACKGROUND. In 1984 the Office of Personnel Management amended Title 5 of the Code of Federal Regulations (5 CFR), which deals with Administrative Personnel regulations, to reduce reliance on agency initiated disability retirement as the preferred way to deal with performance and conduct related medical problems. Specific regulations were amended in Part 339, which address Medical Determinations Related to Employability, in Part 432 dealing with Reductions In Grade and Removal Based on Unacceptable Performance, in Part 752 for Adverse Actions and in Part 831 for Retirement, specifically Disability Retirement. The Office of Personnel Management amendments gave more authority to agencies and managers to deal with medical conditions quickly and move or remove an employee, if necessary, through non-disciplinary adverse action.

4. INFORMATION. To facilitate ready access to these new rules, Appendix 1 of this order contains the regulations as published in the Federal Register on January 11, 1984. Appendix 2 contains questions and answers on performance and conduct problems involving medical considerations, which the Office of Personnel Management recently published as an attachment to FPM Bulletin 751-3. Appendix 3 contains specific regulations referred to in Appendix 2 which are not included in Appendix 1. Appendices 1 and 3 are included as background information to be used in determining a course of action.

5. ACTION. All managers, staff officers and supervisors who are confronted with medically related performance and conduct problems are encouraged to review the questions and answers in Appendix 2 for immediate guidance and to contact the regional Labor Relations office for assistance.


Joseph M. Del Balzo
Director

Distribution: A-XEA-5; ZEA-120; AEA-60 (5 cys.);
AEA-14C (40 cys.)

Initiated By: AEA-10

Title 5 - Code of Federal Regulations

Accordingly, OPM is amending Title 5, Code of Federal Regulations, as follows:

1. Part 339—*Qualification Requirements (Medical)* is revised to read as follows:

PART 339—MEDICAL DETERMINATIONS RELATED TO EMPLOYABILITY

Subpart A—General

Sec.

339.101 Purpose.

339.102 Definitions.

Subpart B—Medical Disqualifications

339.201 Medical disqualifications.

Subpart C—Medical Examinations

339.301 Examination authority.

339.302 Examination procedures.

339.303 Payment for examination.

339.304 Records and reports.

Authority: 5 U.S.C. 3301; E.O. 9830, Feb. 24, 1947.

Subpart A—General

§ 339.101 Purpose.

The applicability of this part to applicants and employees is defined by the specific regulation governing the personnel decision in which the medical issue arises. This part also defines the circumstances under which medical documentation may be acquired and under which examinations and evaluations may be conducted to determine the nature of a medical condition, knowledge of which is necessary to make personnel determinations under any part of this title. Personnel decisions based wholly or in part on the review of medical documentation and the results of medical examinations and evaluations shall be made in accordance with all requirements of the appropriate part of this title and provisions of any other title.

§ 339.102 Definitions.

For the purpose of this part:

"Medical condition" means health impairment which results from injury or disease, including psychiatric disease.

"Medical documentation" or "documentation of a medical condition" means a statement which provides the following information, or the parts identified by the agency as necessary and relevant:

(a) The history of the specific medical condition(s), including references to

findings from previous examinations, treatment, and responses to treatment;

(b) Clinical findings from the most recent medical evaluation, including any of the following which have been obtained: findings of physical examination; results of laboratory tests; X-rays; EKG's and other special evaluations or diagnostic procedures; and, in the case of psychiatric disease, the findings of a mental status examination and the results of psychological tests;

(c) Assessment of the current clinical status and plans for future treatment;

(d) Diagnosis;

(e) An estimate of the expected date of full or partial recovery;

(f) An explanation of the impact of the medical condition on life activities both on and off the job;

(g) Narrative explanation of the medical basis for any conclusion that the medical condition has or has not become static or well stabilized;

(h) Narrative explanation of the medical basis for any conclusion which indicates the likelihood that the individual is, or is not, expected to experience sudden or subtle incapacitation as a result of the medical condition;

(i) Narrative explanation of the medical basis for any conclusion that duty restrictions or accommodations are or are not warranted and, if they are, an explanation of their therapeutic or risk avoiding value and the nature of any similar restrictions or accommodations recommended for non-work-related activities; and

(j) Narrative explanation of the medical basis for any conclusion which indicates the likelihood that the individual is, or is not, expected to suffer injury or harm by carrying out, with or without accommodation, the tasks or duties of a position for which he/she is assigned or qualified.

"Medical specialist" means any physician who is board-certified in a medical specialty, or a physician serving on active duty in the uniformed services who is board-eligible and who is designated by the uniformed service to perform examinations under this part.

"Physician" means a licensed Doctor of Medicine or Doctor of Osteopathy, or a physician who is serving on active duty in the uniformed services and is designated by the uniformed service to conduct examinations under this part.

"Review of medical documentation" means assessment of medical documentation by, or in coordination with, a physician to ensure that the following criteria are met:

(a) The diagnosis or clinical impression is justified in accordance with established diagnostic criteria; and

(b) The conclusions and recommendations are not inconsistent with generally accepted medical principles and practices.

"Static or well stabilized medical condition" means a medical condition which is not likely to change:

(a) As a consequence of the natural progression of the condition;

(b) Specifically as a result of the normal aging process; or

(c) In response to the work environment or the work itself.

"Subtle incapacitation" means gradual, initially inapparent impairment of physical or mental function which is likely to result in a performance failure, whether reversible or not.

"Sudden incapacitation" means abrupt onset of loss of control of physical or mental function.

Subpart B—Medical Disqualifications

§ 339.201 Medical disqualifications.

Subject to Subpart C of Part 731 of this chapter, OPM may deny an applicant examination, deny an eligible appointment, and instruct an agency to remove an appointee by reason of physical or mental unfitness for the position for which he or she has applied to which he or she has been appointed.

Subpart C—Medical Examinations

§ 339.301 Examination authority.

(a) An agency may require an individual who has applied for or occupies a position which has physical/medical standards for selection or retention, or which is part of an established program of medical surveillance related to occupational or environmental exposure or demands, to report for a medical evaluation:

(1) Prior to appointment or selection (including reemployment on the basis of full or partial recovery from a medical condition);

(2) On a regularly recurring, periodic basis; and

(3) Whenever there is a direct question about an employee's continued capacity to meet the physical or medical requirements of the position.

(b) An agency may require an employee receiving workers compensation benefits or assigned to limited duties as a result of an on-the-job injury to report for medical evaluation when the agency has identified an assignment or position (including the employee's regular position) which it reasonably believes the employee can perform consistent

with the medical limitations of his/her condition. If the medical information (consistent with generally accepted medical principles and practice) indicates that the employee is capable of performing the duties identified, the agency will promptly return the employee to corresponding duty and pay status.

(c) An agency may require an employee who is released from his/her competitive level in a reduction-in-force to undergo a medical evaluation if the position(s) to which the employee has reassignment rights requires specific physical capacities to perform the duties of the job, and those physical capacities are different from those required in the employee's present position. The agency shall be aware of the affirmative obligations of the provisions of 29 CFR 1613.704, which require reasonable accommodation of a qualified employee who is handicapped.

(d) An agency may offer a medical examination when an individual has made a request for medical reasons for a change in duty status, assignment, or working conditions or any other benefit or special treatment (including reemployment on the basis of full or partial recovery from a medical condition) and the agency, after it has received and reviewed medical documentation, determines that it cannot grant, support, or act further on the request without verification of the clinical findings and current clinical status.

(e) Any medical evaluation required of an individual shall be carried out and used in accordance with 29 CFR 1613.706.

§ 339.302 Examination procedures.

(a) When an agency orders or offers a medical examination under this subpart it shall inform the applicant or employee in writing of its reasons for ordering or offering the examination and the consequences of failure to cooperate.

(b) The agency shall designate the examining physician, but shall offer the employee or former employee an opportunity to submit medical documentation from his or her personal physician, which the agency shall review and consider.

(c) The agency shall provide the examining physician with a copy of any approved medical evaluation protocol, any applicable standards and requirements for the position, and/or a detailed description of the duties of the position, including critical elements, as defined in Part 430 of this chapter, physical demands, and environmental factors.

(d) If the examination is ordered or offered as a regularly recurring, periodic examination as a part of an established medical retention or surveillance program under § 339.301(a), notification required under paragraphs (a) through (c) of this section may be made once, covering a series of examinations, provided the notice is issued prior to the first required examination.

(e) An agency shall order or offer a psychiatric evaluation to an employee only when the employee first provides results of a general medical or psychiatric examination, or the agency has first conducted a non-psychiatric medical examination, and, after review of the documentation or examination report, the agency's physician concurs that a psychiatric evaluation is warranted for medical reasons. Unless not medically indicated in the psychiatrist's judgment, a psychiatric evaluation normally consists of more than one interview with the employee and includes psychological testing.

(f) All medical specialty examinations ordered or offered under this subpart shall be conducted by a medical specialist.

§ 339.303 Payment for examination.

Agencies shall pay for all agency ordered or agency offered examinations of employees conducted under this subpart. Agencies shall also pay for all required pre-employment examinations of applicants which are conducted by a physician designated by the agency. However, applicants and employees, not the agency, shall pay for a medical examination conducted by a private physician selected by the applicant or employee, unless a statute, regulation, or appropriations act gives the agency authority to pay this expense.

§ 339.304 Records and reports.

(a) Agencies shall receive and maintain all medical documentation and records of examinations obtained under this part in accordance with instructions provided by OPM.

(b) The report of an examination conducted under this subpart shall be made available to the applicant or employee under the provisions of § 294.401 of this chapter.

(c) Agencies shall forward to the Office of Workers' Compensation Programs (OWCP), Department of Labor, a copy of all medical documentation and reports of examinations of individuals who are receiving or have applied for injury compensation benefits including continuation of pay. The agency shall also report to the OWCP the failure of such individuals to report for

examinations that the agency orders under this subpart.

PART 432—REDUCTION IN GRADE AND REMOVAL BASED ON UNACCEPTABLE PERFORMANCE

2. Section 432.204 is amended by adding paragraphs (d) and (e) as follows:

§ 432.204 Procedures.

(d) *Consideration of medical condition.* If the employee wishes the agency to consider any medical condition which may contribute to his or her unacceptable performance, he or she shall be given a reasonable time to furnish medical documentation (as defined in § 339.102 of this chapter) of the condition. Whenever possible, the employee shall supply this information at the time the agency offers him or her the opportunity to demonstrate acceptable performance. If the employee offers such documentation after the agency has proposed a reduction in grade or removal, he or she shall supply this information within the time limits allowed for a reply, whenever possible. After its review of the medical documentation supplied by the employee, the agency may, if authorized, require a medical examination under the criteria of § 339.301(a)(3) and the procedures of § 330.302 of this chapter, or otherwise, at its option, offer a medical examination in accordance with the criteria in § 339.301(d) and the procedures of § 339.302 of this chapter. If the employee has five years of service, the agency shall provide information concerning disability retirement. The agency shall be aware of the affirmative obligations of the provisions of 29 CFR 1613.704, which require reasonable accommodation of a qualified employee who is handicapped.

(e) *Applications for disability retirement.* Section 831.501(d) provides that an employee's application for disability retirement shall not preclude or delay any other appropriate personnel action. Section 831.1203 sets forth the basis under which an agency shall file an application for disability retirement on behalf of an employee. (5 U.S.C. 4305)

PART 752—ADVERSE ACTIONS

§ 752.04 [Amended]

3. In § 752.404, paragraph (c)(3) is added, paragraph (f) is revised, and paragraph (h) is added to read as follows:

(c) *Employee's answer.* . . .

(3) If the employee wishes the agency to consider any medical condition which may contribute to a conduct, performance, or leave problem, the employee shall be given a reasonable time to furnish medical documentation (as defined in § 339.102 of this chapter) of the condition. Whenever possible, the employee shall supply such documentation within the time limits allowed for an answer. After its review of the medical documentation supplied by the employee, the agency may, if authorized, require a medical examination under the criteria of § 339.301(a)(3) and the procedures of § 339.302 of this chapter, or otherwise, at its option, offer a medical examination in accordance with the criteria of § 339.301(d) and procedures of § 339.302 of this chapter. If the employee has five years of service, the agency shall provide information concerning disability retirement. The agency shall be aware of the affirmative obligations of the provisions of 29 CFR 1613.704, which require reasonable accommodation of a qualified employee who is handicapped.

(f) *Agency decision.* In arriving at its decision, the agency shall not consider any reasons for action other than those specified in the notice of proposed action. It shall consider any answer of the employee and/or his or her representative made to a designated official and any medical documentation furnished under paragraph (c) of this section. The agency shall deliver the notice of decision to the employee at or before the time the action will be effective, and advise the employee of appeal rights.

(h) *Applications for disability retirement.* Section 831.501(d) of this chapter provides that an employee's application for disability retirement shall not preclude or delay any other appropriate personnel action. Section 831.1203 of this chapter sets forth the basis under which an agency shall file an application for disability retirement on behalf of an employee.

(5 U.S.C. 7514)

PART 831—RETIREMENT

4. Section 831.109(b) is revised to read as follows:

§ 831.109 *Initial decision and reconsideration.*

(b) *Actions covered elsewhere.* (1) A request for reconsideration of

termination of annuity payments under 5 U.S.C. 8311-22 shall be made in accordance with the procedures set out in Subpart K of this part.

(2) A request for reconsideration of a decision to collect an erroneous annuity overpayment shall be made in accordance with § 831.1303(b) of this part.

5. Under § 831.501, paragraph (d) is revised and paragraph (e) added, to read as follows:

§ 831.501 *Time for filing applications.*

(d) An employee's application for disability retirement shall not preclude or delay any other appropriate personnel action by the employing agency.

(e) When a department or agency files an application for disability retirement of an employee, it shall do so in accordance with Subpart L of this part. Medical documentation shall be obtained in accordance with Part 339 of this chapter.

6. In § 831.502, paragraph (a) is amended by removing the definition of "medical information" and adding alphabetically the definitions listed below; and paragraph (b) is revised to read as follows:

§ 831.502 *Disability retirement.*

(a) . . . "Examination" and "reexamination" mean an evaluation of evidentiary material related to the question of disability. Unless OPM exercises its choice of physician, the cost of providing medical documentation rests with the employee or disability annuitant, who will provide any information necessary to OPM's evaluation.

"Income from wages and/or self-employment" means money or property received by a disability annuitant as consideration for or in reward of personal services or a work product, or as a profit from a business (sole proprietorship, partnership, or corporation) wholly or partly owned by the disability annuitant and in which the disability annuitant has an active role in the management thereof; and also includes, for a disability annuitant reemployed by the Federal Government, any amount offset or deducted under the provisions of 5 U.S.C. 8344. Income is deemed earned in the calendar year in which it is received.

"Medical documentation," "documentation of a medical condition," and "physician" have the same meaning given these terms in § 339.102 of this chapter. "Medical documentation"

submitted under this part shall be submitted from a physician.

"Same grade or pay level" means, in regard to a vacant position within the same pay system as the position the employee presently occupies, the same grade and an equivalent amount of basic pay, as defined in 5 U.S.C. 8331(3); in regard to a vacant position in another pay system, an equivalent amount of basic pay, as defined in 5 U.S.C. 8331(3).

(b) *Proof of claim.* No claim for disability retirement shall be allowed unless OPM determines that the claim should be granted based upon documentation provided by the applicant or the agency which demonstrates the following:

(1) A deficiency in service with respect to performance, conduct or attendance, or in the absence of any actual service deficiency, a showing that the medical condition is incompatible with either useful service or retention in the position;

(2) A medical condition which is defined as a disease or injury;

(3) A relationship between the service deficiency and the medical condition such that the medical condition has caused the service deficiency;

(4) The duration of the medical condition, past and expected, and a showing that the condition, in all probability, will continue for at least a year;

(5) The applicant became disabled while serving under the Civil Service Retirement System;

(6) The agency's inability to make reasonable accommodation to the employee's medical condition; and

(7) The absence of another available position, within the employing agency and commuting area, at the same grade or pay level and tenure, for which the employee is qualified for reassignment. For this part, placement in the agency is limited to those facilities in the commuting area that are serviced by the same appointing authority.

7. Subpart L of Part 831 is revised to read as follows:

Subpart L—Disability Retirement on Application by an Agency

Sec.
831.1201 Scope.
831.1202 Definitions
831.1203 Basis for filing application.
831.1204 Agency procedure.
831.1205 Office of Personnel Management procedure.
831.1206 Cancellation of retirement.

Authority: 5 U.S.C. 8347

Subpart L—Disability Retirement on Application by an Agency

§ 831.1201 Scope.

This subpart prescribes the procedures to be followed when an agency files an application for the employee's disability retirement in the course of removing an employee.

§ 831.1202 Definitions.

"Medical documentation," "documentation of a medical condition," and "review of medical documentation," have the same meaning given these terms in § 330.102 of this chapter. "Medical documentation" submitted under this subpart shall be submitted from a physician.

§ 831.1203 Basis for filing application.

(a) An agency shall file an application for disability retirement of an employee who has five years of civilian Federal service under the following conditions:

- (1) The agency has issued a decision to remove the employee;
- (2) The agency concludes, after its review of medical documentation, that cause for the unacceptable performance, conduct, or attendance is due to disease or injury;
- (3) The employee is institutionalized, or based on the agency's review of medical and other information, it concludes that the employee is incapable of making a decision to file an application for disability retirement;
- (4) The employee has no personal representative or guardian; and
- (5) The employee has no immediate family member who is willing to file an application on his or her behalf.

(b) When an agency issues a decision to remove and the conditions described in paragraph (a) of this section have not been satisfied but the removal is based on reasons apparently caused by a medical condition, the agency shall advise the employee in writing of his or her possible eligibility for disability retirement.

§ 831.1204 Agency procedure.

(a) The agency shall inform the employee in writing at the same time it informs the employee of its removal decision, or any time before the separation is effected, that: (1) The agency is submitting a disability retirement application on the employee's behalf to OPM, (2) the employee may review any medical information in accordance with the criteria in § 204.401(b) of this chapter, and (3) the action does not affect the employee's right to submit a voluntary application

for disability retirement under § 831.502 of this part.

(b) When an agency submits an application for disability retirement to OPM under this subpart, it shall provide OPM with copies of the decision to remove, the medical documentation, and any other documents needed to show that the cause for removal is due to a medical condition. Following separation, the agency shall provide OPM a copy of the documentation of the separation.

§ 831.1205 Office of Personnel Management procedure.

(a) OPM shall not act on any application for disability retirement under this subpart until it receives the appropriate documentation of the separation. When OPM receives a complete application for disability retirement under this subpart, it shall notify the former employee that it has received the application, and that he or she may submit medical documentation. OPM shall determine entitlement to disability retirement under the provisions of § 831.502 of this part.

(b) OPM shall issue its decision in writing to the employee and to the employing agency. The decision shall include a statement of findings and conclusions, and an explanation of the right to request reconsideration under § 831.109 of this part.

§ 831.1206 Cancellation of retirement.

OPM shall cancel any disability retirement when a final decision of an administrative authority or court reverses the removal action and orders the reinstatement of an employee to the agency rolls.

QUESTIONS AND ANSWERS ON PERFORMANCE AND CONDUCT PROBLEMS INVOLVING MEDICAL CONSIDERATIONS

I. MEDICAL ISSUES ARISING BEFORE ACTION IS PROPOSED ON PERFORMANCE OR CONDUCT PROBLEMPerformance ProblemsMinimally successful or unacceptable performance

1. Q. The employee's performance has become minimally successful, and the agency plans counseling on the deficiencies. Whose responsibility is it to determine if a medical condition is causing the poor performance?
 - A. The responsibility for raising any medical condition generally lies with the employee. This is one of the major thrusts of the new regulations. However, some agencies do include in the record of counseling on the performance problem a statement that if the employee believes that a personal, medical, or other problem is causing the deficient performance, he or she may use the employee counseling service or supply documentation of a medical condition. (See question 14 on the agency obligations if the employee raises alcohol or drug dependence as a medical condition, questions 13 and 15 on handicap claims in general, and question 16 if the agency believes there is a medical problem but the employee has not raised it.) Further, if an employee is serving in a position with physical medical standards or in a position subject to an established medical surveillance program (this will be clarified in the forthcoming FPM Chapter 339), and the agency believes that a medical condition may be affecting his or her ability to carry out the duties of the position, the agency may raise the issue of a medical condition without waiting for the employee to do so. (See questions 21 and 25 below for the circumstances under which agencies may order examinations and details of getting physicians and paying for the examinations.)

2. Q. What if the employee's performance is determined to be unacceptable? Does the agency have different responsibilities then?
 - A. Consistent with 5 CFR §432.203, the agency must inform the employee that his or her performance is unacceptable in one or more critical elements and give a reasonable time in which to demonstrate acceptable performance prior to proceeding with its proposed action. At this point, some agencies give the employee an opportunity to raise a medical condition which may contribute to the unacceptable performance. How and if this is done is best left to the agency. If the employee does raise such a condition, the regulations (§432.204(d)) require that he or she be given a reasonable time to supply medical documentation (see question 19 on medical documentation). If necessary, the agency can extend the opportunity period to allow for obtaining and reviewing the necessary documentation which describes the medical condition. It can then determine if it can accommodate the employee's medical condition, and if not, go forward with its proposed action.

Inability to perform

3. Q. Based on medical documentation the agency may determine that it has an employee who is unable to meet the physical requirements of the job (perhaps because of an on-the-job injury). Can the agency take any administrative action to remove the employee and, if so, under what procedures -- Part 432 or Part 752?
 - A. Yes. For the most part, agencies should rely on the "efficiency of the service" standard in Part 752 as the basis for taking a nondisciplinary action based on inability to perform, even when the impairment is affecting only performance. When inability to perform arises because of physical incapacity to meet the requirements of the job, it is very unlikely that the agency could provide the "opportunity period" to demonstrate acceptable

Appendix 2

performance required by 5 U.S.C. §4302(b)(6). A recent decision by the Federal Circuit Court of Appeals, Lovshin v. Department of the Navy, Appeal No. 84-1002, June 21, 1985, has held that agencies may take performance-based actions under Part 752. This decision overturns the previous holdings of the MSPB in Gende v. Department of Justice. Also, the MSPB has noted in Stith v. HUD, MSPB Dkt. No. DC07528210275, October 25, 1983, that the agency may remove an employee who is unable to perform the duties of his or her position and that the efficiency of the service is promoted by the removal of an employee who "has long remained unable to meet the requirements of his position." Before effecting any action under Part 432 or Part 752, the agency must advise the employee concerning disability retirement if he or she meets the five-year service requirement. An employee's application for disability retirement does not delay the the agency's removal action. (See questions 13 through 16 on reasonable accommodation.)

4. Q. In another set of circumstances, the employee may be physically able to do the job, but obviously unable to comprehend the work expected of him or her and/or how to do it. Again, can the agency take any action to remove the employee and if so, how?
- A. Complete mental inability to comprehend work instructions is an extreme example, but OPM has been made aware of more than a few such situations. In these circumstances, the agency would be again unable to provide the opportunity to demonstrate acceptable performance. The agency's action to remove the employee should be brought under Part 752. As is more often true, if an employee with a mental condition is nevertheless able to function to some extent and can understand instructions concerning job performance, the agency may then provide an opportunity to demonstrate acceptable performance and proceed with any necessary action under Part 432.

In either case, the agency must inform the employee of the procedures for filing a disability retirement application if he or she meets the service requirements. In addition, if an employee appears to meet the stringent criteria for an agency-filed disability retirement, the agency must be aware of the procedures for doing so. (See question 30 on agency-filed disability retirement applications.) Note that an employee's filing of an application for disability retirement does not delay the agency's action to remove under Part 432 or Part 752 (§831.501(d)).

5. Q. Because of illness or injury, the employee has been on approved leave without pay for an extended length of time and there seems to be little prospect that he or she will be able to return soon. Meanwhile, the agency needs to have the employee's work done and believes the position should be filled by someone who can do the work. Can the agency separate the employee under such circumstances?
- A. Yes. In some cases, the agency may take action based on the employee's physical or mental inability to perform, or one based on excessive use of unscheduled leave without pay or prolonged absence for which no foreseeable end was in sight. Ordinarily, OPM guidance and MSPB decisions have stated that agencies may not take action based on use of approved leave. The agency generally should not continue to grant LWOP. However, FPM Chapter 752, Section 3-2b(4)(e), provides that an agency may take an action based on a record of excessive unscheduled leave without pay when three criteria are met:
- The record shows that the employee was absent for compelling reasons beyond his or her control so that agency approval or disapproval was immaterial because the employee could not be on the job;
 - The absence or absences have continued beyond a reasonable time and the agency has warned the employee that it might initiate adverse action unless the employee becomes available for duty on a regular, full-time or part-time basis; and

- c. The agency can show that the position needs to be filled by an employee available for duty on a regular, full-time or part-time basis.

MSPB has upheld the use of actions based on approved leave when the agency can prove that these criteria have been met. (See McKenzie v. Postal Service, 1 MSPB 480, Doran v. Internal Revenue Service, 7 MSPB 499, Komora v. Veterans Administration, 10 MSPB 719.) This is not intended to suggest that an agency may not at any time initiate action to separate an employee who is unable to perform the duties of the job. (See question 3.)

Conduct Problems

General

6. Q. If the employee has a conduct problem, whose responsibility is it to raise a medical condition which may be connected with the misconduct?
- A. As in cases involving performance problems, the employee is responsible for bringing a medical condition which he or she believes is causing the conduct problems to the attention of the agency and supplying acceptable documentation when the agency requests it. We note that some agencies do include a general statement in a discussion with the employee or in a written warning that if the employee believes that a personal, medical, or other problem is causing the misconduct, he or she may go to the agency counseling service or supply medical documentation. (See questions 13, 14, and 15 on handicapping conditions raised by the employee, question 16 on what to do if the agency suspects a health problem not raised by the employee, and questions 21 and 25 on medical examinations, getting physicians and paying for the examinations.)

On-the-job intoxication

7. Q. What can the supervisor do when confronted by an employee who he or she believes is intoxicated?
- A. If the employee is exhibiting symptoms of intoxication such as strong odor of alcohol, unsteady gait, blurred speech, falling, etc., those symptoms are sufficient to conclude that the employee is not "ready, willing, and able to work," and the employee may be placed on enforced leave for the day and restricted from the worksite. (See FPM Chapter 751, Section 1-3.) Of course, if the employee requests leave, the agency may grant it. In placing the employee on enforced leave, the agency may authorize annual or sick leave or it may place the employee in a nonduty, nonpay status.

If the employee appears incapable of getting home safely, it may be prudent to make arrangements to take the person home or to provide a place to wait until such time as he or she is not likely to harm him or herself or others. Agencies must avoid letting an intoxicated person drive.

To prove the fact of intoxication, the Merit System Protection Board has allowed agencies to rely on lay evidence, for example Zych v. Postal Service, MSPB Dkt. No. CH07528310458, July 6, 1984, and Peru v. Department of Justice, MSPB Dkt. No. SF07528310021, July 12, 1984. These decisions show clearly that lay evidence of intoxication, if supported by witnesses, is sufficient to sustain the agency's charge. Therefore, the agency does not need to send the employee to the health unit for a medical examination to confirm obvious intoxication. However, if there is a health unit available, agencies may want to encourage the employee to go to it to determine if there is a medical problem.

Whether or not the employee indicates on return to work that he or she suffers from alcoholism, the agency is obligated to refer the employee for counseling. (See FPM Supplement 792-2 and Ruzek v. GSA, 7 MSPB 307.) If the employee does not agree to go, the

Appendix 2

agency should take whatever action it would otherwise take. Note that beyond the placement of the employee on enforced leave, on-the-job intoxication is often cause for some form of disciplinary action.

Dangerous, irrational, or disruptive behavior

8. Q. What can agencies do with an employee whose behavior is irrational and is causing a disruptive, perhaps a dangerous situation?

As an immediate step, if the employee is behaving in an irrational, dangerous manner, the agency may send him or her home on enforced leave for a few days as not ready, willing, and able to work, using appropriate sick or annual leave, or nonduty, nonpay status. If the employee appears incapable of reaching home safely, the agency may arrange for transportation home or provide a place to wait until he or she is not a danger to himself, herself, or others. In extreme cases, it may be necessary to call the building guards or the police. Before the employee returns to work, the agency may want to require him or her to submit medical documentation that the condition leading to the aberrant behavior is under control. (See question 19 on medical documentation and questions 21, 22, and 24 on ordering and offering medical examinations, including psychiatric examinations.)

If the medical documentation shows that the problem is likely to be a continuing one which necessitates the employee's continued absence from the worksite, but where the employee's conduct would not call for disciplinary action, the agency may be able to continue the employee in an enforced leave status. (See FPM Chapter 751, Section 1-3.) On the other hand, when there are again questions regarding when the employee may be able to return to work and if the employee's conduct might otherwise require disciplinary action, then an indefinite suspension taken under Part 752 pending further action may be preferable. (See Thomas v. GSA, U.S. Court of Appeals for the Federal Circuit, Appeal No. 84-1487.) Though a 30-day notice period is required, the agency may place the employee in a nonduty, pay status during this period. In some cases, the employee's aberrant behavior may call for immediate disciplinary action under Part 752, e.g., violence to a supervisor or coworkers.

Leave problems.

9. Q. How do the new regulations tie in with the requirement that the employee supply administratively acceptable evidence to support a request for sick leave (§630.403)?
- A. A long-standing flexibility exists on the level of documentation that may be requested by the agency. The employee can supply self-certification for absences, unless the agency decides to require medical certification. Some or all of the items listed under medical documentation in §339.102 may be included in the agency's request for medical certification. Agencies should be careful only to require what they really need in the way of medical documentation for leave purposes. We recommend that the agency supply the physician with a copy of the requirements of the position or another position in which the employee may be able to perform, and ask that he or she indicate which duties the employee cannot perform and for how long. Agencies should be aware of a bargaining obligation with recognized unions if they plan to change their requirements for leave documentation.
10. Q. May the agency deny sick leave if the employee does not supply acceptable medical documentation?
- A. Yes. (See §630.403) However, several MSPB decisions have held that the agency must retroactively approve the sick leave if the employee subsequently supplies the requested documentation, even on an untimely basis. The Board held in these cases that the agency still may be able to take actions based on a charge of failure to follow procedures for requesting leave, even though it could not deny the leave.

11. Q. Does the agency have to grant leave without pay (LWOP) if an employee who requests it after exhausting sick and/or annual leave supplies acceptable medical documentation that he or she is suffering from a medical condition which affects performance or conduct?

A. Generally, no. The awarding of leave without pay is usually considered to be a matter that is entirely within agency discretion.

However, under Executive Order 5390, an agency is required to allow a disabled veteran to receive properly scheduled medical treatment, subject to his or her provision of acceptable medical documentation.

Also, when an employee sustains a compensable injury, an agency has essentially two choices. It may place the individual on LWOP (for practical reasons OPM suggests that injured employees be carried on the rolls for the first year), or it may separate the individual under Part 752 based on inability to perform the duties of the position. (See answers to questions 3 and 5.) The agency may not, however, charge the employee with being absent without leave and then use this as the basis for a separation action. The Merit Systems Protection Board has overturned such actions in several cases (see Hardin v. Department of the Army, MSPB Dkt. No. DA07528210275, October 25, 1983, Stith v. Department of Housing and Urban Development, MSPB Dkt. No. DC07528310194, June 18, 1984, and Crawford v. Veterans Administration, MSPB Dkt. No. AT07528211145, August 7, 1984.)

12. Q. In what leave status is an employee when attending a medical examination ordered or offered by the agency?

A. When the agency orders or offers the examination, the agency may place the employee on excused absence for the time spent undergoing the examination. When the employee is attending an examination with his or her physician which he or she has requested and paid for, the employee would ordinarily use sick leave just as he or she would otherwise.

Handicapping Conditions Raised by the Employee

13. Q. What should the agency do when an employee alleges prior to any agency action that a physical or mental handicap is causing performance or conduct problems?

A. The agency should request the employee to supply medical documentation concerning the handicapping condition and its effect on job performance. This documentation will assist in determining whether the employee is handicapped for the purposes of reasonable accommodation, i.e., has a physical or mental impairment which substantially limits one or more of his or her major life activities, has a record of such an impairment, or is regarded as having such an impairment (§1613.702(a)). Alcohol and/or drug dependence has also been determined to be a handicapping condition (see question 15). If the employee is handicapped, the agency should explore the possibilities of reasonable accommodation, and, if none are apparent or the agency has attempted accommodation unsuccessfully, it may ask the employee to articulate an accommodation(s) for the handicap, for example, light duty, special equipment, training, etc. If the employee requests light duty, the agency should ask him or her to specify the specific light duty. If the employee claims stress, the agency will wish to have the employee explain which component of the job is causing stress. In other words, the agency should require as much specificity from the employee as possible to determine whether the type of accommodation requested is appropriate and feasible. Medical documentation may help in determining whether a particular accommodation is feasible or would constitute an undue hardship to the agency.

If the employee is a "qualified handicapped employee" (an employee who, with or without reasonable accommodation can perform the essential duties of the position without endangering the health or safety of the employee or others) and the requested accommodation will not impose an undue hardship on the agency, the agency should afford the accommodation prior to considering the initiation of a Part 432 or Part 752 action. (See 29 CFR §1613.704.) Question 19 provides more information on medical documentation; and questions 12, 22, and 25 cover agency-ordered and offered examinations, including psychiatric examinations.

The Board's decisions in Ziemba v. Navy, 6 MSPB 638 (1981) and Nealen v. Treasury, MSPB Dkt. Nos. PH07528110149COMP, PH07528110664, November 30, 1984, are instructive on the issue of reasonable accommodation.

14. Q. What should the agency do if an employee, again prior to any agency action, raises a claim of alcohol and/or drug use as a handicapping condition affecting his or her performance or conduct?

A. The agency must refer the employee to counseling. At that time, OPM recommends that the agency give the employee a firm choice between successful rehabilitation and future performance-based or disciplinary action if the employee refuses rehabilitation or problems persist following treatment or rehabilitation. If there is any question as to the severity of the condition, the agency should request medical documentation or other evidence of the employee's condition to ascertain whether he or she is handicapped and should be given an opportunity for rehabilitative assistance prior to initiating a performance-based or misconduct action.

If the employee accepts the offer of rehabilitative assistance, the agency must allow him or her an opportunity to enter the program and demonstrate successful rehabilitation before instituting any action based on continuing performance or conduct problems. Following the rehabilitation program or other requested accommodation, the agency may proceed with appropriate disciplinary action if problems continue. The agency may also proceed with action against an employee who fails to attend or drops out of a scheduled rehabilitation program.

However, if the agency voluntarily and knowingly allows the employee to enter into another rehabilitation program, it must allow the employee an opportunity to complete the program and demonstrate successful rehabilitation before instituting any adverse action. (See Ruzek v. GSA, 7 MSPB 307, and Haskins v. FAA, MSPB Dkt. No. DC07528210812, June 29, 1984, for the agency's obligations in these respects.)

15. Q. What obligation is the agency under and what can it do when it believes that an alleged handicapping condition has no effect on the employee's poor performance or misconduct?

A. If in the agency's view the employee's performance or conduct problems are unrelated to the nature of the handicap, the employee is not a handicapped employee for the purpose of requiring the agency to consider whether reasonable accommodation is possible. That is, the employee will not be able to establish a showing of handicap discrimination if it is determined that the handicapping condition is not causally related to the misconduct or performance being charged. Although this is a difficult determination in some cases, agencies can rely on medical documentation and other related evidence. In addition, in some cases it is obvious that handicapping conditions have little or no bearing on conduct or performance problems. When such conditions exist, the agency is not obligated to consider accommodation prior to initiating action under Chapter 43 or Chapter 75. Agencies of course must be ready to defend their actions before MSPB and/or EEOC. The MSPB has issued several decisions which will be helpful to agencies on this point: Kiernan v. Army, 10 MSPB 593 (one-armed custodian fails to demonstrate that the agency committed handicap discrimination when it removed him for repeated AWOL); Peru v. Justice, MSPB Dkt. No. SF07528310021, July 12, 1984 (employee's drinking problem not tied to several instances of off-duty misconduct); Clemons and Nichols v. Army, MSPB Dkt. No. DC07528310099, June 7, 1984 (employees' inebriation not related to the offenses charged); and Miller v. HHS, MSPB Dkt. No. BN07528210215, September 14, 1984 (psychiatrists' evidence failed to show that the employee's mental impairment was causally related to her numerous acts of insubordination, misconduct, and other unacceptable behavior).

Medical condition suspected by the agency

16. Q. What should the agency do if it believes that there is a medical problem which is contributing to an employee's performance or conduct problems and the employee does not acknowledge it, provide medical documentation, or refuses to take a medical examination ordered or offered by the agency?

- A. The agency should make whatever management decision it would have made if there were no suspected medical problems, e.g., performance or conduct counseling or action proposal. While detailed medical information might permit a more comprehensive decision process, it is only a tool and not necessary in order to proceed with an otherwise appropriate management action. If the employee wishes to claim a benefit or special treatment such as accommodation, leave approval, light duty, being granted a new or extended opportunity to demonstrate acceptable performance, etc., the burden is on him or her to provide acceptable medical documentation or accept the agency's offer of an examination. If the employee refuses a properly authorized agency-ordered examination (see question 21), the agency may take appropriate disciplinary action based on the refusal of a proper order. The agency should, however, be aware of its obligation to refer to counseling an employee who has a performance or conduct problem which the agency reasonably believes may be caused by an alcohol and/or drug problem before initiating any action based on the performance or conduct problem. (See Ruzek v. GSA, 7 MSPB 307, on this obligation.)

II. MEDICAL ISSUES ARISING AFTER ACTION IS PROPOSED OR TAKEN

17. Q. What are agencies required to do if the employee waits until receiving a proposal to take action under Part 432 or Part 752 to raise a medical or handicapping condition?
- A. Both Part 432 and Part 752 allow an employee to submit medical documentation as part of an answer to a proposed action, and the agency must consider it in making its decision on the proposed action. If authorized under §339.301, the agency may order an examination to supplement the documentation, or offer an examination otherwise, but neither of these are required. If the employee is unable to obtain the necessary documentation in the time for an answer, the agency may allow an extension of the time for an answer or even an extension of the notice period itself. (See questions 21, 22, and 24 on agency-ordered and offered examinations, including psychiatric examinations.) If the employee has five years of service, the agency must provide information on disability retirement. Note: an employee's application for disability retirement does not delay a proposed action (§831.501(d)).

A recent decision by MSPB, Noe v. U.S.P.S., MSPB Dkt. No. SF07528411002, June 17, 1985, emphasizes the requirement that agencies consider a claim of the handicapping condition of alcoholism or drug dependence raised in the employee's answer. This requirement does not mean that agencies must unquestioningly accept the employee's claim of alcoholism or drug dependence. If an agency has any reason to believe that the employee's claim may be a pretext to delay the agency's action, it may request medical documentation to show the presence of alcohol or drug dependence. If none is forthcoming, the agency may then conclude that there is no medical evidence of a true alcohol or drug dependence and proceed with its action. If medical documentation does show such a dependence, the agency may conclude that the employee is handicapped. It must then determine whether it can accommodate the handicapping condition. Because of safety considerations or because of the criminal nature of the employee's misconduct (e.g., danger to other employees, theft or embezzlement, etc.), the agency may not be able to provide any accommodation. In any case, however, the agency may not ignore the issue once the employee has raised it, and it must refer the employee for counseling. In many instances, the agency will have to delay action pending the outcome of the employee's attempts to rehabilitate. Question 14 also deals with employees who raise alcohol and/or drug use problems as handicapping conditions.

18. Q. What are an agency's obligations when it separates an employee because of a compensable on-the-job injury?
- A. Section 353.106 requires the agency to notify the employee who is separated because of compensable injury on the job of the rights, obligations, and benefits relating to his or her Government employment, including restoration rights. MSPB has held in Huff v. USPS, 9 MSPB 828, that failure to notify an employee of these rights is sufficient grounds to waive any applicable time limits to apply for restoration. However, the Board has held in Richards v. Navy, MSPB Dkt. No. SF07528410052, October 30, 1984, that restoration rights would not apply if the employee is removed for excessive absences not substantially related to the compensable injury.

III. OBTAINING MEDICAL INFORMATION

Medical Documentation

19. Q. The definition of medical documentation in §339.102 lists ten items of information which could be necessary and relevant for the agency review if the employee has raised a medical condition in connection with a performance or conduct problem. Agencies have the authority to request this information when an employee raises a medical condition in connection with a performance or conduct problem. Should the agency always ask for all ten pieces of information?
- A. No. This should be a very obvious answer, but agencies have cited situations where over-eager supervisors have not exercised discretion in their requests. The agency should always tailor its requests for medical documentation to the specific need in a particular case. The content of medical documentation was defined to provide authority to seek the type of information which might be relevant. Usually, however, the agency would need the full range of information if the employee raises a medical condition after it has initiated an opportunity period or proposed an action under Part 432 or Part 752. Under these circumstances, the agency will likely have the medical information reviewed by another physician, and of course it will be subject to review if the employee grieves or appeals a subsequent action.
20. Q. Does medical documentation supplied by an employee have to come from a physician?
- A. The only requirement for medical information from a physician is for documentation for the purposes of disability retirement determinations. Otherwise, documentation from chiropractor, psychologist, or other licensed practitioner is acceptable.

Ordering and Offering Examinations

Authority to order examinations

21. Q. When may the agency order an examination to obtain enough medical information on which to base its decision?
- A. The new regulations in §339.301(a) through (c) have sharply limited the circumstances under which an agency may order the employee to take a medical examination. The authority to order an examination is not the authority to force an employee to see a physician against his or her will, but rather the authority to take appropriate disciplinary action if the employee refuses such an order. Under the following circumstances, the agency may order an examination, but of course is not required to do so:
- a. When the individual occupies a position which has physical/medical standards or requirements for selection or retention or which is part of an established program of medical surveillance related to occupational or environmental exposure or demand. (§339.301(a)) Chapter 339, soon to be issued, will explain the meaning of these terms.
 - b. When the agency needs to determine whether claimants for workers' compensation may be able to perform duties of available jobs within the agency. (Note that this is not to be used to challenge the eligibility of claimants to receive workers' compensation. That is the responsibility of the Department of Labor, which administers the program.) (§339.301(b))
 - c. When the agency needs to determine the qualifications of employees separated from their competitive level during a reduction-in-force when the job for which the employees have assignment rights contain different and more rigorous physical requirements. (§339.103(c))

Authority to offer examinations

22. Q. What does the agency do if it cannot order an examination to obtain medical information?
- A. The agency may offer an examination (§339.301(d)) to supplement medical documentation supplied by the employee or if the employee is unable to obtain documentation. The agency may not take disciplinary action based on the employee's refusal to go to the examination.
23. Q. If the intent of the regulations is to place responsibility on the employee for showing that a medical condition exists which is adversely affecting some aspect of his or her performance or conduct, why would an agency ever wish to offer an examination to an employee?
- A. There are several reasons, including:
- a. An agency's genuine concern for an employee whose performance or conduct is deteriorating for what the agency believes are medical reasons, and the employee is unable to obtain sufficient medical documentation for management to reach an appropriate decision. OPM does not recommend offering medical examinations to all problem employees.
 - b. A demonstration of an effort by the agency to provide reasonable accommodation;
 - c. The agency's desire to obtain more information before making a management decision when there is confusion concerning information provided by the employee's physician.

Psychiatric examinations

24. Q. Are there situations pending an action when the agency may order an employee to take a psychiatric examination before it first evaluates the results of a general medical examination? What about offering a psychiatric examination to the employee?
- A. Under the new regulations (§339.302(e)), the agency may only order (or offer) a psychiatric examination if the record clearly shows that a psychiatric examination is warranted for medical reasons; i.e., that psychiatric symptoms were present and a physician believes they are not caused by organic conditions but require psychiatric evaluation. The agency only has the authority to order a psychiatric examination if it has the authority to order a general medical examination under §339.301(a) through (c). This regulatory provision was designed in response to many concerns about the inappropriate use of agency-ordered psychiatric examinations as harassment or in lieu of appropriate disciplinary action.

Getting and Paying for a Physician

25. Q. Who selects the physician for an examination to obtain medical documentation, the employee or the agency? Who pays for the examination?
- A. Under Part 339, if the agency orders or offers the examination, the agency selects the physician, either its own, one from the Public Health Service, or one obtained on a contract basis and pays for the cost of the examination. Otherwise, the employee selects the physician and pays for the services.

In selecting a physician, the agency may choose to select a physician suggested by the employee, although that is not the usual procedure. The past practice of the agency selecting from a list of physicians provided by the employee is no longer necessary. However, if the agency does order or offer an examination, and selects the physician, it must notify the employee of his or her right to submit additional medical information from whatever source, which the agency must consider. This procedure gives the employee ample opportunity to have input in the decision, while providing enough authority for the agency to obtain the information it needs to reach a decision. The employee is responsible for the cost of providing such additional information.

Evaluating medical documentation

26. Q. Do nonmedical agency officials have the right to review and act on medical information?
- A. Yes. Although the weight given to medical information in a particular situation will vary depending on the circumstances, the decision is a management, not a medical one. Under the Privacy Act, medical information submitted to an agency for purposes of an employment-related decision is an "employee record" under the Government-wide system of records which covers other employee records like the Official Personnel File. As such, the records are available to any management official who has a need to know the information for an appropriate management purpose. At the same time, any official who has access to such information is required to maintain the confidentiality of that information.

IV. DISABILITY RETIREMENT

Employee-filed Application

27. Q. Does the employee's application for disability retirement stop or delay a removal action under Part 432 or Part 752?
- A. No, it does not. The new regulations (§831.501(d)) clearly state that an employee's filing for disability retirement does not preclude or delay another personnel action. The old case law on this subject no longer applies.
28. Q. If an employee applied for disability retirement either before or after a removal, does cancellation of the removal (either by the former employing agency or another appropriate authority, e.g., MSPB or a court) cancel the application for disability retirement?
- A. No, it does not. If the application for disability retirement has been approved by OPM, the agency should take action to separate the employee for disability consistent with the instructions in FPM Letter 831-78 (Attachment 1, S10-10(c)(1)). Since a disability finding by OPM is sufficient cause to deny back pay under 5 U.S.C. §5596(b), because the employee was not "ready, willing, and able" to work in his or her position, unless the employee has unused sick leave, the disability retirement date should be the first business day following the receipt of the approval of the retirement. If the application for disability retirement has not yet been decided, or has been denied, the agency must restore the employee to its rolls. Entitlement to back pay in this case is contingent on the agency's determination as to whether the employee was "ready, willing, and able" to perform in his or her position. The evidence submitted in support of the disability retirement application may be used in making this evaluation.
29. Q. May an employee whose removal was cancelled withdraw his or her application for disability retirement?
- A. If the application has not yet been approved by OPM, then the employee may withdraw it. If it has been approved, however, and the employee has five years of service, he or she may not withdraw it.

Agency-filed Application

30. Q. What if the agency believes that a removal action is necessary but the employee has more than five years of service and appears to be suffering from a physical or mental condition? Under what circumstances does the agency have to file an application for disability retirement on the employee's behalf before proposing action?
- A. In almost all cases, the employee is solely responsible for filing an application for disability retirement. The new regulations (§831.1203) set five very specific conditions, all of which must be met before the agency must or may file on an employee's behalf:
- a. The agency has issued a decision to remove the employee;

3-6-86

EA 3750.8
Appendix 2

- b. Medical documentation causes the agency to conclude that the medical condition has caused the deficiency in attendance, performance, or conduct on which the decision to remove was based. Note that under the new regulations an agency's lay evidence is no longer sufficient. There must be medical documentation from a physician (not a chiropractor, psychologist, or other practitioner).
- c. The employee is institutionalized, or based on the agency's review of medical and other information, the agency judges that the employee is incapable of filing on his or her own behalf, not merely unwilling to file.
- d. The employee has no guardian or personal representative such as a lawyer; and
- e. There is no immediate family member (spouse, parent, or adult child) who is willing to file on the employee's behalf.

The circumstances under which the agency has the authority or the responsibility to file an application on the employee's behalf have been specified and limited only to those above because OPM believes that an employee should ordinarily be considered capable of making a decision on whether to file, even when this decision is not the one that agency officials might make. Furthermore, OPM may not allow a disability retirement unless there is a demonstrated "service deficiency" which is caused by a medically documented medical condition. These are changes in policy which will undoubtedly be reflected in new case law.

Portions of Title 5 and Title 29 of the Code of
Federal Regulations

5 CFR**§ 353.106 Notification of rights and obligations.**

An agency shall notify an employee who is separated, furloughed, or given leave of absence because of military duty or injury, of his rights, obligations, and benefits relating to his Government employment.

§ 432.203 Timing of actions.

(a) *At any time.* Pursuant to the requirements of this subpart, an employee may be reduced in grade or removed at any time during the performance appraisal cycle that the employee's performance in one or more critical elements of the job becomes unacceptable.

(b) *Reasonable time.* The agency shall identify for the employee the critical element(s) for which performance is unacceptable and give the employee a reasonable time to demonstrate acceptable performance before proposing a reduction in grade or removal under this part.

(c) *One-year limitation.* 5 U.S.C. 4303(c)(2) places a one year time restriction on the use of instances of unacceptable performance by an employee.

(d) *Decision.* 5 U.S.C. 4303(c)(1) provides that the decision on the proposed action must be made within 30 days after the date of expiration of the notice period.

§ 630.403 Supporting evidence.

An agency may grant sick leave only when supported by evidence administratively acceptable. Regardless of the duration of the absence, an agency may consider an employee's certification as to the reason for his absence as evidence administratively acceptable. However, for an absence in excess of 3 workdays, or for a lesser period when determined necessary by an agency, the agency may also require a medical certificate, or other administratively acceptable evidence as to the reason for the absence.

29 CFR**§ 1613.702 Definitions.**

(a) "Handicapped person" is defined for this subpart as one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

§ 1613.704 Reasonable accommodation.

(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

Federal Personnel Manual (FPM) - Chapter 751

1-3. ENFORCED LEAVE

a. **Emergency situations.** Emergency situations, involving the need to get the employee off the premises immediately, sometimes develop before any sort of disciplinary action has been initiated or even decided upon. The latitude agencies have to cope with these non-disciplinary situations is described in 38 Comp. Gen. 203. This decision dealt with, first, the circumstances under which an agency may require an employee who is ready and willing to perform his duties to absent himself because the agency believes his presence either constitutes an emergency or is otherwise highly undesirable; and, second, what the employee's leave and pay status should be during any such period of involuntary absence imposed by the agency. In this decision the Comptroller General held that:

(1) In an emergency situation constituting an immediate threat to Government property or to the well-being of the employee, his fellow workers, or the public in which the agency has not had an opportunity to appraise the situation and decide whether to initiate suspension or removal action, the agency has full authority to require the employee to absent himself from duty. Under these circumstances, there is no basis for relieving the employee from duty except by charging the absence to appropriate conventional leave.

(2) A period of enforced leave that began on this basis may not be continued indefinitely. Thus, if the employee presents himself for duty after the immediate emergency has been relieved and the agency determines that he is ready and able to perform duty, a continuation of his enforced leave constitutes a suspension and must be effected in accordance with the provisions of part 752, if applicable. However, the employee may be placed in a nonduty status with pay and without charge to leave for such time as is necessary to effect his suspension. (This last conclusion is the authority for the regulatory provision allowing not to exceed five days of nonduty status with pay while a suspension action is being effected.)

(3) During investigations of employees for wrong-doing when it is in the interest of the Government to have the employee off the job preliminary to a determination to suspend or remove, it is not proper to place the employee in an enforced leave status. Instead, the employee may be relieved from duty and continued in a pay status without charge to leave for such time, not to exceed five days, as is necessary to effect his suspension.

b. **Disciplinary situations.** In a personal, disciplinary-type situation, the placing of an employee on leave without his consent constitutes a suspension. An agency must observe the appropriate procedures of part 752 when using enforced leave as a disciplinary action, as part of a disciplinary action, or as a prelude to a possible disciplinary action, such as pending investigation or inquiry.

c. **Nondisciplinary, nonemergency situations.** In a nondisciplinary situation, when the employee is not "ready, willing, and able to work,"

he may be placed on annual or sick leave or in a nonduty nonpay status, as the circumstances and the status of his leave account require, and this action will not be considered a suspension. For example, an employee who reported to work without his safety equipment would not be ready to work. He could be placed on annual leave or in a nonduty nonpay status until he reported to work with his safety equipment. As long as the enforced absence was not disciplinary in nature it would not be considered a suspension.

Portions of Title 5 of the United States Code (5USC)

§ 4302. ESTABLISHMENT OF PERFORMANCE APPRAISAL SYSTEMS

(a) Each agency shall develop one or more performance appraisal systems which—

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees;

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for—

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

§ 5596. Back pay due to unjustified personnel action

(a) For the purpose of this section, "agency" means—

- (1) an Executive agency;
- (2) the Administrative Office of the United States Courts;
- (3) the Library of Congress;
- (4) the Government Printing Office; and
- (5) the government of the District of Columbia.

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title; and

(B) for all purposes, is deemed to have performed service for the agency during that period, except that—

(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1)

of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(2) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

(3) For the purpose of this subsection, "grievance" and "collective bargaining agreement" have the meanings set forth in section 7103 of this title and (with respect to members of the Foreign Service) in sections 1101 and 1002 of the Foreign Service Act of 1980, "unfair labor practice" means an unfair labor practice described in section 7116 of this title and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980, and "personnel action" includes the omission or failure to take an action or confer a benefit.

(c) The Office of Personnel Management shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees.

(Added Pub. L. 90-83, § 1(34)(C), Sept. 11, 1967, 81 Stat. 203, and amended Pub. L. 94-172, § 1(a), Dec. 23, 1975, 89 Stat. 1025; Pub. L. 95-454, title VII, § 702, Oct. 13, 1978, 92 Stat. 1216; Pub. L. 96-54, § 2(a)(14), Aug. 14, 1979, 93 Stat. 382; Pub. L. 96-465, title II, § 2306, Oct. 17, 1980, 94 Stat. 2165.)