

# AFGE GUIDANCE TO LOCALS ON VA ACCOUNTABILITY BILL CHANGES TO TIMELINES AND PROCEDURES FOR ADVERSE ACTIONS

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This guidance is to brief AFGE's VA Locals about provisions about the new "accountability" law (S. 1094) that impacts timelines and procedures for adverse actions taken against VA employees. Adverse actions are 1) a suspension of more than 14 days, 2) a demotion and 3) a removal. These new timelines also apply to major adverse actions taken against Title 38 employees. **There are no changes for the time lines and procedures for reprimands, suspensions of 14 days or less, or other such lesser discipline. The procedures and timelines for lesser discipline remain unchanged.**

With S. 1094 only signed on June 23<sup>rd</sup>, **we still do not know what steps VA will take to implement the legislation—whether they will issue a Directive, Handbook, HRML or some other such policy document with specific procedures implementing the law.** Once VA issues such policy guidance, this explanation and guidance memorandum will be updated accordingly.

While S. 1094 addresses numerous issues unrelated to employee discipline, this memorandum will only address Sections 202 and 208 of the bill which modifies timelines and procedures for adverse actions.

**CHANGE #1:**       **The standard of proof the VA must meet to remove a VA employee for misconduct is now reduced from preponderance of the evidence to substantial evidence.**

Previously, the VA had to prove misconduct by a "preponderance" of the evidence. This meant that more than 50% of the evidence needed to support the disciplinary action for the adverse action to be upheld. Now, VA can sustain adverse actions with only "substantial" evidence. This means that VA only needs to support its disciplinary action with around 30%-40% of the evidence weighing in favor of the penalty for discipline. Substantial evidence, however, has never been defined as a specific percentage. Remember, this lower standard only applies to adverse actions—suspensions of more than 14 days, removals and demotions.

**CHANGE #2:**       **Proposed adverse actions: The total period for notice, response and final decision as it relates to the VA taking adverse actions against VA employees may not exceed 15 business days.**

Within the 15 business day period, 7 business days must be set aside for the employee to respond to the proposed adverse action. **This notice, response and final decision period supersedes any timelines for these actions in a collective bargaining agreement.** Therefore, the timelines applicable to adverse actions in Article 14 of the Master Agreement are now superseded by the 15-business-day period in the law.

Also, this new timeline applies to Title 38 employees. For Title 38 major adverse actions, the 15-business-day timeline discussed above also applies—an employee has 7 business days to respond to a proposed major adverse action and the entire notice, response and final decision process must occur within 15 business days. In addition, **appeals of final decisions filed with the Disciplinary Appeals Board regarding major adverse actions involving Professional Conduct or Competence (PCC) must be filed within 7 business days.** There is no change to the timelines to appeal major adverse actions that do not involve PCC.

**CHANGE #3:**           **Appealing an adverse action: An appeal of an adverse action must be filed with the Merit Systems Protection Board (MSPB) no more than 10 business days after the final decision.**

After a timely appeal with MSPB is filed, the case is referred to an Administrative Judge (AJ). The law requires the AJ to issue his or her decision in 180 days.

**CHANGE #4:**           **An MSPB Administrative Judge MAY NOT mitigate (lower or change) the penalty imposed by the VA.**

The change in lowering the evidence standard from “preponderance” to “substantial” discussed in Change #1 could mean that the Douglas factors no longer apply. Until litigation clarifies the rules for the substantial evidence standard to be met, the amount and standards of evidence to meet the substantial evidence test are unclear. Also, if the adverse action is not supported by the new substantial evidence standard, the penalty is overturned completely and the suspension, demotion or termination will be overturned, not mitigated.

**WHAT IS NOT CHANGING:**

- **Timelines for grievances under the collective bargaining agreement**
  - AFGE’s position is that the law does not alter the timeline for filing a grievance and the steps in the grievance process. The law only changes the timelines for what happens before an action is taken (notice, response, decision), and for filing an appeal with MSPB (10 days) and for the AJ’s decision (180 days). Other timelines remain unchanged.
- **How long an arbitrator has to decide a case involving an adverse action**
  - While an MSPB AJ has 180 days under the law to issues his or her decision, there is no similar time limit on an arbitrator to issue a decision under the law. AFGE takes the position that the 180-day limit for an AJ to issue a decision does not apply to arbitrators.
  - While the law clearly does not require an arbitrator to issue his or her decision in 180 days, we expect the VA will try and extend this requirement to arbitrators.
- **The ability of an arbitrator to mitigate a penalty**
  - While the law prohibits an MSPB AJ from mitigating a penalty for an adverse action, the law does not prohibit an arbitrator from mitigating a penalty.
  - While the law clearly does not prohibit an arbitrator from mitigating a penalty, we expect the VA will try and extend this prohibition to arbitrators
- **Adverse actions initiated before the law was enacted will not be impacted by S. 1094**
  - There is no provision in S. 1094 making its terms retroactive. Therefore, any adverse action currently in any stage of notice, response or final decision is not subject to the new timelines and the change in the evidentiary standard.
  - AFGE takes the position that since there is no retroactivity provision in the law, any adverse action currently pending at the time the legislation was signed is governed by the previous law/applicable contract provisions including the preponderance of the evidence standard, and is subject to the contractual provisions of Article 14 of the Master Agreement.
- **A file containing the evidence must be provided to the employee at the time the adverse action is proposed.**
  - This requirement is now in the law instead of just in the Master Agreement.

- AFGE takes the position that the 15-business-day timeframe for an adverse action proposal, response and removal cannot begin to run until the VA provides an evidence file with “all” of the evidence as the law requires.
- **As stated above, there are no changes for the timelines of lesser discipline.**
  - Disciplinary actions that are not suspensions of more than 14 days, demotions or removals have the timelines set out in the Master Agreement and Title 5, Chapter 75.

### **WHAT WE DON'T KNOW YET**

- **What policy document VA will issue to implement the law**
  - VA could issue a Directive, Human Resources Management Letter (HRML) or some similar policy document implementing the law
  - AFGE’s position is that the VA is required to notify and bargain with AFGE before implementing any policies related to the implementation of the law.
  - We do not know if VA will honor their duty to bargain
- **What position VA will take about performance based actions.**
  - All of the discussion above is related to disciplinary actions for misconduct. The law also states that Title 5 Chapter 43, which relates to performance based actions, does not apply.
  - This could mean, for example, the VA will try and change the way it handles performance appraisals or Performance Improvement Plans (PIPs). Once VA issues the policy document implementing the law, we will have a better idea as to how they intend to handle performance actions.

### **NEXT STEPS**

- **We need all VA Locals to send in to the AFGE General Counsel’s Office any adverse actions proposed under this new procedure to make sure they comply with new deadlines and send copies of proposed actions under this new law.**
  - As mentioned above, we do not know when the VA will start using its authority under the new law. **Locals should look for the following when reviewing a notice of an adverse action:**
    - Does the proposed disciplinary action mention the 15-business-day timeline to respond to the notice of discipline?
    - **If the proposed disciplinary action mentions the 15-business-day timeline to respond to the action, you need to do 2 things immediately:**
      - Make sure the Local/employee meets the new timelines
      - Send a copy of the proposed action to the AFGE General Counsel’s Office by emailing a copy of the proposed action to AFGE Deputy General Counsel Cathie McQuiston at [mcquic@afge.org](mailto:mcquic@afge.org)
- In the near future, Locals will be notified of a conference call where this guidance will be discussed and questions can be asked and answered. Please watch your email for notices of this important call.