

Indefinite Suspension for Federal Employees

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Federal employees may be placed on indefinite suspension either with or without pay for disciplinary reasons or other reasons pending investigation, inquiry, or further agency action.

BASIS FOR INDEFINITE SUSPENSIONS

The use of indefinite suspensions in the federal sector is generally limited to three types of situations. These include situations where: (1) the agency has reasonable cause to believe an employee has committed a crime for which a sentence of imprisonment could be imposed, pending the outcome of the criminal proceeding or any subsequent agency action following the conclusion of the criminal process; (2) the agency has legitimate concerns that an employee's medical condition makes his or her continued presence in the workplace dangerous or inappropriate, pending a determination that the employee is fit for duty; or (3) an employee's access to classified information has been suspended and the employee must have such access to perform his or her job, pending a final determination on the employee's access to classified information. Gonzalez v. Department of Homeland Security, 2010 M.S.P.B. 132, 114 M.S.P.R. 318 (2010).

When one of these three situations applies, it is important to obtain an attorney familiar with the indefinite suspension process for legal advice or representation.

TWO TYPES OF INDEFINITE SUSPENSIONS

There are generally two types of indefinite suspensions: with pay or without pay. Although federal employees need to be concerned with both types, the more urgent situation involves an indefinite suspension that is proposed without pay. Indefinite suspensions with pay are generally issued to a federal employee in short memorandum form. Proposed indefinite suspensions involving a loss of pay must follow a due process format.

Pursuant to OPM regulations, at 5 C.F.R. § 752.402 Definitions, an "indefinite suspension" that is issued to a federal employee is defined as follows:

[T]he placing of an employee in a temporary status without duties and pay pending investigation, inquiry, or further agency action. The indefinite suspension continues for an indeterminate period of time and ends with the occurrence of the pending conditions set forth in the notice of action which may include the completion of any subsequent administrative action.

INITIATION OF THE INDEFINITE SUSPENSION PROCESS

A significant issue arises when a federal employee is informed that he or she must leave work because he or she is being placed on suspension, and an agency supervisor then issues

the employee a proposed indefinite suspension action. If this is the case, the federal employee should review 5 C.F.R. § 752.404 Procedures, which governs the process and requires the employer to give the employee a number of rights, as specified by the U.S. Office of Personnel Management (OPM):

(a) *Statutory entitlements.* An employee against whom action is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. § 7513(b).

(b) *Notice of proposed action.* (1) An employee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. The notice must state the specific reason(s) for the proposed action, and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice.

As specified by 5 C.F.R. § 752.404 (3): Under ordinary circumstances, an employee whose removal or suspension, including indefinite suspension, has been proposed shall remain in a duty status in his or her regular position during the advance notice period. In those rare circumstances where the agency determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the agency may elect one or a combination of the following alternatives:

1. Assigning the employee to duties where he or she is no longer a threat to safety, the agency mission, or to Government property;
2. Allowing the employee to take leave, or carrying him or her in an appropriate leave status (annual, sick, leave without pay, or absence without leave) if the employee has absented himself or herself from the worksite without requesting leave;
3. Curtailing the notice period when the agency can invoke the provisions of paragraph (d)(1) of this section; or
4. Placing the employee in a paid, nonduty status for such time as is necessary to effect the action.

If a federal agency places an employee on indefinite suspension, and the employee appeals the indefinite suspension to the Merit Systems Protection Board ("MSPB" or "Board"), the action can be difficult to reverse. In order for the Board to sustain an indefinite suspension, the agency must establish a preponderance of the evidence (51%) that it had reasonable cause to believe the employee committed a crime for which imprisonment may be imposed. In addition, the Board must prove that the suspension would promote the efficiency of the service. 5 U.S.C. § 7513(a).

In order to show that a suspension promotes the efficiency of the service, the agency must establish a nexus between petitioner's alleged acts of misconduct and the employee's job responsibilities. See Dunnington v. Department of Justice, 956 F.2d 1151, 1155 (Fed.Cir.1992); and Brown v. FAA, 735 F.2d 543, 548 (Fed.Cir.1984). An indefinite suspension will be viewed as appropriate where the agency has evidence of alleged

misconduct, based on a government investigation. See Dunnington, 956 F.2d at 1157 (An indictment following an investigation and grand jury proceedings would provide, absent special circumstances, more than enough evidence of possible misconduct to meet the threshold requirement of reasonable cause to suspend.); and Martin v. Dep't of Treasury, 10 MSPB 568, 12 M.S.P.R. 12, 19 (1982) (A grand jury indictment was sufficient to show there was a reasonable cause to believe an employee has committed a crime for which imprisonment could be imposed.).

In terms of the efficiency of the service requirement, the agency tends to receive significant deference with such factors as bad media coverage, the prominence of a government employee, the misuse of government property or resources to engage in misconduct, etc., that will usually suffice to demonstrate the nexus requirement.

ISSUES FOLLOWING A DECISION TO INDEFINITELY SUSPEND A FEDERAL EMPLOYEE

A number of other issues may surface when an indefinite suspension decision is made. Often times, the federal employee appeals the final agency decision (FAD) to the MSPB.

Due Process Issues

One of the potential issues in reversing an indefinite suspension without pay involves a failure by the federal agency to provide due process. Due process for such an action requires that a notice of charges against the federal employee be sufficiently detailed to give the employee a meaningful opportunity to be heard. See Mason v. Dep't of the Navy, 70 M.S.P.R. 584, 586 (1996). In analyzing such an issue, the Board examines whether lack of specificity in the notice detrimentally affected the appellant. See Dawson v. Dep't of Agriculture, 2013 MSPB Lexis 1233 (2013) (the agency's failure to give the appellant prior notice of the specific reason for his indefinite suspension, i.e., reasonable cause to believe he committed a crime, abridged his constitutional right to minimum due process of law.).

Harmful Error Issues

Another potential issue in indefinite suspension cases involves an agency's failure to expressly state the condition subsequent to returning the individual back to duty in its notice of indefinite suspension. The courts and the MSPB have ruled that this issue is subject to the harmless error rule. See Johnson v. USPS., 37 M.S.P.R. 388, 393 (July 19, 1988) (concluding that "the agency's delay in identifying the condition that will terminate the indefinite suspension does not constitute harmful error warranting reversal of the action"). To be valid, an indefinite suspension must have an ascertainable end, that is, a determinable condition subsequent that will bring the suspension to a conclusion. See Cooper v. DHHS, 80 M.S.P.R. 612 (1999). An indefinite suspension may extend through the completion of both a pending investigation and any subsequent administrative action. See 5 C.F.R. § 752.402 Definitions.

Reasonable Conclusion of Indefinite Suspension

Following the resolution of the issue resulting in the indefinite suspension, an agency must move in a reasonable fashion to end the indefinite suspension. In other words, an agency must initiate administrative action within a reasonable period of time after the completion of the pending investigation. See *Engdahl v. Department of the Navy*, 900 F.2d 1572, 1578 (Fed. Cir. 1990); and See *Campbell v. Defense Logistics Agency*, 31 M.S.P.R. 691, 693, 695 (1986) (where the appellant's indefinite suspension was based on an indictment, the agency acted reasonably by proposing the appellant's removal nine days after it learned of the appellant's guilty plea and continuing the indefinite suspension until the effective date of the appellant's removal), aff'd, 833 F.2d 1024 (Fed. Cir. 1987) (Table).

To permit a federal agency to take an unlimited amount of time to determine what action to take while keeping the appellant on an indefinite suspension would run contrary to the requirement that an indefinite suspension has an ascertainable end. See *Martin v. Department of the Treasury, U.S. Customs Service*, 12 M.S.P.R. 12, 17, 20 (1982), aff'd in part, rev'd in part on other grounds sub nom. *Brown v. Department of Justice*, 715 F.2d 662 (D.C. Cir. 1983), and aff'd sub nom. *Otherson v. Department of Justice*, I.N.S., 728 F.2d 1513 (D.C. Cir. 1984), modified on other grounds by *Barresi v. U.S.P.S.* 65 M.S.P.R. 656, 663 n.5 (1984).

The U.S. Court of Appeals for the Federal Circuit has held that the imposition of an indefinite suspension and the failure to terminate that suspension after the condition subsequent has occurred are separately reviewable agency actions. See *Rhodes v. Merit Systems Protection Board*, 487 F.3d 1377, 1381 (Fed. Cir. 2007). In *Rhodes*, the United States Court of Appeals for the Federal Circuit held that an employee's election to grieve the imposition of his indefinite suspension did not preclude him from filing a Board appeal, challenging the continuation of that suspension beyond the condition subsequent.

CONTACT US

When a federal employee faces a proposed indefinite suspension without pay it is very important for that individual to retain counsel as soon as possible. Berry & Berry, PLLC represents federal employees in response to proposed indefinite suspension matters and associated administrative investigations. Contact us by telephone at (703) 668-0070 or at www.berrylegal.com to schedule an initial consultation regarding your federal employment issues.

Attorneys

John V. Berry

Practice Areas

Federal Adverse and Disciplinary Actions