

## **Furlough Notice Action and Appeals**

5 CFR 752.403(a) states “An agency may take an adverse action, including a performance-based adverse action or an indefinite suspension, under this subpart only for such cause as will promote the efficiency of the service.”

The Procedure for doing furloughs is located in 5 CFR 752.404:

(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)

<http://www.law.cornell.edu/uscode/5/7513.html#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.

(2) When some but not all employees in a given competitive level are being furloughed, the notice of proposed action must state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough.

(c) Employee's answer. (1) An employee may answer orally and in writing except as provided in paragraph (c)(2) of this section. The agency must give the employee a reasonable amount of official time to review the material relied on to support its proposed action, to prepare an answer orally and in writing, and to secure affidavits, if the employee is in an active duty status. The agency may require the employee to furnish any answer to the proposed action, and affidavits and other documentary evidence in support of the answer, within such time as would be reasonable, but not less than 7 days.

(2) The agency will designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action. The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides for such hearing in its regulations. Under 5 U.S.C. 7513(c) <http://www.law.cornell.edu/uscode/5/7513.html#c> , the agency may, in its regulations, provide a hearing in place of or in addition to the opportunity for written and oral answer.

(e) Representation. Section 7513(b)(3) of title 5, U.S. Code, provides that an employee covered by this part is entitled to be represented by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as representative would cause a conflict of interest or position, or an employee of the agency whose release from his or her official position would give rise to unreasonable costs or whose priority work assignments preclude his or her release.

(g) Agency decision. (1) In arriving at its decision, the agency will consider only the reasons specified in the notice of proposed action and any answer of the employee or his or her representative, or both, made to a designated official and any medical documentation reviewed under paragraph (f) of this section.

(2) The notice must specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights under § 752.405 <<http://www.law.cornell.edu/cfr/text/5/752.405>> of this part. The agency must deliver the notice of decision to the employee on or before the effective date of the action.

(Sections not applicable to these furloughs have been deleted.)

5 CFR 752.404(c) above provides your first step as an employee receiving a furlough notice.

STEP 1 - Once you receive the Furlough Notice, inform your supervisor that you will be making a reply.

STEP 2 - Ask to see ALL of the evidence upon which the agency relied to propose a furlough. (from 5 CFR 752.404(b)). (It is management's responsibility to provide you with the material they relied on to justify your furlough.)

STEP 3 – Take as many notes as allowed (even copy the material if management lets you) to help you prepare your written response to the furlough notice. Make sure, at a minimum, you document the information that management provided by name or title of the document, if they will not let you copy the material.

5 CFR 752.404(c) provides the agency must give you reasonable amount of “official time” to review the material relied on to support their proposed action. This applies for every single individual employee who wishes to challenge the agency's decision to furlough you. Request the agency provide you with this time, if they do not request the denial in writing.

Most likely the information that your local management provides you will not be sufficient to support furloughing you. 5 CFR 752.403(a) requires the agency to show the furlough “promotes the efficiency of the service”.

This review and appeal process is an individual process and for those of you, that may be on the fence about filing an appeal, remember the “efficiency” standard is left open to interpretation and also remember there is a chance you could get your pay back if you prevail in your appeal!

STEP 4 –Prepare a written response challenging the agency's decision to furlough you and base this challenge on the material they provided to justify the furlough. The basis of your challenge will be “it does not promote the efficiency” of the service. Challenge the financial evidence you were given as inadequate, challenge the number of proposed furlough days as unsubstantiated by the evidence, and propose that even if the furlough is justified and the number of days is substantiated that it would be better to let you serve the furlough at times you pick rather than the agency.

Some counter arguments you can provide are:

(Navy) The Navy has already stated publically that they have enough money to avoid furloughing people.

(Others) The (local) Agency has the financial ability to avoid furloughs at a local level.

(All) Furloughing employees will have a net negative effect on the efficiency of the Agency as the workload has not decreased, the cost to operate the facility does not go away, etc.

Here is an example of that last point. Suppose the agency has proposed that you take every other Friday off for the rest of the fiscal year, for a total of 9 furlough days. Further suppose that you are also going to take a two-week vacation during the summer on annual leave (or two weeks of sick leave for an operation). If you adopt the agency's plan, you will be off the job the 9 furlough days and another 10 leave days for a total of 19 days. However, if the agency lets you serve your nine furlough days while you are on vacation, you save nine days of leave that you would have charged and the agency only loses your services for a total of ten days.

How could an agency possibly argue to MSPB or an arbitrator that the government is more efficient if you are off the job for 19 days rather than 10?

STEP 5 – As provided in 5 CFR 752.404(c)(2) request a meeting with the agency's designated person to hear your response. When you meet with the "designated" person, orally provide what you have written down. Make sure to document every word they respond with (even to the point of asking them to repeat themselves, if you can't write fast enough), after you are finished with your meeting give the "designated" person a copy of your reply and ask for an official written summary, to be included with the Agency's reply to your challenge.

STEP 6 – Fully expect the Agency to deny your challenge! When you receive the Agency's response make sure to document any discrepancies between the written response and what you were told orally. Make sure the agency is using the same standard to deny your challenge as they used in proposing the furlough. Also, make sure they specifically address any individually related topics you may have identified in your challenge. (My guess is they will issue a form letter that does not address individual concerns.)

STEP 7 – Prepare your appeal to MSPB. This can be done online at the MSPB website.

I have never filed an appeal to MSPB, but here is a stab at a final paragraph for your justification: (Make sure to include your specific arguments you provided to management and their response as a lead in to this paragraph.)

This adverse action is unwarranted. The (local agency) is not provided sufficient basis for a furlough. The (local agency) has the budgetary ability to prevent furloughs. The Department of Defense intentionally took no actions ahead of time to prevent the potential effects of sequestration (which the proposed furloughs are a direct result). The (local agency) and Department of Defense have not exhausted all measures available prior to issuing the furlough

notice. These furloughs are a result of a “manufactured” crisis. The Department of Defense has proposed these furloughs based on politically motivations, as opposed to the “promote efficiency of the service” standard per 5 CFR 752.403(a). The remedy desired is to rescind my furlough notice until such time as the Department of Defense has taken every available step to avert my furlough.

Please ignore grammatical and spelling errors, as I am trying to get this out as fast as possible. As always, please feel free to help all of us make this a better document by providing a suggestion along with your with constructive criticism

The Shipyard’s may have been exempted from the furloughs, but HARM TO ONE IS HARM TO ALL!