# AFGE GUIDANCE TO LOCALS ON VA ACCOUNTABILITY BILL CHANGES TO TIMELINES AND PROCEDURES FOR ADVERSE ACTIONS (REVISED 7/31/17)

This updated guidance is to brief AFGE's VA Locals about provisions about the new "accountability" law Public Law (P.L.)—115-41 that impacts timelines and procedures for adverse actions taken against VA employees. Adverse actions against Title 5 and Hybrid employees are 1) a suspension of more than 14 days, 2) a demotion and 3) a removal. These new timelines also apply to adverse and 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 against Title 5 and Hybrid employees. The procedures and timelines for lesser discipline remain unchanged**. While P.L. 115-41 addresses numerous issues unrelated to employee discipline, this memorandum will only address Sections 202 and 208 of the law which modifies timelines and procedures for adverse actions.

**CHANGE #1:** **The standard of proof the VA must meet to take an adverse action against a Title 5 or Hybrid employee for misconduct, pursuant to 38 U.S.C. §714, is substantial evidence.**

The new law now provides VA with an additional authority for adverse actions taken against Title 5 and hybrid employees. For adverse actions taken under Chapter 75, the VA must prove misconduct by a "preponderance" of the evidence. This means that more than 50% of the evidence needs to support the disciplinary action for the adverse action to be upheld. Now, if an adverse action is taken under §714, 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 against Title 5 and Hybrid employees – suspensions of more than 14 days, removals and demotions, taken pursuant to §714.

Actions against Title 38 employees will continue to be required to be proven by a preponderance of the evidence. The lowering of the evidence standard does not apply to Title 38 employees.

**CHANGE #2:** **Proposed Title 5 and Hybrid §714 adverse actions and Title 38 adverse actions and major adverse actions: The total period for notice, response and final decision as it relates to the VA taking these 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 adverse actions and 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 adverse actions and major adverse actions that do not involve PCC through the negotiated grievance procedure.

**CHANGE #3:** **Appealing an adverse action: Appeal of a Title 5 or Hybrid adverse action with the Merit Systems Protection Board (MSPB) or a grievance over a final decision under the negotiated grievance procedure must be filed no more than 10 business days after the final decision.**

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

The change in removing the authority of the Administrative Judge to mitigate the penalty imposed could mean that the Douglas factors no longer apply. However, the MSPB will more than likely apply some level of scrutiny to the reasonableness of the penalty imposed (e.g. inconsistent treatment of comparable employees). 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.

The DAB may still mitigate a penalty for Title 38 employees who have appealed a major adverse action involving PCC to the DAB.

**OTHER ISSUES FOR AWARENESS:**

- **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 new law does not specifically prohibit an arbitrator from mitigating a penalty. VA has taken the position that an arbitrator may not mitigate the penalty.

- **Adverse actions initiated before the accountability law was enacted will not be impacted**
  - There is no provision in P.L. 115-41 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 against Title 5 and hybrid employees.**
  - 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, Chapters 75 or 43.

**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**

  - **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

- 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.