

DEFENSE COMMISSARY AGENCY  
GENERAL RESPONSE TO FURLOUGH

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## DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

### DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

By memorandum dated May 14, 2013, Secretary of Defense Charles Hagel directed all Defense Agencies to prepare to furlough Department of Defense civilian personnel for up to 11 days.. Secretary Hagel stated that this furlough was necessary in order to comply with the sequestration cuts required by the Budget Control Act of 2011. (*See SecDef Memo of May 14, 2013 (Furloughs) at Tab 1 and Declaration of Robert F. Hale at Tab 2*). The Secretary affirmed the authority of agency managers to develop the specifics of furlough procedures and to make final decisions regarding the furlough for agency employees in order to minimize adverse mission effects and limit unnecessary harm to morale and productivity of their agencies. Pursuant to the Secretary's memorandum, individual Agency managers would act as the deciding officials in the furlough process, with the authority to reduce the number of days/hours an individual employee is furloughed or grant the individual employee an exception from the furlough altogether. (*Id.*) Therefore, Defense Commissary Agency officials were fully empowered to render individual furlough decisions in accordance with and under the provisions of 5 U.S.C. Chapter 75, Subchapter II (*See Declaration of Mr Michael J. Dowling at Tab 3*).

Under the provisions of 5 U.S.C. Chapter 75, Subchapter II, Agency decisions to furlough employees for 30 days or less are considered adverse actions subject to the review jurisdiction of the Merit Systems Protection Board (hereinafter "MSPB" or "the Board"). Thus, each employee subjected to the furlough action was entitled to due process, consisting of written notification of the proposed action, a right to respond, and a written decision prior to the effective date of the furlough. In compliance with the Secretary of Defense's direction, on or

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about May 28, 2013, the Defense Commissary Agency notified employees by memorandum on or about May 28, 2013 of the impending furlough. This notice informed each affected employee of his/her right to respond orally, in writing, or both. The notice also identified the Agency official to whom any response should be addressed. (*See Agency memo of May 28, 2013 (Notice of Proposed Furlough) at Tab 4*).

At the conclusion of the notice response period and after consideration of the responses submitted by employees, the designated Agency Deciding Official issued a Notice of Decision to each affected Agency employee. These decision letters, dated June 27, 2013, informed affected employees of their appeal rights to the Board and provided them with the proper procedures and deadlines for filing an appeal. (*See Agency memo of June 27, 2013 (Agency Decision to Furlough) at Tab 5*).

The Agency exempted a total of five employees from the agency-wide furlough, including one victim of the May 20, 2013 Oklahoma tornado, three victims of the June/July 2013 Colorado wildfires, and one employee serving on deployed duty in Afghanistan. In addition, employees at U.S. Coast Guard Air Station commissary in Kodiak, Alaska were exempted from the furlough as this commissary remained in operation during the furlough. This particular commissary continued to operate during the furlough because its funding is 100% reimbursed to the Agency from the Department of Homeland Security, U.S. Coast Guard, and Department of Defense funds are not used.

For FY 2013, approximately \$700 million dollars of total agency spending was allocated for employee salaries and benefits. As a result of the order of sequestration issued on March 1, 2013 and the enactment of the FY 2013 budget on March 26, 2013 at FY 2012 operating levels, the Defense Commissary Agency's operating levels were reduced by \$ 19.8 million dollars for

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the remainder of FY 2013 (*See Declaration of Lauren Bands at Tab 6*). In order to operate at these reduced levels, the agency was forced to cut spending across the board in critical areas such as hiring, travel, training and other non-labor activities. The Department of Defense determined that these cuts, coupled with salary savings from staffing decreases over the past two years, in turn, enabled it to reduce the number of furlough days from the initial anticipated estimate of 11 days, to 6 furlough days for all employees. The Defense Commissary Agency maintains that the 6 days of non-paid furlough yielded a savings of approximately \$ 12.6 million dollars (*Id.*).

### **AGENCY RESPONSE TO SPECIFICALLY CITED APPEAL BASES**

#### I. Efficiency of the Service

An agency satisfies the efficiency of service standard required in a furlough appeal by showing, in general, that the furlough was a reasonable management solution to the financial restrictions placed on it and that the agency applied its determination as to which employees to furlough in a "fair and even manner." *Chandler v. Department of the Treasury*, 2013 M.S.P.B. 74 (2013). Applying the furlough in a "fair and even manner," means that the agency applied the adverse action furlough "uniformly and consistently." See 5 C.F.R. § 351.201(b). This does not mean that the agency is required to apply the furlough in such a way as to satisfy the Board's sense of equity. Rather, it means that the agency is required to treat similar employees similarly and to justify any deviations with legitimate management reasons. See 5 C.F.R. § 752.404(b)(2).

The ultimate decision to implement the DeCA furlough was carried out in a fair and even manner. The Agency exempted a total of five individuals from furlough proceedings, all based on special circumstances that are clearly distinguishable from those of the vast majority of employees to whom the furlough was applied. (*See Paragraph II - Arbitrary and Capricious*)

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*below.* In addition, only one commissary remained in operation (U. S. Coast Guard Air Station, Kodiak, Alaska), based on its unique funding source. (*See Agency General Response and Paragraph II – Arbitrary and Capricious*) These exemptions were made for legitimate business reasons as stated in the Agency’s General Response and Arbitrary and Capricious section.

An agency need not show that its decision was the best decision, but only that its decision promoted the efficiency of the service in a way that was fair and even. *See* 5 U.S.C. §7513. DeCA’s decision to apply the furlough was financially necessary to effectively manage the agency’s budget restrictions as stated in the Agency’s General Response. The Deciding Official carefully considered all relevant information in forming the basis for the furlough. As previously argued, the Agency’s decision to furlough was made for legitimate business reasons consistent with promoting the efficiency of the service and mission accomplishment.

### II. Arbitrary and Capricious

With regard to any arguments that the Agency’s furlough action was arbitrary and capricious, Black’s Law dictionary generally defines “Arbitrary and Capricious” as a willful and unreasonable action taken by an Agency without consideration of or in disregard of fact or law or without determining principle. *Elwood Investors Co. v. Behme*, 79 Misc.2d 910, 361 N.Y.S. 2d 488, 492 (1974). In determining whether such an action was actually arbitrary or capricious, the rational basis test is applied. This review attempts to ascertain whether the action taken has a reasonable relationship to the attainment of some legitimate governmental objective.

In this case, the action being challenged is the furlough of Agency employees. Thus, the relevant question is whether or not the furlough action had a reasonable relationship to the attainment of some legitimate governmental objective. The Agency submits that the furlough was conducted toward the Agency’s objective of complying with the sequestration cuts required

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by the Budget Control Act of 2011. On May 14, 2013, the Secretary of Defense directed all Defense Agencies to prepare to furlough Department of Defense civilian personnel for up to 11 days (Tab 4e). This DOD directive, therefore, substantiates that the action of the Agency was not only reasonably related to the attainment of the sequestration cuts required by the Budget Control Act of 2011, but was specifically directed by the Secretary of Defense in order to help achieve those cuts. Additionally, with regard to the reasonableness of the action, the Board has previously determined that furlough is a reasonable management solution to the shortage of funds caused by sequestration. *See Wishart v. DOT*, 2013 MSPB Lexis 3946 (M.S.P.B. July 29, 2013).

To the extent any appellant argues that the identification of individuals to be furloughed was accomplished arbitrarily, the Agency refutes such assertion. 5 C.F.R. § 351.201(b) requires that a furlough be applied in a “fair and even manner” by treating employees uniformly and consistently. (*See also Paragraph I - Efficiency of the Service*) Here, the Agency applied its furlough uniformly and consistently to all employees, unless specifically exempted based on exceptional circumstances. Upon consideration, the Agency exempted only five individuals from the furlough: one victim of the Oklahoma tornadoes, three victims of the Colorado wildfires, and one on deployed duty in Afghanistan. In addition, the commissary at the U.S. Coast Guard Air Station, Kodiak, Alaska remained in operation based on its unique funding source in that funding for this particular store is 100% reimbursed to the Agency from the Department of Homeland Security, U.S. Coast Guard and does not involve Department of Defense funds.

The Board has previously held that Management's discretion in conducting a short-term furlough will not be disturbed without a showing of disparate treatment among similarly situated

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employees. See *Clark v. Office of Personnel Management*, 24 M.S.P.R. 224, 226 (1984). In that regard, there is no evidence of such disparate treatment in the course of this Agency furlough.

### III. Financial Hardship

To the extent certain appellants argue that the decision to furlough them was unreasonable or unfair because of their personal circumstances, the Board has not required the agency to address and consider the harm specific to each employee in deciding how to resolve its budget difficulties. See *Hill, Tittermary, Williams, Bodner v. Department of Treasury*, 2013 MSPB LEXIS 4951 (September 17, 2013).

The Board has also found that, although lost pay resulting from furloughs may have a deleterious effect on individual appellants by making it difficult for them to pay bills and by creating financial hardship, such equitable factors do not preclude an agency from demonstrating that such furlough action promotes the efficiency of the service. If the argument of personal financial hardship of the affected employee did constitute a basis upon which to find that furloughs were unreasonable, or did not promote the efficiency of the service, the Agency could not employ the statutory furlough tool as a means to address budget deficits. Rather, Congress specifically included furloughs as an option for agencies suffering financial difficulties, and there is no indication in statute or any other source that the option cannot be employed by the Agency. This is notwithstanding the fact that such an action on the part of a Federal Agency may adversely affect an employee's ability to pay their personal bills and maintain a satisfactory personal credit rating, both of which could be impacted due to wages lost by furlough. *Id.*

### IV. Breach of Contract

With regard to any arguments that the Agency's furlough action constituted a breach of contract, the Agency refutes such assertion. The general nature of the contractual agreement

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between an employee and the Federal government is that the government profits from the labor of the employee in exchange for the salary paid to that employee. However, this contractual relationship is subject to the various rules and regulations contained in the United States Code, with Titles 5 and 29 being most important in that respect.

The Board has previously held that Congress included furloughs as an option for agencies suffering financial difficulties. *See Hill, Tittermary, Williams, Bodner v. Department of Treasury*, 2013 MSPB LEXIS 4951 (September 17, 2013). In applying a furlough, an Agency must do so in a uniform and consistent manner. *See* 5 C.F.R. §351.201(b). It must also afford employees certain due process rights before furloughing them. That due process consists of, at a minimum, a 30-day advance written notice, opportunity to respond, and a separate decision notice. *See* 5 U.S.C. §7513. As previously set forth, the Agency applied the challenged furlough in a uniform and consistent manner and afforded due process to its employees. (*See Paragraph I – Efficiency of the Service and Tabs 1-6*).

In conclusion, the Agency submits that the furlough was a lawful and reasonable management solution to the financial restrictions placed upon it under the direction of the Secretary of Defense. The process through which the furlough was accomplished was consistent with the provisions of 5 United States Code Chapter 75, subchapter II. It satisfied the statutorily required efficiency of the service standard, was applied in a fair and even manner, and all those employees affected by the furlough were afforded full, fair, and complete statutory due process rights.

DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH



SECRETARY OF DEFENSE  
1000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1000

MAY 14 2013

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
UNDER SECRETARIES OF DEFENSE  
DEPUTY CHIEF MANAGEMENT OFFICER  
CHIEFS OF THE MILITARY SERVICES  
COMMANDERS OF THE COMBATANT COMMANDS  
CHIEF OF THE NATIONAL GUARD BUREAU  
DIRECTOR, COST ASSESSMENT AND PROGRAM  
EVALUATION  
DIRECTOR, OPERATIONAL TEST AND EVALUATION  
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE  
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE  
ASSISTANT SECRETARIES OF DEFENSE  
DEPARTMENT OF DEFENSE CHIEF INFORMATION OFFICER  
ASSISTANTS TO THE SECRETARY OF DEFENSE  
DIRECTOR, ADMINISTRATION AND MANAGEMENT  
DIRECTOR, NET ASSESSMENT  
DIRECTORS OF THE DEFENSE AGENCIES  
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Furloughs

This memo directs defense managers to prepare to furlough most Department of Defense (DoD) civilians for up to 11 days. The schedule for furloughs, and some specific exceptions, are described later in this memo and in the attachment. I have made this decision very reluctantly, because I know that the furloughs will disrupt lives and impact DoD operations. I, along with the senior civilian and military leadership of the Department, have spent considerable time reviewing information related to the need for furloughs, and I would like to share with you the reasoning that led me to this difficult decision.

Major budgetary shortfalls drove the basic furlough decision. On March 1, sequestration went into effect across the federal government. DoD's budget for FY 2013 was reduced by \$37 billion, including \$20 billion in the operation and maintenance (O&M) accounts that pay many of our civilian workers. In addition, because our wartime budget is also subject to sequestration, we must utilize funds originally budgeted for other purposes in order to provide our troops at war with every resource they need. To compound our problems, when we estimated future wartime operating costs more than a year ago, we planned on fuel costs below what we are currently experiencing. Taken together, all these factors lead to a shortfall in our O&M accounts of more than \$30 billion – a level that exceeds 15 percent of our budget request, with fewer than six months left in the fiscal year in which to accommodate this dramatic reduction in available resources.

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We are taking actions to reduce this shortfall. One main priority has governed our decisions: to minimize the adverse effects on our military mission, including military readiness. With this in mind, early this calendar year we cut back sharply on facilities maintenance and worked to hold down base operating costs -- decisions we knew would build a backlog of maintenance and adversely affect our bases. We are also preparing a request to Congress that would permit us to shift some funding from investment and military personnel accounts into the O&M accounts. If approved by Congress, this initiative -- known as a reprogramming -- would help close the gap.

But these actions are not enough. We have begun making sharp cuts in the training and maintenance of our operating forces -- cutbacks that are seriously harming military readiness. The Army, for example, has terminated most remaining FY 2013 training rotations at its combat training centers. The Air Force has or soon will stop all flying at about one-third of its combat-coded squadrons in the active forces. The Navy and Marine Corps are cutting back on training and on deployments -- including a decision not to send a second carrier strike group to the Gulf. These are only a few of the many cutbacks we have made in training and maintenance. These actions reduce our ability to handle future military contingency needs, both this year and in subsequent years.

Even after taking all these actions, we are still short of needed operating funds for FY 2013, and we cannot rule out unexpected increases in costs during the next few months. So we confront a difficult set of trade offs. We can make even larger cutbacks in training and maintenance, further reducing readiness to handle contingency operations and putting into even greater jeopardy our military readiness in future fiscal years. Alternatively, we can furlough civilian personnel to help close the gap and, knowing that morale, productivity and readiness would be affected. This is an unpleasant set of choices, but this is the situation we face.

Before making a decision, I sought advice and inputs from senior leaders in the military departments and agencies as well as advice from my senior civilian and military staff. I asked them to keep in mind our fundamental criterion to minimize adverse mission effects and, subject to that criterion, to ensure reasonable consistency and fairness across the Department for any furloughs that we impose.

Based on all these inputs, I have decided to direct furloughs of up to 11 days for most of the Department's civilian personnel. Furloughs for up to 11 days represent about half of the 22 days that can legally be imposed in a year and also about half the number we had originally planned. This halving of previous furlough plans reflects vigorous efforts to meet our budgetary shortfalls through actions other than furloughs as well as Congressional passage of an appropriations bill in late March that reduced the shortfalls in our operating budget and expectations of Congressional action on our reprogramming request.

Furloughs will be imposed in every military department as well as almost every agency and in our working capital funds. All of our civilian employees are important, and I would prefer not to furlough any of them. However, there will only be limited exceptions driven by law and by the need to minimize harm to mission execution. We will except civilians deployed to combat zones and civilians necessary to protect life and property (but only to the extent needed to provide that protection). A few categories of workers will be excepted for specific mission reasons while some categories of workers will be excepted because furloughing them would not

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free up money for critical DoD mission needs. The attachment provides details regarding approved exceptions. Fewer than one fifth of all civilians paid with appropriated funds will be excepted from furloughs.

The planning and implementation of furloughs will be carried out based on the schedule below:

- May 28 - June 5: Furlough proposal notices will be served to individual employees subject to furloughs.
- June 4 - June 12: Individual employee reply periods end 7 calendar days from when the proposal was received, unless Component procedures allow for a different reply period.
- June 5 - July 5: Furlough decision letters will be served to individual employees subject to furloughs, depending on when the proposal was received and prior to the first day of furlough.
- July 8: Furlough period begins no earlier than this date.

We will begin furloughs on July 8 at the rate of 1 furlough day per week for most personnel. For now, we plan to continue furloughs through the end of FY 2013. That schedule would lead to 11 furlough days – one fifth of the week for about one quarter of the year. Moreover, I am directing all components to monitor funding closely for the remainder of FY 2013. If our budgetary situation permits us to end furloughs early, I would strongly prefer to do so. That is a decision I will make later in the year.

Consistent with this memo and with applicable laws and rules, commanders and managers will have the authority to develop the specifics of furlough procedures in order to minimize adverse mission effects and also limit the harm to morale and productivity. Further bargaining with unions may also be required. The Under Secretary for Personnel and Readiness has already issued guidance as appropriate regarding personnel and union issues related to furloughs and will issue additional guidance as needed. Overall coordination of sequester and furlough policies will be the responsibility of the Under Secretary of Defense (Comptroller).

Each of the Department's civilian employees makes an important contribution to the readiness of our Department to meet the nation's national security needs. I understand that the decision to impose furloughs imposes financial burdens on our valued employees, harms overall morale, and corrodes the long-term ability of the Department to carry out the national defense mission. I deeply regret this decision. I will continue to urge that our nation's leaders reach an agreement to reduce the deficit and de-trigger sequestration. If no agreement is reached, I will continue to look for ways to limit the adverse effects of sequestration and associated budgetary shortfalls both on the men and women of the Department of Defense, and on our national defense.

Attachment:  
As stated.

*DAVID  
HABEL*

## DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

### Department of Defense Furlough Exceptions

This attachment provides Components with final dispositions on categorical exceptions to the Department of Defense (DoD) plan to furlough civilian employees for a maximum of 88 hours or 11 discontinuous workdays because of the current financial crisis caused by a sequestration for Fiscal Year (FY) 2013, increased costs for ongoing Overseas Contingency Operations, and other emerging requirements. In order to minimize adverse effects on mission, employees in the following categories are excepted from furlough for the reasons noted:

- a) In order to avoid harm to war efforts, all employees deployed (in a Temporary Duty status) or temporarily assigned (to include Temporary Change of Station) to a combat zone (as defined in notes below) are excepted from furlough.
- b) In order to avoid harm to mission, those employees necessary to protect safety of life and property are excepted to the extent necessary to protect life and property. This includes selected medical personnel. Later portions of this attachment provide details.
- c) Employees in Navy shipyards will be excepted from furlough because it would be particularly difficult to make up delays in maintenance work on nuclear vessels and these vessels are critical to mission success. All other depot employees, whether mission-funded or working capital fund employees, will be subject to furlough.
- d) Furloughs for employees funded with National Intelligence Program (NIP) funds will be determined by the Director of National Intelligence. Employees funded with Military Intelligence Program (MIP) funds will be subject to furlough.
- e) Because there would be no savings, Foreign Military Sales (FMS) employees whose positions are exclusively funded from FMS Administrative and FMS case funds (case number may be required to validate funding source) and from Foreign Military Financing accounts are excepted from furlough. Furloughing employees in this category would not reduce the expenditure of DoD budgetary resources and so would not assist in meeting sequestration reductions. The FMS case-funded positions funded in whole or part by DoD appropriations (to include "pseudo-FMS" cases) are subject to furlough.
- f) By law, all individuals appointed by the President, with Senate confirmation, who are not covered by the leave system in title 5, U.S. Code, chapter 63, or an equivalent formal leave system, are excepted from furlough.
- g) All employees funded by non-appropriated funds (NAF) <sup>1</sup> (regardless of source of NAF funding) are excepted from furlough. Furloughing employees in this category would not reduce the DoD budget and so would not assist in meeting sequestration reductions.
- h) All Outside Contiguous United States foreign national employees, many of whom are subject to Status of Forces Agreements, are excepted from furlough because their situation vary greatly by country/region and because, in some cases, they are paid by host governments.

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<sup>1</sup> NAF employees are not covered by the requirements and procedures applicable to furloughs of appropriated fund employees under FY13 sequestration. However, NAF employees may be furloughed under DoD NAF and Component policies and procedures for business-based reasons.

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Any employees who are not paid directly by accounts included in the Department of Defense-Military (subfunction 051) budget are excepted from furlough. For example, this would include employees funded by the Arlington National Cemetery (705 function) and DoD Civil Works (various non-051 functions) programs. These exceptions have been identified by the Components. Furloughing these employees would not reduce the expenditure of DoD budgetary resources and so would not assist in meeting sequestration reductions.

The following portion of this document provides the definitive list of additional approved exceptions beyond those listed in the preceding paragraph. The exceptions approved for the safety of life and protection of property category are granted with the understanding that these are the minimum exceptions needed to maintain operations and provide security on a 24/7 basis and that furloughing these employees would result in the Department incurring additional costs for premium pay. Similarly, the exceptions for the medical category are approved with the understanding these exceptions preserve the minimum level of personnel needed to maintain quality of care in 24/7 emergency rooms and other critical care areas such as behavioral health, wounded warrior support, and disability evaluation. Furloughing these employees would result in unacceptable care being provided, and the Department would incur increased costs for premium pay or TRICARE. The exception for Child Development Centers is granted with the understanding that this is the minimum level needed to maintain accreditation and maintain quality care for children in military families. Some Department of Defense Education Activity employees, while not excepted from furlough, may only be furloughed when they are in a pay status. Therefore, they will only be subject to furlough for up to five days at the beginning of the 2013 school year.

Recognizing that circumstances can change in this dynamic environment, the Secretaries of the Military Departments, and the Principal Staff Assistants for the Defense Agencies and Field Activities, may approve up to 50 additional individual, mission-based, exceptions as needed to ensure safe and efficient operations of their respective Departments. Any such exception must be reported to the Acting Under Secretary of Defense (USD) for Personnel and Readiness and the USD Comptroller. There are no other approved exceptions provided based on the Components' submissions. Furlough proposal notices should be issued to all impacted employees beginning May 28, 2013.

Relative to the review and decision on individual employee requests for exception, per guidance issued via the Principal Deputy Assistant Secretary of Defense, Readiness and Force Management, memorandum, dated March 13, 2013, activities should designate the Deciding Official. The designated Deciding Official will be no lower than a local Installation Commander, senior civilian or equivalent who would be in the best position to determine the fair and equitable application of the furlough. Deciding Official responsibilities may not be further delegated. Deciding Officials are charged with, and are accountable for, making final decisions on furloughs for individual employees after carefully considering the employee's reply, if any, and the needs of the Department. *Deciding Officials must also ensure they make final decisions in cases where an employee does not submit a reply.* Deciding Officials will have the authority to execute the full range of options with respect to providing relief in individual employee cases. This authority includes, but is not limited to, reducing the number of days/hours an individual employee is furloughed, or granting the individual employee an exception from the furlough altogether.

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Component	Safety of Life & Property	Medical Personnel	Others	Comments
DoN	7,543	1,418	212 CIVPERS at Sea  4,712 CIVMARS  514 Appropriated Fund (APF) Child Development Centers (CDCs)  15  28,000  1,657	CIVPERS deployed at sea are subject to furlough upon return from deployment  CIVMARS are subject to furlough upon return from deployment  Maintain safety standards and quality of care  Support to classified programs  Shipyard Workers, General  Shipyard Workers, Nuclear and Naval Reactors Staff
USA	263	Up to 6,600	555 APF CDC Employees  75  17  257	Maintain safety standards and quality of care  ARNG Dual Status Technicians for Alerts, Firefighting, Personnel Recovery and other missions  Support to classified programs  Non-immigrant employees requiring H-1B visas at Defense Language Institute

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Component	Safety of Life & Property	Medical Personnel	Others	Comments
USAF	933	410	62  1,123  30 Students  94 Multi-IOC 24/7 Plant Operators  2  3  1,634 APF CDCs	Support to classified programs  ANG Dual Status Technicians for Alerts, Firefighting, Personnel Recovery and other missions  Intel School & FLETC  Heating/Waste Water Plant minimum safe manning  Contingency Planners  Special Law Enforcement Pay  Maintain safety standards and quality of care
DLA	363			
DA&M	623			546 are from the Pentagon Force Protection Agency; the remaining 77 are Washington Headquarters Services for Pentagon safety and emergency communications.  Most will be furloughed fewer than 11 days due to the need to maintain operations and security 24/7.
US Court of Appeals for Armed Services			59	The Chief Judge will decide how many days to furlough employees, if at all.
JTFCAPMED		368		165 @ Walter Reed  203 @ Fort Belvoir

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Component	Safety of Life & Property	Medical Personnel	Others	Comments
USUHS	22		5	Animal Husbandry Technicians Non-immigrant employees requiring H-1B visas
Office of the Military Commissions -- Defense Legal Services Agency			9	Civilian Trial Practitioners
Department of Defense Education Activity (DoDEA)			10,950	9-month DoDEA employees, which includes teachers, educational aids, and support staff may only be furloughed for up to 5 days at the beginning of the 2013 school year.
DCAA			1	Non-immigrant employees requiring H-1B visa

Notes:

1. Safety of life and property exceptions are based on need for 24/7 coverage in most instances. It is expected all Components will furlough for less than 88 hours in these areas where feasible.
2. *Individuals for whom law enforcement premium pay would result in no loss of pay if furloughed will be excepted from the furlough.*
3. 20 CFR 655.731 requires that the employer of a H-1B non-immigrant who is not performing work and is placed in a nonproductive status due to a decision by the employer (e.g., placed in a non-pay/non-duty status due to administrative furlough) pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for hourly employees, or the full amount of the weekly salary for salaried employees) at the required wage for the occupation.

# DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

## 1. References.

- a) Title 26, U.S. Code, Section 112, Certain combat zone compensation of members of the Armed Forces
- b) Executive Order 12744, January 21, 1991
- c) Executive Order 13119, April 13, 1999
- d) Executive Order 13239, December 12, 2001
- e) Public Law 104-117, To provide that members of the Armed Forces performing services for peacekeeping efforts in Bosnia and Herzegovina, Croatia, and Macedonia shall be entitled to tax benefits in the same manner as if such services were performed in a combat zone.

2. The following locations are designated as "Combat Zones" by law, Presidential Executive Order or by DoD certification that members of the Armed Forces serving in such locations are serving in direct support of military operations in a combat zone:

### Countries:

Afghanistan (EO 13239)	United Arab Emirates (EO 12744)
Albania (EO 13119)	Uzbekistan (DoD certification)
Bahrain (EO 12744)	Yemen (DoD certification)
Bosnia (PL 104-117)	Croatia (PL 104-117)
Djibouti (DoD certification)	Herzegovina (PL 104-117)
Iraq (EO 12744)	Jordan (DoD certification)
Kuwait (EO 12744)	Kyrgyzstan (DoD certification)
Macedonia (PL 104-1170)	Montenegro (EO 13119)
Oman (EO 12744)	Pakistan (DoD certification)
Philippines (Only troops with orders referencing Operation Enduring Freedom) (DoD certification)	Qatar (EO 12744)
Saudi Arabia (EO 12744)	Serbia (includes Kosovo) (EO 13119)
Somalia (DoD certification)	Tajikistan (DoD certification)

## DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

### Sea Areas:

Adriatic Sea (EO 13119)

That portion of the Arabian Sea that lies north of 10 degrees north latitude, and west of 68 degrees east longitude (EO 12744)

Gulf of Aden (EO 12744)

Gulf of Oman (EO 12744)

Ionian Sea north of the 39<sup>th</sup> Parallel (EO 13119)

Persian Gulf (EO 12744)

Red Sea (EO 12744)

3. Adherence to the following principles ensures consistency in applying the "deployed to combat zone" exemption to civilian employees in the context of the administrative furlough:

- a) "Deployed civilian" is defined as a civilian employee who is deployed (in temporary duty (TDY) status) or temporarily assigned (to include temporary change of station (TCS)) to a "combat zone" as set forth above.
- b) "Combat zone" is defined as those locations listed as combat zones in Executive Orders 12744, 13119 or 13239 and locations where military are eligible for combat zone tax benefits under law or because DoD has certified that they are providing direct support to military operations.
- c) A "deployed civilian's" period of deployment includes time spent in attendance at mandatory pre-deployment training as well as in completing mandatory post-deployment requirements.
- d) A civilian employee who was deployed to a combat zone but redeploys mid-way through the furlough period will receive a notice of proposed furlough upon return to their parent organization and prior to any furlough. Further, the number of hours for which the employee will be furloughed will be pro-rated.

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**DECLARATION OF ROBERT F. HALE**

**Personal Background**

I, Robert F. Hale, having personal knowledge of the facts contained in this declaration and being competent to testify to them, hereby state as follows:

1. I currently serve as the Under Secretary of Defense (Comptroller)/Chief Financial Officer in the United States Department of Defense (“DoD” or “the Department”). I have held this position since February 2009 following my nomination by President Barack Obama, confirmation by the United States Senate, and appointment by President Obama.

2. Prior to my appointment, I served as the Executive Director of the American Society of Military Comptrollers (ASMC), the professional association of Defense financial managers. As Executive Director, I led the ASMC’s certification program (the Certified Defense Financial Manager program), and oversaw other training programs, the society’s professional journal, and the ASMC’s National Professional Development Institute, an annual conference attracting more than 3,500 participants. Prior to my ASMC tenure, from 1994 to 2001, I served in the Pentagon as the Assistant Secretary of the Air Force (Financial Management and Comptroller), where I was responsible for annual budgets in excess of \$70 billion, efforts to streamline Air Force financial management, and compliance with the Chief Financial Officers Act. In addition, from 1982 to 1994, I headed the National Security Division at the Congressional Budget Office, developing quantitative analyses of major defense budget issues and testifying frequently before congressional committees. During my career, I was also a senior fellow and head of the acquisition and grants management group at LMI, a consulting firm

## DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

specializing in service to the Federal government. I also spent 3 years as an active duty officer in the U.S. Navy and served as a staff analyst and study director at the Center for Naval Analysis.

3. I graduated with honors from Stanford University with a Bachelor of Science (B.S.) in mathematics and statistics. I also hold a Master's degree in operations research from Stanford and a Master of Business Administration (MBA) degree from the George Washington University. I am a Certified Defense Financial Manager (CDFM). I am a fellow of the National Academy of Public Administration and a past member of the Defense Business Board, a high-level Pentagon advisory panel. In addition, I am the recipient of the Department of Defense Exceptional Public Service Award, the Air Force Distinguished Service Award, and the National Defense Medal.

4. In my current position as Under Secretary of Defense (Comptroller), I am the principal advisor to Secretary of Defense Hagel on all budgetary and fiscal matters, including the development and execution of DoD's annual budget of more than \$500 billion, which pays for day-to-day and wartime requirements. As Chief Financial Officer, I also oversee the Department's financial policy, financial management systems, and business modernization efforts. I served in the same capacity for former Secretaries of Defense Panetta and Gates.

### **Overview of Sequestration and Its Impact on the Department of Defense**

5. As the Department's Comptroller, I have advised both Secretary Hagel and former Secretary Panetta regarding the Department's reduced funding levels and the impact of sequestration on the Department's budget and the various options, including furloughs, for addressing such impact. I advised that an administrative furlough was a management tool that would result in a predictable, recurring amount of money being available for use by the

## DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

Department to contribute to addressing the negative fiscal impacts of sequestration, operating for a full-year under a continuing resolution, and increasing war requirements.

6. By way of background, the Budget Control Act (BCA) of 2011, which was enacted in August 2011, provided for a projected \$1.2 trillion in automatic spending cuts, if Congress failed to enact deficit reduction legislation by adopting the recommendations of the Joint Select Committee on Deficit Reduction by January 15, 2012. The cuts were to be evenly divided: (1) over a 9-year period beginning in 2013 and ending in 2021, and (2) between defense spending and discretionary domestic spending. Known as sequestration (or sequester), the above process of automatic spending cuts was intended as a means of encouraging compromise on deficit reduction efforts. When no such compromise was reached, however, the mandatory budget cuts (including \$109 billion in total cuts for fiscal year 2013) were scheduled to go into effect on January 2, 2013. Passage of the American Taxpayer Relief Act on January 2, 2013, delayed the mandatory budget cuts until March 1, 2013.

7. As of February 2013, the Department anticipated, absent another postponement or a compromise, that by the end of the following month, its share of the sequester for fiscal year 2013 would result in an approximate \$42 billion reduction in the Department's total discretionary budgetary topline (later recalculated by the Office of Management and Budget at \$37 billion) with virtually every budget account in the Department's budget – including wartime funding but excluding military personnel accounts – cut by as much as 9 percent.

8. In addition to sequestration, the Department anticipated further budgetary constraints if the funding levels for the remainder of fiscal year 2013 were to stay in effect at the then-current funding levels allowed by the continuing resolution (CR). A CR is an appropriations act that funds specified Federal agencies or the entire Federal government until a

## DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

specified date or for the remainder of the fiscal year when agreement cannot be reached on one or more of the regular appropriation acts. Typically it proportionally allocates budget authority into accounts based on amounts appropriated in the prior year appropriations acts. Thus, the lack of a regular DoD appropriations act for fiscal year 2013 created, among other things, the additional constraint of having money in the wrong appropriation accounts. Specifically, under the then-existing CR, the Department had too many dollars in the investment accounts and too few dollars in the operation and maintenance (O&M) accounts.

9. Finally, by February 2013 the Department faced costs of wartime operations in excess of those that were estimated two years earlier when budgets were prepared. At that point we estimated that we could be short as much as \$10 billion in wartime operating costs.

10. These various factors – sequestration, misallocation of funds under the CR, unexpectedly high wartime costs – all affected the DoD budget, especially the Operation and Maintenance (O&M) portion of the budget, which funds the costs for many of our civilian employees. Taken together, these factors left us facing shortfalls of \$40 billion or roughly 20 percent of O&M funding for active forces.

### **Initial Considerations Regarding the Furlough of Department of Defense Civilian Employees**

11. In response to sequestration and other shortfalls, the DoD determined that if it had to operate under reduced funding levels for an extended period of time, it would have to consider furloughs and other actions to ensure it could execute its core mission and to bring its expenditures down to appropriated levels. As an initial overriding objective, the Department had to protect the warfighter. This objective meant, however, that there would be larger and more disproportionate cuts in the Military Departments' O&M accounts supporting the base budget for

## DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

the active forces and from which most civilian positions are funded. The need to protect warfighter funds added to the Department's O&M problems.

12. As of late February 2013, the Department had already begun taking many near-term actions in an attempt to slow spending and avoid more draconian cuts at a later time. Such actions included severe cutbacks in travel and training conferences; civilian hiring freezes; layoffs of more than 7,500 temporary and term employees; sharp cutbacks in facilities maintenance (by as much as 90 percent in the remainder of the year); cutbacks in base operations; reduction of the number of aircraft carriers, embarked air wings, and accompanying defensive and support ships deployed to the Persian Gulf; reductions in the scope of and period of performance of contracts; and delay of contracting actions until the next fiscal year. However, the Department recognized at that time that if sequestration and the CR were to last throughout fiscal year 2013, many more far-reaching changes would be required, including cutbacks and delays in virtually every investment program in the Department (some 2,500 of them) and the furlough of civilian personnel.

13. As a result, on February 20, 2013, Secretary of Defense Panetta notified DoD civilian employees and the Congress about the potential for such furloughs for up to 22 days (176 hours). As I noted that same day in a DoD Press Briefing on "Civilian Furlough Planning Efforts," although the Department would strongly prefer not to impose furloughs, the Department believed that it had no choice but to do so absent further action by Congress, given the severe budget constraints outlined above. As I then stated,

We're more than 20 percent short in O&M, with 7 months to go, much higher in some of the services, particularly the Army. Civilian personnel make up a substantial part of DoD O&M funding. We can't do reductions in force, especially at this point in the year. They'd cost us money in this year because of unused leave and severance pay, so furloughs are really the only way we have to quickly cut civilian personnel funding.

## DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

14. During the planning for possible furloughs, the Secretary determined that, as a matter of policy, there would be only limited exceptions to any furloughs that were imposed. Exceptions would include civilians directly involved in support of wartime operations, those needed for protection of life and property, and those involved in a few programs of particularly high priority (especially programs directly and significantly affecting military readiness). Remaining furloughs would be implemented in a fair and even manner across the breadth of the Department (including the Military Departments). We estimated that furloughs of 22 days would reduce DoD expenditures by \$4 to \$5 billion.

15. On March 21, 2013, Congress passed H.R. 933, the “Consolidated and Further Continuing Appropriations Act, 2013,” (hereafter referred to as “the Act”) which, in part, provided fiscal year 2013 full-year appropriations through September 30, 2013, for various Federal agencies, including the Department of Defense, and which modified some aspects of sequestration. Although it retained the overall sequestration spending cuts and their across-the-board nature, and did not provide sufficient funding to cover the OCO shortfalls, it aligned funding closer to the fiscal year 2013 budget request for DoD and provided limited transfer authority to the Department, which is an authority to move money from one account (*e.g.*, Procurement) to another (*e.g.*, O&M) in order to provide some flexibility during budget execution. In anticipation of the President’s signing Public Law No. 113-6, on March 21, 2013, the Department delayed issuance of furlough notices to allow the Department to analyze carefully the impact of the Act on the Department’s resources. After March 26, 2013, when President Obama signed H.R. 933 into law as Public Law No. 113-6, the Department no longer operated under the CR terms and conditions. This corrected approximately \$11 billion of the

## DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

shortfall in the Military Departments' base O&M accounts that resulted from operating under the CR at the fiscal year 2012 funding levels and authorized a total of \$7.5 billion in general and special transfer authority under sections 8005 and 9002, respectively.

16. However, even after enactment of this appropriations legislation, the Department still faced an O&M shortfall in excess of \$30 billion. In efforts to minimize the adverse effects of the sequester, and of the overall O&M shortfall, the Department pursued various courses of action. In addition to the short-term actions mentioned above, the Department imposed far-reaching cutbacks in training and maintenance. In April the Air Force began shutting down all flying at 12 combat-coded fighter and bomber squadrons and curtailed exercises, acts that seriously reduced military readiness. By April the Army had already cancelled seven combat training center rotations – culminating training events that are necessary to ready units for deployment – and five brigade-level exercises. The Department of the Navy also cut back steaming days and flying hours across the Navy and Marine Corps. The military services also cut back funding for weapons maintenance. In addition, the Department of the Navy delayed deployment of the USS TRUMAN carrier strike group to the Persian Gulf, curtailed the sailing of the USNS COMFORT to the United States Southern command area of responsibility, and cancelled four other ship deployments.

17. By late April these various actions had reduced the estimated O&M shortfall to about \$11 billion, mostly in our wartime budget and mostly in the Army. Faced with a limited number of options to close this gap, and with uncertainty about the Department's ability to identify and gain Congressional acceptance of further budget cuts, on May 14 the Secretary announced his intention to impose furloughs on civilian personnel rather than making even larger cuts in training and maintenance that would have further eroded military readiness. Overall, the

## DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

furloughs impacted approximately 650,000 (or about 85%) of the Department's approximately 767,000 civilian employees paid directly by DoD funds. Rather than the 22 days estimated earlier, the Secretary reviewed budget projections and decided that furloughs could be limited to a maximum of 11 days (88 hours). We estimated that furloughs of 11 days would save DoD about \$2 billion, avoiding substantial further cuts in training and maintenance. The Department began the required "impact and implementation" bargaining with unions and began the process of issuing required notifications to employees and furloughs began during the week of July 8.

### **Inclusion of Working Capital Fund Employees**

18. On June 21, 2013, a bipartisan group of 31 Members of Congress sent a letter to the Secretary of Defense expressing "concern about the determination that civilian workers at entities funded through Defense Working Capital funds are subject to furlough." Specifically, the members inquired as to the legality of furloughing civilians in these funds in light of section 129 of title 10 of the United States Code.

19. On July 5, 2013, acting based on the Advice of the DoD Office of General Counsel, I responded on behalf of Secretary Hagel. In my letter, which is attached hereto as Attachment 1, I noted that the short-term furlough directed by the Department of Defense does not contradict any of the various prohibitions which are set forth in section 129. As I further explained, to the contrary,

Section 129 directs the Department to manage our civilian workforce based on workload and on the "funds made available to the department for such fiscal year." The \$37 billion reduction levied on the Department by sequestration is a major cause of these furloughs, and therefore our actions satisfy the requirements of section 129. Indeed, section 129 directs the Department to manage our civilian workforce based on workload and funding.

As for your cost concerns, furloughs of all DoD civilians will save about \$2 billion in fiscal year 2013, including more than \$500 million associated with

## DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

reduced personnel costs in working capital fund activities. These working capital fund personnel savings provide us the flexibility to adjust maintenance funding downward to meet higher-priority needs. The Air Force, for example, currently expects to reduce funded orders in their working capital funds by about \$700 million to meet higher-priority needs while the Army expects to reduce orders by \$500 million.

*See Attachment 1.*

20. Having imposed furloughs, the Department undertook extensive efforts to identify budget changes that would close the remaining gap and, if possible, reduce cutbacks in training and impose fewer furlough days. In mid-May the Department prepared and submitted two Omnibus reprogramming requests that sought permission from the congressional defense committees to move funds totaling about \$9.6 billion from lower priority budget lines to higher priority budget lines. When the congressional committees did not approve all of the Omnibus reprogramming requests, the Department submitted two additional reprogramming actions on July 22, 2013, that included about \$1 billion of replacement sources for those sources that one or more of the committees had denied or deferred. These reprogrammings moved furlough savings and funds for lower-priority activities to areas of highest budgetary need. The law limits the amount of funds that can be transferred annually under reprogrammings, and these two reprogramming actions used almost all of DoD's transfer authority for FY 2013. Second, pursuant to existing authorities, the Department transferred responsibilities for some specific programs and missions from one Department of Defense component to another and used other available means to reallocate the financial burden for supporting the warfighter. For example, on July 15, 2013, pursuant to section 165(c) of title 10 of the United States Code, the Deputy Secretary of Defense assigned to the Secretary of the Navy the responsibility for providing up to \$450 million for support to U.S. Forces in Afghanistan that previously had been the responsibility of the Army under the Logistics Civil Augmentation Program (LOGCAP). The

## DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

Navy ultimately provided \$310 million for the support to U.S. Forces in Afghanistan using the Army's LOGCAP contract. On July 15, 2013, pursuant to section 2571(b) of title 10 of the United States Code, the Deputy Secretary also directed the Director for the Defense Logistics Agency to reduce the standard prices for jet and ground fuel procured under the authority of section 2208 of title 10 of the United States Code and provided to DoD customers in connection with military operations conducted in Afghanistan, retroactive to March 1, 2013 (to coincide with the President's sequestration order). This effectively tapped funds available to the Defense Logistics Agency to support the warfighting costs that would otherwise have been borne by the military departments.

### **The Furlough Outcome**

21. Since Congress approved most of the Department's large reprogramming requests that were submitted in mid-May and late-July, giving the Department flexibility to move funds across accounts, together with the facts that the Military Departments were aggressive in identifying ways to hold down costs, and that the Department was able to transfer some responsibilities for funding specific programs and missions using existing authorities, the Department was successful in shifting savings (including furlough savings) to meet its highest priority needs. As a result, the Department was able to close the remaining budgetary gap and abide by legally binding spending caps. DoD was also able to accomplish two high-priority goals: a reduction in furlough days, and modest improvements in training and readiness. Specifically, DoD was able to reduce furloughs from a maximum of 11 days to 6 days (48 hours) for most DoD civilian employees.

I certify under penalty of perjury that the foregoing is true and correct.

DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

Dated: September 16, 2013

A handwritten signature in cursive script that reads "Robert F. Hale". The signature is written in black ink and is positioned above a horizontal line.

Robert F. Hale

# DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

## DECLARATION OF MICHAEL J. DOWLING

I, Michael J. Dowling, am the Deputy Director of the Defense Commissary Agency (DeCA). In that role I have responsibility to manage a workforce of approximately 17,000 employees, worldwide, and sales of grocery products in over 245 stores in 12 countries and the United States. The Defense Commissary Agency has annual sales, at cost, in excess of \$5.8 billion, and operates under a budget appropriated by the U.S. Congress of approximately \$1.4 billion. In my capacity as a manager, I have the discretion as a result of express responsibilities contained in statute and regulation, delegations of authority and inherent authority of the position itself, to make decisions to accomplish the mission and goals of the Agency, including those required in my role as a Deciding Official in Adverse Actions taken under the provisions of 5 U.S.C. Chapter 75, Subchapter II.

On or about June 27, 2013, I functioned as the Deciding Official on the adverse actions for the Defense Commissary Agency arising from furloughs required as a result of the implementation of sequestration required by the Budget Control Act of 2011. I performed the duties of Deciding Official in accordance with and under the provisions of the directions of the Secretary of Defense, Chuck Hagel, as set forth in his Memorandum of May 14, 2013, Subject: Furloughs. In that Memorandum, the Secretary of Defense charged deciding officials:

“with, and [being] accountable for, making final decisions on furloughs for individual employees after carefully considering the employee’s reply, if any, and the needs of the Department. Deciding Officials must also ensure they make final decisions in cases where an employee does not submit a reply. Deciding Officials will have the authority to execute the full range of options with respect to providing relief in individual employee cases. This authority includes, but is not limited to, reducing the number of days/hours

## DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

an individual employee is furloughed, or granting the individual employee an exception from the furlough altogether.”

Neither the DeCA Agency Director nor any official of the Department of Defense ever instructed or restricted me in any way as to what individual decisions I had the authority to make after considering the proposed adverse actions and the oral and /or written responses of the employees who made a response. No official of the Department of Defense reduced or withheld any authority I held as Deciding Official in the furlough cases.

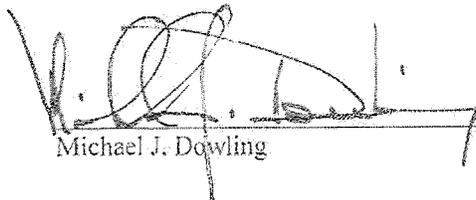
In making these decisions I reviewed the Proposed Notices of Furlough and the individual adverse action files. In those cases in which employees had submitted a response, I reviewed and considered the individual circumstances and arguments set forth in each employee's response. In all cases, whether or not an employee submitted a response, I considered all relevant factors, in making the determination whether to exempt an employee from furlough or not. As is the fact, in retrospect, I decided that no exceptions were appropriate under the circumstances.

In performing my function as Deciding Official, in each case I signed and issued a written decision in accordance with the requirements of law and regulation and caused that written decision document to be sent to, and received by, each respective employee prior to the effective date of the individual's first non-pay furlough date.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date:

3 Nov 2013



Michael J. Dowling

# DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH



DEFENSE COMMISSARY AGENCY  
HEADQUARTERS  
1300 E AVENUE  
FORT LEE, VIRGINIA 23801-1800

IN REPLY  
REFER TO

COH

May 28, 2013

MEMORANDUM FOR

SUBJECT: Notice of Proposed Furlough

This memorandum notifies you that the Defense Commissary Agency proposes to furlough you no earlier than 30 days from receipt of this notice. This furlough is being proposed in accordance with 5 CFR, Part 752, Subpart D. This administrative furlough is necessitated by the extraordinary and serious budgetary challenges facing the Department of Defense (DoD) for the remainder of Fiscal Year (FY) 2013, the most serious of which is the sequester that began on March 1, 2013. The Budget Control Act of 2011, as amended by the American Taxpayer Relief Act of 2012, makes across-the-board reductions to budgetary resources for the Federal government. In addition, DoD must and will protect wartime operations funding for our troops in harm's way. This inevitably means larger cuts in base-budget funding for the Operation and Maintenance (O&M) accounts. Thus, DoD will need funding in other accounts that can be used to provide the warfighters with what they need to protect national security and fight the war. This furlough is proposed to help meet their need while avoiding a deficit of funds in FY 2013.

If other employees in your competitive level (i.e., generally, positions at the same grade level and classification series, the duties of which are generally interchangeable -- see 5 CFR 351.403(a)) are not being furloughed or are being furloughed for a different number of days/hours, it is because they (1) are currently in a non-pay status, (2) are on an assignment not otherwise causing an expenditure of funds to the agency, or (3) are on a different work schedule.

We plan to apply the following procedures and conditions related to the furlough:

- a. The furlough will be on discontinuous (intermittent) days, beginning on Mondays, no earlier than July 8, 2013 up to September 30, 2013. Full-time employees will be furloughed no more than 11 workdays or 88 hours. If you are a part-time employee, your furlough time will be prorated, based on your work schedule.
- b. Due to uncertain and potentially fluctuating amount of funding which may be available to this Agency, the number of hours per pay period required for the furlough may vary. Accordingly, if the decision is made to furlough, you will be advised in advance of each pay period of the number of furlough hours required to allow the financial obligations of DoD to be met. Generally, you will not be furloughed for more than 16 hours for each pay period beginning no earlier than July 8, 2013 up to September 30, 2013.
- c. Annual, sick, court, military leave, or leave without pay which has been approved for a day which is later designated as a furlough day will be recorded as a furlough and you will be placed in a non-pay status for the day.

At this time, we do not reasonably anticipate the need for furlough beyond 11 workdays (88 full-time hours). However, should additional furlough days/hours become necessary,

Your Commissary ... It's Worth the Trip!

## DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

employees will be given another notice. We recognize the difficult personal financial implications of any furlough, no matter how limited its length. We will make every effort to keep you informed as additional information regarding the agency funding level becomes available. If you have questions, see your supervisor.

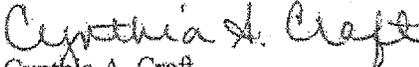
You will be allowed 21 calendar days from receipt of this letter to respond orally and/or in writing, to review the supporting material, and to furnish any affidavits or other supporting documentary evidence in your answer. You have the right to be represented in this matter by an attorney or other person you may choose, at no cost to the government. If you are in a paid status, you and/or your representative, if an agency employee, will be allowed a reasonable amount of official time to review the supporting material, seek assistance, prepare your reply, secure affidavits and statements, consider appropriate courses of action, and make a response. Contact your supervisor to arrange for official time. The deciding official has designated representatives to hear oral replies on his behalf. To arrange for an oral reply or review the supporting materials, please contact your assigned Labor and Employee Relations (LMER) Specialist, or one of the Specialists on the attached list.

Your written reply should be mailed to the deciding official:

Mr. Michael Dowling  
Deputy Director  
c/o Your assigned LMER Specialist  
Defense Commissary Agency  
ATTN: COH  
1300 E Avenue  
Fort Lee, VA 23801

A final written decision, including an explanation of the specific reasons for the action taken, will be given to you as soon as possible after the 21 calendar days allowed for your reply.

No decision to furlough you has been made or will be made until full consideration is given to your reply.

  
Cynthia A. Craft  
Director, Human Resources

Attachment:  
As stated

Acknowledgement of Receipt:

Employee's Signature and Date of Receipt: \_\_\_\_\_



# DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

1300 E AVENUE  
FORT LEE, VIRGINIA 23801-1800

IN REPLY  
REFER TO

CC

June 27, 2013

MEMORANDUM FOR

SUBJECT: Notice of Decision to Furlough

By written notice of May 28, 2013, you were notified of a proposal to furlough you pursuant to the procedures in 5 CFR Part 752, Subpart D. You did not reply to that notice.

I have determined that the reasons for the proposed furlough, as stated in the notice of the proposal, remain valid. The procedures and conditions related to the furlough, as proposed, have been determined to be the most equitable means of implementing the furlough. Therefore, you will be required to be on a discontinuous furlough during the period beginning July 8, 2013, through the end of the fiscal year.

In accordance with the procedures and conditions outlined in the notice of proposal dated May 28, 2013, you will be furloughed for no more than 16 hours in each of the pay periods, or parts thereof, between July 8, 2013, through the end of the fiscal year. The maximum furlough time for full-time employees will be no more than 11 workdays, or a maximum of 88 hours. For full-time employees, this maximum is based on a regular work schedule of 80 hours per pay period. A part-time employee's number of hours required for furlough is prorated according to the specific work schedule.

Your supervisor will inform you of the amount of furlough time required prior to each pay period. Please contact your supervisor if you have any questions concerning the scheduling of your furlough days.

When you are on furlough, you will be in a non-pay, non-duty status. Also, during any furlough period, you will not be permitted to serve as an unpaid volunteer, must remain away from your workplace, and are prohibited from performing any work-related duties during that time.

If you have completed a probationary or trial period or one year of current continuous employment in the competitive service under other than a temporary appointment, you may appeal this action to the Merit Systems Protection Board (MSPB). If you are a preference eligible employee in an excepted service appointment, you may appeal to the MSPB if you have completed one year of current continuous service in the same position or positions similar to the one you now hold. Employees in the excepted service who do not have veterans preference and who are not serving a probationary or trial period under an initial appointment pending conversion to the competitive service may appeal to the MSPB if they have completed two years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to two years or less. You have the right to be represented in this matter by an attorney or other person you may choose, at no cost to the government.

## DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

If you have the right of appeal and wish to appeal this action to the MSPB, you must file the appeal within 30 days after the effective date of your first furlough day, or 30 days after the date of your receipt of this decision, whichever is later. If you do not submit an appeal within this timeframe, the MSPB will dismiss it as untimely filed unless a good reason for delay is shown. You may obtain a copy of the appeals form and a copy of the Board's regulations from the MSPB website at <http://www.mspb.gov> or contact your assigned Labor and Employee Relations Specialist (see attached list).

Your appeal must be filed with the MSPB regional or field office serving the area of your duty station when the action was taken. Please see the attached list of MSPB jurisdictions. MSPB also offers the option of electronic filing at <https://e-appeal.mspb.gov/>.

If you are a bargaining unit employee, and your collective bargaining agreement permits, you may grieve this action in accordance with the applicable negotiated agreement or you may appeal to the MSPB in accordance with the procedures outlined above, **but not both**. Your election to proceed under one process will be considered made when you timely file a grievance in writing, or timely file a notice of appeal, whichever event occurs first. To obtain information on filing a grievance under the negotiated grievance procedure, contact your exclusive union representative.

The Board will send an Acknowledgement Order and copy of your appeal to the Office of General Counsel, Defense Commissary Agency, 1300 E Avenue, Fort Lee, VA, 23801-1800, e-mail, [Camillo.desantis@deca.mil](mailto:Camillo.desantis@deca.mil), telephone (804) 734-8000, extension 48116, or by facsimile (804) 734-8259.

If you believe this action is taken as reprisal for whistle blowing, you may file a complaint with either the MSPB (<http://www.mspb.gov/appeals/whistleblower.htm#introduction>) or the Office of Special Counsel (OSC), which can be followed by an Individual Right of Action Appeal filed with the MSPB. The Whistleblower Disclosure Form, OSC-12, is available at the following web address [http://www.osc.gov/RR\\_OSCFORMS.htm](http://www.osc.gov/RR_OSCFORMS.htm). The web address for an electronic filing of whistleblower disclosure with OSC is at <https://www.osc.gov/oscefile/>.

You have the right to file a complaint with the Equal Employment Opportunity office and the Equal Employment Opportunity Commission (EEOC), if you believe that this furlough was effected in a discriminatory manner. Information regarding the Federal section EEO process is available on the EEOC website at [http://eeoc.gov/federal/fed\\_employees/complaint\\_overview.cfm](http://eeoc.gov/federal/fed_employees/complaint_overview.cfm). You may contact your servicing Equal Employment Opportunity Office at 1-877-435-7336.

DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

We recognize the difficult financial implications of any furlough, no matter how limited its length. We will make every effort to keep you informed as additional information regarding the Agency funding level becomes available. If you have questions, contact Labor and Employee Relations Specialist (see attached list).



Michael J. Dowling  
Deputy Director

Attachments:  
As stated

Acknowledgement of Receipt:

Employee's Signature and Date: \_\_\_\_\_

# DEFENSE COMMISSARY AGENCY GENERAL RESPONSE TO FURLOUGH

## DECLARATION OF LAUREN P. BANDS

I, Mr. Lauren P. Bands Jr., am the Chief Financial Executive and Director of Resource Management for the Defense Commissary Agency ("DeCA" or "the Agency"). As the Chief Financial Executive I am responsible for overall management of the appropriated and other funds provided to, and generated by, the Defense Commissary Agency in and for the accomplishment of its mission. Its mission is to provide grocery products to military service members, their spouses and families and others at cost. The Commissary benefit is intended to be an integral element of the military pay and benefits package for active duty military personnel, and an income benefit for members of a military household, retirees and various others, based primarily on their compensation status. The Agency maintains commissaries and sells grocery products in 245 stores in 12 countries and the United States. The Defense Commissary Agency has annual sales, at cost, in excess of 5.8 billion dollars, and operates under an annual appropriation from Congress of approximately 1.4 billion dollars. The Defense Commissary Agency is comprised of a workforce of approximately 17,000 employees, worldwide. In excess of \$700 million dollars of the total DeCA appropriation is spent on personnel salaries and benefits.

As a result of the order of sequestration issued on March 1, 2013 by the President of the United States pursuant to the Budget Control Act of 2011 and the enactment of the Consolidated And Further Continuing Appropriations Act, 2013 on March 21, 2013 maintaining appropriated funding at Fiscal Year 2012 operating levels, the Defense Commissary Agency's operating levels were reduced by \$ 19.8 million in its surcharge trust fund for the remainder of FY 2013. After other cost saving measures by the Department of Defense (DoD) and implemented by DeCA over the previous two years, such as cutting spending across the board in critical areas such as hiring, travel, training and other non-labor activities were taken into account, DoD found

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that in order to continue to operate at the above reduced levels, the Agency would have to reduce personnel costs and place its employees in a non-pay furlough status for approximately eleven (11) days.

After initiating the first of the furlough days, DoD found that it could reduce the number of furlough days from the initial anticipated estimate of 11 days, to 6 furlough days for all employees.

Each day of furlough saved DeCA (or DoD) approximately \$2.1 million dollars and therefore substantially improved the efficiency of DeCA and contributed to the overall savings in the Agency's expenditure of Appropriated Funds necessary to meet the requirements of the Budget Control Act of 2011. In the execution of that responsibility, the Agency achieved an overall reduction in appropriated fund personnel salary costs of \$12.6 million dollars.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: \_\_\_\_\_

11-15-13



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Lauren P. Bands