

## *Indefinite Suspensions and Potentially Criminal Behavior: Using Reasonable Cause to Act*

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You may be aware that if an agency has reason to believe that an employee has committed a crime for which a sentence of imprisonment may be imposed that the employee can be removed in as little as seven (7) days. But, what if the agency does not feel sufficiently confident that the employee committed the crime and wants to wait for the criminal charges to be resolved before taking the removal action? If the agency would prefer not to have the employee at work or even in a pay status pending resolution of the criminal matter, then the agency can opt to indefinitely suspend the employee (without pay) while the agency waits for the criminal matter to be resolved.<sup>1</sup> In such cases, the basis for the action is not that the offense was committed, but only that the agency had reasonable cause to believe that the appellant committed a crime that could result in imprisonment. The agency still retains the option to remove the employee later for the underlying conduct.<sup>2</sup> The indefinite suspension without pay pending resolution of a criminal matter is considered a separate personnel action from a removal for the underlying criminal conduct and each type of action follows different rules.

If the removal of an employee is challenged, the agency must show that it is more likely than not that the employee committed the alleged offense. This is called “preponderant evidence.” However, what is being proven is different when the agency seeks an indefinite suspension. The agency is not required to have preponderant evidence of the *crime*, only preponderant evidence of a

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<sup>1</sup> The Board and its reviewing court have approved of the use of indefinite suspensions in three different sets of circumstances. These are when: (1) the agency has reasonable cause to believe an employee has committed a crime for which a sentence of imprisonment could be imposed—pending the outcome of the criminal proceeding or any subsequent agency action following the conclusion of the criminal process; (2) the agency has legitimate concerns that an employee’s medical condition makes his continued presence in the workplace dangerous or inappropriate—pending a determination that the employee is fit for duty; or (3) an employee’s access to classified information has been suspended and the employee must have such access to perform his job—pending a final determination on the employee’s access to classified information. *Gonzalez v. Department of Homeland Security*, 114 M.S.P.R. 318, ¶ 13 (2010).

<sup>2</sup> The Board has emphatically stated that “an agency is not precluded from indefinitely suspending an employee based upon reasonable cause to believe he has committed a crime for which a sentence of imprisonment could be imposed and thereafter proposing to remove him based upon either his subsequent criminal conviction or his underlying misconduct.” *Frederick v. Department of Homeland Security*, 122 M.S.P.R. 401, ¶ 14 (2015).

*reasonable belief* that the employee has committed a crime that may result in imprisonment. Often, a criminal indictment is used to establish this reasonable belief. However, an indictment is *not* specifically required to invoke the crime provision, only reasonable cause for belief that a crime (serious enough to permit possible imprisonment) has been committed.<sup>3</sup> *The agency is not required by law to wait for an indictment.*

The agency may *opt* to wait for an investigation to be completed by an Inspector General or other investigator in order to provide the deciding official with more information or evidence. While officials can choose to wait for an investigation to be completed before proceeding with the indefinite suspension, that is a choice, not a requirement.<sup>4</sup>

As with any other suspension of 14 days or more, a lengthy indefinite suspension is appealable to MSPB under 5 U.S.C. § 7513. The four elements the Board looks for in indefinite suspensions based on potential criminal activity are: (1) there is reasonable cause to believe the employee committed a crime for which a term of imprisonment may be imposed; (2) the suspension has an ascertainable end (*e.g.*, conviction, dismissal of charges, or completion of the investigation); (3) there is a nexus (connection) between the criminal charge and the efficiency of the service; and (4) the penalty is reasonable. These are the elements the agency must prove if the action is challenged, *not guilt of the alleged crime.*<sup>5</sup>

If an agency indefinitely suspends the employee based upon reasonable cause to believe there has been a crime, and the individual is not convicted, the suspension itself is still valid for the period where the belief was reasonable.<sup>6</sup> What matters is *the record that the officials had before them when they put*

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<sup>3</sup> *Rampado v. U.S. Customs Service*, 28 M.S.P.R. 189, 191 (1985) (finding reasonable cause existed at the time of a suspension action despite the lack of an indictment); *Jones v. Government Printing Office*, 13 M.S.P.R. 365, 368 (1982) (same).

<sup>4</sup> *See, e.g., Raymond v. Department of the Army*, 34 M.S.P.R. 476, 478 (1987) (appellant removed and MSPB appeal dismissed without prejudice to refile because of investigation by U.S. Attorney); *Green v. U.S. Postal Service*, 16 M.S.P.R. 203, 206 (1983) (staying a removal appeal at MSPB pending completion of the ongoing criminal investigation by the U.S. Attorney's Office).

<sup>5</sup> *Dalton v. Department of Justice*, 66 M.S.P.R. 429, 435 (1995).

<sup>6</sup> *See, e.g., Wiemers v. Merit Systems Protection Board*, 792 F.2d 1113, 1116 (Fed. Cir. 1986) (holding that a reversal of a conviction did not entitle an employee to back pay for a suspension based on alleged criminal activity).

*the action into effect.*<sup>7</sup> Additionally, it is not necessary that the agency form a belief as to whether the employee will be imprisoned, only that such imprisonment *could* be imposed.<sup>8</sup>

To reiterate: **An agency is not required to keep an employee in a pay status while the investigation or prosecution takes place if there is reasonable cause to believe the employee committed a crime for which imprisonment could be imposed.** The *reasonable belief* is the foundation for the suspension action, not the merits of the case proving the alleged crime.<sup>9</sup> Once that belief is resolved through the resolution of the criminal matter, the agency must act within a reasonable time period to either: (1) return to the employee to duty; or (2) take further administrative action (such as removing the employee).<sup>10</sup>

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<sup>7</sup> *Dawson v. Department of Agriculture*, 121 M.S.P.R. 495, ¶ 10 (2014).

<sup>8</sup> See, e.g., *Camaj v. Department of Homeland Security*, 119 M.S.P.R. 95, ¶¶ 9-10 (2012). In *Camaj*, the employee was in a pre-trial diversion (PTD) program and the agency was aware that his case had been dismissed without prejudice. However, the prosecutor had the option to reinstate the prosecution if the PTD was not completed successfully. Thus, the suspension was permitted to continue until the PTD program was completed.

<sup>9</sup> *Frederick v. Department of Homeland Security*, 122 M.S.P.R. 401, ¶ 14 (2015) (citing *Rittgers v. Department of the Army*, 117 M.S.P.R. 182, ¶ 12 (2011)).

<sup>10</sup> *Frederick v. Department of Homeland Security*, 122 M.S.P.R. 401, ¶ 14 (2015). See *Campbell v. Defense Logistics Agency*, 31 M.S.P.R. 691, 694–95 (1986) (explaining that based upon the resolution of the criminal proceedings, the agency must either promptly return the employee to duty or proceed expeditiously to take further administrative action), *aff'd*, 833 F.2d 1024 (Fed. Cir. 1987) (Table).