

The Adverse Action Process – A Flowchart

When reading about various steps of the adverse action process, it may be helpful to have a picture of where each step falls in relation to the others. Therefore, the flowchart below provides the major steps in the process to take an adverse action under chapter 75 of title 5 (the statute that authorizes an agency to take an action to advance the efficiency of the service).

STEP 1

Agency official will collect evidence (*e.g.*, witness statements, e-mails, copies of customers' complaints, data reports). If appropriate, ask employee for his/her side of the story before proceeding.^a (A one-sided collection of allegations may not provide a full picture of events and even Inspector General investigations can reach erroneous conclusions.)^b Proposing official will consider the evidence (which may be as simple as just his or her own statement of something the official personally observed) and will decide if he/she believes that an adverse action is warranted.^c

STEP 2

Proposing official will sign a written notice of proposed action that includes:

- Notice of the law or regulation under which the action is being taken.^d
- Clear charge(s) and specification(s).^e
- Who the deciding official will be, how to contact him/her, the deadline to submit a written reply, and the deadline to make an appointment for any oral reply.^f
- Notice that the employee can choose to have a representative (such as a private attorney or union representative).^g
- Information on how the employee can obtain a copy of (or access to) the evidence.^h
- Notice of the proposed penalty and the factors the deciding official will consider when determining the appropriate penalty.ⁱ

STEP 3

Deciding official will consider any reply from the employee.^j If the deciding official obtains new information, official will inform the employee of the new information being considered and provide an opportunity to respond.^k The original proposal can be rescinded and a new proposal issued if the agency deems it appropriate (*e.g.*, if the deciding official determines that there are errors in the proposed action or that action is warranted on a different basis).^l

STEP 4

Deciding official will issue a written notice of decision. If the official elects to implement a penalty with appeal or grievance rights, the notice will inform the employee of his/her rights.^m

Step 1: Agency Official

^a 5 U.S.C. § 552a(e)(2). The “specific nature of each case shapes the practical considerations at stake that determine whether an agency has fulfilled its obligation under the Privacy Act to elicit information directly from the subject of the investigation to the greatest extent practicable.” *Cardamone v. Cohen*, 241 F.3d 520, 528 (6th Cir. 2001). The Privacy Act does not require that an agency seek information only from the person being investigated. “The Office of Management and Budget (OMB) Guidelines promulgated with the Privacy Act provide that, ‘when conducting an investigation into a particular person, third-party sources may be contacted first when practical considerations, such as confirming or denying false statements, require this or when the information can only be obtained from third parties.’” *Carton v. Reno*, 310 F.3d 108, 112 (2nd Cir. 2002).

^b See, e.g., *Wallace v. Department of Commerce*, 106 M.S.P.R. 23, ¶¶ 4, 20 (2007) (holding that despite an Office of the Inspector General (OIG) report concluding that Wallace had improper involvement in the hiring of her sister, the witnesses most closely involved in the hiring action testified that Wallace had no involvement). See also Anthony Capaccio, “Inspector General Erred Boasting Hotline Found Raytheon Defect,” *Bloomberg* (Dec. 15, 2015), available at <http://www.bloomberg.com/news/articles/2015-12-30/inspector-general-erred-boasting-hotline-found-raytheon-defect> (explaining that the OIG erroneously claimed a report to its hotline forced the payment of \$10.6 million when the contractor had fixed the issue on its own and at its own expense); Elizabeth Dvoskin, “Revisiting the \$16 Muffin,” *Bloomberg* (Sep. 29, 2011), available at <http://www.bloomberg.com/bw/magazine/revisiting-the-16-muffin-09292011.html> (explaining that the OIG conceded that it erred because it reached a conclusion without being in possession of all the facts).

^c 5 U.S.C. § 7513 (authorizing an agency to impose an adverse action that “will promote the efficiency of the service”). See *Boddie v. Department of the Navy*, 827 F.2d 1578, 1580 (Fed. Cir. 1987) (explaining that a new official can be substituted only if the substitution occurs before the assigned official considers the charges); *Goeke v. Department of Justice*, 122 M.S.P.R. 69, ¶ 23 (2015) (explaining that the agency opted to delegate to a non-supervisory career official the authority to propose adverse actions, even though no external law, rule, or regulation required any delegation of the agency’s disciplinary power. Such a delegation can be abandoned or modified prospectively by the agency at will; but, once adopted and until modified, it must be enforced).

Step 2: Proposing Official

^d *Wilson v. Department of Health and Human Services*, 770 F.2d 1048, 1055 (Fed. Cir. 1985) (holding that the agency cannot later use a law it did not invoke); see *Hanratty v. Federal Aviation Administration*, 780 F.2d 33, 35 (Fed. Cir. 1985) (holding that MSPB cannot re-characterize which law was used).

^e The agency is required to state the reasons for the proposed adverse action in sufficient detail to allow the employee to make an informed reply. *Plath v. Department of Justice*, 12 M.S.P.R. 421, 424 (1982). But, nothing in law or regulation requires that an agency affix a label to a charge of misconduct. If an agency so chooses, it may simply describe actions that constitute misbehavior in a narrative form, and have its discipline sustained if the efficiency of the service suffers because of the misconduct. But, if an agency chooses to label an act of misconduct, then it is bound to prove the elements that make up the legal definition of that charge, if there are any. *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 202 (1997). See, e.g., *Ludlum v. Department of Justice*, 278 F.3d 1280, 1283-84 (Fed. Cir. 2002) (explaining that “[j]ack of candor and falsification are different, although related, forms of misconduct, and the latter is not a necessary element of the former”); *King v. Nazelrod*, 43 F.3d 663, 665 (Fed. Cir. 1994) (explaining that if an agency charges an employee with “theft,” the agency may be required to prove the “intent to permanently deprive the owner of possession and use of the property”); *Phillips v. General Services Administration*, 878 F.2d 370, 373-74 (Fed. Cir. 1989) (explaining that “insubordination by an employee is a willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed” and that when an employee does not refuse to obey but is merely late in obedience, the charge is not supported) (emphasis in original, internal notations and citations omitted). Proposing and deciding officials may find it beneficial to consult with a subject matter expert in the human resources office or an agency attorney regarding the words used in the charge, or any other relevant issue, but such consultation is not a statutory requirement. For more on labeling charges, see our article, [Labels Are Not Required, but if Used They Must be Proven](#).

^f It is crucial that the agency be clear on the deadline for an employee to provide a reply, and whether the reply must be submitted or received by a particular date, because if unclear language regarding the dates leads to the agency’s failure to consider the reply, this lack of consideration may constitute a due process violation. See, e.g., *Massey v. Department of the Army*, 120 M.S.P.R. 226, ¶¶ 8-10 (2013) (reversing the action on due process grounds when the oral reply was never heard because of conflicting interpretations of the agency’s instructions on the deadline for the oral reply, which could have meant either make the reply by that date, or make the appointment by that date).

^g 5 U.S.C. § 7513(b)(3). The employee may be entitled to reimbursement for attorney fees under 5 U.S.C. § 7701(g)(1), but to obtain attorney fees an appellant must show that: (1) he was the prevailing party; (2) he incurred attorney fees pursuant to an existing attorney-client relationship; (3) an award of fees is warranted in the interest of justice; and (4) the amount of fees claimed is reasonable. *Caros v. Department of Homeland Security*, 122 M.S.P.R. 231, ¶ 5 (2015).

^h 5 C.F.R. §§ 752.203(b), 752.404(b). See *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1280 (Fed. Cir. 2011); *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376-77 (Fed. Cir. 1999).

ⁱ *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1280 (Fed. Cir. 2011).

Step 3: Deciding Official Consideration

^j *Hodges v. U.S. Postal Service*, 118 M.S.P.R. 591, ¶ 6 (2012) (reversing the agency’s action because the deciding official did not consider the employee’s response); *Alford v. Department of Defense*, 118 M.S.P.R. 556, ¶¶ 5-7 (2012) (same). See *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376-77 (Fed. Cir. 1999) (discussing the right to a *meaningful* opportunity to reply).

^k See *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1377 (Fed. Cir. 1999) (explaining that new information is a due process violation when there is a lack of “notice (both of the charges and of the employer’s evidence) and the opportunity to respond”). But see *Mathis v. Department of State*, 122 M.S.P.R. 507, ¶¶ 9-10 (2015) (explaining that a deciding official does not violate an employee’s right to due process when he considers issues raised by an employee in her response to the proposed adverse action or initiates an *ex parte* communication that only confirms or clarifies information already contained in the record); *Grimes v. Department of Justice*, 122 M.S.P.R. 36, ¶¶ 11-13 (2014) (same).

^l See *Dejoy v. Department of Health and Human Services*, 2 M.S.P.R. 577, 580 (1980) (explaining that an agency may rescind a notice of proposed action and issue a new one without running afoul of double jeopardy).

Step 4: Deciding Official Decision

^m 5 U.S.C. § 7513(b)(4); 5 C.F.R. § 1201.21. See 5 U.S.C. § 7121(g) (instructing that an appellant “may elect not more than one of the remedies” listed in the statute).