SEC. ____ CLARIFICATION REGARDING ADVERSE ACTIONS.

(a) SUFFICIENCY OF NOTIFICATION.—Chapter 75 of title 5, United States Code, is amended—

(1) in section 7513(b)(1), by inserting “, including the factual basis for the proposed action with sufficient clarity to reasonably inform the employee of the charge under the circumstances” after “proposed action”; and

(2) in section 7543(b)(1), by inserting “, including the factual basis for the proposed action with sufficient clarity to reasonably inform the employee of the charge under the circumstances” after “proposed action”.

(b) APPEALS.—Section 7701(b) of such title is amended—

(1) by redesignating paragraph (3) as paragraph (6); and

(2) by inserting after paragraph (2) the following new paragraphs:

“(3) With respect to an appeal from an adverse action covered by subchapter II or V of chapter 75, the Board shall—

“(A) review whether the agency has proved the factual specifications of the charge in light of the circumstances;

“(B) in the case of an adverse action covered by subchapter II of such chapter, review whether the proposed adverse action is for such cause as will promote the efficiency of the service;

“(C) in the case of an adverse action covered by subchapter V of such chapter, review whether the proposed adverse action is for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function; and

"(D) not infer any elements of proof from the title, caption, or label of the charge.

"(4) An adverse action shall not be overturned or modified due to insufficiency of the charge if the factual basis for the proposed adverse action is stated with sufficient clarity so that the employee knew or reasonably should have known what the charge is.

"(5) An action under section 4303 shall not be overturned because of the wording of a performance standard if the employee has been placed on notice in the performance standards or by other means during the applicable minimal appraisal period, including an opportunity period, of the performance necessary to demonstrate acceptable performance, such that the employee knew or reasonably should have known the performance necessary to demonstrate acceptable performance.".

(c) JUDICIAL REVIEW; ENFORCEMENT.—Section 7123(a)(1) of such title is amended by inserting "unless the person alleges that the order is contrary to law or" before "unless the order".

(d) GRIEVANCE PROCEDURES.—Section 7121 of such title is amended—

(1) in subsection (a)(1), by striking "subsections (d), (e), and (g)" and inserting "subsections (d) and (f)";

(2) in subsection (c)—

(A) in paragraph (4), by striking "; or" and inserting a semicolon;

(B) in paragraph (5), by striking the period and inserting "; or"; and

(C) by adding at the end the following new paragraph:

"(6) matters covered under sections 4303 and 7512 that would otherwise be appealable to the Merit Systems Protection Board.";

(3) by striking subsection (e); and

(4) by redesignating subsections (f) through (h) as subsections (e) through (g), respectively.

[PLEASE NOTE: THE "CHANGES TO EXISTING LAW" SECTION BELOW SETS OUT IN RED-LINE FORMAT HOW THE LEGISLATIVE TEXT ABOVE WOULD AMEND EXISTING LAW.]

Section-by-Section Analysis

This proposal is a legislative change to, first, adverse action procedural requirements to clarify that the term "written notice" does not import any heightened pleading requirements and instead means providing sufficient information so that the employee may reasonably understand the action or failure to act that is the basis for the proposed action. This will simplify adverse action "written notice" requirements reducing the time burden in drafting notices and reduce technical reversals of actions taken for employee misconduct. Second, judicial review would be available to challenge FLRA decisions on arbitral awards that are contrary to law – not arbitral fact findings or mere contract interpretation. Last, it would restore unity of review in MSPB, with no option for grievance arbitration on matters covered under sections 4303 and 7512 that would otherwise be appealable to the MSPB.

Budgetary Implications: OPM does not believe this proposal has any significant governmentwide cost implications. A budget table is inapplicable and has not been provided.

Changes to Existing Law: This proposal would make the following changes to title 5, United States Code:

§7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to-

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action<u>, including the factual basis for the proposed action with sufficient clarity to reasonably inform the employee of the charge under the circumstances</u>;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

* * * * *

§7543. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

(b) An employee against whom an action covered by this subchapter is proposed is entitled to-

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment can be imposed, stating specific reasons for the proposed action, <u>including the factual basis for the proposed action with sufficient clarity to reasonably inform the employee of the charge under the circumstances</u>;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and specific reasons therefor at the earliest practicable date.

* * * * *

§7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right-

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless-

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter II or V of chapter 75, the Board shall—

(A) review whether the agency has proved the factual specifications of the charge in light of the circumstances;

(B) in the case of an adverse action covered by subchapter II of such chapter, review whether the proposed adverse action is for such cause as will promote the efficiency of the service;

(C) in the case of an adverse action covered by subchapter V of such chapter, review whether the proposed adverse action is for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function; and

(D) not infer any elements of proof from the title, caption, or label of the charge.

(4) An adverse action shall not be overturned or modified due to insufficiency of the charge if the factual basis for the proposed adverse action is stated with sufficient clarity so that the employee knew or reasonably should have known what the charge is.

(5) An action under section 4303 shall not be overturned because of the wording of a performance standard if the employee has been placed on notice in the performance standards or by other means during the applicable minimal appraisal period, including an opportunity period, of the performance necessary to demonstrate acceptable performance, such that the employee knew or reasonably should have known the performance necessary to demonstrate acceptable performance.

(~~3~~6) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

* * * * *

§7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under-

(1) section 7122 of this title (involving an award by an arbitrator), unless the person alleges that the order is contrary to law or unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

* * * * *

§7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall-

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that-

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order-

(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning-

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; ~~or~~

(5) the classification of any position which does not result in the reduction in grade or pay of an employee~~.~~; or

(6) matters covered under sections 4303 and 7512 that would otherwise be appealable to the Merit Systems Protection Board.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)~~(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.~~

~~(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.~~

(~~f~~e) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel

systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

(~~g~~f)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).

(3) The remedies described in this paragraph are as follows:

(A) An appeal to the Merit Systems Protection Board under section 7701.

(B) A negotiated grievance procedure under this section.

(C) Procedures for seeking corrective action under subchapters II and III of chapter 12.

(4) For the purpose of this subsection, a person shall be considered to have elected-

(A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedures;

(B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).

(~~h~~g) Settlements and awards under this chapter shall be subject to the limitations in section 5596(b)(4) of this title.