

## § 359.304

than a career Executive Schedule or equivalent position.

[56 FR 172, Jan. 3, 1991, as amended at 58 FR 58261, Nov. 1, 1993]

### § 359.304 Appeals.

Removal under this subpart is appealable to the Merit Systems Protection Board under 5 U.S.C. 7701. Under 5 U.S.C. 7701(c)(1)(A), the decision of the agency shall be sustained if it is supported by substantial evidence, which is defined in the Board's regulations at 5 CFR 1201.56(c). The burden is on the agency to show that there is substantial evidence to support its action. Once such substantial evidence is demonstrated, the burden shifts to the appellant to refute the agency's case that there was substantial evidence or to make a demonstration under 5 U.S.C. 7701(c)(2).

## Subpart D—Removal of Career Appointees During Probation

### § 359.401 General exclusions.

This subpart does not apply to the removal of a career appointee during probation when—

(a) The action is initiated under 5 U.S.C. 1206(g) or 5 U.S.C. 7542;

(b) The removal is effected under subpart C of this part for failure to be recertified; or

(c) The appointee is a reemployed annuitant. See subpart I of this part for removal of a reemployed annuitant.

[56 FR 172, Jan. 3, 1991]

### § 359.402 Removal: Unacceptable performance.

(a) *Coverage.* This section covers the removal of a career appointee from the SES during the probationary period for unacceptable performance.

(b) *Basis for action.* A removal under this section need not be based upon a final rating under the agency's SES performance appraisal system established under subpart C of part 430 of this chapter. Even if a removal is based on such a rating, the removal action is taken under this section.

(c) *Procedures.* The agency shall notify the appointee in writing before the effective date of the action. The notice shall, as a minimum—

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(1) State the agency's conclusions as to the inadequacies of the appointee's performance;

(2) State whether the appointee has placement rights under § 359.701 and, if so, identify the position to which the appointee will be assigned; and

(3) Show the effective date of the action.

### § 359.403 Removal: Conduct.

(a) *Coverage.* (1) This section covers the removal of a career appointee from the SES during the probationary period for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

(2) This section does not apply, however, when the appointee was covered under 5 U.S.C. 7511 immediately before appointment to the SES. In that case, the removal is subject to the provisions of part 752, subpart F, of this chapter.

(b) *Procedures.* The agency shall notify the appointee in writing before the effective date of the action. The notice shall, as a minimum—

(1) State the basis for the removal action (including the act(s) of misconduct, neglect of duty, or malfeasance if those factors are involved); and

(2) Show the effective date of the action.

### § 359.404 Removal: Conditions arising before appointment.

(a) *Coverage.* (1) This section covers the removal of a career appointee from the SES during the probationary period when the action is based in whole or in part on conditions arising before the appointment.

(2) This section does not apply, however, when the career appointee was covered under 5 U.S.C. 7511 immediately before appointment to the SES. In that case, the removal is subject to the provisions of part 752, subpart F, of this chapter.

(b) *Procedures.* (1) The agency shall give the appointee an advance written notice stating the specific reasons for the proposed removal.

(2) The appointee shall be given a reasonable time to reply.

(3) The agency shall give the appointee a written decision showing the reasons for the action and the effective