

**SENIOR EXECUTIVE SERVICE (SES)  
ADDRESSING CONDUCT**

An agency may take disciplinary action against a career SES member covered by subchapter V of chapter 75 of title 5 of the U.S. Code only for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function. Certain probationary career SES appointees may be removed under streamlined procedures for conduct reasons; however, other probationers have the same due process rights as a post-probationary career appointee. Any career SES appointee removed for disciplinary reasons has no placement rights and must be removed from Federal employment. Removal and certain other disciplinary measures are covered in this chart.

	<b>Conduct-Based Actions during Probation</b>	<b>Conduct-Based Actions after Probation</b>
Removal Actions	Covered Actions: Removal from the civil service.	Covered Actions: <ul style="list-style-type: none"> <li>• Removal from the civil service</li> <li>• Suspension for more than 14 days</li> </ul>
Covered Executives	Covered Executives: A probationary career SES member who was not covered by 5 U.S.C. 7511 immediately before SES appointment may be removed based upon conduct. (See the next column for procedures that apply to probationary appointees who were covered by 5 U.S.C. 7511 before SES appointment.)	Covered Executives: Adverse action rules in 5 U.S.C. 7541-7543 apply to the following SES members – <ul style="list-style-type: none"> <li>• A non-probationary career SES appointee,</li> <li>• A probationary career SES appointee who was covered by adverse action rules in 5 U.S.C. 7511 immediately before the SES appointment, or</li> <li>• A limited term or limited emergency SES member who was appointed without a break in service from a career or career-conditional or equivalent appointment in the same agency under which he or she was covered by 5 U.S.C. 7511.</li> </ul>
Cause of Action	<p>Cause of Action: To provide a uniform standard for disciplinary actions in the SES, the cause of action for conduct removal of these probationers should be the same as that required for career SES members under 5 U.S.C. 7543(a): misconduct, neglect of duty, or malfeasance, failure to accept a directed reassignment.</p> <p>The “efficiency of the service” standard used for non-SES employees does not apply.</p>	<p>Cause of Action: Misconduct, neglect of duty, malfeasance, failure to accept a directed reassignment, or failure to accompany a position in a transfer of function.</p> <p>If an agency wishes to take disciplinary action based on the appointee’s off-duty actions or misconduct, the agency must demonstrate a direct connection between</p>

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		the off-duty actions and the appointee's ability to carry out the assigned responsibilities of his/her position.
Removal Procedures	<p>An agency must notify the probationary appointee in writing before the effective date of the action.</p> <p>The notice shall, at a minimum –</p> <ul style="list-style-type: none"> <li>• State the specific reasons for the removal action (e.g., the acts of misconduct, neglect of duty, or malfeasance); and</li> <li>• Show the effective date of the action.</li> </ul> <p>To be processed under probationary procedures, the action must be made effective before the end of the last scheduled workday in the executive's probationary period (i.e., if removal will be effected on the last workday, the advance written notice must specify a time before the end of the appointee's tour of duty).</p> <p>An agency may separate a probationer for conditions arising before appointment to the SES when those conditions have a bearing on the probationer's fitness or qualifications for continued employment in the SES. Such cases require.</p> <ul style="list-style-type: none"> <li>• Advance written notice stating specific reasons for proposed removal;</li> <li>• An opportunity to reply; and</li> <li>• A written decision showing reasons for the action and the effective date.</li> </ul> <p>(Note: A proposed removal for conditions arising before appointment of a probationer who was covered by 5 U.S.C. 7511 immediately before SES appointment would be subject to procedures described in the next column.)</p>	<p>An SES career appointee against whom an adverse action is proposed is entitled to –</p> <ul style="list-style-type: none"> <li>• at least 30 days' advance written notice stating specific reasons for the proposed action (agency may reduce notice period if there is reasonable cause to believe the SES member has committed a crime for which a prison sentence can be imposed but must explain why and individual may answer);</li> <li>• a reasonable time, but not less than 7 days, to review material relied upon by the agency and to answer orally and in writing and to furnish evidence in support of the answer (agency may provide, by regulation, for a hearing in addition to or in lieu of this opportunity to answer);</li> <li>• be represented by an attorney or other representative; and</li> <li>• a written decision and specific reasons for the action at the earliest practicable date, considering only reasons specified in the proposed action, any reply by SES member, and any medical documentation reviewed based upon the executive's request for consideration of a medical condition that may have affected the basis for taking the action.</li> </ul> <p>OPM regulations at 5 CFR 752 subpart F provide additional information on requirements relating to these entitlements and procedures, to include invoking the crime provision, review of medical records, reasonable accommodation, and filing disability applications for an executive in certain circumstances.</p>

	<b>Conduct-Based Actions during Probation</b>	<b>Conduct-Based Actions after Probation</b>
Effect of Moratorium on Removal of Career Appointees	<p>The procedures described above may not be used to remove a probationary career SES appointee within 120 days after appointment of a new agency head or the appointment of the career appointee’s most immediate supervisor who is a non-career appointee and has the authority to remove the career appointee, except as follows:</p> <ul style="list-style-type: none"> <li>• The disciplinary removal was initiated before the appointment that initiated the moratorium, in which case the streamlined procedures apply;</li> <li>• Disciplinary actions where there is reasonable cause to believe the appointee has committed a crime for which imprisonment can be imposed (See 5 CFR 359.406 for additional required procedures);</li> <li>• Disciplinary actions where retention of the career appointee poses a significant threat to others, loss or damage to government property, or jeopardy to other legitimate government interests. (See 5 CFR 359.406 for additional required procedures.)</li> </ul> <p>If the career appointee’s probationary period expires during the moratorium, any subsequent removal must be effected under procedures that apply to a post-probationer. (See next column.)</p>	<p>During the 120-day moratorium described in the column to the left, an agency may propose or effect an adverse action removal (or a suspension for more than 14 days) of any SES member covered by subchapter V of chapter 75 of title 5, or a covered probationary career appointee, under the procedures of that subchapter.</p>
Appeal of Covered Adverse Actions	No appeal right	<p>The executive is entitled to appeal covered adverse actions (i.e., removal, suspension for more than 14 days) to the Merit Systems Protection Board (MSPB). An agency must give the SES member notice of this right and must retain and furnish to MSPB and the affected individual upon request –</p> <ul style="list-style-type: none"> <li>• Copies of the notice of proposed action,</li> <li>• the executive’s answer, when written, and a summary when</li> </ul>

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		<p>made orally,</p> <ul style="list-style-type: none"> <li>the decision notice and reasons therefor, and any order effecting the action, together with any supporting material</li> </ul>
Pay Reduction Based upon Conduct	Generally not possible during the probationary period because pay setting upon appointment initiates a 12-month restriction on pay adjustments including reductions or increases.	<p>An agency may reduce the pay of a career SES appointee by not more than 10 percent without the executive’s consent as disciplinary action for conduct-related activity, including, but not limited to, misconduct, neglect of duty, or malfeasance. The executive must be provided –</p> <ul style="list-style-type: none"> <li>Written notice at least 15 days in advance of the effective date</li> <li>Reasonable period of time to respond (not less than 7 days)</li> <li>Opportunity to be represented</li> <li>Written decision and reasons for any pay reduction after considering executive’s response</li> <li>Opportunity to request reconsideration by the agency head within 7 days of the decision. There is no third party review of a pay reduction.</li> </ul> <p>Implementation of a reduction in pay is subject to the 12-month restriction on pay adjustments. This is generally not possible during the probationary period because pay setting upon appointment initiates a 12-month restriction on pay adjustments including reductions or increases.</p>
Reassignment	Any career SES appointee may be involuntarily reassigned, including for disciplinary reasons, based upon advance written notice of 15 days. (Failure to accept a directed reassignment could be cited as a basis for conduct removal of a probationer under procedures described above.)	Any career SES appointee may be involuntarily reassigned, including for disciplinary reasons, based upon advance written notice of 15 days. (Failure to accept a directed reassignment is a cause for adverse actions under subchapter V of chapter 75 of title 5.)

	<b>Conduct-Based Actions during Probation</b>	<b>Conduct-Based Actions after Probation</b>
Suspension/ Other	An agency may not suspend an SES member for more than 14 days except as provided in subchapter V of chapter 75. The statute does not provide authority to suspend an SES member for 14 days or less. Thus, an agency may not take any suspension action against a probationer who was not covered by 5 U.S.C. 7511 immediately before the SES appointment. However, this does not restrict the agency from issuing a reprimand or admonishment for offenses for which suspension is not possible.	An agency may suspend an SES member for more than 14 days following the procedures described above. The law is silent on short-term suspensions, i.e., a suspension of 14 days or less. Since there is no statutory authority for such action, agencies may not take a suspension of 14 days or less against an SES member. However, this does not restrict the agency from issuing a reprimand or admonishment for offenses which do not warrant a longer suspension.

### **Useful References for SES Discipline**

- 5 U.S.C. 3592; 5 CFR 359 subpart D – Removal of Probationary Career Appointees
- 5 CFR 359.403 – Conduct Removal of Probationary Career Appointees who were not covered by 5 U.S.C. 7511 immediately before SES appointment
- 5 U.S.C. Chapter 75, subchapter V – Adverse Actions for Post-Probationary Career Appointees and Probationary Appointees covered by 5 U.S.C. 7511 immediately before SES appointment
- 5 CFR 752 subpart F – Adverse Actions for Post Probationary Career Appointees and Probationary Appointees covered by 5 U.S.C. 7511 immediately before SES appointment (regulation extends coverage and MSPB appeal right to an SES limited appointee covered by 5 U.S.C. 7511 in a non-SES agency position immediately before the SES limited appointment)
- 5 U.S.C. 7511 – Adverse Actions for Non-SES Employee
- 5 U.S.C. 5383(d); 5 CFR 534.404(j) – SES Pay Reductions for Conduct Reasons
- OPM memorandum and guidance regarding management tools for maximizing employee performance:

<https://www.chcoc.gov/content/management-tools-maximizing-employee-performance>

<https://www.chcoc.gov/sites/default/files/Managing%20Federal%20Employees%27%20Performance%20Issues%20or%20Misconduct.pdf>