



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

The Director

Monday, May 7, 2018

MEMORANDUM FOR: CHIEF HUMAN CAPITAL OFFICERS

FROM: DR. JEFF T.H. PON, DIRECTOR

Subject: Implementing Policy Guidance for 5 U.S.C. 3322 – Voluntary Separation Before Resolution of Personnel Investigation

Section 1140 of the National Defense Authorization Act for Fiscal Year 2017 amended title 5 by adding a new section 3322, Voluntary Separation Before Resolution of Personnel Investigation <https://www.gpo.gov/fdsys/pkg/USCODE-2016-title5/pdf/USCODE-2016-title5-partIII-subpartB-chap33-subchapI-sec3322.pdf>. The newly created section 3322 is currently in effect and applies to employees who occupy positions in the competitive or the excepted service. This new section requires an agency to make a permanent notation in the personnel record file of an employee who is the subject of a personnel investigation and resigns from the agency prior to the resolution of the personnel investigation, and the agency makes an adverse finding pursuant to the investigation. Section 3322(e) defines the term “personnel investigation” to include:

- An investigation by an Inspector General; and
- An adverse personnel action as a result of performance, misconduct, or for such cause as will promote the efficiency of the service under chapter 43 or chapter 75.

The permanent notation in the Official Personnel File (OPF) is made only after the employee has had an opportunity to respond to the agency’s findings. The law sets forth the process for making a permanent notation. Please see Attachment 1 which outlines the steps required to make a permanent notation. A summary of the process is provided below:

1. The agency notifies the employee of the adverse finding that resulted from the personnel investigation.
2. The agency provides the employee an opportunity to respond to the adverse finding.
3. The agency notifies the employee of its final decision concerning the adverse finding.
4. The agency makes the permanent notation in the employee’s OPF.
 - The employee may appeal the agency’s decision to the U.S. Merit Systems Protection Board (MSPB) under 5 U.S.C. 7701.
 - If an employee files an appeal with the MSPB, the agency head must make a notation in the employee’s OPF indicating that an appeal disputing the notation is pending not later than 2 weeks after the date on which such appeal is filed. In addition, a summary of the employee’s written response and other documentary evidence that shows why the employee believes the adverse finding was unfounded must be included in the OPF.

- If the employee prevails, the agency must remove the adverse finding notation from the employee's OPF.
- If the agency prevails, the agency must remove the notation concerning the appeal not later than 2 weeks after the date that the MSPB issues the appeal decision.

Section 3322 does not provide details on how to implement this new provision; nor does it require the U.S. Office of Personnel Management to prescribe regulations. While the statute prescribes the process for making the required permanent notation, an agency may use its own discretion for determining the format for making the notation. Agencies may wish to consult with their legal counsel regarding implementation of the statute.

We have attached a sample document that may be used as a guide for developing documentation to make the permanent notation. We recommend agencies place the document used to make the notation (including any supporting materials) on the permanent side of the employee's OPF. If the employee appeals an agency's findings and prevails in that appeal, section 3322 requires removal of the permanent notation.

If you have questions about this guidance, please send an e-mail to employ@opm.gov.

Attachments (see 508-compliant PDF below):

Attachment 1: Summary of the steps for making a permanent notation (see 508-compliant PDF below)

Attachment 2: Sample permanent notation document (see 508-compliant PDF below)

Attachment 3: Questions and Answers (see 508-compliant PDF below)

cc: Human Resources Directors, EEO Directors, and Inspectors General