SENIOR EXECUTIVES ASSOCIATION

SEA - The Voice of Senior Executives

Clarifying Civil Service Protections and Merit System Principles Regarding the Senior Executive Service

The Civil Service Reform Act of 1978 (CSRA) established a new service—the Senior Executive Service, or SES — "to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and is otherwise of the highest quality." [79] ." As noted by the Office of Personnel Management (OPM) SES Desk Guide, CSRA gave greater authority to agencies to manage their executive resources and stated the SES was to be administered to—

- attract and retain highly competent executives;
- assign executives where they will be most effective in accomplishing the agency's mission and where best use will be made of their talents;
- provide for the systematic development of managers and executives;
- hold executives accountable for individual and organizational performance;
- reward the outstanding performers and remove the poor performers; and
- provide an executive personnel system free of prohibited personnel practices and arbitrary actions.

The SES is distinct from the competitive service and the excepted service.[80] It consists of senior government officials, both noncareer and career, who share a broad set of responsibilities to help lead the work of the Federal Government.

This document clarifies current law and policy that affects the rights and responsibilities of SES members with respect to their employment status. This document draws primarily on OPM's SES Desk Guide and the preamble to the final rule issued by the Office of Personnel Management on April 9, 2024, *Upholding Civil Service Protections and Merit System Principles*.

SES Rights as Summarized in Recent OPM Regulations

The final rule issued by the Office of Personnel Management on April 9, 2024, *Upholding Civil Service Protections and Merit System Principles*, to clarify and strengthen protections for career employees in the competitive and excepted services covered under title 5, U.S. Code, did not specifically codify new regulatory provisions regarding this SES (OPM's rule was issued following the establishment of a new "Schedule F" by Executive Order 13957 in October 2020, which was rescinded by Executive Order 14003 in January 2021). Although OPM's final rule does not specifically address additional protections for the SES, the preamble to the final rule indicates such protections already exist in law. This document draws on from OPM's preamble that responds to comments consistent with the Administrative Procedures Act -- and from OPM's subsequent implementation guidance issued on October 28, 2024 -- to clearly outline statutory protections afforded to career members of the SES.

Congress established the SES as a separate service, governed by statutory provisions distinct from those governing competitive and excepted service employees, "to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality for executive-level Federal employees." [344] The SES has a different system for hiring executives, managing them, and compensating them.[345] It provides for both career and noncareer positions and sets its own limitations on the appointment of noncareer positions. Career SES employees are governed by a different set of statutory adverse action protections than those at issue in OPM's final rule. Pursuant to the definitions in 5 U.S.C. 7541, the adverse action protections applicable to the SES s are limited to "career" employees.

This separate statutory structure protects the career SES in different ways from the framework governing the competitive and excepted services. Also, the SES statute expressly provides for "career" and "noncareer" SES positions 5 USC § 3133, 3134. An "employee," for purposes of the SES adverse action provisions, is defined as a "career" employee. Accordingly, the adverse action provisions apply only to career employees and contain no explicit exclusions, akin to section 7511(b)(2), based upon the character of the position.

Moreover, Chapter 75's adverse action procedures for the SES, codified at 5 U.S.C. § 7543, apply to any career appointee in the SES who has completed the relevant probationary period in the SES or had accrued adverse action protections while serving in the competitive or excepted services prior to joining the SES. Accordingly, even though SES employees engage in important policy-related work, the phrase "confidential, policy-determining, policy-making or policy-advocating character" – the term addressed by OPM's final rule in response to those positions that would have been covered by the original Schedule F -- as used to describe positions that are excepted from chapter 75's adverse action protections, does not apply to the SES.

Also, in addition to establishing the requirements and procedures for challenging adverse actions and performance-based actions, the CSRA includes a mechanism for an employee in a "covered position" to challenge a "personnel action" that constitutes a "prohibited personnel practice" because it has been taken for a prohibited reason.[75] "Covered position" means any position in the competitive service, a career appointee in the Senior Executive Service, or a position in the excepted service unless "conditions of good administration warrant" a necessary exception on the basis that the position is of a "confidential, policy-determining, policy-making, or policy-advocating character."

Improperly applying the phrase "confidential, policy-determining, policy-making, or policy-advocating" to describe positions held by career employees, who have an expectation of continuing employment beyond the presidential administration during which they were appointed, and to strip them of civil service protections would be inconsistent with the statute.

Moreover, the provisions governing the SES directly address reassignments and transfers of career senior executives,[378] removal of a career employee from the SES into a civil service position outside of the SES during probation or as a result of less than fully successful executive performance,[379] and the circumstances in which there may be guaranteed placement in other personnel systems for a senior executive who has been removed from the SES.[380]

Further, in addition to providing explicit adverse action protections for career SES, Congress also sought to protect and preserve a career SES free from undue partisan political influence in other ways, including by setting strict limits on the number of SES positions that could be designated as "noncareer" (*i.e.,* political).[347] The rules are clear: the number of noncareer SES in any agency is to be determined annually by OPM, not by the agency; "the total number of noncareer appointees in all agencies may not exceed 10 percent of the total number of Senior Executive Service positions in all agencies"; and the number of noncareer SES in any single agency may not be more than "25 percent of the total number of Senior Executive Service positions in the agency" or "the number of [certain executive and Executive Schedule] positions

in the agency which were filled on the date of the enactment of" the CSRA.[348] There are also limits on the number of emergency and limited-term SES appointments. The governmentwide total may not exceed 5 percent of the governmentwide total of all SES.[349]

Other Key SES Provisions – excerpts from the OPM Desk Guide

120-Day Rule

To prevent peremptory reassignments by new appointees without adequate knowledge of the individuals involved, 5 U.S.C. 3395(e) provides that an agency may not involuntarily reassign an SES career appointee filling either a career reserved or general position:

• within 120 days after an appointment of the head of the agency; or •
within 120 days after the appointment in the agency of the career appointee's most immediate supervisor who is a noncareer appointee and has the authority to make an initial appraisal of the career appointee's performance under 5 U.S.C. Chapter 43, subchapter II. An appointee may voluntarily accept a reassignment during the moratorium but must agree in writing before the reassignment can occur.

Mobility

Among other objectives, 5 U.S.C. 3131, states that the Senior Executive Service is to be administered so as to, "enable the head of an agency to reassign senior executives to best accomplish the agency mission," and to, "provide for the initial and continuing systematic development of highly competent senior executives." The SES system provides flexible assignment rules to accomplish these fundamental and complimentary objectives.

Ultimately, SES rules require an executive to move when agency needs require it. Even where advance written notice and consultation are mandated, the bottom line is that an executive who declines a directed reassignment may be removed through adverse action procedures. If separation is for failure to accept directed reassignment to a different commuting area, the individual is entitled to discontinued service retirement (if eligible) or severance pay (if eligible), unless a memorandum of understanding or other written agreement provides for such geographic reassignments.

Probationary Period

Under 5 U.S.C. 3393(d), 3592, and 5 CFR 317.503, an individual's initial SES career appointment becomes final only after the individual successfully completes a one-year probationary period. This probationary period begins on the effective date of the personnel action initially appointing the individual to the SES as a career appointee and ends one calendar year later. For example, if an individual was appointed to the SES on June 1st, the probationary period ends on

May 31st of the following year. However, a probationary appointee is considered to have completed probation at the end of his/her last tour of duty within the probationary period.

The provisions of 5 U.S.C. 3592 restricting the removal of individuals from the SES for 120 days after the appointment of a new agency head or noncareer supervisor also apply to probationary removals.

Performance Removals

If the annual summary rating is less than the Fully Successful level, the agency must take the personnel actions required by 5 U.S.C. 4314(b) as follows:

- The executive must be reassigned or transferred to another position within the SES, or removed from the SES, for one Unsatisfactory rating;
- The executive must be removed from the SES for two Unsatisfactory ratings in a five year period; or
- The executive must be removed from the SES for two less than Fully Successful ratings (Unsatisfactory or Minimally Satisfactory) in a three-year period.

The agency must provide assistance in improving performance for those executives retained in the SES. This may include formal or on-the-job training, counseling, or closer supervision. The agency must inform the executive of the effect of any personnel action being taken. If the executive is being retained in the SES, he or she should be advised of the effect of another less than Fully Successful rating.

Under 5 U.S.C. 3595(a), the determination of who shall be removed from the SES in a reduction in force (RIF) is made through competitive procedures based primarily on performance.

Details on Removals and Suspension appear in Chapter 8 of the Desk Guide, see Ch 8 pp. 2-17. Note that under 5 U.S.C. 3393(g), a career appointee may not be removed from the SES or the civil service except in accordance with specifically cited provisions in Title 5, U.S.C. Additionally, Merit System Protection Board (MSPB) requirements on what a decision notice regarding matters appealable to the Board should include, and the procedures for filing an appeal, are found at 5 CFR 1201.21-.24.

Details on Reductions in Force (RIF) and Furloughs appear in Ch. 9 of the Desk Guide, see Ch 9 pp. 2-16