



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

Attachment 1

**Documenting an Adverse Finding which Resulted from a Personnel Investigation
under 5 U.S.C. 3322**

The following chart represents the process that agencies must follow to make a permanent notation of an adverse finding in an employee’s Official Personnel File (OPF) who was the subject of a personnel investigation and resigned before the resolution of such investigation.

[Note: Although the chart refers to an “employee,” the employee has resigned and is no longer employed with the agency required to make the notation.]

Step	Who	What Happens
1	Agency Official	<p>INITIAL NOTIFICATION: <i>(Prior to making the permanent notation, the following steps must be taken within a 40-day time period to meet the statutory requirement for filing the permanent notation in the employee’s Official Personnel File (OPF))</i></p> <p>When the agency continues the investigation after the employee resigned, and the agency has made an adverse finding regarding the employee, the agency must:</p> <ul style="list-style-type: none"> • Provide the employee in writing a copy of the adverse finding and any supporting documentation, within 5 days of the resolution of the investigation. • Provide the employee with a reasonable time, but not less than 30 days to respond in writing and to furnish affidavits and other documentary evidence to show why the adverse finding is unwarranted. <p>Provide the employee with a written decision and specific reasons therefore at the earliest practicable date.</p>
2	Agency Official	<p>PERMANENT NOTATION IN THE OPF. <i>(The permanent notation must be made within 40 days of the resolution of the personnel investigation.)</i></p> <p>If an adverse finding is made after reviewing the information provided by the employee, the agency must notate the OPF with the adverse finding.</p>

Step	Who	What Happens						
3	Agency Official	<p data-bbox="492 239 1427 527">U.S. MERIT SYSTEMS PROTECTION BOARD (MSPB) APPEAL:</p> <p data-bbox="492 348 1427 527">If the employee decides to appeal the agency's finding to the MSPB under 5 U.S.C. 7701, the agency must notate that an appeal disputing the notation is pending in the employee's OPF within 2 weeks after the appeal is filed. This notification must also include a summary of the employee's reasons for asserting the adverse finding is unfounded.</p> <table border="1" data-bbox="492 600 1427 972"> <thead> <tr> <th data-bbox="492 600 797 674">If the MSPB finds for the ...</th> <th data-bbox="802 600 1427 674">Then the agency official...</th> </tr> </thead> <tbody> <tr> <td data-bbox="492 680 797 825">Agency</td> <td data-bbox="802 680 1427 825">Must remove the notation concerning the pending MSPB appeal disputing the notation from the employee's OPF within 2 weeks of the MSPB decision.</td> </tr> <tr> <td data-bbox="492 831 797 972">Employee</td> <td data-bbox="802 831 1427 972">Must remove the notation of the adverse finding and the notation of the pending MSPB appeal from the employee's OPF within 2 weeks of the MSPB decision.</td> </tr> </tbody> </table>	If the MSPB finds for the ...	Then the agency official...	Agency	Must remove the notation concerning the pending MSPB appeal disputing the notation from the employee's OPF within 2 weeks of the MSPB decision.	Employee	Must remove the notation of the adverse finding and the notation of the pending MSPB appeal from the employee's OPF within 2 weeks of the MSPB decision.
If the MSPB finds for the ...	Then the agency official...							
Agency	Must remove the notation concerning the pending MSPB appeal disputing the notation from the employee's OPF within 2 weeks of the MSPB decision.							
Employee	Must remove the notation of the adverse finding and the notation of the pending MSPB appeal from the employee's OPF within 2 weeks of the MSPB decision.							

Attachment 2

Sample Notification for Making a Permanent Notation in Accordance with 5 U.S.C. 3322

SUBJECT: Notification of an adverse finding resulting from a personnel investigation under 5 U.S.C. 3322

EMPLOYEE NAME
EMPLOYEE SOCIAL SECURITY NUMBER OR IDENTIFYING NUMBER:
MAILING ADDRESS

DATE:

This document serves as the permanent notation of the adverse findings resulting from the personnel investigation of [Employee’s Name] as required under 5 U.S.C. 3322. Mr. or Ms. [Employee’s Last Name] was the subject of a personnel investigation and resigned prior to the resolution of such personnel investigation.

An adverse finding was made. [Summarize the adverse findings].

XX
XX

Mr. or Ms. [Employee’s Last Name] was notified in writing of the resolution of the investigation and provided a copy of the adverse finding and any supporting documentation on [Enter Date]. The employee was provided with not less than 30 days to respond in writing and to furnish affidavits and other documentary evidence to show why the adverse finding was unfounded. The following is a summary of the employee’s response:

XX
XX

Name of Agency Official
Title of Official
Name of Agency

Date

cc: [Name of Employee]

Questions & Answers for Implementing 5 U.S.C. 3322 – Voluntary Separation before Resolution of Personnel Investigation

Note: All information is provided within the context of 5 U.S.C. 3322 and the requirements of that section. This information does not apply to chapter 75, title 5 of the U.S. Code, and therefore should be used solely for section 3322.

- **When is the “permanent notation” in the Official Personnel Folder (OPF) required by section 3322?**

Section 3322 requires a permanent notation in the OPF when any employee occupying a position in the competitive service or the excepted service who is the subject of a personnel investigation resigns from the Federal service prior to the resolution of such investigation and when an adverse finding is made pursuant to the investigation.

- **What is “resolution of the investigation”?**

The resolution of the investigation occurs when the agency has obtained all of the available facts relevant to the alleged behavior. No adverse finding can be determined until such time as the investigation is concluded.

- **What is “the adverse finding and any supporting documentation”?**

The adverse finding is the written determination by the appropriate agency official that, after an investigation to obtain and review the available facts and circumstances, the agency has concluded that the allegations were supported. Supporting documentation is the information relied upon for the adverse finding, for example, the report of the investigation – which includes evidence, such as facts, statements, and data – and any written response and other evidence provided by the employee.

- **What is the format of the “permanent notation” in an employee’s OPF?**

The statute does not require a specific format for the permanent notation. An agency may choose to require a uniform approach as to what form the permanent notation takes. A permanent notation in an employee’s OPF could be in the form of, for example, a memorandum to the file signed by the agency official who decided the adverse finding. Agencies may consult OPM’s sample notification for consideration.

- **What must be included in the permanent notation in the OPF?**

According to section 3322, the permanent notation must include the adverse finding and a summary of any response from the employee.

- **Must the agency inform the individual about the right to appeal a permanent notation in an employee's OPF to the U.S. Merit Systems Protection (MSPB) and provide the MSPB appeal procedures?**

Yes. The statute states that an employee is entitled to appeal the decision of the head of the agency to make a permanent notation. Further, the MSPB's regulations at 5 CFR 1201 require that when an agency takes an appealable action against an employee, the agency must provide the employee with certain information. At a minimum, that would include the following:

- (1) a notice of the time limits for appealing to the MSPB;
- (2) the address of the appropriate MSPB regional or field office for filing the appeal;
- (3) a copy or access to a copy of the MSPB's regulations;
- (4) a copy of the MSPB's appeal form;
- (5) the name or title and contact information for the agency official to whom the MSPB should send the Acknowledgment Order and copy of the appeal in the event the employee files an appeal with the MSPB.

Please refer to the MSPB regulations at 5 CFR 1201 for detailed instructions on their requirements. It is possible these requirements may be modified as a result of this statute, so it would be prudent to check the MSPB website periodically for changes.

- **What notation in the OPF is required if the individual files an appeal with the MSPB?**
The statute requires that if an employee files an appeal with the MSPB, the agency head must make a notation in the employee's OPF, not later than 2 weeks after the date on which such appeal is filed, indicating that an appeal disputing the notation is pending. 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.
- **What happens to these notations following an appeal?**
If the employee is the prevailing party on appeal, the statute states that not later than two weeks after the date the MSPB issues the appeal decision, the head of the agency shall remove from the individual's OPF: (1) the permanent notation of an adverse finding and (2) the notation that an appeal disputing the permanent notation is pending. If the agency is the prevailing party on appeal, the statute requires that not later than two weeks after the date the MSPB issues the appeal decision, the head of the agency must remove the notation of the pending appeal.