



OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 755

[Docket ID: OPM-2025-0003]

RIN 3206-AO71

Appeal Procedures for Recoupment of Awards, Bonuses, or Relocation Expenses Awarded or Approved for all Employees of the Department of Veterans Affairs

AGENCY: Office of Personnel Management.

ACTION: Interim final rule; request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing an interim final rule to implement provisions of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 that permit current and former employees of the Department of Veterans Affairs (VA) to appeal the recoupment of awards, bonuses, or relocation expenses awarded or approved for these individuals. This regulation prescribes general procedures applicable to appeals to the Director of OPM regarding an order by the Secretary of the VA, or designee, directing the employee or former employee to repay the amount, or a portion of the amount, of any award or bonus paid to the employee. This regulation also prescribes general procedures applicable to appeals regarding an order by the Secretary of the VA, or designee, directing the employee or former employee to repay the amount, or a portion of the amount, paid to or on behalf of an employee for relocation expenses.

DATES:

Effective date: This rule is effective on [DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comment date: OPM must receive comments on the rule on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by the following method:

Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments. All submissions received must include the agency name and docket number or RIN for this document. All comments must be received by the end of the comment period for them to be considered. All comments and other submissions received generally will be posted on the internet at <https://www.regulations.gov> as they are received, without change, including any personal information provided. However, OPM retains discretion to redact personal or sensitive information, including but not limited to, personal or sensitive information pertaining to third parties.

FOR FURTHER INFORMATION CONTACT: Timothy Curry by email at employeeaccountability@opm.gov or by telephone at (202) 606-2930.

SUPPLEMENTARY INFORMATION:

Background

The Department of Veterans Affairs (VA) Accountability and Whistleblower Protection Act of 2017, Public Law 115-41 (June 23, 2017), authorizes the Secretary of the VA to issue an order directing a VA employee to repay, in whole or in part, any award or bonus paid on or after June 23, 2017, to an employee under title 5, United States Code, including chapters 45 or 53, or title 38, United States Code, if it is determined the employee engaged in misconduct or poor performance prior to the payment of the award or bonus, and the award or bonus would not have been paid, in whole or in part, had the misconduct or poor performance been known prior to payment. Furthermore, the law authorizes the Secretary of the VA to issue an order to an employee to repay the amount, or a portion of the amount, paid to or on behalf of an employee under title 5, United States Code, for relocation expenses, including 5 U.S.C. 5724 and 5724a, or title 38, United States Code, if it is determined the relocation expenses were paid on or after June 23, 2017, following an act of fraud or malfeasance that influenced the authorization of the relocation expenses. Finally, the law authorizes the Secretary of the VA to reduce retirement benefits of employees convicted of certain crimes and removed for performance or misconduct.

In all cases, the law provides that, upon issuance of an order by the Secretary, the individual has the right to appeal the order to the Director of the Office of Personnel Management (OPM). However, this rulemaking will only address appeals to the Director of OPM regarding recoupment of awards, bonuses, and relocation expenses. Appeals of orders regarding reduction of retirement benefits of employees convicted of certain crimes will be addressed in a future rulemaking.

Legislative Requirements

Section 204 of Public Law 115-41 amended subchapter I of chapter 7 of title 38, United States Code, by adding a new section 721. Specifically, 38 U.S.C. 721 outlines procedural requirements for recoupment of awards or bonuses paid to VA employees. If the Secretary determines an individual has engaged in misconduct or poor performance prior to payment of the award or bonus and that such award or bonus would not have been paid, in whole or in part, had the misconduct or poor performance been known prior to payment, the Secretary must provide certain procedural protections before issuing an order for repayment. Before such repayment, the employee is afforded (A) notice of the proposed order; and (B) an opportunity to respond to the proposed order by not later than 10 business days after the receipt of such notice. If the individual responds to the proposed order, the Secretary will issue an order not later than five business days after receiving the individual's response. If the individual does not respond to the proposed order, the Secretary will issue an order not later than 15 business days after the Secretary provides notice to the individual. These procedures are outlined in VA policies¹ and are not part of this rulemaking. It is important to note that neither the law nor VA policies require the VA to have taken a disciplinary action, adverse action, or performance-based action for the Secretary to seek recoupment of any awards or bonuses, nor do they prohibit recouping an award or bonus in addition to taking a disciplinary, adverse, or performance-based action. The order by

¹ See VA Handbook 5017/20, January 29, 2024, Procedures for Recoupment of Award or Bonus, Page VI-3, available at https://www.va.gov/vapubs/viewPublication.asp?Pub_ID=1483.

the Secretary only needs to show that the Secretary has determined the employee has engaged in misconduct or poor performance and that the award or bonus would not have been paid had the misconduct or poor performance been known at the time of the award. Upon the issuance of an order by the Secretary, the individual may appeal the order to the Director of OPM before the date that is seven business days after the date of such issuance. This rulemaking establishes the appeal procedures to OPM.

Section 205 of Public Law 115-41 amended subchapter I of chapter 7 of title 38, United States Code, by adding a new section 723. Specifically, 38 U.S.C. 723 outlines procedural requirements for recoupment of relocation expenses paid to or on behalf of VA employees. If the Secretary determines that relocation expenses were paid following an act of fraud or malfeasance that influenced the authorization of the relocation expenses, the Secretary must provide certain procedural protections before the Secretary decides to issue an order directing an individual to repay the amount, or a portion of the amount, paid to or on behalf of the individual for relocation expenses. Before such repayment, the employee is afforded (A) notice of the proposed order; and (B) an opportunity to respond to the proposed order by not later than 10 business days after the receipt of such notice. If the individual responds to the proposed order, the Secretary will issue an order not later than five business days after receiving the individual's response. If the individual does not respond to the proposed order, the Secretary will issue an order not later than 15 business days after the Secretary provides notice to the individual. These procedures are also outlined in VA policies² and are not part of this rulemaking. It is important to note that neither the law nor VA policies require the VA to have taken a disciplinary action or adverse action for the Secretary to seek recoupment of relocation expenses, nor do they prohibit recouping relocation expenses in addition to taking a disciplinary, adverse, or performance-based action. The order by the Secretary only needs to show that the Secretary has determined the employee has engaged in an act of fraud or malfeasance that influenced the authorization of the relocation

² See *Id.*, Procedures for Recoupment of Relocation Expenses, Page VI-6.

expenses. Upon the issuance of an order by the Secretary, the individual may appeal the order to the Director of OPM before the date that is seven business days after the date of such issuance. As noted earlier, this rulemaking addresses the appeal procedures to OPM.

Interim Final Rule with Request for Comments

This interim final rule establishes a new part in the Code of Federal Regulations at 5 CFR part 755 with subparts A and B. Subpart A outlines appeal procedures for recoupment of awards and bonuses for all employees of the VA. Subpart B outlines appeal procedures for recoupment of relocation expenses for all employees of the VA. In addition to the statutory requirements guiding OPM in the development of this interim final rule, OPM was informed by the procedures established by the VA regarding recoupment of awards, bonuses, or relocation expenses outlined in VA Handbook 5017/20, Employee Recognition and Awards.

5 CFR Part 755: Appeal Procedures for Recoupment of Awards, Bonuses, or Relocation Expenses Awarded or Approved for All Employees of the Department of Veterans Affairs

OPM is adding a new part at 5 CFR part 755 to implement the appeals procedures for recoupment of awards, bonuses, and relocation expenses for employees of the VA. This new part is entitled “Appeal Procedures for Recoupment of Awards, Bonuses, or Relocation Expenses Awarded or Approved for All Employees of the Department of Veterans Affairs.” The following sections discuss the scope and procedures within the subparts of part 755.

Subpart A: Awards and Bonuses

Under part 755, OPM is adding a new subpart A which will be known as “Awards and Bonuses.” These new procedures are outlined below.

Section 755.101 Scope of subpart and definitions

Subpart A applies to a current or former civil service employee of the Department of Veterans Affairs (VA). OPM has concluded that a “current employee” is an individual appointed in the civil service as outlined in 5 U.S.C. 2105 or under title 38 regarding VA civil service employees. This subpart does not apply to contractor employees performing work at the VA on

behalf of a contractor because contractor employees are not appointed in the civil service. In recognition of the possibility that VA may issue a recoupment order after an employee has left the VA, for example through transfer to another agency, removal, resignation, or retirement from Federal service, former VA employees are also covered by this appeal process.

Specifically, subpart A is limited to appeals filed pursuant to 38 U.S.C. 721 by an “employee” of the VA to the Director of OPM, or designee, regarding an order by the Secretary of the VA, or designee, directing the employee to repay the amount, or a portion of the amount, of any award or bonus paid to the employee under title 5, United States Code, including chapters 45 or 53 of such title, or title 38, United States Code. OPM has determined this includes, among other provisions under title 5, awards and bonuses paid pursuant to 5 U.S.C. chapter 45 (Awards); 5 U.S.C. 5336 (Additional Step Increases commonly known as Quality Step Increases); 5 U.S.C. 5384 (Performance awards in the Senior Executive Service); 5 U.S.C. 5753 and 5754 (Recruitment, Relocation, and Retention Bonuses); and any title 38 authorities regarding awards and bonuses.

OPM’s review on appeal is limited to whether the procedures in VA’s policies on recoupment were followed or, in the absence of any such policies, the VA’s order was otherwise in compliance with 38 U.S.C. 721. As discussed in more detail elsewhere in this rule (see, e.g., discussion regarding § 755.103), OPM believes the statutory timeframes established by Congress suggest that Congress did not intend for OPM to conduct a more fulsome or comprehensive review of the merits concerning the VA’s order. Furthermore, Congress did not provide OPM the authority to adjudicate the underlying decisions by the VA regarding any disciplinary or adverse action or any performance-based action. Accordingly, subpart A does not cover appeals regarding any disciplinary or adverse action, or any performance-based action taken by the VA, even if such action serves as the basis for the Secretary of the VA, or designee, to order recoupment of a bonus or award paid to an employee of the VA. Likewise, OPM will not review any discrimination claim or prohibited personnel practice claim raised in any appeal. Depending

on the employee, VA may have multiple legal authorities available for addressing misconduct and performance issues, such as 5 U.S.C. chapter 75 (Adverse Actions); 5 U.S.C. 4303 (Actions based on unacceptable performance); 5 U.S.C. 3592 (addressing unacceptable performance for SES); and various title 38, United States Code, authorities for addressing misconduct or unacceptable performance. These statutory authorities have separate appeals or grievance procedures to address any adverse actions or performance-based actions taken by the VA and may serve as the basis for the Secretary of the VA, or designee, to order recoupment of awards or bonuses. Employees may file discrimination complaints to the Equal Employment Opportunity Commission (EEOC) and prohibited personnel practice complaints with the U.S. Office of Special Counsel (OSC). VA employees should consult with their servicing human resources office with questions regarding applicable grievance or appeal rights regarding any disciplinary or adverse action, or performance-based actions, that may be taken against an employee.

To implement the statutory timeframes established by Congress, OPM is defining the term “business days” to mean weekdays, which are Monday through Friday, except when such a day is designated as a Federal holiday by OPM, or the employee’s assigned facility or OPM is closed for regular business, e.g., inclement weather, lapse in appropriations. OPM notes that this definition is similar to the definition of “Business Days” outlined in VA’s policy regarding the recoupment of awards and bonuses but notes that the calculation of business days is slightly different from that established in VA’s policy. VA’s definition of a business day is based upon the employee’s receipt of an order, whereas OPM defines a business day, for the purposes of an appeal to OPM, as beginning on the first business day after the issuance of the order to the employee. OPM’s approach to calculating business days mirrors the statutory language in 38 U.S.C. 721(b)(1), promotes consistent use of an objective timeframe, and avoids the risk of presumption of delivery.

Section 755.102 Procedures for submitting appeals

This section describes the procedures for VA employees to follow when submitting an appeal regarding a VA order for recoupment of an award or bonus under 38 U.S.C. 721. An employee may file an appeal to the Director of OPM by U.S. mail or by email, within seven business days after the date of issuance of the order pursuant to 38 U.S.C. 721(a)(3). This time limit is established in law. Appeals which are untimely filed may be dismissed resulting in the VA's decision being upheld. OPM, for good cause shown, may accept an untimely appeal. OPM adopts the approach taken by the Merit Systems Protection Board in *Alonzo v. Department of the Air Force*, 4 MSPB 262, 4 M.S.P.R. 180 (1980), in determining whether an employee establishes good cause for the untimely filing of an appeal.

If the employee elects to file by the U.S. mail, it must be addressed to Director, U.S. Office of Personnel Management, 1900 E Street, N.W., Room 7H28 (Attention: Accountability and Workforce Relations), Washington, DC 20415. OPM will rely upon the postmark to determine timeliness for filing the appeal. If the employee elects to file by email, it must be sent to employeeaccountability@opm.gov. OPM will rely upon the date the email was sent to determine timeliness for filing the appeal.

The law does not specify the content for any appeal filed with OPM. Therefore, OPM has determined what information OPM needs to adequately consider the appeal. OPM is requiring that minimum information to be included in any appeal to reflect the narrow grant of authority 38 U.S.C. 721 gives to OPM. The appeal must be submitted in writing and must be signed by the employee or their representative. OPM is not requiring a specific form be used in filing the appeal, but any appeal must include the specified information for OPM to properly adjudicate the appeal. The written appeal must include (1) a copy of the notice of proposed order received pursuant to 38 U.S.C. 721(a)(2)(A); (2) a copy of the employee's response to the proposed order, if any; (3) a copy of the order received pursuant to 38 U.S.C. 721(a)(3); (4) a statement explaining why the employee believes the order received pursuant to 38 U.S.C. 721(a)(3) is in error; (5) the name, mailing address, telephone number, and email address of the employee and,

if applicable, the same information for their representative; and (6) the name, mailing address, telephone number, and email address of the VA official who issued the order pursuant to 38 U.S.C. 721(a)(3). OPM will notify the VA upon receipt of a complete, timely appeal. The VA must provide OPM a copy of the evidence file relied upon in proposing and deciding its recoupment order as soon as possible but no later than five business days after OPM sends its notice to the VA. For OPM to make an appropriate decision, OPM must have all necessary facts and evidence relied upon by the VA when making its recoupment decision. If necessary, OPM may request VA provide information in addition to the evidence file. For example, OPM may need additional information to address the employee's belief the order by the VA was in error. Any additional information requested by OPM must be provided to OPM within five business days after OPM's request. VA must also furnish a copy of any additional information requested by and provided to OPM to the employee. VA's failure to provide the evidence file or any requested additional information to OPM will result in a finding against the VA.

An employee covered by this subpart is entitled to be represented by an attorney or other representative. OPM may disallow as an employee's representative an individual whose activities as representative would cause a conflict of interest or position, or an employee of any agency whose release from their official position would give rise to unreasonable costs or whose priority work assignments preclude their release. This is consistent with other complaint processes regulated by OPM.

Finally, it is unclear to OPM whether the appeal rights to OPM are the exclusive process for bargaining unit employees to challenge a VA order on recoupment of awards or bonuses or whether VA bargaining unit employees may file a grievance under any applicable negotiated grievance procedure which ends in binding arbitration. OPM requests comment on whether bargaining unit employees may use the negotiated grievance process under 5 U.S.C. 7121 to challenge a VA order in lieu of filing an appeal with OPM. OPM also requests comment on

whether this determination is impacted by whether the award or bonus was originally paid under title 5 authority or under title 38 authority.

Section 755.103 Basis of appeal decision

The law provides that, upon the issuance of an order by the Secretary, an individual shall have an opportunity to appeal the order to the Director of OPM within seven business days after the date of such issuance. The law further provides that the Director shall make a final decision regarding the appeal within 30 business days after receiving the appeal. Therefore, due to this compressed timeline, OPM has determined the best way to fulfill its obligations to render a timely decision on any appeal is to base the decision on the written record only, which will include the submissions by the employee and the agency. There will be no formal hearing procedures for this appeal.

The burden is upon the employee to establish the timeliness of the appeal and to explain why the VA's order is in error as to one or both of the bases found in 38 U.S.C. 721(a)(1). OPM may uphold the VA order if the employee or their designated representative fails to provide required information. As noted previously, OPM will also uphold the VA order if the appeal was untimely filed without good cause shown for the delay.

Since Congress did not provide OPM the authority to adjudicate decisions by the VA regarding any disciplinary or adverse action, or any performance-based action, OPM's review of the VA order is limited to whether the procedures in VA's policies on recoupment of awards and bonuses³ pursuant to 38 U.S.C. 721 were followed, or, in the absence of such policies, whether the order was otherwise in compliance with the statute. In other words, OPM will not review whether any disciplinary or adverse action, or performance-based action, which may have been relied upon by the VA in its recoupment order, was appropriate. OPM will accept the facts found by the VA regarding the disciplinary or adverse action, performance-based action, or other type of finding or action, if any, which was relied upon by the VA in making its recoupment decision.

³ See *Id.*, Procedures for Recoupment of Award or Bonus, Page VI-3.

As noted earlier, OPM will not review any discrimination claim or prohibited personnel practice claim raised in any appeal. Employees may file complaints with the EEOC or OSC, where appropriate.

Section 755.104 Form of appeal decision

Within 30 business days after receiving an appeal, OPM will make a decision on the employee's appeal. OPM will then send a written appeal decision to the employee or to the employee's representative, if any, advising whether the VA order is upheld by OPM. OPM will send the VA a copy of the appeal decision. This time limit is consistent with the statutory requirements.

Section 755.105 Finality of appeal decision

Pursuant to 38 U.S.C. 721(b)(2), the OPM decision on appeal is final. There will not be any further administrative review available within OPM, and thus this rule does not establish any process for requests for reconsideration. The law is silent regarding any statutory right to judicial review of an OPM appeal decision. Accordingly, although OPM will send its appeal decision to the employee, OPM will not provide an accompanying statement of "appeal rights." OPM requests comment on whether a VA employee may seek judicial review of an OPM final decision. If so, where would judicial review occur? OPM may revise its procedures to address appeals based on comments received.

Subpart B: Relocation Expenses

Under part 755, OPM is adding a new subpart B which will be known as "Relocation Expenses." These new procedures are outlined below.

Section 755.201 Scope of subpart and definitions

Like subpart A, subpart B applies to a current or former civil service employee of the Department of Veterans Affairs (VA). OPM has concluded that a "current employee" is an individual appointed in the civil service as outlined in 5 U.S.C. 2105 or under title 38, United States Code, regarding VA civil service employees. This subpart does not apply to contractor

employees performing work at the VA on behalf of a contractor because contractor employees are not appointed in the civil service. In recognition of the possibility that VA may issue a recoupment order for relocation expenses after an employee has left the VA, for example through transfer to another agency, resignation from Federal service, removal, or retirement from Federal service, former VA employees are covered by this appeal process.

Specifically, subpart B is limited to appeals filed pursuant to 38 U.S.C. 723 by an “employee” of the VA to the Director of OPM, or designee, regarding an order by the Secretary of the VA, or designee, directing the employee to repay the amount, or a portion of the amount, paid to or on behalf of the employee for relocation expenses under title 5, United States Code, including any expenses under section 5724 or 5724a of title 5, or under title 38, United States Code.

OPM’s review on appeal is limited to whether the procedures in VA’s policies on recoupment of relocation expenses were followed or, in the absence of any such policies, whether the VA’s order was otherwise in compliance with 38 U.S.C. 723. As discussed in more detail elsewhere in this rule (see, e.g., discussion regarding § 755.203), OPM believes the statutory timeframes established by Congress suggest that Congress did not intend for OPM to conduct a more fulsome or comprehensive review of the merits concerning the VA’s order. Furthermore, as previously discussed in subpart A, Congress did not provide OPM the authority to adjudicate the underlying decisions by the VA regarding any disciplinary or adverse action or any performance-based action. Accordingly, subpart B does not cover appeals regarding any disciplinary or adverse action, or any performance-based action taken by the VA and which can serve as the basis for the Secretary of the VA, or designee, to order recoupment of relocation expenses paid to an employee of the VA. Likewise, OPM will not review any discrimination claim or prohibited personnel practice claim raised in any appeal. Depending on the employee, VA may have multiple legal authorities for addressing misconduct and performance issues such as 5 U.S.C. chapter 75 (Adverse Actions); 5 U.S.C. 4303 (Actions based on unacceptable

performance); 5 U.S.C. 3592 (addressing unacceptable performance for SES); and any title 38 authorities for addressing misconduct or unacceptable performance. These statutory authorities have separate appeals or grievance procedures which address any adverse actions or performance-based actions taken by the VA and which may happen to serve as the basis for the Secretary of the VA, or designee, to order recoupment of relocation expenses. Employees may file complaints with the EEOC or OSC, where appropriate. VA employees should consult with their servicing human resources office with questions regarding applicable grievance or appeal rights regarding any disciplinary or adverse action, or performance-based actions that may be taken against an employee.

OPM is defining “business days” to mean weekdays, which are Monday through Friday, except when such a day is designated as a Federal holiday by OPM, or the employee’s assigned facility or OPM is closed for regular business, e.g., inclement weather, lapse in appropriations. OPM notes that this definition is similar to the definition of “Business Days” outlined in VA’s policy regarding the recoupment of relocation expenses but notes that the calculations of business days is slightly different from that established in VA’s policy. VA’s definition of a business day is based upon the employee’s receipt of an order, whereas OPM defines a business day, for the purposes of an appeal to OPM, as beginning on the first business day after the issuance of the order to the employee. OPM’s approach to calculating business days mirrors the statutory language in 38 U.S.C. 721(b)(1), promotes consistent use of an objective timeframe, and avoids the risk of presumption of delivery.

Section 755.202 Procedures for submitting appeals

This section describes the procedures for VA employees to follow when submitting an appeal regarding a VA order for recoupment of relocation expenses as provided by 38 U.S.C. 723. An employee may file an appeal to the Director of OPM by U.S. mail or by email, within seven business days after the date of issuance of the order pursuant to 38 U.S.C. 723(a)(3). Like the time limit established for recoupment of awards and bonuses, this time limit is established in

law. Appeals which are untimely filed may be dismissed resulting in the VA's decision being upheld. OPM, for good cause shown, may accept an untimely appeal. OPM adopts the approach taken by the Merit Systems Protection Board in *Alonzo v. Department of the Air Force*, 4 MSPB 262, 4 M.S.P.R. 180 (1980), in determining whether an employee establishes good cause for the untimely filing of an appeal.

If the employee elects to file by the U.S. mail, it must be addressed to Director, U.S. Office of Personnel Management, 1900 E Street, N.W., Room 7H28 (Attention: Accountability and Workforce Relations), Washington, DC 20415. OPM will rely upon the postmark to determine timeliness for filing the appeal. If the employee elects to file by email, it must be sent to employeeaccountability@opm.gov. OPM will rely upon the date the email was sent to determine timeliness for filing the appeal.

The law does not specify the content for any appeal filed with OPM. Therefore, OPM has determined what information OPM needs to adequately consider the appeal. The appeal must be submitted in writing and must be signed by the employee or their representative. OPM is not requiring a specific form be used in filing the appeal, but any appeal must include the specified information for OPM to properly adjudicate the appeal. The written appeal must include (1) a copy of the notice of proposed order received pursuant to 38 U.S.C. 723(a)(2)(A); (2) a copy of the employee's response to the proposed order, if any; (3) a copy of the order received pursuant to 38 U.S.C. 723(a)(3); (4) a statement explaining why the employee believes the order received pursuant to 38 U.S.C. 723(a)(3) is in error; (5) the name, mailing address, telephone number, and email address of the employee and their representative if the employee has elected to be represented; and (6) the name, mailing address, telephone number, and email address of the VA official who issued the order pursuant to 38 U.S.C. 723(a)(3). OPM will notify the VA upon receipt of a complete, timely appeal. The VA must provide OPM a copy of the evidence file relied upon in proposing and deciding its recoupment order as soon as possible but no later than five business days after OPM sends its notice to the VA. For OPM to make an appropriate

decision, OPM must have all necessary facts and evidence relied upon by the VA when making its recoupment decision. If necessary, OPM may request VA provide information in addition to the evidence file. For example, OPM may need additional information to address the employee's belief the order by the VA was in error. Any additional information requested by OPM must be provided to OPM within five business days after OPM's request. VA must also furnish a copy of any additional information requested by and provided to OPM to the employee. VA's failure to provide the evidence file or any requested additional information to OPM will result in a finding against the VA.

An employee covered by this subpart is entitled to be represented by an attorney or other representative. OPM may disallow as an employee's representative an individual whose activities as representative would cause a conflict of interest or position, or an employee of any agency whose release from their official position would give rise to unreasonable costs or whose priority work assignments preclude their release. This is consistent with other complaint processes regulated by OPM.

Finally, like the appeal process for recoupment of awards and bonuses, it is unclear to OPM whether the appeal rights to OPM are the exclusive process for bargaining unit employees to challenge a VA order on recoupment of relocation expenses or whether VA bargaining unit employees may file a grievance under any applicable negotiated grievance procedure which ends in binding arbitration. OPM requests comment on whether bargaining unit employees may use the negotiated grievance process under 5 U.S.C. 7121 to challenge a VA order in lieu of filing an appeal with OPM. OPM also requests comment on whether this determination is impacted by whether the relocation expense was originally paid under title 5 authority or under title 38 authority.

Section 755.203 Basis of appeal decision

The law provides that, upon the issuance of an order by the Secretary, an individual shall have an opportunity to appeal the order to the Director of OPM within seven business days after

the date of such issuance. The law further provides that the Director shall make a final decision regarding the appeal within 30 business days after receiving the appeal. Therefore, due to this compressed timeline, OPM has determined the best way to fulfill its obligations to render a timely decision on any appeal is to base the decision on the written record only, which will include the submissions by the employee and the agency. Like the appeal process for recoupment of awards and bonuses, there will be no formal hearing procedures for this appeal.

The burden is upon the employee to establish the timeliness of the appeal and to explain why the VA's order is in error under 38 U.S.C. 723. OPM may uphold the VA order if the employee or their designated representative fails to provide required information. As noted previously, OPM will also uphold the VA order if the appeal was untimely filed without good cause shown for the delay.

Since Congress did not provide OPM the authority to adjudicate decisions by the VA regarding any disciplinary or adverse action, or any performance-based action, OPM's review of the VA order is limited to whether the procedures in VA's policies on recoupment of relocation expenses⁴ pursuant to 38 U.S.C. 723 were followed, or, in the absence of such policies, compliance with the statute. In other words, OPM will not review whether any disciplinary or adverse action, or performance-based action, which may have been relied upon by the VA in its recoupment order was appropriate. OPM will accept the facts found by the VA regarding the disciplinary or adverse action, or performance-based action, which was relied upon by the VA in making its recoupment decision. OPM will not review any discrimination claim or prohibited personnel practice claim raised in any appeal. Employees may file complaints with the EEOC or OSC, where appropriate.

Section 755.204 Form of appeal decision

Within 30 business days after receiving an appeal, OPM will make a decision on the employee's appeal. OPM will then send a written appeal decision to the employee or to the

⁴ See *Id.*, Procedures for Recoupment of Relocation Expenses, Page VI-6.

employee's representative, if any, advising whether the VA order is upheld by OPM. OPM will send the VA a copy of the appeal decision. This time limit is consistent with the statutory requirements.

Section 755.205 Finality of appeal decision

Pursuant to 38 U.S.C. 723(b)(2), the OPM appeal decision is final. There will not be any further administrative review available within OPM, and thus this rule does not establish any process for requests for reconsideration. Like appeals of recoupment of awards and bonuses, the law is silent regarding any statutory right to judicial review of an OPM appeal decision.

Accordingly, although OPM will send its appeal decision to the employee, OPM will not provide an accompanying statement of "appeal rights." OPM requests comment on whether a VA employee may seek judicial review of an OPM final decision. If so, where would judicial review occur? OPM may revise its procedures to address appeals based on comments received.

Waiver of Notice of Proposed Rule Making

OPM is issuing this rulemaking as an interim final rule because it has determined that, under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), it would be impracticable to delay a final regulation until a public notice and comment process has been completed. VA finalized its internal policies regarding implementation of the authority to recoup awards, bonuses, and relocation expenses on January 29, 2024. Following the issuance of that policy, VA began using the authority to pursue recoupment actions, which could be appealed to OPM imminently if an order to recoup is issued. Therefore, OPM must be ready to receive and adjudicate appeals from VA employees. As explained in further detail below, OPM was unable to develop procedures until it had a better understanding of what process VA would provide and what record would be available for OPM review. VA finalized its internal policies regarding implementation of the authority to recoup awards, bonuses, and relocation expenses on January 29, 2024. OPM developed this interim final rule after review of VA's policies and procedures, consideration of legal and policy options, and consultation with VA. OPM also believes that

waiver of notice and comment is in the public interest. Although OPM has statutory authority to hear appeals, the public is better served to have clear, established procedures that are easily accessible in the Code of Federal Regulations than for OPM to operate under uncodified procedures that could be variable or haphazard pending a final rule. This interim final rule is intended to provide near-term appellants with certainty with respect to the process for appealing a decision of the VA. OPM will seek to finalize this rule with the benefit of public insight as soon as possible. Accordingly, to ensure the regulations accurately reflect the current state of the law and to provide clear procedures for an employee seeking OPM review of a VA recoupment order, OPM finds that good cause exists to waive the general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b)(B). Expedient issuance of this interim final regulation is required to prevent confusion and promote fairness as VA exercises its statutory authority resulting in appeals to OPM. OPM will promulgate a final rule, reflecting consideration of public comments, as soon as practical after receiving public comments on the interim final rule. In addition to welcoming comment on the provisions codified in this interim final rule, OPM invites comment on a number of additional procedural topics outlined below that OPM could address in the final rule.

Waiver of Delay in Effective Date

Pursuant to 5 U.S.C. 553(d)(3), OPM finds that good cause exists to waive the 30-day delay in effective date and make these procedural regulations effective in upon publication. The delay in effective date is being waived because the provisions of the law regarding recoupment of bonuses, awards, or relocation expenses (*see* 38 U.S.C. 721 and 723) became effective upon enactment, June 23, 2017, and the VA finalized its internal procedures regarding this law on January 29, 2024. In crafting this rule, OPM considered the VA's internal procedures, first, to ensure it designed an effective and efficient process for adjudicating appeals given the limited period of time afforded OPM by sections 721(b) and 723(b) to issue a decision. Additionally, OPM's jurisdiction is limited to a review of whether the procedures in VA's policies on

recoupment of relocation expenses were followed or, in the absence of any such policies, whether the VA's order was otherwise in compliance with section 721 or 723. To issue a rule before VA established its internal procedures would have been unworkable and may have created inefficiencies that would either delay or rush OPM in reaching a decision; both of which would unnecessarily prejudice VA employees and the VA.

OPM also believes that after VA finalized its policy, the VA began exercising its authority under this statute and, if an order to recoup is issued, that OPM could receive an appeal prior to the standard 30-day effective date. A delay in the effective date could result in confusion and inconsistency in how to file an appeal with OPM and the content needed for such an appeal. In the interest of fairness and timely resolution for any VA employee who is subjected to a recoupment order in the near future, it is imperative to give effect to this rule as soon as practicable.

Regulatory Impact Analysis

A. Statement of Need

This interim final rule implements portions of sections 204 and 205 of Public Law 115-41, the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, which provides VA employees certain appeal rights to the Director of OPM regarding decisions by the VA to recoup awards, bonuses, or relocation expenses. These sections of Public Law 115-41 amend chapter 7 of title 38, United States Code. Under these authorities, OPM is prescribing additional details of the appeal process to provide consistency and transparency.

B. Regulatory Alternatives

An alternative to this rulemaking is to not issue a regulation or any procedures regarding the appeals process. The law is silent on whether OPM must issue any policies or rules governing the appeals process. However, if OPM does not issue any policies or rules on the appeals process, this likely will result in confusion regarding how OPM will administer the appeals process as the law only outlines the right to appeal to the Director of OPM; the time limit

for a VA employee to file an appeal; and a time limit for the Director to issue a decision regarding any appeal. The rule includes procedural protections for both the VA and employees during the appeal process that are not included in the statute that help inform OPM's decision-making and protect against prejudice. We view these risks in the absence of this rule as particularly elevated given the VA's past use of recoupment authority and stated intention to continue its use. Without further clarification of and inclusion of additional procedures OPM, the VA, and VA employees will follow, there will likely be confusion on procedural requirements, less-informed decision-making, and procedural prejudice to the parties.

Another alternative is to publish these procedures on OPM's public facing website. This provides some transparency regarding how OPM will administer the process. However, the public and interested stakeholders would not be provided an opportunity to review and provide comments and recommendations regarding the procedures since the procedures would not be published through a rulemaking process. Furthermore, 5 U.S.C. 552(a)(1) requires agencies to publish administrative adjudicatory procedures in the *Federal Register*. Moreover, given that the regulations apply only to VA employees, publishing these procedures on OPM's public facing website may cause confusion for the many non-VA employees who visit OPM's website for information.

Finally, another alternative is to publish this as a proposed rule seeking public comment instead of an interim final rule seeking public comment. This would mean the public and interested stakeholders would be provided an opportunity to review and provide comments and recommendations regarding the procedures in the traditional rulemaking process. However, following issuance of its final policy, VA began exercising its authority to recoup awards, bonuses, and relocation expenses. If the VA issues an order to recoup a bonus, award, or relocation expense before any final rule is published, the employee has a right under the law to appeal to the Director of OPM. This means OPM would be obligated to render a decision on any appeal before OPM has finalized and publicized any appeal process. As discussed in greater

detail above in the sections on Waiver of Notice of Proposed Rule Making and Waiver of Delay in Effective Date and in the interest of fairness and transparency to all VA employees, OPM believes it is imperative to publish procedures as soon as possible now that VA has finalized its internal policies on these matters.

C. Impact

OPM is issuing this interim final rule to provide consistency and transparency regarding appeals by VA employees regarding orders by the VA to recoup awards, bonuses, or relocation expenses previously paid to these employees. Congress provided VA employees appeal rights regarding such orders by the VA. OPM's interim final rule provides more clarity regarding this appeal process. It provides VA employees with structure and an explanation of what to expect and provides employees with security that they will receive fair, consistent treatment in the consideration of an appeal.

D. Costs

The costs associated with the interim final rule are minimal. Most costs of this rule are expected to only impact OPM with some minor costs to the VA as it relates to the appeal process. No other Federal agencies are affected by this rule. We do not believe this rule will substantially increase the ongoing administrative costs to OPM or the VA. We anticipate OPM will leverage existing staff and resources to administer the appeal process. To a lesser extent, we anticipate VA will leverage existing staff and resources to respond to requests from OPM for information regarding decisions by the VA to recoup awards, bonuses, or relocation expenses. For VA employees appealing to OPM, we view the costs imposed upon these employees by this interim rule as minimal and limited to submitting existing information and a statement supporting any appeal.

With the above in mind, we estimate this rule will involve such activities as reviewing and analyzing VA employee appeals by OPM subject matter experts; requesting additional information from the VA as necessary; drafting a recommended appeal decision for the OPM

Director or designee; meeting between OPM subject matter experts with the OPM Director or designee, if needed, regarding the recommended appeal decision; and taking steps to communicate the appeal decision by the OPM Director or designee to the employee or their representative and the VA. For this cost analysis, the assumed staffing for Federal employees performing the work required by the regulation is one executive; one GS-15, step 5; one GS-14, step 5; and one GS-13, step 5, in the Washington, DC, locality area. The 2024 basic rate of pay for an executive at an agency with a certified SES performance appraisal system is \$246,400 annually, or \$118.06 per hour. For General Schedule employees in the Washington, DC, locality area, the 2024 pay table rates are \$185,824 annually and \$89.04 hourly for GS-15, step 5; \$157,982 annually and \$75.70 hourly for GS-14; and \$133,692 annually and \$64.06 hourly for GS-13, step 5. We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in assumed hourly labor costs of \$236.13 for an executive; \$178.08 for a GS-15, step 5; \$151.40 for a GS-14, step 5; and \$128.12 for a GS-13, step 5. While OPM has no baseline data to estimate how many appeals will be filed with OPM, OPM is estimating that each appeal received will require an average of 40 hours of work by employees with an average hourly cost of \$173.43. This would result in estimated costs of about \$6,937.20 for OPM for each appeal filed with OPM.

As already noted, the VA will provide OPM a copy of the evidence file for the appeal process. OPM anticipates a negligible cost to the VA for providing the requested file. While VA may incur some costs regarding decisions it makes regarding recoupment of awards, bonuses, or relocation expenses, such matters are not covered by this interim final rule and are covered by VA policies.

Finally, the costs to VA employees appealing an order will be limited to the submission of the required information necessary for processing an appeal. All required information of an appeal is limited and readily available to the employee as nearly all of the required information is provided to the employee by VA or previously submitted by the employee to the VA. The only

new information required of the employee is a statement supporting an appeal to OPM which we anticipate repeats much of the information previously provided to VA and which is required to be submitted as part of any appeal.

E. Benefits

This interim final rule will benefit VA employees. This interim rule will provide consistency and transparency regarding the procedures OPM will follow when processing appeals by VA employees regarding decisions by the VA regarding recoupment of awards, bonuses, or relocations expenses. This final rule provides clarity regarding the procedural protections Congress has provided VA employees on such matters.

F. Request for Comment

In addition to the questions posed in the description of the procedural regulations (repeated below) and given the unique nature of OPM's responsibility for adjudicating employee appeals on matters unique to only one Federal agency, OPM requests comments on the implementation and impact of this interim final rule. The types of information on which OPM is interested in public comments includes, but is not limited to, the following:

- If a disciplinary or adverse action, or performance-based action, relied upon by the VA in recoupment of an award, bonus, or relocation expense is subject to a grievance or appeal in a separate process and the grievance or appeal is still pending, how should this impact any decision by OPM? What if the disciplinary or adverse action, or performance-based action, relied upon by the VA is later overturned in the separate process after any decision by OPM regarding the recoupment by the VA?
- May VA bargaining unit employees use the negotiated grievance process under 5 U.S.C. 7121 to challenge a VA recoupment order in lieu of filing an appeal with OPM? Or do 38 U.S.C. 721 and 723 provide the sole method to challenge a VA recoupment order?
- Does coverage by the negotiated grievance procedure depend on whether the award or bonus was paid under title 5 authority or by title 38 authority?

- May a VA employee seek judicial review of an OPM final decision? If so, where would judicial review occur?
- Should OPM publish its appeal decisions and make them publicly available?

OPM welcomes comments on the answers to these questions and recommendations regarding whether and how these questions should be addressed in OPM regulations in a final rule. OPM may adopt additional procedures to address these and other issues identified in public comments in a final rule.

Executive Orders 14094, 13563 and 12866, Regulatory Review

OPM has examined the impact of this rulemaking as required by Executive Orders 12866 (Sept. 30, 1993), 13563 (Jan. 18, 2011), and 14094 (Apr. 6, 2023), which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with effects of \$200 million or more in any one year. This rulemaking does not reach that threshold but has otherwise been designated as a “significant regulatory action” under section 3(f) of Executive Order 12866, as amended by Executive Order 14094.

Regulatory Flexibility Act

The Director of OPM certifies that this regulation will not have a significant impact on a substantial number of small entities.

Executive Order 13132, Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132 (Aug. 10, 1999), it is determined that this interim final rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Executive Order 12988, Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule that would impose spending costs on State, local, or Tribal governments in the aggregate, or on the private sector, in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. That threshold is currently approximately \$183 million. This regulation will not result in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, in excess of the threshold. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this rule does not satisfy the criteria listed in 5 U.S.C. 804(2).

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless the collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule does not result in a collection of information subject to the PRA.

OPM anticipates that the case records would be subject to the Privacy Act and will be covered by the new OPM System of Records Notice (SORN) “OPM/Internal-29, VA Recoupment and Reduction Appeals to OPM,” which is published elsewhere in this issue of the *Federal Register*.

List of Subjects in 5 CFR Part 755

Administrative practices and procedures, Government employees.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

Accordingly, for the reasons stated in the preamble, OPM adds part 755 to title 5 of the Code of Federal Regulations to read as follows:

**PART 755—APPEAL PROCEDURES FOR RECOUPMENT OF AWARDS, BONUSES,
OR RELOCATION EXPENSES AWARDED OR APPROVED FOR ALL EMPLOYEES
OF THE DEPARTMENT OF VETERANS AFFAIRS (VA)**

Subpart A—Awards and Bonuses

Sec.

755.101 Scope of subpart and definitions.

755.102 Procedures for submitting appeals.

755.103 Basis of appeal decision.

755.104 Form of appeal decision.

755.105 Finality of appeal decision.

Subpart B—Relocation Expenses

755.201 Scope of subpart and definitions.

755.202 Procedures for submitting appeals.

755.203 Basis of appeal decision.

755.204 Form of appeal decision.

755.205 Finality of appeal decision.

Authority: 5 U.S.C. 1103; 38 U.S.C. 721 and 723.

Subpart A—Awards and Bonuses

Authority: 38 U.S.C. 721.

§ 755.101 Scope of subpart and definitions.

(a) *Employees covered.* A current or former civil service employee of the Department of Veterans Affairs (VA) as defined by title 38 of the U.S. Code, or by 5 U.S.C. 2105.

(b) *Appeals covered.* This subpart prescribes general procedures applicable to appeals, pursuant to 38 U.S.C. 721, by a covered employee to the Director of the Office of Personnel Management (OPM), or designee, regarding an order by the Secretary of the VA, or designee, directing the employee to repay the amount, or a portion of the amount, of any award or bonus paid to the employee under title 5 of the U.S. Code, including 5 U.S.C chapter 45 or 53, or under title 38 of the U.S. Code.

(c) *Appeals not covered.* Any disciplinary or adverse action, or any performance-based action taken by the VA (including any such action that may have served as a basis for the Secretary of the VA, or designee, to order recoupment of an award or bonus paid to an employee of the VA) is not appealable under this subpart. Discrimination claims or prohibited personnel practice claims raised in an appeal are not subject to OPM review.

(d) *Business days.* Weekdays, which are Monday through Friday, except when such a day is designated as a Federal holiday by OPM, or the employee's assigned facility or OPM is closed for regular business, e.g., inclement weather, lapse in appropriations.

§ 755.102 Procedures for submitting appeals.

(a) *Filing an appeal and time limits.* An employee may file an appeal to the Director, U.S. Office of Personnel Management, 1900 E Street, N.W., Room 7H28 (Attention: Accountability and Workforce Relations), Washington, DC 20415 or by email to employeeaccountability@opm.gov, within seven business days after the date of issuance of the order pursuant to 38 U.S.C. 721(a)(3). OPM, for good cause shown, may accept an untimely appeal.

(b) *Content of appeals.* An appeal must be submitted by the employee in writing and must be signed by the employee or their representative. While no specific form is required, the appeal must include:

(1) A copy of the notice of proposed order received pursuant to 38 U.S.C. 721(a)(2)(A);

(2) A copy of the employee's response to the proposed order, if any;

(3) A copy of the order received pursuant to 38 U.S.C. 721(a)(3);

(4) A statement explaining why the employee believes the order received pursuant to 38 U.S.C. 721(a)(3) is in error;

(5) The name, mailing address, telephone number, and email address of the employee and their representative (if applicable); and

(6) The name, mailing address, telephone number, and email address of the VA official who issued the order pursuant to 38 U.S.C. 721(a)(3).

(c) *VA submission of evidence file.* OPM will notify the VA upon receipt of a complete, timely appeal. The VA must provide OPM a copy of the evidence file as soon as possible but no later than five business days. If necessary, OPM may request VA provide information in addition to the evidence file. Any additional information requested by OPM must be provided to OPM within five business days after OPM's request. VA must also furnish a copy of any additional information requested by and provided to OPM to the employee. VA's failure to provide the evidence file or any requested additional information to OPM will result in a finding against VA.

(d) *Employee representative.* An employee may select a representative of their choice to assist in the preparation and submission of an appeal. An appeal filed by their representative must be supported by a duly executed power of attorney or other written documentation by the employee designating the representative. OPM may disallow as an employee's representative an individual whose activities as representative would cause a conflict of interest or position; an employee of any agency who cannot be released from official duties because of the priority needs of the Government; or an employee of any agency whose release would give rise to unreasonable costs to the Government.

§ 755.103 Basis of appeal decision.

The burden is upon the employee to establish the timeliness of the appeal and to explain why the VA's order is in error. OPM's decision is based upon the written record only, which will include the submissions by the employee and the agency. OPM will accept the facts found by the VA regarding the disciplinary or adverse action, or performance-based action, or other type of finding or action, if any, which was relied upon by the VA in making its recoupment decision. OPM may uphold the VA order if the employee or their designated representative fails to provide requested information. OPM's review of the VA order is limited to whether the procedures in VA's policies on recoupment of awards and bonuses pursuant to 38 U.S.C. 721 were followed. In the absence of such policies, OPM's review is limited to compliance with 38 U.S.C. 721.

§ 755.104 Form of appeal decision.

Within 30 business days after receiving an appeal, OPM will make a decision on the employee's appeal. OPM will then send a written appeal decision to the employee or their representative advising whether the VA order is upheld by OPM. OPM will send the VA a copy of the appeal decision.

§ 755.105 Finality of appeal decision.

Pursuant to 38 U.S.C. 721(b)(2), the OPM appeal decision is final; no further administrative review is available within OPM.

Subpart B—Relocation Expenses

Authority: 38 U.S.C. 723.

§ 755.201 Scope of subpart and definitions.

(a) *Employees covered.* A current or former civil service employee of the Department of Veterans Affairs (VA) as defined by title 38 of the U.S. Code, or by 5 U.S.C 2105.

(b) *Appeals covered.* This subpart prescribes general procedures applicable to appeals, pursuant to 38 U.S.C. 723, by a covered employee to the Director of the Office of Personnel Management (OPM), or designee, regarding an order by the Secretary of the VA, or designee,

directing the employee to repay the amount, or a portion of the amount, paid to or on behalf of an employee for relocation expenses under title 5 of the U.S. Code, including any expenses under 5 U.S.C. 5724 or 5724(a), or under title 38 of the U.S. Code.

(c) *Appeals not covered.* Any disciplinary or adverse action, or any performance-based action taken by the VA (including any such action that may have served as a basis for the Secretary of the VA, or designee, to order repayment of a relocation expense by an employee of the VA) is not appealable under this subpart. Discrimination claims or prohibited personnel practice claims raised in an appeal are not subject to OPM review.

(d) *Business days.* Weekdays, which are Monday through Friday, except when such a day is designated as a Federal holiday by OPM, or the employee's assigned facility or OPM is closed for regular business, e.g., inclement weather, lapse in appropriations.

§ 755.202 Procedures for submitting appeals.

(a) *Filing an appeal and time limits.* An employee may file an appeal to the Director, U.S. Office of Personnel Management, 1900 E Street, N.W., Room 7H28 (Attention: Accountability and Workforce Relations), Washington, DC 20415 or by email to employeeaccountability@opm.gov, within seven business days after the date of issuance of the order pursuant to 38 U.S.C. 723(a)(3). OPM, for good cause shown, may accept an untimely appeal.

(b) *Content of appeals.* An appeal must be submitted by the employee in writing and must be signed by the employee or their representative. While no specific form is required, the appeal must include:

- (1) A copy of the notice of proposed order received pursuant to 38 U.S.C. 723(a)(2)(A);
- (2) A copy of the employee's response to the proposed order, if any;
- (3) A copy of the order received pursuant to 38 U.S.C. 723(a)(3);
- (4) A statement explaining why the employee believes the order received pursuant to 38 U.S.C. 723(a)(3) is in error;

(5) The name, mailing address, telephone number, and email address of the employee and their representative (if applicable); and

(6) The name, mailing address, telephone number, and email address of the VA official who issued the order pursuant to 38 U.S.C. 723(a)(3).

(c) *VA submission of evidence file.* OPM will notify the VA upon receipt of a complete, timely appeal. The VA must provide OPM a copy of the evidence file-as soon as possible but no later than five business days. If necessary, OPM may request VA provide information in addition to the evidence file. Any additional information requested by OPM must be provided to OPM within five business days after OPM's request. VA must also furnish a copy of any additional information requested by and provided to OPM to the employee. VA's failure to provide the evidence file or any requested additional information to OPM will result in a finding against VA.

(d) *Employee representative.* An employee may select a representative of their choice to assist in the preparation and submission of an appeal. An appeal filed by their representative must be supported by a duly executed power of attorney or other written documentation by the employee designating the representative. OPM may disallow as an employee's representative an individual whose activities as representative would cause a conflict of interest or position; an employee of any agency who cannot be released from official duties because of the priority needs of the Government; or an employee of any agency whose release would give rise to unreasonable costs to the Government.

§ 755.203 Basis of appeal decision.

The burden is upon the employee to establish the timeliness of the appeal and to explain why the VA's order is in error. OPM's decision is based upon the written record only, which will include the submissions by the employee and the agency. OPM will accept the facts found by the VA regarding the disciplinary or adverse action, performance-based action, or other type of finding or action, if any, which was relied upon by the VA in making its recoupment decision. OPM may uphold the VA order if the employee or their designated representative fails to

provide requested information. OPM's review of the VA order is limited to whether the procedures in VA's policies on recoupment of relocation expenses pursuant to 38 U.S.C. 723 were followed. In the absence of such policies, OPM's review is limited to compliance with 38 U.S.C. 723.

§ 755.204 Form of appeal decision.

Within 30 business days after receiving an appeal, OPM will make a decision on the employee's appeal. OPM will then send a written appeal decision to the employee or their representative advising whether the VA order is upheld by OPM. OPM will send the agency a copy of the appeal decision.

§ 755.205 Finality of appeal decision.

Pursuant to 38 U.S.C. 723(b)(2), the OPM appeal decision is final; no further administrative review is available within OPM.

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