



OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 755

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: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a 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, bonus, or relocation expenses paid to the employee.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION]

FOR FURTHER INFORMATION CONTACT: Allen Brooks 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) (“Accountability Act” hereafter), 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 for relocation expenses, including 5 U.S.C. 5724 and 5724a, or title 38, 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 only addresses 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 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 within seven business days after the date of such issuance. This final rule 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

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

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

Interim Final Rule with Request for Comments

OPM issued an interim final rule with request for comments, published at 90 FR 3601 on January 15, 2025, to establish 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 the 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.

OPM received submissions from two individuals, one organization, and one national union during the 60-day public comment period for the interim final rule. At the conclusion of the comment period, OPM reviewed and analyzed the comments and responses provided to OPM's questions. In general, the comments express concern about OPM's rulemaking process and appeal procedures. The comments also demonstrate an interest in ensuring that VA employees have a fair opportunity for meaningful review of a VA recoupment order.

² See *id.*, Procedures for Recoupment of Relocation Expenses, p. VI-6.

The next sections provide a brief description of new part 755 followed by a summary of the comments received and a discussion of the suggestions for revision that were considered and either adopted, adopted in part, or declined, and the rationale therefor.

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

The interim final rule adding a new 5 CFR part 755 implemented the appeals procedures for recoupment of awards, bonuses, and relocation expenses for employees of the VA. Part 755 is entitled “Appeal Procedures for Recoupment of Awards, Bonuses, or Relocation Expenses Awarded or Approved for All Employees of the Department of Veterans Affairs.” 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. OPM invited comments on the interim final rule and on additional topics for consideration for this final rule.

General Comment

An individual questioned why VA employees should be allowed an appeals process and urged “[n]o appeals of any shape or form.” The individual alleged that there are VA employees who take advantage of their positions and authority and poor policy enforcement while the VA “unduly den[ies] benefits” to veterans.

OPM will not make any revisions based on this comment. The Accountability Act authorizes an appeal process for VA employees subject to the recoupment of an award, bonus, or relocation expenses under the statute. The law provides that, upon issuance of such a recoupment order by the VA Secretary, the individual has the right to appeal the order to the Director of the OPM. Thus, it is the law, not OPM’s rulemaking, that provides appeal rights to VA employees. While the law does not require OPM to issue a regulation regarding the appeals process, OPM believes that doing so will help employees and the VA avoid confusion about how OPM will administer the appeals process. Providing clarity to the appeals process will also aide OPM in

meeting its statutory deadline for issuing a decision within 30 business days after receiving an appeal.

Comments Related to Procedures for Submitting Appeals

Sections 755.102 and 755.202 describe the procedures for VA employees to follow when submitting an appeal regarding, respectively, a VA order for recoupment of an award or bonus under 38 U.S.C. 721 or recoupment of relocation expenses under 38 U.S.C. 723. The regulations also require that VA provide OPM a copy of the evidence file relied upon in proposing and deciding its recoupment order. The interim final rule specified that, if OPM requests that the VA provide information in addition to the evidence file, VA must also furnish to the employee a copy of any additional information requested by and provided to OPM.

An organization recommended that OPM revise §§ 755.102(a) and 755.202(a) to “clearly state that ‘good cause shown’ for untimely filing of an appeal includes evidence that a delay occurred in the employee’s receipt of notice from OPM.” The organization is concerned that, if VA opts to transmit a recoupment order through the U.S. Postal Service, postal delay in receipt of the order could prevent an employee from making a timely appeal. The organization thinks that OPM’s appeals process could thus run afoul of Congress’ due process intent.

OPM will not revise the rule based on this comment. OPM notes that the employee will receive notice of a recoupment order from VA, not OPM. OPM believes that it is unnecessary to detail in the regulatory text the circumstances that could excuse an untimely filing but meets the good cause standard. As stated in the interim final rule, OPM will apply 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 *Alonzo*, the Board established a non-exhaustive set of factors for determining whether an employee establishes good cause for the untimely filing of an appeal. These factors will allow OPM to consider a variety of circumstances using well-established law without enumerating each exception in regulation, including delays attributed to the U.S. Postal Service.

The organization also recommended that OPM revise the regulations to provide employees a right of reply to the VA evidence file submissions required under §§ 755.102(c) and 755.202(c). The organization expressed concern that the VA may try to “unfairly game the OPM appeal mechanism” by raising new facts or arguments not previously presented to the employee in prior proceedings.

For consistency in the treatment of VA submissions of the evidence file and additional information, OPM revises the final rule to state that VA will furnish a copy of both the evidence file and any additional information to OPM and the employee. The requirement to serve the employee and OPM the same submissions will promote transparency in the adjudicative process and provide a check on any attempt to raise new issues or withhold evidence or arguments submitted by the employee to the VA. However, OPM believes it is unnecessary to provide employees a right of reply to VA’s submissions due to the limited nature of OPM’s review of the VA order, as discussed in more detail below. Moreover, the VA will not have a right to respond to the employee’s appeal to OPM. The employee and VA will have had an opportunity to present their respective positions on the propriety of the VA recoupment during VA’s decision-making process.

Comments Related to Basis of OPM’s Appeal Decision

Sections 755.103 and 755.203 provide that OPM will fulfill its statutory obligation to render a timely decision on any appeal of a VA recoupment order by basing the decision on the written record only, which will include the submissions by the employee and the agency. OPM’s appeal decision regarding a VA recoupment order is limited to whether the procedures in VA’s recoupment policies were followed, or, in the absence of such policies, whether the order was otherwise in compliance with 38 U.S.C. 721-723. 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 received a comment from an individual who stated that OPM's interim final rule lacked sufficient detail in §§ 755.103 and 755.203 about what a VA employee must establish to prove that a recoupment order is erroneous. The same commenter asked what will happen if the VA fails to adhere to a timeframe in its policies or states an incorrect award amount in its proposal notice. The individual went on to ask that OPM address whether the employee is required to prove that an error prejudiced the employee in some way.

OPM will not revise §§ 755.103 and 755.203 based on these comments. The regulatory text is sufficiently detailed for a VA employee to understand what is needed to prove that a recoupment order is erroneous. OPM does not require any particular form – only a “statement.” The statement must explain why the employee believes the recoupment order is in error. That statement will vary based on the specific facts of each case. In addition, the regulations specify that OPM's review is limited to whether the VA followed its procedures (or, in the absence of such procedures, the relevant statutory provision). Thus, the statement must explain how the VA erred in following its procedures. If an employee alleges that the VA erred in adhering to a timeframe or made a technical error in its proposal notice, OPM will consider whether the VA's error would result in a different outcome.

An individual commenter asserted that a procedural review will not provide an employee a meaningful opportunity to put forth an argument that the VA erred on a substantive issue in the recoupment process. In addition, an organization commented that OPM should expand the scope of its review under §§ 755.103 and 755.203 to remove “artificial” constraints that are not required by 38 U.S.C. 721(b) and 723(b). Specifically, the organization urged that OPM revise §§ 755.103 and 755.203 to add a substantive assessment of VA's exercise of its authority under sections 721(a)(1) and 723(a)(1). The organization also commented that §§ 755.103 and 755.203 should be revised to delete the language, “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.” The

organization recommends a *de novo* appeal decision in which OPM makes its own factual findings. To do otherwise, according to the organization, would prevent employees from receiving a meaningful post-decision assessment and allow OPM to “abdicate its responsibility to conduct appellate review as required under 38 U.S.C. §§ 721(b), 723(b).”

A national union likened OPM’s appeal procedures to “procedural rubber-stamping” that will deprive employees of “a meaningful, substantive right of appeal consistent with the legislative purpose and plain text of 38 U.S.C. §§721-723.” The union argued that the statutory language in sections 721 and 723 places no limitation on the scope of an employee’s appeal and OPM’s standards of review. The union added that OPM’s rule is not in accordance with law because OPM limits its review to procedural compliance with agency policy.

OPM disagrees with the commenters and will not expand the scope of OPM’s review. Prior to a VA recoupment order, the VA renders a determination under section 721(a)(1) that the individual engaged in misconduct or demonstrated poor performance, or a determination under section 723(a)(1) that the individual engaged in fraud or malfeasance. Such determinations will involve factual findings that can be challenged and assessed through the response period afforded an employee, or if those factual findings are the basis for disciplinary or adverse action, a grievance, appeal, or other appropriate administrative process. Further, a reading of sections 721(b) and 723(b) requiring *de novo* review by OPM ignores the time limitation placed upon OPM to issue a decision within 30 business days. OPM does not believe Congress intended for it to conduct a full review of the facts and reach its own conclusions underlying a recoupment order based on the limited amount of time afforded. To read these two sections otherwise would be a novel interpretation without parallel in the body of statutory law governing federal employment and would impose substantial burden on OPM, creating the risk that it could not render a decision within the 30-day deadline for issuing a decision. Thus, OPM concludes that 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.

In its own analysis of Congress' intent, the organization provided a brief discussion of the legislative history and argued that Congress did not indicate that it intended to limit OPM's review to whether VA followed its procedures. The organization pointed to legislative history that Congress intended to preserve minimal Constitutional due process and to allow for post-decisional appeal. The organization pointed to statements that Congress designed the recoupment process such that "each [employee] would receive pre-decisional due process and enough process after a decision to pass constitutional muster." The organization cited that such constitutional muster "requires that an individual receive notice of an action affecting the individual's interests and a reasonable opportunity to contest that action." The organization concludes that reading into the statute a solely procedural review is "contrary to the canon of avoidance of absurd result."

OPM disagrees with the organization's argument that the legislative history indicates Congress' desire to require OPM review both substantive and procedural review of VA recoupment orders. The organization relies on legislative history that describes the constitutional minimum pre-decisional process required for every recoupment order – advance notice and an opportunity to respond to an order before the VA issues an order. The same legislative history did not, however, speak to OPM's post-decisional review. Nevertheless, OPM believes that its regulations provide the constitutional minimum consistent with Congress' intent and the statutory text.

Comments Related to Finality of Appeal Decision

Sections 755.105 and 755.205 establish that OPM's decision in a VA recoupment order appeal is final, pursuant to 38 U.S.C. 721(b)(2) and 723(b)(2), respectively. In response to OPM's Request for Comment section of the interim final rule, both the national union and the organization responded that, yes, a VA employee may seek judicial review of an OPM appeal decision. The union and organization stated that OPM's regulations should clarify additional appeal rights available to employees.

The commenters stated that the statutory text in sections 721 and 723 does not preclude judicial review. To that point, the union and organization cited *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 298, 298 fn.9 (2001) for the proposition that “a statute should not be construed as barring judicial review of administrative actions, absent a clear statement of congressional intent to do so.” In addition, both commenters noted that “other adverse actions” under the Accountability Act are subject to judicial review. On the latter point, the organization referred to *Trinka v. McDonough*, Civil Action No. 21-2904 (RC) (September 21, 2023) (Contreras, J.) (citing *Order, McLafferty v. Wilkie*, No. 20-1772, at 2 (Fed. Cir. Aug. 31, 2020), ECF No. 10).

In addition to “the constitutionality challenge discussed in *Trinka* and *McLafferty*,” the organization raised what it sees as other “potential causes” of action for judicial review: (1) an arbitrary and capricious review under the APA, 5 U.S.C. 702; (2) an “illegal exaction” review under the Tucker Act if the employee wants to challenge the recoupment after payment; and (3) enforcement of OPM’s decision in mandamus if the VA does not prevail in the appeals process, pursuant to 28 U.S.C. 1361. The national union pointed to the availability of 28 U.S.C. 1361 for an employee to seek judicial review if the VA fails to act on OPM’s reversal of a recoupment order.

OPM declines the commenters’ recommended modifications to the regulations to address further appeal rights. In 38 U.S.C. 714, Congress expressly provided for appeal rights to the U.S. Court of Appeals for the Federal Circuit or to any court of appeals of competent jurisdiction. In 38 U.S.C. 713, Congress granted a right to judicial review for decisions to remove a covered senior executive from the civil service. Accordingly, in *Trinka*, the court reviewed a grievance decision that affirmed the senior executive’s removal under section 713, pursuant to *McLafferty* (federal district courts have jurisdiction to review final grievance decisions governed by 38 U.S.C. 713(b)(5)). Congress could have explicitly provided for judicial review of OPM appeal decisions of VA recoupment orders and chose not to do so.

Additionally, OPM notes that a recoupment action is not an adverse action under 38 U.S.C. 714 or chapter 75 of title 5. The applicability of judicial review for adverse actions may or may not be instructive for appeal decisions involving VA recoupment actions. The organization did not provide additional details about the other potential causes of action it identified and why those considerations favor an amendment to §§ 755.105 and 755.205. Accordingly, OPM is not persuaded to revise the regulatory text to add whether or where judicial review may occur.

The commenters also opined that OPM should affirmatively provide notice of available judicial review options to avoid prejudice to employees. Sections 721 and 723 do not require that OPM affirmatively provide notice of judicial review options in its appeal decision. In the absence of clear statutory entitlement to judicial review, OPM does not believe the lack of notice regarding possible further judicial review will prejudice an employee. Accordingly, OPM's decision notice to the employee will not include a statement of "appeal rights."

In the next sections, we outline the specific amendments, provide a regulatory analysis and address related comments, and summarize and address responses to OPM's request for comment regarding additional considerations for the implementation and impact of this rule.

Subpart A: Awards and Bonuses

Under part 755, OPM added a new subpart A "Awards and Bonuses." The provisions of subpart A, as revised in this final rule, are outlined below.

Section 755.101 Scope of subpart and definitions

Subpart A applies to a current or former civil service employee of the 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, including chapters 45 or 53, or under title 38. 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 concludes, based on the statutory timeframes established by Congress, 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 claims of discrimination, prohibited personnel practice, or other collateral issues 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 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 which 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) or to the Department of Labor's Veterans' Employment and Training Service (DOL VETS) 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 or 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) and promotes consistent use of the term.

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 and the employee 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 and the employee 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 (e.g., classification appeals and complaints involving violations of the Fair Chance Act of 2019).

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 obligation 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.. 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. As noted earlier, OPM will not review any claims of discrimination, prohibited personnel practices, or other collateral issues raised in any appeal. Employees may file complaints with the EEOC, DOL VETS, OSC, or other administrative body having jurisdiction. 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

³ See *id.*, Procedures for Recoupment of Award or Bonus, p. VI-3.

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.”

Subpart B: Relocation Expenses

Under part 755, OPM added a new subpart B “Relocation Expenses.” These provisions of subpart B, as revised in this final rule, 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 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 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, including any expenses under section 5724 or 5724a of title 5, or under title 38.

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 concludes, based on the statutory timeframes established by Congress, 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, even if such action serves 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 to address any adverse actions or performance-based actions taken by the VA and which may 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, DOL VETS, 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 or 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 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) and promotes consistent use of the term.

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. 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. 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 the same information for 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 and the employee 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 and the employee 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.

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 obligation 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 any disciplinary or adverse action, or performance-based action and relied upon by the VA in making its recoupment decision. OPM will not review any discrimination claim or prohibited personnel

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

practice claim raised in any appeal. Employees may file complaints with the EEOC, DOL VETS, 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 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's Request for Comment

Given the unique nature of OPM's responsibility for adjudicating employee appeals on matters specific only to the VA, OPM requested comment on the implementation and impact of the interim final rule. In the paragraphs that follow, OPM restates the questions and discusses the responses from three commenters.

- 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?

The national union stated that, if the VA seeks recoupment while the disciplinary or adverse action, or performance-based action is still in litigation, OPM should stay its adjudication of the employee appeal pending resolution of the litigation. The union suggested that OPM should reverse the VA's recoupment order through its appeal process if the underlying disciplinary or adverse action, or performance-based action, relied upon by the VA in recoupment is overturned, rescinded, vacated or otherwise undone. The organization also recommended that OPM stay VA's recoupment action pending litigation of any underlying adverse personnel action. Additionally, the organization made a similar suggestion that, if the underlying adverse personnel action is undone, then the recoupment should also be undone.

An individual also responded to OPM's request for comments regarding how any pending appeal would impact a decision by OPM. The individual suggested that OPM's decision on a VA recoupment order should not be implemented until any pending grievance or appeal of the underlying action is resolved. As to OPM's request for comments regarding the impact of an overturned personnel action on OPM's decision, the individual recommended that OPM's decision is issued and implemented only if the decision reverses the VA recoupment order.

OPM thanks the commenters for their responses. However, OPM will not make any revisions based on these comments. After careful consideration, OPM has concluded that a decision by OPM should not be impacted by a grievance or appeal in a separate process in a disciplinary or adverse action, or performance-based action, relied upon by the VA in recoupment of an award, bonus, or relocation expense. Congress afforded OPM only 30 business days to adjudicate an appeal filed seven business days after the date of an order. Such a limited timeframe indicates that Congress intended for OPM to conduct a limited review of the Secretary's order and issue a prompt decision on the employee's appeal. In addition, Congress did not authorize OPM to stay a decision on a recoupment appeal pending the outcome of collateral litigation. Further, even if, after OPM makes its decision, a tribunal overturns a disciplinary or adverse action, or performance-based action that was relied upon by the VA,

Congress did not authorize OPM to reopen or revisit its decisions on recoupment appeals.

Finally, allowing for OPM to stay or revisit its decisions based on underlying substantive matters is incongruent with OPM's conclusion that its review under 38 U.S.C. 721(a) and 723(a) is limited to VA's compliance with its internal policy or, in the absence of such policy, compliance with the law.

- 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?

The national union put forth that the plain text of sections 721 and 723 “does not supersede 5 U.S.C. § 7121, and therefore, cannot be interpreted to exclude or otherwise prohibit a grievance being filed under the negotiated grievance procedure.” The commenting organization provided a similar rationale, noting that no provision in sections 721 and 723 expressly excludes coverage by a negotiated grievance procedure. The organization also stated that the terms of the applicable collective bargaining agreement would decide whether a covered employee can grieve a recoupment order. Both the national union and organization stated that sections 721 and 723 cannot be read to mean that an OPM appeal is the sole method to contest a VA recoupment order. They concluded that the statute should be interpreted instead to mean that an employee may file a negotiated grievance or an appeal to OPM, but not both.

As stated in the interim final rule, it was 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. After consideration of these comments, it is not clear to OPM that Congress intended to exclude VA bargaining unit employees from pursuing a grievance under a negotiated grievance procedure concerning a recoupment award issued under 38 U.S.C. 721(a) or 723(a). However, it is unnecessary for OPM to decide this question of statutory interpretation as such issues are more

appropriate for resolution through the procedures established by the Federal Labor Relations Authority. However, OPM agrees with the commenters' arguments that an employee could not both file grievance and a recoupment appeal. Accordingly, OPM is revising §§ 755.102 and 755.202 to collect information related to any grievance as part of the appeal and to clarify that an employee must elect to pursue either an appeal to OPM or negotiated grievance procedures.

- 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?

The national union responded that the authority, whether title 5 or title 38, for the award is irrelevant. The union pointed to 38 U.S.C. 7422(a), stating that the statute entitles bargaining unit employees to collective bargaining and negotiated grievance procedures. The union noted that an employee who contests a VA recoupment is not challenging the award itself but rather the recoupment of the award. Such a challenge, in the union's view, is not excluded by 38 U.S.C. 7422(b). Lastly, the union stated that relocation expenses are similar to payments for travel and training, which the VA has previously found under 38 U.S.C. 7422(d) are not matters that would be excluded from negotiated grievance procedures by 38 U.S.C. 7422(b). The organization shared a perspective similar to the national union's and posited that the "sole limitation" is whether coverage is excluded by 38 U.S.C. 7422.

- OPM appreciates the commenters' feedback on this question but will not make changes to the regulations based on the feedback. Because the Secretary of Veterans Affairs retains exclusive authority, subject to judicial review, to determine whether an award or bonus paid under title 38 for employees described under 38 U.S.C. 7421(b) falls within the exclusion in 38 U.S.C. 7422(b), OPM will defer to VA on the applicability of that statute to recoupments. May a VA employee seek judicial review of an OPM final decision? If so, where would judicial review occur?

As discussed in the sections about comments on §§ 755.105 and 755.205, both the national union and the organization responded that, yes, a VA employee may seek judicial

review of an OPM appeal decision. The commenters stated that OPM should clarify in its regulations additional appeal rights available to employees. In addition, the comments recommended that OPM should affirmatively provide notice of available judicial review options to avoid prejudice to employees. For the reasons provided in the comment discussion for §§ 755.105 and 755.205, OPM declines the recommendation to modify the regulations to address further appeal rights.

- Should OPM publish its appeal decisions and make them publicly available?

The national union and the organization both believe OPM should publish its appeal decisions and make them publicly available, in the same manner that OPM makes publicly available OPM's decisions on compensation and leave claims. The commenters recommended that OPM protect the employee's privacy by identifying the cases by an OPM case number and pseudonym or redacted name.

OPM appreciates the responses and will take them under advisement in developing internal procedures.

Waiver of Notice of Proposed Rule Making and Related Comments

OPM issued an interim final rule because it 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 had been completed. A national union asserted that OPM's issuance of the interim final rule was without good cause, in violation of the APA, and done in haste. The union recommended that OPM rescind the interim final rule and issue a notice of proposed rulemaking to solicit public comment consistent with the APA and the Accountability Act. The union averred that, as far as the union was aware, the VA had not exercised its recoupment authority. In support of its claim, the union included a copy of a negative June 2022 VA response to a Freedom of Information Act (FOIA) request for records related to the recoupment of awards or bonuses under 38 U.S.C. 721.

OPM disagrees with the union's assertion that the interim final rule was without good cause and in violation of the APA. As the union noted, 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. Therefore, it was imperative that OPM prepare to receive and adjudicate appeals from VA employees. In fact, two VA recoupment orders were appealed to OPM shortly before publication of the interim final rule, and the appeals were adjudicated during the comment period. The fact that VA began ordering recoupment of awards prior to OPM's publication of the interim final rule confirms that OPM's waiver of notice and comment was prudent and 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. 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 correctly determined that good cause existed to waive the general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b)(B).

The national union also asserted that OPM violated the APA by not affording the public an opportunity to participate in the rulemaking process as required by 5 U.S.C. 553(c). OPM disagrees. Given that OPM reasonably found that good cause existed pursuant to section 553(b)(B), OPM was not required to allow for public comment prior to publication of a final rule. Nonetheless, OPM gave interested persons an opportunity to participate in the rulemaking through public comment as part of the interim final rule. OPM welcomed comment on the provisions codified in its interim final rule and on a number of additional procedural topics that OPM expressly sought to address before finalizing its appeal procedures. OPM has now

solicited and responded to comment, thus fulfilling all of the procedural requirements under the APA.

Regarding the union's perspective that OPM acted in haste, OPM determined that, after the VA finalized its internal policy, expeditious issuance of an interim final regulation was required to prevent confusion and promote fairness as VA exercises its statutory authority resulting in appeals to OPM. We note that OPM developed its interim final rule after review of VA's policies and procedures, consideration of legal and policy options, and in consultation with VA. OPM developed procedures only after it had a better understanding of what process VA would provide and what record would be available for OPM review.

Waiver of Delay in Effective Date and Related Comments

Pursuant to 5 U.S.C. 553(d)(3), OPM found that good cause existed to waive the 30-day delay in effective date for the interim final rule and made those interim procedural regulations effective upon publication. The delay in effective date was 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.

The national union characterized OPM's interim final rule as lacking an explanation for its delay in rulemaking and speculative regarding the potential impact if OPM were to adhere to the 30-day delay in effective date. For these reasons, the union believed the interim final rule was arbitrary and capricious under the APA.

OPM notes that the union has described OPM's rulemaking as both hasty and unjustifiably delayed. Neither is the case, and nor was the interim final rule arbitrary and capricious. As explained in the interim final 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. 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.

As noted above, after VA finalized its policy, the VA began exercising its authority under this statute. Subsequent to the union's 2022 FOIA request, the VA informed OPM that it had issued several recoupment orders. Therefore, OPM's justification for waiving the delay in effective date was not speculative. In December 2024, two VA employees appealed their recoupment orders to OPM, and OPM was aware that additional recoupment orders and appeals could occur at any time. A delay in the effective date would not have addressed the immediate need to avoid confusion and inconsistency in how to file new appeals with OPM and to provide information about the content needed for such appeals.

Regulatory Impact Analysis

A. Statement of Need

The interim final rule implemented portions of sections 204 and 205 of the Accountability Act, 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 the Accountability Act amend chapter 7 of title 38, United States Code. Under these authorities, OPM prescribed additional details of the appeal process to provide consistency and transparency.

After consideration of public comments about the interim final rule, OPM determined that minor changes to the appeal procedures were needed. OPM added provisions to § 755.102(b) and § 755.202(b) that require an employee to disclose information concerning any grievance concerning the recoupment award. OPM also added a requirement in § 755.102(c) and § 755.202(c) for the VA provide to the VA employee copies of information provided to OPM. OPM also added new subparagraphs (e) to both § 755.102 and § 755.202 that preclude OPM from asserting jurisdiction over an appeal of a recoupment award where the employee first elects to challenge a recoupment award through a negotiated grievance process.

B. Regulatory Alternatives

An alternative to this final rule was to rescind the provisions of the interim final rule and publish a new notice of proposed rulemaking, as suggested by one commenter. As discussed in the section “Waiver of Notice of Proposed Rule Making and Related Comments,” VA began exercising its authority under 38 U.S.C. 721 and 723 in 2024. OPM’s rescission of the interim final rule would 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. To leave VA employees without any procedures for appealing those decisions would not be in their interest. Accordingly, OPM determined that this was not an appropriate course of action.

Another alternative was for OPM to refrain from publishing this final rule. OPM found good cause to adopt interim regulations prior to receiving public comment; however, OPM sought public input to ensure that it had considered a range of viewpoints and concerns prior to finalizing those processes. Although OPM is only making minor changes in response to public comments, OPM believes that the changes made in this rule will better guide VA employees through the appeals process.

C. Impact

OPM is issuing this final rule to provide consistency and transparency regarding appeals by VA employees involving 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 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 this final rule are de minimis. OPM estimates that the final rule would result in costs of about \$7,100 to OPM for each appeal filed with OPM. This estimate is slightly larger than the \$6,937.20 estimated in the interim final rule. The difference between the two estimates is attributed to the difference between salary rates used to estimate labor costs. The interim final rule used the 2024 salary rates. This final rule used the 2025 salary rates.

As already noted, this final rule specifies that VA will provide both OPM and the employee a copy of the evidence file for the appeal process. OPM anticipates a negligible cost to VA for providing the requested file to the employee in addition to OPM. 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 final rule and are covered by VA policies.

OPM does not expect the changes in this final rule to result in any costs to VA employees that were not accounted for in the interim final rule.

E. Benefits

This final rule will benefit VA employees. This 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.

Regulatory Compliance

1. Regulatory Review

OPM has examined the impact of this rule as required by Executive Orders 12866 and 13563, 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 rules that have an annual effect on the economy of \$100 million or more or adversely affect in a material way the

economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. 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. This rule is not an E.O. 14176 regulatory action because it does not impose any more than de minimis regulatory costs.

2. Regulatory Flexibility Act

The Acting Director of OPM certifies this regulation will not have a significant impact on a substantial number of small entities because it will apply only to Federal agencies and individuals (Federal employees and former employees).

3. 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, it is determined that this final rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

4. Unfunded Mandates Reform Act

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 \$206 million. This rulemaking 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 written assessment of unfunded mandates is required.

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.

Case records are subject to the Privacy Act and are covered by OPM System of Records Notice (SORN) “OPM/Internal-29, VA Recoupment and Reduction Appeals to OPM” (90 FR 3970).

List of Subjects in 5 CFR Part 755

Administrative practice and procedure, Government employees.

Jerson Matias

Federal Register Liaison

Accordingly, for the reasons stated in the preamble, OPM amends 5 CFR part 755 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)

1. The authority citation for part 755 continues to read as follows:

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

Subpart A—[Amended]

2. Remove the authority citation for subpart A.

3. Amend § 755.102 by revising paragraphs (b) and (c) and adding paragraph (e) to read as follows:

§ 755.102 Procedures for submitting appeals.

* * * * *

(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 copy of any grievance filed by the employee under a negotiated grievance procedure pursuant to 5 U.S.C. 7121 seeking to reverse a recoupment order;
- (5) A statement explaining why the employee believes the order received pursuant to 38 U.S.C. 721(a)(3) is in error and whether the employee filed a grievance under a negotiated grievance procedure pursuant to 5 U.S.C. 7121 seeking to reverse a recoupment order;
- (6) The name, mailing address, telephone number, and email address of the employee and their representative (if applicable); and
- (7) 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 and the employee 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 and the employee 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 and the employee will result in a finding against VA.

* * * * *

(e) *Election under a negotiated grievance procedure.* When an employee has an option of pursuing either a recoupment appeal to OPM or a grievance under a negotiated grievance procedure pursuant to 5 U.S.C. 7121, OPM will only review a recoupment appeal where the employee files a timely appeal first with OPM. Where an employee makes a timely election to file a recoupment appeal and a grievance on the same day, OPM will not consider the recoupment appeal absent clear and unmistakable evidence that the employee filed his or her recoupment appeal before filing a grievance.

Subpart B—[Amended]

4. Remove the authority citation for subpart B.

5. Amend § 755.202 by revising paragraphs (b) and (c) and adding paragraph (e) to read as follows:

§ 755.202 Procedures for submitting appeals.

* * * * *

(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 copy of any grievance filed by the employee under a negotiated grievance procedure pursuant to 5 U.S.C. 7121 seeking to reverse a recoupment order;
- (5) A statement explaining why the employee believes the order received pursuant to 38 U.S.C. 723(a)(3) is in error and whether the employee filed a grievance under a negotiated grievance procedure pursuant to 5 U.S.C. 7121 seeking to reverse a recoupment order;
- (6) The name, mailing address, telephone number, and email address of the employee and their representative (if applicable); and

(7) 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 and the employee 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 and the employee 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 and the employee will result in a finding against VA.

* * * * *

(e) *Election under a negotiated grievance procedure.* When an employee has an option of pursuing either a recoupment appeal to OPM or a grievance under a negotiated grievance procedure pursuant to 5 U.S.C. 7121, OPM will only review a recoupment appeal where the employee files a timely appeal first with OPM. Where an employee makes a timely election to file a recoupment appeal and a grievance on the same day, OPM will not consider the recoupment appeal absent clear and unmistakable evidence that the employee filed his or her recoupment appeal before filing a grievance.