7400-01-P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 412, 432, 715, and 752

[Docket ID: 2025-OPM-0012]

RIN 3206-AO91

MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

RIN 3124-AA35

Promoting Employee Accountability

AGENCY: Office of Personnel Management and Merit Systems Protection Board.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) and Merit Systems Protection Board (MSPB or Board) are issuing proposed regulations governing performance-based reduction in grade and removal actions, non-disciplinary separations, and adverse actions, along with the MSPB's review of those actions, and proposing improved and additional training to supervisors. With this rule, OPM seeks to improve the accountability of employees for poor performance and misconduct by streamlining the administrative procedures used by agencies to take performance-based and adverse actions; and MSPB seeks to refocus its penalty review on a totality of the circumstances test rather than a rigid application of prescribed factors. The proposed rule also promotes transparency regarding employee poor performance and misconduct by restricting agencies' ability to engage in settlement agreements that remove official documentation of performance or conduct detrimental to the efficiency of the service.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments for this proposed rulemaking through the Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Instructions: Please arrange and identify your comments on the regulatory text by subpart and section number. If your comments relate to the supplementary information, please refer to the heading and page number. All comments will be docketed in the OPM docket for this rulemaking. All comments must be received by the end of the comment period for them to be considered by OPM and MSPB. All comments and other submissions received generally will be posted on the internet at https://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.

As required by 5 U.S.C. 553(b)(4), a summary of this rule may be found in the docket for this rulemaking at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Noah Peters, Senior Advisor to the Director, by e-mail at employeeaccountability@opm.gov or by telephone at (202) 606-2930.

Gina K. Grippando, Clerk of the Board, by email at mspb@mspb.gov or by telephone at (202) 653-7200.

SUPPLEMENTARY INFORMATION:

OPM proposes to amend its regulations governing performance-based reduction in grade, removal actions, and adverse actions. OPM proposes these regulations under its congressionally granted authority to regulate agency actions to hold employees accountable for unacceptable performance and misconduct detrimental to the efficiency of the service and to implement the President's expressed policy direction. Specifically, OPM proposes revisions to regulations governing performance-based reduction in grade, and removal actions, and adverse actions under statutory authority vested in it by Congress in 5 U.S.C. 4305, 4315, 7504, 7514 and 7543. The

regulations will update current procedures to make them more efficient and effective.[1] The proposed regulations also will clarify procedures and requirements to support managers in addressing unacceptable performance and promoting employee accountability for performance-based reduction-in-grade, removal actions, and adverse actions.

MSPB proposes to amend its regulations governing its review of agency actions taken under 5 U.S.C. chapter 75. Specifically, MSPB proposes to no longer apply the 12 factors established in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981) (*Douglas*), in reviewing whether an agency's chosen penalty for an action taken under chapter 75 is reasonable. Instead, MSPB proposes to assess reasonableness of the penalty under a more flexible totality of the circumstances standard.

OPM and MSPB recognize the interactions between the proposed changes to each of their regulations. To that end, OPM and MSPB are publishing these proposals in a joint notice of proposed rulemaking and welcome comment on those interactions and related impacts. After consideration of comments, the agencies may issue a joint final rule or each agency may finalize its respective proposals in separate final rules.

I. Previous Attempts to Promote Accountability of the Federal Workforce

One of the major purposes of the Civil Service Reform Act of 1978 (CSRA) was to "preserve the ability of federal managers to maintain an effective and efficient Government." *Cornelius v. Nutt*, 472 U.S. 648, 662 (1985) (internal formatting omitted). "In order to achieve this purpose, one of the 'central tasks' of the [CSRA] was to [a]llow civil servants to be able to be hired and fired more easily, but for the right reasons.'" *Id*. (quoting S.Rep. No. 95–969, p. 4 (1978), U.S.C. Cong. & Admin. News 1978, p. 2726). However, contrary to Congress's objectives that the CSRA would "give agencies greater ability to remove or discipline

[1] See also OPM Memorandum, "Guidance on Revocation of Executive Order 14003," Feb. 7, 2025, https://www.opm.gov/chcoc/latest-memos/guidance-on-revocation-of-eo-14003.pdf; OPM Memorandum, "Guidance on Executive Order *Exclusions from Federal Labor-Management Programs*," March 27, 2025, https://www.opm.gov/chcoc/latest-memos/guidance-on-executive-order-exclusions-from-federal-labor-management-programs.pdf.

expeditiously employees who engage in misconduct, or whose work performance is unacceptable," *id*. (internal quotation marks omitted), reports and surveys consistently document that the Federal government struggles to effectively address widespread performance and conduct issues in the Federal workforce.

During his first administration, President Trump prioritized federal employee accountability by issuing E.O. 13839, "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles;"[2] E.O. 13839 recognized that implementation of Merit System Principles has fallen short of their ideals of promoting high levels of performance and correcting poor performance and misconduct.[3] Among many reforms to reestablish these Merit System Principles, President Trump sought changes to agencies' use of performance improvement plans to promote greater accountability. He also sought to lift the restrictions on supervisors and managers seeking to levy penalties commensurate with employee misconduct by eliminating requirements that agencies use progressive discipline measures in every disciplinary action.

On September 17, 2019, OPM issued a proposed rule to incorporate these principles and actions into its regulations to address the long-standing problem of employee accountability.[4] OPM proposed modifications to 5 C.F.R. Parts 432 and 752 to streamline the procedures for holding employees accountable for unacceptable performance and conduct detrimental to the efficiency of the service. OPM proposed, for example, clarifying that neither law nor OPM regulations prescribed the nature of any assistance agencies must provide to an employee during an opportunity to improve period, nor could the nature of any such assistance be determinative of the penalty imposed for a reduction in grade or pay or removal. Additionally, the proposed rule modified OPM's adverse action regulations under Part 752 to loosen the restrictions on management in assessing the appropriate penalty for misconduct by eliminating any requirement

[2] 83 FR 25343 (May 25, 2018).
[3] 5 U.S.C. 2301(b)(4)-(6).
[4] 84 FR 48794.

to use progressive discipline; expanding the scope of past discipline and work performance considered; narrowing the appropriate comparators; and allowing managers and supervisors to impose more severe penalties where appropriate. The proposed rule also limited the use of settlement agreements to hide adverse performance or misconduct information from other federal agencies. On October 16, 2020, OPM issued a final rule adopting these provisions with some modifications.

President Biden issued E.O. 14003 (86 FR 7231; Jan. 27, 2021), which rescinded E.O. 13839. As directed by E.O. 14003, OPM issued a proposed rule on January 4, 2022, to rescind most of OPM's employee accountability reforms adopted in its October 16, 2020 final rule.[5] OPM argued that these changes were necessary to effectuate President Biden's policy to "protect, empower and rebuild the career Federal workforce as well as its current policy to encourage employee organizing and collective bargaining."[6]

As part of its justification, OPM articulated several reasons for amending its regulations. On the timing and nature of assistance offered by an agency to improve an employee's unacceptable performance, OPM expressed concerns that the then-current rule would incentivize supervisors to offer minimal assistance during an opportunity to demonstrate acceptable performance (ODAP) period. OPM also stated that returning to the previous regulations would merely restate the statutory requirements under 5 U.S.C. 4302(c)(5).

OPM noted that its plan to rescind amendments to adverse action procedures under part 752 was consistent with established regulatory principles. OPM decided not to adopt the amendments in regulations and determined that rescinding them provides agencies greater flexibility in addressing employee misconduct. OPM also justified revoking the limitations on the use of settlement agreements it previously imposed arguing that they inhibited dispute resolution options; reduced the likelihood of reaching settlement; potentially increased the cost

[5] 87 FR 200.
[6] *Id*.

of litigation and arbitration; and crowded the docket of federal administrative adjudicative agencies. OPM stated that there were greater benefits to giving agencies flexibility to resolve disputes over their ability to access adverse information during the hiring process.

On November 10, 2022, OPM issued a final rule adopting its proposed rule with few modifications despite significant opposition. In justifying why it chose to proceed with proposed changes that would not credit an agency's attempts to correct an employee's unacceptable performance before the formal ODAP, OPM merely asserted that it favored returning to the statutory language. Despite many commenters arguing that OPM was giving extra-statutory protections to employees, OPM argued that agencies still had adequate means to take swift action to address unacceptable performance. OPM also generally asserted that the previous final rule placed restrictions and limitations on when agencies could offer performance assistance to struggling employees.

OPM also explained that it declined to modify its proposed changes to adverse action procedures under Part 752 because they reflected consistency with law while providing agencies with the necessary tools and flexibility to address unacceptable performance and misconduct. OPM also rebutted concerns that it failed to cite to data or evidence to support its change in policy, arguing that a change in administration is a sufficient basis for revising its regulations. OPM also argued that the final rule adopted during the first Trump administration lacked sufficient reliance interests since less than three-months lapsed between the final rule and the issuance of E.O. 14003.

Finally, in explaining why it decided to adopt its rescission of its limitations on clean record settlements, OPM stated that it "deem[ed] impracticable, unrealistic, and unhelpful because it absolutely prohibits agencies from altering or removing information about performance or misconduct as a condition to resolve or settle a complaint or challenge to a

personnel action, even where doing so furthers the best interests of an effective and efficient Government and the interests, voluntarily expressed, of both parties to personnel litigation."[7]

Shortly after taking the oath of office on January 20, 2025, President Trump revoked E.O. 14003 and restored the policies of E.O. 13839.[8] President Trump made it a priority of his Administration to ensure that the federal civilian workforce is accountable to the American people. See, e.g., E.O. 14171, 90 FR 8625 (Jan. 31, 2025) ("A critical aspect of this executive function is the responsibility to maintain professionalism and accountability within the civil service."). The need to promote accountability within the federal workforce comes at a critical time to ensure that the federal government meets the needs of the American people while agencies seek to eliminate waste and find efficiencies to deliver on their missions. To accomplish the President's vision for the federal workforce, OPM finds it necessary to amend its regulations issued during the Biden Administration and return to the regulations finalized during the first Trump Administration.

II. Reinvigorating Merit System Principles

President Trump made it a priority of his Administration to ensure that the federal civilian workforce is accountable to the American taxpayer. See, e.g., E.O. 14171, 90 FR 8625 (Jan. 31, 2025) ("A critical aspect of this executive function is the responsibility to maintain professionalism and accountability within the civil service."). The need to promote accountability within the federal workforce comes at a critical time to ensure that the federal government meets the needs of the American people while agencies seek to eliminate waste and find efficiencies to deliver on their missions.

In establishing the Merit System Principles that underpin the federal government, Congress intended to require a professional workforce designed to be used efficiently and

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[7] 87 FR 67774.

[8] 90 FR 8237 (Jan. 28, 2025). Note that section 6 of E.O. 14171 directed agencies to reverse changes to agency policies pertaining to disciplinary actions and unacceptable performance effectuated under E.O. 14003. That order in turn had required agencies to reverse changes to such policies effectuated under E.O. 13839. Consequently, E.O. 14171 on net directed agencies to return to the disciplinary and unacceptable performance policies implemented pursuant to E.O. 13839 and reversed under E.O. 14003.

effectively, where employees are retained based on performance or released from service; and, where high performance and achievement are demonstrated, agencies provide incentives and recognition for employee achievement. *See* 5 U.S.C. 2301(b)(3), (5)-(6). Congress also intended for federal employees to uphold exemplary standards of integrity and demonstrate a commitment to the public interest. 5 U.S.C. 2301(b)(4).

Over an extended period, numerous studies have documented that agencies face serious challenges holding federal employees accountable for poor performance and misconduct. While the CSRA "was passed, in part, to make it easier for managers to remove poor performers from the Federal workplace. Experience… shows that this goal has not been achieved."[9] The Government Accountability Office (GAO) reported in 1990 that "[a]bout half of the supervisors [it surveyed] said they had experienced difficulty in implementing the process for dealing with poor performers…[and] cited the significant amount of calendar time" the process may require, among other cumbersome reasons.[10] Specifically, GAO reported that "91,770, or 51 percent, of the supervisors experienced one or more problems, including the amount of time involved."[11] GAO also reported that "19,730, or 11 percent, of the supervisors would be unlikely to use their agency's process to deal with poor performers in the future, primarily because the process takes too long and uses too much of their time."[12] In a survey of more than 5,700 federal managers conducted in 1995, the MSPB found "most supervisors… perceive [chapter 43 procedures] to be too complicated, time consuming, or onerous."[13] And in 2015, GAO "reviewed the rules and trends relating to the review and dismissal of federal employees for poor performance," and found that "it can take six months to a year (and sometimes longer) to dismiss an employee."[14] It

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[9] Merit Sys. Prot. Bd., "Removing Poor Performers in the Federal Service," September 1995, available at https://www.mspb.gov/studies/studies/Removing_Poor_Performers_in_the_Federal_Service_Issue_Paper_September_1995_253662.pdf

[10] Government Accountability Office, "Performance Management: How Well Is the Government Dealing With Poor Performers?" October 1990, available at https://www.gao.gov/assets/ggd-91-7.pdf.

[11] *Id*.

[12] *Id*.

[13] *Id*.

[14] Government Accountability Office, "Federal Workforce: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance," February 2015, p. 1, available at https://www.gao.gov/assets/gao-15-191.pdf.

also found "agencies rarely use chapter 43 to dismiss employees," noting only 280 employees were dismissed under chapter 43 procedures in 2013, 45 percent of whom appealed, the average length of which took 243 days to complete.[15]

The use of legal settlement agreements also contributes to the problem of employee accountability in the federal workforce. Settlement agreements often contain terms that require agencies to remove any negative information about employees' performance or conduct from their official personnel folder and provide for a neutral reference during reference checks. The incorporation of these terms means that a hiring official may not become aware of an employee's past issues at another agency, which can interfere with agencies' ability to hire the best candidate for a position. Settlement agreements, thus, contribute to a cycle of passing around underperforming or problematic employees who suffer few, if any, consequences. OPM understands that this practice is colloquially described as the "Dance of the Lemons" within agencies.

OPM is proposing to incorporate the policies and changes first identified in E.O. 13839 into its regulations, as well as other revisions discussed below, as a necessary step toward ensuring accountability in the federal workforce. These proposed changes align with President Trump's vision for restoring merit to the workforce, promoting stewardship of taxpayers' money, and facilitating agencies' ability to deliver on their missions.

While E.O. 13839 is not currently in effect, President Trump directed agencies to rescind regulations and other policies implemented pursuant to E.O. 14003 that rescinded or reversed policies issued under E.O. 13839.[16] This directive applies to OPM's November 10, 2022, final rule. As stated in the 2022 final rule, OPM finds that "a change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of its regulations and programs."[17] Further and as discussed in greater detail below,

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[15] *Id*. at 25.
[16] *See* E.O. 14171, section 6.
[17] *See* 87 FR 67767 (cleaned up).

even if E.O. 14171 had not directed restoration of E.O. 13839 policies, OPM independently believes these changes are necessary to promote greater employee accountability.

III. Retiring the *Douglas* Factors

One of Congress's primary purposes in enacting 5 U.S.C. 7701, establishing the MSPB's appellate jurisdiction, was "to give agencies greater ability to remove or discipline expeditiously employees who engage in misconduct, or whose work performance is unacceptable." *Cornelius v. Nutt*, 472 U.S. 648, 662–63 (1985). This principal objective, however, has been frustrated by the perceived requirement to consider the 12 *Douglas* factors in every adverse action case—a requirement that is not mandated by statute. *Nagel v. Dep't of Health & Hum. Servs.*, 707 F.2d 1384, 1386 (Fed. Cir. 1983).

Since the Board's decision in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981) establishing 12 factors for assessing the reasonableness of an agency's chosen penalty for adverse actions taken under 5 U.S.C. 7513, agencies have often mechanically applied each of these factors. Considering each of these factors before taking an appropriate adverse action against an employee may now be seen by Federal managers as a requirement, as though the *Douglas* factors were statutorily mandated.

Quite the opposite, nothing in 5 U.S.C. 7513, or for that matter in *Douglas*, requires, or even suggests, the use of the 12 *Douglas* factors in every case. Instead, Congress carefully and deliberately established the following standard for Federal agencies taking covered adverse actions: "Under regulations prescribed by [OPM], an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service." 5 U.S.C. 7513.[18] The "efficiency of the service" standard enacted by Congress should be the basis upon which covered adverse actions are taken and reviewed under 5 U.S.C. 7513, not a weighing of the 12 *Douglas* factors. The Board set forth the 12 *Douglas* factors as a

[18] The requirement that an adverse action promote the "efficiency of the service" originated with the Lloyd-La Follette Act, ch. 389, sec. 6, 37 Stat. 539 (1912).

method for elucidating what constituted "efficiency of the service" in the context of review of agency penalty determinations, but the rigid application of the factors since that time, and the perceived obligation among Federal supervisors to consider each of the 12 *Douglas* factors in every case, has demonstrated that another method is needed. *See Douglas*, 5 M.S.P.R. at 306 (1981) (cautioning against a "mechanistic" or "formulaic" weighing of the *Douglas* factors in every case).

Further, MSPB does not view consideration of the *Douglas* factors in every adverse action case as necessary to uphold merit principles. On the contrary, it is concerned that the perceived requirement to consider each of the 12 *Douglas* factors in taking an action under 5 U.S.C. 7513 may undermine merit principles, particularly Merit System Principle 4 ("All employees should maintain high standards of integrity, conduct, and concern for the public interest") and Merit System Principle 6 ("Employees should be retained on the basis of adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards"). *See* 5 U.S.C. 2301.

MSPB therefore proposes to amend its regulations at 5 CFR part 1201 regarding its review of the agency's choice of penalty to make clear that it will no longer apply the 12 *Douglas* factors but, instead, will consider the penalty in each case under the totality of the circumstances. MSPB also proposes to codify existing case law regarding how it determines whether to sustain or mitigate penalties, consistent with *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999).

IV. Proposed Amendments

a. 5 CFR Part 412 – Supervisory, Management, and Executive Development

Part 412 applies to all incumbents of (and candidates for) supervisory, managerial, and executive positions in the General Schedule (GS), the Senior Executive Service (SES), or equivalent pay systems that are also covered by 5 CFR part 410. Among some of the most

common refrains that supervisors, managers, and executives report is the lack of training on effectively and efficiently managing their workforces and aligning their work units to the broader strategic goals of the agencies.[19]

The revisions to 412.202 proposed in this rule are intended to ensure agencies train and develop these individuals so that they may become more effective managers, improve their employees' performance without needing to take performance-based or adverse actions, and become better prepared to take any such action to address poor performance or misconduct.

§ 412.202 Systematic training and development of supervisors, managers, and executives.

While current regulation requires agencies to establish leadership development plans, programs, and strategies, provide periodic training to ensure quality managers, and to assist employees transitioning from non-supervisory employee to manager, or from manager to executive, the current requirements lack rigor and specificity. This proposed rule intends to improve the quality of such policies and programs.

Namely, under the proposed rule, agencies would be required to design and implement training and development programs for supervisors, managers, and executives with improved focus on promoting high levels of performance and accountability and align with OPM guidance. The proposed rule also reduces the interval for training to supervisory, managerial, and executive positions from once every three years to annually, to ensure such personnel are well-versed in the use of actions, options, and strategies to oversee and manage the productivity of their workforces. The proposed rule modifies four existing subjects and adds eight new ones agencies must incorporate into their annual trainings for supervisors, managers, and executives under 5 CFR 412.202(b). Among the new subjects, agencies will be required to provide training on: the procedures for holding employees accountable for unacceptable performance; effective use of

[19] U.S. Government Accountability Office, "2020 Federal Managers Survey: Results on Government Performance and Management Issues," July 27, 2021, available at https://files.gao.gov/special.pubs/gao-21-537sp/resultsall.htm.

probationary and trial periods, awards, bonuses, and other forms of employee recognition; and addressing reports of hostile work environment, retaliation, or harassment.

Additional and qualitatively-improved supervisor training is important to ensure supervisors, managers, and executives are appropriately equipped to build the high-performance culture essential to individual and organizational success as President Trump has directed.[20] For example, GAO's 2020 Federal Managers Survey found that a plurality of managers self-reported they have not been provided trainings to help accomplish basic workforce management tasks including but not limited to conducting strategic planning, setting performance goals, or using program performance to inform future decision-making.[21] Further, as it relates to the authorities of chapter 43 and 75 specifically, GAO reports supervisors may suffer from a lack of "basic understanding of the processes under chapter 43 and 75; and … knowledge or an understanding of requirements for addressing poor performance…"[22] OPM seeks to rectify this reported lack of expertise by increasing the cadence and improving the quality of the training provided pursuant to § 412.202.

OPM recognizes that agencies may have separate training requirements established by law. For example, 5 U.S.C. 9902(d) requires supervisors of the Department of War to complete a training program once every three years on authorities and topics detailed under that specific Section. The plain reading of the statute sets a floor—not a mandate—for supervisors to meet. Notwithstanding the provisions of 5 U.S.C. 9902(d)(2) or similar statute, OPM may establish training requirements under 5 U.S.C. 4118. As applicable here, 5 U.S.C. 4103 directs each agency to establish training programs in accordance with the regulations promulgated by OPM

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[20] *See, e.g.*, E.O. 14284, *Strengthening Probationary Periods in the Federal Service,* 90 FR 17729-33 (April 29, 2025); E.O. 14171, *Restoring Accountability to Policy-Influencing Positions Within the Federal Workforce*, 90 FR 8625 (Jan. 31, 2025); *Restoring Accountability for Career Senior Executives*, 90 FR 8481 (Jan. 30, 2025); *Return to In-Person Work* (Jan. 28, 2025).

[21] Government Accountability Office, "2020 Federal Managers Survey: Results on Government Performance and Management Issues," July 27, 2021, available at https://files.gao.gov/special.pubs/gao-21-537sp/resultsall.htm.

[22] U.S. Government Accountability Office, "Federal Workforce: Improved Supervision and Better Use of Probationary Periods are Needed to Address Substandard Employee Performance," February 2016, available at https://www.gao.gov/assets/gao-15-191.pdf.

under 5 U.S.C. 4118; and 5 U.S.C. 4103(a)(1). This directive, housed in 5 U.S.C. chapter 41, is in part the underlying predicate authority for 5 CFR 412.202. *See* 5 CFR part 412.

b. 5 CFR Part 432 – Performance-Based Reduction in Grade and Removal Actions

Part 432 applies to reduction in grade and removal of covered employees based on performance at the unacceptable level. Congress enacted 5 U.S.C. chapter 43, in part, to create a simple, dedicated, though not exclusive, process for agencies to use in taking adverse actions based on unacceptable performance. Since that time, however, chapter 43 has not worked as Congress intended. Specifically, interpretations of chapter 43 that are not statutorily required have hindered agencies from taking effective action against poor performers and sustaining those actions on appeal.

The proposed rule is intended to clarify the requirements in 5 U.S.C. chapter 43. The proposed amendments to 5 CFR part 432 should be construed to be read in concert with related provisions of Federal law (e.g., 5 U.S.C. 6384 and 29 U.S.C. 791(f)) as well as OPM's proposed rulemaking modifying part 430 of this subchapter. Finally, OPM notes that 5 U.S.C. 2301(b)(2) provides that employees should receive fair and equitable treatment without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights. All personnel actions must meet this statutory requirement.

§ 432.103 Definitions.

The proposed rule modifies the definition of "acceptable performance" in paragraph (a) to account for OPM's proposed rule "Performance Appraisal for General Schedule, Prevailing Rate, and Certain Other Employees," 91 FR 8780 (Feb. 24, 2026), which eliminates Level 2 summary levels in part 430. If adopted, these changes to part 430 would require employees to demonstrate performance at the Level 3 "Fully Successful" or equivalent level during an opportunity to demonstrate acceptable performance to avoid a performance-based action. Such employees would also need to sustain their performance at the Fully Successful level for one

year from the beginning of an opportunity to demonstrate acceptable performance to avoid a performance-based action under 5 CFR 432.105(b).

§ 432.104 Addressing unacceptable performance.

OPM proposes several changes to streamline its procedures agencies must follow in addressing unacceptable performance. First, under § 432.104 agencies are only required to provide performance assistance to employees performing unacceptably when the employee is given an opportunity to demonstrate acceptable performance. Under the proposed rule, agencies will be required to provide such assistance before or during the period in which an employee is given an opportunity to demonstrate acceptable performance. The proposed rule also provides that any such assistance provided to the employee before or during the opportunity to demonstrate acceptable performance meets the requirement under 5 U.S.C. 4302(c)(5).

Second, OPM is proposing to generally limit the opportunity period to demonstrate acceptable performance to 30 calendar days. Under the current regulation at § 432.104, OPM limited the amount of time for an employee to demonstrate acceptable performance to a "reasonable opportunity" without further defining the term. This undefined term allowed agencies the discretion through policies and collective bargaining agreements, to provide extensive time periods for employees to improve their performance. The MSPB has articulated factors it uses to determine whether the period of time granted is reasonable under the circumstances. *Macijauskas v. Dep't of the Army*, 34 M.S.P.R. 564, 566 (1987), *aff'd* 847 F.2d 841 (Fed. Cir. 1988). Agencies are typically left using their best predictive judgment on whether an administrative judge would retroactively agree that the amount of time afforded an employee was reasonable. This uncertainty results in lengthy opportunity periods, as managers seek risk aversion, that drag out the process and chills supervisors' willingness to engage in the chapter 43 process. The proposed rule sets a maximum of 30 calendar days for employees to demonstrate acceptable performance. However, an agency retains sole and exclusive discretion to extend this period when circumstances warrant additional time for performance evaluation.

Third, the proposed rule provides that agencies are not permitted to provide additional informal periods to demonstrate acceptable performance. OPM is aware that some agency collective bargaining agreements require managers to provide employees with "performance assistance periods" before they can initiate opportunity periods under 5 U.S.C. § 4302(c)(6). This can significantly extend the amount of time necessary to remove an underperforming employee through chapter 43 procedures, as the agency must proceed through both an informal performance assistance period and then an opportunity period.

Although the current regulation at § 432.104 does not prohibit or authorize these additional periods, OPM believes this prohibition is necessary to avoid agencies, whether through policy or collective bargaining agreement, from adding time beyond what OPM considers to be a reasonable amount of time for an employee to improve his or her performance to an acceptable level–30 calendar days. Establishing limits on the opportunity to demonstrate acceptable performance by precluding informal performance assistance periods or similar additional periods beyond what is required by law encourages efficient use of the procedures under chapter 43, reduces the burden of using these procedures on supervisors, and furthers effective delivery of agency mission while still providing employees with sufficient opportunity to demonstrate acceptable performance as required by law.

OPM notes that under this proposal supervisors would remain free to informally provide employees with assistance in improving performance at any time and indeed are expected to do so. This proposed regulation would only prohibit agency policies or practices, including those required by collective bargaining agreements, that establish definite periods (beyond those provided for in 5 U.S.C. § 4302(c)(6)) for demonstrating acceptable performance.

Lastly, the proposed rule specifies that the nature of the assistance provided to the employee is not determinative of any penalty imposed upon the employee who fails to demonstrate acceptable performance. This would prohibit an administrative judge or arbitrator from mitigating or reversing an agency-imposed penalty of a reduction in grade or removal based

on a finding that the agency did not offer sufficient or certain types of assistance during the opportunity to improve period.

§ 432.105 Proposing and taking action based on unacceptable performance.

Section 4302(c)(5) requires OPM to ensure each performance appraisal system provides for assisting employees in improving unacceptable performance. Similarly, performance appraisal systems must provide for reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance. 5 U.S.C. 4302(c)(6). Currently, § 432.105 does not specifically address whether assistance provided to an employee before or during an opportunity period satisfies the requirement under Section 4302(c)(5). The proposed rule decouples 5 U.S.C. 4302(c)(5) and (6) by clarifying in § 432.105 that the opportunity to demonstrate acceptable performance required prior to initiating an action pursuant to 5 U.S.C. 4303 is separate from the requirement to provide assistance with improving unacceptable performance. Aiding with improving unacceptable performance includes any and all performance assistance measures taken during the performance appraisal period to assist an employee to improve his or her performance and is not limited to any efforts taken during the formal opportunity period.

Moreover, Section 4303(a) authorizes agencies to reduce in grade or remove an employee for unacceptable performance. Neither 5 U.S.C. 4303 nor 5 CFR 432.105 specify which penalty must be proposed by an agency taking an action for unacceptable performance. Agencies are free to propose either a reduction in grade or removal. The proposed rule removes this choice by establishing removal as the default penalty agencies must propose for unacceptable performance. Agencies will, however, retain their discretion to mitigate a reduction in grade or lesser penalty such as a written warning consistent with their internal policies. Any such mitigation will be left to the sole and exclusive discretion of the higher agency official or agency head and may only be exercised consistent with the agency's mission. These updates are essential to ensure agencies can hold employees responsible for poor performance that negatively impacts the agency's

mission, especially as resources become more limited. Agencies must concentrate exclusively on their missions when determining whether to keep employees who are unable to fulfill the responsibilities of their positions.

OPM is further proposing to clarify an agency's and an employee's obligations under 5 U.S.C. 4303(b) by standardizing the timelines for chapter 43 actions, with appropriate qualifications for circumstances that may arise that would necessitate the non-adherence to those timelines. As a general matter, OPM is proposing to direct agencies to effectuate a proposed action no later than 30 days after the date on which an employee is notified of the proposed action. The proposed rule also limits the circumstances when an agency may extend the advance notice to only those situations where (1) it is necessary to comply with a stay ordered by a member of the MSPB under 5 U.S.C. 1214(b)(1)(A) or (B), or (2) to consider information gathered as part of a medical examination. Otherwise, an agency, through its Chief Human Capital Officer or equivalent official (such as the agency's HR Director), must request prior approval from OPM to extend the advance notice period for any other reason.

The proposed rule would provide an employee, in general, 7 to 10 calendar days from the date of the agency's proposed action to provide an answer to the proposed removal. The proposal also provides an agency with sole and exclusive discretion and authority to provide for a 10-day extension so that the employee may consider a settlement or other offer from the agency to terminate employment. The proposed rule would require that an employee raise any medical issues, such as illness, incapacitation, or disability, that might have impacted the employee's performance as part of the employee's answer. Failure to do so at that juncture would be considered a waiver of the ability to do so prior to the proposed action being effectuated, except where prohibited by statute.

Pursuant to statutory requirements, employees have the right to representation. The proposed rule provides clarification regarding the selection process for representatives and outlines the specific, limited circumstances under which an agency may, at its sole discretion,

deny an employee's chosen representative. Namely, the proposed rule allows the agency to disallow a representative if the representative is also an employee of the agency and his or her activities would cause a conflict of interest, the employee cannot be released from official duties because of priority needs of the Government, or that employee's release would give rise to unreasonable costs to the Government. The proposed rule also requires the employee to provide a written designation of his or her chosen representative to the agency

The proposed rule also prohibits the use of taxpayer-funded union time under 5 U.S.C. 7131(d) for a Federal employee serving as a representative of an employee during the procedures established under subparts B and D of part 752. OPM believes that American taxpayers should not pay for the representation of Federal employees charged with conduct detrimental to the efficiency of the service. As detailed in the *Taxpayer-Funded Union Time Usage in the Federal Government: Fiscal Year 2024*, taxpayers subsidize labor union representatives at a total compensation rate of $64.05 per hour to represent bargaining unit employees or at a total annual compensation cost of more than $207 million.[23] In Fiscal Year 2019, the total annual compensation cost was slightly below $135 million. OPM, thus, finds it entirely appropriate and necessary to reduce these growing costs by ending the general subsidization of employee opposition to proposed removals. Employees may represent themselves in such proceedings or bring in outside counsel. But agencies should not be required to subsidize employee opposition to removal actions. to shift these costs away from taxpayers to employees. This prohibition is also consistent with the policies of E.O. 13837 and two other OPM-proposed rulemakings. If adopted in the final rule, the regulation would prevent agencies from agreeing to a proposal or provision in a collective bargaining agreement or authorizing the use of taxpayer-funded union time under section 7131(d) for the purposes of representing employees during proceedings established under subparts B and D. Where agencies have agreed to provide such time in a

[23] https://www.opm.gov/about-us/reports-publications/agency-reports/fiscal-year-2024-taxpayer-funded-union-time-usage-in-the-federal-government/.

collective bargaining agreement before any such final rule, this prohibition would apply at the expiration of the term of that agreement.

To align with 5 U.S.C. 4303(c)(1) and to promote efficiency, the proposed rule directs agencies to make their final written decision within 30 days after the expiration of the advance notice period but encourages an agency to make its final written decision as soon as practicable. The proposal empowers the deciding official, in his or her sole and exclusive discretion, to mitigate the proposed action only where doing so is consistent with the mission of the agency.

§ 432.108 Settlement agreements.

Under E.O. 13839, President Trump prohibited agencies from agreeing to erase, remove, alter, or withhold from another Federal agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action. Such agreements or provisions thereof have traditionally been referred to as "clean record" settlements or become a part of agreements described as "last chance agreements."[24] This proposed rule is intended to promote the high standards of integrity, transparency, and accountability within the Federal workforce by requiring agencies to maintain personnel records that reflect complete information and preventing the alteration of information contained in those records in connection with a formal or informal complaint or adverse action. These limitations pertain to the exchange of information among Federal agencies and do not extend to external employers. Thus, agencies may agree to, for example, a provision in a settlement agreement that would provide a "neutral reference"[25] to a non-Federal agency

[24] These types of agreements call for an agency to hold a proposed action in abeyance for a period of time, typically one or two years, subject to an employee's good behavior. If the employee does not engage in any misconduct during this time, the agency would, as a condition of the agreement, mitigate or rescind the proposed action including removing evidence of the misconduct giving rise to the proposed action. Such agreements would be prohibited under this proposed rule.

[25] Agencies sometimes agree as part of a settlement agreement to provide a neutral reference to prospective employers. The terms of a typical neutral reference provide that an agency will only confirm the dates of employment, salary history, and title of an employee to a prospective employer conducting a reference check.

employer. This requirement would also ensure that those records are preserved so that agencies can make appropriate and informed decisions regarding an employee's qualification, suitability or fitness, and eligibility for access to classified information as applicable to future employment.

These requirements should not be construed to prevent agencies from correcting records of an action taken by the agency illegally or in error. In such cases, an agency has the authority—unilaterally or by agreement—to modify an employee's personnel file to remove inaccurate information or the record of an erroneous or illegal action. Specifically, the proposed rule states that the requirement would not prevent agencies from taking corrective action should it come to light, including during or after the issuance of an adverse personnel action, that information contained in a personnel record is inaccurate or documents an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel file to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal or a complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action, or an employee performance appraisal.

Finally, to the extent that an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency files. Under the proposed rule, if persuasive evidence emerges before a final agency decision that questions the validity of an adverse personnel action or the agency's ability to defend it in litigation, the agency may cancel or vacate the action. Additional information can emerge at any point in the process before the agency makes its final decision, including during an employee's response period. To the extent

an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency files. However, the requirements would continue to apply to any accurate information about the employee's performance or conduct which comes to light prior to issuance of a final agency decision on an adverse action.

Should an agency cancel an action or proposed action and remove it from an employee's personnel file, the agency may need to retain the removed documentation to comply with other obligations such as litigation holds, suitability background investigations, and national security clearance background investigations.

c. 5 CFR Part 715 – Nondisciplinary separations, demotions, and furloughs

§ 715.201 Applicability

The proposed language in this section removes the term "requested" to accommodate the proposed changes to 715.203.

§ 715.203 Abandonment

The proposed language in this section establishes a clear standard for agencies to use in determining whether an employee abandons his or her position. An employee deemed to have abandoned his position is not entitled to the statutory procedures under subparts D and F of Part 752 in the separation process. An employee who does not report for duty, or fails to return from leave or furlough of 30 days or less, for a period of 10 consecutive calendar days or longer without submitting a resignation is considered to have voluntarily abandoned their position. The D.C. Circuit has observed that the abandonment doctrine aligns with 5 U.S.C. § 7512, which delineates the categories of adverse actions subject to MSPB review and specifically excludes abandonment. The abandonment doctrine is recognized in MSPB decisions, judicial decisions, and OPM's Guide to Processing Personnel Actions.[26]

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[26] *McLane v. Burgum*, No. 23-5205, 2025 WL 817423, at *2 (D.C. Cir. Mar. 14, 2025); see also *Carroll v. Dep't of Interior*, 2014 WL 6791369 (M.S.P.B. Dec. 3, 2014); Off. of Personnel Mgmt., Guide to Processing Personnel Actions (2017), Ch. 35 at 1, Ch. 31 at 25.

OPM is convinced that it would benefit agency HR professionals if the abandonment doctrine were officially included in its regulations. OPM believes this proposal would clearly define the time required to establish abandonment, offering a regulatory standard where case law is unclear. OPM based its determination that 10 calendar days is reasonable on the Civil Service Commission's prior rule from the Federal Personnel Manual.[27]

d. 5 CFR Part 752 – Adverse Actions

§ 752.104 Settlement agreements.

The proposed language in this section establishes the same requirement that is detailed in the proposed rule changes at § 432.108, Settlement agreements. Through revocation of E.O. 14003 and rescission of policies effectuated under it, President Trump directed a return to policies promulgated under E.O. 13839 to promote transparency and accountability in the federal workplace. This includes prohibiting the use of settlement agreements by agencies to obscure poor performance or misconduct of federal employees. As such, the same prohibition of settlement agreements under § 432.108 is appropriate when agencies utilize adverse action procedures under 5 U.S.C. chapter 75. Please see prior discussion of § 432.108.

§ 752.202 Standard for action and penalty determination.

Currently, § 752.202 establishes the standard for action when agencies suspend employees for 14 days or less. An agency may only suspend an employee for 14 days or less for such cause as will promote the efficiency of the service under 5 U.S.C. 7503(a). Although the standard for action under this subpart is unchanged, the proposed rule introduces three additional requirements to be considered when determining the appropriate penalty pursuant to this subpart.

First, the proposed rule clarifies that an agency is not required to use progressive discipline under this subpart. This change mirrors the same policy articulated in E.O. 13839 which stated that supervisors and managers should not use progressive discipline and that each instance of conduct should be penalized based on the facts and circumstances.

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[27] See FPM Chapter 715, subchapter 3-2 (July 1969).

Second, OPM proposes to prohibit agencies from establishing or using tables of penalties or similar policies that prescribe mandatory or recommended disciplines. Certain agencies create penalty tables to help supervisors determine what discipline might best apply in specific cases. The creation and use of a table of penalties is neither required by statute, case law, or OPM regulation; nor does OPM provide written guidance on this topic. The applicable standard, "to promote the efficiency of the service," is broad and flexible enough to encompass all occurrences that may occasion an adverse action. Thus, agencies can address misconduct appropriately without a table of penalties, and with sufficient flexibility to determine the appropriate discipline for each instance of misconduct.

Tables of penalties may also create significant drawbacks to the viability of a particular action and to effective management. By establishing a range of penalties for an offense, tables of penalties restrict management's discretion to adjust disciplines according to the specific facts and circumstances of each case by eliminating certain options along the continuum. For example, an arbitrator mitigated a federal employee's seven-day suspension to a reprimand despite the employee's prior discipline two years earlier for "conduct unbecoming a federal employee," on the grounds that the previous offense did not count as a second offense of "disrespectful response to directions" under the agency's table of penalties.[28] OPM also recognizes that the existence of a table of penalties can encourage supervisors to assign more severe penalties than they believe are warranted in the particular case in order to align with the table's prescriptions. OPM believes supervisors should have discretion to tailor the penalty to the facts of the case without feeling restricted, in either direction, by a table of penalties.[29] OPM also encourages supervisors and managers to think carefully and coherently about when and how to impose discipline in a way that fosters an effective and efficient workplace, in the best interests of all employees and the

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[28] *U.S. Dep't of Energy and Am. Fed'n of Gov't Emps.*, 73 FLRA No. 100 (2023).

[29] Indeed, OPM has long cautioned that "*surface* consistency should be avoided" in favor of allowing for consideration of all relevant factors in the specific case. *Douglas*, 5 M.S.P.B. at 333 (emphasis in original). The MSPB has cautioned against "rigid formalism" in choosing a penalty and the "inflexible" use of tables of penalties. *Id*.

agency's mission. By contrast, tables of penalties can foster a "paint-by-numbers" approach in which managers may hide behind a chart imposed from above rather than take direct responsibility for their workplace.

Ultimately, managers must use their own judgment to thoughtfully address each situation as it happens, determining or recommending the most suitable discipline when required.

Third, OPM proposes in § 752.202(e) that agencies should not replace removal with suspension as a penalty when removal is warranted. Additionally, it should not be required that an employee be previously suspended or demoted before being removed. OPM previously adopted into regulations these commonsense principles.[30] Supervisors and managers should retain the flexibility to appropriately sanction misconduct so detrimental to the efficiency of the service that only removal is the appropriate penalty. Artificial constraints that only serve to reward such poor behavior should be removed to restore the public's trust in the federal workforce.

§ 752.203 Procedures.

The proposed changes in § 752.203(a) prohibit agencies from supplementing the procedures under subpart B when taking a performance-based action. This prohibition applies to both agency policies as well as collective bargaining agreements. Consistent with the proposed changes to the regulations under Part 432, OPM believes these changes are necessary to free supervisors and managers from administrative burdens placed upon them by agency policy or collective bargaining agreements that prevent them from quickly addressing misconduct in the workplace.

The proposed language in § 752.203(c) revises the timeline an employee is to be given to prepare an answer to a proposed action. OPM proposes to clarify that a reasonable amount of time for an employee to respond to such a proposal is not less than one business day but no more than 5 business days. The proposed language provides for an agency, in its sole and exclusive

[30] 85 FR 65940.

discretion, to offer an extension of no more than 5 additional calendar days, for a total of 10 calendar days, to consider a settlement or other offer from the agency, as well as an unlimited extension in such cases in which additional time is necessary for compliance with a statute, regulation, or where doing so is clearly in the government's interests.

The proposed § 752.203(d) establishes the same requirement outlined in the proposed rule changes in § 432.105(d)(3) regarding appropriate representation of federal employees during the procedures established under this Subpart. Providing consistent rules across similar procedures promotes compliance across OPM's employee accountability regulations.

The proposed § 752.203(e) also strongly encourages agencies to issue a decision on the proposed action as soon as practicable and establishes a recommended timeline for agencies to respond within five business days from the end of the employee's opportunity to respond. While decisions rendered after this deadline are still valid, OPM views it necessary to establish this time limit for agencies to measure their performance in effectively addressing conduct detrimental to the efficiency of the service.

The proposed § 752.203(f) authorizes employees to file an administrative grievance concerning an action taken under this subpart. It also proposes to prohibit bargaining unit employees or labor organizations on behalf of the bargaining unit employees from filing a negotiated grievance procedure contesting short-term suspensions taken under this subpart unless the agency and OPM agree that the negotiated grievance procedure does not impair the effective use of actions taken under this subpart. If either the agency or OPM subsequently determines that the negotiated grievance procedure impairs the effective use of actions under this subpart either may revoke their previous determination. OPM views these changes as necessary to prevent negotiated grievance procedures from creating significant delays and imposing significant expenses when agencies utilize short-term suspensions. Such delays and costs disincentivize supervisors and managers from carrying out relatively minor disciplinary actions. Congress intended suspensions of 14 days or less to be less administratively burdensome than adverse

actions. The proposed amendments permit continued grievance arbitration of such actions, but only where the agency and OPM find the use of grievance procedures does not impair their use as a disciplinary tool.

The proposed language in § 752.203(h) establishes the same requirements restricting settlement agreements that is detailed in the proposed rule changes at § 432.108, Settlement agreements. See prior discussion about §§ 432.108 and 752.104 for additional context.

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

This subpart addresses the procedural requirements for removals, suspensions for more than 14 days, including indefinite suspensions, reductions in grade, reductions in pay, and furloughs of 30 days or less for covered employees.

§ 752.401 Coverage.

The proposed § 752.401(b)(18) reflects the changes to 5 CFR part 11 established under E.O. 14284. Employees terminated for failing to complete a probationary or trial period will not be able to avail themselves of the procedures established under subpart D. This is also consistent with the definition of employee under 5 U.S.C. 7511(a)(1). Similarly, the proposed § 752.401(d)(2) adds those employees appointed to positions in Schedule G to the list of employees excluded from coverage under this subpart. The proposed rule reflects the prohibition under 5 U.S.C. 7511(b)(2) excluding employees occupying positions established under Schedule Policy/Career from adverse action procedures.

§ 752.403 Standard for action and penalty determination.

For the same reasons articulated previously, OPM is proposing to adopt the same changes proposed under § 752.202 and § 752.203(a) under § 752.403. The proposed § 752.403(a) adopts the same limitations found at § 752.203(a) on supplementing the procedures used by agencies in taking adverse actions under subpart D. The proposed § 752.403(c)-(e) add the same penalty determination standards proposed at § 752.202(c), (e), and (f). OPM is also proposing in §

752.403(b) to adopt the same standard in § 752.202(b) to clarify that agencies shall not take any action under subpart D prohibited by 5 U.S.C. 2302.

Additionally, OPM proposes in § 752.403(d) to clarify that in assessing an appropriate penalty, agencies should focus on comparators in the same work unit, with the same supervisor, and who were subjected to the same standards governing discipline. OPM is adopting the approach articulated by the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Miskill v. Social Security Administration*, 863 F.3d 1379 (Fed. Cir. 2017), to guide agencies in identifying the appropriate comparators. The Federal Circuit held that an agency need only provide "proof that the proffered comparator was in the same work unit, with the same supervisor, and was subjected to the same standards governing discipline." *Miskill*, 863 F.3d at 1384. A line of since-repudiated Board decisions functionally required supervisors to consider agency-wide comparators when assessing penalties for misconduct.[31] This both made removals for misconduct difficult and strongly discouraged agencies from showing leniency in appropriate circumstances, as a single incident of leniency anywhere in the agency could prevent it from removing any other employee for similar conduct. OPM accordingly proposes to regulatorily codify that the use of comparator employees is optional on the part of agencies; and, when used, appropriate comparators are those in the same work unit and with the same supervisor. This approach reinforces the key principle that each case stands on its own factual and contextual footing.

§752.404 Procedures.

Section 752.404(b) discusses the requirements for a notice of proposed action issued under this subpart. Specifically, § 752.404(b)(1) provides that, to the extent an agency, in its sole and exclusive discretion deems practicable, agencies should limit written notice of adverse

[31] *See Lewis v. VA*, 2010 MSPB 98 (2010); *Woebcke v. DHS*, 2010 MSPB 85 (2010); and *Villada v. USPS*, 2010 MSPB 232 (2010) (requiring agencies to look at agency-wide comparators when evaluating proposed discipline for misconduct). *But see Singh v. USPS, 2022* MSPB 15 (2022) (abandoning the standard set out in *Lewis* and related cases).

actions taken under this subpart to the 30 days prescribed in 5 U.S.C. 7513(b)(1). Any notice period greater than 30 days must be reported to OPM. OPM will use this information to evaluate whether agencies are (1) promoting a culture of high performance and accountability and (2) holding managers and human resources professionals accountable for efficient and effective human resources management. The proposed rule leaves unchanged the requirement that the notice must provide detailed information with respect to any right to appeal the action pursuant to Pub. L. 115-91 section 1097(b)(2)(A); specifically, the forum in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file. This additional language implements the requirement in Pub. L. 115-91 section 1097(b)(2)(A), which mandates that information on whistleblower appeal rights be included in any notice provided to an employee under 5 U.S.C. 7503(b)(1), 7513(b)(1), or 7543(b)(1).

OPM is proposing to modify § 752.404(b)(3) to remove language that it believes discourages supervisors from placing an employee on notice leave. The current regulation states that agencies ordinarily should not take employees they have proposed to suspend or remove out of the worksite and should instead generally keep them in a regular duty status. OPM believes the current regulation serves as a deterrent to supervisors and managers taking action under this subpart because it conveys a policy preference of discouraging use of the notice leave authority. According to MSPB, over 40% of supervisors "cited their discomfort" as a barrier to removing employees for misconduct.[32] GAO has also noted that "dislike of confrontation may deter supervisors from taking steps to address poor performance issues."[33] Put simply, evidence supports that a supervisor is less likely to take an appropriate adverse action if faced with the prospect of being required to see the employee against whom the action is taken each day for as

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[32] Merit Sys. Prot. Bd., "Remedying Unacceptable Employee Performance in the Federal Civil Service," p. 6, June 18, 1995, *available at* https://www.mspb.gov/studies/researchbriefs/Remedying_Unacceptable_Employee_Performance_in_the_Federal_Civil_Service_1627610.pdf.

[33] U.S. Government Accountability Office, "Issues Related to Poor Performers in the Workplace," June 30, 2005, available at https://www.gao.gov/assets/a93353.html.

long as the process may take. These proposed changes, nonetheless, still require the agency to make the appropriate assessment under 5 U.S.C. 6329b(b)(2) and 5 CFR 630.1503(b) when placing an employee on notice leave.

Additionally, OPM is proposing changes to § 752.404(c)(1) similar to its proposed changes at § 752.203(c). The proposed change under this subpart would narrow the window for employees to respond to a proposed adverse action to a 7-10 calendar day window. OPM is also proposing to enable agencies to offer a limited extension of this time period to allow an employee to consider a settlement or other offer from the agency, as well as allow an unlimited extension in cases in which additional time is necessary for compliance with a statute, regulation, or where doing so is clearly in the government's interests.

Finally, the proposed rule at § 752.404(g) discusses the requirements for an agency decision issued under this subpart. Specifically, the proposed rule at § 752.404(g)(3) includes new language that, to the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 10 calendar days of the conclusion of the employee's opportunity. However, an agency that exceeds this time limit is still authorized to take an action under this subpart. These proposed changes facilitate timely resolution of adverse actions while preserving employee rights.

§752.407 Settlement agreements.

The proposed language in this section establishes the same requirement that is detailed in the proposed rule changes at § 432.108, Settlement agreements. See prior discussion regarding §§ 432.108 and 752.104 for additional context.

Subpart F—Regulatory Requirements for Taking Adverse Actions Under the Senior Executive Service

This subpart addresses the procedural requirements for suspensions for more than 14 days and removals from the civil service as set forth in 5 U.S.C. 7542.

§752.603 Standard for action and penalty determination.

As with the rule changes proposed for §§ 752.202 and 752.403, the standard for action under this subpart remains unchanged. OPM also proposes to add nearly identical language to that proposed for § 752.202 and 752.403 regarding penalty determinations. Please see the prior discussion about § 752.202 and 752.403, with one notable difference. OPM proposes in 752.603(d) to remove language that limits the appropriate comparators to the same work unit, same supervisor, those employees subject to the same standards of discipline for purposes of determining the appropriate penalty. In OPM's view, including these limits for SES would likely produce no valid comparators as most SES members are the only executives within a work unit. Additionally, the proposed rule adds the same paragraph (f) proposed at § 752.403 as paragraph (f) at § 752.603 which states that a suspension or a reduction in pay or grade should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or reduced in pay or grade before a proposing official may propose removal.

§752.604 Procedures.

§ 752.604(b) discusses the requirements for a notice of proposed action issued under this subpart. OPM proposes revising the language in this subpart to be consistent with the advance notice period for general schedule employees. Specifically, § 752.604(b)(1) provides that, to the extent an agency, in its sole and exclusive discretion deems practicable, agencies should limit written notice of adverse actions taken under this subpart to the 30 days prescribed in 5 U.S.C. 7543(b)(1). Any notice period greater than 30 days must be reported to OPM.

The proposed rule also retains existing language that the notice must provide detailed information with respect to any right to appeal the action pursuant to Pub. L. 115-91 section 1097(b)(2)(A); specifically, the forum in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file. This additional language implements the requirement within Pub. L. 115-91 section 1097(b)(2)(A), which mandates that information on whistleblower appeal rights

be included in any notice provided to an employee under 5 U.S.C. 7503(b)(1), 7513(b)(1), or 7543(b)(1).

Finally, the proposed rule at § 752.604(g) discusses the requirements for an agency decision issued under this subpart. Specifically, the proposed rule at § 752.604(g)(3) includes new language that, to the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 30 calendar days of the conclusion of the employee's opportunity.

§752.607 Settlement Agreements.

The proposed language in this section establishes the same requirement that is detailed in the proposed rule changes at §§ 432.108, 752.203 and 752.407. Please see prior discussion regarding §§ 432.108 and 752.104 for additional context.

e. § 1201.56 Burden and degree of proof.

The MSPB proposes to amend its regulations to modify the 12-factor test used to assess penalty determinations, as initially established in its decision in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), and replace it with a new test for assessing whether an agency's chosen penalty under chapter 75 is reasonable. Under the proposed 5 CFR 1201.56(b)(3), MSPB will evaluate whether an agency's penalty is within the tolerable limits of reasonableness in light of the totality of the circumstances. MSPB will make this determination on a case-by-case basis; no particular set of factors must be considered in every case.

In proposing this departure from the 12-factor *Douglas* test, MSPB acknowledges that *Douglas* has long been a cornerstone of federal employment law. However, over the ensuing decades, agencies and, occasionally, MSPB, have applied *Douglas* in a rigid, mechanistic way that the original decision never contemplated or prescribed. For the reasons set forth in this proposed rule, and in conjunction with OPM's streamlining of performance management policy, the Board proposes to correct this rigid application and reaffirm the Board's commitment to

adjudicating disciplinary action appeals under a more flexible standard in conformance with its statutory authority.

Additionally, MSPB proposes to codify existing case law regarding how the Board determines whether to sustain or mitigate penalties. Consistent with *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999) (hereinafter "*Devall*"), if MSPB sustains all charges by the agency and determines that the agency's penalty is reasonable, it will sustain the agency's action. If MSPB sustains all the charges but determines the penalty is not reasonable, it may mitigate the penalty to the maximum reasonable penalty. If MSPB sustains fewer than all of the agency's charges, MSPB may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency did not indicate either in its final decision, or during proceedings before MSPB, that it desired that a lesser penalty be imposed if the Board did not sustain all of its charges. If an agency so indicated, MSPB may impose a lesser penalty the agency indicated it would have imposed or give the agency an opportunity to institute a lesser penalty. If an agency did not indicate that it desired a lesser penalty be imposed if MSPB did not sustain all its charges, MSPB may mitigate the agency's penalty to the maximum reasonable penalty or give the agency an opportunity to institute a lesser penalty.[34]

Legal Standards Governing Penalty Review Under Statute and Regulation

Congress has directed that an agency may take an adverse action "only for such cause as will promote the efficiency of the service."[35] In addition, the statute requires that the employee receive procedural rights—notice, an opportunity to respond, representation, and a written decision.[36]

When an employee appeals a chapter 75 action, the Board adjudicates the appeal under 5 U.S.C. 7701. The agency bears the burden of proof, and the Board must sustain the agency

[34] *Devall*, 178 F.3d at 1260.
[35] 5 U.S.C. 7513(a).
[36] 5 U.S.C. 7513(b).

action only if supported by the applicable evidentiary standard.[37] Specifically, for actions under chapter 75, the agency must prove its charge and its penalty by a preponderance of the evidence and for actions under chapter 43, by substantial evidence.[38] An appellant may prevail by establishing that the agency has committed harmful procedural error in arriving at its decision, the agency's decision was based on a prohibited personnel practice, or the agency's decision was contrary to law.[39]

Regarding the penalty imposed, nothing in the governing statutes or regulations mandates the use of any particular set of enumerated factors. The statutory command is that the action must be reasonable and "promote the efficiency of the service," and the Board must evaluate the agency's justification on the record as a whole.

The Douglas Decision and the Emergence of the Twelve Factors

In *Douglas*, the Board confronted the question of how to assess the reasonableness of penalties selected by agencies under chapter 75. The Board held that it possessed the authority—previously exercised by the Civil Service Commission—to mitigate penalties in appropriate circumstances.[40] It then summarized prior decisions into a nonexhaustive list of twelve relevant considerations, now commonly called the *Douglas* factors.

This nonexhaustive list of *Douglas* factors included: (1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5)

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[37] 5 U.S.C. 7701(c)(1); 5 CFR 1201.56(b).
[38] 5 CFR 1201.56(b)(1)(ii).
[39] 5 CFR 1201.56(c).
[40] The Board's proposal to overrule the *Douglas* test will not alter its holding regarding its mitigation authority, which the Federal Circuit has also recognized. *Devall*, 178 F.3d at 1256.

the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.[41] These *Douglas* factors quickly became circulated throughout agency policies, OPM guidance, and Board case law.

From the outset, *Douglas* cautioned that not all factors apply in every case and that the list should not supplant the statutory inquiry. Nonetheless, although nothing in *Douglas* or subsequent case law[42] so required, the factors became the framework around which agencies structured penalty determinations and the manner in which appellants and advocates litigated penalty issues. The Board has observed that application of *Douglas*, primarily by agencies but at times also by MSPB, has gradually become overly formalistic and rigid, at times divorced from the statutory standard. Agencies regularly rely on standardized "*Douglas* worksheets" as if they were legally compulsory. Parties before the Board routinely litigate whether each of the twelve factors was considered in a case, whether the deciding official assigned an adequate weight to each factor, whether the agency's decision letter mechanically checked each box, or whether the administrative judge conducted an explicit factor-by-factor review. This checklist-centered

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[41] *Douglas*, 5 M.S.P.R. at 305.

[42] *E.g.*, *Nagel v. Department of Health and Human Services*, 707 F.2d 1384 (Fed. Cir. 1983) (rejecting the contention that *Douglas* created a checklist that must be specifically considered and addressed "one by one" in every case and stating that the factors should not be applied mechanically either by agencies or the Board).

mindset has increasingly overshadowed the statutory question: whether the agency's chosen penalty reasonably promotes the efficiency of the service under 5 U.S.C. 7513(a).

Thus, while *Douglas* intended flexibility, the evolution of practice has led to rigidity, formalism, and a risk of misplacing emphasis on a checklist of factors rather than the reasonableness inquiry. The Board concludes that a return to a simpler, more flexible, statute-focused inquiry is required to remain faithful to Congress's directives.

For all these reasons, the Board proposes to reconsider *Douglas* and its progeny to the extent they require a factor-by-factor penalty analysis in appeals arising under 5 U.S.C. chapter 75. Going forward, the Board proposes to assess the reasonableness of an agency's penalty under a totality-of-the-circumstances standard, consistent with the statutory command that discipline be "for such cause as will promote the efficiency of the service."

Board Deference to an Agency's Choice of Penalty

Douglas and countless other decisions since have recognized that the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, acknowledging that the Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised.[43] In other words, an agency's choice of penalty is generally entitled to deference.

That deference is not unbounded, however. The Federal Circuit explained in *Devall* that the Board's degree of deference to an agency's penalty depends on whether the Board sustains all of the agency's charges or only some of them.[44] *Devall* evaluated the Board's and OPM's relative statutory authorities, and its formulation binds both agencies. Accordingly, the Board proposes to codify the *Devall* standard in its penalty review regulation, so all parties, and the Board's administrative judges, understand how the Board will exercise its penalty review authority.

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[43] *E.g.*, *Thomas v. Dep't of the Army*, 2022 MSPB 35, at 6 (2022); *Douglas*, 5 M.S.P.R. at 302.
[44] 178 F.3d at 1260.

Additionally, this proposed rule, if finalized, will not alter longstanding case law directing that if an agency intends to rely on "aggravating factors" as the basis for the imposition of a penalty, such factors should be included in the advance notice of adverse action so that the employee will have a fair opportunity to respond to those factors before the agency's deciding official.[45] Otherwise, the agency risks reversal of an otherwise supported adverse action, including its reasonable penalty, on due process grounds.[46]

f. Limits on Agencies' Policies and Labor-Management Relations Implications

A component of these proposed government-wide rules would be to in effect create an outer bound outside which an agency would be precluded from providing for or otherwise authorizing any requirements, process, standards, or allowances not contemplated, in whole or in part, by this rule. Thus, these procedures are proposed to supersede any conflicting provisions found in agency policies or collective bargaining agreements.

The Federal Service Labor-Management Relations Statute (the FSLMRS, enacted as part of the CSRA) provides that "the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation." 5 U.S.C. 7117(a)(1). This would be such a government-wide rule. It is proposed to apply to each agency and employee covered under chapter 43 and 75, respectively, and proposes to regulate and tailor how each agency is to exercise its broad workforce management authorities under 5 CFR parts 412, 432, and 752. For example, this rule is proposing to strictly circumscribe the length of an opportunity to demonstrate acceptable performance to 30 calendar days with limited exceptions.

Therefore, it would firmly and completely limit the flexibility of agencies to provide processes not contemplated by this rule, including by agreeing to conflicting provisions in

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[45] *E.g.*, *Ward v. U.S. Postal Serv.*, 634 F.3d 1274, 1280 (Fed. Cir. 2011); *Solis v. Dep't of Justice*, 117 M.S.P.R. 458, 461-462 (2012).
[46] *Ward*, 634 F.3d at 1280; *Solis*, 117 M.S.P.R. at 461-462.

collective bargaining agreements. *See U.S. Dep't of Treasury, I.R.S. v. FLRA*, 996 F.2d 1246, 1250-51 (D.C. Cir. 1993) (5 U.S.C. 7117(a)(1) "permits the government to pull a subject out of the bargaining process by issuing a government-wide rule that creates a regime inconsistent with bargaining," including where a regulation "directs the exercise of existing management prerogatives in a *specific* way, so that *particular* subjects or appropriate arrangements are identified as appropriate topics of bargaining," citing *Office of Personnel Management v. FLRA*, 864 F.2d 165, 171 (D.C. Cir. 1988) (emphasis in original)).[47] OPM takes this approach to limit agency discretion and limit the scope of collective bargaining to reduce and eliminate barriers to employee accountability. As noted by GAO, the average dismissal process for removing an employee for unacceptable performance utilizing chapter 43 and 5 CFR Part 432 procedures takes up to one year.[48] This extensive delay to correct employee performance is intolerable for an efficient and effective government and inconsistent with Merit System Principles.

As a result, under this proposal, an agency would be unable to, for example, categorically establish through agency policy (including policy set forth in a collective bargaining agreement) a 45-day ODAP prior to initiating a performance-based removal under chapter 43. Many collective bargaining agreements currently require agencies to provide ODAPs prior to effectuating performance-based removals not just under 5 CFR Part 432, but also under 5 CFR Part 752. The proposed prohibition on requiring procedures beyond those set forth in this rule would prohibit such requirements for Part 752 performance-based actions. Agencies should strictly construe the exceptions established under this rule as just that–exceptions. OPM will monitor agencies' use of these exceptions to ensure they do not 'swallow the rule' and undermine the executive branch's agenda of promoting high levels of employee accountability.

V. Regulatory Analysis

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[47] OPM also notes that any collective bargaining agreement that conflicts with a government-wide regulation, the conflicting provisions of the agreement will prevail until the expiration of its term. 5 U.S.C. 7116(a)(7).

[48] Government Accountability Office, "Federal Workforce: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance," GAO-15-191, pp. 13-14 (Feb. 2015). https://www.gao.gov/assets/gao-15-191.pdf.

1. Statement of Need

This rule is needed to improve performance, accountability, and transparency within the federal workforce. Without streamlined processes for holding employees accountable, agencies will continue to suffer from segments of their workforces that detract from their maximum potential in delivering on their critical missions. Moreover, current regulations do not empower agency leaders, supervisors, and managers to hold employees accountable. As discussed in the preamble, regulations and agency policies unnecessarily create impediments that frustrate supervisors and managers attempting to hold employees accountable. Holding employees accountable for unacceptable performance or misconduct has become too difficult without reform.[49] In a 2016 study conducted by MSPB, federal employees expressed skepticism that their agencies successfully addressed performance and conduct issues. One in four employees "agreed that management addressed poor performances effectively," while two in five "agreed that their agency retains its best performers."[50] One agency recently reported how difficult it is to remove employees for poor performance and misconduct, citing, for example, one situation where it took an entire year to effectuate a removal for poor performance.[51] The result is a federal workplace filled with poorly performing employees and a frustrated workforce. From Fiscal Years 2019-2025, agencies terminated or removed 2,996 employees on average[52], or about 0.15% of the federal workforce.[53] The evidence, thus, supports this rulemaking to streamline an overcomplicated process for removing employees for unacceptable performance and misconduct; remove extra-statutory processes that impede accountability; promote transparency; and fulfill

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[49] E.O. 14171, "Restoring Accountability to Policy-Influencing Positions Within the Federal Workforce," 90 FR 8625 (Jan. 31, 2025).

[50] MSPB, "The Merit System Principles: Guiding the Fair and Effective Management of the Federal Workforce," Sept. 2016, p. 51, *available at*: https://www.mspb.gov/studies/studies/The_Merit_System_Principles_Guiding_the_Fair_and_Effective_Management_of_the_Federal_Workforce_1340293.pdf.

[51] Comment 29917 to OPM's notice of proposed rulemaking, "Improving Performance, Accountability and Responsiveness in the Civil Service," April 23, 2025, *available at*: https://www.regulations.gov/comment/OPM-2025-0004-29917.

[52] OPM used data from its Enterprise Human Resources Integration to calculate this seven-year average. This data is uploaded and available in the docket.

[53] OPM used the average number of terminations and removals between Fiscal Years 2019-2025 and the government-wide on-board strength as of February 2026 (2,028,138) to determine this figure.

Congressional intent of fostering a workforce that maintains high standards of integrity and performance.[54]

2. Impact

The proposed changes are expected to allow greater flexibility for agency leaders, supervisors, and managers to take decisive action when faced with federal employees performing unacceptably or who commit misconduct that harms the efficiency of the service. Among the many proposed changes, supervisors will be able to fashion penalties based on the facts and circumstances on each individual case, not based on required progressive discipline. Supervisors will also be able to make quicker decisions on an employee's ability to perform acceptably by limiting the period for performance improvement plans. And agencies will no longer be able to obscure an employee's poor performance or misconduct through a settlement agreement, thereby ending the Dance of the Lemons and empowering agencies to hire and retain employees that are capable and willing to contribute to mission success.

Current federal employees subject to the provisions of chapters 43 and 75 of the United States Code, or whose agencies adopt such provisions under their own legal authorities, will be impacted by the rule. For employees, the proposed changes will reduce the period afforded during a performance improvement plan to demonstrate acceptable performance to 30 calendar days. It may also result in increased penalties for actions taken under part 752. The proposed changes will also preclude agencies and employees from engaging in settlement agreements that obscure, modify, and remove from an employee's personnel files documented poor performance or misconduct. Such information would, therefore, be available to hiring officials seeking information on past performance or misconduct when making a hiring decision. This will improve the quality of agency hiring. Agency leaders, supervisors, and managers will benefit from having greater flexibility and streamlined processes for holding employees accountable. OPM also acknowledges that the prohibition of clean record settlement agreements will make it

[54] See 5 U.S.C. 2301(b)(6).

more difficult for agencies to persuade employees to voluntarily quit and, thus, further complicate or delay resolution of an action. The proposed regulations also require, to the extent practicable, that leaders, supervisors, and managers render decisions on a proposed removal within 30 calendar days and, therefore, require them to devote more time to such decision making. Relatedly, agencies whose personnel are subject to these proposed changes will be required to update their internal disciplinary policies and procedures. Agencies will also need to monitor internal processing of proposed actions under subparts D and F and report to OPM where it provides more than 30 days' advance written notice to employees and members of the Senior Executive Service, respectively. Labor unions, too, will see impacts to their collective bargaining agreements. If a final rule is adopted with the proposed changes, any change in the regulation that does not conflict with a collective bargaining agreement will be immediately enforceable. For those collective bargaining agreements that conflict with any change, the government-wide regulation will become enforceable upon the expiration of the term of the agreement.

3. Costs

One-time costs

The rule would affect the operations of more than 80 Federal agencies, ranging from cabinet-level departments to small independent agencies. The cost analysis to update policies and procedures assumes an average salary rate of Federal employees performing this work at the 2026 rate for a GS-14, step 5, from the Washington, DC, locality pay table ($163,104 annual locality rate and $78.15 hourly locality rate). OPM assumes the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $156.30 per hour. OPM estimates that it will take 100 hours of work by employees with an average hourly cost of $156.30 per hour, or approximately $1.25 million.

Recurring costs

The rule would likely result in an increase in the number of actions taken against employees under parts 432 and 752. OPM estimates that the number of such actions will rise by 20% based on an analysis of OPM data as well as annual reporting from the MSPB. As noted above, agencies terminate or remove 2,996 employees each year. During the last full fiscal year of President Trump's first term when the policies and requirements of E.O. 13839 were in place, 2,574 employees were terminated or removed for discipline or performance in Fiscal Year 2020 under procedures governed by OPM regulations.[55] In Fiscal Year 2021, that number fell by 4.4% to 2,434.[56] More recently, the number of terminations or removals from Fiscal Year 2024 to Fiscal Year 2025 grew from 3,126 to 4,160, a 33% increase as the federal government entered the second Trump administration.[57] OPM also reviewed the MSPB's annual reports for Fiscal Years 2020 and 2022 to analyze appeals data filed by federal employees seeking to reverse appealable actions.[58] In Fiscal Year 2020, the MSPB issued 5,265 initial decisions of which 2,903 involved adverse actions, performance-based actions, individual right of action appeals, or raised claims under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[59] In Fiscal Year 2022, the MSPB issued 4,241 initial decisions or 20% fewer than Fiscal Year 2020. Of these 4,241 initial decisions, the Board issued 2,275 initial decisions that fell within these four categories and represented a 22% decline compared to Fiscal Year 2020.[60]

OPM recognizes that the effects from the workforce reductions beginning on January 20, 2025, may reduce the total number of actions taken under these regulations. However, based on the latest publicly available, full fiscal year data from OPM and the MSPB's annual report[61],

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[55] This data is uploaded and available in the docket at https://www.regulations.gov/docket/OPM-2025-0012.
[56] *Id*.
[57] *Id*.
[58] MSPB, "Annual Report for FY 2020," January 19, 2021, *available at* https://www.mspb.gov/about/annual_reports/MSPB_FY_2020_Annual_Report_1800131.pdf (MSPB 2020); MSPB, "Annual Report for FY 2022," April 18, 2023, *available at* https://www.mspb.gov/about/annual_reports/MSPB_FY_2022_Annual_Report_2022671.pdf (MSPB 2022).
[59] MSPB 2020 at p. 12.
[60] MSPB 2022 at p. 11.
[61] The MSPB annual report for FY 2024 reported 1,832 initial decisions across the four categories relevant to this rulemaking. MSPB, "Annual Report for FY 2024," June 24, 2025, *available at* https://www.mspb.gov/about/annual_reports/MSPB_FY_2024_Annual_Report.pdf.

OPM estimates that agencies will take an additional 599 terminations or removals governed by these regulations and the MSPB will issue an additional 366 initial decisions due to this rulemaking.

In determining the additional costs to agencies in processing 599 terminations or removals governed by these regulations, OPM assumes that each action will require one first-level supervisor, one second-level supervisor, and one human resources subject matter expert, to execute an action, each paid at the rate in 2026 for GS-15, step 5, from the Washington, DC, locality pay table ($191,850 annual locality rate and $91.93 hourly locality rate). OPM assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $183.86. We estimate that each action requires one first-level supervisor, one second-level supervisor, and one human resources subject matter expert to perform 24, 16, and 36 hours of work, respectively. Thus, each action costs approximately $13,973.36 or $8.37 million each year.

To determine the additional costs to the MSPB for adjudicating an additional 366 initial appeals, OPM assumes that the Board's administrative judges at the GS-15 grade levels will adjudicate appeals. In estimating the cost of adjudicating these cases, we assume that each appeal requires one administrative judge paid at the rate in 2026 for GS-15, step 5, from the Washington, DC, locality pay table ($191,850 annual locality rate and $91.93 hourly locality rate); one paralegal at the rate in 2026 for a GS-11, step 5, from the Washington, DC, locality pay table ($96,843 annual locality rate and $46.40 hourly locality rate); and one chief administrative judge paid at the rate in 2026 for a GS-15, step 5, from the Washington, D.C., locality pay table. 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 an assumed labor cost of $183.86, $92.80, and $183.86 per hour for these respective positions. We estimate that each initial appeal requires 60, 12, and 4 hours for an administrative judge, paralegal, and chief administrative judge, respectively, to adjudicate an appeal. Based on these assumptions, we

estimate the cost for the MSPB to adjudicate each additional appeal at $12,880.64 per appeal or $4.71 million per year for 366 appeals.

OPM also expects that the MSPB will adjudicate an additional 15% increase in petitions for review (PFRs). OPM notes that it is difficult to assess how many additional PFRs should be expected as a result of this proposed rule. Nonetheless, OPM expects an increase commensurate with the increase in initial appeals as a consequence of additional adverse actions taken by agencies. In estimating an increase in PFRs, OPM considered the number and types of issues raised in PFRs before and after the loss in quorum at the MSPB from January 8, 2017, through March 3, 2022. In reviewing the number of PFRs, in Fiscal Year 2016 the Board adjudicated 1,022 PFRs of which 762 involved adverse actions, performance-based actions, individual right of actions, or USERRA.[62] In Fiscal Year 2023, the Board adjudicated 1,252 PFRs of which 907 involved adverse actions, performance-based actions, individual right of actions, or USERRA.[63] In Fiscal Year 2024, the Board adjudicated 2,129 PFRs of which 1,370 involved adverse actions, performance-based actions, individual right of actions, or USERRA.[64]

Across these three Fiscal Years, the number of PFRs filed rose to more than double from Fiscal Years 2016 to 2024. The proportion of PFRs involving matters potentially impacted by the changes proposed in this rule were 75%, 72%, and 64%, respectively. OPM anticipates the number of PFRs adjudicated at the Board will rise consistent with the expected number of initial appeals. OPM estimates that the number of PFRs involving adverse actions, performance-based actions, individual right of actions, and USERRA will rise by 205 to 1,575, or 15% from Fiscal Year 2024 levels, as a result of this rulemaking.

To determine the additional costs to the MSPB for adjudicating an additional 205 PFRs, MSPB assumes that each PFR requires the Chairman and two Members of the Board paid at the

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[62] Merit Sys. Prot. Bd., "Annual Report for FY 2016," p. 26, January 18, 2017, *available at* https://www.mspb.gov/about/annual_reports/MSPB_FY_2016_Annual_Report_1374269.pdf.
[63] Merit Sys. Prot. Bd., "Annual Report for FY 2023," p. 16, May 1, 2024, *available at* https://www.mspb.gov/about/annual_reports/MSPB_FY_2023_Annual_Report.pdf.
[64] Merit Sys. Prot. Bd., "Annual Report for FY 2024," p. 9, June 24, 2025, *available at* https://www.mspb.gov/about/annual_reports/MSPB_FY_2024_Annual_Report.pdf.

2026 rate of Executive Schedule Levels III ($168,400, $80.69 hourly rate) and IV ($158,500, $75.95 hourly rate),[65] respectively; and one attorney paid at the rate in 2026 for a GS-15, step 5, from the Washington, DC, locality pay table ($191,850 annual locality rate and $91.93 hourly locality rate). 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 an assumed labor cost of $161.38 for the Chairman, $151.90 for the two Members, and $183.86 for the attorney. We estimate that each PFR requires 2 hours each for the Chairman and two Members, and 8 hours for the attorney to adjudicate each PFR. Based on these assumptions, we estimate the cost for the MSPB to adjudicate each additional PFR at $2,401.24, or approximately $492,254.20 per year for 205 PFRs.

OPM also expects that agencies and the EEOC will see an increase in costs from an increase in Equal Employment Opportunity complaint processing attributed to the prohibition of clean record settlements and supervisors encouraged to correct unacceptable performance and misconduct. OPM reviewed the last two publicly available annual reports published by the EEOC to assess the potential impacts of the proposed rule. OPM anticipates that federal agencies will see an increase of 8% in the number of completed counselings and an increase of 15% in the number of complaints of discrimination filed by employees. For Fiscal Year 2020, federal employees entered and completed 36,359 counselings.[66] Subsequently, federal employees filed 14,812 complaints of discrimination.[67] Of these, 3,562 complaints involved various types of disciplinary actions and 1,468 complaints concerned an employee's performance evaluation or appraisal.[68] For Fiscal Year 2021,[69] federal employees entered and completed 33,561

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[65] These positions are subject to the pay freeze imposed under the Consolidated Appropriations Act of 2026 (P.L. 119-75, Feb. 3, 2026). See OPM, Updated Guidance – Pay Freeze for Certain Senior Political Officials, CPM 2026-06, Feb. 12, 2026, *available at*: https://www.opm.gov/chcoc/latest-memos/updated-guidance-pay-freeze-for-certain-senior-political-officials-1.pdf.

[66] EEOC Fiscal Year 2020 Annual Report on the Federal Work Force, "Table B-1 FY 2020 Total Work Force, Counselings, and Complaints," March 2023, *available at* https://www.eeoc.gov/sites/default/files/2023-02/FY%202020%20Annual%20Report%20Complaint%20Tables.zip.

[67] *Id*.

[68] *Id.* at "Table B-8 FY 2020 Complaints Filed Basis and Issues – Grand Total."

[69] The EEOC has not published its annual report for any fiscal year after 2021.

counselings.[70] Subsequently, federal employees filed 12,946 complaints of discrimination.[71] Of these, 3,057 complaints involved various types of disciplinary actions and 1,241 complaints concerned an employee's performance evaluation or appraisal.[72] Between the two fiscal years, EEOC data shows the number of completed counselings fell by 8%, while complaints concerning disciplinary actions and performance evaluations or appraisals fell by 14% and 16%, respectively. Thus, OPM views an increase of 2,684, or 8%, in the number of completed counselings, and 350, or 15%, in the number of complaints of discrimination concerning disciplinary actions and performance evaluations or appraisals over Fiscal Year 2021 levels as reasonable given that Fiscal Year 2020 encompasses the final year of the first Trump administration which established similar policies as the ones encompassed in this proposed rule.

In assessing the cost of 2,684 additional EEO counselings, OPM believes that agencies will use existing EEO specialists to process at the rate in 2026 for GS-12, step 5, from the Washington, DC, locality pay table ($116,071 annual locality rate and $55.62 hourly locality rate), taking 16 hours of time to process. OPM assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $111.24 per hour. The total additional cost to federal agencies to provide this EEO counseling is approximately $4.78 million. OPM also anticipates that agencies will utilize existing EEO specialists to process the 350 complaints of discrimination it attributes to the proposed rule. Using the same cost information for a GS-12, step 5, EEO Specialist to conduct an investigation over the course of 30 hours, OPM estimates that the total additional cost to federal agencies to investigate complaints of discrimination is approximately $1.17 million.

Following the investigative stage, OPM assumes that 250 complaints will proceed to a final agency decision while 100 will be adjudicated by an EEOC administrative judge. In

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[70] EEOC Fiscal Year 2021 Annual Report on the Federal Work Force, "Table B-1 FY 2021 Total Work Force, Counselings, and Complaints," December 2024, *available at* https://www.eeoc.gov/sites/default/files/2024-12/2021%20Annual%20Report%20Complaints%20Tables.zip

[71] *Id*.

[72] *Id*. at "Table B-8 FY 2021 Complaints Filed Basis and Issues – Grand Total."

drafting and issuing a final agency decision, OPM estimates that agencies will employ one EEO Specialist paid at the rate in 2026 for GS-12, step 5, from the Washington, DC, locality pay table ($116,071 annual locality rate and $55.62 hourly locality rate) to perform 12 hours of work to draft the decision; and one EEO Director paid at the GS-15, step 5, from the Washington, DC, locality pay table ($191,850 annual locality rate and $91.93 hourly locality rate) to perform 4 hours of work to review and sign the decision. OPM also assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $111.24 and $183.86 per hour, respectively. OPM estimates that the total cost to the Federal Government to issue 250 final agency decisions is approximately $517,580.

In adjudicating the 100 cases filed with the EEOC, OPM assumes that an EEOC administrative judge paid at the rate in 2026 for GS-14, step 5, from the Washington, DC, locality pay table ($163,104 annual locality rate and $78.15 hourly locality rate) will adjudicate complaints; the chief administrative judge paid at the GS-15, step 5, from the Washington, DC, locality pay table ($191,850 annual locality rate and $91.93 hourly locality rate) will review the administrative judge's decision; and a paralegal paid at the GS-11, step 5, from the Washington, DC, locality pay table ($96,843 annual locality rate and $46.40 hourly locality rate) will assist the administrative judge during the adjudicative hearing process. OPM also assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $156.30, $183.86, and $92.80 per hour, respectively. OPM estimates that each complaint will require 60, 4, and 6 hours, respectively, of an administrative judge, chief administrative judge, and paralegal to adjudicate each complaint. Therefore, OPM estimates that the total cost to adjudicate these 100 complaints is approximately $1.07 million.

OPM also estimates that 40 of the 100 complaints adjudicated will be appealed to the EEOC's Office of Federal Operations. OPM assumes that an EEOC attorney paid at the rate in

2026 for GS-14, step 5, from the Washington, DC, locality pay table ($163,104 annual locality rate and $78.15 hourly locality rate) will draft and issue the opinion, requiring 8 hours of work per appeal. OPM also assumes that an EEOC paralegal paid at the GS-11, step 5, from the Washington, DC, locality pay table ($96,843 annual locality rate and $46.40 hourly locality rate) will assist the attorney, requiring 2 hours of work. OPM also assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $156.30 and $92.80 per hour, respectively. Thus, OPM calculates that the total cost to adjudicate 40 appeals is approximately $57,440.

OPM also considered the defensive litigation costs to agencies when employees pursue appeals, counselings, or complaints under the MSPB or EEOC processes detailed immediately above. For the 366 initial appeals filed at the MSPB and 100 complaints of discrimination filed at the EEOC, OPM assumes that agencies will require an attorney paid at the rate in 2026 for GS-14, step 5, from the Washington, DC, locality pay table ($163,104 annual locality rate and $78.15 hourly locality rate), and two supervisors and one human resources subject matter expert paid at the rate in 2026 for GS-15, step 5, from the Washington, D.C., locality pay table ($191,850 annual locality rate and $91.93 hourly locality rate). OPM also assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $156.30 and $183.86 per hour, respectively. For each initial appeal or complaint of discrimination, OPM estimates that each appeal will require 100 hours of work from an agency's attorney and 120 hours total for the two supervisors and one human resources subject matter expert. OPM also estimates $7,500 in miscellaneous litigation costs (e.g., court reporter fees, discovery). Therefore, the total estimated cost to agencies to defend initial appeals and complaints of discrimination is $21.06 million.

For counselings and the process for drafting and issuing a final agency decision, OPM assumes that agencies will require the services of an attorney to advise their Equal Employment Opportunity office during the course of these proceedings. OPM estimates this advisory function

will be performed by an attorney paid at the rate in 2026 for GS-14, step 5, from the Washington, DC, locality pay table ($163,104 annual locality rate and $78.15 hourly locality rate). OPM also assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $156.30 per hour. OPM estimates these matters will require four hours of legal advisory services for each counseling or final agency decision. Thus, OPM estimates that the total cost to agencies to provide these legal advisory services across government is $1.83 million.

Finally, OPM assumes the costs borne by agencies to pursue and defend 205 petitions for review and 40 appeals to the EEOC's Office of Federal Operations will require agencies to employ an attorney paid at the rate in 2026 for GS-14, step 5, from the Washington, DC, locality pay table ($163,104 annual locality rate and $78.15 hourly locality rate). OPM also assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $156.30 per hour. OPM estimates that each petition and appeal will require 100 hours of work for the attorney per petition for review and appeal. Thus, OPM estimates that the total cost to agencies to litigate petitions and appeals is $3.83 million.

4. Benefits

OPM expects this proposed rule will generate qualitative benefits for each agency. OPM anticipates the revisions to § 412.202 would result in supervisors having more proficiency in subjects integral to proper workforce management. As noted above, managers report they suffer from a severe lack of adequate training.[73] For example, managers are the connective tissue between the large, organizational objectives and the line employees who implement those objectives. Yet more than 40 percent of managers report they have not been provided adequate training to link the performance of their programs to the agency's strategic goals.[74] It is

[73] Government Accountability Office, "2020 Federal Managers Survey: Results on Government Performance and Management Issues," July 27, 2021, available at https://files.gao.gov/special.pubs/gao-21-537sp/resultsall.htm.
[74] *Id*.

undoubtedly to the benefit of each employee, manager, agency, and the American public for that matter, for management to be taught how to more closely align programs to strategic agency goals. OPM anticipates the added training it is proposing—and the improvements to the quality thereof—would help to close this gap and accrue those benefits.

OPM further expects that the proposed revisions to 5 CFR parts 432 and 752 will allow agencies to exert more quality control on its workforce to ensure those "who cannot or will not improve their performance to meet required standards" can be "separated" quickly, efficiently and effectively.[75] Overall, these revisions are expected to increase the quality and efficiency of the federal workforce, resulting in resource cost savings and improved service delivery for the American public. Streamlining the process for performance-based and adverse actions will reduce the burden on supervisors of undertaking these actions and facilitate removals of employees who undercut agency effectiveness. This will facilitate the removal of underperforming employees and those who engage in serious misconduct. Heightened accountability will also help set higher standards of performance and conduct for the entire workforce, promoting more effective accomplishment of agency missions. Prohibiting clean record settlements will prevent problematic employees from being shuffled between agencies, and will instead help agencies hire the best candidates initially. While it will require more resources to litigate removals against employees who would have voluntarily separated in exchange for a clean record settlement, agencies will benefit from gaining a fuller picture about applicants' prior work history during the hiring process and screening out employees unlikely to perform effectively based on documented evidence of prior poor performance or misconduct. OPM cannot quantify these qualitative benefits but believes they are substantial.

Lastly, OPM expects that some agencies will determine and OPM concur that some negotiated grievance procedures will impair the effective use of actions covered under subpart B of part 752 and, therefore, bar the use of grievance-arbitration to challenge short-term

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[75] 5 U.S.C. 2301(b)(6).

suspensions. OPM conservatively estimates that agencies will forego approximately 100 arbitrations each year. OPM estimates that each agency will utilize one attorney and one labor relations specialist paid at the rate in 2026 for GS-14, step 5, from the Washington, DC, locality pay table ($163,104 annual locality rate and $78.15 hourly locality rate). OPM also assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $156.30 per hour. OPM also assumes that each grievant and one union representative are paid at the rate in 2026 for GS-12, step 5, from the Washington, DC, locality pay table ($116,071 annual locality rate and $55.62 hourly locality rate). OPM also assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $111.24 per hour. OPM also assumes each arbitration lasts one regular workday of 8 hours. Thus, the total labor costs for the parties are $4,280.64 for each arbitration. OPM also assumes that cost for arbitration services is $3,000 for one arbitrator for one day and $1,000 for one court reporter for one day. Thus, OPM assumes that the total cost savings for each arbitration is $8,280.64 and $828,064 for 100 arbitrations each year.

5. Alternatives

An alternative to this rulemaking is to retain the current regulatory landscape and provide additional guidance to practitioners to improve their competencies as it relates both to the adverse action procedures and general supervisory obligations. It is true that many supervisors report they in fact need tutelage in these areas, including, but not limited to, in the adverse action procedures.[76] This reported lack of knowledge is in part the impetus for the proposed revisions to part 412 in this proposed rule. However, failing to rewrite these regulations would fail to address many of the substantive issues addressed herein which will empower supervisors to best manage and hold their employees accountable.

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[76] Government Accountability Office, "Federal Workforce: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance," GAO-15-191, (Feb. 2015). https://www.gao.gov/assets/gao-15-191.pdf.

A second alternative to this rulemaking would be to repeal the relevant portions of parts 412, 432, and 752 proposed to be revised without replacing them. This is suboptimal for several reasons. As it relates to § 412.202, the principles of good governance mandate that supervisors be adequately equipped via training and other professional development programs to execute their responsibilities to the best of their ability. While some supervisors may be equipped to do so without regular training, OPM believes these would be the exception, not the rule.[77]

Repealing the prescribed regulations for parts 432 and 752 would also create more issues than doing so would solve. First, without providing clear processes and guidance to supervisors and employees, attempts to remove underperforming personnel or those who have committed misconduct would be mired in conflicting and litigious interpretations of the relevant portions of statute. In an attempt to avoid this inevitability, Congress presupposed that OPM would issue regulations to provide additional clarity and specificity to the provisions of the relevant statutory authorizations—and at times directed it to do so.[78]

As part of the development of this proposed rulemaking, OPM also considered whether to maintain the current regulatory landscape without providing additional guidance but opted against this conclusion as well. For the same reasons as discussed previously in this section, this option similarly would contravene the principles of good governance.

VI. Request for Comment

OPM requests public comments to assist OPM better understand the impacts of the proposed rule on key stakeholders. The types of information which OPM is interested in include, but are not limited to, the following:

- To what extent have federal agencies, employees, labor unions, and other impacted stakeholders made commitments, plans, or other decisions in a reasonable reliance on the

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[77] *See* Government Accountability Office, "2020 Federal Managers Survey: Results on Government Performance and Management Issues," GAO-21-537SP, (July 27, 2021). https://files.gao.gov/special.pubs/gao-21-537sp/resultsall.htm.

[78] *See, e.g.,* 5 U.S.C. 4303(b)(2) ("An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management."); 5 U.S.C. 7503(a) ("Under regulations prescribed by the Office of Personnel Management…").

regulations impacted by this proposed rulemaking that would be disrupted, frustrated, or rendered economically or otherwise unviable by the proposed rule? Commenters are encouraged to describe the (1) specific actions taken or foregone in reliance on current regulations; (2) the timeframe over which such reliance occurred; (3) the financial, operational, economic, or other costs that would result from the changes under the proposed rule; and (4) any factors that may have caused regulated parties to anticipate that a regulatory change of this nature was forthcoming, thereby potentially limiting the reasonableness of any such reliance.

In addition, the MSPB requests comments on whether it should adopt in the final rule the totality of the circumstances rule as proposed or retain all or some of the *Douglas* factors. Commenters should include as part of their response a discussion of why any specific individual *Douglas* factor should or should not be retained.

Lastly, OPM and MSPB request comments on whether any reliance interests identified by commenters in response to the previous questions could be adequately addressed through transitional, phase-in, grandfathering, or other provisions or accommodations, and, if so, what specifically should OPM or MSPB adopt in a final rule?

VII. Procedural Issues and Regulatory Review

1. Severability

OPM and MSPB propose that, if any of the provisions of this proposed rule as finalized is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, it shall be severable from its respective section(s) and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances. In enforcing civil service protections and merit system principles, OPM and MSPB will comply with all applicable legal requirements.

2. Regulatory Review

OPM and MSPB have examined the impact of this rule as required by E.O.s 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 E.O. 12866. This rulemaking is not expected to be an E.O. 14192 regulatory action because it imposes no more than de minimis costs.

3. Regulatory Flexibility Act

The Director of OPM and Chairman of the MSPB certify that this regulation will not have a significant impact on a substantial number of small entities because it applies only to Federal agencies and employees.

4. 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 E.O. 13132, the Director of OPM and the Chairman of the MSPB certify that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

5. Civil Justice Reform

This regulation meets the applicable standard set forth in section 3(a) and 3(b)(2) of E.O. 12988 (61 FR 4729; Feb. 7, 1996).

6. 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 $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. Thus, no written assessment of unfunded mandates is required.

7. Paperwork Reduction Act

This regulatory action will not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act (44 U.S.C. Chapter 35).

List of Subjects

5 CFR Part 412

Education, Government employees.

5 CFR Part 432

Government employees.

5 CFR Part 715

Government employees.

5 CFR Part 752

Administrative practice and procedure, Government employees.

5 CFR Part 1201

Administrative practice and procedure, Government employees.

Signing Statement

The Director of OPM, Scott Kupor, reviewed and approved this document and has authorized the undersigned to electronically sign and submit this document to the Office of the Federal Register for publication.

Office of Personnel Management

Jerson Matias,

Federal Register Liaison.

Merit Systems Protection Board

Gina K. Grippando,

Clerk of the Board.

Accordingly, for the reasons stated in the preamble, OPM proposes to amend 5 CFR parts 412, 432, 715, and 752 as follows:

PART 412—SUPERVISORY, MANAGEMENT, AND EXECUTIVE DEVELOPMENT

1. The authority citation for part 412 continues to read as follows:

Authority: 5 U.S.C. 1103(c)(2)(C), 3396, 3397, 4101 *et seq.*

2. Revise § 412.202 to read as follows:

§ 412.202 Systematic training and development of supervisors, managers, and executives.

All agencies must provide for the development of individuals in supervisory, managerial and executive positions, as well as individuals whom the agency identifies as potential candidates for those positions, based on the agencies' succession plans. In coordination with OPM, agencies also must issue written policies to ensure they achieve each of the following:

(a) Design and implement leadership development programs integrated with the employee development plans, programs, and strategies required by 5 CFR 410.201 and guidance issued by OPM on required supervisory competencies, and that foster a broad agency and Governmentwide perspective.

(b) Provide training within one year of an employee's initial appointment to a supervisory position and follow up periodically, but at least annually, by providing each supervisor and manager additional training on the use of appropriate actions, options, and strategies to:

(1) Mentor and coach employees and improve employee engagement, performance, and productivity;

(2) Improve employee performance and productivity;

(3) Conduct employee performance appraisals in accordance with agency appraisal systems and OPM guidance;

(4) Effectively manage employees with unacceptable performance, including understanding the disciplinary options and procedures available to the supervisor, manager, or executive;

(5) Develop and discuss relevant performance goals and objectives with the employee and ensure the performance goals and objectives align to the mission and priority goals of the agency;

(6) Communicate and discuss progress relative to performance goals and objectives, and conduct performance appraisals;

(7) Effectively use probationary and trial periods to examine whether an employee should continue past the probationary or trial period pursuant to the factors set forth in 5 CFR 11.5(b), and to assess the needs and interests of the agency with respect to the probationary or trial period employee’s final appointment;

(8) Effectively use awards, bonuses, and other means of employee recognition to motivate employees, reinforce desired behaviors, and incentivize high performance;

(9) Address reports of a hostile work environment, retaliation, or harassment of, or by, another supervisor, manager, executive, or employee;

(10) Identify and prevent violations of the prohibited personnel practices under 5 U.S.C. 2302;

(11) Develop supervisory competencies established by OPM that are applicable to the supervisor, manager or executive; and

(12) Collaborate with human resources offices to recruit, select, appraise, and reward employees to build a workforce based on merit and competence, organizational goals, budget considerations, and staffing needs.

(c) Provide training when individuals make critical career transitions, for instance from non-supervisory to manager or from manager to executive. This training should be consistent with assessments of the agency's and the individual's needs.

PART 432—PERFORMANCE BASED REDUCTION IN GRADE AND REMOVAL ACTIONS

3. The authority citation for part 432 continues to read as follows:

Authority: 5 U.S.C. 4303, 4305.

4. Amend § 432.103 by revising paragraph (a) to read as follows:

§ 432.103 Definitions.

* * * * *

(a) ***Acceptable performance*** means performance that meets an employee's performance requirement(s) or standard(s) at a level of performance at or above the “Fully Successful” level in the critical element(s) at issue.

* * * * *

5. Revise § 432.104 to read as follows:

§ 432.104 Addressing unacceptable performance.

(a) ***Notice***. At any time during the performance appraisal cycle that an employee’s performance is determined, in the sole and exclusive discretion of the agency, to be unacceptable in one or more critical elements, the agency must:

(1) Notify the employee of the critical element(s) for which performance has been found unacceptable and an explanation of the reasons therefore;

(2) Inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position; and

(3) Inform the employee that, unless his or her performance in the critical element(s) improves to and is sustained at an acceptable level, the employee must be reduced in grade or removed.

(b) ***Opportunity to demonstrate acceptable performance***. For each critical element in which the employee's performance is unacceptable, the agency must afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position. A reasonable opportunity to demonstrate acceptable performance may last no more than 30 calendar days subject to an agency's sole and exclusive discretion to offer a longer period of time as may be necessary to account for situations in which 30 calendar days may be insufficient to evaluate an employee's performance.

(c) ***Assistance***. Before or during the opportunity for acceptable performance, the agency must provide assistance to improve unacceptable performance. There is no requirement regarding the nature of any assistance offered during the opportunity period. The nature of such assistance is not determinative of a reduction in grade or pay or a removal. Except as provided for in § 432.105(c), an agency is not permitted to provide an additional opportunity to demonstrate acceptable performance or similar informal period prior to or in addition to the opportunity period provided under paragraph (b) of this section.

6. Revise § 432.105 to read as follows:

§ 432.105 Proposing and taking action based on unacceptable performance.

(a) Once an employee has been afforded a reasonable opportunity to demonstrate acceptable performance pursuant to § 432.104 of this part, an agency must propose a removal action if the employee's performance during or following the opportunity to demonstrate acceptable

performance is unacceptable in one or more of the critical elements for which the employee was afforded an opportunity to demonstrate acceptable performance. Agencies may satisfy the requirement to provide assistance before or during the opportunity period.

(b) A proposed action may be based on instances of unacceptable performance which occur within a 1-year period ending on the date of the notice of proposed action.

(c) If an employee has performed acceptably for 1 year from the beginning of an opportunity to demonstrate acceptable performance (in the critical element(s) for which the employee was afforded an opportunity to demonstrate acceptable performance), and the employee's performance again becomes unacceptable, the agency shall afford the employee an additional opportunity to demonstrate acceptable performance before determining whether to propose a removal under this part.

(d) An employee whose removal is proposed under this part is entitled to:

(1) ***Advance notice.***

(i) The agency shall notify the employee of the proposed removal action which, subject to the agency’s sole and exclusive discretion to mitigate or cease the proposed removal, should take effect 30 calendar days thereafter, and such notice shall identify both the specific instances of unacceptable performance by the employee on which the proposed action is based and the critical element(s) of the employee's position involved in each instance of unacceptable performance.

(ii) An agency, in its sole and exclusive discretion, may extend the advance notice period for a period not to exceed 30 days under regulations prescribed by the head of the agency necessary for compliance with law, rule, or regulation, or where necessary to ensure mission effectiveness. An agency may extend this notice period further without prior OPM approval where necessary to comply with a stay ordered by a member of the Merit Systems Protection Board under 5 U.S.C. 1214(b)(1)(A) or (B), or to consider information gathered as part of a medical examination as described in (d)(2)(ii) of this section.

(iii) If an agency believes that an extension of the advance notice period is necessary for another reason, it must request and obtain prior approval for such extension from the Office of Personnel Management by emailing employeeaccountability@opm.gov with a letter signed by the agency's Chief Human Capital Officer (or equivalent) stating the reasons for requesting an extension.

(2) ***Opportunity to answer***. The agency shall afford the employee a reasonable time, but not less than 7 calendar days or more than 10 calendar days from the date of the agency's notice of proposed action to answer the agency's notice of proposed removal action orally and in writing.

(i) The agency may, in its sole and exclusive discretion, grant the employee an extension of no more than 10 calendar days to answer an agency's notice of proposed removal action in order to consider any settlement or other offer from an agency to terminate employment, provided that additional time beyond 10 days may be provided if doing so is necessary to comply with law, rule, or regulation, or where doing so is clearly in the government's interests.

(ii) As part of any answer to a proposed action, the employee must raise any medical issues (including illness or incapacitation) or disabilities that have precluded the employee's ability to perform acceptably. Failure to raise such medical issues constitutes waiver of the ability to do so before any decision is effected, except where prohibited by statute. In the event an employee raises a medical issue, the employee must furnish medical documentation (as defined in § 339.104 of this chapter) of the condition for the agency's consideration. If warranted, the agency shall require or offer a medical examination in accordance with the procedures of part 339 of this chapter. The examination may occur after the employee submits his or her answer and any information gathered through an examination is to be considered furnished as part of the answer. The agency shall be aware of the affirmative obligations of 29 CFR 1630.14. If the employee who raises a medical condition has the requisite number of years of service under the Civil Service Retirement System or the Federal Employees Retirement

System, the agency shall provide information concerning application for disability retirement. As provided at § 831.501(d) of this chapter, an employee's application for disability retirement shall not preclude or delay any other appropriate agency decision or personnel action.

(3) ***Representation***. An employee may select a representative of his or her choice to assist in the preparation and presentation of the answer under paragraph (d)(2) of this section, provided that the employee submits his or her designation in writing. If the selected representative is a Federal employee, the representative may not perform such representational functions while in a duty status (including while on official time authorized under 5 U.S.C. 7131), nor may the representative claim agency reimbursement for any expenses incurred while performing such representational function. The agency proposing the action may, in its sole and exclusive discretion, disallow an employee's choice of representative when the representative is an employee of the agency and his or her activities as a representative would cause a conflict of interest or position; that employee cannot be released from his or her official duties because of the priority needs of the Government; or that employee's release would give rise to unreasonable costs to the Government.

(4) ***Final written decision.*** The agency shall make its final decision within 30 days after expiration of the advance notice period but should make its final decision as quickly as practicable. Unless proposed by the head of the agency, such written decision shall be concurred in by an employee who is in a higher position than the person who proposed the removal action. In arriving at its decision, the agency shall consider any answer of the employee or his or her representative furnished in response to the agency's proposal. The higher level official or agency head, in their sole and exclusive discretion, may mitigate or rescind a proposed removal action only when doing so is consistent with the mission of the agency. A decision to reduce in grade or remove an employee for unacceptable performance may be based only on those instances of unacceptable performance that occurred during the 1-year period ending on the date of issuance of the advance notice of proposed action under paragraph (d)(1)(i) of this section. The agency

shall issue written notice of its decision to the employee at or before the time the action will be effective. Such notice shall specify the instances of unacceptable performance by the employee on which the action is based and shall inform the employee of any applicable appeal and grievance rights.

(e) An agency's exceeding of the timelines set forth in this subpart is not grounds for mitigating or overturning an action.

7. Add § 432.108 to read as follows:

§ 432.108 Settlement agreements.

(a) ***Agreements to alter personnel records***. An agency must not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an action taken under this part.

(b) ***Corrective action based on discovery of agency error***. Notwithstanding paragraph (a) of this section, an agency may take corrective action, including during or after the issuance of an action taken under this part, if the agency determines the information contained in a personnel record is not accurate or documents an action taken by the agency illegally or in error. In such cases, an agency has the authority, unilaterally or by agreement, to modify an employee's personnel file to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. The agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error.

(c) ***Corrective action based on persuasive information prior to final agency action***. An agency may cancel or withdraw a proposed action taken under this part prior to the issuance of a final

agency decision when persuasive evidence casts doubt on the validity of the action or the ability of the agency to sustain the action in litigation. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency must remove that action from the employee's personnel file or other agency files; however, paragraph (a) applies to any accurate information about the employee's performance leading up to that proposed action or separation from Federal service.

(d) Notwithstanding the provisions in paragraphs (b) and (c), an agency must retain the documentation removed from an employee's personnel file as needed to comply with other obligations, including but not limited to litigation holds, suitability background investigations, and security clearance investigations.

(e) Nothing in this section restricts an agency's ability to withhold information about an employee's performance or conduct from an employer that is not an Executive agency as defined under 5 U.S.C. 105 as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an action taken under this part.

PART 715—NONDISCIPLINARY SEPARATIONS, DEMOTIONS, AND FURLOUGHS

8. Amend § 715.201 to read as follows:

§ 715.201 Applicability.

This subpart applies to voluntary separations of employees in the executive departments and independent establishments of the Federal Government, including Government-owned or controlled corporations, and in those portions of the legislative and judicial branches of the Federal Government and the government of the District of Columbia having positions in the competitive service.

9. Add a new § 715.203 to read as follows:

§ 715.203 Abandonment

When an employee fails to report for duty (or to return from leave or from furlough of 30 days or less) for a period of 10 consecutive calendar days or more, and does not submit a resignation, an

employee voluntarily abandons his or her position. An employee who voluntarily abandons his or her position may be separated without regard to the provisions of part 752 of this chapter. Authorized leave does not constitute a failure to report for duty under this section.

PART 752—ADVERSE ACTIONS

10. The authority citation for part 752 continues to read as follows:

Authority: 5 U.S.C. 6329b, 7504, 7514, 7515, and 7543; Sec. 1097, Pub. L. 115-91, 131 Stat. 1617 (5 U.S.C. 7503 note).

Subpart A—Discipline of Supervisors Based on Retaliation Against Whistleblowers

11. Add § 752.104 to read as follows:

§ 752.104 Settlement agreements.

(a) ***Agreements to alter official personnel records***. An agency must not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an action taken under this subpart.

(b) ***Corrective action based on discovery of agency error***. Notwithstanding paragraph (a), an agency may take corrective action, including during or after the issuance of action taken under this subpart, if the agency determines the information contained in a personnel record is not accurate or documents an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel file to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or

in error. The agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error.

(c) ***Corrective action based on persuasive information prior to final agency action***. An agency may cancel or withdraw a proposed action taken under this subpart prior to the issuance of a final agency decision when persuasive evidence casts doubt on the validity of the action or the ability of the agency to sustain the action in litigation. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency must remove that action from the employee's personnel file or other agency files; however, paragraph (a) applies to any accurate information about the employee's performance or conduct leading up to that proposed action or separation from Federal service.

(d) Notwithstanding the provisions in paragraphs (b) and (c), an agency must retain the documentation removed from an employee's personnel file as needed to comply with other obligations, including but not limited to litigation holds, suitability background investigations, and security clearance investigations.

(e) Nothing in this section restricts an agency's ability to withhold information about an employee's performance or conduct from an employer that is not an Executive agency as defined under 5 U.S.C. 105 as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an action taken under this subpart.

Subpart B—Regulatory Requirements for Suspension for 14 Days or Less

12. Amend § 752.202 by revising the section heading and adding paragraphs (c) through (f) to read as follows:

§ 752.202 Standard for action and penalty determination.

* * * * *

(c) An agency is not required to use progressive discipline under this subpart. The penalty for an instance of misconduct must be tailored to the facts and circumstances. A proposed penalty is in

the sole and exclusive discretion of a proposing official, and a penalty decision is in the sole and exclusive discretion of the deciding official.

(d) Unless required by law, an agency must not establish or use an existing table of penalties or similar policy, nor agree to do so through collective bargaining, to prescribe mandatory or recommended disciplinary penalties.

(e) A suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or demoted before a proposing official may propose removal, except as may be appropriate under applicable facts.

(f) An agency's exceeding of the timelines set forth in this subpart is not grounds for mitigating or overturning an action under this subpart.

13. Revise § 752.203 to read as follows:

§ 752.203 Procedures.

(a) ***Statutory entitlements.*** An employee covered under this subpart whose suspension is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7503(b). Unless required by law, agencies must not apply any other procedures established by agency regulation or policy, or through collective bargaining authorized under 5 U.S.C. chapter 71, when taking an action under this subpart.

(b) ***Notice of proposed action.*** The notice must state the specific reason(s) for the proposed action and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Pub. L. 115-91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

(c) ***Employee's answer.*** The employee must be given a reasonable time, but not less than one business day or more than five business days, to answer orally and in writing and to secure and furnish affidavits and other documentary evidence in support of the answer. The agency may, in its sole and exclusive discretion, grant the employee an extension of no more than five calendar days to answer an agency's proposed action or to consider any settlement or other offer from an agency to terminate employment, unless additional time is necessary for compliance with law, rule, or regulation, or where doing so is clearly in the government's interests.

(d) ***Representation.*** An employee covered by this subpart is entitled to be represented by an attorney or other representative. An employee must submit his or her designation in writing related to the specific answer. If the selected representative is a Federal employee, the representative may not perform such representational functions while in a duty status (including while on official time under 5 U.S.C. 7131), nor may the representative claim agency reimbursement for any expenses incurred while performing such representational function. The agency proposing the action may, in its sole and exclusive discretion, disallow an employee's choice of representative when the representative is an employee of the agency and his or her activities as a representative would cause a conflict of interest or position; that employee cannot be released from his or her official duties because of the priority needs of the Government; or that employee's release would give rise to unreasonable costs to the Government.

(e) ***Agency decision***.

(1) In arriving at its decision, the agency will consider only the reasons specified in the notice of proposed action and any answer of the employee or his or her representative, or both, made to a designated official.

(2) The agency must specify in writing the reason(s) for the decision and advise the employee of any grievance rights under paragraph (f) of this section. The agency must deliver the notice of decision to the employee on or before the effective date of the action.

(3) An agency should issue the decision on a proposed action under this subpart as soon as practicable, which should be no later than 5 business days of the conclusion of the employee's opportunity to respond under paragraph (c) of this section. An agency's exceeding of the timelines set forth in this subpart is not grounds for mitigating or overturning an action.

(f) ***Grievances.***

(1) The employee may file a grievance through an agency administrative grievance system if authorized by agency policy. Except as provided in paragraph (2), a suspension under this subpart may not be challenged through a grievance procedure negotiated under 5 U.S.C. 7121.

(2) Notwithstanding paragraph (1), a suspension under this subpart of an employee in a particular agency or subdivision thereof or bargaining unit may be subjected to the coverage of a grievance procedure negotiated pursuant to 5 U.S.C. 7121, only if the agency head or, if designated by the agency head, the agency's Chief Human Capital Officer, has determined that the applicability of such grievance procedure will not impair the effective use of actions covered by this subpart and the Office of Personnel Management concurs in that assessment. Either the agency head or the Office of Personnel Management may, in their sole and exclusive discretion, revoke such determination at any time and such revocation shall become immediately effective. Where negotiated grievances are authorized, employees may file grievances only under that procedure and not under an agency's administrative grievance procedure. Sections 7114(a)(5) and 7121(b)(1)(C) of title 5, U.S. Code, and the terms of any collective bargaining agreement, will govern representation for employees in a bargaining unit who grieve a suspension under this subpart through the negotiated grievance procedure.

(g) ***Agency records.*** The agency must maintain copies of, and will furnish to the Merit Systems Protection Board and to the employee upon their request, the following documents:

(1) Notice of the proposed action;

(2) Employee's written reply, if any;

(3) Summary of the employee's oral reply, if any;

(4) Notice of decision; and

(5) Any order effecting the suspension, together with any supporting material.

(h) ***Settlement agreements***. (1) An agency must not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an action taken under this subpart.

(2) Notwithstanding paragraph (h)(1) of this section, an agency may take corrective action, including during or after the issuance of an action taken under this subpart, if the agency determines the information contained in a personnel record is not accurate or documents an action taken by the agency illegally or in error. In such cases, an agency has the authority, unilaterally or by agreement, to modify an employee's personnel file to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. The agency must ensure that it removes only information that the agency has determined to be inaccurate or to reflect an action taken illegally or in error.

(3) If an agency determines, prior to the issuance of a final agency decision on an action taken under this subpart, the validity of the action or the ability of the agency to sustain the action in litigation is in question due to persuasive evidence, an agency may cancel or withdraw the proposed action. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency may remove that action from the employee's personnel file or other agency files; however, paragraph (h)(1) applies to any accurate information about the employee's performance or conduct leading up to that proposed action or separation from Federal service.

(4) Nothing in this section restricts an agency's ability to withhold information about an employee's performance or conduct from an employer that is not an Executive agency as defined under 5 U.S.C. 105 as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an action taken under this subpart.

(i) ***Retaining personnel records***. Notwithstanding paragraph (h), an agency must retain the documentation removed from an employee's personnel file as needed to comply with other obligations, including but not limited to litigation holds, suitability background investigations, and security clearance investigations.

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

14. Amend § 752.401 by adding paragraph (b)(18) and revising paragraph (d)(2) to read as follows:

§ 752.401 Coverage.

* * * * *

(b) * * *

(18) Termination of an employee who fails to complete a probationary or trial period under part 11 of this chapter.

* * * * *

(d) * * *

(2) An employee whose position is in Schedules C, G, or Policy/Career;

* * * * *

15. Revise § 752.403 to read as follows:

§ 752.403 Standard for action and penalty determination.

(a) An agency may take an adverse action, including a performance-based adverse action or an indefinite suspension, under this subpart only for such cause as will promote the efficiency of the service. Unless required by law, agencies must not apply any other procedures established by

agency regulation or policy, or through collective bargaining authorized under 5 U.S.C. chapter 71, when taking an action under this subpart.

(b) An agency may not take an adverse action against an employee on the basis of any reason prohibited by 5 U.S.C. 2302.

(c) An agency is not required to use progressive discipline before taking an action under this subpart. The penalty for an instance of misconduct must be tailored to the facts and circumstances. A proposed penalty is in the sole and exclusive discretion of a proposing official, and a penalty decision is in the sole and exclusive discretion of the deciding official. Penalty decisions are subject to appellate or other review procedures prescribed in law.

(d) Employees should be treated impartially. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. An agency may, but is not required to, consider appropriate comparators as the agency evaluates a potential adverse action. In such cases appropriate comparators are individuals in the same work unit, with the same supervisor, and who were subjected to the same standards governing discipline.

(e) Unless required by law, an agency must not establish or use an existing table of penalties or similar policy, nor agree to do so through collective bargaining, to prescribe mandatory or recommended disciplinary penalties for an action taken under this subpart.

(f) A suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or demoted before a proposing official may propose removal, except as may be appropriate under applicable facts.

16. Amend § 752.404 by revising paragraphs (b)(1), (b)(3) introductory text, and (c)(1), and adding paragraph (g)(3) to read as follows:

§ 752.404 Procedures.

* * * * *

(b)* * *

(1) An employee against whom an action is proposed is entitled to 30 calendar days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. Advance notices of greater than 30 days must be reported to the Office of Personnel Management. The notice to an employee must state the specific reason(s) for the proposed action and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Pub. L. 115-91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

(2) * * *

(3) An employee whose removal or suspension, including indefinite suspension, has been proposed may remain in a duty status in his or her regular position during the advance notice period. Where the agency determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the agency may elect one or a combination of the following alternatives:

* * * * *

(c) * * *

(1) An employee may answer orally and in writing except as provided in paragraph (c)(2) of this section. An employee must be given a reasonable time, but not less than 7 calendar days or more than 10 calendar days, to review the material relied upon to support the proposed action, prepare an answer orally and in writing, and to secure and furnish affidavits and other documentary evidence in support of the answer. The agency may, in its sole and exclusive discretion, grant the employee an extension of no more than 10 calendar days in order to answer an agency's proposed action or to consider any settlement or other offer from an agency to terminate

employment, unless additional time is necessary for compliance with law, rule, or regulation, or where doing so is clearly in the government's interests. If the employee remains in an active duty status, the agency must give the employee a reasonable amount of official time (to be determined in the sole and exclusive discretion of the agency) to engage in the activities described under this paragraph.

* * * * *

(g)* * *

(3) To the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 30 calendar days of the conclusion of the employee's opportunity to respond under paragraph (c) of this section. An agency's exceeding of the timelines set forth in this subpart is not grounds for mitigating or overturning an action.

* * * * *

17. Add § 752.407 to read as follows:

§ 752.407 Settlement agreements.

(a) ***Agreements to alter official personnel records***. An agency must not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an action taken under this subpart.

(b) ***Corrective action based on discovery of agency error***. Notwithstanding paragraph (a) of this section, an agency may take corrective action, including during or after the issuance of an action taken under this subpart, if the agency determines the information contained in a personnel record is not accurate or documents an action taken by the agency illegally or in error. In such cases, an agency has the authority, unilaterally or by agreement, to modify an employee's personnel file to remove inaccurate information or the record of an erroneous or illegal action.

An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. The agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error.

(c) ***Corrective action based on persuasive information prior to final agency action***. If an agency determines, prior to the issuance of a final agency decision on an action taken under this subpart, the validity of the action or the ability of the agency to sustain the action in litigation is in question due to persuasive evidence, an agency may cancel or withdraw the proposed action. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency may remove that action from the employee's personnel file or other agency files; however, paragraph (a) applies to any accurate information about the employee's performance or conduct leading up to that proposed action or separation from Federal service.

(d) Notwithstanding the provisions in paragraphs (b) and (c), an agency must retain the documentation removed from an employee's personnel file as needed to comply with other obligations, including but not limited to litigation holds, suitability background investigations, and security clearance investigations.

(e) Nothing in this section restricts an agency's ability to withhold information about an employee's performance or conduct from an employer that is not an Executive agency as defined under 5 U.S.C. 105 as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an action taken under this subpart.

Subpart F—Regulatory Requirements for Taking Adverse Actions Under the Senior Executive Service

18. Amend § 752.603 by revising the section heading and adding paragraphs (c) through (f) to read as follows:

§ 752.603 Standard for action and penalty determination.

* * * * *

(c) An agency is not required to use progressive discipline under this subpart. The penalty for an instance of misconduct must be tailored to the facts and circumstances. A proposed penalty is in the sole and exclusive discretion of a proposing official, and a penalty decision is in the sole and exclusive discretion of the deciding official. Penalty decisions are subject to appellate or other review procedures prescribed in law.

(d) Employees should be treated impartially. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. An agency may consider appropriate comparators as the agency evaluates a potential adverse action.

(e) Unless required by law, an agency must not establish or use an existing table of penalties or similar policy to prescribe mandatory or recommended disciplinary penalties for an action taken under this subpart.

(f) A suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or demoted before a proposing official may propose removal, except as may be appropriate under applicable facts.

19. Amend § 752.604 by revising paragraphs (b)(1), (b)(2) introductory text, and (c)(1) and adding paragraph (g)(3) to read as follows:

§ 752.604 Procedures.

* * * * *

(b)* * *

(1) An appointee against whom an action is proposed is entitled to 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. However, to the extent an agency, in its sole and exclusive discretion, deems practicable, the agency should limit a written notice of an adverse action to the 30 days prescribed in 5 U.S.C. 7543(b)(1). Advance

notices of greater than 30 days must be reported to the Office of Personnel Management. The notice to an appointee must state the specific reason(s) for the proposed action and inform the appointee of his or her right to review the material that is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Pub. L. 115-91, the forums in which the appointee may file an appeal, and any limitations on the rights of the appointee that would apply because of the forum in which the appointee decides to file.

(2) An appointee whose removal or suspension, including indefinite suspension, has been proposed may remain in a duty status in his or her regular position during the advance notice period. Where the agency determines that the appointee's continued presence in the workplace during the notice period may pose a threat to the appointee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the agency may elect one or a combination of the following alternatives:

* * * * *

(c) * * *

(1) An appointee may answer orally and in writing except as provided in paragraph (c)(2) of this section. An appointee must be given a reasonable time, but not less than 7 calendar days or more than 10 calendar days, to review the material relied upon to support the proposed action, prepare an answer orally and in writing, and to secure and furnish affidavits and other documentary evidence in support of the answer. The agency may, in its sole and exclusive discretion, grant the appointee an extension of no more than 10 calendar days to answer an agency’s proposed action in order to consider any settlement or other offer from an agency to terminate employment, unless additional time is necessary for compliance with law, rule, or regulation, or where doing so is clearly in the government’s interests. If the appointee remains in active duty status, the agency must give the appointee a reasonable amount of official time (to be determined in the sole and exclusive discretion of the agency) to engage in the activities described under this paragraph.

* * * * *

(g)* * *

(3) To the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 30 calendar days of the conclusion of the appointee's opportunity to respond under paragraph (c) of this section. An agency's exceeding of the timelines set forth in this subpart is not grounds for mitigating or overturning an action.

* * * * *

20. Add § 752.607 to subpart F to read as follows:

§ 752.607 Settlement agreements.

(a) ***Agreements to alter official personnel records***. An agency must not agree to erase, remove, alter, or withhold from another agency any information about an appointee's performance or conduct in that appointee's official personnel records, including an appointee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the appointee or settling an administrative challenge to an action taken under this subpart.

(b) ***Corrective action based on discovery of agency error***. Notwithstanding paragraph (a) of this section, an agency may take corrective action, including during or after the issuance of an action taken under this subpart, if the agency determines the information contained in a personnel record is not accurate or documents an action taken by the agency illegally or in error. In such cases, an agency has the authority, unilaterally or by agreement, to modify an appointee's personnel file to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. The agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error.

(c) ***Corrective action based on persuasive information prior to final agency action***. If an agency determines, prior to the issuance of a final agency decision on an action taken under this subpart, the validity of the action or the ability of the agency to sustain the action in litigation is in question due to persuasive evidence, an agency may cancel or withdraw the proposed action. To the extent an appointee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency may remove that action from the appointee's personnel file or other agency files; however, paragraph (a) applies to any accurate information about the appointee's performance or conduct leading up to that proposed action or separation from Federal service.

(d) Notwithstanding the provisions in paragraphs (b) and (c), an agency must retain the documentation removed from an appointee's personnel file as needed to comply with other obligations, including but not limited to litigation holds, suitability background investigations, and security clearance investigations.

(e) Nothing in this section restricts an agency's ability to withhold information about an appointee's performance or conduct from an employer that is not an Executive agency as defined under 5 U.S.C. 105 as part of, or as a condition to, resolving a formal or informal complaint by the appointee or settling an administrative challenge to an action taken under this subpart.

Accordingly, for the reasons stated in the preamble, the Merit Systems Protection Board proposes to amend 5 CFR part 1201 as follows:

PART 1201—PRACTICES AND PROCEDURES

1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204, 1305, and 7701, and 38 U.S.C. 4331, unless otherwise noted.

Subpart B — Procedures for Appellate Cases

2. Amend § 1201.56(b) by adding a new subparagraph (3) to read as follows:

* * * * *

(b) * * *

(3) ***Penalty determination.*** (i) This subparagraph applies only to appeals filed under 5 U.S.C. 7513.

(ii) The agency's choice of penalty is entitled to substantial deference. The Board will review a penalty only to determine whether it is within the tolerable limits of reasonableness in light of the charges sustained under subparagraph (b)(1)(ii). This determination is based upon the totality of the circumstances relating to the efficiency of the service, on a case-by-case basis.

(iii) If the Board sustains all of the agency's charges, the Board will determine whether the penalty imposed by the agency is within the tolerable limits of reasonableness, and will not substitute its judgment for the judgment of the deciding official.

(A) If the Board makes an affirmative finding in this regard, the Board will sustain the agency's action.

(B) If the Board makes a negative finding in this regard, the Board may mitigate the agency's original penalty to the maximum reasonable penalty.

(iv) If the Board sustains fewer than all of the agency's charges, the Board may mitigate the agency's original penalty to the maximum reasonable penalty so long as the agency did not indicate either in its final decision, or during proceedings before the Board, that it desired that a lesser penalty be imposed if the Board did not sustain all of its charges.

(A) If the agency so indicated, the Board may:

(i) Impose the lesser penalty the agency indicated it would have imposed; or

(ii) If the Board cannot discern what that penalty would have been, accord the agency an opportunity to institute a lesser penalty.

(B) If the agency did not so indicate, the Board may:

(i) Mitigate the agency's original penalty to the maximum reasonable penalty; or

(ii) Accord the agency an opportunity to institute a lesser penalty.

* * * * *

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