



## **OFFICE OF PERSONNEL MANAGEMENT**

### **5 CFR Part 731**

**[Docket ID: OPM-2025-0173]**

**RIN: 3206-AO97**

### **Suitability Action Appeals**

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing final regulations to revise how an applicant, appointee, or employee may appeal a suitability action taken under 5 CFR part 731. OPM will replace the Merit Systems Protection Board (MSPB) as the adjudicative agency for such appeals. The change will streamline suitability action appeals procedures, thereby improving the efficiency, rigor, and timeliness by which OPM and agencies resolve challenges to suitability actions and ensure the integrity and efficiency of the service.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. This rule does not apply to appeals filed with the MSPB before the effective date of this final rule.

**FOR FURTHER INFORMATION CONTACT:** For questions, contact Joe Knouff, Suitability Executive Agent Programs, by email at [SuitEA@opm.gov](mailto:SuitEA@opm.gov) or by phone at (202) 599-0090.

### **SUPPLEMENTARY INFORMATION:**

OPM is issuing this rule to improve the efficiency, rigor, and timeliness by which OPM and agencies resolve challenges to suitability actions and ensure the integrity and efficiency of the service. In February 2026, OPM proposed updates to 5 CFR part 731 to modernize suitability procedures that allow the Government to quickly resolve any risks discovered in the

Federal workforce by returning the venue to hear suitability action appeals from the MSPB to OPM. *See* 91 FR 5352 (Feb. 6, 2026). OPM proposed new procedures by which an individual may appeal a suitability action to OPM. This final rule amends 5 CFR part 731 subpart E to align with 5 U.S.C. 7512(F) and the Fiscal Year 2016 National Defense Authorization Act (FY 2016 NDAA) excluding OPM suitability actions from the scope of chapter 75 and providing procedures to appeal suitability actions to OPM to improve the speed and effectiveness of Government personnel security, suitability, and credentialing reviews.

## **I. Digest of Public Comments and Summary of Changes from the Proposed Rule**

In response to the proposed rule, OPM received 343 comments during the 30-day public comment period from multiple individuals and multiple labor organizations. At the conclusion of the public comment period, OPM reviewed and analyzed the comments. In general, the comments on the rule change were mixed, with some expressing support, others expressing opposition, and many comments that were outside the scope of the rulemaking.

The comments included many suggestions for revisions that OPM considered and either adopted, adopted in part, or declined. For example, commenters were concerned with OPM's authority to establish the appeal process in this final rule; the relationship between suitability actions and MSPB review; procedural protections available to individuals subject to suitability actions; the independence and neutrality of OPM's appeal process; the treatment of discrimination claims, prohibited personnel practice allegations, and other claims within the jurisdiction of other adjudicatory bodies; appellant representation; protective orders and sanctions; the electronic filing process; publication or transparency of appeal decisions; the expected costs and benefits of the rule; and the adequacy of the comment period.

OPM found many of the comments helpful. OPM has determined to move suitability action appeals from MSPB to OPM as set forth in the proposed rule. However, in the final rule, it has added a number of procedural safeguards in response to comments.

*First*, the revised text narrows and clarifies the appeal right by specifying that it applies to applicants, appointees, and employees in the competitive service or career Senior Executive Service (SES), as those terms are used in part 731. It also adds an express burden-of-proof provision: the appellant bears the burden on timeliness, jurisdiction, and any improper-procedure claim, while the responsible agency bears the burden to prove the charges supporting the unfavorable suitability determination and the substantive propriety of the suitability action. This responds to comments, including from 0303, 0334, 0332, and 0329, that the proposed process lacked sufficient standards for fair and reasoned adjudication.

*Second*, the revised text adds safeguards addressing concerns that OPM would be policymaker, enforcement authority, and adjudicator. It defines the “responsible agency,” including the OPM office or component responsible for the action when OPM took, directed, or made the suitability action, and requires separation between that component and the adjudicative function. It also adds adjudicator-insulation requirements, ex parte communication protections, conflict-of-interest disqualification standards, and ALJ adjudication for appeals by OPM applicants, appointees, or employees. These changes respond to independence and institutional-bias comments raised by 0207/0286, 0288, 0303, 0334, 0332, 0314, 0331, and 0329.

*Third*, the revised text strengthens the record and disclosure rules. The responsible agency must now produce a complete, indexed, paginated, and certified record, including materials considered, relied upon, generated, received, issued, or served in investigating, proposing, deciding, directing, or effectuating the action. The record must include charge-by-charge analysis, suitability-factor analysis, mitigating or exculpatory evidence, the rationale for the action selected, and implementation documents. The revised text also requires identification of withheld or redacted material and generally bars reliance on nondisclosed material unless the appellant receives notice of its substance and a meaningful opportunity to respond. This responds to comments from 0303, 0334, 0332, 0333, and 0329 that eliminating MSPB discovery would

worsen information asymmetry and impair appellants' ability to challenge factual error, pretext, or procedural defects.

*Fourth*, the revised text changes the fact-development and hearing provisions. The revised text allows additional information or investigation only when the existing record is insufficient to resolve a material issue and further development is reasonably likely to produce material information. It also provides that written-record review remains the default, but a hearing is required when the written record is insufficient to resolve a material factual dispute, including where there is a material credibility dispute. Any such hearing must be presided over by an administrative judge. This responds especially to 0207/0286 and other commenters who urged objective hearing criteria and a meaningful mechanism for resolving disputed facts without adopting a categorical hearing right in every case.

*Fifth*, the revised text broadens the savings clause and narrows the protective-order provision. The exclusive-appeal provision now states that the OPM process is the sole means of appealing a suitability action under part 731, but does not displace matters within the independent jurisdiction of the Equal Employment Opportunity Commission (EEOC), Federal Labor Relations Authority (FLRA), Inspectors General, MSPB, Department of Labor's Veterans' Employment and Training Service (VETS), or the Office of Special Counsel (OSC). The protective-order provision is narrowed to protect adjudicatory integrity, prevent threats, intimidation, targeted harassment, improper witness contact, disclosure of protected personal information, or misuse of nonpublic information, and it states that any protective order must be no broader than reasonably necessary and must not restrict lawful protected communications. These revisions respond to comments from 0303, 0334, 0332, 0333, and 0329 regarding discrimination claims, labor-relations matters, whistleblower issues, veterans' rights, union communications, and concerns that the NPRM could operate as a gag order.

*Finally*, the revised text adds several administrability and transparency improvements. It narrows e-filing sanctions by requiring repeated failure to follow instructions after a show-cause

order before OPM may strike a document; requires initial decisions to make findings on each material charge, specification, and suitability factor; tailors remedies to applicants, appointees, and employees; gives more specific grounds for Director review; clarifies when decisions become final; and adds publication of final merits decisions or de-identified summaries. These changes respond to comments that the proposed process needed clearer standards, more reasoned decision-making, greater transparency, and stronger safeguards against arbitrary or opaque adjudication.

## **II. Authority and Background**

Congress has long charged the President with establishing rules for admission to the competitive service and with ensuring that individuals who enter and remain in the Federal workforce possess the character and conduct necessary to protect the integrity and promote the efficiency of the service. The President's authority to prescribe rules for the civil service and to regulate employee conduct is reflected in 5 U.S.C. 3301, 3302, and 7301, and has been delegated in relevant part to OPM and its predecessor, the Civil Service Commission. OPM administers these authorities through governmentwide civil service regulations, including the suitability and fitness regulations in 5 CFR part 731. Those regulations apply to competitive service employees and career appointments in the Senior Executive Service (SES). *See* 5 CFR 731.101(a).

Suitability and fitness determinations examine whether an individual's character or conduct may have an adverse impact on the integrity or efficiency of the service. *See* 5 CFR 731.101, 731.201, and 731.202. The objective of the suitability adjudicator is to determine whether there is a reasonable expectation that the individual's employment or continued employment would protect the integrity or promote the efficiency of the service. *See* 5 CFR 731.201. When an unfavorable suitability determination is made, OPM or an agency acting under delegated authority must determine whether a suitability action is appropriate. OPM's regulations define a "suitability action" to include cancellation of eligibility, removal, cancellation of reinstatement eligibility, and debarment. *See* 5 CFR 731.101(a).

Suitability standards and procedures are an important part of the Federal Government's personnel-vetting framework. They assist agencies in identifying and mitigating risks associated with individuals who seek access to Federal employment, Federal facilities, Federal information, Federal systems, or agency mission functions. Those risks may include misconduct, dishonesty, fraud in examination or appointment, criminal conduct, violent conduct, or other conduct that bears on whether the individual's employment would protect the integrity and promote the efficiency of the service. Suitability procedures therefore serve both individual and institutional interests: they require agencies and OPM to provide notice and an opportunity to respond before certain suitability actions are taken, while enabling the Government to resolve suitability concerns in a timely and effective manner.

Suitability standards and procedures play a key role in protecting the Federal Government against potential risks posed by those entrusted to work for it. Every day, America's adversaries seek to undermine the effective performance of Government functions and the confidentiality of sensitive Government information. Employees who are untrustworthy or unvetted pose a threat to the effective performance of agency missions, workplace safety, and data security. Successive presidential administrations spanning almost 20 years have emphasized the importance of enhanced risk management of the Federal Government's trusted workforce through efforts at modernizing processes to ensure only trusted individuals enter and remain in the Federal workforce.

In May 2018, the OPM Director and the Director of National Intelligence launched the Trusted Workforce 2.0 initiative in their respective roles as Suitability and Credentialing Executive Agent and Security Executive Agent. Trusted Workforce 2.0 reflects the Government's continued movement toward modernized vetting, risk management, and continuous-vetting processes designed to ensure that the Federal workforce remains trusted over time. Modernizing the procedures for reviewing suitability actions is part of that broader objective: suitability appeals should provide a fair opportunity to contest an unfavorable

suitability determination and suitability action, while also reaching final resolution with sufficient speed to protect agency missions, workforce integrity, and the public interest.

This final rule revises subpart E of part 731. It removes the regulatory appeal of suitability actions to MSPB and establishes an OPM suitability-action appeal process.

Individuals in any covered status—whether applicant, appointee, or employee, as those terms are used in part 731—may no longer appeal a part 731 suitability action to the MSPB under subpart E. Instead, an applicant, appointee, or employee in the competitive service or career Senior Executive Service may appeal to OPM a suitability action taken because of an unfavorable suitability determination. This final rule is limited to appeals of suitability actions under part 731. It does not establish an appeal right for fitness determinations, security-clearance determinations, credentialing determinations, national-security eligibility determinations, or any other determination outside the scope of subpart E.

OPM separately addressed amendments to subparts A, B, C, and D of 5 CFR part 731 in the *Suitability and Fitness* rulemaking. 91 FR 39361 (June 30, 2026). That rulemaking addressed substantive suitability and fitness standards and the authority and procedures for taking suitability actions. This final rule is separate from that rulemaking and is limited to the forum and procedures for appeals of suitability actions. OPM considered comments asserting that the two rulemakings should be evaluated together. OPM recognizes that procedural safeguards are important in any covered suitability action and, in response to comments, has strengthened the final subpart E procedures as described below. This rule, however, does not itself amend the substantive suitability factors, the standards for making suitability or fitness determinations, or the procedures in subparts C and D for taking suitability actions.

The statutory and regulatory history of suitability actions confirms that suitability actions are distinct from adverse actions under chapter 75 of title 5. In 2011, the MSPB decided in *Scott v. OPM*, 116 M.S.P.R. 356, *modified by* 117 M.S.P.R. 467, that suitability actions could not be taken for post-appointment conduct. In 2015, the U.S. Court of Appeals for the Federal Circuit

held in *Archuleta v. Hopper*, 786 F.3d 1340, that a suitability-based removal of a covered employee was subject to chapter 75 adverse-action procedures. Later in 2015, Congress amended 5 U.S.C. 7512 to provide that chapter 75 does not apply to “a suitability action taken by the Office under regulations prescribed by the Office, subject to the rules prescribed by the President under this title for the administration of the competitive service.” Pub. L. 114-92, div. A, title X, sec. 1086(f)(9), 129 Stat. 1010. That amendment confirmed that a suitability action taken under OPM’s regulations is not a chapter 75 adverse action.

This clarifying addition was part of a larger package of reforms in the Fiscal Year 2016 National Defense Authorization Act (FY 2016 NDAA) designed to improve the speed and effectiveness of Government personnel security, suitability, and credentialing reviews. These reforms were heavily influenced by Congress’s response to tragic events that potentially could have been avoided had the Government had more robust personnel vetting processes. Following the Washington Navy Yard shooting in September 2013, when a trusted insider tragically killed 12 individuals at a Government facility, Congress held hearings examining necessary improvements to vetting processes highlighted by this event and other high-profile leaks of information (e.g., the unauthorized disclosure and subsequent public release of classified U.S. Government information leaked by Edward Snowden to the media), and crafted legislation to improve the Government’s ability to protect against risk posed by trusted insiders. For example, the same section of the FY 2016 NDAA that added language to clarify that suitability actions were not within the scope of chapter 75 also directed action to develop strategies and capabilities to enable real-time, risk managed personnel vetting decisions, increase access to criminal history information when determining an individual’s suitability or fitness for employment, and improve insider threat detection and prevention.

Although chapter 75 does not apply to suitability actions taken under OPM’s regulations, OPM’s prior regulations continued to provide for MSPB review of suitability actions under subpart E of part 731. The MSPB’s authority to adjudicate suitability appeals under part 731



therefore arose from OPM's regulations, not from chapter 75. Under 5 U.S.C. 1204(a), the MSPB may adjudicate matters placed within its jurisdiction by law, rule, or regulation.

Accordingly, while OPM's prior regulation placed suitability-action appeals within MSPB's jurisdiction, OPM may revise that regulatory appeal procedure and establish an alternative appeal process consistent with OPM's authority to administer the suitability program.

The final rule does not remove all review of suitability actions. Instead, it replaces the prior MSPB appeal route with an OPM appeal process tailored to the statutory and regulatory nature of suitability actions. OPM concludes that suitability appeals should be decided by adjudicators with suitability expertise, under procedures designed for suitability determinations and actions rather than chapter 75 adverse-action litigation. At the same time, OPM agrees with commenters that the process must contain safeguards sufficient to promote fairness, accuracy, transparency, and confidence in the adjudication—and has built such safeguards into the final rule. Those safeguards include:

- A defined right to appeal suitability actions to OPM, including challenges to the underlying unfavorable suitability determination and specified procedural failures.
- Continued pre-action protections under subparts C and D of 5 CFR part 731, including written notice, reasons for the action, access to relied-upon materials, representation, at least 30 days to respond, and a written decision with appeal rights.
- Clear burden and evidentiary standards: the appellant bears the burden on timeliness, jurisdiction, and improper procedure; the responsible agency bears the burden on the merits; and both are governed by a preponderance-of-the-evidence standard.
- A robust record requirement, including a complete, indexed, paginated, and certified agency record with mitigating, rehabilitative, contradictory, and exculpatory evidence, plus the rationale for the action selected.

- Disclosure protections, including service of the record on the appellant, privilege-log or index requirements for withheld or redacted material, substitute-disclosure procedures where needed, and limits on reliance on undisclosed material.
- Separation-of-functions and impartiality safeguards, including separation when OPM is the responsible agency, adjudicator insulation, ex parte communication protections, conflict disqualification, and training requirements.
- ALJ adjudication of appeals by OPM applicants, appointees, or employees and limited OPM review of those ALJ decisions;
- Fact-development safeguards, including a written-record default, materiality limits on investigations, notice and disclosure of investigation results, and hearings before administrative judges whenever resolution of a material factual dispute requires evaluation of witness credibility or when the written record is otherwise insufficient to resolve facts material to the outcome of the appeal.
- Reasoned decision and remedy requirements, including findings on each material charge, specification, and suitability factor; review of whether sustained grounds support the action imposed; and legally authorized corrective relief for prevailing appellants.
- Reconsideration and finality rules, including party requests for reconsideration, Director review before finality, and specified points at which OPM decisions become final.
- Preservation of matters within the independent jurisdiction of the EEOC, FLRA, Inspectors General, MSPB, DOL VETS, and OSC.
- Protective-order limits and transparency safeguards, including narrow tailoring of protective orders, protection for lawful communications, public availability of final merits decisions or de-identified summaries, and access to final merits decisions for the appellant, the appellant's representative, and the representative of the involved Federal agency or office with a need to know.

### **III. Major Issues Raised by Commenters**

## **A. OPM Authority to Transfer Suitability Appeals from MSPB to OPM**

Several commenters questioned OPM's legal authority to remove suitability action appeals from the MSPB and asserted that the proposal contravenes congressional intent in the CSRA including its creation and empowerment of the MSPB.

Commenters 0207/0286, 0288, 0303, 0334, 0332, 0314, 0330, 0331, and 0329 argued that transferring suitability appeals is inconsistent with CSRA, collapses the separation between personnel management and independent adjudication, and would recreate features of the pre-CSRA Civil Service Commission model. Commenter 005 asserted that the proposed rule did not adequately identify statutory authority for narrowing or eliminating MSPB jurisdiction and argued that OPM had not sufficiently explained how the change comports with the CSRA. Commenter 186 asserted that OPM lacked statutory authority to adjudicate suitability cases. Commenter 236 argued that the rule violates 5 U.S.C. 1204(a)(1), which requires MSPB to handle and decide cases within its jurisdiction. Commenter 285 asserted that the proposal circumvents protections Congress afforded in Federal employment by removing powers from entities such as MSPB and OSC. Commenter 319 argued that OPM's reliance on 5 U.S.C. 7512(F) stretches that provision because, in the commenter's view, it applies only to pre-appointment matters and does not expand the scope of permissible suitability actions. Commenter 332 argued that OPM's interpretation of 5 U.S.C. 7512(F) is inconsistent with Congress's intent in the CSRA and, in connection with OPM's related Suitability and Fitness rule, would improperly move matters that should be handled under chapter 75 into the suitability process. Commenters also emphasized that suitability actions may result in removal, cancellation of eligibility, cancellation of reinstatement eligibility, or debarment, and therefore warrant review by a structurally independent tribunal.

OPM disagrees that the final rule exceeds OPM's authority or conflicts with the CSRA. The comments largely conflate three distinct questions: first, the substantive authority to make suitability determinations and take suitability actions; second, whether chapter 75 procedures

apply to suitability actions taken under OPM's regulations; and third, which administrative forum will review suitability actions under part 731. This rule addresses only the third question. It revises the administrative appeal procedure in subpart E of part 731. It does not independently expand the substantive grounds for taking suitability actions, enlarge the categories of positions covered by part 731, convert all misconduct into a suitability matter, or displace chapter 75 when an agency proceeds under chapter 75 rather than under part 731.

Congress has vested the President with broad authority to regulate admission to the civil service, to ascertain the fitness of applicants as to age, health, character, knowledge, and ability, and to prescribe rules governing the competitive service. *See* 5 U.S.C. 3301, 3302. Congress has also authorized the President to prescribe regulations for the conduct of employees in the executive branch. *See* 5 U.S.C. 7301. OPM administers these authorities through governmentwide regulations, including 5 CFR part 731. OPM's authority also includes prescribing regulations for examinations in the competitive service and administering civil service rules and regulations, subject to the statutory functions assigned to MSPB and OSC. *See* 5 U.S.C. 1103(a)(5), 1302(a).

The question in this rulemaking is therefore not whether OPM may newly create a suitability system. OPM has long administered such a system. The question is whether OPM may revise the regulatory forum for reviewing suitability actions taken under part 731.

The statutory structure answers that question. MSPB is not a tribunal of plenary jurisdiction. It may hear and decide only those matters placed within its jurisdiction by statute, rule, or regulation. *See* 5 U.S.C. 1204(a)(1); 5 U.S.C. 7701(a); *Forest v. MSPB*, 47 F.3d 409, 410 (Fed. Cir. 1995); *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1327 (Fed. Cir. 2006). Section 1204(a)(1) does not itself assign suitability actions to MSPB; it requires MSPB to hear matters that are otherwise within MSPB's jurisdiction. Likewise, section 7701(a) does not itself make every personnel action appealable to MSPB; it provides procedures when an employee or applicant appeals an action that is appealable to MSPB "under any law, rule, or

regulation.” The right to a hearing and representation under section 7701(a) attaches once an action is otherwise made appealable to MSPB; it does not independently create MSPB jurisdiction over actions that no law, rule, or regulation makes appealable.

For part 731 suitability actions, the prior MSPB appeal route was regulatory. The Federal Circuit recognized this point in *Folio v. Department of Homeland Security*, explaining that the Board’s jurisdiction “is not plenary, but is limited to those matters over which it has been given jurisdiction by law, rule, or regulation,” and that former 5 CFR 731.501 “pertains to appeals of agency suitability determinations to the Board and sets out that jurisdiction.” 402 F.3d 1350, 1353 (Fed. Cir. 2005). The court further observed that section 731.501 was the regulation that made the suitability determination appealable to MSPB under section 7701(a). *Id.* at 1356. Thus, before this final rule, MSPB jurisdiction over part 731 suitability appeals existed because OPM’s regulation placed those appeals before MSPB. It did not exist because chapter 75 independently required MSPB review of part 731 suitability actions. Because the prior MSPB appeal route was regulatory, OPM may revise that regulatory choice through notice-and-comment rulemaking.

OPM also disagrees with commenters who argue that 5 U.S.C. 7512(F) has no bearing on this rule. Section 7512(F) provides that chapter 75’s adverse-action provisions do not apply to “a suitability action taken by the Office under regulations prescribed by the Office, subject to the rules prescribed by the President under this title for the administration of the competitive service.” Congress added that language after the MSPB’s decision in *Scott v. OPM*, 116 M.S.P.R. 356 (2011), *modified by* 117 M.S.P.R. 467 (2012), and the Federal Circuit’s decision in *Archuleta v. Hopper*, 786 F.3d 1340 (Fed. Cir. 2015). In *Archuleta*, the Federal Circuit held that, because then-existing chapter 75 did not exclude suitability-based removals, a covered employee’s OPM-directed suitability removal was subject to chapter 75 adverse-action review. *See Archuleta*, 786 F.3d at 1348-51. Congress responded by adding section 7512(F). *See Pub. L.* 114-92, div. A, title X, sec. 1086(f)(9), 129 Stat. 1010.

OPM does not read section 7512(F) as a freestanding source of substantive suitability authority, and this final rule does not depend on such a reading. Section 7512(F) addresses chapter 75 coverage. It confirms that when OPM lawfully proceeds through a suitability action under OPM's regulations and applicable Presidential rules for the administration of the competitive service, that action is not an adverse action under chapter 75. The substantive standards for suitability determinations and suitability actions remain those prescribed in part 731 and supported by the underlying civil service authorities, including 5 U.S.C. 3301, 3302, and 7301. This final rule merely prescribes the administrative review mechanism for those actions. It does not rely on section 7512(F) to expand the conduct that may support a suitability action, to enlarge the class of covered employees, or to convert ordinary chapter 75 matters into suitability actions.

Nor does section 7512(F) need to do more than that for purposes of this final rule. The relevant point is narrower: where OPM or an agency proceeds under part 731 and the action is a suitability action within the meaning of part 731, chapter 75 does not compel MSPB review. Former subpart E nevertheless provided MSPB review as a matter of regulation. This final rule revises that regulatory appeal path by establishing an OPM appeal process. Because the statute does not itself require MSPB review of part 731 suitability actions, OPM's revision of its own regulations does not unlawfully eliminate a statutory MSPB appeal right.

OPM further disagrees that the CSRA's creation of MSPB as an independent adjudicatory body freezes in place every regulatory grant of MSPB jurisdiction that existed at or after the time of the CSRA. OPM recognizes that the CSRA separated personnel-management functions from many adjudicatory functions and created MSPB to adjudicate matters within its jurisdiction. But that integrated scheme itself makes MSPB jurisdiction dependent on statute, rule, or regulation. *See* 5 U.S.C. 1204(a)(1), 7701(a). Congress could have provided that all suitability actions under part 731 must always be reviewed by MSPB. It did not. Instead, it preserved a structure in which MSPB hears matters placed within its jurisdiction by law, rule, or

regulation, and former § 731.501 was the regulation that placed part 731 suitability appeals before MSPB. A regulatory forum choice does not become irrevocable merely because it has existed for a long period of time.

OPM also does not agree that establishing an OPM appeal process recreates the pre-CSRA Civil Service Commission or collapses the civil service remedial structure into OPM. This rule does not give OPM general authority to adjudicate all Federal employment disputes. It establishes an OPM-administered process for a narrow class of appeals involving suitability actions under part 731. MSPB remains responsible for matters placed within its jurisdiction by statute, rule, or regulation. OSC, EEOC, FLRA, Inspectors General, the Department of Labor's Veterans' Employment and Training Service, and other forums remain available where an independent legal basis for jurisdiction exists. Revised § 731.501(e) expressly provides that the part 731 appeal process is the sole means of appealing a suitability action under part 731, but does not otherwise preclude an applicant, appointee, or employee from filing a complaint, appeal, or other matter within the independent jurisdiction of those entities.

## **B. Separation of Policymaking and Adjudication Functions and Adequacy of OPM as a Suitability Appeals Forum**

Several commenters, including commenters 0005, 0046, and 0057, argued that the proposed OPM appeal process would not provide sufficiently impartial review because OPM issues suitability policy, may take or direct suitability actions, and would adjudicate appeals from those actions. Commenters also asserted that the proposed "appropriate independence" standard was insufficiently defined and did not adequately explain how OPM appeal adjudicators would be insulated from prior involvement, institutional pressure, supervisory influence, or case-specific direction. Other commenters similarly argued that transferring suitability appeals to OPM would collapse the separation between personnel management and independent adjudication that Congress adopted in the CSRA.

OPM does not agree that an OPM-administered suitability appeal process is inherently biased, creates an impermissible conflict of interest, or is inconsistent with the CSRA. Congress created MSPB as an independent adjudicatory body for matters within MSPB's jurisdiction, but the CSRA does not require every regulatory personnel appeal to be adjudicated by MSPB. As explained above, MSPB jurisdiction is limited to matters placed within its jurisdiction by law, rule, or regulation. *See* 5 U.S.C. 1204(a)(1), 7701(a). Prior MSPB jurisdiction over part 731 suitability appeals arose from OPM's regulations, not from chapter 75 itself. OPM therefore may revise the regulatory appeal forum for part 731 suitability actions, provided that the resulting process is fair, reasoned, and consistent with applicable law.

Nor does the fact that OPM administers civil service laws and regulations make OPM categorically incapable of adjudicating disputes under those laws. Congress vested the OPM Director with responsibility for executing, administering, and enforcing civil service rules and regulations and laws governing the civil service. *See* 5 U.S.C. 1103(a). OPM has long exercised adjudicative or quasi-adjudicative responsibilities in Federal personnel matters, including classification appeals under 5 CFR part 511, Fair Labor Standards Act claims under 5 CFR part 551, compensation and leave claims under 5 CFR part 178, and other matters assigned to OPM by statute or regulation. The existence of such functions does not transform OPM into an improper adjudicator; rather, it reflects a familiar feature of Federal administration in which agencies apply and adjudicate matters within programs they administer.

Other Federal agencies operate in the same manner. For example, the EEOC issues Federal-sector EEO regulations and adjudicates appeals from agency final actions, dismissals, class-complaint decisions, and certain grievance decisions raising discrimination issues. *See* 29 CFR 1614.401, 1614.405. The FLRA provides governmentwide leadership on Federal labor-management relations while resolving representation, negotiability, unfair-labor-practice, and arbitration matters. *See* 5 U.S.C. 7105. These examples illustrate that combining regulatory,



guidance, supervisory, and adjudicatory responsibilities within a single agency is not, standing alone, evidence of structural bias.

Supreme Court precedent confirms the same point. The Court has rejected the proposition that combining investigative, policymaking, prosecutorial, and adjudicative functions within an agency inherently violates due process. In *Withrow v. Larkin*, the Court explained that a party asserting unconstitutional bias in administrative adjudication must overcome the presumption of honesty and integrity of adjudicators and show a risk of actual bias or prejudgment that is constitutionally intolerable. 421 U.S. 35, 47 (1975). The Court likewise has rejected claims that agency decisionmakers are disqualified merely because they previously investigated or expressed policy views about related issues. *FTC v. Cement Institute*, 333 U.S. 683, 700–03 (1948). Due process concerns arise from more concrete circumstances, such as a direct, personal, substantial pecuniary interest, personal participation in the matter under review, personal animus, or an objectively intolerable probability of actual bias. *See Tumey v. Ohio*, 273 U.S. 510, 523, 532 (1927); *Withrow*, 421 U.S. at 47; *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884–87 (2009).

The APA reflects a similar principle. Even in formal adjudications governed by the APA, an agency may review an initial decision and, on review, generally has the powers it would have had in making the initial decision, subject to limits imposed by rule or notice. *See* 5 U.S.C. 557(b). The APA’s separation-of-functions provision also does not apply to “the agency or a member or members of the body comprising the agency.” 5 U.S.C. 554(d)(2)(C). Although this part does not make 5 U.S.C. 554, 556, or 557 applicable except to the extent independently required by law or expressly incorporated, these provisions underscore that Federal administrative law does not treat agency-head supervision or agency-level review as equivalent to bias. The relevant inquiry is whether the process contains adequate safeguards against prejudgment, improper influence, ex parte communications, and conflicts of interest.

Nor does the fact that OPM is headed by a presidentially appointed Director establish bias. The OPM Director is appointed by the President with the advice and consent of the Senate. *See* 5 U.S.C. 1102. That appointment structure does not itself disqualify the Director or the agency from carrying out adjudicatory responsibilities assigned by law or regulation. Federal administrative adjudication frequently occurs within agencies headed by presidentially appointed officials, including agencies that also issue regulations and enforce the statutory schemes they administer. Indeed, the MSPB consists of three members appointed by the President with Senate confirmation. *See* 5 U.S.C. 1201. Due process does not require every administrative appeal to be decided by an entity outside the Executive Branch; it requires procedures that provide a meaningful opportunity to be heard before a fair decisionmaker. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

OPM recognizes the importance of separating the personnel involved in taking a suitability action from the personnel assigned to adjudicate an appeal of that action. The revised regulatory text therefore does not rely solely on general assurances of internal separation. The revised regulatory text replaces the proposed rule's more general "appropriate independence" formulation with specific, codified safeguards. Section 731.503(b)(2) now defines the "responsible agency" to include the employing agency or, when OPM took, directed, or made the suitability action under review, the OPM office or component responsible for that action. When OPM is the responsible agency, the adjudicative function must be separated from any OPM office or official that participated personally and substantially in the suitability determination or action.

The final rule also codifies individual adjudicator protections. Section 731.505(a) requires OPM personnel assigned to adjudicate appeals to be insulated from officials who participated personally and substantially in the challenged action or provided case-specific advice concerning that action. It prohibits OPM adjudicators from considering material ex parte communications concerning the merits of an appeal. If such a communication occurs, OPM must

place a summary in the record and provide the parties a reasonable opportunity to respond, unless disclosure is prohibited by law. The rule also disqualifies any OPM employee who has a prior relationship with the appellant, had prior involvement in the suitability determination or suitability action under appeal, or has any other conflict that would reasonably call the employee's impartiality into question.

OPM has also strengthened the rule for cases in which the appellant is an OPM applicant, appointee, or employee. In those appeals, OPM will assign an administrative law judge to adjudicate the appeal. To further insulate those appeals from agency involvement, OPM will not disturb the administrative law judge's initial decision unless a party shows harmful procedural irregularity, clear legal error, or material factual error that affected the outcome. In addition, an administrative judge will preside over any hearing held under the ascertainment-of-facts provision, and the hearing will be limited to material factual issues identified by OPM or the administrative judge as necessary to resolve the appeal.

The final rule also addresses commenters' concerns about expertise and decisional quality. Section 731.505(c) requires all OPM employees or administrative law judges assigned to adjudicate appeals under this subpart to have completed training that complies with national training standards for suitability adjudicators and qualifies them to review OPM and agency suitability determinations and actions. The rule further requires a complete, indexed, paginated, and certified record of the action; allocates burdens of proof; requires findings on each material charge, specification, and suitability factor; and authorizes appropriate relief where the appellant prevails. These features reinforce that the process is not intended to be a summary affirmance mechanism or a "rubber stamp," but a specialized administrative appeal process focused on whether the responsible agency has established the suitability determination and action by a preponderance of the evidence and whether the appellant has established any appealable procedural defect.

OPM also considered comments objecting to Director review. The final rule explains the circumstances in which Directorial review is called for. The Director may reopen and reconsider an initial decision or reopened-and-reconsidered decision only before it becomes final. In deciding whether to exercise that authority, the Director may consider whether the decision contains clear legal error, rests on an erroneous finding of material fact, involves an issue of exceptional importance, affects governmentwide administration of the civil service laws, rules, regulations, or OPM policy, creates a conflict among OPM decisions, or otherwise warrants Director review. The rule also makes clear that there is no right to request Director review. These limitations provide transparency about when Director review is contemplated.

Ultimately, OPM concludes that the final rule provides a fair and reasoned adjudicatory process for suitability appeals. Suitability appeals require application of OPM's governmentwide suitability regulations and standards, and OPM is responsible for prescribing, interpreting, and administering those standards. At the same time, the final rule recognizes the importance of separating personnel involved in taking or directing a suitability action from personnel assigned to adjudicate an appeal of that action. The final rule therefore codifies separation-of-functions, ex parte, conflict-of-interest, ALJ, training, record-production, burden-of-proof, hearing, decision-writing, and transparency safeguards. OPM concludes that these safeguards adequately address commenters' impartiality concerns while preserving a specialized and efficient appeal process for part 731 suitability actions.

### **C. Due Process Considerations, Written Record, Hearings, and Discovery**

OPM received several comments expressing concern that transferring suitability-action appeals from MSPB to OPM would provide insufficient independent review for individuals subject to suitability actions. Commenter 0193 contended that limiting external review may undermine veterans' confidence that veterans' preference rights under 5 U.S.C. 3330a will receive fair and independent consideration. Commenter 0195 asserted that the proposed rule creates an inherent structural risk or appearance of bias inconsistent with constitutional

requirements for neutral decisionmakers because both the initial decisionmakers and reviewers ultimately report within OPM. Commenter 0195 also asserted that eliminating Federal Circuit review would violate constitutional due-process requirements. Commenter 0329 asserted that OPM cannot foreclose review in higher or alternative forums and that the proposed rule may increase litigation. Commenter 0332 argued that, because MSPB decisions are currently subject to Federal Circuit review, replacing MSPB review with an OPM final decision risks insulating suitability determinations from meaningful judicial scrutiny.

OPM has carefully considered these comments but disagrees that the final rule is inconsistent with due process or otherwise provides insufficiently fair review. With respect to veterans' preference, this rule concerns only the procedures for appealing suitability actions under 5 CFR part 731. It does not amend, limit, or adjudicate rights or remedies arising under the veterans' preference statutes, including 5 U.S.C. 3330a. Section 731.501(e) has been revised to make this point clearer: the procedures in subpart E are the sole means of appealing a suitability action under part 731, but do not otherwise preclude an applicant, appointee, or employee from filing a complaint, appeal, or other matter within the independent jurisdiction of the Department of Labor's Veterans' Employment and Training Service, the MSPB, the EEOC, the FLRA, an Inspector General, or OSC. Thus, the final rule does not displace veterans' preference remedies or other independent statutory forums.

OPM also disagrees that due process requires suitability appeals to be adjudicated by MSPB, by an inferior officer, or by an adjudicator outside OPM. The relevant constitutional inquiry is whether the procedures, taken as a whole, provide a meaningful opportunity to be heard before a fair decisionmaker. Administrative agencies may adjudicate matters within programs they administer, and combining policymaking, investigative, enforcement, and adjudicative functions in the same agency does not by itself violate due process. *See Withrow v. Larkin*, 421 U.S. at 47–52. The Supreme Court has emphasized that adjudicators are presumed to act with honesty and integrity, and due process is concerned with concrete risks of actual bias or

prejudgment, not the mere fact that adjudicators serve within the same agency that administers the relevant program. *See Mathews v. Eldridge*, 424 U.S. 319, 333–35 (1976); *Richardson v. Perales*, 402 U.S. 389, 402, 407–08 (1971).

At the same time, OPM agrees that the final rule should contain clear safeguards against prejudgment, improper influence, undisclosed evidence, and institutional bias. The final rule therefore adds substantial protections beyond those contained in the proposed rule. It defines the “responsible agency” to include the employing agency or, when OPM took, directed, or made the suitability action under review, the OPM office or component responsible for that action. When OPM is the responsible agency, the final rule requires the adjudicative function to be separated from any OPM office or official that participated personally and substantially in the suitability determination or action. The final rule also requires adjudicators to be insulated from officials who participated personally and substantially in the challenged action or provided case-specific advice; prohibits adjudicators from considering material ex parte communications concerning the merits unless the communication is placed in the record and the parties receive a reasonable opportunity to respond, unless disclosure is prohibited by law; and bars assignment of an adjudicator who had prior involvement in the action, a prior relationship with the appellant, or another conflict reasonably calling impartiality into question. These provisions respond directly to comments asserting that the proposed rule did not define “appropriate independence” with sufficient precision.

The final rule adds additional safeguards for cases involving OPM’s own applicants, appointees, and employees. In those cases, OPM will assign an administrative law judge to adjudicate the appeal, and OPM will not disturb the ALJ’s initial decision unless a party shows harmful procedural irregularity, clear legal error, or material factual error that affected the outcome. The final rule also requires an administrative judge to preside over any hearing held under the ascertainment-of-facts provision. These provisions are not constitutionally required in

every administrative appeal, but OPM has included them to further strengthen decisional independence and public confidence in the appeal process.

The constitutional adequacy of the final rule is best evaluated under the balancing framework set out in *Mathews*, which considers the private interest affected, the risk of erroneous deprivation and probable value of additional procedures, and the Government's interest, including administrative burden. Due process is flexible and calls for the procedures the particular situation demands. *See Gilbert v. Homar*, 520 U.S. 924, 930–31 (1997). OPM recognizes that suitability actions can have significant consequences, including removal, cancellation of eligibility, cancellation of reinstatement eligibility, or debarment. The final rule therefore provides notice, an opportunity to respond, representation, access to the materials relied upon, production of a complete record, an opportunity to reply, written adjudication, burden-of-proof standards, additional fact development where necessary, hearings where material factual disputes, including witness-credibility disputes, cannot be resolved on the developed written record, reconsideration, and appropriate relief where the appellant prevails. Those procedures, taken together, adequately reduce the risk of erroneous deprivation while preserving the Government's strong interest in resolving suitability issues efficiently and protecting the integrity and efficiency of the service.

Commenters 0303, 0334, 0332, 0333, and 0329 argued that eliminating MSPB discovery would exacerbate information asymmetry between appellants and agencies. Commenters asserted that the agency or OPM will control most relevant documents and witnesses, while appellants may lack access to evidence needed to show factual error, pretext, retaliation, or procedural irregularity. Commenters 0052 and 0060 expressed concern that written-record review and limitations on hearings would reduce procedural protections because suitability determinations may involve credibility assessments, subjective intent, character evidence, or disputed facts that are difficult to evaluate without live testimony, cross-examination, or in-person presentation of evidence. Commenters 0025 and 0053 similarly expressed concern that

eliminating MSPB-style discovery would restrict appellants' ability to obtain information needed to challenge the suitability determination.

OPM agrees in part and has revised the final rule to reduce the risk of error while retaining a streamlined process. OPM declines to provide automatic discovery or an automatic hearing in every part 731 appeal. Suitability appeals under this subpart concern limited regulatory issues: whether the unfavorable suitability determination that resulted in a suitability action is supported, whether the suitability action is substantively proper, and whether the responsible agency failed to provide specified procedural protections. A default written-record process is proportionate to those issues, particularly because suitability determinations often turn on application materials, investigative records, employment records, court records, written notices, written responses, and other documentary evidence. Written procedures can satisfy due process where the issues can be fairly resolved on a written record, and the Supreme Court has recognized in administrative adjudication that written evidence may support agency decisionmaking without violating due process. *See Richardson*, 402 U.S. at 402, 407–08.

The final rule, however, does not leave appellants confined to a record unilaterally selected by the responsible agency. The rule requires the responsible agency to file a complete, indexed, paginated, and certified record of the action. That record must include all documents considered, relied upon, generated, received, issued, or served in investigating, proposing, deciding, directing, or effectuating the unfavorable suitability determination and resulting suitability action, regardless of whether the documents are maintained by the employing agency, OPM, an OPM component, or another authorized investigative or personnel-vetting entity. The required record must include, as applicable, status and appointment documents, investigative and vetting materials, charge-by-charge analysis, suitability-factor analysis, consideration of mitigating, rehabilitative, contradictory, or exculpatory evidence, the rationale for the action selected, final-decision materials, implementation documents, and a certification that the



submitted record is complete. This record-production requirement is a significant safeguard against the information-asymmetry concerns raised by commenters.

The final rule also strengthens disclosure protections. The responsible agency must serve the appellant with the agency record. If documents are withheld, redacted, or protectively handled, the responsible agency must identify them in an index or privilege log unless identifying the document itself is prohibited by law. OPM may require a summary, substitute disclosure, protective order, in camera submission, or other procedure sufficient to provide the appellant a meaningful opportunity to respond, consistent with applicable law. The final rule provides that no nondisclosed material may be relied upon to affirm the suitability action unless the appellant has received notice of the substance of the material and a meaningful opportunity to respond, except as otherwise authorized by law. These provisions directly address concerns that appellants could be unable to know or rebut the evidence used against them.

OPM has also revised the hearing and fact-development provisions. The final rule authorizes OPM to require either party to provide additional information and to investigate the facts underlying the unfavorable suitability determination or suitability action when the existing record is insufficient to resolve a material issue within OPM's jurisdiction and the investigation is reasonably likely to produce material information. When OPM conducts an investigation, it must notify the appellant, the appellant's representative, and the responsible agency (and, if different, the employing agency) of the investigation and the nature of the information requested, provide the results of the investigation to the parties, and give them a reasonable opportunity to submit argument or additional information.

The final rule further provides objective criteria for hearings. OPM's review must be based solely on the developed written record unless the written record is insufficiently developed to resolve one or more facts material to the outcome of the appeal, including when resolution of a material factual dispute requires evaluation of witness credibility. In those circumstances, a hearing is required: OPM will assign an administrative judge to preside over the hearing, which

will be limited to the material factual issues identified by OPM or the administrative judge as necessary to resolve the appeal. These revisions respond to comments requesting defined hearing criteria while avoiding unnecessary hearings where the developed written record is sufficient.

OPM recognizes that oral presentation and cross-examination can have particular value where credibility or veracity is central. *See Goldberg v. Kelly*, 397 U.S. 254, 269–70 (1970). The final rule accounts for that concern by directing hearings where witness credibility is material to the outcome and cannot be resolved fairly on the written record. There will be cases in which uncontested objective facts are sufficient to resolve a suitability appeal—for example, where the appellant has been convicted of a disqualifying criminal offense. The final rule does not require a superfluous hearing in those cases. But where material facts are in dispute, particularly where resolution of the dispute requires evaluation of witness credibility, the rule provides for a hearing before an administrative judge. OPM declines, however, to adopt a categorical right to a hearing in every suitability appeal, including every removal or debarment case. Under *Mathews*, due process does not require the maximum possible procedure in every case; it requires procedures reasonably tailored to the interests, risks, and governmental burdens at issue. The final rule’s material-dispute standard provides hearings where they are likely to improve decisional accuracy, while avoiding proceedings that would add cost and delay without meaningful benefit.

The final rule also adds several safeguards beyond record production, disclosure, and hearings. It expressly allocates burdens of proof: the appellant bears the burden to establish timeliness, OPM jurisdiction, and any improper-procedure claim, while the responsible agency bears the burden to establish, by a preponderance of the evidence, the charge or charges supporting the unfavorable suitability determination and the substantive propriety of the suitability action. It requires adjudicators and ALJs assigned to appeals to have completed training that complies with national training standards for suitability adjudicators. It requires written initial decisions that may affirm, reverse, modify, vacate, or remand the action in whole or in part and that must make findings on each material charge, specification, and suitability

factor. If fewer than all charges or specifications are sustained, OPM must determine whether the sustained grounds support the action imposed and may affirm, reverse, modify, vacate, or remand as appropriate.

The final rule further provides remedies where the appellant prevails, including correction, cancellation, or modification of the suitability action; correction of relevant records; prospective eligibility or appointment-related relief; and, where legally authorized, back pay, interest, and reasonable attorney fees. It limits protective orders and cease-and-desist directives to matters necessary to protect the integrity of the adjudicatory process, prevent threats, intimidation, targeted harassment, improper witness contact, disclosure of protected personal information, or misuse of nonpublic information obtained through the appeal. Any protective order must be no broader than reasonably necessary and must not restrict lawful communications protected by law. The rule also provides for reconsideration based on material factual error, legal error, new and material evidence or legal argument that was unavailable despite due diligence, or good cause; limits Director review to decisions that have not yet become final; identifies considerations that may warrant Director review; clarifies finality; and requires public availability of final merits decisions or de-identified summaries consistent with FOIA, the Privacy Act, and other applicable law.

OPM concludes that the procedures adopted in the final rule are adequate and proportionate for the limited issues appealable under part 731. The final rule does not simply replace MSPB review with summary internal review. It creates a specialized suitability-appeal process with express burden allocations, separation-of-functions protections, ex parte safeguards, adjudicator-disqualification rules, ALJ protections where appropriate, a complete certified record, disclosure and substitute-disclosure requirements, a bar on reliance on undisclosed material absent notice and a meaningful opportunity to respond except as authorized by law, objective criteria for investigations and hearings, administrative judge-presided hearings, written findings on material charges and suitability factors, reconsideration standards, remedies, and

transparency provisions. OPM therefore concludes that the final rule provides a fair and meaningful opportunity to challenge a part 731 suitability action while also serving the Government's interest in timely, consistent, and expert resolution of suitability appeals.

#### **D. Claims of Politicization, Merit System Harm, and Whistleblower Reprisal**

OPM received comments that characterized the proposed rule as anti-democratic. See comments 010 and 213. Commenters 008 and 009 also expressed concern that moving suitability action appeals from MSPB to OPM would politicize the suitability appeals process. Commenters 0004 and 0285 expressed concern that moving suitability appeals from MSPB to OPM could weaken whistleblower protections, discourage employees from reporting waste, fraud, abuse, or corruption, and limit access to independent review or other legal protections. Commenter 0285 also appeared to assert that the proposed rule would remove appeal rights and prevent appellants from seeking review of unfavorable suitability determinations and to raise broader concerns about OPM removing powers from entities such as MSPB and OSC in this area.

OPM disagrees that this rule is anti-democratic or that it politicizes the suitability action appeals process. The rule does not authorize suitability determinations or suitability actions based on political affiliation, political viewpoint, voting history, partisan activity, or disagreement with agency leadership. Suitability determinations continue to be based on the specific suitability factors in 5 CFR 731.202(b) and on whether the individual's character or conduct may adversely affect the integrity or efficiency of the service. In addition, pursuant to section 731.102(c), suitability determinations and actions under part 731 must be applied consistent with the Merit Systems Principles in 5 U.S.C. 2301 and the prohibited personnel practices in 5 U.S.C. 2302(b). Those requirements prohibit the use of suitability procedures for partisan political purposes or other unlawful personnel practices.

OPM also rejects the contention that MSPB review is any more or less independent than OPM review. Like MSPB, OPM is an independent agency. 5 U.S.C. 1101. Both MSPB and

OPM leadership are appointed by the President with Senate consent. Further, both MSPB Members and the OPM Director are equally accountable to and serve at the pleasure of the President.<sup>1</sup> The principal difference between MSPB and OPM is that the MSPB is led by three Presidentially-appointed members while OPM is headed by a single Presidentially-appointed director. But the MSPB's tripartite leadership structure does not make it meaningfully more independent than OPM; both agencies are equally subject to Presidential supervision. Consequently, OPM rejects the argument that greater MSPB independence makes it a more appropriate venue for suitability appeals as the premise is inaccurate.

OPM agrees with commenters that statutory whistleblower protections and prohibitions against whistleblower retaliation are important. Nothing in this final rule authorizes OPM or an agency to take a suitability action because an individual made a protected disclosure or engaged in protected whistleblowing activity. Further, nothing in this rule alters the statutory prohibition on retaliation for protected disclosures and protected activity, *see* 5 U.S.C. 2302(b)(8)-(9), the OSC's authority to receive and investigate allegations of prohibited personnel practices, *see* 5 U.S.C. 1214(a)(1)(A), or any individual right of action before MSPB that otherwise exists. 5 U.S.C. 1221.

Nor does the rule eliminate an individual's ability to challenge a suitability action. Rather, the rule changes the forum for suitability action appeals and establishes an OPM appeals process. Under that process, an appellant may contest the unfavorable suitability determination and may challenge whether the required suitability action procedures were followed. OPM will review the record using the preponderance of the evidence standard and may affirm, reverse, modify, vacate, or remand the action, in whole or in part.

OPM also disagrees that adjudication by OPM creates a politicized process or weakens whistleblower protections. The final rule also adds safeguards that directly address concerns about pretext, retaliation, and rubber-stamp review. The responsible agency must prove, by a

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<sup>1</sup> *See Harris v. Bessent*, 160 F.4th 1235 (D.C. Cir. 2025); *see also Trump v. Slaughter*, No. 25-332 (June 29, 2026).

preponderance of the evidence, the charge or charges supporting the unfavorable suitability determination and the substantive propriety of the suitability action. The appellant may challenge specified procedural failures. The responsible agency must provide a complete, indexed, paginated, and certified record, including the charge-by-charge analysis, suitability-factor analysis, consideration of mitigating, rehabilitative, contradictory, or exculpatory evidence, and the rationale for the action selected. OPM may not rely on nondisclosed material to affirm a suitability action unless the appellant receives notice of the substance of the material and a meaningful opportunity to respond, except as otherwise authorized by law. The final rule includes procedural safeguards intended to support impartial review, including separation between personnel involved in taking the suitability action and personnel assigned to adjudicate the appeal, training requirements for personnel adjudicating appeals, minimum requirements for the contents of the responsible agency's record, written decisions, and standards governing review of the record.

OPM also revised the final rule to make clear that the part 731 appeal process does not displace matters within the independent jurisdiction of the EEOC, FLRA, Inspectors General, MSPB, VETS, and OSC. Thus, allegations of discrimination, retaliation, whistleblower reprisal, labor-relations violations, veterans' rights violations, or other prohibited personnel practices remain subject to the procedures and remedies Congress assigned to those forums. Evidence of improper motive may also be considered in a part 731 appeal to the extent relevant to whether the charged suitability factor is supported, whether the suitability action is substantively proper, or whether the appellant has established an appealable procedural defect.

For these reasons, OPM declines to retain MSPB review based on comments asserting that the OPM appeal process is anti-democratic or politically motivated. The final rule does not introduce political criteria into suitability adjudication. Nor does it displace existing whistleblower protections and related statutory remedies. Instead, it establishes a specialized administrative appeal process while preserving the requirement that suitability determinations

and actions be based on conduct relevant to the integrity or efficiency of the service and be applied consistently with the merit system principles and prohibited personnel practices.

#### **E. Exclusion of Mixed Cases**

Commenters 0334, 0332, 0303, and 0329 argued that eliminating MSPB review would fragment mixed-case adjudication, weaken civil-rights enforcement, and require employees to litigate related facts in multiple forums. Commenters also expressed concern that individuals alleging discrimination, retaliation, whistleblower reprisal, veterans' rights violations, labor-relations violations, or other prohibited personnel practices would lack meaningful remedies.

OPM acknowledges that a suitability action may arise from facts that also form the basis of a discrimination claim, prohibited-personnel-practice allegation, whistleblower reprisal claim, veterans' rights claim, labor-relations matter, or other statutory cause of action. OPM disagrees, however, that part 731 must preserve an MSPB "mixed case" route for those claims. The mixed-case framework in 5 U.S.C. 7702 and 29 CFR 1614.302 applies where an employee or applicant has been affected by an action that is otherwise appealable to MSPB and alleges covered discrimination. Once this final rule removes the regulatory MSPB appeal for part 731 suitability actions, a part 731 suitability appeal is no longer an MSPB appeal to which the mixed-case procedures attach. Cases such as *Kloeckner v. Solis*, 568 U.S. 41 (2012), and *Perry v. MSPB*, 582 U.S. 420 (2017), address routing and review of statutory mixed cases; they do not require OPM to retain a regulatory MSPB appeal for suitability actions where no statute independently requires one.

This rule does not eliminate independent statutory remedies. OPM revised § 731.501(e) to make clear that the part 731 appeal process is the sole means of appealing a suitability action under part 731, but does not otherwise preclude an applicant, appointee, or employee from filing a complaint, appeal, disclosure, grievance, or other matter within the independent jurisdiction of the EEOC, FLRA, an Inspector General, MSPB, the Department of Labor's Veterans' Employment and Training Service, or OSC. Thus, discrimination claims remain subject to the

Federal-sector EEO process; prohibited-personnel-practice and whistleblower-reprisal matters remain subject to OSC and MSPB jurisdiction where applicable; veterans' rights matters remain subject to the governing VETS and MSPB procedures; and labor-relations matters remain subject to the statutory framework Congress assigned to the FLRA or other appropriate forum.

OPM will adjudicate the issues assigned to it under part 731: whether the unfavorable suitability determination is supported, whether the resulting suitability action is substantively proper, and whether the appellant has established an appealable procedural defect. OPM will not adjudicate independent claims of discrimination, retaliation, whistleblower reprisal, veterans' rights violations, or labor-law violations in a part 731 appeal. Evidence of discriminatory or retaliatory motive, however, may be considered to the extent it is relevant to the part 731 issues before OPM, including whether the charged suitability factor is supported, whether the action selected is substantively proper, or whether the appellant has established improper procedure.

This allocation of claims reflects, rather than undermines, the structure of the civil service remedial scheme. Congress has not created a single universal forum for every Federal employment dispute. Different forums decide different legal questions under different statutes, standards, procedures, and remedial schemes. A discrimination claim, a prohibited-personnel-practice claim, a USERRA or VEOA claim, a labor-relations claim, and a part 731 suitability appeal may involve overlapping facts, but they are not the same claim. Routing those claims to the entities Congress assigned to administer them preserves specialized expertise and avoids requiring OPM to decide matters outside the scope of part 731.

OPM also disagrees that this structure improperly duplicates proceedings or conceals unlawful conduct. Where an individual pursues multiple avenues of redress, some evidence may overlap, but the legal inquiries differ. In a part 731 appeal, OPM determines whether the suitability action satisfies part 731. In an EEO matter, the responsible agency and EEOC framework determine whether antidiscrimination law was violated. In an OSC, MSPB, FLRA, VETS, or Inspector General matter, the relevant entity applies the statute and procedures



governing that matter. The final rule preserves those independent channels and does not alter their jurisdiction, deadlines, election requirements, or remedies.

Accordingly, OPM declines to revise the rule to preserve an MSPB mixed-case election for part 731 suitability appeals. The final rule clarifies claim routing, preserves independent statutory remedies, and ensures that OPM's review remains focused on the suitability determination and action committed to OPM under part 731.

#### **F. Limitation on Judicial Review**

In the final rule, OPM provides that a party may not obtain judicial review of an OPM decision issued under this subpart and that there is no further right of appeal from a final OPM decision. Commenters 0207, 0329, and 0332 objected that the rule does not preserve review comparable to Federal Circuit review of MSPB decisions, and commenter 0207 objected generally to eliminating judicial review.

OPM declines to revise the rule in response to these comments. The final rule does not withdraw a statutory right to judicial review. Rather, it reflects that Congress has not provided a statutory right to judicial review of an OPM decision adjudicating a regulatory suitability appeal under part 731. Congress has provided judicial review in the CSRA where it chose to do so. For example, 5 U.S.C. 7703 authorizes judicial review of final orders or decisions of the MSPB. But a final decision issued under this subpart is an OPM decision, not an MSPB order or decision. Nothing in 5 U.S.C. 7703, chapter 75, or chapter 77 grants a party a right to judicial review of an OPM decision issued under this regulatory suitability-appeal process.

Nor did the prior availability of judicial review create an independent statutory entitlement to court review of all suitability appeals. Any Federal Circuit review previously available flowed from OPM's former regulatory decision to route suitability appeals to MSPB, whose final decisions are governed by 5 U.S.C. 7703. The Federal Circuit has recognized that MSPB jurisdiction is not plenary and that, for suitability appeals, former § 731.501 was the regulation that placed those matters within MSPB's jurisdiction. *Folio*, 402 F.3d at 1353, 1356

(Fed. Cir. 2005). OPM has now revised that regulatory forum. Because no statute independently requires MSPB review of part 731 suitability actions, the elimination of the prior regulatory MSPB route does not eliminate a statutory judicial-review right.

This conclusion follows from the structure of the CSRA. MSPB hears matters placed within its jurisdiction by law, rule, or regulation. *See* 5 U.S.C. 1204(a)(1), 7701(a) (2024). Section 7701(a) supplies procedures for actions otherwise appealable to MSPB; it does not itself make every personnel matter appealable to MSPB. Section 7512(F) further confirms that a suitability action taken by OPM under OPM regulations is not a chapter 75 adverse action. Thus, where OPM or an agency proceeds under part 731, chapter 75 does not supply an independent MSPB or Federal Circuit review path.

The CSRA is a comprehensive and carefully calibrated remedial scheme. The D.C. Circuit has explained that Congress “intentionally provid[ed]—and intentionally [did] not provid[e]—particular forums and procedures for particular kinds of claims.” *Am. Fed’n of Gov’t Emps. v. Secretary of the Air Force*, 716 F.3d 633, 636 (D.C. Cir. 2013); *see also Am. Fed’n of Gov’t Emps. v. Trump*, 929 F.3d 748, 757 (D.C. Cir. 2019). The scheme is “comprehensive and exclusive.” *Grosdidier v. Broad. Bd. of Governors*, 560 F.3d 495, 497 (D.C. Cir. 2009). It regulates Federal employment and prescribes in detail the remedies, forums, and review available for different categories of personnel disputes. *Nyunt v. Broad. Bd. of Governors*, 589 F.3d 445, 448 (D.C. Cir. 2009). That exclusivity applies even where the CSRA provides no relief in a particular circumstance. *Graham v. Ashcroft*, 358 F.3d 931, 935 (D.C. Cir. 2004); *Filebark v. Dep’t of Transportation*, 555 F.3d 1009, 1010 (D.C. Cir. 2009); *Fornaro v. James*, 416 F.3d 63, 67 (D.C. Cir. 2005).

The Supreme Court has applied the same principle. In *United States v. Fausto*, the Court held that the absence of CSRA review rights for a covered category of excepted-service employees was not a gap to be filled by another remedial statute, but a manifestation of Congress’s considered judgment about the scope of review. 484 U.S. 439, 448–49 (1988). In

*Elgin v. Dep't of the Treasury*, the Court held that the CSRA supplied the exclusive review scheme for covered employees challenging covered adverse actions, even where constitutional claims were raised. 567 U.S. 1, 11–15 (2012). These decisions confirm that the relevant question is not whether judicial review would be desirable as a policy matter, but whether Congress provided it for the action, forum, claim, and party at issue.

Further, having decided to channel suitability appeals to OPM instead of the MSPB, OPM cannot itself confer, by regulation, a right to judicial review of its decisions in suitability actions. It is black-letter constitutional law that the “United States, as sovereign, is immune from suit save as it consents to be sued,” and “the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.” *United States v. Sherwood*, 312 U.S. 584, 586 (1941). It is equally well established that such consent must come from Congress: waivers of sovereign immunity must be “unequivocally expressed in statutory text”. *Lane v. Peña*, 518 U.S. 187, 192 (1996). The Supreme Court has held that without specific statutory authorization, no suit may be brought against the United States, and “no officer by his action can confer jurisdiction.” *United States v. Shaw*, 309 U.S. 495, 501 (1940). The CSRA waives the Federal Government’s sovereign immunity and authorizes judicial review of MSPB decisions. That waiver, however, extends to petitions for review of final MSPB orders and decisions under 5 U.S.C. 7703; it does not extend to an OPM decision issued under this subpart. The provisions of the final rule stating that a party cannot obtain judicial review of a decision under this subpart accordingly do not withdraw any consent to suit that Congress has given. They reflect OPM’s considered view, explained below, that Congress has neither provided a specific avenue of judicial review for these decisions nor left them subject to review under the general provisions of the Administrative Procedure Act (APA), because the CSRA’s comprehensive and exclusive remedial scheme precludes such review.

OPM acknowledges that sovereign immunity, standing alone, would not bar every suit challenging a final OPM decision under this subpart. In 1976, Congress amended 5 U.S.C. 702 to

waive the Federal Government’s sovereign immunity in actions “seeking relief other than money damages” against an agency or its officers or employees. Public Law 94–574, 90 Stat. 2721 (1976). A suit challenging a final OPM decision under this subpart that seeks only nonmonetary relief—for example, an order setting aside the suitability action—accordingly would not confront a sovereign-immunity bar as such. The dispositive question for such a suit is not immunity but reviewability. Section 702 waives immunity subject to existing limits: it expressly preserves “other limitations on judicial review” and confers no authority to grant relief that any other statute granting consent to suit expressly or impliedly forbids. 5 U.S.C. 702. And the APA’s judicial-review provisions do not apply to the extent that “statutes preclude judicial review.” 5 U.S.C. 701(a)(1). Congressional intent to preclude review need not be express; it may be “fairly discernible” from the structure of a statutory scheme that channels claims through a particular administrative path. *Block v. Community Nutrition Institute*, 467 U.S. 340, 345, 349, 351 (1984); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994); *Elgin*, 567 U.S. at 10. As explained below, the CSRA is such a scheme with respect to challenges to Federal personnel actions.

OPM also disagrees that the APA independently requires judicial review of OPM’s final decision under this subpart. OPM recognizes that 5 U.S.C. 704 makes reviewable “final agency action for which there is no other adequate remedy in a court,” and that a final OPM decision under this subpart is final agency action. OPM further recognizes that, because this rule replaces the former avenue of MSPB adjudication followed by judicial review under 5 U.S.C. 7703, an appellant will have no alternative judicial remedy for a suitability action, so section 704’s adequate-alternative-remedy limitation would not itself bar an APA claim. But section 704 identifies which agency actions are reviewable when judicial review is otherwise available; it does not supply review that the governing statutory scheme withholds. The APA does not create review where statutes preclude review, and it does not allow parties to bypass the exclusive remedial structure Congress established for Federal personnel disputes. *See* 5 U.S.C. 701(a)(1), 704; *Fausto*, 484 U.S. at 448–49; *Elgin*, 567 U.S. at 11–15. In *Fausto*, the Supreme Court held

that the CSRA’s “integrated scheme of administrative and judicial review” forecloses review outside its terms even for employees to whom the statute gives no right of review at all. 484 U.S. at 443–49. The courts of appeals have repeatedly applied that holding to bar APA suits over Federal employment actions. *Fornaro v. James*, 416 F.3d 63, 66–67 (D.C. Cir. 2005) (“what you get under the CSRA is what you get”); *Grosdidier v. Chairman, Broadcasting Board of Governors*, 560 F.3d 495, 497 (D.C. Cir. 2009); *Filebark v. United States Department of Transportation*, 555 F.3d 1009, 1010–14 (D.C. Cir. 2009); *Graham v. Ashcroft*, 358 F.3d 931, 933–35 (D.C. Cir. 2004); *Nyunt v. Chairman, Broadcasting Board of Governors*, 589 F.3d 445, 448 (D.C. Cir. 2009). Those decisions confirm that CSRA preclusion applies even where the statute affords the claimant no avenue of relief. The final rule therefore does not use regulation to extinguish a statutory judicial-review right; it clarifies that the part 731 regulatory appeal process itself does not create one.

OPM acknowledges one respect in which this rulemaking differs from *Fausto* and *Elgin*: here, the unavailability of further review results in part from OPM’s revision of its own regulations rather than solely from the CSRA’s text. But the premise of that revision is statutory. Congress provided in 5 U.S.C. 7512(F) that chapter 75’s adverse-action provisions do not apply to a suitability action taken under OPM’s regulations, and the MSPB appeal path that this rule replaces existed only as a matter of OPM regulation. The architecture of review for suitability actions thus rests, within the CSRA’s comprehensive framework, on OPM’s regulations, and the *Fausto–Elgin* structural analysis governs the resulting scheme. In any event, this rule neither enlarges nor contracts the jurisdiction of the Federal courts, which is fixed by statute; whether a particular suit may proceed under 5 U.S.C. 702 and 704 is ultimately a question for the courts to decide. Nor does anything in this subpart purport to preclude judicial review of colorable constitutional claims, which courts require a heightened showing of congressional intent to foreclose. *Webster v. Doe*, 486 U.S. 592, 603 (1988).

Finally, the limitation on judicial review applies to OPM's decision under this subpart. Revised § 731.501(e) preserves an applicant's, appointee's, or employee's ability to file a complaint, appeal, or other matter within the independent jurisdiction of the EEOC, FLRA, an Inspector General, MSPB, the Department of Labor's Veterans' Employment and Training Service, or OSC. Accordingly, the final rule does not foreclose independent statutory remedies; it provides that the final OPM decision resolving a part 731 suitability appeal is not subject to further administrative appeal or judicial review under part 731.

### **G. Recruitment, Retention, and Workforce Concerns**

Several commenters, including commenter 0097, expressed concern that the proposed rule would negatively affect hiring, retention, morale, and trust in Federal personnel systems because employees and potential applicants rely on predictable, transparent, and fair suitability procedures. Other commenters, including commenter 0166, supported the rule, stating that existing processes can be burdensome and may discourage agencies from acting when serious conduct raises suitability concerns, thereby allowing conduct that harms workplace culture, mission performance, and accountability to persist. Similar comments in the record reflected both sets of concerns: some commenters warned that reduced protections could deter Federal service, while others acknowledged that existing processes may be slow or may discourage warranted action.

OPM agrees that public confidence in the Federal personnel system is essential to recruitment and retention. But confidence is not served only by preserving existing procedures. It is also served by ensuring that suitability concerns are resolved promptly, consistently, and under procedures that are clear to applicants, appointees, employees, agencies, and the public. A system that leaves serious suitability concerns unresolved for extended periods can itself harm morale, workplace trust, mission effectiveness, and the willingness of high-performing employees to remain in Federal service.

OPM disagrees that MSPB review is necessary to maintain a stable and attractive Federal workforce. This rule does not make suitability actions at-will dismissals, does not add political or viewpoint-based suitability criteria, and does not eliminate procedural protections. Suitability actions remain limited to actions taken under part 731 because of an unfavorable suitability determination, and appellants may contest both the unfavorable suitability determination and specified procedural failures. The final rule also adds safeguards beyond the proposal, including express burdens of proof, a complete certified agency record, disclosure protections, separation-of-functions requirements, adjudicator conflict rules, ex parte protections, training requirements, ALJ adjudication or administrative judge-presided hearings where required by the rule, objective criteria for additional fact development and hearings, written findings on material charges and suitability factors, remedies for prevailing appellants, reconsideration standards, and public availability of final merits decisions or de-identified summaries.

These protections respond directly to commenters' concerns that a streamlined process could reduce fairness or transparency. At the same time, the final rule responds to commenters who emphasized the costs of delay and under-enforcement. A suitability system that is too cumbersome to use effectively can undermine accountability and public trust by deterring agencies from addressing conduct that bears on the integrity or efficiency of the service. The final rule seeks to avoid both errors: unsupported or procedurally defective suitability actions should not be sustained, but supported suitability actions should be resolved without unnecessary duplication or delay.

Accordingly, OPM does not expect this final rule to deter qualified applicants from seeking Federal employment or discourage employees from continuing their service. OPM expects the rule to promote a more predictable, timely, and accountable suitability appeals process while preserving meaningful procedural protections and reinforcing the integrity and efficiency of the Federal service.

## **H. Sanctions and Protective Orders**

Several commenters, such as 0296, 0299, 0303, 0329, and others, expressed concern that the proposed sanctions for noncompliance are excessively severe, and that the sanctions and protective-order provisions in the proposed rule were overly broad and insufficiently justified. Commenters argued the language improperly expanded OPM's authority by allowing OPM to issue protective or "cease-and-desist" orders *sua sponte*, preemptively, and outside the context of actual harassment. Commenters further asserted that the proposal could restrict First Amendment-protected speech, employee advocacy, union communications, whistleblowing, and other protected disclosures by limiting the use or communication of appeal-related information.

OPM has considered these comments and is narrowing § 731.506 in the final rule. The final rule does not adopt the broad "reasonably be foreseen to lead to harassment" formulation and does not authorize OPM to bar use of any information related to an appeal for any purpose whatsoever. Instead, OPM may issue a protective order or cease-and-desist directive only to protect the integrity of the adjudicatory process; prevent threats, intimidation, targeted harassment, improper witness contact, disclosure of protected personal information; or prevent misuse of nonpublic information obtained through the appeal. The final rule also adds two limiting principles. Any protective order must be no broader than reasonably necessary, and any such order must not restrict lawful communications protected by law.

OPM declines to remove protective-order authority entirely. Because OPM will adjudicate appeals under part 731, it must have reasonable procedural tools to protect witnesses, parties, protected personal information, nonpublic appeal materials, and the integrity of the adjudicatory record. OPM also retains authority to act *sua sponte* or preemptively where necessary, because threats to the process, improper witness contact, or disclosure of protected information may arise before a party files a motion or before harm has fully occurred. That authority is limited to matters connected to an appeal under part 731 and to the specific purposes identified in § 731.506(a).



The final rule does not prohibit an appellant from discussing the appellant's own experience, seeking advice or representation, communicating with a union representative or attorney, filing or pursuing a matter before another authorized forum, making protected whistleblower disclosures, communicating with Congress, or engaging in any other communication protected by law. As revised, § 731.506 is a tailored case-management provision designed to protect the fairness and integrity of the adjudicatory process.

As finalized, § 731.506 is not a general authority for OPM to restrict speech, control communications unrelated to an appeal, or create a procedural trap for appellants. OPM may issue a protective order or cease-and-desist directive only for specified process-integrity purposes: to protect the integrity of the adjudicatory process; prevent threats, intimidation, targeted harassment, improper witness contact, or disclosure of protected personal information; or prevent misuse of nonpublic information obtained through the appeal. The final rule further provides that any protective order must be no broader than reasonably necessary and must not restrict lawful communications protected by law. These limitations directly address commenter concerns that the proposed language could be read too broadly.

OPM also clarifies that a violation of a protective order will not automatically result in denial or dismissal of an appeal. Section 731.506 is a case-management provision, not a dispositive merits rule. If a party violates a lawful protective order, OPM may impose only case-related sanctions appropriate to the violation, such as drawing an adverse inference, limiting a party's reliance on improperly used evidence, or excluding appropriate portions of a filing or submission. Any such consequence must be tied to the violation and to the integrity of the adjudicatory process; it may not be used to avoid deciding the appealable issues under § 731.501(c).

In sum, OPM appreciates and has revised this section to reflect valid concerns raised by the commenters, and is finalizing language that is narrower and clearer, to ensure that the

authority—both the protective order and sanctions for violation thereof—are used only to protect the fairness and integrity of the part 731 adjudication process.

## **I. Remedies**

Commenter 0296 objected that proposed § 731.505(h) appeared to limit prevailing appellants principally to Back Pay Act relief and would delay payment of back pay, interest, and attorney fees until OPM's decision became final. The commenter also argued that excluding discrimination claims from the suitability appeal process would deny compensatory damages in that forum.

OPM agrees in part and has revised the remedies provision to better reflect the range of relief that may be appropriate in a suitability appeal. The final rule no longer frames relief solely in Back Pay Act terms. Instead, final § 731.505(g) provides that, if the appellant is the prevailing party, OPM will order appropriate relief authorized by law, which may include correction, cancellation, or modification of the suitability action; correction of relevant records; prospective eligibility or appointment-related relief; and, where applicable and legally authorized, back pay, interest, and reasonable attorney fees consistent with 5 CFR part 550, subpart H.

This revision is important because part 731 appeals may involve applicants, appointees, or employees and may concern cancellation of eligibility, removal, cancellation of reinstatement eligibility, or debarment. A remedy limited to back pay would not adequately account for cases involving applicants or eligibility-based actions. The final rule therefore expressly authorizes relief tailored to the suitability action at issue, including correction of records and prospective eligibility or appointment-related relief where authorized.

OPM also revised the proposed rule's treatment of interim relief. The final rule removes the proposed language stating that back pay, interest, or attorney fees are not payable before the decision becomes final. Instead, if a party timely seeks reopening and reconsideration, or if the OPM Director reopens and reconsiders an initial decision, the responsible agency must continue to provide ordered relief unless OPM issues a stay. The final rule further provides that no stay

may deprive the individual of pay and benefits while the initial decision is pending reconsideration. This change addresses the commenter's concern that relief could be unduly delayed after an appellant prevails.

OPM declines, however, to authorize compensatory damages or other relief not available under applicable law in a part 731 suitability appeal. The purpose of subpart E is to determine whether the unfavorable suitability determination and resulting suitability action are supported and whether the required suitability-action procedures were followed. It is not an EEO adjudication, a prohibited-personnel-practice proceeding, or a general damages forum. Accordingly, the final rule provides that the appellant is not entitled to compensatory damages or other relief not authorized by law.

This limitation does not preclude remedies available in another forum. Section 731.501(e) makes clear that the part 731 appeal process does not prevent an applicant, appointee, or employee from filing a complaint, appeal, or other matter within the independent jurisdiction of the EEOC, FLRA, an Inspector General, MSPB, DOL VETS, or OSC. Thus, if compensatory damages or other relief are authorized in an EEO or other statutory process, this rule does not limit those remedies. The final rule simply confines remedies in the part 731 appeal to relief legally available for correcting an improper suitability determination or suitability action.

## **J. Appellant Representatives, Union Involvement, and Official Time**

Commenters 0303, 0332, 0333, and 0329 objected to the proposed representative provisions, arguing that the restriction on Federal-employee representatives serving while on duty status or official time conflicts with 5 U.S.C. 7131, collective-bargaining agreements, and established representational rights. Commenter 0333 also argued that the rule would eliminate negotiated grievance and arbitration rights for bargaining-unit employees. Commenters 0043, 0249, 0250, 0252, and others raised similar concerns about OPM's authority to disallow a chosen representative.

OPM recognizes the importance of representation in suitability-action appeals. For that reason, the final rule preserves an appellant's right to select a representative of the appellant's choice to assist in preparing and presenting an appeal. It also makes notice of the right to representation one of the procedural protections that an appellant may challenge as an improper procedure if the responsible agency failed to provide it.

OPM does not agree, however, that a Federal employee selected as a representative must be permitted to perform representational functions in duty status or on official time in this OPM regulatory appeal process. A part 731 appeal is not a negotiated grievance proceeding under chapter 71. It is a governmentwide suitability-appeal procedure established by OPM for review of suitability actions under part 731. Section 7131(d) does not create an unconditional entitlement to official time for every representational activity in every forum; it provides for official time in amounts the agency and exclusive representative agree are reasonable, necessary, and in the public interest. Section 7117(a)(1), in turn, provides that the duty to bargain extends only to the extent not inconsistent with Federal law or any governmentwide rule or regulation.

Accordingly, OPM is adopting § 731.504(b) as a governmentwide procedural limitation for this appeal process. The provision does not "delete" statutory text or eliminate the right to representation. It specifies that, when the chosen representative is a Federal employee, that representative may not perform the representational function in duty status, including official time under 5 U.S.C. 7131, and may not claim agency reimbursement for expenses incurred while performing that representational function. OPM concludes that agencies should not be required, through this OPM appeal process, to subsidize the prosecution or defense of individual suitability appeals through duty time, official time, or reimbursement of representative expenses, except where otherwise required by law.

Commenters' reliance on prior official-time precedent does not require a different result. In *AFGE, National INS Council*, 45 FLRA 391 (1992), and *INS v. FLRA*, 4 F.3d 268 (4th Cir. 1993), the FLRA and court addressed negotiability of official time for statutory appeals in the

absence of a controlling prohibition. The Fourth Circuit specifically noted that it found no statute or regulation precluding the negotiated official-time provision at issue. This final rule supplies a governmentwide regulatory limitation for part 731 appeals; those decisions do not hold that OPM is barred from adopting such a rule for a regulatory appeal process that OPM itself establishes.

OPM also disagrees that the official-time limitation makes the appeal right illusory or denies meaningful representation. An appellant may represent himself or herself; retain an attorney; select a non-Federal representative; select a union representative; or select a Federal employee representative who serves outside duty status. The rule does not prohibit a union from advising an appellant, does not prohibit a union official from serving as representative outside duty status, and does not limit representation in proceedings where official time is independently authorized by law. It only prevents a Federal employee representative from performing the part 731 appeal function while in duty status or from claiming agency reimbursement for that function.

OPM also declines to remove the representative-disallowance provision. Section 731.504(c) does not authorize arbitrary disallowance of representatives. It applies only when the selected representative is an employee of the responsible agency or OPM, and only when the representative's activities would cause a conflict of interest or position. In response to comments, the final rule narrows this provision from the proposal by removing the additional grounds that would have permitted disallowance based on the priority needs of the Government or unreasonable costs to the Government. The remaining, narrowed provision is tailored to genuine conflicts of interest or position; it does not authorize OPM or an agency to disallow a representative merely because the representative is affiliated with a union or because the agency disagrees with the appellant's position.

Nor does the final rule eliminate matters that are independently within FLRA jurisdiction or other collateral statutory forums. Section 731.501(e) provides that subpart E is the sole means

of appealing a suitability action under part 731, but does not otherwise preclude an applicant, appointee, or employee from filing a complaint, appeal, or other matter within the independent jurisdiction of the FLRA or other listed entities. Thus, disputes over collective-bargaining obligations, unfair labor practices, or contract interpretation remain subject to the statutory framework governing those matters. To the extent a negotiated grievance procedure purports to provide an alternative forum for deciding the merits of a part 731 suitability action, however, this governmentwide regulation governs the appeal procedure for that suitability action. *See U.S. Dep't of the Treasury, IRS v. FLRA*, 996 F.2d 1246, 1250 (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 governmentwide rule that creates a regime inconsistent with bargaining,” including where a regulation “sets out an exclusive method of resolving any claims”).

For these reasons, OPM declines to remove § 731.504(b) or § 731.504(c). The final rule preserves the appellant’s right to representation while reasonably limiting agency-funded representational activity and preserving OPM’s ability to prevent conflicts of interest, mission disruption, and unreasonable costs in the administration of this governmentwide suitability-appeal process.

#### **K. Training/Qualifications**

Commenters such as 0194, 0195, and 0332 questioned whether OPM personnel assigned to adjudicate suitability action appeals would have sufficient training, qualifications, and expertise to perform that function and asserted that the quality and rigor of the adjudicator process would diminish when compared to MSPB administrative judges and other legally trained adjudicators.

OPM appreciates the comments concerning the training and qualifications of personnel who will adjudicate suitability action appeals. OPM agrees that individuals assigned to review suitability action appeals must be qualified to evaluate the record, apply the suitability factors in § 731.202(b), and determine whether the suitability determination is supported by a

preponderance of the evidence. OPM does not agree, however, that meaningful review of suitability-action appeals requires adjudication by MSPB administrative judges. Suitability appeals require specialized knowledge of part 731, suitability factors, suitability-action procedures, mitigating and exculpatory evidence, action-selection principles, and the evidentiary standards applicable to suitability determinations. OPM is the agency responsible for prescribing, interpreting, and administering the governmentwide suitability framework, and it is well positioned to ensure that adjudicators assigned to these appeals are trained in the standards they must apply.

Section 731.505(c) of the final rule requires that all OPM employees and administrative law judges assigned by OPM to adjudicate appeals complete training that complies with national training standards for suitability adjudicators. These standards are not new. OPM has required training in accordance with national suitability adjudicator standards since 2012, and OPM provides governmentwide training that complies with those standards. The final rule formalizes that qualification requirement for personnel assigned to adjudicate suitability action appeals.

OPM also disagrees with comments suggesting that the use of trained OPM personnel will result in less rigorous review. The final rule also adds several safeguards that reinforce adjudicatory rigor beyond training alone. The responsible agency bears the burden to establish, by a preponderance of the evidence, the charge or charges supporting the unfavorable suitability determination and the substantive propriety of the suitability action. The responsible agency must submit a complete, indexed, paginated, and certified record, including the charge-by-charge analysis, suitability-factor analysis, consideration of mitigating, rehabilitative, contradictory, or exculpatory evidence, and the rationale for the action selected.

Under the final rule, appeal adjudicators must review the record under the preponderance of the evidence standard and determine whether the unfavorable suitability determination and resulting suitability action are supported under that standard. The initial decision must make findings on each material charge, specification, and suitability factor relied upon to support the

action, and if fewer than all charges or specifications are sustained, OPM must determine whether the sustained grounds support the suitability action imposed.

The final rule's fact-development provisions will ensure that adjudicators have tools to address incomplete records or disputed material facts. OPM may require either party to provide additional information and may investigate where the existing record is insufficient to resolve a material issue and further development is reasonably likely to produce material information. If the written record is insufficiently developed to decide the appeal because of disputes involving one or more material facts, the final rule permits OPM to conduct further investigation or hold a hearing to evaluate witness credibility. These procedures require adjudicators to apply the governing suitability standards to the record and provide a mechanism to address material evidentiary gaps when they arise.

Accordingly, OPM declines to require MSPB adjudication as a prerequisite for qualified and rigorous review. The final rule instead establishes a specialized suitability-appeal process in which adjudicators must be trained in national suitability-adjudicator standards and must operate within a framework that includes burden-of-proof rules, complete-record requirements, disclosure protections, separation-of-functions safeguards, ex parte restrictions, conflict-of-interest disqualification, objective criteria for additional fact development and hearings, and written findings on the material issues. OPM concludes that these requirements provide sufficient expertise, rigor, and procedural integrity for adjudicating part 731 suitability-action appeals.

#### **L. Transparency and Publication of Decisions**

OPM received comments expressing concern that the proposed suitability-appeals process would reduce transparency because filings would be accessible only to the parties and the proposed rule did not specify how OPM would make appeal decisions available to the public. Commenters 0296 and 0005, for example, asserted that without public, searchable, reasoned decisions, the new process could impair public oversight, reduce consistency, and increase the



risk or perception of favoritism. Commenters recommended that OPM publish redacted or precedential decisions to promote transparency and consistent application of part 731.

OPM agrees in part. Transparency in suitability-action adjudication promotes public confidence, assists agencies and appellants in understanding how OPM applies part 731, and supports consistency across cases. At the same time, suitability appeals often involve sensitive personal, investigative, medical, financial, employment, law-enforcement, classified, national-security, or otherwise protected information. Public disclosure of full appeal records could unnecessarily expose private information about appellants, witnesses, agencies, and third parties, and could undermine legal privileges or other disclosure restrictions.

The final rule therefore adopts a balanced approach. OPM will make publicly available final merits decisions or de-identified summaries of final merits decisions, consistent with 5 U.S.C. 552, the Privacy Act, and other applicable law. Public summaries will identify the procedural posture, sustained and unsustained suitability factors, disposition, and remedy, without disclosing protected information. In addition, final merits decisions will be made available upon request to the applicant, appointee, or employee involved in the proceeding, the appellant's representative under § 731.504, or the representative of the Federal agency or office involved in the proceeding with a need to know.

OPM is not adopting a requirement that all filings or complete case records be made publicly available. The final rule limits access to documents in OPM's electronic filing system to the parties and their representatives in the case, and separately permits inspection of OPM's appellate record subject to the Privacy Act, applicable privileges, classified-information or national-security requirements, protective orders, and other legal limits. This protects privacy and legally protected information while ensuring that the parties have access to the record needed to litigate the appeal.

OPM also is not adopting a separate precedential-decision regime in this rule. The final rule instead promotes consistency through reasoned initial decisions that must make findings on

each material charge, specification, and suitability factor, and through public availability of final merits decisions or de-identified summaries. This approach provides public insight into OPM's application of the suitability standards while preserving flexibility to protect sensitive information and to determine, consistent with law, whether a full final merits decision or a de-identified summary is the appropriate public vehicle in a particular case.

Accordingly, OPM has revised the final rule to provide greater transparency than the proposal while protecting privacy, national-security, privileged, and other legally protected information. OPM concludes that the publication framework in § 731.509(e), together with the final rule's requirements for reasoned decisions, record access by the parties, and public summaries or decisions, appropriately addresses commenters' transparency concerns without making sensitive appeal filings publicly available.

#### **M. Types of Positions Covered**

Commenter 0336 objected to the rule's application to competitive-service employees, including tenured employees, and career SES members. The commenter asserted that applying suitability actions to post-appointment conduct is a novel expansion that circumvents chapter 75 protections, treats competitive-service employees less favorably than some excepted-service employees, lacks statutory support for career SES members, and improperly changes the mechanisms available for removing tenured Federal employees.

OPM disagrees with the commenter's characterization of this rule and declines to revise the rule on that basis. This final rule does not expand the categories of positions or individuals subject to part 731, create new substantive suitability factors, authorize new suitability actions, or alter the circumstances under which OPM or an agency may take a suitability action. It revises only subpart E—the forum and procedures for appealing a suitability action taken under part 731. Revised § 731.501(a) limits the appeal right to an applicant, appointee, or employee in the competitive service or career Senior Executive Service, as those terms are used in part 731, who is subject to a suitability action because of an unfavorable suitability determination. Revised §

731.501(c) further limits appealable merits issues to determinations based on the specific suitability factors in § 731.202(b) that resulted in a suitability action as defined in § 731.101(a), and § 731.501(d) confirms that an unfavorable suitability determination that does not result in a suitability action is not appealable under this subpart.

The commenter's objections to the use of suitability authority for post-appointment conduct are addressed in the separate *Suitability and Fitness* final rule. *See* 91 FR 39361. That rule addresses the substantive scope of part 731 and explains OPM's authority to make suitability determinations and take suitability actions under the President's and OPM's civil service authorities. This appeals rule assumes only that a suitability action has been taken under part 731 and prescribes the procedure for administrative review of that action. It therefore does not itself convert ordinary misconduct, performance deficiencies, or chapter 75 matters into suitability matters.

OPM also disagrees that this rule circumvents chapter 75. Chapter 75 remains available when an agency proceeds under chapter 75. When OPM or an agency proceeds under part 731, however, Congress has provided that chapter 75 does not apply to "a suitability action taken by the Office under regulations prescribed by the Office, subject to the rules prescribed by the President under this title for the administration of the competitive service." 5 U.S.C. 7512(F). OPM does not rely on section 7512(F) as an independent expansion of substantive suitability authority; rather, the provision confirms that, where a suitability action is lawfully taken under part 731, chapter 75 does not supply the governing appeal route.

Nor is the inclusion of career SES members improper. Part 731 has long applied to career SES appointments, and OPM does not read chapter 75's SES provisions to displace the President's and OPM's separate suitability authority when OPM acts under the civil-service rules and part 731. Section 7543 governs actions covered by subchapter V of chapter 75. A suitability action under part 731 is taken under separate suitability authority and remains subject to part 731's substantive limits and procedural requirements.

## **N. Timely Filing**

OPM received a comment objecting to the proposed requirement that an appellant bear the burden to demonstrate, by a preponderance of the evidence, that the appeal was timely. Commenter 0301 stated that this requirement is unfair to appellants.

OPM disagrees. Timely filing is a threshold requirement for invoking OPM's appeal process, and it is reasonable to place the burden on the party seeking review to show that the appeal was filed within the applicable deadline or that good cause exists for an untimely filing. In the final rule, OPM has consolidated this requirement in § 731.501(b)(1), which provides that the appellant bears the burden to demonstrate the timeliness of the written appeal and OPM's jurisdiction by a preponderance of the evidence. This threshold burden is separate from the merits burden. If the appellant contests the unfavorable suitability determination and establishes timeliness and jurisdiction, the responsible agency bears the burden to prove, by a preponderance of the evidence, the charge or charges supporting the unfavorable suitability determination and the substantive propriety of the suitability action.

The final rule also provides clear filing rules. An appellant may file an appeal within 30 calendar days from the effective date of the suitability action. An appeal is timely if electronically filed by 11:59 p.m. Eastern Time on the 30th calendar day after the effective date of the action. The rule explains how to calculate the filing period, including that the first day counted is the day after the effective date; that, for an appointee or employee, the effective date is the date the employing agency effectuates the action; and that, for an applicant, the effective date is the date on the notice of final action. When a notice of final action is served on an applicant by mail, 10 calendar days are added to the date of the notice for purposes of the filing deadline. If the last day falls on a Saturday, Sunday, or Federal holiday, the filing period extends to the first workday after that date.

The final rule also preserves flexibility for appropriate cases. If an appeal is not filed within the regulatory deadline, it will be dismissed as untimely unless the appellant demonstrates

good cause for the untimely filing. Section 731.503(g) separately provides that untimely filings may be accepted upon a party's showing of good cause, in OPM's sole and exclusive discretion. OPM declines to codify a fixed list of good-cause factors, but may consider the relevant facts and circumstances presented, including whether the appellant acted diligently, whether the delay resulted from circumstances outside the appellant's control, and whether the appellant timely sought any needed e-filing exemption.

Accordingly, OPM concludes that the timeliness burden is a reasonable threshold requirement. It provides certainty, promotes orderly adjudication, and does not alter the responsible agency's burden to prove the merits of the suitability determination and action once the appeal is properly before OPM.

#### **O. Electronic filing system**

OPM received comments raising concerns about the proposed electronic filing requirement. Commenter 0183 questioned the readiness, administration, funding, and cost assumptions associated with the e-filing system. Commenter 0296 expressed concern that mandatory e-filing could reduce access for individuals with disabilities if the system is not accessible and compliant with applicable accessibility requirements. Commenter 0197 raised concerns that individuals without reliable email or internet access could be disadvantaged in pursuing an appeal.

OPM appreciates these comments but will retain electronic filing as the default method for suitability-action appeals. Electronic filing supports a more efficient, reliable, and orderly appeal process by allowing parties to submit filings, receive service, view case documents, and monitor case activity through a centralized system. It also provides a clear filing timestamp, reduces delays associated with paper mail and manual distribution, and helps OPM maintain a complete administrative record.

The final rule includes safeguards to ensure that the e-filing requirement does not prevent meaningful access to the appeal process. Section 731.502(a) provides that filings must be made

through the electronic filing system identified on OPM's website unless a party demonstrates good cause and obtains OPM approval to use another method. Section 731.502(c)(7) further provides that OPM may exempt a party or representative from registering as an e-filer for good cause. A party or representative who cannot use the system must promptly contact OPM, as instructed on OPM's website, to request an exemption before the applicable filing deadline.

OPM also recognizes the importance of accessibility. OPM will administer the electronic filing system consistent with applicable Federal accessibility requirements, including Section 508 of the Rehabilitation Act, 29 U.S.C. 794d. The good-cause exemption provides an additional safeguard for individuals who cannot use the electronic filing system because of disability-related, technological, access-related, or other demonstrated limitations.

The final rule also narrows and clarifies e-filing compliance provisions. Registration as an e-filer constitutes consent to electronic service, and registered users are responsible for maintaining current contact information and monitoring case activity. Documents filed in the system are deemed received on the date of electronic submission. Access to case documents in the system is limited to the parties and their representatives in the cases in which the documents were filed. OPM may strike a document only where an e-filer repeatedly fails to follow filing instructions after receiving a show-cause order. These provisions promote orderly case management while avoiding unnecessary sanctions for isolated or good-faith filing errors.

With respect to system readiness and cost, OPM has secured access to an existing electronic case-management system to receive, track, and manage appeal submissions. OPM has updated the regulatory impact analysis to account for the annual recurring cost of licenses for OPM staff, estimated at \$16,000 annually. OPM does not expect this recurring cost to materially alter the overall cost analysis. OPM will also address any applicable Paperwork Reduction Act, Privacy Act, records-management, and system-of-record requirements associated with collecting and maintaining appeal records.

Accordingly, OPM concludes that electronic filing is appropriate for this appeal process. The final rule promotes timely and reliable filing and service, protects case records, provides good-cause exemptions for individuals who cannot use the system, and will be implemented consistent with applicable accessibility, privacy, records, and information-management requirements.

## **P. Length of Comment Period**

OPM received several comments asserting that the comment period for the proposed rule was insufficient and violated the Administrative Procedure Act (APA). See Comment 0329 for an example. They argued that the comment period did not provide adequate time for meaningful public participation and cited Executive Order (E.O.) 12866's general statement that agencies should provide at least 60 days for public comment when practicable. The commenters based this argument on multiple sources—first, the APA's mandate that an “opportunity to participate” on proposed rules be provided following a notice of proposed rulemaking; second, as a violation of 5 U.S.C. 553(d); and third, E.O. 12866, which specifies that comment periods should “generally” be at least 60 days.

OPM rejects the argument that the comment period was inadequate as a matter of law or policy. The APA requires agencies to provide interested persons an opportunity to participate in rulemaking through submission of written data, views, or arguments. OPM provided that opportunity. As several appellate courts have held, a 30-day comment period is generally the minimum needed to comply with the APA.<sup>2</sup>

The commenter's reliance on E.O. 12866 and E.O. 13563 is similarly misplaced. These orders only mandate that comment periods should “generally” be at least 60 days. The policy

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<sup>2</sup> See *Chamber of Com. of the U.S. v. U.S. Sec. & Exch. Comm'n*, 85 F.4th 760, 779 (5th Cir. 2023) (“the APA generally requires only a minimum thirty-day comment period.”); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992) (“Although the APA mandates no minimum comment period, some window of time, usually thirty days or more, is . . . allowed for interested parties to comment.”); *Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n*, 921 F.3d 1102, 1117 (D.C. Cir. 2019) (“When substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.”).

rationale for that mandate is that stakeholders should have adequate opportunity to meaningfully participate in the notice-and-comment process. Concerning the present rulemaking, OPM received 343 comments, offering perspectives on many aspects of the proposed rule. OPM received hundreds of comments addressing the rule's legal basis, policy justification, procedural design, effect on employees and agencies, relationship to MSPB, relationship to EEOC and OSC processes, possible alternatives, and potential consequences for the civil service. The breadth and specificity of the comments confirm that interested parties had a meaningful opportunity to comment. Factually, it cannot be said that the comment period was insufficient to allow for meaningful feedback on the proposed rule given the feedback that OPM did receive. The volume of comments received and their wide scope indicate that the 30-day comment period did not meaningfully impair the public's ability to comment on the proposed rule.

Further, in the years since those executive orders were issued, comment periods have not infrequently been shorter, often 30 or 45 days. This is, in part, because agencies, working with the White House, have a great deal of discretion in shortening the comment period based on the facts of the situation. As courts have repeatedly held, "executive orders are not judicially enforceable."<sup>3</sup> That is, as a general matter, executive orders and other White House guidance on the regulatory process bind executive agencies only as a matter of the internal management of the executive branch. Thus, several Federal courts have specifically held that there is no legal requirement that agencies comply with the requirements specified in E.O.s 12866 and 13563.<sup>4</sup>

Accordingly, the 30-day comment period provided by OPM was not "truncated" but was instead well within the APA's procedural requirements and the period that should be considered reasonable in light of the President's executive order compelling agency action.

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<sup>3</sup> *Sierra Club v. U.S. Dep't of Energy*, 134 F.4th 568, 573 (D.C. Cir. 2025) (citing *Marin Audubon Soc'y v. Fed. Aviation Admin.*, 121 F.4th 902, 913 (D.C. Cir. 2024)); *see also Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1338-39 (4th Cir. 1995) (no private right of action to enforce executive order unless issued pursuant to a statutory mandate or delegation by Congress).

<sup>4</sup> *Nat'l Mining Ass'n v. United Steel Workers*, 985 F.3d 1309, 1326-27 (11th Cir. 2021) (holding that E.O. 12866 and E.O. 13563 specifically are not judicially enforceable); *Miller v. Garland*, 674 F.Supp.3d 296, 307 (E.D. Va. 2023), appeal dismissed, No. 23-1604, 2024 WL 4973474 (4th Cir. July 30, 2024) (holding that E.O. 12866 is not judicially enforceable).



## **Q. Interaction with the June 2025 Suitability and Fitness NPRM and other personnel rulemakings**

Commenters 0207/0286, 0288, 0303, 0334, 0332, 0314, 0330, and 0329 argued that this rule should not be evaluated in isolation from other recent or pending OPM personnel rulemakings, including the June 2025 Suitability and Fitness NPRM. Several commenters asserted that the rulemakings, viewed together, would expand the use of suitability actions while reducing independent review, judicial review, discovery, hearings, and other procedural protections. Some commenters also argued that OPM's decision to proceed through several separate rulemakings addressing related personnel subjects deprived the public of a meaningful opportunity to comment or violated the APA.

OPM has considered these comments and disagrees that the APA required OPM to combine this rulemaking with the June 2025 Suitability and Fitness rulemaking, delay this rulemaking, reopen the comment period, or provide a separate comment period devoted solely to the interaction among this rulemaking and other personnel rulemakings. The APA requires a notice of proposed rulemaking to identify the time, place, and nature of the proceeding; the legal authority for the proposal; and either the proposed rule's terms or substance or a description of the subjects and issues involved. After notice, the agency must provide interested persons an opportunity to submit written data, views, or arguments and must consider the relevant matter presented. 5 U.S.C. 553(b)-(c). The fair-notice inquiry asks whether the final rule is a logical outgrowth of the proposal; it does not require an agency to combine every related regulatory initiative into a single omnibus rulemaking.

This rulemaking satisfied those APA requirements. The proposed rule identified the affected CFR part and subpart, provided proposed regulatory text for subpart E of part 731, described the proposed transfer of the suitability-action appeal process from MSPB to OPM, explained the proposed procedures for filing and adjudicating appeals, invited public comment, and set a comment deadline. The NPRM also expressly identified the June 2025 Suitability and

Fitness NPRM, explained that the June NPRM addressed separate changes to subparts A, B, C, and D of part 731, and stated that this suitability-appeals rule was limited to subpart E and would operate independently of the June NPRM. OPM also addressed the potential cost implications if both rulemakings were finalized, further confirming that OPM did not conceal the possible interaction between the rulemakings.

The APA does not prohibit an agency from pursuing several rulemakings at the same time, even where those rulemakings concern related aspects of a broader regulatory program.

Agencies may proceed through separate rulemakings where, as here, the rules amend different regulatory provisions, address distinct legal and operational questions, rest on separate administrative records, and can operate independently. This final rule concerns the forum and procedures for appealing suitability actions under subpart E of part 731. The June 2025 Suitability and Fitness rulemaking addressed the substantive suitability and fitness standards and the authority and procedures for taking suitability actions under other subparts of part 731. Other personnel rulemakings referenced by commenters concerned different regulatory parts or different subjects, such as probationary or trial-period appeals, reductions in force, or performance appraisals. Those subjects may be related in the broad sense that they concern Federal personnel administration, but they are not the same rulemaking.

Nor did the use of separate rulemakings prevent meaningful public comment. The proposed rule disclosed the relationship between this suitability-appeals rulemaking and the June 2025 Suitability and Fitness NPRM, and commenters in fact submitted extensive comments addressing the alleged cumulative effects of the rulemakings. The comments received demonstrate that interested parties understood OPM was proceeding through separate but related rulemakings and had a meaningful opportunity to raise interaction-based objections. OPM has considered those objections.

OPM also disagrees that separate rulemakings were an attempt to evade the APA. Proceeding separately allowed commenters to focus on the specific legal authority, regulatory

text, operational effects, and policy rationale for each proposal. Combining all contemporaneous personnel proposals into a single omnibus rulemaking would not necessarily have improved notice or public participation; it could instead have obscured the issues by combining distinct statutory questions, regulatory provisions, and administrative records in one proceeding. The APA does not require that result.

At the same time, OPM recognizes that commenters' interaction-based concerns were principally about the procedural protections that would apply to any covered suitability action. OPM has therefore revised subpart E to strengthen the appeal process. The final rule clarifies the appellant's right to contest an unfavorable suitability determination and specified procedural failures; expressly allocates burdens of proof; requires the responsible agency to provide a complete, indexed, paginated, and certified record of the action; requires disclosure or appropriate treatment of withheld, redacted, privileged, classified, national-security, or otherwise protected material; prohibits reliance on nondisclosed material to affirm a suitability action unless the appellant receives notice of the substance and a meaningful opportunity to respond, except as otherwise authorized by law; codifies separation-of-functions and ex parte safeguards; provides objective criteria for investigation and hearings; requires an administrative judge to preside over any hearing; requires findings on each material charge, specification, and suitability factor; and preserves matters within the independent jurisdiction of other forums, including EEOC, FLRA, Inspectors General, MSPB, DOL VETS, and OSC.

These revisions address procedural concerns raised by commenters without changing the scope of this rulemaking. This final rule does not itself amend the substantive suitability factors, expand the grounds for taking suitability actions, or decide whether any separate amendments to subparts A, B, C, or D of part 731 should be finalized. If separate substantive amendments to part 731 are finalized, the appeal procedures in this final rule will apply to covered suitability actions under part 731. If those separate amendments are not finalized, this final rule will still

operate as the appeal procedure for suitability actions that are otherwise covered by part 731. In either circumstance, the procedures in subpart E are capable of operating independently. For these reasons, OPM does not adopt commenters' argument that the APA required a consolidated rulemaking or a reopened comment period. OPM has considered the asserted interaction among this rulemaking, the June 2025 Suitability and Fitness rulemaking, and other personnel rulemakings, and has strengthened the final appeal procedures in response to commenters' procedural concerns.

#### **R. Suitability determinations versus security-clearance or national-security determinations**

Commenter 0329 asserted that the proposed rule appeared to conflate suitability determinations with eligibility determinations for access to classified information or assignment to, or retention in, sensitive national-security positions. OPM agrees that these determinations are distinct and clarifies that this rule does not merge them. Part 731 itself distinguishes suitability determinations and actions from determinations of eligibility for access to classified information or for assignment to, or retention in, sensitive national-security positions made under E.O. 12968, E.O. 10865, E.O. 13467, or similar authorities. This final rule amends only the appeal procedures in subpart E of part 731 and applies only to a suitability action taken because of an unfavorable suitability determination. Revised § 731.501(a) limits the appeal right to applicants, appointees, and employees in the competitive service or career Senior Executive Service, as those terms are used in part 731; § 731.501(c) limits appealable merits issues to suitability determinations based on the factors in § 731.202(b) that resulted in a suitability action; and § 731.501(d) makes clear that an unfavorable suitability determination that does not result in a suitability action is not appealable under this subpart.

The final rule therefore does not create, expand, or alter any appeal right for security-clearance determinations, credentialing determinations, national-security eligibility determinations, position-sensitivity determinations, or other determinations outside part 731. References in the final rule to classified information, national-security requirements, or other

legally protected information address only how such information must be handled if it appears in the suitability-appeal record; they do not expand OPM's jurisdiction in a part 731 appeal or authorize OPM to adjudicate a clearance or national-security eligibility determination in this proceeding.

### **S. Comments from Federal Agencies**

OPM received several comments in favor of the rule from individuals and agencies. Across the submissions, these commenters strongly support the rule and view it as a necessary step to streamline and accelerate suitability actions in the Federal Government. Commenters emphasized that agencies often avoid taking an action because the existing process is too burdensome and drawn out, allowing misconduct to persist. They argue that this tolerance of wrongdoing damages workplace culture, signals that accountability is weak, and discourages supervisors from addressing problems. *See* Comment 166. A significant theme among favorable comments involves the need to expedite removal of employees who commit serious misconduct. *See* Comments 089 and 190. Commenters recognize that keeping such individuals in the workplace harms others and erodes trust, and they believe this rule will enable agencies to take faster, more decisive action to protect employees. Overall, individuals in support of this rule see it as long overdue, beneficial for the efficiency and integrity of the civil service, and likely to make Federal workplaces safer and more accountable.

Several agencies provided comments in support of the rule, consistently describing the reform to suitability action appeals as necessary, efficient, and beneficial for workforce management. Existing procedures are described as too complicated and inefficient, and the standards applied by MSPB as overly technical. *See* Comment 179. Agencies expressed frustration with current processes, citing a discrepancy between MSPB goals of resolving certain categories of appeals within approximately 120 days, while in practice, suitability action appeals frequently consume a year or more to reach a final resolution, despite them being a small share of MSPB's annual filings. *See* Comments 178, 218, and 309.

Other agencies recognized the opportunity for consistency and benefits of expertise by centralizing suitability appeals within OPM, specifically recognizing OPM’s exclusive authority over a subset of suitability cases pursuant to 5 CFR 731.202(b). Further, agencies anticipate the rules would reduce litigation and administrative costs, citing considerable attorney, human capital, and management resources expended to defend suitability actions before MSPB, including post-MSPB judicial review on disproportionate, narrowly focused issues that do not need the full scope of MSPB discovery for a fair adjudication. Agencies explained that even successfully litigated cases are overshadowed by punishing processes and costs to the American public. *See* Comments 188 and 230. Agencies positively noted the rule’s retention of strong due process protections, including notice, access to records, and an opportunity for response and representation. *See* Comment 218. OPM believes this final rule will restore confidence in the Federal workforce and eliminate procedural bottlenecks that unnecessarily complicate an agency’s ability to maintain efficient and effective mission performance.

OPM also considered other options as explained in the alternatives section of this final rule.

#### **IV. Section-by-Section Analysis**

##### **Authority citation**

OPM revises the authority citation for part 731 to reflect OPM’s civil-service administration authorities under 5 U.S.C. 1103, which include “securing accuracy, uniformity, and justice in the functions of the Office” and “executing, administering, and enforcing” the civil service rules and regulations of the President and the Office and the laws governing the civil service.

##### **Subpart E—Suitability Action Appeals**

OPM revises subpart E to remove the prior MSPB appeal procedure and establish an OPM appeal process for suitability actions taken because of unfavorable suitability determinations. The revised subpart sets out the right to appeal, filing procedures, record and

response requirements, representative provisions, adjudication standards, sanctions and protective orders, reconsideration, Director review, and finality.

### **731.501—Right to appeal**

Section 731.501 establishes the right of an applicant, appointee, or employee in the competitive service or career SES, as those terms are used in part 731, to appeal to OPM a suitability action taken because of an unfavorable suitability determination. The section also allocates burdens of proof. The appellant bears the burden, by a preponderance of the evidence, to establish the timeliness of the appeal, OPM's jurisdiction, and any claim of improper procedure. If the appellant contests the unfavorable suitability determination and establishes timeliness and jurisdiction, the responsible agency bears the burden to establish, by a preponderance of the evidence, the charge or charges supporting the unfavorable suitability determination and the substantive propriety of the suitability action.

The section identifies the appealable issues: the unfavorable suitability determination based on the factors in § 731.202(b), provided it resulted in a suitability action as defined in § 731.101(a), and specified procedural failures relating to advance notice, representation, time to respond, and the written decision. It also provides that an unfavorable suitability determination that does not result in a suitability action is not appealable under this subpart. Finally, the section provides that subpart E is the sole means of appealing a suitability action under part 731, while preserving matters within the independent jurisdiction of the EEOC, FLRA, Inspectors General, MSPB, DOL VETS, and OSC. The section also provides that a party cannot obtain judicial review of a decision under this subpart.

### **731.502—Procedures for submitting appeals**

Section 731.502 establishes filing procedures and time limits. Appeals and requests to reopen and reconsider must be filed through the electronic filing system identified on OPM's website unless OPM grants a good-cause exception. An appeal must be filed within 30 calendar days from the effective date of the suitability action and is timely if electronically filed by 11:59

p.m. Eastern Time on the 30th calendar day after the effective date. The section explains how to compute the filing period, including special rules for applicants, service by mail, weekends, and Federal holidays. Untimely appeals will be dismissed unless the appellant demonstrates good cause, as determined by OPM.

The section also establishes e-filing procedures. Parties and representatives must register using a unique email address; registration constitutes consent to electronic service; documents will be available through OPM's electronic filing system; and access to case documents is limited to registered parties and representatives in the case. The section requires e-filers to follow OPM filing instructions, maintain current contact information, monitor case activity, and use the electronic system unless exempted for good cause. OPM may strike a document only when an e-filer repeatedly fails to follow filing instructions after receiving a show-cause order. Documents filed in the system are deemed received on the date of electronic submission.

### **731.503—Form and content of suitability action appeals and agency response**

Section 731.503 specifies the required content of an appeal, including the basis for the appeal, contact information for the appellant and representative, and supporting documentation. The section also governs the responsible agency's response. OPM will notify the responsible agency of the appeal; and, unless the OPM adjudicator provides otherwise, the responsible agency must respond within 30 calendar days of notification.

The section defines "responsible agency" as the employing agency or, when OPM took, directed, or made the suitability action under review, the OPM office or component responsible for that action. When OPM is the responsible agency, the adjudicative function must be separated from any OPM office or official that participated personally and substantially in the suitability determination or action.

The final rule also addresses the employing agency's role when OPM is the responsible agency. Because many relevant records will be in the employing agency's possession, § 731.503(b)(3) provides that, when OPM is the responsible agency and is not the appellant's



employing agency, OPM will notify the employing agency of the appeal, and the employing agency must furnish requested records and information and otherwise participate in the response to the extent OPM directs. Section 731.503(c) likewise requires the employing agency to furnish documents within the scope of the record of the action that are in its possession, and OPM will identify the records the employing agency must furnish and the records OPM will provide. Parallel provisions in § 731.505(d) and (f) provide that the employing agency, when it is not the responsible agency, may be required to provide information and will receive notice of investigations and of the decision on the appeal.

The section requires the responsible agency to file a complete, indexed, paginated, and certified record of the action. The record must include documents considered, relied upon, generated, received, issued, or served in investigating, proposing, deciding, directing, or effectuating the unfavorable suitability determination and resulting suitability action. The record must include, as applicable, documents establishing the appellant's status and the authority for the action, investigative and adjudicative materials, charge-by-charge and suitability-factor analysis, mitigating and exculpatory evidence, the rationale for the action selected, the final decision, proof of service, implementation documents, and a certification of completeness.

The responsible agency must serve the appellant with the agency record. If documents are withheld, redacted, or protectively handled, the responsible agency must identify them in an index or privilege log unless identifying the document itself is prohibited by law. OPM may require a summary, substitute disclosure, protective order, in camera submission, or other procedure sufficient to provide the appellant a meaningful opportunity to respond, consistent with applicable law. No nondisclosed material may be relied upon to affirm a suitability action unless the appellant has received notice of the substance of the material and a meaningful opportunity to respond, except as otherwise authorized by law.

The section also permits the appellant to file a reply within 15 calendar days of the agency response unless OPM provides otherwise. The reply may not raise new allegations of

error unless the basis rests on information first disclosed in the agency response or OPM grants leave for good cause. The section further addresses inspection of OPM's appellate record, mutual service of documents, certificates of service, and acceptance of untimely filings upon a showing of good cause.

#### **731.504—Appellant representatives**

Section 731.504 preserves the appellant's ability to select a representative of choice, provided the designation is submitted in writing for the specific appeal. If the selected representative is a Federal employee, the representative may not perform representational functions while in duty status, including while on official time under 5 U.S.C. 7131, and may not claim agency reimbursement for expenses incurred while performing the representational function.

The section also allows OPM or the responsible agency, in its sole and exclusive discretion, to disallow a representative when the representative is an employee of the responsible agency or OPM and the representative's activities would cause a conflict of interest or position.

#### **731.505—Adjudication of appeals**

Section 731.505 establishes the adjudication framework. For appeals by applicants, appointees, or employees of agencies other than OPM, OPM will assign OPM personnel to adjudicate the appeal. Those adjudicators must be insulated from officials who participated personally and substantially in the challenged action or provided case-specific advice concerning that action. The section prohibits adjudicators from considering material ex parte communications concerning the merits of an appeal. If such a communication occurs, OPM must place a summary in the record and provide the parties a reasonable opportunity to respond unless disclosure is prohibited by law. The section also disqualifies any OPM employee with a prior relationship with the appellant, prior involvement in the suitability determination or action, or another conflict that would reasonably call the employee's impartiality into question. OPM may assign an administrative law judge when necessary.

For appeals by OPM applicants, appointees, or employees, OPM will assign an administrative law judge to adjudicate the appeal. To insulate those appeals from agency involvement, OPM will not disturb the administrative law judge's initial decision unless a party shows harmful procedural irregularity, clear legal error, or material factual error that affected the outcome. The section defines harmful procedural irregularity and clarifies that assigning an administrative law judge does not make 5 U.S.C. 554, 556–557 applicable except to the extent independently required by law or expressly incorporated in part 731.

The section requires all OPM employees or administrative law judges assigned to adjudicate appeals to complete training that complies with national training standards for suitability adjudicators and qualifies them to review OPM and agency suitability determinations and actions.

The section also establishes fact-development procedures. OPM may require either party, or the employing agency if the employing agency is not a party to the appeal, to provide additional information and may investigate the facts underlying the suitability determination or action if the existing record is insufficient to resolve a material issue within OPM's jurisdiction and the investigation is reasonably likely to produce material information. If OPM conducts an investigation, it must notify the appellant, the appellant's representative, and the responsible agency (and, if different, the employing agency) of the investigation and the nature of the information requested; provide the results; and allow a reasonable opportunity to submit argument or additional information.

OPM's review must be based solely on the developed written record unless the written record is insufficiently developed to resolve one or more facts material to the outcome, including when resolution of a material factual dispute requires evaluation of witness credibility. In those cases, OPM will assign an administrative judge to preside over a hearing, which will be limited to the material factual issues identified by OPM or the administrative judge as necessary to resolve the appeal.

If a party fails to participate in an investigation or hearing, OPM may impose sanctions listed in § 731.506(b)(1) through (3), except where prohibited by law. OPM may issue an initial decision affirming, reversing, modifying, or vacating the unfavorable suitability determination and resulting suitability action, in whole or in part. The initial decision must make findings on each material charge, specification, and suitability factor relied upon to support the action. If fewer than all charges or specifications are sustained, OPM will determine whether the sustained grounds support the action imposed and may affirm, reverse, modify, vacate, or remand the action as appropriate.

The section also addresses remedies. If the appellant prevails, OPM will order appropriate relief authorized by law, which may include correction, cancellation, or modification of the suitability action; correction of relevant records; prospective eligibility or appointment-related relief; and, where applicable and legally authorized, back pay, interest, and reasonable attorney fees consistent with 5 CFR part 550, subpart H. The appellant is not entitled to compensatory damages or other relief not authorized by law. If reopening or reconsideration is pending, the responsible agency must continue to provide ordered relief unless OPM issues a stay, but no stay may deprive the individual of pay and benefits while the initial decision is pending reconsideration.

#### **731.506—Sanctions and protective orders**

Section 731.506 authorizes OPM to issue protective orders or cease-and-desist directives to protect the integrity of the adjudicatory process, prevent threats, intimidation, targeted harassment, improper witness contact, disclosure of protected personal information, or misuse of nonpublic information obtained through the appeal. OPM may act sua sponte or at a party's request, preemptively or at any point in the appeal process. A requesting party must file the request through OPM's e-filing procedures and include reasons and supporting evidence. Any protective order must be no broader than reasonably necessary and must not restrict lawful communications protected by law.

If a party fails to comply with an OPM order, OPM may, except where prohibited by law, draw adverse inferences, prohibit the noncompliant party from introducing or relying on evidence, or eliminate from consideration appropriate parts of the noncompliant party's filings or submissions. Any sanction issued under this authority must be proportionate, causally related to the violation, and no broader than necessary to protect the adjudicatory process.

#### **731.507—Requests for reconsideration of an initial decision**

Section 731.507 permits either party to request that OPM reopen and reconsider an initial decision. The request must be filed within 30 calendar days of issuance of the initial decision through the e-filing system and must explain how the asserted ground affected the outcome. Any documents or filings related to the request must be submitted at the same time.

OPM may grant reconsideration when the initial decision contains an erroneous finding of material fact sufficient to warrant a different outcome; is based on an erroneous interpretation of statute or regulation or erroneous application of law to the facts; when new and material evidence or legal argument is available that, despite due diligence, was unavailable when the record closed; or when OPM finds good cause. In a reopened and reconsidered appeal, OPM may issue a reopened and reconsidered decision affirming, reversing, modifying, or vacating the initial decision; require additional argument and evidence; take any other action necessary for final disposition; and issue a compliance order. There is no further administrative appeal from the reopened and reconsidered decision, subject to Director review under § 731.508 before finality.

#### **731.508—Review by the OPM Director**

Section 731.508 preserves discretionary review by the OPM Director before a decision becomes final under § 731.509. The Director may, on the Director's own initiative, reopen and reconsider any initial decision or reopened and reconsidered decision before it becomes final. The section does not create a party right to request Director review; parties seeking review must use the reconsideration process in § 731.507. If the Director reopens and reconsiders a decision,

the Director may take any action available under § 731.507(d). Under the final rule, the Director may act on the Director's own initiative and only before a decision becomes final under § 731.509.

In response to comments expressing concern that Director review could be too open-ended or could undermine the perceived neutrality of OPM adjudication, OPM has revised § 731.508 to identify nonexclusive considerations that may inform the Director's decision to reopen and reconsider a nonfinal suitability appeal decision. In determining whether to exercise this authority, the Director may consider whether the decision contains clear legal error, rests on an erroneous finding of material fact, involves an issue of exceptional importance, affects the governmentwide administration of civil-service laws, rules, regulations, or OPM policy, creates a conflict among OPM decisions, or otherwise warrants Director review.

This revision responds to commenters who objected to Director review as insufficiently cabined, while preserving final agency supervision over important legal, factual, policy, consistency, and governmentwide civil service issues. OPM has retained sua sponte Director review because final agency oversight promotes decisional consistency and accountability within OPM's adjudicatory process. The revision does not create a separate right for parties to request Director review; parties may seek reconsideration under § 731.507. If the Director reopens and reconsiders a decision under § 731.508, the Director may take any action available under § 731.507(d). This structure preserves meaningful principal-officer oversight of the decisions of inferior officers while clarifying that Director review will occur within the rule's record-based adjudicatory framework, including the final rule's agency-record, separation-of-functions, ex parte, reconsideration, and finality provisions.

OPM declines to eliminate Director review entirely. Director review serves both administrative and constitutional functions. As an administrative matter, it ensures that OPM can correct material legal, factual, or procedural errors before a decision becomes final; resolve recurring or important questions of interpretation; and promote uniform application of part 731

across agencies. That review function is especially important in a governmentwide personnel system, where inconsistent interpretations by subordinate adjudicators could produce uneven appeal rights for similarly situated employees in different agencies. *See* 5 U.S.C. 1103(a)(1), (a)(3), (a)(5) (vesting the OPM Director with responsibility for securing “accuracy, uniformity, and justice” in OPM’s functions, directing and supervising OPM employees, and executing, administering, and enforcing civil service laws and regulations).

Director review also reinforces the rule’s consistency with the Appointments Clause. The Constitution requires principal officers to be appointed by the President with the advice and consent of the Senate, while Congress may vest appointment of inferior officers in the President alone, courts of law, or heads of departments. U.S. Const. art. II, sec. 2, cl. 2. The OPM Director is a presidentially appointed, Senate-confirmed officer with authority to appoint subordinate OPM officials. *See* 5 U.S.C. 1102(a), 1103(a)(2). Under the Supreme Court’s Appointments Clause precedents, inferior officers must remain subject to direction and supervision by a properly appointed superior officer. *See Edmond v. United States*, 520 U.S. 651, 663–65 (1997). In the adjudicatory context, the Court has treated the availability of review by a superior executive officer as a significant feature distinguishing inferior officers from principal officers. *Id.* at 665.

That principle is particularly relevant where subordinate adjudicators exercise significant authority under Federal law. The Supreme Court has held that officials who occupy continuing offices and exercise significant discretion in conducting adjudications may be “Officers of the United States” rather than mere employees. *See Freytag v. Comm’r*, 501 U.S. 868, 881–82 (1991); *Lucia v. SEC*, 585 U.S. 237, 245–51 (2018). The rule need not resolve in every case whether a particular OPM adjudicator is an employee or an inferior officer. It is enough that the rule preserves supervision by the Director, a principal officer, before OPM’s decision becomes final. In addition, OPM intends to ensure that OPM personnel assigned to adjudicate appeals under this subpart are appointed by the Director. Because such adjudicators may occupy

continuing positions and exercise significant discretion in conducting adjudications, appointment by the Director—the head of OPM—ensures that any adjudicator who qualifies as an inferior officer will have been appointed in the manner the Appointments Clause requires. See U.S. Const. art. II, sec. 2, cl. 2.

The Supreme Court’s decision in *United States v. Arthrex*, 594 U.S. 1, 22–23 (2021), confirms the importance of that structure. There, the Court held that administrative patent judges could not constitutionally issue unreviewable final decisions on behalf of the Executive Branch while being appointed only as inferior officers. The constitutional problem was not that subordinate adjudicators participated in deciding cases; it was that their decisions were insulated from review by a principal officer. *Id.* at 25–26. The Court’s remedy was to permit discretionary review by the Director of the Patent and Trademark Office, explaining that the Director need not review every decision, but must have authority to review decisions if he chooses. *Id.* at 27–28.

Subpart E follows that model. OPM adjudicators may issue initial decisions, and OPM may reopen and reconsider those decisions on party request or on its own initiative. In addition, the Director may, in his or her discretion, reopen and reconsider any appeal in which OPM has issued a decision that has not yet become final, and a decision issued by the Director is the final decision of OPM. This structure ensures that no subordinate adjudicator has unreviewable authority to bind OPM or the Executive Branch in an appeal under part 731.

### **731.509—Final decision**

Section 731.509 establishes when OPM decisions become final. An initial decision becomes OPM’s final decision 30 calendar days after issuance unless, before that time, a party timely requests reopening and reconsideration under § 731.507 or the Director reopens the decision under § 731.508. A timely request for reconsideration suspends finality: if OPM denies or dismisses the request without reopening the initial decision, the initial decision becomes final 30 calendar days after issuance of the denial or dismissal unless the Director reopens it before that time; and if OPM grants the request, the reopened and reconsidered decision becomes final



30 calendar days after issuance unless the Director reopens that decision before that time. An untimely request does not suspend or otherwise affect finality, but if OPM accepts and grants an untimely request for good cause, any resulting reopened and reconsidered decision becomes final in the same manner. A decision issued by the Director under § 731.508 that disposes of the appeal is OPM's final decision and is effective upon issuance; if the Director remands the appeal or directs further proceedings, any resulting decision becomes final under § 731.509. There is no further right of appeal from a final OPM decision.

The section also addresses publication and access. OPM will make publicly available final merits decisions or de-identified summaries of final merits decisions, consistent with FOIA, the Privacy Act, and other applicable law. Public summaries will identify the procedural posture, sustained and unsustained suitability factors, disposition, and remedy without disclosing protected information. Final merits decisions will also be made available upon request to the applicant, appointee, or employee involved in the proceeding, the representative selected under § 731.504, or the representative of the Federal agency or office involved in the proceeding who has a need to know.

## **V. Regulatory Analysis and Related Comments**

### ***A. Statement of Need***

This final rule is needed to establish a suitability-specific appeal process that resolves challenges to suitability actions more promptly, consistently, and effectively while preserving meaningful procedural protections. Suitability actions are taken to protect the integrity and promote the efficiency of the civil service. When such actions remain unresolved for extended periods, both the individual and the Government are left in uncertainty, agencies may be delayed in addressing conduct that presents suitability concerns, and the public interest in a trusted Federal workforce is undermined.

Before this final rule, suitability-action appeals were routed to the MSPB by OPM regulation. Congress did not require that forum. MSPB adjudicates matters placed within its

jurisdiction by law, rule, or regulation, and Congress has separately clarified in 5 U.S.C. 7512(F) that a suitability action taken by OPM under OPM regulations is not a chapter 75 adverse action. OPM therefore has authority to revise its own regulatory appeal procedure and to establish an administrative review process tailored to suitability actions rather than chapter 75 litigation.

OPM is adopting this rule for several related reasons. First, suitability appeals require application of OPM's governmentwide suitability regulations, suitability factors, action-selection standards, and personnel-vetting expertise. Housing these appeals within OPM promotes uniform application of part 731 and allows appeals to be decided by adjudicators trained in the suitability framework they are applying.

Second, the MSPB process imposes procedures designed for a broader range of personnel disputes, including discovery, hearings, petitions for full Board review, and judicial review. Those procedures can add complexity, cost, and delay to a class of appeals that Congress has distinguished from chapter 75 adverse actions.

OPM considered that MSPB procedures add considerable complexity and delay in arriving at a final resolution for both appellants and agencies. When appealing to the MSPB, employees have a statutory right to a hearing when the matter is within its jurisdiction. See 5 U.S.C. 7701(a). And before reaching a hearing, MSPB regulations allow the parties to engage in discovery. See 5 CFR 1201.71–1201.75.

Under the prior regulatory framework, a suitability appeal filed with MSPB could proceed through multiple adjudicative stages. First, the appeal was assigned to an MSPB administrative judge, who possessed broad authority to conduct the proceeding, including authority to rule on discovery motions, issue subpoenas, receive evidence, order production of evidence and witness appearances, hold prehearing conferences, grant hearing requests, regulate hearings, and issue an initial decision. 5 CFR part 1201 also provides for discovery, including interrogatories, depositions, requests for production, and requests for admission, as well as motions to compel and subpoena procedures.

If a hearing is held, MSPB procedures contemplate hearing scheduling, presentation of testimony and evidence, a hearing record or transcript, and closure of the record after the hearing or after written submissions if the hearing is waived. The administrative judge then issues an initial decision containing findings of fact, conclusions of law, reasons or bases for those findings, an order disposing of the case, and notice of further review rights.

Then, after the administrative judge's initial decision, either party may seek review by the full Board. The initial decision becomes final after 35 days only if no petition for review is filed and no other action prevents finality. If a party files a petition for review, the Board may deny review, grant review, reopen the case, hear oral argument, require briefs, remand for further testimony or evidence, or take other action necessary for final disposition.

After a final MSPB decision, a party may seek judicial review. Under 5 U.S.C. 7703, an employee or applicant adversely affected or aggrieved by a final MSPB order or decision may obtain judicial review, generally by filing a petition in the U.S. Court of Appeals for the Federal Circuit within 60 days, subject to specific statutory rules for certain cases.

This multi-stage process may be appropriate for matters Congress made appealable to MSPB under chapter 75 or other statutes. But OPM has determined that it is not necessary or well-tailored for suitability appeals that are expressly outside the MSPB's statutory jurisdiction.

Third, MSPB's ability to provide final Board-level review has depended on the existence of a quorum, and recent quorum lapses have produced substantial delays in some cases. OPM considered that, during the 2017 to 2022 lack-of-quorum period, 14 OPM suitability appeals were affected, with individuals and agencies waiting an average of more than five years between OPM's suitability action and a Board decision. Quorum-related delay is a significant pain point for agencies as well as appellants: while an appeal awaits Board action, the responsible agency cannot obtain finality on a warranted suitability action, must preserve evidence and witness availability for years, and faces prolonged uncertainty in staffing decisions. OPM considered that, in light of recent judicial decisions holding the President may dismiss MSPB members at-

will, the MSPB may lose a quorum even more frequently going forward. OPM also considered MSPB annual performance information showing that initial appeals averaged 109 days during fiscal years 2022 through 2024, not including additional time for full Board review.

Fourth, OPM considered the operational effect that lengthy and costly appeal procedures may have on agencies' willingness to take warranted suitability actions. Suitability actions, including cancellation of eligibility, removal, cancellation of reinstatement eligibility, and debarment, are tools for protecting the integrity and efficiency of the service and, where applicable, allowing time for rehabilitation before renewed Federal employment. OPM considered that, from fiscal years 2018 through 2024, 71 percent of MSPB suitability appeals that were not initially dismissed resulted in settlement. Settlement may be appropriate in individual cases. But OPM also considered that frequent settlement of suitability appeals may reduce the protective effect of debarment or other suitability actions and may discourage agencies from taking warranted actions. OPM does not treat any single statistic as dispositive. Rather, OPM considered the statutory structure, the nature of suitability actions, MSPB procedural complexity, quorum-related delay, settlement experience, agency costs, and the need for timely finality together.

OPM received comments asserting that the rule was inadequately justified, relied too heavily on efficiency, failed to consider reliance interests, and should instead preserve MSPB review or pursue alternatives such as MSPB reform, additional MSPB resources, or an expedited MSPB track. OPM considered those comments but, as discussed above, disagrees that the APA requires OPM to preserve a regulatory MSPB appeal route or to rely on reforms outside OPM's control. The final rule does not eliminate review of suitability actions. It replaces the prior regulatory forum with a specialized OPM appeal process and substantially strengthens the proposed procedures in response to comments.

The final rule includes safeguards designed to promote fairness, accuracy, and confidence in the new process. It expressly allocates burdens of proof; requires the responsible agency to

establish the charges supporting the unfavorable suitability determination and the substantive propriety of the action by a preponderance of the evidence; requires a complete, indexed, paginated, and certified record of the action; requires service of that record on the appellant; requires identification of withheld, redacted, or protectively handled material; and prohibits reliance on nondisclosed material to affirm a suitability action unless the appellant receives notice of the substance of the material and a meaningful opportunity to respond, except as otherwise authorized by law. The final rule also codifies separation-of-functions protections when OPM is the responsible agency, bars adjudicators with prior involvement or conflicts reasonably calling impartiality into question, restricts material ex parte communications, requires training for adjudicators, provides for additional fact development where the record is insufficient, and requires an administrative judge to preside over any hearing held to resolve material factual disputes. It further requires reasoned initial decisions addressing material charges, specifications, and suitability factors; provides appropriate remedies for prevailing appellants; allows reopening and reconsideration; preserves Director review before finality; and provides for public availability of final merits decisions or de-identified summaries consistent with applicable law.

These safeguards address commenters' concerns that streamlining should not come at the expense of fairness or accuracy. OPM agrees that suitability-action appeals must provide meaningful review, particularly because suitability actions can have serious consequences. The final rule therefore does not adopt a summary affirmance model. It establishes a structured administrative appeal process that preserves notice, response, representation, record access, reasoned decision-making, additional fact development where necessary, hearings where material factual disputes, including witness-credibility disputes, cannot be resolved on the written record, reconsideration, appropriate relief, and transparency.

OPM concludes that the final rule is necessary to align the appeal forum with the statutory and regulatory nature of suitability actions, reduce delay and unnecessary procedural

complexity, promote uniform application of governmentwide suitability standards, and ensure that suitability actions are resolved in a manner that protects both individual procedural interests and the Government's interest in maintaining the integrity and efficiency of the civil service.

### ***B. Impact***

This final rule removes the prior regulatory route for suitability-action appeals to MSPB and establishes an OPM suitability-action appeal process. The rule affects applicants, appointees, and employees in the competitive service or career Senior Executive Service, as those terms are used in part 731, who are subject to a suitability action because of an unfavorable suitability determination. These are the categories of individuals covered by part 731 suitability-action procedures; the rule does not independently expand the categories of persons subject to suitability actions or alter the substantive standards for taking such actions.

For affected individuals, the principal impact is a change in appellate forum and procedure. Individuals will no longer appeal part 731 suitability actions to MSPB under subpart E. Instead, they may appeal to OPM, contest the unfavorable suitability determination, and raise specified procedural challenges. OPM anticipates that this process will allow appellants and agencies to reach final administrative resolution more quickly than under the prior MSPB route, while preserving meaningful procedural protections.

The final rule provides safeguards designed to ensure that the new process is fair, structured, and reviewable within OPM. The responsible agency must prove, by a preponderance of the evidence, the charges supporting the unfavorable suitability determination and the substantive propriety of the suitability action. The appellant retains the burden to establish timeliness, jurisdiction, and any improper-procedure claim. The responsible agency must file and serve a complete, indexed, paginated, and certified record of the action, including the charge-by-charge analysis, suitability-factor analysis, mitigating or exculpatory evidence, and rationale for the action selected. OPM may not rely on nondisclosed material to affirm a suitability action

unless the appellant receives notice of the substance of the material and a meaningful opportunity to respond, except as otherwise authorized by law.

The rule also affects agencies that take or effectuate suitability actions. Responsible agencies will need to respond to OPM appeal notices, produce the complete record of the action, identify any withheld or redacted materials, serve required documents, and comply with OPM orders. These obligations may require agencies to organize and certify suitability-action records more carefully than under prior practice. At the same time, agencies will no longer incur the same costs associated with litigating part 731 suitability appeals before MSPB, including MSPB discovery, hearing practice, petitions for Board review, and related defense obligations.

OPM will be affected because it will operate the new suitability-action appeal process. OPM will need to maintain the electronic filing system, receive and process appeals, notify responsible agencies, adjudicate appeals, manage records, rule on reconsideration requests, conduct or direct additional fact development where appropriate, assign administrative law judges when required by the rule, maintain separation between responsible and adjudicative functions when OPM is the responsible agency, and make final merits decisions or de-identified summaries publicly available consistent with applicable law. These responsibilities will require dedicated process management and trained adjudicators, but they also replace OPM's prior role in preparing and defending suitability actions before MSPB.

The final rule also limits the impact on other remedial systems. Although the OPM process is the sole means of appealing a suitability action under part 731, it does not preclude an applicant, appointee, or employee from filing a complaint, appeal, or other matter within the independent jurisdiction of the EEOC, FLRA, an Inspector General, MSPB, DOL VETS, or OSC. Thus, the rule changes the forum for part 731 suitability appeals but does not displace independent statutory remedies for discrimination, prohibited personnel practices, veterans' rights, labor-relations matters, or other claims assigned by law to another forum.

OPM expects the final rule to reduce delay and operational costs associated with suitability-action appeals while improving consistency in the application of governmentwide suitability standards. The rule is also expected to improve the Government's ability to resolve suitability concerns in a timely manner, thereby supporting the integrity and efficiency of the Federal service. At the same time, the final rule adds procedural safeguards beyond those proposed in the NPRM, including express burden allocations, a complete-record requirement, disclosure protections, separation-of-functions requirements, ex parte restrictions, adjudicator-disqualification rules, training requirements, administrative-judge-presided hearings where material factual disputes, including witness-credibility disputes, cannot be resolved on the developed written record, reasoned written decisions, reconsideration, Director review before finality, remedies for prevailing appellants, and public availability of final merits decisions or de-identified summaries.

### ***C. Costs***

OPM has updated the cost analysis for this final rule to reflect the current regulatory baseline. In the proposed rule, OPM presented a current-volume estimate and a separate estimate of potential additional impacts if the June 2025 *Suitability and Fitness* rule were finalized. Because the *Suitability and Fitness* rule is now final, this final rule uses the anticipated combined appeal volume as the operative estimate. The final analysis also updates wage assumptions to 2026 rates, accounts for the procedures established in the final OPM suitability-action appeal process, and includes the recurring cost of OPM appeal-staff licenses for the electronic filing system.

Although the changes in this final rule are separate and distinct from the changes made by the *Suitability and Fitness* rule, the *Suitability and Fitness* rule affects the expected volume of suitability-action appeals that will be processed under this subpart. The cost analysis below therefore incorporates the expected effects of both rulemakings for purposes of estimating the



costs and savings associated with transferring suitability-action appeals from MSPB adjudication to the OPM appeal process established in this final rule.

## **1. One-time implementation costs**

This rule will affect the operations of most Federal agencies in the Executive branch, ranging from cabinet-level departments to small independent agencies. To comply with the regulatory changes in this rule, affected agencies will need to review the final rule and update policies and procedures governing suitability-action appeals, agency records, service, representation, and related internal processing.

For this cost analysis, OPM assumes that the average salary rate of Federal employees performing this work will be the 2026 rate for GS-14, step 5, from the Washington, DC, locality pay table: \$163,104 annually and \$78.15 hourly. OPM assumes that the total value of labor, including wages, benefits, and overhead, equals 200 percent of the wage rate, resulting in an assumed labor cost of \$156.30 per hour.

OPM estimates that, in the first year following publication of this rule, affected agencies will spend an average of 80 hours updating policies and procedures. This results in an estimated one-time implementation cost of approximately \$12,500 per agency and approximately \$1 million governmentwide. This estimate differs from the proposed rule primarily because OPM updated the wage assumptions from 2025 to 2026 rates.

## **2. Recurring costs and savings**

OPM assessed recurring cost impacts by estimating: first, savings to agencies, OPM, and MSPB from eliminating MSPB adjudication of suitability-action appeals; and second, costs to agencies and OPM to process suitability-action appeals under the OPM appeal process established in this final rule. The difference between the avoided MSPB-related costs and the costs of the new OPM process represents the recurring cost impact of the final rule.

OPM estimates that, under the current framework, MSPB receives approximately 63 initial suitability appeals per year, based on MSPB annual reports for fiscal years 2018 through

2024. In light of the final Suitability and Fitness rule, OPM also estimates that approximately 1,226 removal actions presently taken by agencies under chapter 75 could be referred to OPM for suitability action instead. From FY 2021 through FY 2025, OPM found that OPM suitability actions were appealed to MSPB at a rate of 20.8 percent. Applying that rate to the estimated 1,226 removal actions yields approximately 255 additional appeals per year that are expected to shift from adverse-action appeals to suitability-action appeals. Adding those 255 appeals to the historical average of 63 initial suitability appeals results in an estimated annual volume of 318 suitability-action appeals under this final rule.

OPM recognizes that not all appeals proceed to a hearing. Based on MSPB annual reports for fiscal years 2018 through 2024, approximately 86 percent of suitability appeals were dismissed or settled. Applying that rate to the estimated 318 annual suitability-action appeals, OPM estimates that approximately 273 appeals per year would resolve before a full hearing-equivalent level of effort, while approximately 45 appeals per year would require the full level of effort associated with hearing preparation and adjudication.

OPM notes that the historical rate of dismissal and settlement may overstate the share of appeals that will resolve early under this rule. As discussed above, frequent settlement under the MSPB framework partly reflected the length, cost, and complexity of MSPB litigation, and this rule is expected to reduce the resulting pressure on agencies to settle warranted suitability actions. As a sensitivity analysis, OPM therefore also considered a substantially lower pre-hearing resolution rate of 50 percent, under which approximately 159 appeals per year would require the full level of effort. Even under that assumption, the rule remains a net-savings deregulatory action: avoided MSPB-related costs would also increase as more appeals proceed to a full decision, and the incremental cost of each additional OPM hearing is small relative to the avoided cost of a full MSPB proceeding, so net savings would grow, not shrink, as the pre-hearing resolution rate declines.

#### **a. Savings from eliminating MSPB suitability-action appeals**

Eliminating MSPB adjudication of suitability-action appeals will reduce costs for agencies, OPM, and MSPB. These savings arise from avoided MSPB litigation and adjudication work, including reduced attorney time, reduced agency HR and supervisory time associated with appeals that otherwise would be processed as adverse-action appeals before MSPB, and reduced MSPB administrative judge time.

OPM estimates that agencies will avoid approximately \$3.75 million annually in supervisory and HR personnel time associated with the 255 adverse-action appeals expected to shift to the suitability-action appeal process. This estimate assumes 80 hours of supervisory or HR staff time per appeal and uses the 2026 Washington, DC, locality rate for GS-15, step 5: \$191,850 annually and \$91.93 hourly. Applying OPM's assumption that the total value of labor equals 200 percent of the hourly wage results in an hourly labor cost of \$183.86.

OPM also estimates annual savings of approximately \$2.83 million from reduced attorney time. This estimate uses the 2026 Washington, DC, locality rate for GS-14, step 5: \$163,104 annually and \$78.15 hourly, with total labor cost calculated at 200 percent of the wage rate, or \$156.30 per hour. OPM assumes that attorneys would spend approximately 100 hours on appeals that proceed through a full hearing and approximately 50 hours on appeals that are dismissed or settled. Applying those assumptions to the estimated 45 appeals requiring the full level of effort and 273 appeals resolving earlier yields approximately \$2.83 million in avoided attorney costs.

MSPB will also avoid work associated with processing suitability-action appeals. OPM assumes that MSPB administrative judges are paid at the 2026 Washington, DC, locality rate for GS-15, step 5, with total labor cost of \$183.86 per hour. OPM assumes that an administrative judge would spend 20 hours on each appeal proceeding through a full hearing and 12 hours on each appeal dismissed or settled. Applying those assumptions to the estimated 45 full-effort appeals and 273 dismissed or settled appeals yields approximately \$768,000 in annual MSPB savings. OPM recognizes that MSPB may also experience additional savings from reduced

administrative staff support, but OPM lacks sufficient information to estimate those additional savings reliably.

Taking together the estimated savings from avoided agency HR and supervisory time, avoided attorney time, and avoided MSPB administrative judge time, OPM estimates annual avoided costs of approximately \$7.35 million before accounting for the costs of operating the OPM suitability-action appeal process. OPM does not separately claim avoided suitability-staff record-preparation time as an additional savings because the final OPM appeal process requires the responsible agency to prepare and submit a complete agency record, and that work is accounted for as part of the cost of operating the OPM appeal process.

#### **b. Costs of operating the OPM suitability-action appeal process**

Operating the OPM suitability-action appeal process will impose recurring costs on OPM and responsible agencies. These costs consist of six principal components: first, time required by suitability staff at the responsible agency to prepare the response file and certified agency record; second, time required by OPM appeal-review staff and deciding officials to review and decide appeals; third, costs associated with hearings when a material factual dispute cannot be resolved on the developed written record; fourth, costs associated with requests to reopen and reconsider initial decisions; fifth, annual license costs for OPM appeal staff to use the electronic filing and case-management application; and sixth, incremental administrative-law-judge costs to adjudicate appeals filed by OPM applicants, appointees, or employees under § 731.505(b).

For the first component, OPM estimates that responsible-agency suitability staff will spend approximately 20 hours per appeal compiling the response file and agency record required by the final rule. OPM uses the 2026 Washington, DC, locality rate for GS-13, step 5: \$138,024 annually and \$66.14 hourly. Applying the 200-percent labor-cost assumption results in an hourly labor cost of \$132.28. Applying these assumptions across the anticipated annual volume yields estimated record-preparation costs of approximately \$841,000 per year (318 appeals × 20 hours × \$132.28 per hour).

For the second component, OPM estimates that appeal-review personnel will spend approximately 10 hours reviewing each appeal and preparing a recommendation, and that an OPM deciding official will spend approximately 3 hours reviewing the recommendation and issuing the initial decision. OPM assumes appeal-review personnel are paid at the 2026 GS-13, step 5, Washington, DC, locality rate, with a total labor cost of \$132.28 per hour, and deciding officials are paid at the 2026 GS-14, step 5, Washington, DC, locality rate, with a total labor cost of \$156.30 per hour. Applying these assumptions across all 318 anticipated appeals yields estimated costs of approximately \$421,000 per year for appeal review (318 appeals × 10 hours × \$132.28 per hour) and approximately \$149,000 per year for deciding officials (318 appeals × 3 hours × \$156.30 per hour), for total review-and-decision costs of approximately \$570,000 per year.

For the third component, agencies and OPM will incur costs when resolution of a material factual dispute requires evaluation of witness credibility or the written record is otherwise insufficient to resolve facts material to the outcome. The final rule provides that any such hearing will be presided over by an administrative judge and will be limited to the material factual issues identified by OPM or the administrative judge as necessary to resolve the appeal. Because the final rule adopts a written-record default, requires a complete certified agency record, and limits any hearing to the material factual issues that cannot be resolved on the developed written record, OPM expects hearings to be infrequent. Informed by the small share of former MSPB suitability appeals that turned on witness credibility, OPM estimates that approximately 18 percent of the approximately 45 appeals per year expected to require the full level of adjudicatory effort—approximately 8 appeals per year, or roughly 2.5 percent of all anticipated appeals—will require a hearing. For each hearing, OPM assumes 6 hours of administrative-judge time for preparation, presiding, and ruling on hearing-related motions, at the 2026 GS-15, step 5, Washington, DC, locality rate (\$191,850 annually and \$91.93 hourly, or \$183.86 per hour with the 200-percent labor-cost assumption), totaling \$1,103; 20 hours of

responsible-agency attorney time at the GS-14 rate of \$156.30 per hour, totaling \$3,126; 15 hours of responsible-agency suitability or other staff time at the GS-13 rate of \$132.28 per hour, totaling \$1,984; 10 hours of OPM deciding-official time at the GS-14 rate of \$156.30 per hour, totaling \$1,563; and transcription costs of approximately \$1,500 per hearing, reflecting one hearing day of approximately 300 transcript pages at \$5.00 per page. These assumptions yield estimated costs of approximately \$9,276 per hearing and approximately \$74,000 per year (8 hearings  $\times$  \$9,276).

For the fourth component, OPM will incur costs to process requests to reopen and reconsider initial decisions. Based on the narrow grounds for reopening under § 731.507 and the MSPB's experience with petitions for review of initial decisions, OPM estimates that parties will request reopening and reconsideration in approximately 15 percent of appeals—approximately 48 requests per year—and that OPM will grant approximately 33 percent of those requests, or approximately 16 per year. OPM assumes a GS-13 reviewer will spend approximately 1 hour screening each request and preparing a recommended disposition, yielding approximately \$6,300 per year (48 requests  $\times$  1 hour  $\times$  \$132.28 per hour). OPM assumes that, for each request granted, a GS-13 reviewer will spend approximately 3 hours reviewing the case and making a new recommendation, and that a GS-14 deciding official will spend approximately 2 hours reviewing the recommendation and issuing any reopened and reconsidered decision. Applying those assumptions to the approximately 16 granted requests yields approximately \$11,351 per year (16 requests  $\times$  ((3 hours  $\times$  \$132.28) + (2 hours  $\times$  \$156.30))), for total reconsideration-related costs of approximately \$18,000 per year.

For the fifth component, OPM will incur annual license costs for OPM appeal staff to use the electronic filing and case-management application. OPM estimates those recurring license costs at approximately \$16,000 annually. This is a change from the proposed rule, which did not separately include recurring e-filing license costs.

For the sixth component, OPM will incur incremental costs for appeals filed by OPM applicants, appointees, or employees, which § 731.505(b) requires to be adjudicated by an administrative law judge to safeguard impartiality. Based on the small share of former MSPB suitability appeals involving OPM's own workforce, OPM anticipates approximately 3 such appeals per year. Because the record-preparation and review costs of those appeals are already captured in the first and second components, this component reflects only the incremental cost of administrative-law-judge adjudication. OPM assumes approximately 12 hours of administrative-law-judge time per appeal at the 2026 AL-3, step F, rate (\$199,296 annually and \$95.49 hourly, or \$190.98 per hour with the 200-percent labor-cost assumption), yielding approximately \$7,000 per year (3 appeals × 12 hours × \$190.98 per hour). This estimate is conservative because such appeals are expected to be resolved on the written record in most cases.

Taking together these six components—approximately \$841,000 for responsible-agency record preparation; approximately \$570,000 for OPM appeal review and initial decisions; approximately \$74,000 for hearings; approximately \$18,000 for reconsideration; approximately \$16,000 for annual e-filing licenses; and approximately \$7,000 for administrative-law-judge adjudication of appeals by OPM applicants, appointees, or employees—OPM estimates that the OPM suitability-action appeal process will cost agencies and OPM approximately \$1.52 million annually (approximately \$1,525,000) at the anticipated volume of 318 suitability-action appeals per year. OPM anticipates that existing adjudicatory personnel can assume the preparatory work necessary to compile response files and respond to information requests for appeals of OPM's own suitability actions. For the work of reviewing appeals and making recommendations for initial decisions, OPM anticipates that it will likely need two additional personnel at the 2026 GS-13, step 5, Washington, DC, locality rate to handle the additional workload expected as a result of the final Suitability and Fitness rule.

### **c. Total cost impact**

OPM has updated the final cost analysis to reflect the current regulatory baseline, including final amendments to part 731 made by the Suitability and Fitness rule. OPM is not presenting alternative cost scenarios in this final rule. Instead, because the Suitability and Fitness rule is now final, OPM uses the anticipated combined volume of 318 suitability-action appeals per year as the operative estimate.

Taking into account approximately \$7.35 million in annual avoided MSPB-related costs and approximately \$1.52 million in annual costs to operate the OPM suitability-action appeal process, this final rule is expected to result in annual net savings to the Government of approximately \$5.83 million. These recurring annual savings are separate from the one-time implementation costs of approximately \$1 million.

OPM notes that the final estimate differs from the proposed rule. The proposed rule estimated approximately \$574,000 in annual savings if suitability-action appeal volumes remained at then-current levels and approximately \$5.9 million in annual savings if both this rulemaking and the Suitability and Fitness rule were finalized. The final rule no longer uses the current-volume-only scenario as the operative estimate, updates wage assumptions to 2026 rates, includes recurring electronic filing license costs, and reflects the procedural requirements in the final regulatory text.

#### **d. Comments on the cost analysis**

Commenters 0236 and 0282 broadly disputed OPM's efficiency rationale and argued that the rule may shift or increase costs rather than reduce them, including by creating new OPM resource needs or increasing downstream litigation. OPM acknowledges these comments but does not agree that they undermine the cost estimate. The final cost analysis identifies the principal labor costs avoided by eliminating MSPB adjudication of suitability-action appeals and the principal costs of operating the OPM suitability-action appeal process. Commenters 0236 and 0282 did not provide quantified data that would allow OPM to estimate additional downstream litigation costs attributable to this rule.



Commenter 0267 argued that savings are illusory and largely offset by the need to build and staff a new internal OPM appeals system. Commenter 0267 also expressed concern that the rule could create an under-resourced appeals function, especially at startup, and merely shift case backlogs from MSPB to OPM. OPM acknowledges this concern but disagrees that the final cost estimate fails to account for OPM resource needs. The final cost analysis includes OPM appeal-review staff time, OPM deciding-official time, hearing-related costs, reconsideration costs, and recurring e-filing license costs. OPM has also updated the analysis to reflect the anticipated increase in appeal volume following the final *Suitability and Fitness* rule and estimates that it will likely need two additional GS-13 personnel to support appeal review and recommendations.

Commenter 0294 argued that cost savings cannot be reliably projected because the estimate appears to depend on a projected decrease in settlements. OPM clarifies that the estimate does not depend on an assumption that settlement rates will decrease. Rather, OPM uses historical MSPB dismissal and settlement rates to estimate the expected level of effort associated with appeals that resolve before a full hearing-equivalent level of effort and appeals that require the full level of effort. The cost model therefore uses settlement and dismissal data to allocate expected labor hours, not to assume any particular future settlement outcome.

Commenter 0258 argued that this rule could not be evaluated separately from the *Suitability and Fitness* rule. OPM agrees that the final cost analysis should reflect the current regulatory baseline. The proposed rule presented both a current-volume estimate and a potential combined estimate if the June 2025 *Suitability and Fitness* rule were finalized. In this final rule, because the *Suitability and Fitness* rule is now final, OPM has removed the current-volume-only scenario as the operative estimate and incorporated the anticipated appeal-volume effects of that final rule, including the estimate that approximately 1,226 removal actions presently taken under chapter 75 could be referred to OPM for suitability action and that approximately 255 additional appeals per year may shift from adverse-action appeals to suitability-action appeals.

Commenter 0058 asserted that the cost-benefit analysis was fundamentally flawed. OPM acknowledges the comment but notes that Commenter 0058 did not provide additional detail or alternative quantitative assumptions supporting that assertion. OPM has nevertheless updated the final cost analysis to reflect the final regulatory baseline, 2026 pay rates, the expected combined appeal volume, the final rule's procedural requirements, and annual e-filing license costs.

Commenters 0303 and 0338 asserted that the projected savings are minimal. OPM disagrees. The proposed rule estimated approximately \$574,000 in annual savings under then-current appeal volumes, and approximately \$5.9 million if both the appeal-rulemaking and the June 2025 Suitability and Fitness rule were finalized. The final analysis now uses the final Suitability and Fitness rule as part of the operative baseline and estimates approximately \$5.83 million in annual net savings. OPM concludes that annual net savings of that magnitude are not minimal, particularly when considered together with the final rule's objective of establishing a specialized suitability-action appeal process.

Commenter 0303 also argued that OPM's projected cost analysis failed to account for an increase in suitability actions used to remove employees. OPM disagrees. Both the proposed rule and this final rule account for the possibility that approximately 1,226 removal actions presently taken by agencies under chapter 75 could be referred to OPM for suitability action, and this final rule incorporates the resulting estimated 255 additional annual appeals into the operative cost model.

Commenter 0246 objected that OPM's cost estimates are based on unclear or faulty assumptions and questioned the credibility of OPM's implementation plan. OPM disagrees. Commenter 0246 questioned OPM's projected hearing-related costs, but the commenter's estimate was based on 63 appeals per year. The final rule updates the model to reflect 318 appeals per year, including 255 additional appeals expected as a result of the final Suitability and Fitness rule. OPM also clarifies that the hearing-rate assumption is derived from seven years of

MSPB suitability-appeal data and is used to distinguish appeals expected to require a full hearing-equivalent level of effort from those expected to resolve earlier.

Commenter 0246 also raised concerns about OPM's estimated costs for administrative judges. OPM disagrees that the estimate is understated. The final rule provides for hearings only when a material factual dispute cannot be resolved on the developed written record, including when resolution requires evaluation of witness credibility, and any hearing held under § 731.505(d) will be presided over by an administrative judge. OPM's calculations therefore assume that administrative judges participate only in the subset of cases requiring a hearing; the rule does not assume that administrative judges will be dedicated exclusively to suitability-action appeals. The final cost analysis quantifies these assumptions, estimating approximately 8 hearings per year and itemizing the associated administrative-judge, attorney, agency-staff, deciding-official, and transcription costs.

OPM disagrees that the cost estimate is understated merely because the proposal initially discussed a smaller baseline volume of appeals. The final rule's cost model uses the higher projected appeal volume and accounts for the fact that not every appeal will require the same level of adjudicatory effort. Some appeals are expected to be dismissed as untimely, outside OPM's jurisdiction, or otherwise procedurally defective; some are expected to be resolved on the developed written record; some may require additional information or investigation; and only a subset are expected to require a hearing. The final rule's procedures reflect that structure. OPM's review is based on the developed written record except where the written record is insufficient to resolve a material factual dispute, including a material witness-credibility dispute. Any hearing held under § 731.505(d) will be presided over by an administrative judge and limited to the material factual issues identified as necessary to resolve the appeal.

OPM also disagrees that the cost estimate for administrative judges is understated. The final rule does not assume that administrative judges will adjudicate every appeal or that any administrative judge will be dedicated exclusively to suitability-action appeals. Rather,

administrative judges are expected to participate in the subset of matters requiring that level of adjudicatory involvement, including hearings under § 731.505(d) and appeals by OPM applicants, appointees, or employees under § 731.505(b). This is consistent with the final regulatory text, which uses administrative-judge participation as a procedural safeguard where warranted, not as the staffing model for every case.

OPM further clarifies that the reference to a “separate cadre” of staff does not mean that every person supporting suitability-action appeals will perform only that function on a full-time basis. OPM intends to maintain functional separation between personnel involved in taking or directing suitability actions and personnel involved in adjudicating appeals. That separation is required by the final rule when OPM is the responsible agency. It does not require OPM to create idle full-time positions or prevent OPM from assigning qualified personnel to other compatible duties when appeal workload permits. The final rule is therefore consistent with a staffing model in which existing adjudicatory or suitability personnel perform some functions and OPM adds capacity where needed to support the projected appeal volume.

OPM also disagrees with the commenter’s suggestion that part-time use of specialized staff undermines the efficiency rationale for the rule. The purpose of the rule is not to maximize utilization of each individual staff role in isolation; it is to replace a multi-stage MSPB process with a suitability-specific OPM process that can be managed within OPM, is not dependent on MSPB quorum or Board-level review, and applies procedures proportionate to the issues presented in part 731 appeals. The final rule uses a written-record default, targeted record-development authority, hearings when material factual disputes, including witness-credibility disputes, cannot be resolved on the written record, and reconsideration standards tailored to OPM’s process. Those design choices reduce unnecessary procedural layers while preserving safeguards for cases that require more intensive review.

OPM also notes that the final rule adds procedural protections that may increase some OPM processing costs compared with the proposal but improve the fairness and reliability of the

process. These include express burdens of proof, a complete indexed and certified agency record, disclosure and substitute-disclosure procedures for withheld or protected material, a rule against reliance on nondisclosed material absent notice and a meaningful opportunity to respond except as authorized by law, separation-of-functions safeguards, ex parte restrictions, adjudicator-disqualification rules, training requirements, written findings on material charges and suitability factors, and public availability of final merits decisions or de-identified summaries. These protections reflect OPM's consideration of comments asserting that efficiency should not come at the expense of accuracy or procedural fairness.

Finally, OPM has updated the implementation assumptions to reflect that OPM has secured access to an existing electronic case-management system to receive, track, and manage appeal submissions, and has updated the regulatory impact analysis to include the annual recurring license cost for OPM staff. OPM therefore disagrees that the final rule lacks a reasonable implementation plan. The final analysis reflects a higher projected caseload, clarifies the basis for hearing-related assumptions, does not assume full-time dedicated administrative-judge work where the workload does not require it, and accounts for the final rule's actual procedural framework.

Commenter 0183 expressed concern that OPM would need to build a new electronic filing system. OPM clarifies that it is leveraging an existing electronic case-management system to receive, track, and manage suitability-action appeal submissions. The final cost analysis therefore includes approximately \$16,000 in annual recurring license costs for OPM appeal staff, rather than costs to build an entirely new electronic filing platform.

Commenter 0183 also questioned whether OPM is sufficiently staffed to handle the expected appeal workload and questioned the hourly time assumptions used to calculate costs for judges and attorneys. OPM has updated the final analysis to reflect the anticipated increase in appeals and the expected need for two additional GS-13 personnel. OPM also concludes that the time assumptions used in the final cost analysis reflect the structural differences between MSPB

litigation-style proceedings and OPM's streamlined administrative review process. The final cost estimate accounts for the final rule's record-based review process, the complete agency-record requirement, the availability of hearings where the written record is insufficient to resolve material factual disputes, and the reconsideration process established in the final regulatory text.

#### ***D. Benefits***

This final rule is expected to provide substantial procedural, operational, and programmatic benefits. By replacing the prior MSPB appeal route with a suitability-specific OPM appeal process, the rule is expected to reduce unnecessary delay, cost, and procedural complexity while preserving meaningful review for individuals subject to suitability actions. The rule does not eliminate an appeal; it establishes a more tailored appeal process for determining whether the unfavorable suitability determination and resulting suitability action are supported and whether required suitability procedures were followed.

A principal benefit of the rule is more timely finality for both appellants and agencies. Under the prior regulatory framework, suitability appeals could proceed through MSPB administrative-judge proceedings, discovery, potential hearings, petitions for full Board review, and judicial review. That multi-stage process may be appropriate for matters Congress made appealable to MSPB under chapter 75 or other statutes, but OPM has determined that it is not necessary for regulatory suitability appeals under part 731. The final rule instead provides a written-record default, targeted record development where needed, hearings when material factual disputes, including witness-credibility disputes, cannot be resolved on the written record, reopening and reconsideration standards tailored to this process, and Director review before finality. This structure is expected to shorten the time needed to reach a final administrative resolution.

The rule also reduces the Executive Branch's dependency on MSPB Board-level review and quorum availability for this limited class of regulatory appeals. Suitability actions are designed to protect the integrity and promote the efficiency of the service. Prolonged uncertainty

can burden appellants, delay agency workforce decisions, and weaken the protective function of suitability actions. By placing suitability appeals within OPM, the agency responsible for governmentwide suitability policy and administration, the rule allows OPM to allocate resources, manage caseloads, and maintain continuity in the resolution of suitability appeals without relying on the availability of a separate Board quorum.

The rule is also expected to promote greater consistency and rigor in suitability adjudication. Suitability appeals require application of OPM's part 731 regulations, suitability factors, action-selection principles, and personnel-vetting standards. The final rule requires OPM employees and administrative law judges assigned to adjudicate appeals to complete training that complies with national training standards for suitability adjudicators. Centralizing review in OPM is expected to produce more uniform application of governmentwide suitability standards and reduce variation that may arise when suitability appeals are processed as a small subset of a broader personnel-litigation docket.

The final rule also strengthens procedural protections compared with the proposal. It expressly allocates burdens of proof; requires the responsible agency to prove, by a preponderance of the evidence, the charges supporting the unfavorable suitability determination and the substantive propriety of the suitability action; requires a complete, indexed, paginated, and certified agency record; requires service of that record on the appellant; requires identification of withheld, redacted, or protectively handled material; and generally prohibits reliance on nondisclosed material to affirm a suitability action unless the appellant receives notice of the substance of the material and a meaningful opportunity to respond, except as otherwise authorized by law. The rule also adds separation-of-functions protections, ex parte restrictions, adjudicator-disqualification rules, ALJ adjudication or ALJ-presided hearings where required, reasoned initial decisions addressing material charges and suitability factors, remedies for prevailing appellants, and public availability of final merits decisions or de-identified

summaries consistent with applicable law. These safeguards are expected to improve confidence in the OPM appeal process while avoiding procedures not necessary in every suitability appeal.

The rule may also improve agency accountability and workforce integrity. A costly, lengthy, and uncertain appeal process may discourage agencies from pursuing warranted suitability actions, particularly where the action is intended to mitigate risk, protect mission functions, or ensure sufficient time for rehabilitation before renewed Federal employment. A more prompt and suitability-specific appeal process may increase agencies' willingness to take appropriate action when supported by the record, while ensuring that unsupported or procedurally defective actions are corrected. This benefits the public by helping agencies maintain a trusted workforce and by ensuring that suitability decisions are resolved on the merits rather than avoided because of unnecessary procedural burden.

Finally, the rule aligns the appeal procedure with the statutory distinction between suitability actions and chapter 75 adverse actions. Congress has provided that a suitability action taken by OPM under OPM regulations is not a chapter 75 adverse action. This final rule reflects that distinction by replacing a chapter 75-style appellate model with procedures designed for part 731 suitability actions. On balance, OPM expects the final rule to reduce operational costs, improve timeliness, promote consistent suitability adjudication, preserve meaningful procedural protections, and more effectively protect the integrity and efficiency of the Federal service.

#### ***E. Alternatives***

OPM considered retaining the existing regulatory framework, under which individuals subject to suitability actions may appeal to MSPB. OPM declines to adopt that alternative. Although MSPB review has historically provided an external adjudicatory forum, OPM concludes that retaining the existing process would not adequately address the principal problems this rule is intended to solve: delay, procedural complexity, duplicative layers of review, and inconsistent alignment between the nature of suitability actions and the procedures used to review them. Suitability actions are distinct from chapter 75 adverse actions, and



Congress has made clear in 5 U.S.C. 7512(F) that a suitability action taken by OPM under OPM regulations is not a chapter 75 action. OPM therefore concludes that a suitability-specific OPM appeal process is more appropriate than continuing to route these regulatory appeals through MSPB.

OPM also considered creating a two-step process under which an appellant would first appeal to OPM and then retain a further appeal to MSPB. OPM rejects that alternative because it would add, rather than reduce, procedural layers. OPM's prior experience with the OPM Review Panel demonstrates that adding internal OPM review while retaining MSPB review did not achieve streamlined finality; many appellants proceeded to MSPB after the Review Panel issued a decision. The lesson OPM draws from that history is not that OPM review is infeasible, but that a duplicative OPM-plus-MSPB model would preserve the same delay and cost concerns that this rule is designed to address.

Several commenters, including commenters 0207/0286, 0303, 0332, 0331, 0333, and 0329, urged OPM to consider alternatives such as retaining MSPB jurisdiction, creating an expedited MSPB track for suitability appeals, increasing MSPB funding and staffing, ensuring MSPB Board vacancies are filled, using specialized MSPB administrative judges, improving agency training, working with Congress, or assigning appeals to another independent third party. Other commenters, including 0204, 0287, and 0294, similarly recommended preserving MSPB review or using existing adjudicatory expertise.

OPM considered these alternatives but does not adopt them. Many would require action by Congress, MSPB, or other actors outside OPM's control, such as appropriations, statutory amendments, changes to MSPB internal case-management rules, creation of a new adjudicatory body, or appointment and confirmation of Board members. The APA does not require OPM to adopt an alternative that OPM cannot implement through this rulemaking, particularly where the alternative would not achieve OPM's objective of establishing a single, specialized, and timely suitability-appeal process.

OPM also considered whether improved agency training or management guidance would be sufficient. OPM agrees that training remains important and will continue to provide governmentwide suitability guidance and training. But training alone would not address the structural features of the existing appeals process that OPM identified as resulting in protracted proceedings: MSPB procedures designed for broader personnel litigation, potential discovery and hearing practice in every MSPB appeal, petitions for Board review, judicial review of MSPB decisions, and recurring vulnerability to Board quorum lapses. Training may improve the quality of initial suitability actions, but it would not create a more timely, suitability-specific appellate process.

In response to comments, OPM also considered whether to preserve additional procedural features of MSPB practice, including automatic discovery, a categorical right to a hearing, or a broader mixed-case process within the suitability appeal. OPM declines to adopt those alternatives. OPM concludes that automatic discovery and a hearing in every appeal are not necessary for the limited issues reviewable under part 731 and would undermine the efficiency gains this rule is intended to achieve. At the same time, OPM agrees that the appeal process must include safeguards sufficient to ensure fair and accurate review. The final rule therefore strengthens the proposed process by adding express burdens of proof, requiring a complete certified agency record, requiring disclosure or legally appropriate substitute treatment of withheld or redacted material, prohibiting reliance on nondisclosed material absent notice and a meaningful opportunity to respond except as otherwise authorized by law, establishing separation-of-functions and ex parte safeguards, requiring trained adjudicators, providing objective criteria for additional fact development and hearings, requiring an administrative judge to preside over any hearing, requiring reasoned findings on material charges and suitability factors, and providing reconsideration and Director review before finality. The rule also provides that administrative judge hearings will be held when the written record is insufficiently developed to resolve one or more facts material to the outcome of the appeal, including all cases

where resolution of a material factual dispute requires evaluation of witness credibility. Thus the regulations provide for hearings where they are relevant to resolving the case without creating a categorical right to hearings in cases where material facts are not in dispute. These revisions address commenters' procedural concerns while preserving the rule's central objective: replacing the MSPB process with a suitability-specific OPM appeal process.

OPM further considered whether Director review should be eliminated or made available as a party-requested appeal. OPM declines both alternatives. The final rule preserves party-requested reopening and reconsideration under § 731.507 and separately preserves the Director's ability, on the Director's own initiative and before finality, to reopen and reconsider an initial decision or reopened-and-reconsidered decision under § 731.508. OPM revised § 731.508 to identify considerations that may warrant Director review, including clear legal error, erroneous material fact, exceptional importance, governmentwide civil-service administration, OPM policy, conflict among OPM decisions, or other reasons warranting review. This approach preserves principal-officer supervision and decisional consistency without creating an additional appeal layer as of right. Under the Supreme Court's decision in *United States v. Arthrex*, 141 S. Ct. 1970 (2021), OPM cannot constitutionally permit inferior officers to issue final decisions without review by a principal officer.

OPM recognizes that the final rule does not adopt every alternative proposed by commenters. But OPM has considered the principal alternatives and concludes that they would either fail to address the problems identified, depend on actions outside OPM's control, preserve duplicative or lengthy review, or undermine the suitability-specific process OPM is establishing. OPM instead adopts a final rule that changes the appeal forum while adding significant procedural protections. OPM concludes that this approach best balances timely resolution, consistent application of part 731, fairness to appellants, and the Government's interest in protecting the integrity and efficiency of the Federal service.

#### ***F. Reliance Interests***

OPM considered potential reliance interests arising from the prior MSPB appeal procedure and concludes that those interests do not warrant retaining MSPB as the forum for part 731 suitability-action appeals. OPM recognizes that applicants, appointees, employees, agencies, unions, and representatives have operated for many years under a regulatory framework that routed suitability-action appeals to MSPB. OPM also recognizes that parties may have valued MSPB procedures, including discovery, hearings, petitions for Board review, and judicial review of MSPB decisions.

Those reliance interests, however, concern a regulatory forum and regulatory procedures, not a statutory entitlement to MSPB adjudication. MSPB jurisdiction over part 731 suitability appeals existed because OPM's regulations placed those appeals before MSPB. Congress did not require that suitability actions be appealed to MSPB, and suitability actions are distinct from chapter 75 adverse actions. OPM may revise a regulatory appeal forum prospectively through notice-and-comment rulemaking, provided it acknowledges reliance interests and gives a reasoned explanation for the change. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009); *Department of Homeland Security v. Regents of the University of California*, 591 U.S. 1, 30–33 (2020); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016).

OPM has done so here. The final rule is not a withdrawal of review; it replaces one regulatory forum with another and adds a structured suitability-specific appeal process. Individuals subject to a suitability action will continue to receive the pre-action protections provided in part 731, including advance written notice of the charges and reasons, notice of the right to respond, access to the materials relied upon, a minimum 30-day response period, the right to representation, and a written decision. The final rule also preserves an appeal in which the appellant may contest the unfavorable suitability determination and raise specified procedural defects.

In addition, the final rule strengthens the procedures proposed in the NPRM. It expressly allocates burdens of proof; requires the responsible agency to prove the charges supporting the

unfavorable suitability determination and the substantive propriety of the action by a preponderance of the evidence; requires a complete, indexed, paginated, and certified agency record; requires service of that record on the appellant; requires identification of withheld, redacted, or protectively handled material; and prohibits reliance on nondisclosed material to affirm a suitability action unless the appellant receives notice of the substance of that material and a meaningful opportunity to respond, except as otherwise authorized by law. The rule also provides separation-of-functions safeguards when OPM is the responsible agency, ex parte restrictions, adjudicator-disqualification rules, training requirements, objective criteria for additional fact development, administrative-judge-presided hearings where material factual disputes, including witness-credibility disputes, cannot be resolved on the developed written record, reasoned initial decisions, reconsideration, Director review before finality, remedies for prevailing appellants, and public availability of final merits decisions or de-identified summaries.

These safeguards address the core interests underlying commenters' reliance concerns: fair notice, meaningful opportunity to respond, access to the evidence supporting the action, impartial review, reasoned decision-making, and appropriate relief. The final rule does not preserve every procedural feature of MSPB litigation, but reliance on the prior regulatory forum does not require OPM to retain procedures that OPM has reasonably determined are not necessary for part 731 suitability appeals and that contribute to delay, cost, and duplicative review.

OPM also considered reliance interests in other statutory and regulatory remedies. The final rule makes clear that the part 731 appeal process is the sole means of appealing a suitability action under part 731, but it does not preclude an applicant, appointee, or employee from filing a complaint, appeal, or other matter within the independent jurisdiction of the EEOC, FLRA, an Inspector General, MSPB, DOL VETS, or OSC. Thus, the rule does not displace independent remedies for discrimination, prohibited personnel practices, whistleblower reprisal, veterans' rights violations, labor-relations matters, or other claims committed by law to another forum.

Nor does the rule reopen final decisions issued under the prior framework or eliminate rights that vested under a final adjudication. The rule operates prospectively as a change to the appeal forum and procedures for suitability actions governed by subpart E, and it does not affect appeals filed with the MSPB before the effective date of this final rule, which will continue to be adjudicated by the MSPB. Parties may no longer rely on the continued availability of the prior regulatory MSPB route for future part 731 suitability appeals, but they retain meaningful procedural protections and any independent statutory remedies otherwise available.

OPM therefore concludes that any reliance interests associated with the former MSPB appeal route are outweighed by OPM's reasons for adopting a suitability-specific appeal process: aligning the appeal forum with the regulatory nature of part 731 suitability actions, reducing delay and unnecessary procedural complexity, promoting consistent application of OPM's governmentwide suitability standards, and protecting both individual procedural interests and the integrity and efficiency of the Federal service.

## **VI. Procedural Issues and Regulatory Review**

### ***A. Regulatory Flexibility Act***

The Director of OPM certifies that this rule will not have a significant economic impact on a substantial number of small entities because this rule affects suitability and fitness regulations which apply primarily to Federal agencies and employees. Although some Federal contractors may be small entities, the nature of the changes in this rulemaking is not expected to result in economic impacts to non-agency entities.

### ***B. Regulatory Review***

OPM has 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 with effects of \$100 million or

more in any one year. This rulemaking does not reach that threshold but has otherwise been designated as a “significant regulatory action” under section 3(f) of E.O. 12866, as supplemented by Executive Order 13563. This rule is an E.O. 14192 deregulatory action. OPM estimates this rule generates \$4.7 million in annualized savings in 2024 dollars at a 7% discount rate, discounted relative to year 2024, over a perpetual time horizon. That figure is derived as follows. In 2026 dollars, OPM estimates the rule produces approximately \$5.83 million in recurring annual savings and approximately \$1 million in one-time implementation costs incurred in fiscal year 2026. Converting to 2024 dollars using the GDP price deflator (approximately 2.2 percent annual inflation, a two-year conversion factor of approximately 0.957) yields approximately \$5.58 million in recurring annual savings and approximately \$0.96 million in one-time costs. Because the final rule does not apply to appeals filed with the MSPB before its effective date, OPM assumes the recurring savings phase in at 50 percent (approximately \$2.79 million) in fiscal year 2027 and reach the full \$5.58 million in fiscal year 2028 and each year thereafter over a perpetual horizon. Discounting those flows to 2024 at a 7 percent rate produces a present value of savings of approximately \$67.3 million and a present value of costs of approximately \$0.8 million, for a net present value of approximately \$66.5 million; multiplying by the 7 percent discount rate to annualize over a perpetual horizon yields approximately \$4.7 million in annualized net savings.

### ***C. Severability***

If any of the provisions of this rule as finalized are 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 will comply with all applicable legal requirements.

### ***D. 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, it is determined that this rule does not have sufficient Federalism implications to warrant preparation of a Federalism Assessment.

#### ***E. Civil Justice Reform***

This regulation meets the applicable standard set forth in section 3(a) and (b)(2) of E.O. 12988.

#### ***F. 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.

#### ***G. Congressional Review Act***

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act or CRA) (5 U.S.C. 801 et seq.) requires most final rules to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this rule before its effective date. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this rule is not a major rule as defined by the CRA (5 U.S.C. 804).

#### ***H. Paperwork Reduction Act***



This final rule contains information collection requirements within the meaning of the Paperwork Reduction Act of 1995, as amended (44 U.S.C. chapter 35). Depending on the population, currently suitability and vetting information is collected through the following OMB Control Numbers.

- 3206-0261 (Standard Form 85, Questionnaire for Non-Sensitive Positions)
- 3206-0258 (Standard Form 85P, Questionnaire for Public Trust Positions and SF 85P-S, Supplemental Questionnaire for Selected Positions)
- 3206-0005 (SF 86, Questionnaire for National Security Positions)

Additional information regarding these collections of information – including all current supporting materials – can be found at <https://www.reginfo.gov/public/do/PRAMain> by using the search function to enter either the title of the collection or the OMB Control Number. Data gathered through these information collections fall under the following system of records notice: Personnel Vetting Records System, DUSDI 02-DoD (83 FR 52420).

In addition, OPM suitability adjudication records are currently covered by the system of records notice (SORN) CENTRAL-9, Personnel Investigations Records (81 FR 70191). After reviewing that SORN in light of the changes in the Suitability and Fitness rule and this rulemaking, OPM is proposing to rescind the existing system of records and establish a new system of records titled CENTRAL-9, OPM Suitability Adjudications Files. Individual agencies should each have a SORN that covers the agency's adjudication and referral records. Agencies should evaluate whether the agency-specific SORNs must be updated to permit sharing information with OPM as part of the appeals process.

On November 15, 2023, a new information collection, the Personnel Vetting Questionnaire (PVQ), was approved (OMB Control Number 3206-0279). The Defense Counterintelligence and Security Agency (DCSA) is working to implement the new information collection. OPM plans to discontinue the current information collections once the PVQ is

operational. OPM believes this rulemaking does not require any changes in any of these collections.

OPM is adopting an e-filing system for use in collecting and maintaining adjudication records for a variety of different existing regulatory provisions. OPM has submitted a request for a new information collection to the Office of Management and Budget for this system (see 91 FR 46802 (July 24, 2026)). OPM will not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a currently valid OMB control number.

To the extent the final rule requires Federal agencies to submit agency responses, agency records, certifications, or other documents in their official capacity, those submissions are not collections from “persons” for purposes of the Paperwork Reduction Act. However, submissions from appellants, representatives, or other non-agency parties may constitute information collections subject to the Paperwork Reduction Act.

## **List of Subjects**

### **5 CFR Part 731**

Administrative practice and procedure, Authority delegations (Government agencies), Government contracts, Government employees, Investigations.

## **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.*

Accordingly, for the reasons stated in the preamble, OPM amends 5 CFR part 731 as follows:

## **PART 731—SUITABILITY AND FITNESS**

1. The authority citation for part 731 is revised to read as follows:

**Authority:** 5 U.S.C. 1103, 1302, 2301, 2302, 3301, 7301. E.O. 10577, 19 FR 7521, 3 CFR, 1954-1958 Comp., p. 218, as amended. E.O. 13467, 73 FR 38103, 3 CFR, 2009 Comp., p. 198, as amended. E.O. 13488, 74 FR 4111, 3 CFR, 2010 Comp., p. 189, as amended. E.O. 13764, 82 FR 8115, 3 CFR, 2017 Comp., p. 243. E.O. 14210, 90 FR 9669. Presidential Memorandum of January 31, 2014, 3 CFR, 2014 Comp., p. 340. Presidential Memorandum of March 20, 2025, 90 FR 13683. 5 CFR parts 1, 2, 5, and 6.

2. Revise Subpart E to read as follows:

### **Subpart E—Suitability Action Appeals**

Sec.

731.501 Right to appeal.

731.502 Procedures for submitting appeals.

731.503 Form and content of suitability action appeals and agency response.

731.504 Appellant representatives.

731.505 Adjudication of appeals.

731.506 Sanctions and protective orders.

731.507 Requests for reconsideration of an initial decision.

731.508 Review by the OPM Director.

731.509 Final decision.

#### **§ 731.501 Right to appeal.**

(a) *Right of appeal.* An applicant, appointee, or employee in the competitive service or career Senior Executive Service, as those terms are used in this part, may appeal to OPM a suitability action taken against the appellant because of an unfavorable suitability determination.

(b) *Burden of proof.* (1) The appellant bears the burden to demonstrate, by a preponderance of the evidence:

- (i) The timeliness of the written appeal;
- (ii) That OPM possesses jurisdiction over the appeal; and
- (iii) If the appellant challenges the suitability action based on improper procedure under paragraph (c)(2) of this section, that the responsible agency failed to provide one or more of the procedural protections identified in paragraph (c)(2) of this section.

(2) If the appellant contests the unfavorable suitability determination under paragraph (c)(1) of this section, and after the appellant establishes timeliness and jurisdiction, the responsible agency bears the burden to establish, by a preponderance of the evidence, the charge or charges supporting the unfavorable suitability determination and the substantive propriety of the suitability action taken. This paragraph does not shift to the responsible agency the appellant's burden under paragraph (b)(1)(iii) of this section to demonstrate improper procedure.

(c) *Appealable issues*—(1) *Unfavorable suitability determination.* The appellant may contest the determination that he or she is unsuitable for Federal employment based on the specific factors found at § 731.202(b) provided that the unfavorable suitability determination resulted in a suitability action as defined at § 731.101(a).

(2) *Improper procedure.* An appellant who has been subject to a suitability action may challenge whether the responsible agency failed to provide:

- (i) Advance written notice stating the charge(s) and specific reason(s) for the proposed action and notifying the appellant of the right to answer the notice in writing and to review, upon request, the materials relied upon;
- (ii) Notice of the right to be represented by a representative chosen by the appellant;
- (iii) A minimum of 30 calendar days from the date of the notice of proposed action to file a written response and furnish documentation; or

(iv) A written decision delivered to the appellant that explains the decision and the procedures for appealing the decision.

(d) *Nonappealable issues.* An applicant, appointee, or employee may not appeal an unfavorable suitability determination that does not result in a suitability action as those actions are defined at § 731.101(a).

(e) *Exclusive appeal procedure.* The procedures in this subpart are the sole means of appealing a suitability action under this part, but do not otherwise preclude an applicant, appointee, or employee from filing a complaint, appeal, or other matter within the independent jurisdiction of the Equal Employment Opportunity Commission, Federal Labor Relations Authority, an Inspector General, Merit Systems Protection Board, the Department of Labor's Veterans' Employment and Training Service, or the Office of Special Counsel. A party cannot obtain judicial review of a decision under this subpart.

#### **§ 731.502 Procedures for submitting appeals.**

(a) *Filing an appeal.* An applicant, appointee, employee, or authorized representative seeking to file an appeal or reconsideration under this subpart must utilize the electronic filing system identified on OPM's website. Unless a party demonstrates good cause and seeks approval from OPM, OPM will not accept pleadings, evidence, or other documents via electronic mail or postal mail.

(b) *Time limits.* An appellant may file an appeal within 30 calendar days from the effective date of a suitability action. An appeal is deemed timely when it is electronically filed by 11:59 p.m. Eastern Time on the 30<sup>th</sup> calendar day after the effective date of the action.

(1) In computing the number of days allowed for filing an appeal, the first day counted is the day after the effective date of the suitability action. In the case of an appointee or employee, the effective date of the action is the date the employing agency effectuates the suitability action, regardless of whether the agency is effectuating its own action or an OPM action. In the case of an applicant, the effective date of the action is the date on the notice of final action. When a

notice of final action is served on an applicant by mail, 10 calendar days are added to the date of the notice for the deadline to file an appeal. If the date that ordinarily would be the last day for filing falls on a Saturday, Sunday, or Federal holiday, the filing period will include the first workday after that date.

(2) If an individual does not file an appeal within the time set by this section, the appeal will be dismissed as untimely filed unless the individual demonstrates good cause for an untimely appeal. The determination of good cause will be in the sole and exclusive discretion of OPM.

(c) *E-filing procedures.* (1) All parties and their representatives to an appeal or request to reopen and reconsider must register as instructed by OPM on its suitability action appeals website using a unique email address.

(2) Registration as an e-filer constitutes consent to accept electronic service of pleadings, evidence, notices, orders, and other documents filed by other e-filers or issued by OPM. No party may electronically file any document with OPM or access an appeal or reconsideration of an appeal unless registered as an e-filer or exempted under paragraph (c)(7) of this section.

(3) All notices, orders, decisions, and other documents issued by OPM, as well as all documents filed by parties, will be made available for viewing and downloading at OPM's electronic filing system. Access to documents is limited to the parties and their representatives who are registered as e-filers in the cases in which they were filed.

(4) All parties and their representatives must follow the instructions on OPM's website for properly filing all pleadings, evidence, and other documents. OPM may strike a document where an e-filer repeatedly fails to follow these instructions following receipt of a show cause order.

(5) Each e-filer must promptly update their profile in OPM's electronic filing system and notify OPM and other parties of any change in their address, telephone number, or email address by filing a pleading in each pending case with which they are associated. E-filers are responsible

for monitoring case activity regularly in OPM's electronic filing system to ensure that they have received all case-related documents.

(6) A party or representative may withdraw their registration as an e-filer pursuant to the requirements posted on OPM's website. Withdrawing registration in OPM's electronic filing system means that, effective upon OPM's processing of a proper withdrawal, pleadings, evidence, orders, and other documents filed by a party, a party's representative, or OPM will no longer be served on that person electronically and that person will no longer have electronic access to their case records through OPM's electronic filing system. OPM may still process an appeal or request for reconsideration after a party withdraws as an e-filer. Withdrawal of e-filing registration by a party or representative will not be considered good cause for staying a case.

(7) OPM, in its sole and exclusive discretion, may exempt a party or representative from registering as an e-filer for good cause. A party or representative must promptly contact OPM as instructed on OPM's website to request an exemption from the e-filing requirements in this subpart. OPM will not find good cause for failing to timely file an appeal or seek reconsideration if the party or representative fails to contact OPM to request an exemption before any deadline to appeal or seek reconsideration.

(8) Documents filed in OPM's electronic filing system are deemed received on the date of the electronic submission.

### **§ 731.503 Form and content of suitability action appeals and agency response.**

(a) *Appeal.* An appeal must be in writing and shall state the basis of the appellant's appeal; the name, address, and email address or phone number of the appellant and appellant's representative, if any; and any documentation supporting the appellant's appeal.

(b) *Agency response.* (1) Upon receipt of the appeal, OPM will notify the agency responsible for the suitability action (responsible agency) of the appeal. Unless the OPM adjudicator processing the appeal provides otherwise, the responsible agency must file its response to an appeal within 30 calendar days of notification of the appeal; include all

documents contained in the agency record of the action; include a designation of and signature by the authorized agency representative; and include any other documents or responses requested by OPM.

(2) For purposes of this subpart, *responsible agency* means the employing agency or, when OPM took, directed, or made the suitability action under review, the OPM office or component responsible for that action. When OPM is the responsible agency, the adjudicative function must be separated from any OPM office or official that participated personally and substantially in the suitability determination or action.

(3) When OPM is the responsible agency and is not the appellant's employing agency, OPM will also notify the employing agency of the appeal. The employing agency must furnish to OPM, within the time OPM specifies, any documents or information in its possession that are within the scope of the record of the action or that OPM otherwise requests, and must otherwise participate in the response to the appeal to the extent OPM directs.

(c) *Record of the action.* The responsible agency must file a complete, indexed, paginated, and certified record of the action with OPM. The record of the action includes all documents considered, relied upon, generated, received, issued, or served in investigating, proposing, deciding, directing, or effectuating the unfavorable suitability determination and consequent suitability action, regardless of whether such documents are maintained by the employing agency, OPM, an OPM investigative or adjudicative component, or another authorized investigative or personnel-vetting entity. When the responsible agency is not the employing agency, the employing agency must furnish to the responsible agency or to OPM, within the time OPM specifies, any documents within the scope of the record of the action that are in the employing agency's possession; OPM will identify for the employing agency the records the employing agency must furnish and the records OPM will provide. The record must include, as applicable:



(1) documents establishing the appellant's status, position, appointment or application, and the legal authority under which the action was taken or directed;

(2) all investigative, vetting, personnel, application, and adjudicative materials considered or relied upon by the office or component that took or directed the action;

(3) the charge-by-charge analysis, suitability-factor analysis, consideration of mitigating, rehabilitative, contradictory, or exculpatory evidence, and rationale for the action selected;

(4) the written final decision, proof of service, effective-date documentation, appeal-rights notice, and documents implementing the action;

(5) any direction from OPM to an employing agency to effectuate the action and any employing-agency implementation documents; and

(6) a certification that the submitted record is complete.

The responsible agency must serve the appellant with the agency record. The responsible agency must identify any withheld, redacted, or protectively handled document in an index or privilege log, unless identifying the document itself is prohibited by law. OPM may require a summary, substitute disclosure, protective order, in camera submission, or other procedure sufficient to provide the appellant a meaningful opportunity to respond, consistent with applicable law. No nondisclosed material may be relied upon to affirm the suitability action unless the appellant has received notice of the substance of the material and a meaningful opportunity to respond, except as otherwise authorized by law.

(d) *Reply*. Unless the OPM adjudicator provides otherwise, the appellant may file a reply to an agency response to an initial appeal utilizing the electronic filing system within 15 calendar days of the agency response. The reply may not raise new allegations of error unless the basis rests on information first disclosed in the agency response or unless OPM grants leave for good cause.

(e) *Inspection of OPM's appellate record*. The parties may inspect OPM's appellate record on request, subject to the Privacy Act, applicable legal privileges, classified information

or national security requirements, protective orders issued by OPM, and any other applicable limitation on disclosure required by law.

(f) *Service of Documents.* The parties will serve on each other copies of any and all information submitted to OPM with respect to an appeal, subject to the Privacy Act, applicable privileges, classified information or national security requirements, protective orders issued by OPM, and any other applicable limitation on disclosure required by law. Such information must be served on all other parties at the same time the information is submitted to OPM and must be accompanied by a certificate of service stating how and when service was made.

(g) *Untimely Filings.* Untimely filings may be accepted upon a party's showing of good cause at the sole and exclusive discretion of OPM.

#### **§ 731.504 Appellant representatives.**

(a) *Designation of representative.* An appellant may select a representative of his or her choice to assist in the preparation and presentation of an appeal, provided that the appellant submits his or her designation of representative in writing related to the specific appeal.

(b) *Federal employee representatives; official time and reimbursement.* 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.

(c) *Disallowance of representative.* OPM or the responsible agency may, in its sole and exclusive discretion, disallow an appellant's choice of representative when the representative is an employee of the responsible agency or OPM and the representative's activities would cause a conflict of interest or position.

#### **§ 731.505 Adjudication of appeals.**

(a) *Appeals by non-OPM applicants, appointees, or employees.* OPM will assign OPM personnel to adjudicate an appeal under this subpart by an applicant, employee, or appointee of

an agency other than OPM. OPM personnel assigned to adjudicate an appeal under this subpart shall be insulated from officials who participated personally and substantially in the challenged personnel action or provided case-specific advice concerning that action. OPM adjudicators shall not consider material ex parte communications concerning the merits of an appeal. If such a communication occurs, OPM will place a summary of the communication in the record and provide the parties a reasonable opportunity to respond, unless disclosure is prohibited by law. In addition, no OPM employee may be assigned to adjudicate an appeal if the employee has a prior relationship with the appellant, had prior involvement in the suitability determination or suitability action under appeal, or has any other conflict that would reasonably call the employee's impartiality into question. When necessary, OPM may assign an administrative law judge to adjudicate an appeal.

(b) *Appeals by OPM applicants, appointees, or employees.* OPM will assign an administrative law judge to adjudicate an appeal under this subpart by an OPM applicant, appointee, or employee. To insulate the adjudication of appeals by such individuals from agency involvement, OPM will not disturb initial decisions in those cases unless a party shows there has been harmful procedural irregularity in the proceedings, a clear error of law, or a material factual error that affected the outcome of the appeal. For purposes of this paragraph, the term *harmful procedural irregularity* means an irregularity in the application of procedures that was likely to have caused the administrative law judge to reach a conclusion different from the one he or she would have reached in the absence or cure of the irregularity. The assignment of an administrative law judge under this paragraph or paragraphs (a) or (d) of this section does not make 5 U.S.C. 554, 556, or 557 applicable to an appeal under this subpart except to the extent those provisions are independently required by law or expressly incorporated in this part.

(c) *Training of personnel assigned to adjudicate appeals.* All OPM employees or administrative law judges assigned by OPM to adjudicate appeals under this subpart must have

completed training that complies with national training standards for suitability adjudicators that qualifies them to review OPM and agency suitability determinations and actions.

(d) *Ascertainment of facts.* (1) OPM may require either party, or the employing agency if the employing agency is not a party to the appeal, to provide additional information and may investigate the facts underlying an unfavorable suitability determination or suitability action in the course of adjudicating an appeal if OPM determines, in its sole discretion, that the existing record is insufficient to resolve a material issue within OPM's jurisdiction and that the investigation is reasonably likely to produce information material to resolving that issue.

(2) When OPM conducts an investigation under this paragraph, OPM will:

(i) Inform the appellant, the appellant's representative, if any, and the responsible agency, and, if different, the employing agency, of the investigation and the nature of the information requested; and

(ii) Provide the appellant, the appellant's representative, if any, and the responsible agency, and, if different, the employing agency, with the results of the investigation and a reasonable opportunity to submit argument or additional information to support their positions.

(3) OPM's review of an unfavorable suitability determination and consequent suitability action must be based solely on the developed written record unless the written record is insufficiently developed to resolve one or more facts material to the outcome of the appeal, including when resolution of a material factual dispute requires evaluation of witness credibility.

(4) In cases where the resolution of a material factual dispute requires evaluation of witness credibility, or where the developed written record is insufficient to resolve one or more facts material to the outcome of the appeal, OPM will assign an administrative judge to preside over a hearing. The hearing will be limited to the material factual issues identified by OPM or the administrative judge as necessary to resolve the appeal.

(e) *Failure to participate.* If a party fails to participate in an investigation or hearing pursuant to paragraph (d), OPM may, except when prohibited by law, impose any sanction listed at § 731.506(b)(1) through (3).

(f) *Initial decision.* (1) OPM may issue an initial decision that affirms, reverses, modifies, vacates, or remands the unfavorable suitability determination and consequent suitability action, in whole or in part. OPM will notify the appellant, the responsible agency, and, if different, the employing agency in writing of its decision on the appeal.

(2) The initial decision must make findings on each material charge, specification, and suitability factor relied upon to support the action. If fewer than all charges or specifications are sustained, OPM will determine whether the sustained grounds support the suitability action imposed and may affirm, reverse, modify, vacate, or remand the action, as appropriate.

(g) *Remedies.* (1) If the appellant is the prevailing party, OPM will order appropriate relief authorized by law, which may include correction, cancellation, or modification of the suitability action; correction of relevant records; prospective eligibility or appointment-related relief; and, where applicable and legally authorized, back pay, interest, and reasonable attorney fees consistent with subpart H of part 550 of this chapter. The appellant is not entitled to compensatory damages or other relief not authorized by law.

(2) If a party timely requests reopening and reconsideration of an initial decision or the OPM Director reopens and reconsiders an initial decision, the responsible agency must continue to provide ordered relief unless OPM issues an order staying any such relief. No such stay may be ordered that would deprive the individual of pay and benefits while the initial decision is pending reconsideration.

#### **§ 731.506 Sanctions and protective orders.**

(a) *Cease-and-desist order.* OPM may issue a protective order or cease-and-desist directive to protect the integrity of the adjudicatory process, prevent threats, intimidation, targeted harassment, improper witness contact, disclosure of protected personal information, or

misuse of nonpublic information obtained through the appeal. OPM may do this *sua sponte*, or at the request of a party, preemptively or at any juncture in the appeal process. A party requesting OPM to issue a protective order or cease-and-desist order should file such request using the e-filing procedures prescribed at § 731.502(c) and must include a statement of reasons justifying the request, together with any relevant documentary evidence. Any protective order issued by OPM must be no broader than reasonably necessary and must not restrict lawful communications protected by law.

(b) *Failure to comply with an OPM order.* When a party to an appeal fails to comply with an order issued under paragraph (a) of this section, OPM may, except when prohibited by law:

(1) Draw all inferences in opposition to the noncompliant party with regard to the appeal in question;

(2) Prohibit the noncompliant party from introducing evidence, or additional evidence, concerning the appeal, or otherwise relying on the record; or

(3) Eliminate from consideration any appropriate part of the filings or other submissions of the noncompliant party.

(4) Any sanction issued under this paragraph (b) must be proportionate, causally related to the violation, and no broader than necessary to protect the adjudicatory process.

#### **§ 731.507 Requests for reconsideration of an initial decision.**

(a) Upon a request from either party to the dispute, OPM may, in its sole and exclusive discretion, reopen and reconsider an initial decision issued under this subpart. A party may request reopening and reconsideration of an initial decision within 30 calendar days from issuance of the initial decision.

(b) The request to reopen and reconsider must be filed using the e-filing system identified on OPM's website and must explain how the ground(s) relied on affected the outcome of the

case. Any documents or further filings related to a request to reopen and reconsider must be filed at the same time the request is submitted.

(c) Grounds for which OPM may grant a request to reopen and reconsider are:

(1) The initial decision contains an erroneous finding of material fact sufficient to warrant a different outcome;

(2) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The party must explain how the error affected the outcome of the case;

(3) New and material evidence or legal argument is available that, despite the party's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed; or

(4) OPM finds good cause to reopen and reconsider an appeal.

(d) In any appeal that is reopened and reconsidered, OPM may:

(1) Issue a reopened and reconsidered decision ("R&R decision") that affirms, reverses, modifies, or vacates the initial decision, in whole or in part;

(2) Require the parties to submit argument and evidence;

(3) Take any other action necessary for final disposition of the case; and

(4) Issue an order with a date for compliance with the R&R decision.

(e) There is no further right of administrative appeal from the R&R decision.

#### **§ 731.508 Review by the OPM Director.**

The Director may, on the Director's own initiative and before a decision becomes final under § 731.509, reopen and reconsider any initial decision or reopened and reconsidered decision. In determining whether to exercise this authority, the Director may consider, among other things, whether the decision contains clear legal error; rests on an erroneous finding of material fact; involves an issue of exceptional importance, an issue affecting the

governmentwide administration of the civil service laws, rules, regulations, or OPM policy, or a conflict among OPM decisions; or otherwise warrants Director review. This section does not create a right to request Director review. Upon reopening and reconsideration, the Director may take any action described in § 731.507(d).

**§ 731.509 Final decision.**

(a) The initial decision becomes OPM's final decision 30 calendar days after issuance unless, before that time, a party timely requests reopening and reconsideration under § 731.507 or the Director reopens the decision under § 731.508.

(b) A timely request under § 731.507 suspends finality. If OPM denies or dismisses the request without reopening the initial decision, the initial decision becomes OPM's final decision 30 calendar days after issuance of the denial or dismissal, unless the Director reopens the initial decision under § 731.508 before that time. If OPM grants the request, a reopened and reconsidered decision becomes OPM's final decision 30 calendar days after issuance unless the Director reopens that decision under § 731.508 before that time.

(c) An untimely request under § 731.507 does not suspend or otherwise affect finality. If OPM accepts and grants an untimely request for good cause, any resulting reopened and reconsidered decision becomes final as provided in paragraph (b) of this section.

(d) A decision by the OPM Director under § 731.508 that disposes of the appeal is OPM's final decision and is effective upon issuance. If the Director remands the appeal or directs further proceedings, any resulting decision becomes final under this section.

(e) There is no further right of appeal of a final decision by OPM.

(f) OPM will make publicly available final merits decisions or de-identified summaries of final merits decisions issued under this subpart, consistent with 5 U.S.C. 552, the Privacy Act, and other applicable law. Public summaries will identify the procedural posture, sustained and unsustained suitability factors, disposition, and remedy, without disclosing protected information. OPM will also make a final merits decision available upon request to the applicant,



appointee, or employee involved in the proceeding; the individual's representative under § 731.504; or a representative of the Federal agency or office involved in the proceeding who has a need to know.

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