



OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 11, 230, 315, 432, 751, and 752

[Docket ID: OPM-2025-0013]

RIN 3206-AO96

Streamlining Probationary and Trial Period Appeals

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a final rule to change the circumstances and procedures for adjudicating appeals from employees terminated during their probationary and trial periods and supervisors and managers who fail to complete their probationary periods. Executive order, "Strengthening Probationary Periods in the Federal Service," rendered the prior procedures for appealing such actions to the Merit Systems Protection Board (MSPB) inoperative. This final rule establishes a new, limited appeals process adjudicated by OPM. The final rule also makes conforming amendments.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Covered actions (i.e., terminations, assignments, noncertifications, or failures to certify/finalize) effected before the effective date of this rule are not governed by this final rule.

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SUPPLEMENTARY INFORMATION: OPM is issuing this final rule to establish streamlined appeal procedures for employees terminated during their probationary or trial periods and supervisors and managers who fail to complete their probationary periods.¹ Under Executive

¹ In this preamble, OPM sometimes uses the terms "probationary," "probationer," or "probationary employee" as shorthand to refer collectively to employees serving probationary periods or trial periods covered by this final rule.

Order (E.O.) 14284, the President rendered the probationary period appeal procedures in 5 CFR part 315, subpart H, “inoperative and without effect” and directed OPM to rescind those regulations and make conforming amendments. OPM published a final rule implementing those directives on June 24, 2025, at 90 FR 26727. Since that rescission, no administrative appeals process has existed for terminations during probationary or trial periods. E.O. 14284 delegated authority to OPM to prescribe circumstances and procedures by regulation by which employees terminated during their probationary or trial periods may appeal such termination.

This final rule establishes OPM procedures for appeals formerly addressed by subpart H of part 315 and for supervisory or managerial probationary period appeals under § 315.908. The rule grants authority to OPM to adjudicate appeals to include appeals filed by employees terminated during their probationary periods (or during their trial periods, for employees covered under 5 CFR part 307), or whose appointments were not finalized during such periods, and by supervisors and managers who fail to complete their probationary periods (akin to the former § 315.806 and the current § 315.908, respectively).

OPM will only adjudicate appeals that allege either discrimination based on partisan political reasons, marital status, or an agency’s failure to follow procedures for terminations based upon pre-appointment reasons. Employees will not, however, be able to attach claims of unlawful discrimination under the laws administered by the Equal Employment Opportunity Commission (EEOC) to an appeal as previously permitted before issuance of E.O. 14284. Employees may pursue such claims at the EEOC to the same extent they could do so before issuance of E.O. 14284. This final rule also provides a procedure for an appellant to seek

This shorthand is not intended to expand the scope of the rule or to eliminate distinctions among competitive service probationary periods, trial periods covered by 5 CFR part 307, supervisory or managerial probationary periods, or other appointment-specific requirements. A relatively small number of employees serving trial periods under 5 CFR part 307 are covered by this final rule and have the limited appeal rights granted herein. However, excepted service employees serving trial periods outside 5 CFR part 307 do not have appeal rights under this rule arising solely from termination during such trial periods, unless another statute, regulation, or other independent legal authority provides such rights.

reconsideration of the decision. This rule will not apply to any termination effected prior to the effective date of the rule.

I. Digest of Public Comments

In response to the proposed rule, OPM received 632 comments during the 30-day public comment period from a variety of individuals (including current and former civil servants, scientists, and members of Congress) and organizations, such as those representing science and technology, national and local unions, and Federal agencies.² Of the 632 comments received, 618 were posted, and 2 were not posted because they contained threats to the President and members of the Administration or contained sensitive personally identifiable information from commenters. The remaining 12 comments are attributed to individual commenters who indicated on their comment submission that their comment represented a specific number of submissions. At the conclusion of the public comment period, OPM reviewed and analyzed the comments. In general, the comments ranged from ardent support of the proposed regulation to categorical rejection of it. Some of the comments supported the proposed regulation or were neutral or mixed, while many opposed it.

OPM found many of the comments helpful, and it has made several adjustments to the proposed rule in response to comments, as explained below. Among other changes, the final rule adds more detailed procedures for agency certification at the end of the probationary or trial period, specifies the minimum contents of the agency record, allows employees to raise new allegations in reply when they are based on information first disclosed by the agency or when good cause exists, and strengthens safeguards insulating OPM adjudicators from officials involved in the challenged action. The final rule also clarifies that OPM's audit and investigation authority is directed to material issues that cannot be resolved on the existing record, and it

² Comments cited are available in the docket for this rulemaking and can be accessed at <https://www.regulations.gov/comment/OPM-2025-0013-nnnn>, where "nnnn" is the comment number.

revises the protective-order provision to ensure that any order is no broader than reasonably necessary and does not restrict lawful protected communications.

The comments focused on probationers potentially losing rights under the new OPM appeals process as compared with the former MSPB process that E.O. 14284 rescinded, as well as the requirement that discrimination claims within the jurisdiction of the EEOC be filed with the EEOC. Commenters who supported the proposed rule noted that probationers' rights were already limited prior to the proposal, so providing a complicated and burdensome appeal process under MSPB jurisdiction is not practical nor does it support managers and supervisors removing probationers for inefficient service to the public.

In the next section, we address the background for these regulatory amendments and related comments. In subsequent sections, we respond to the significant groups of comments, describe the specific amendments, provide a regulatory analysis, and provide the amended regulatory text. Note that OPM received several comments that are not addressed below because they were beyond the scope of the proposed regulatory changes or were vague or incomplete.

II. Background, Legal Authority, and Need for the Rule³

The concept of a probationary or trial period in the U.S. civil service dates to the Pendleton Civil Service Act of 1883 (Pendleton Act). The Pendleton Act required “that there shall be a period of probation before any absolute appointment or employment aforesaid.”⁴ The new Civil Service Commission created by the Pendleton Act reflected a similar understanding of probation. In its first annual report in 1884, the Commission characterized the probationary period as lasting “six months before any absolute appointment can be made. At the end of this

³ Commenter 0348 notes that much of the “Background” section of the proposed rule was identical or nearly so to an Office of Special Counsel brief filed with the MSPB. OPM agrees that a citation should be provided and does so now. See Brief for the U.S. Office of Special Counsel as Amicus Curiae, *Commerce v. U.S. Office of Pers. Mgmt.*, CB-1205-25-0021-U-1 (Merit Sys. Prot. Bd. filed May 14, 2025), available at https://www.osc.gov/~assets/docs/osc-amicus-brief-cb-1205-25-0021-u-1-et-al_.pdf.

⁴ *Pendleton Civil Service Act*, ch. 27, sec. 2, 22 Stat. 403, 404 (1883), available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/22/STATUTE-22-Pg403a.pdf>.

time the appointee goes out of the service unless then reappointed.”⁵ Two years later, the Commission wrote in its third annual report that probation was “another test under the Merit System” which “must be considered before we pass final judgment on the examinations, of which they are an essential part.” If at the end of the probationary period “the appointing officer is not . . . willing to make an unconditional appointment,” the probationer would not remain in the service.⁶ In 1897 President William McKinley signed E.O. 101, *Amending Civil Service Rules Regarding Removal from Service*, adding a number 8 to Rule II that stated: “No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department, or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense.”

In 1910, the Court of Claims explained in the case of *Ruggles v. United States* that probationers lacked any cognizable legal rights under the rules or the Pendleton Act.⁷ With the enactment of the Lloyd-La Follette Act of 1912, Congress created the first legislative codification of protection against removal for civil servants. In doing so, Congress did not create new protections out of whole cloth; it largely codified the removal protections that had already developed as a matter of Executive practice under President McKinley’s 1897 executive order and its successors. The Act established “[t]hat no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service.”⁸ The Act also imposed certain procedural requirements on removals, including advance notice and an opportunity to respond in writing.⁹ However, Congress did not establish employment protections for probationary employees.

⁵ U.S. Civil Service Commission, *First Annual Report of the United States Civil Service Commission to the President* 29 (1884), available at <https://babel.hathitrust.org/cgi/pt?id=nnc1.cu09006737&seq=9>.

⁶ U.S. Civil Service Commission, *Third Annual Report of the United States Civil Service Commission to the President* 36 (1886), available at <https://babel.hathitrust.org/cgi/pt?id=njp.32101073361022&seq=40>.

⁷ *Ruggles v. United States*, 45 Ct. Cl. 86 (1910).

⁸ *Lloyd-La Follette Act*, Act of Aug. 24, 1912, ch. 389, sec. 6, 37 Stat. 555, 555, amended by Act of June 19, 1948, ch. 502, sec. 1, 62 Stat. 354, 354 (formerly codified at 5 U.S.C. 652(a)).

⁹ *Id.*

After the passage of the Lloyd-La Follette Act and the court's decision in *Ruggles*, the CSC took the opportunity to clarify that the removal rules first established in 1897 should never have been treated as creating any serious limits on removing civil servants from employment.¹⁰ Regarding probationers, the Commission quoted from *Ruggles* that probationers have no cognizable right to their employment¹¹ and that the Lloyd-La Follette Act's protections did not apply to probationers at all.¹² Over the next decade, the Commission would repeatedly cite the *Ruggles* decision and its assessment of the Lloyd-La Follette Act.¹³

By 1922, the Commission expressed concerns that too few probationers were being terminated and that agencies were not adequately using the probationary period as a screening mechanism.¹⁴ Consistent with that concern, over the next couple of decades, the Commission maintained the view, embodied in its regulations, that probationers retained virtually no protection from removal at all.

The Veterans' Preference Act of 1944 expanded civil service protections beyond the Lloyd-La Follette Act to preference eligible Federal employees, but it explicitly excluded probationers.¹⁵ President John F. Kennedy later expanded these protections beyond preference

¹⁰ See 29th Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1912 (1913), p. 21, available at <https://babel.hathitrust.org/cgi/pt?id=coo.31924103152033&seq=11>.

¹¹ *Id.* at 96.

¹² *Id.* at 112.

¹³ See, e.g., U.S. Civil Service Commission, 30th Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1913 91 (1914), available at <https://babel.hathitrust.org/cgi/pt?id=coo.31924103152041&seq=97>; U.S. Civil Service Commission, 31st Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1914 79, 95 (1915), available at <https://babel.hathitrust.org/cgi/pt?id=coo.31924054241355&seq=223>; U.S. Civil Service Commission, 32nd Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1915 72, 89 (1915), available at <https://babel.hathitrust.org/cgi/pt?id=coo.31924103152066&seq=9>; U.S. Civil Service Commission, 33rd Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1916 48, 66 (1916), available at <https://babel.hathitrust.org/cgi/pt?id=coo.31924103152074&seq=112>; U.S. Civil Service Commission, 38th Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1921 52, 75 (1921), available at <https://babel.hathitrust.org/cgi/pt?id=coo.31924103152124&seq=8>.

¹⁴ U.S. Civil Service Commission, 39th Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1922 xxi (1922), available at <https://babel.hathitrust.org/cgi/pt?id=coo.31924103152140&seq=9> ("The proportion of failures on probation seems small to the commission, being only about one-half of 1 per cent. This may indicate that appointing officers do not in all cases fully scrutinize the conduct and capacity of the probationers and perform the duty of dropping those found unsuitable.").

¹⁵ Veterans' Preference Act of 1944, Pub. L. 78-359, sec. 14, 58 Stat. 387, 390 (codified as amended in scattered sections of 5 U.S.C.), available at <https://tile.loc.gov/storage-services/service/ll/uscode/uscode1940-00900/uscode1940-009005017/uscode1940-009005017.pdf>.

eligibles. As the CSC recognized, “[w]ith the issuance of Executive Orders 10987 and 10988 on January 17, 1962, a new era of greatly expanded appeals rights for employees was opened.”¹⁶ However, nothing in these E.O.s or implementation by the CSC attempted to expand application of those protections to probationers.

For a brief period of time starting in 1958, the CSC instituted a rule granting broader appeal rights to probationary employees.¹⁷ But in 1962, the Commission revoked these regulations. 27 FR 4755, 4759 (May 19, 1962). In the following year, the Commission issued new regulations establishing much more limited appeal rights for probationary employees that, until E.O. 14284, permitted appeals based on improper discrimination or terminations for matters arising before employment. 28 FR 9973, 10052 (Sept. 14, 1963).

The passage of the Civil Service Reform Act of 1978 (CSRA) formed the basis of the current law governing probationary employment. The relevant language, unchanged since 1978, provides the President with substantial authority to issue regulations establishing the conditions in which an appointment in the competitive service becomes final. 5 U.S.C. 3321(a). The Senate Committee for Government Affairs explained in its report on the CSRA the importance of preserving executive discretion to remove probationers as “an extension of the examining process to determine an employee’s ability to actually perform the duties of the position. It is inappropriate to restrict an agency’s authority to separate an employee who does not perform acceptably during this period.” S. Rep. No. 95-969, 95th Cong., 2d Sess. 45 (1978).

Courts emphasized this language in holding that Congress purposefully denied probationary employees statutory appeal rights. *See, e.g., United States v. Connolly*, 716 F.2d 882, 886 (Fed. Cir. 1983); *Nat’l Treasury Emps. Union v. FLRA*, 848 F.2d 1273, 1275 (D.C. Cir.

¹⁶ U.S. Civil Service Commission, *79th Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1962* 15 (1962), available at <https://babel.hathitrust.org/cgi/pt?id=uiug.30112109910338&seq=237&q1>.

¹⁷ U.S. Civil Service Commission, *75th Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1958* 4 (1958), available at <https://babel.hathitrust.org/cgi/pt?id=uiug.30112109910361&seq=495>. *See also* 5 CFR 9.103 (1960), available at <https://www.loc.gov/item/cfr1960002-T5CIP9/>.

1988). As the United States Court of Appeals for the District of Columbia Circuit explained in *Dep't of Justice v. Federal Labor Relations Authority*, Congress chose not to extend the same employment protections afforded tenured employees to probationary employees because it “recognized and approved of the inextricable link between the effective operation of the probationary period and the agency’s right to summary termination.” 709 F.2d 724, 728 (D.C. Cir. 1983). Similarly, courts elsewhere recognized Congress’ intentional limitation on protections for probationary employees. *See, e.g., Nat’l Treasury Emps. Union v. FLRA*, 737 F.3d 273, 276 (4th Cir. 2013); *Yates v. Dep’t of the Air Force*, 115 F. App’x 57, 59 (Fed. Cir. 2004); *Jones v. United States DOJ*, 111 F. Supp. 3d 25, 30 n.5 (D.D.C. 2015).

Concerns that agencies have not been effectively utilizing probationary periods have continued into the 21st century. In 2005, the MSPB reported to the President and to Congress that Federal agencies were failing to use the probationary period to assess and remove probationers.¹⁸ In conducting a survey of agency supervisors, the MSPB found that, “even though supervisors are aware that the probationer’s appointment is not final, supervisors tend to treat their probationers as fully appointed Federal employees, with all the rights and responsibilities that implies.”¹⁹ The MSPB identified that the failure of agencies to maximize the probationary period is a cultural problem pervasive across all levels. The problem appeared to be a systemic one, as “supervisors expressed frustration at the lack of agency support for the full use of the probationary period, and even a number of probationers were perturbed by what they saw as agencies’ failure to use the probationary period to remove marginal and poor performers.”²⁰ The MSPB reaffirmed the 2005 report in a 2019 Research Brief, acknowledging that “MSPB found that supervisors are sometimes reluctant to remove a probationer who is not performing

¹⁸ *See, generally*, Merit Systems Protection Board, *The Probationary Period: A Critical Assessment Opportunity, Report to the President and the Congress of the United States* (Aug. 2005), available at [https://www.mspb.gov/studies/studies/The_Probationary_Period_A_Critical_Assessment_Opportunity_\(2005\)_224555.pdf](https://www.mspb.gov/studies/studies/The_Probationary_Period_A_Critical_Assessment_Opportunity_(2005)_224555.pdf).

¹⁹ *Id.* at 33.

²⁰ *Id.*

well in the position, even though it is easier to remove a probationer than an employee with a final appointment.”²¹

In 2015, the Government Accountability Office (GAO) issued a report regarding Federal workforce performance.²² GAO interviewed several chief human capital officers in Federal agencies and found that “[a]gencies may not be using the supervisory probationary period as intended.”²³ The GAO found that “supervisors are often not making performance-related decisions about an individual’s future likelihood of success with the agency during the probationary period.”²⁴ This inefficiency typically happened for two reasons: “(1) the supervisor may not know that the individual’s probationary period is ending, and (2) the supervisor has not had enough time to observe the individual’s performance in all critical areas of the job.”²⁵ The GAO concluded that the probationary period needed to be “more effectively used by agencies” and that “improving how the probationary period is used could help agencies more effectively deal with poor performers.”²⁶

To this day, poor performance in the civil service has not been adequately addressed. OPM’s 2024 Federal Employee Viewpoint Survey indicated that 40 percent of Federal employees reported that poor performers in their units would usually “[r]emain in the work unit and continue to underperform[.]”²⁷ The next highest percentage of respondents—21 percent—

²¹ Merit Systems Protection Board, *Remedying Unacceptable Employee Performance in the Federal Civil Service*, Research Brief 4 (June 18, 2019), available at https://www.mspb.gov/studies/researchbriefs/Remedying_Unacceptable_Employee_Performance_in_the_Federal_Civil_Service_1627610.pdf.

²² Government Accountability Office, *Federal Workforce: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance*, GAO-15-191 (Feb. 2015), available at <https://www.gao.gov/assets/gao-15-191.pdf>.

²³ *Id.* at 9.

²⁴ *Id.* at 11.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Office of Personnel Management, Federal Employee Viewpoint Survey Dashboard, “Core Performance (Q16) In my work unit poor performers usually,” at 7 (2024), available at <https://www.opm.gov/fevs/reports/opm-fevs-dashboard/>.

answered “Do Not Know[.]”²⁸ Only 47 percent agreed that “[i]n my work unit, differences in performance are recognized in a meaningful way.”²⁹ 27 percent disagreed with that claim.³⁰

Commenters scrutinized reports cited by OPM in the proposed rule. Commenter 0337 argued that the rule does not consider policy changes already implemented to address problems with the probationary periods including new OPM training and planning on performance management. Commenter 0341 argued that agencies’ failure to use probationary periods is a management and training issue, not grounds for an overhaul. Commenter 0443 added that reports showing these periods are not effectively utilized by managers are not connected to the existence of impartial and independent review under the MSPB.

OPM acknowledges these comments but disagrees that training and management guidance alone are sufficient. OPM agrees that agencies should improve supervisory training and performance-management practices, and the rule does not preclude those efforts. But the record also shows that existing processes have not produced adequate results. In OPM’s view, the costs, formality, and litigation risk associated with MSPB appeals have contributed to supervisors’ reluctance to make full use of probationary and trial periods. Additional training may improve supervisory confidence, but it does not address the procedural incentives that discourage timely action during the very period designed to assess an employee’s fitness for continued Federal service.

The rule therefore preserves the limited legal status of probationary and trial period employees while creating a more appropriate review mechanism for the narrow claims that remain appealable. Such employees will continue to receive neutral, record-based review by OPM’s Merit System Accountability and Compliance (MSAC) office, and the final rule includes safeguards insulating adjudicators from officials who participated in the challenged personnel action or provided case-specific advice concerning that action. This approach maintains

²⁸ *Id.*

²⁹ *Id.* at 6, “Core Question Bank,” Question No. 17.

³⁰ *See id.* (Reporting Positive versus Negative “*Perception*” Score).

meaningful review for legally cognizable claims while supporting the intended function to which E.O. 14284 restored probationary and trial periods: allowing agencies to make timely, evidence-based decisions about whether continued employment advances the efficiency of the service.

Commenters 0449 and 0516 suggested that the rule misreads the 2024 FEVS since it applies to all Federal workers rather than exclusively employees in their probationary or trial periods; most Federal workers did not respond; and a majority did not agree that poor performers usually remain in their work unit and continue to underperform. Further, they suggest it is outdated since OPM cancelled the 2025 FEVS. Commenter 0580 said that agencies should require another OPM FEVS to collect data on OPM policies from 2025, and commenter 0581 noted FEVS showed improvements in most scores since a dip between 2020 and 2021 attributable to the COVID-19 pandemic.

OPM is not required to conduct a new study to address the persistent problems found in performance management and utilization of the probationary period. OPM acknowledges that the FEVS does not concentrate solely on probationary employees and that other initiatives have been taken by agencies to improve employee performance and accountability, however these initiatives do not correct the specific issues addressed by the rule such as the lengthy appeals process through adjudication from the MSPB. Additionally, OPM believes that it is not sufficient that most Federal employees did not find poor performance unaddressed in their work unit. The fact that FEVS showed that a significant number of employees do not believe that poor performance is adequately addressed in their work unit helps demonstrate the need for a more efficient adjudication process for the limited number of claims that are appropriately appealable following a probationary termination.

President Trump sought to address this longstanding issue when he signed E.O. 14284, “Strengthening Probationary Periods in the Federal Service,” on April 24, 2025. 90 FR 17729 (Apr. 24, 2025). E.O. 14284 established Civil Service Rule XI to govern Federal agencies’ use of probationary and trial periods. Under Rule XI, agencies must assess and certify their employees

serving under probationary or trial periods before finalizing their appointments to the Federal service. Rule XI provides four non-mandatory criteria for the agency head, or designee, to consider in determining whether a probationary employee's continued employment advances the public's interest. Where an agency determines not to certify an employee's continued employment, the employee's appointment expires before the end of the employee's tour of duty on the last day of their probationary or trial period. The agency also retains the discretion to dismiss them prior to the expiration of their probationary or trial period.

Section 4 of E.O. 14284 also revoked the termination and appeal procedures under subpart H of part 315 of this chapter. These procedures, which applied upon initial appointment to a career-conditional competitive service position, included the requirement for agencies to provide, at a minimum, written notice of the agency's conclusions as to the inadequacies of an employee's performance or conduct when terminating an employee during a probationary period; procedures and bases for appealing a termination during a probationary period; and the authority of the MSPB to adjudicate appeals. The rescission of subpart H meant that employees could not appeal any terminations from a probationary or trial period. However, through Civil Service Rule 11.6 (5 CFR 11.6) the President delegated authority to the Director of OPM to issue rulemaking on the circumstances and procedures for employees to appeal their termination from a probationary or trial period.

Prior to E.O. 14284, OPM established through regulation the circumstances and procedures for appealing terminations during an employee's probationary period. *See* 44 FR 48951–52 (Aug. 21, 1979). Congress defined the term “employee” for purposes of identifying who could appeal certain adverse actions to the MSPB to exclude employees serving a probationary or trial period. *See* 5 U.S.C. 7511(a)(1). However, Congress also granted, inadvertently or not,³¹ appeal rights to employees in the (1) competitive service who complete

³¹ Merit Systems Protection Board, *Navigating the Probationary Period after Van Wersch and McCormick* (Sept. 2006), available at

one year of current continuous service under other than a temporary appointment limited to one year or less; (2) excepted service who are preference eligibles that completed one year of current continuous service in the same or similar positions in either an Executive Agency or the United States Postal Service or Postal Rate Commission; or (3) excepted service who complete two years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment as defined by OPM regulations in 5 CFR 213.104(a)(1).³² For employees who did not meet the definition of employee, they could not appeal, for example, a termination from the Federal service. However, the CSC and, later, OPM exercised its authority to prescribe the circumstances in which an employee serving a probationary period in the competitive service could appeal to the CSC or MSPB, respectively.³³

Likewise, Congress did not establish through statute the circumstances under which supervisors and managers failing their probationary period have the right to appeal their assignment to nonsupervisory or nonmanagerial positions. Nor did Congress specify that the MSPB adjudicate such appeals. However, OPM exercised its regulatory authority to authorize the MSPB to adjudicate such appeals that raise discrimination based on partisan political reasons or marital status. *See* 44 FR 48951–52 (Aug. 21, 1979).

The final rule establishes limited grounds for employees serving a probationary period in the competitive service and employees in the excepted service covered by 5 CFR part 307 serving a trial period to appeal their terminations, or their employing agencies' failure to finalize their appointments during those periods. Under these regulations, such employees can challenge their terminations or their agencies' failure to finalize their appointments for alleged discrimination based on partisan political reasons or marital status. These limited grounds of appeal reflect the historical principle that probationary and trial periods serve as a critical

https://www.mspb.gov/studies/studies/Navigating_the_Probationary_Period_After_Van_Wersch_and_McCormick_276106.pdf.

³² *See* 5 U.S.C. 7511(a)(1)(A)(ii), (a)(1)(B)(ii), (a)(1)(C)(ii); *see also Mitchell v. MSPB*, 741 F.3d 81 (Fed. Cir. 2014) (holding that “temporary appointment” refers to the regulatory definition, which currently limits a temporary appointment to one year or less).

³³ *See, e.g.*, 33 FR 12422-23; 40 FR 15380; 44 FR 48951-52; 55 FR 29339; 79 FR 43922.

evaluation phase for new Federal employees, and thus that agencies should enjoy great flexibility in separating employees serving probationary or trial periods. Some non-veteran excepted service employees may qualify for appeal rights under other regulatory or legal provisions not covered by this rule. It should also be noted that excepted service employees serving in an appointment in the excepted service outside of part 307 of this chapter did not have such appeal rights unless otherwise entitled by statute, and OPM is maintaining that policy. Providing limited grounds of appeal also ensures agencies adhere to the Merit System Principles and corrects agency actions taken contrary to these principles consistent with OPM's statutory authority. *See* 5 U.S.C. 1103(a)(7), (c)(2)(F), 1104(b)(2); *see also* 5 CFR 5.3, 10.2-10.3.

III. Responses to Major Issues Raised by Commenters

A. OPM's Authority to Hear Probationary Appeals

Several commenters such as 0010, 0047, 0231, and 0620 argued that the authority to hear appeals from probationary employees is legally assigned to the MSPB. They believed this jurisdiction was established by Congress in the CSRA. According to these commenters, moving this authority from MSPB to OPM would be unlawful unless Congress amended the law to specifically allow OPM to take over this responsibility. To support their argument, they reference Chapters 12 and 77 of Title 5 of the United States Code and other sections of the CSRA.

The commenters' reading of the CSRA is incorrect. As an initial matter, the comments rest on an inaccurate premise: the CSRA itself confers no appeal rights on probationary employees, and the limited appeal rights formerly available under subpart H of part 315 were created by regulation, not statute. The CSRA gives OPM extensive discretion in regulating probationary periods. Pursuant to 5 U.S.C. 1301, "[t]he Office of Personnel Management shall aid the President, as he may request, in preparing the rules he prescribes under this title for the administration of the competitive service." Under 5 U.S.C. 1104(a)(1), "the President may delegate, in whole or in part, authority for personnel management functions, including authority

for competitive examinations, to the Director of the Office of Personnel Management.” Further, OPM “shall establish standards which shall apply to the activities of the Office or any other agency under authority delegated under subsection (a) of this section.” 5 U.S.C. 1104(b)(1). And the OPM Director has the responsibility “to prescribe regulations and to ensure compliance with the civil service laws, rules, and regulations,” and “execut[e], administer[], and enforc[e] . . . the civil service rules and regulations of the President and the Office and the laws governing the civil service.” 5 U.S.C. 1104(b)(3), 1103(a)(5). Under 5 U.S.C. 3321(a), the authority to prescribe rules, regulations, and directives governing probationary periods rests with the President, and the President has delegated to OPM, consistent with 5 U.S.C. 1104(a), the authority to prescribe the circumstances and procedures for probationary and trial period appeals through E.O. 14284 and Civil Service Rule XI. Moreover, if OPM did not exercise that delegated authority, appeals would not revert to the MSPB; covered employees would simply have no appeals process at all. Courts have recognized that Congress charged OPM with the authority to establish conditions of employment including procedural protections. *Nat’l Treasury Emps. Union*, 737 F.3d at 277-78. This includes rights to challenge removals in violation of these protections. *FLRA*, 709 F.2d at 725 n. 3.

When crafting the CSRA, Congress gave the President, acting through the Director of OPM, authority to create a regulatory right for terminated probationary employees to appeal their termination. *See* 5 U.S.C. 3321(a), 1104(a). Nowhere in the CSRA did Congress extend statutory appeal rights to probationary employees seeking to reverse a termination. In fact, as noted in the proposed rule, the Senate Committee for Government Affairs stressed the importance of *not* providing such a right of appeal because the agency’s discretion to remove probationers was “an extension of the examining process to determine an employee’s ability to actually perform the duties of the position.” S. Rep. No. 95-969, 95th Cong., 2d Sess. 45 (1978). Congress went so far as to explicitly *exclude* probationary employees from the definition of “employee” for

purposes of 5 U.S.C. Chapter 75. *See* 5 U.S.C. 7501(1). Commenter 0134 noted this significant statutory distinction.

Unlike OPM's authority to regulate probationer appeals, which derives from the President's statutory authority under 5 U.S.C. 3321(a), delegated to OPM pursuant to 5 U.S.C. 1104(a) through E.O. 14284 and Civil Service Rule XI, the MSPB's jurisdiction to hear termination appeals from a probationary or trial period employee is derived from regulation. Specifically, the Federal Circuit has explained that "[t]he Board's jurisdiction to review adverse personnel action taken against probationary government employees is extremely narrow. In fact, there is no statutory basis for jurisdiction." *Goss v. Dep't of the Air Force*, 131 F. App'x 721, 724 (Fed. Cir. 2005). Moreover, "[t]he only cognizable right of appeal by a probationary employee to the MSPB is contained in the regulation previously mentioned, 5 C.F.R. 315.806." *Mastriano v. FAA*, 714 F.2d 1152, 1155 (Fed. Cir. 1983). Congress authorized MSPB to be that venue if, and only if, OPM designated such appeals be heard there. 5 U.S.C. 7701(a). That designation was a policy choice, selected by virtue of regulation, (subpart H of part 315 of title 5, Code of Federal Regulations). Pursuant to Executive Order 14284, that regulation has been repealed.

Further, in Civil Service Rule XI, the President designated OPM as the body which defines the "circumstances under and procedures by which employees terminated from a probationary or trial period may appeal such termination." 5 CFR 11.6(a). Civil Service Rule XI further specifies that, "[e]xcept as otherwise required by law, such appeals shall be the sole and exclusive means of appealing terminations during probationary or trial periods." 5 CFR 11.6(b).

In the CSRA, Congress did not direct that the MSPB have jurisdiction over probationary appeals. At the time the CSRA was passed, probationary appeals were housed within the Civil Service Commission. Nothing in the CSRA altered that arrangement or mentions probationary appeals. Further, *AFGE v. OPM* states "***if OPM chooses to use the MSPB for dispute resolutions***, it must take that statutory device as it finds it." 821 F.2d 761, 769 (D.C. Cir. 1987)

(emphasis added). This declaration assumes that OPM may, in fact, choose not to use the MSPB for dispute resolution and can create its own probationary appeal process.

That conclusion is reinforced by the structure of 5 U.S.C. 7701. MSPB hears appeals that are properly before it under law, rule, or regulation. Before E.O. 14284, OPM regulations supplied the relevant rule for the narrow class of probationary appeals formerly heard by MSPB. Once those regulations were rescinded and replaced, there was no independent statutory command requiring those appeals to remain at MSPB. Civil Service Rule 11.6 now expressly directs OPM to prescribe the circumstances and procedures for appeals by employees terminated during probationary or trial periods. OPM is exercising that authority in this rule.

Commenter 0620 asserted that “adjudicating employee appeals is inherently a quasi-judicial activity function” and so MSPB is best positioned to adjudicate probationary appeals. The Commenter further suggested that the MSPB has a more “professionalized” process than OPM could establish, “citing MSPB’s use of administrative judges, its publication of decisions, development of rules of evidence, and establishment of precedential case law through Board review.”

OPM respectfully disagrees with the Commenter’s criticisms. Contrary to the claim that OPM lacks the professionalism and capability of MSPB, OPM has shown it can effectively carry out the responsibilities outlined in this rule through its experience with the classification appeals process. OPM has established a fair, impartial, and professional approach to handling classification appeals, making decisions based solely on established facts without bias or improper influence. This experience demonstrates OPM’s ability to develop and maintain a neutral and effective system for adjudicating appeals.

OPM intends to apply this proven framework to the adjudication process under this rule. OPM will issue written decisions and make final merits decisions publicly available, subject to applicable legal limits, to promote transparency, consistency, and guidance for future adjudications. While the Commenter points out that OPM will use adjudicators instead of

administrative judges, there is no meaningful difference between these roles in terms of their function, and this distinction does not affect the fairness or professionalism of the process.

OPM disagrees with Commenter 0443 that moving these appeals to OPM recreates the Civil Service Commission structure that Congress altered in 1978. The rule does not give OPM general authority to adjudicate all Federal employment disputes. It establishes an OPM-administered process for a narrow class of regulatory appeals involving employees whose appointments have not yet been finalized and who do not yet have tenure or a property interest in their position. MSPB remains responsible for matters within its statutory or regulatory jurisdiction. OSC, EEOC, Inspectors General, and other forums remain available where an independent legal basis for jurisdiction exists. The rule therefore does not collapse the civil service remedial structure into OPM; it establishes the limited matters that will be heard by OPM under part 751.

OPM notes finally that Executive Order 14284 eliminated Part 315, subpart H in its entirety, including the limited MSPB appeals it formerly provided. This rule creates a new process for appealing some probationary terminations to OPM. If OPM were to decline to finalize this rule then probationary employees would continue to have no appeals process whatsoever. That no-appeals status quo—not the former MSPB process—is the baseline against which this rule should be measured.

B. OPM's Capacity to Fairly Adjudicate Probationary Appeals

Commenters 0607 and 0615 asserted that relocating the appellate venue from MSPB to OPM will make probationary and trial period appeals less transparent and will thereby undermine public confidence in the civil service. OPM disagrees.

The final rule creates a new forum—where none currently exists—and procedures for a narrow class of regulatory appeals; it does not make probationary or trial period personnel actions secret, exempt agencies from generally applicable disclosure laws, or diminish the merit system principles, prohibited personnel practice rules, or other accountability mechanisms that

continue to govern Federal employment. Agencies remain subject to applicable statutory and regulatory requirements governing records, disclosures, privacy, prohibited personnel practices, equal employment opportunity, Inspector General oversight, Office of Special Counsel (OSC) jurisdiction, and other independent remedial processes.

OPM also disagrees that transparency depends on reinstituting MSPB as the forum for these limited appeals. As explained elsewhere in this preamble, MSPB's prior jurisdiction over probationary appeals was regulatory rather than statutory. OPM may therefore provide an OPM-administered process affording appeal rights that correspond to the limited substantive grounds historically available to covered probationary and trial period employees. The question is not whether MSPB is the only possible transparent forum, but whether the final rule provides sufficient procedural transparency and accountability for the narrow issues that are appealable under part 751.

The final rule does so. OPM has committed to issuing written decisions and making final merits decisions publicly available. In particular, OPM will maintain a publicly accessible website containing final decisions issued under part 751 that address a party's claim on the merits, subject to applicable legal limits protecting privacy, privileged information, protected personal information, law-enforcement-sensitive information, and other information that may not lawfully be publicly disclosed. This public decision requirement is intended to promote consistency, permit public review of OPM's reasoning, provide guidance to agencies and employees, and allow interested parties to assess how OPM is applying part 751 over time. The final rule also reflects OPM's intent to publish its decisions and use them to promote consistency in future adjudications.

OPM further notes that the final rule contains additional transparency safeguards. The agency must submit a response and all documents in the agency record supporting the action. The appellant may reply. The appellant, the appellant's representative, and the agency may inspect OPM's appellate record, subject to applicable limits. OPM may require additional

information, conduct an audit or investigation where necessary to determine a material fact, and issue a written decision explaining the disposition of the appeal. The rule also provides reconsideration and Director review before finality. These procedures ensure that appeals are resolved on an identifiable record and through reasoned decision-making, not through unexplained or informal action.

OPM therefore declines to retain MSPB as the venue on transparency grounds. The final rule preserves public accountability through written decisions, a defined administrative record, and public availability of final merits decisions. In OPM's judgment, this framework provides transparency appropriate to the limited regulatory appeal rights at issue while also supporting the rule's objective of a faster and more focused probationary and trial period appeal process.

Many commenters, including 0006, 0203, 0395, and 0617, argued that moving probationary appeals from MSPB to OPM would deny employees an objective and independent adjudicatory forum. These commenters asserted that OPM is a partisan authority, that OPM has a conflict of interest because it has issued governmentwide policy and guidance relating to probationary employees, and that the new process would produce predetermined outcomes. Commenters 0175 and 0198 similarly argued that the rule narrows appeal grounds and procedures before a decisionmaker subordinate to political leadership. Commenters 0036 and 0172 stated that employees will perceive OPM adjudication as unfair because agencies benefit from faster removals and because OPM adjudication will be opaque.

OPM disagrees. These comments rest on an incorrect premise about the source and nature of the former MSPB forum. Congress did not create a general statutory right for probationary employees to appeal probationary terminations to MSPB. Rather, MSPB's jurisdiction over the limited category of probationary appeals formerly covered by § 315.806 was created by regulation. Congress excluded most probationary employees from the statutory adverse-action appeal rights available to employees who have completed the applicable period of service, and Civil Service Rule XI nullified the former § 315.806 and directed OPM to prescribe the

circumstances and procedures for appeals from probationary and trial period terminations. The final rule therefore provides a forum and procedures for a limited regulatory appeal; it does not withdraw a statutory right to MSPB adjudication. No such right exists.

OPM notes that declining to finalize this rule would not restore MSPB jurisdiction over probationary appeals. Rather, employees on probationary and trial periods would continue to have no ability to appeal terminations over issues such as political discrimination. OPM concludes that finalizing this rule and providing a transparent and defined appeals process within OPM is preferable to maintaining that status quo. Under that status quo, covered employees have no administrative forum in which to challenge even a termination alleged to be based on partisan political reasons.

OPM also disagrees that its institutional role creates a conflict of interest. OPM does not make the employing agency's individualized decision to terminate, not certify, or fail to finalize a particular employee's appointment. Those determinations are made by the employing agency. OPM's role under this rule is to adjudicate, based on the record and the limited issues made appealable under part 751, whether the appellant has established a basis for relief.

The fact that OPM administers civil service laws and regulations does not make OPM incapable of adjudicating disputes under those laws. Federal agencies routinely issue regulations, provide governmentwide guidance, and adjudicate matters within their statutory responsibilities. OPM itself is a clear example. Congress has vested the OPM Director with responsibility for executing, administering, and enforcing civil service rules and regulations and the laws governing the civil service, including retirement and classification activities. *See* 5 U.S.C. 1103. OPM also has express regulatory authority in several civil service areas, including competitive service examinations and veterans' preference administration. *See* 5 U.S.C. 1302. The fact that OPM issues governmentwide personnel policy therefore does not make it unusual for OPM also to resolve particular disputes arising under that same statutory framework.

OPM has long maintained adjudicative or quasi-adjudicative processes in personnel matters. For example, OPM adjudicates classification appeals under 5 CFR part 511, subpart F. Employees may request an OPM decision on the proper occupational series, grade, or chapter 51 coverage of their official positions, and agencies may appeal certain OPM classification certificates. In those appeals, OPM may request written facts, investigate, or audit the position; OPM's appellate decision is final unless OPM reconsiders it; and the decision is binding on administrative, certifying, payroll, disbursing, and accounting officials.

OPM also adjudicates Fair Labor Standards Act claims under 5 CFR part 551, subpart G. Those procedures cover FLSA exemption-status determinations, minimum-wage and overtime-pay claims, and child-labor complaints. Covered claimants may file with either the employing agency or OPM, but not both at the same time, and an OPM FLSA claim decision is final and not subject to further administrative review. Similarly, OPM settles certain compensation and leave claims under 5 CFR part 178; those claims are resolved on the written record, with the burden on the claimant, and OPM's settlement is final within OPM. OPM regulations also provide for appeals to OPM from certain examination ratings or application rejections.

Other agencies operate in the same manner. 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(a)–(e). EEOC's Office of Federal Operations issues written appellate decisions on behalf of the Commission, applying specified standards of review and providing for finality unless reconsideration is granted. 29 CFR 1614.405(a)–(c). The FLRA likewise provides governmentwide leadership and guidance on Federal labor-management relations while resolving representation, negotiability, unfair-labor-practice, and arbitration matters. *See* 5 U.S.C. 7105. These examples show that combining policy, guidance, and adjudication within the same agency is a familiar feature of Federal administration in general, and Federal workforce administration in particular, not evidence of structural bias.

Nor does the fact that OPM is headed by a presidentially appointed Director establish bias. Like MSPB, OPM is an independent agency. 5 U.S.C. 1101. Both the OPM Director and MSPB Members are appointed by the President with the advice and consent of the Senate and serve at the President's pleasure. Indeed, MSPB members no longer enjoy for-cause removal protections and are removable at will, so MSPB possesses no greater structural independence from the President than does OPM.³⁴ The principal structural difference between MSPB and OPM is that the MSPB is led by three members while OPM is headed by a single director. But a tripartite versus single-head leadership structure has little bearing on an agency's capacity to issue impartial decisions. Consequently, OPM rejects the argument that greater MSPB independence makes it a more appropriate venue for probationary appeals; the premise is inaccurate.

The relevant question is whether the adjudicatory structure creates a constitutionally intolerable risk of actual bias or prejudgment—not whether the agency head is politically accountable. Administrative adjudicators are presumed to act with honesty and integrity, and the combination of investigative, policymaking, and adjudicative functions in an agency does not, without more, violate due process. *Withrow v. Larkin*, 421 U.S. 35, 47, 58 (1975). The Supreme Court has also rejected the proposition that agency decisionmakers are disqualified merely because they previously investigated, reported on, or expressed policy views concerning related issues. *FTC v. Cement Inst.*, 333 U.S. 683, 700–03 (1948). Due process concerns arise from more concrete circumstances, such as a direct pecuniary interest, personal involvement, 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 Administrative Procedure Act (APA) itself reflects the same principle. It permits agency review of initial decisions by presiding employees and provides that, on review, the

³⁴ See *Harris v. Bessent*, 160 F. 4th 1235 (D.C. Cir. 2025); see also *Trump v. Slaughter*, No. 25-332 (June 29, 2026).

agency has the powers it would have had in making the initial decision, subject to any limits imposed by rule or notice. 5 U.S.C. 557(b). The APA's separation-of-functions provision also expressly 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). Federal administrative law therefore does not treat agency-head accountability as equivalent to bias; it looks instead to whether the process includes appropriate safeguards against prejudgment, improper influence, or conflicts of interest.

Ultimately, OPM must determine whether the rule provides a fair and reasoned adjudicatory process for the limited appeal rights at issue. OPM concludes that it does. Here, the final rule provides a defined administrative process, requires decisions to be based on the record, preserves the limited substantive appeal grounds historically available to covered probationary employees, and includes safeguards against arbitrary or predetermined decision-making.

Those safeguards are substantial. Appeals are not assigned to the agency officials who took the challenged action. Rather, OPM personnel assigned to adjudicate appeals must be insulated from officials who participated personally and substantially in the challenged personnel action or provided case-specific advice concerning that action; OPM adjudicators may not consider material *ex parte* communications on the merits; and OPM-employee appeals must be assigned to an administrative law judge, whose initial decision may be disturbed only on limited grounds.

Further, the agency must submit a response and all documents in the agency record supporting the action. The appellant may reply. OPM may require additional information, audit or investigate an agency's action when doing so is necessary to determine a material fact, and conduct a hearing where the written record is insufficient or where credibility issues make a hearing necessary and efficient. OPM will issue written decisions, allow reconsideration, and permit Director review before finality. Those are the safeguards relevant to adjudicatory fairness; the mere fact that OPM is headed by a presidentially appointed Director is not a basis for finding institutional bias.

OPM further disagrees that the new process will be opaque. OPM has committed to make its decisions public. The final rule provides that OPM will maintain a publicly accessible website containing final decisions issued under part 751 that address a party's claim on the merits, subject to applicable legal limits protecting privacy, privileged information, protected personal information, law-enforcement-sensitive information, and other information that may not lawfully be publicly disclosed. Public availability of final merits decisions will promote consistency, allow employees and agencies to understand OPM's reasoning, and permit the public to assess how OPM is applying the rule over time. The rule therefore does not create a closed process with hidden outcomes. It creates a written, record-based process with public final merits decisions.

Commenters 0430, 0450, 0454, and others asserted that OPM will not have enough employees to review probationary appeals, that the appeals experience will become more difficult for employees, and that OPM employees will be overburdened by additional duties. OPM disagrees. The rule establishes a streamlined process tailored to a narrow class of regulatory appeals. These appeals are limited to specified issues: partisan-political reasons, marital status, and certain procedural claims involving terminations based in whole or in part on pre-appointment reasons. The final rule does not require OPM to replicate the full MSPB adjudicatory structure for chapter 75 adverse actions. By using electronic filing, written submissions, required agency records, targeted record development, and hearings only where necessary and efficient, the rule reduces unnecessary process while preserving fair adjudication of the issues that remain appealable. OPM has assessed the expected case volume and resource needs and has determined that MSAC and OPM's adjudicatory staff can administer the process. OPM will monitor implementation and may adjust internal staffing, case-management practices, and guidance as necessary.

Commenters 0006, 0010, 0013, 0030, 0617, and others asserted that making OPM the forum for these appeals forces appellants to litigate before the same entity that directed agencies to terminate them or fail to certify their appointments. OPM disagrees with that characterization.

OPM does not direct agencies to terminate or refuse to certify particular employees. Agencies are responsible for evaluating their own probationary and trial period employees and for making the individualized personnel decisions challenged in any appeal. OPM's role in issuing governmentwide rules or guidance does not make it the deciding official in each agency's personnel action. Under the final rule, OPM will review the agency's action through the part 751 process, not defend or ratify a predetermined outcome.

Commenters 0038, 0307, and 0417 argued that the rule weakens the ability to challenge OPM decision-making. Commenter 0485 further argued that OPM adjudication creates a risk of bias because certain OPM actions or guidance have been alleged or found likely unlawful in other contexts. Commenters 0421, 0444, and 0578 argued that OPM cannot independently review terminations they contend OPM directed, and that the Director's ability to review decisions gives final authority to a political appointee without recourse to Article III courts.

OPM disagrees. Allegations regarding separate guidance, separate litigation, or separate personnel actions do not establish that OPM adjudicators will fail to decide part 751 appeals fairly. If an appellant contends that an employing agency acted unlawfully in a specific case, the appellant may raise any issue that is appealable under § 751.101(c) and may pursue any independent remedy available before EEOC, OSC, MSPB, an Inspector General, or another authorized forum. Further, OPM notes that if it does not finalize this rule probationary employees will remain without any appeals.

Finally, commenters 0001, 0029, 0043, 0479, 0585, and others asserted that the rule is intended to "cover up" or obscure probationary terminations that occurred in 2025. Commenters 0019 and 0421 suggested that the rule would nullify pending and future probationary employee cases and allow agencies to avoid accountability for prior conduct. OPM disagrees. The final rule is prospective. Terminations effected before the effective date of the rule are not governed by this final rule, and the rule does not reopen, extinguish, or nullify pending appeals or past decisions. Rather, probationary terminations effectuated between the issuance of Executive

Order 14284 and the finalization of this rule are not subject to any administrative appeal. The rule is not designed to affect the outcome of prior personnel actions or pending litigation. Rather, it creates procedures that will govern covered appeals going forward.

For these reasons, OPM declines to restore MSPB as the adjudicatory forum based on generalized concerns about bias, opacity, staffing, or political influence. The final rule provides a neutral administrative process appropriate to the limited regulatory rights at issue; provides—where none now exist—appeal rights on the historically narrow substantive grounds for covered probationary appeals; makes final merits decisions public; and leaves intact independent remedies available under other statutes and regulations.

C. Due Process, Written Record, Hearings, Discovery, and Burden of Proof

Commenters 0086, 0322, 0398, and 0500 raised due process concerns, arguing that procedures limited to the written record would be unfair and one-sided toward the agency without the due process rights to a hearing and discovery, as well as giving OPM unilateral authority to decide cases on the written record it controls and to reopen decisions. Commenters 0423 and 0430 argued that removing the agency requirement to disclose the reason for termination and placing the burden of proof on the employee blocks any successful appeal. Commenters 0444 and 0500 claimed that eliminating discovery also makes claims functionally unprovable and that the lack of hearings and discovery provide information asymmetries that give government agencies an advantage. Commenter 0502 added that this limits the ability to develop a sufficient factual record of circumstances to render an informed decision. Commenters 0485 and 0516 contended that the proposed rule failed to satisfy due process requirements by narrowing appealable claims, limiting procedural safeguards and eliminating independent adjudication, adding that these deficiencies mean the rule fails to meet the *Mathews* balancing test.³⁵

³⁵ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Commenter 0448 stated that it would be impossible to prove partisan or marital discrimination as the rule removes essential tools like the deposition of supervisors and the ability to examine internal communications. Commenter 0335 suggested that shortening the length of appeals benefits no one except the executive branch. And commenters 0339, 0380, 0414, and 0447 criticized the rule for replacing hearings and discovery with an OPM audit in which appellants cannot compel evidence, subpoena witnesses, or cross-examine.

OPM has carefully considered these concerns but declines to provide an automatic right to discovery or a hearing in every part 751 appeal. The appeal rights preserved in part 751 are narrow. Covered employees may raise allegations that the action was based on partisan political reasons or marital status and may raise specified procedural issues where a termination is based in whole or in part on conditions arising before appointment. These issues do not require the full range of procedures associated with statutory adverse-action appeals under chapter 75. A default written-record process is proportionate to the limited regulatory rights at issue and is consistent with the government's interest in preserving the probationary and trial period as an effective final stage of examining and assessing an employee before finalizing an appointment.

OPM also disagrees that the final rule leaves appellants dependent on an agency-created record. The final rule requires the agency to submit a response and the agency record. The appellant may reply. OPM may audit or investigate the agency's action when doing so is necessary to determine a material fact. OPM may require additional information from the agency or the appellant. OPM may also conduct a hearing where the written record is insufficient to resolve a material factual dispute or where material credibility issues make a hearing necessary and efficient. These tools allow OPM to develop the record where necessary without requiring full discovery and a hearing in every case.

OPM concludes that the procedures adopted in the final rule are adequate and proportionate for the limited issues that may be appealed under part 751. The final rule provides the substantive appeal grounds historically available for covered probationary employees—

grounds that do not exist at all under the current baseline—through a process tailored to those narrow claims.

Commenter 0317 asserted that the Fifth Amendment requires that Federal employees have a fair opportunity to appeal decisions. Commenter 0150 claimed that OPM has engaged in illegal conduct since 2025, violating the constitutional right to due process. Commenters 0307, 0310, 0314 and 0516 argued that courts recognize employment rights and these cannot be extinguished arbitrarily; *Loudermill* held that employees possess a property interest in continued employment that entitles them to protections, including notice of reason for removal and an opportunity to respond.³⁶ Commenter 0421 added that probationary employees denied discovery, hearings or independent review will argue to courts that they have been deprived of property and liberty interests without due process of law.

OPM agrees that agencies must comply with applicable law and regulations when taking action against probationary and trial period employees. The final rule does not authorize terminations for unlawful reasons, and it preserves appeals alleging partisan-political discrimination, marital-status discrimination, and specified procedural defects in cases based on pre-appointment reasons.

But probationary and trial period employees do not have the same statutory property interest and concomitant due process protections as employees who have completed the applicable period of service. *Smith v. Lehman*, 689 F.2d 342, 345 (2d Cir. 1982), clarified that probationary employees lack a property interest in continued employment and receive only minimal procedural protection. The probationary and trial period remains an extension of the examining process. Congress and the President have preserved agency flexibility during that period because the government has a strong interest in determining, before an appointment is finalized, whether continued employment serves the public interest and the efficiency of the service.

³⁶ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

The procedures in part 751 are therefore calibrated to the employee's limited status and the narrow issues that may be appealed. The final rule does not convert probationary or trial period terminations into chapter 75 adverse actions, and it does not create a general appeal right for claims that fall outside § 751.101(c). To the extent an employee has an independent statutory claim before another forum, the final rule does not displace that remedy. Further, OPM notes that the rule creates an appeals process where none currently exists. The rule thus gives probationary and trial period employees substantially more procedural protections than they currently possess.

Commenters 0450 and 0515 argued that restricting hearings to circumstances in which OPM determines that a hearing is "necessary and efficient" will allow OPM to deny hearings in most cases. Commenters such as 0049, 0051, and 0062 similarly asserted that the absence of a guaranteed hearing or formal discovery right will tilt the appeals process in favor of agencies. These commenters contended that agencies will possess most relevant information, that appellants may be unable to uncover evidence of pretext or procedural irregularity, and that credibility disputes cannot be fairly resolved on the written record.

OPM has considered these comments but declines to create an automatic right to discovery or a hearing in every appeal under part 751. The appeal rights preserved in this final rule are narrow regulatory rights. Covered appellants may raise only the issues identified in § 751.101(c): whether the action was based on partisan political reasons or marital status, and whether the agency failed to follow the specified procedures applicable to a termination based in whole or in part on conditions arising before appointment. These are not ordinary chapter 75 adverse-action appeals, and Congress did not give probationary employees the same procedural rights that apply to employees who have completed the applicable period of service. OPM therefore concludes that a default written-record process is appropriate and proportionate to the limited issues that may be appealed.

OPM disagrees, however, that the final rule leaves appellants dependent on whatever record an agency chooses to create. The final rule requires the agency to file a response and

provide the agency record. The agency record must include the materials considered or relied upon in taking the action, documentation relevant to the appellant's appointment and probationary or trial period status, and other documents necessary to adjudicate jurisdiction, timeliness, appealability, and the merits of any appealable claim. The appellant may then file a reply to the agency's response and may address factual or legal issues raised by the agency. These procedures are intended to reduce information asymmetry and ensure that OPM decides appeals on an identifiable record rather than on unsupported agency assertions.

The final rule also gives OPM tools to develop the record when the written submissions are insufficient. OPM may require additional information, audit or investigate an agency's action when doing so is necessary to determine a material issue of fact, and conduct a hearing where the written record is insufficient to resolve a material factual dispute or where a material credibility issue makes a hearing necessary and efficient. OPM's standard does not mean that hearings will be denied whenever a hearing would be inconvenient. It means that hearings will be used when they are needed to resolve issues that matter to the disposition of the appeal, rather than as a routine procedural step in every case regardless of need. This approach preserves fairness while avoiding unnecessary delay and expense in cases that can be resolved on the written record.

Commenters 0008, 0167, 0357, 0430, and 0408 asserted that placing the burden on appellants to establish timeliness, OPM jurisdiction, and the appealable basis for the claim is unfair, even if lawful. OPM disagrees. The appellant is the party invoking OPM's limited regulatory jurisdiction under part 751. It is therefore appropriate for the appellant to establish, by a preponderance of the evidence, that the appeal was timely filed, that OPM has jurisdiction, and that the appellant has raised an issue made appealable by § 751.101(c). This allocation is consistent with the limited nature of probationary appeal rights and with the general principle that a party seeking relief must establish the basis for that relief.

At the same time, the final rule does not require appellants to prove their claims without access to the agency's explanation and records. The agency must respond and produce the

agency record; the appellant may reply; and OPM may obtain additional information where necessary. In addition, if the agency record is incomplete, inconsistent, or insufficiently developed on a material issue, OPM may take that into account in deciding whether further record development, an audit, an investigation, or a hearing is warranted. The burden-of-proof provision therefore does not make the agency's action unreviewable. It identifies which party must establish threshold jurisdictional and appealability matters and, where the merits are reached, the factual predicate for the limited claims allowed under the rule.

Commenters 0002, 0029, 0077, 0160, 0253, and others asserted that agencies should be required to provide an appellant with a rationale for dismissal. OPM declines to adopt a general rationale-for-dismissal requirement beyond the requirements preserved in the final rule. The historical probationary appeal framework distinguished between terminations based on post-appointment performance or conduct and terminations based in whole or in part on conditions arising before appointment. The final rule preserves that distinction. Where an agency terminates an employee based in whole or in part on conditions arising before appointment, the employee may appeal whether the agency failed to provide the specified procedural protections, including advance written notice stating the reasons for the proposed action, a reasonable time to answer, and a written decision. OPM has preserved that limited procedural appeal because pre-appointment reasons raise distinct fairness concerns.

OPM does not, however, make every probationary or trial period termination independently appealable based on the adequacy of the agency's explanation. The probationary and trial period is part of the examining and assessment process, and an appointment is not finalized merely by the passage of time. Agencies must comply with Civil Service Rule XI (5 CFR part 11) and applicable law, but the final rule does not convert probationary or trial period separations into chapter 75 adverse actions requiring the full statement-of-charges process applicable to covered employees. Nor does the final rule make failure to provide written notice of the effective date under 5 CFR 11.5, standing alone, a basis for reversal. Such notice serves an

important administrative function, but it does not itself establish that an action was based on partisan political reasons or marital status, nor does it establish a violation of the specific pre-appointment procedures preserved in § 751.101(c).

Commenters 0429 and 0572 claimed that OPM improperly assumes that non-attorney staff will be able to adjudicate appeals and that due process concerns arise unless appeals are handled by attorneys trained for that task. OPM disagrees. The final rule does not require OPM to use only attorneys, administrative judges, or administrative law judges in every case. The relevant question is whether OPM assigns personnel who are qualified to apply the governing regulation, evaluate the record, make findings on the limited issues presented, and issue reasoned decisions. OPM has experience administering record-based adjudicatory functions and will assign personnel with appropriate training and expertise to adjudicate appeals under part 751. Further, as noted above, constitutional due process requirements do not attach to probationary employees who lack a cognizable property interest in their job.

OPM also notes that these appeals involve a defined set of legal and factual issues. The adjudicator must determine timeliness, jurisdiction, appealability, and, where appropriate, whether the appellant has established one of the limited claims permitted by § 751.101(c). OPM will provide internal procedures, training, supervisory review, reconsideration, and Director review before finality to promote consistency and correct material errors. The final rule also provides an additional safeguard for appeals filed by OPM employees by assigning those appeals to an administrative law judge. OPM therefore declines to adopt a categorical rule requiring attorney adjudicators or administrative law judges in every part 751 appeal.

Some commenters assert that OPM or employing agencies may modify, omit, or shape records to support predetermined outcomes. OPM takes record integrity seriously but does not agree that speculative concerns about possible misconduct justify retaining the prior MSPB forum or imposing full discovery and hearing procedures in every case. Agencies remain subject to generally applicable legal obligations governing official records, personnel records, prohibited

personnel practices, false statements, and misconduct. The final rule also requires agencies to produce the agency record, permits appellants to reply, allows OPM to require additional information, and authorizes OPM to audit or investigate where necessary to determine an issue of material fact. If an appellant identifies a material inconsistency, omission, or other reason to question the completeness or reliability of the agency record, OPM may consider that issue in determining whether further development is needed and in deciding the appeal.

Commenters 0212, 0356, 0396, and 0406 asserted that the Director's authority to oversee and, if necessary, reverse a decision subjects the process to undue political influence. 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 § 751.108 to identify nonexclusive considerations that may inform the Director's decision to reopen and reconsider a nonfinal probationary or trial period appeal decision. Under the final rule, the Director may act on the Director's own initiative and only before a decision becomes final under § 751.109. In determining whether to exercise that authority, the Director may consider, among other things, whether the decision may contain clear legal error, may rest on an erroneous finding of material fact, may involve an issue of exceptional importance, may affect the governmentwide administration of civil service laws, rules, regulations, or OPM policy, may conflict with another OPM decision, or may otherwise warrant 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 § 751.107. If the Director reopens and reconsiders a decision under § 751.108, the Director may take any action available under § 751.107(c). This structure preserves meaningful principal-officer oversight 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 751 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 probationary or trial period employees in different agencies. Cf. 5 U.S.C. 1103(a)(1), (3), (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. 5 U.S.C. 1102(a). Under the Supreme Court’s Appointments Clause precedents, inferior officers must remain subject to direction and supervision by a properly appointed superior officer. *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). Consistent with those decisions, the Director of OPM—exercising the appointment authority vested in the Director by 5 U.S.C. 1103(a)(2)—will appoint, or ratify the appointment of, the officials who adjudicate appeals under this rule, and the rule further provides for supervision and review by the Director, a principal officer, before OPM’s decision becomes final.

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.

Part 751 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 751.

D. Scope of Covered Employees and Appeal Rights

Several commenters (for example, 0553, 0543, 0548, and 0467) urged OPM to clarify or expand the final rule to permit employees in the excepted service serving a trial period under Civil Service Rule XI to appeal trial period terminations to OPM on the same grounds as competitive service probationers. OPM declines to adopt that approach. The final rule establishes a new appeals process whose substantive scope corresponds to the probationary and trial period

appeal rights that existed before E.O. 14284, with a different forum and different procedures. Before E.O. 14284, subpart H of part 315 applied to probation on initial appointment to a competitive position. It did not create a general appeal right for employees serving trial periods in the excepted service. Excepted-service employees serving trial periods had appeal rights only where Congress or another regulation independently provided them. For example, part 307 provides particular appeal rights for individuals serving under Veterans Recruitment Appointments. The final rule preserves that limited category by including employees appointed under part 307 to the extent they previously had comparable appeal rights, but it does not create a new, across-the-board appeal right for all excepted-service trial period employees.

This limitation is consistent with the structure of the CSRA. Congress distinguished between competitive service employees, excepted service preference eligibles, and excepted service non-preference eligibles for purposes of adverse-action appeal rights. In particular, Congress generally did not provide excepted service employees full adverse-action appeal rights until they completed the applicable period of current continuous service. OPM does not read E.O. 14284 or Civil Service Rule XI as requiring OPM to expand those statutory or regulatory appeal rights to excepted service employees who had no such right before the Executive Order.

Civil Service Rule XI uses “probationary period” for the competitive service and “trial period” for the excepted service, and it establishes a common certification framework for both categories. That terminology and certification framework do not themselves create identical appeal rights for all employees serving probationary or trial periods. Civil Service Rule 11.6 authorizes the Director of OPM to prescribe the circumstances and procedures for appeals; it does not require OPM to create new appeal rights for categories of employees who did not previously possess them.

Expanding part 751 to cover all excepted service trial period employees would be a substantive enlargement of appeal rights rather than a conforming implementation of E.O. 14284. Such an expansion would be inconsistent with the purpose of the probationary and trial

period system: to preserve agency flexibility during the initial period of assessment before an appointment is finalized. It would also risk creating uncertainty by granting appeal rights to employees whose appointments, statutory coverage, and excepted service authorities vary substantially across agencies and programs.

Accordingly, the final rule limits part 751 coverage to the categories identified in § 751.101(f). Excepted service employees serving trial periods outside those categories may not appeal under this part unless they are otherwise entitled to appeal by statute or another applicable regulation. Nothing in the final rule prevents such employees from pursuing any claim or remedy that falls within the jurisdiction of the EEOC, the OSC, an Inspector General, the Merit Systems Protection Board, the Department of Labor, or another forum where an independent legal basis for such jurisdiction exists.

E. EEOC, OSC, MSPB, and Other Forums

Commenter 0004 and others contended that the rule does not sufficiently explain how part 751 interacts with MSPB procedures in cases involving overlapping claims, mixed cases, constructive adverse actions, or employees transitioning out of probationary status. OPM has considered these comments and provides the following clarification.

Part 751 establishes a limited OPM appeal process for the categories of employees and claims identified in § 751.101. It does not displace independent statutory or regulatory jurisdiction assigned to another forum. If an employee is covered by part 751 and alleges that a probationary termination, noncertification, failure to certify and finalize an appointment, or covered supervisory or managerial probationary action was based on partisan political reasons or marital status, that claim is brought to OPM under this part. If the employee alleges discrimination under statutes administered by the EEOC, the employee may pursue that claim through the Federal-sector EEO process. If the employee alleges a prohibited personnel practice within OSC's jurisdiction, the employee may file with OSC. If the employee claims that the employee was not actually a probationary or trial period employee because the employee had

completed the service necessary to qualify as an “employee” under chapter 75, or if the employee asserts an independent statutory appeal right such as a claim under USERRA or VEOA, the final rule does not preclude the employee from seeking review in the forum Congress provided.

This allocation of claims reflects the structure of the current civil service remedial scheme. Congress and the President have not created a single universal forum for every type of personnel claim. Instead, different forums address different legal questions: OPM will adjudicate the narrow probationary and trial period appeal issues preserved in § 751.101(c); EEOC will adjudicate claims under the Federal-sector antidiscrimination statutes it administers; OSC will address matters within its prohibited-personnel-practice jurisdiction; and MSPB will continue to adjudicate matters within its independent statutory or regulatory jurisdiction. Section 751.101(e) therefore makes the part 751 process exclusive only for appeals covered by this part, while preserving other claims where another forum has an independent legal basis for jurisdiction.

OPM also clarifies how part 751 applies when an employee is transitioning out of probationary status. The relevant question is the employee’s legal status and the nature of the action at issue. If the employee has completed one year of current continuous service under other than a temporary appointment limited to one year or less and is not otherwise excluded from coverage, the employee may be covered by the procedures in part 432 or part 752, rather than part 751. If the employee remains within the categories defined in § 751.101(f), the limited part 751 process applies. If the employee disputes probationary status itself, that threshold issue may be raised because OPM must determine its own jurisdiction and the applicability of part 751 before resolving the merits of any appeal.

OPM further clarifies that the label an appellant gives a claim does not determine the forum. A claim styled as a “constructive adverse action” will not be heard under part 751 unless the appellant establishes that the matter falls within OPM’s jurisdiction and raises an issue made appealable by § 751.101(c). Conversely, if the employee alleges facts showing that the action is

actually appealable to MSPB under an independent statutory or regulatory basis—such as because the employee had already acquired chapter 75 coverage—nothing in part 751 prevents the employee from presenting that jurisdictional argument to MSPB. Part 751 does not expand MSPB jurisdiction, but it also does not eliminate MSPB jurisdiction that exists independently of this rule.

Multiple commenters, including 0049, 0119, 0250, 0352, and many others, stated that probationary employees should have a choice to bring mixed cases to MSPB or EEOC. Commenters 0252, 0607, and 0613 expressed concern that probationary employees are especially vulnerable to discrimination and that limiting OPM appeals could hide patterns of abuse. OPM does not agree that the final rule eliminates discrimination remedies or conceals discriminatory conduct.

The final rule does not bar probationary or trial period employees from filing discrimination complaints. It directs discrimination claims to the forum Congress and regulation have made responsible for Federal-sector discrimination claims: the EEOC process. Employees who believe they were discriminated against based on race, color, religion, sex, pregnancy, national origin, age, disability, genetic information, or other protected status under statutes administered through the Federal-sector EEO process may continue to pursue those claims through that process. The final rule does not narrow the substantive protections of Title VII, the ADEA, the Rehabilitation Act, the ADA-related Federal-sector framework, or other laws administered through the EEO process. Nor does it prevent an employee from seeking judicial review where the applicable discrimination statute and EEO framework provide such review.

OPM disagrees that probationary employees must have an MSPB “mixed case” option for these claims. Congress did not create a general statutory right for probationary employees to bring probationary termination appeals to MSPB. The prior ability to attach certain discrimination allegations to an MSPB probationary appeal depended on OPM’s former regulatory choice to route a narrow class of probationary appeals to MSPB. Once E.O. 14284

rendered those regulations inoperative and Civil Service Rule XI directed OPM to prescribe the circumstances and procedures for probationary and trial period appeals, OPM was not required to recreate the prior mixed-case structure for probationary appeals. OPM has instead determined that discrimination claims should be handled by the EEO process, while OPM resolves the limited probationary issues identified in § 751.101(c).

Many commenters, including Commenters 0028, 0260, 0368, and 0497, suggested that the rule bars probationary employees from filing complaints with the EEOC or otherwise strips employees of rights to make discrimination claims. Those commenters are mistaken. The rule does not eliminate any substantive right to be free from unlawful discrimination. It separates claims by legal source and forum. OPM will decide the limited issues assigned to OPM under part 751. EEOC and agency EEO offices will address claims under the Federal-sector anti-discrimination laws. That approach channels claims to the entity with specialized responsibility for the relevant body of law and avoids requiring OPM to adjudicate claims that this final rule does not assign to it.

Commenters 0289, 0293, and 0296 correctly noted that probationary employees may have several possible avenues depending on the claim: an EEO complaint if they allege discrimination under statutes administered through the Federal-sector EEO process; an OPM appeal if they allege partisan-political reasons, marital status, or specified pre-appointment procedural defects within § 751.101(c); an OSC complaint if they allege a prohibited personnel practice within OSC's jurisdiction; and, in some circumstances, an MSPB appeal if they contend they meet the statutory definition of "employee" or assert another independent statutory appeal right, such as rights related to military service. Other commenters, including 0342, 0484, 0579, and 0613, characterized this structure as fragmented. OPM disagrees.

The civil service remedial scheme is claim-specific by design. A structure that directs different legal claims to different expert forums does not reflect improper fragmentation. Instead, it reflects how Congress and implementing regulations have long allocated responsibility for

Federal employment disputes. A discrimination claim, a prohibited-personnel-practice claim, a USERRA or VEOA claim, a threshold chapter 75 coverage claim, and a limited probationary appeal under part 751 may arise from related facts, but they are not the same legal claim. They require different legal standards, different remedies, and different adjudicatory expertise. The final rule therefore clarifies, rather than obscures, which forum is responsible for which issue.

Commenter 0345 argued that assigning discrimination claims to the EEOC process forces bifurcation, parallel litigation tracks, separate investigations, and duplicative agency staffing. Commenters 0380, 0414, 0418, 0439, 0447, 0451, and 0516 similarly argued that the rule unlawfully bifurcates EEO claims contrary to congressional intent. Commenters 0419, 0425, and 0474 argued that separating claims based on race, sex, pregnancy, or other protected status from claims of partisan-political discrimination would create waste, burden claimants, and create a possible conflict of interest because OPM would be adjudicating and enforcing its own rules.

OPM does not agree. Congress did not establish a general MSPB mixed-case appeal right for probationary terminations. The former mixed-case route existed only because OPM had previously assigned certain probationary appeals to MSPB by regulation. OPM is now replacing that regulatory assignment with a narrower OPM process under Civil Service Rule XI. It is reasonable for OPM to assign discrimination claims to the EEO process while retaining OPM review over the limited claims that part 751 preserves.

OPM also does not agree that separate forums will necessarily produce duplication or inconsistent decisions. The legal inquiries are distinct. In a part 751 appeal, OPM will determine whether the action was based on partisan political reasons or marital status, or whether the agency failed to follow specified procedures for a termination based in whole or in part on pre-appointment reasons. In an EEO matter, the agency EEO process and EEOC framework address whether the agency violated applicable antidiscrimination law. The same factual background may be relevant to more than one claim, but the legal standards, decisionmakers, and available remedies differ. Where an employee chooses to pursue multiple avenues, the employee may

submit overlapping evidence to more than one forum, but that does not make the legal inquiries duplicative.

OPM further concludes that routing discrimination claims to the EEO process promotes expertise and consistency. EEOC and agency EEO offices have specialized responsibility for Federal-sector discrimination complaints, including investigation, administrative adjudication, remedies, and coordination with judicial-review rights where applicable. Requiring OPM to adjudicate EEO claims as part of a limited probationary appeal would complicate and delay the part 751 process, undermine the streamlined structure of the rule, and risk inconsistent development of discrimination law outside the forum charged with administering it.

Nor does the rule conceal patterns of discrimination or abuse. EEO complaints remain available. OSC complaints remain available for matters within OSC's jurisdiction. Inspector General complaints remain available where appropriate. MSPB review remains available where an independent basis for MSPB jurisdiction exists. OPM will also issue written decisions in part 751 appeals and has committed to make final merits decisions publicly available, subject to applicable limits protecting privacy, privileged information, protected personal information, law-enforcement-sensitive information, and other information that may not lawfully be disclosed. These mechanisms preserve transparency and accountability while maintaining the limited scope of part 751.

Finally, OPM disagrees that its role creates a conflict of interest. OPM is not the employing agency in appeals filed by employees of other agencies and does not make the individualized decision to terminate, not certify, or fail to finalize a particular employee's appointment. Those decisions are made by the employing agency. OPM's MSAC adjudicatory function is distinct from OPM's rulemaking and policy functions, and part 751 requires decisions to be made on the record and within the limited issues identified in the rule. For appeals filed by OPM employees, the final rule provides an additional safeguard by assigning the appeal to an administrative law judge.

Accordingly, OPM declines to revise the rule to provide an MSPB mixed-case election for probationary and trial period appeals. The final rule preserves the limited appeal rights historically available to covered probationary employees, directs discrimination claims to the EEO process, preserves independent remedies in other forums where legally available, and provides clearer claim routing for employees, agencies, and adjudicators.

Commenters 0163, 0172, 0274, 0331, and 0484 argued that by taking jurisdiction from MSPB and establishing a venue at OPM, appellants will instead file wrongful termination claims in Article III courts, unnecessarily and counterproductively fracturing the CSRA's model of administrative and judicial review of Federal personnel actions.

The Supreme Court has repeatedly explained that Article III courts lack jurisdiction to hear claims arising under the CSRA, including the types of claims covered by this rule (probationary appeals). In *United States v. Fausto*, the Court explained that “[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the outdated patchwork of statutes and rules built up over almost a century that was the civil service system.” 484 U.S. 439, 444 (1988) (internal quotations and citations omitted). This comprehensive framework reflects Congress’s deliberate choice to preclude judicial review outside the narrow circumstances in which the CSRA scheme permits judicial, or administrative, review.³⁷ Nothing in this rule opens the doors to judicial review by probationers on wrongful termination grounds, and under this rule, such cases will continue to be dismissed for lack of jurisdiction.³⁸

F. Consistency with Merit System Principles

³⁷ See, e.g., *Elgin v. Dep’t of the Treasury*, 567 U.S. 1 (2012); *Mastriano v. FAA*, 714 F.2d 1152 (Fed. Cir. 1983); *Sagar v. Lew*, 211 F. Supp. 3d 262 (D.D.C., 2016); *Walker v. Merit Sys. Prot. Bd.*, 594 F. App’x 984 (Fed. Cir. 2014); *González v. Vélez*, 864 F.3d 45 (1st Cir. 2017).

³⁸ See *Tocci v. Napolitano*, 791 F. Supp. 2d 944 (D. Or., 2011); *Ahuruone v. U.S. Dep’t of the Interior*, 312 F. Supp. 3d 1 (D.D.C., 2018); *Swartz v. Internal Revenue Serv.*, 702 F. Supp. 780 (W.D. Mo. 1988); *Ladson v. Jue*, 2015 WL 3755918 (E.D. Va., 2015); *Chamat v. Paulson*, 2009 WL 764989 (S.D. Cal., 2009); *Peter B. v. C.I.A.*, 620 F. Supp. 2d 58 (D.D.C. 2009); *Gonzalez v. Manjarrez*, 2013 WL 152177 (W.D. Tex. Jan. 4, 2013), *aff’d*, 558 F. App’x 350 (5th Cir. 2014); *Toro v. Napolitano*, 2013 WL 4102158 (S.D. Cal. Aug. 13, 2013); *Radakovic v. U.S. Office of Pers. Mgmt.*, 2012 WL 1900037 (D. Mass. 2012).

Commenters 0227, 0035, 0044, 0399, 0425, 0516 and others asserted that this rule violates the Merit System Principles codified at 5 U.S.C. 2301. OPM disagrees. The Merit System Principles remain fully in effect and continue to govern Federal personnel management. Nothing in this rule authorizes an agency to take, or OPM to approve, a personnel action based on partisan political reasons, marital status, political affiliation, favoritism, arbitrary conduct, retaliation, or any other basis prohibited by law. The final rule creates a forum and procedures for a limited class of regulatory appeals; it does not displace the Merit System Principles, the prohibited personnel practices in 5 U.S.C. 2302, the jurisdiction of OSC, the jurisdiction of EEOC, or any other independent statutory protection.

Indeed, the final rule is designed to preserve the merit-based character of probationary and trial period employment while recognizing the distinct role of those periods in the civil service system. A probationary or trial period is part of the examining and assessment process. During that period, agencies must be able to determine whether continued employment advances the public interest and the efficiency of the service. At the same time, agencies may not use that period as a means to evade the Merit System Principles or to take actions for unlawful reasons. Part 751 reflects that balance by preserving appeals alleging partisan political reasons or marital status and by preserving specified procedural challenges where a termination is based in whole or in part on conditions arising before appointment.

Commenters 0011, 0070, 0396, 0615 and others asserted that this rule will be abused to effectuate politically based dismissals. One commenter points to *Starkey v. Dep't of Housing and Urban Development*, 2024 M.S.P.B. 6 (2024), as justification for retaining MSPB jurisdiction to prevent politically based dismissals. OPM has considered this concern, but does not agree that *Starkey* supports reestablishing MSPB as the forum for all probationary appeals.

Starkey demonstrates the importance of preserving a meaningful avenue to challenge a probationary termination allegedly based on partisan political reasons. The final rule does exactly that. A covered appellant who alleges that a termination, noncertification, failure to

certify and finalize an appointment, or covered supervisory or managerial probationary action was based on partisan political reasons may appeal that claim to OPM under § 751.101(c). Thus, the final rule does not eliminate the type of claim at issue in *Starkey*; it preserves that claim and assigns it to OPM for adjudication under the procedures in part 751.

OPM also disagrees that such claims can be fairly resolved only by MSPB. The relevant question is whether the adjudicatory process allows the decisionmaker to evaluate the record, require production of relevant agency materials, consider the appellant's response, develop the record where necessary, assess material factual disputes, and provide reasoned decisions. The final rule provides those safeguards. The agency must submit a response and all documents in the agency record supporting the action. The appellant may reply. OPM may require additional information, audit or investigate the agency's action when doing so is necessary to determine a material fact, and conduct a hearing where the written record is insufficient or where a material credibility dispute makes a hearing necessary and efficient. OPM will issue written decisions, provide reconsideration and Director review before finality, and make final merits decisions publicly available subject to applicable legal limits.

These safeguards are particularly important in cases alleging partisan political motive. If the written record is sufficient to resolve the claim, OPM may decide the appeal on that record. If the record contains material factual gaps, inconsistent explanations, or credibility issues comparable to those that may arise in a politically based dismissal case, OPM has authority to obtain additional information, conduct an audit or investigation, or hold a hearing where necessary and efficient. The final rule therefore does not require OPM to accept an agency's explanation at face value, nor does it prevent OPM from developing the record when the appellant raises a nonfrivolous and material claim within OPM's jurisdiction.

OPM further rejects the suggestion that agency officials will be permitted to use the probationary or trial period as cover for political retaliation or partisan discrimination. Such conduct remains prohibited. In addition, employees may continue to pursue claims within OSC's

jurisdiction, including prohibited personnel practice claims, where an independent legal basis for OSC jurisdiction exists. Employees may also pursue claims in other forums, including EEOC, MSPB, Inspectors General, or another authorized forum, where an independent statute or regulation provides jurisdiction.

OPM acknowledges that public confidence in the civil service depends not only on legal rules but also on transparent and even-handed administration. For that reason, the final rule requires record-based adjudication and written decisions, and OPM has committed to making final merits decisions publicly available, subject to applicable limits protecting privacy, privileged information, protected personal information, law-enforcement-sensitive information, and other information that may not lawfully be disclosed. Public availability of final merits decisions will allow agencies, employees, representatives, and the public to assess how OPM applies the prohibition against partisan-political and marital-status based actions over time.

OPM also has experience administering adjudicatory functions in a neutral and professional manner, including classification appeals and other record-based personnel determinations. OPM will apply that experience in administering part 751. Decisions under this rule must be based on the administrative record and the issues made appealable by the regulation, not on political preference, agency convenience, or a predetermined outcome. For appeals filed by OPM employees, the final rule adds an additional safeguard by assigning the matter to an administrative law judge.

Accordingly, OPM declines to revise the rule on the grounds that it violates the Merit System Principles or will enable politically based dismissals. The final rule preserves the substantive prohibition against partisan-political and marital-status based terminations of probationary period employees. OPM again notes that, if it did not finalize this rule, probationary employees would have no right to appeal terminations allegedly undertaken on the basis of political affiliation. OPM thus sees this rule as reinforcing Merit System Principles by providing a forum and procedures to adjudicate such allegations.

G. Representatives, Unions, and Official Time

Commenters 0570 and 0608 questioned OPM's authority to mandate the procedures provided for in this rule as the sole and exclusive means by which a probationary or trial period employee may appeal a termination. For example, they point to the definition of the term "grievance," provided at 5 U.S.C. 7103(a)(9) as basis for Congress mandating probationary or trial period employees be permitted to challenge terminations via negotiated grievance arbitration procedures.

OPM disagrees. Courts, interpreting Congress's intent, have long found that probationary employees are, by statute, treated differently than those who have been certified following such periods.³⁹ Among the procedures Congress did not grant to probationary employees was the ability to challenge a removal by grievance. Proposals to extend such procedures to probationary employees are contrary to law. "Permitting probationary employees to grieve removals based on a mere allegation of violation ... would eviscerate the entire purpose of the probationary program." *NTEU v. FLRA*, 737 F.3d 273, 280 (4th Cir. 2013).

Probationary terminations are not a matter covered under Chapter 71, and placing them within such bounds, thereby opening the door to use of negotiated grievance procedures to challenge terminations, would "upset nearly thirty years of FLRA decisions holding that probationary employees are not permitted under law or regulation to grieve removals." *Id.* Thus, there is no statutory basis to provide official time to representatives in connection with probationary appeals. Use of official time is principally governed by statute. Under 5 U.S.C. 7131, which forms the basis of the statutory right, official time is authorized only when a representative is: negotiating a collective bargaining agreement; participating for or on behalf of a labor organization in a proceeding before the FLRA; or in connection with any other matter

³⁹ See, e.g., 5 U.S.C. 7501(1); *Goss v. Dep't of the Air Force*, 131 F. App'x 721, 724 (Fed. Cir. 2005); *Mastriano v. FAA*, 714 F.2d 1152, 1155 (Fed. Cir. 1983); see also *Bante v. Merit Sys. Prot. Bd.*, 966 F.2d 647 (Fed. Cir. 1992); *Bofill v. Merit Sys. Prot. Bd.*, 26 F. App'x 916 (Fed. Cir. 2001).

covered by the FSLMRS. Courts have repeatedly explained that probationary appeals are not covered by Chapter 71.⁴⁰

Therefore, OPM's rulemaking properly precludes proposals to grant grievance-arbitration rights to probationary employees. Further, Commenters misunderstand how the term "grievance" is defined under 5 U.S.C. 7103(a)(9). Provisions of the FSLMRS, "like every Act of Congress, should not be read as a series of unrelated and isolated provisions." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995). This means the definition of "grievance" in the FSLMRS is not rigid or applied to every situation. Instead, when determining what counts as a grievance, one must exclude any subject matter that is already excluded due to conflicts with other laws or by governmentwide rules under 5 U.S.C. 7117(a)(1). Further, Congress "specifically excluded probationary employees from the broad definitions of 'employee' and 'grievance'" in statute. *NTEU v. FLRA*, 848 F.2d 1273, 1276 (D.C. Cir. 1988).

Commenters 0055, 0081, and 0110 asserted that the rule would preclude an appellant from designating a union official as his or her representative. Commenters 0004, 0047, 0153, 0217, 0347, 0599, and others asserted that an employee is statutorily entitled to select a Federal employee who is a union official to assist him or her in the preparation of an appeal, and, in such cases, the selected representative is entitled to claim official time for work done while in a duty status on behalf of the employee.

However, the final rule preserves an appellant's ability to select a representative, including a union representative, subject to the limitations in § 751.104. The rule does not prevent an employee from seeking advice, consulting a representative, or being represented in an appeal under part 751. Nor does it affect official time that may be independently authorized in other proceedings, such as EEO proceedings, where a separate legal framework applies.

⁴⁰ See *Nat'l Treasury Emps. Union v. Fed. Labor Rels. Auth.*, 737 F.3d 273, 280 (4th Cir. 2013) (noting longstanding precedent that probationary employees may not grieve removals); *United States Dep't of Health & Human Servs. v. FLRA*, 858 F.2d 1278, 1283 (D.C. Cir. 1988) (emphasizing Congress's intent to permit summary termination during probation); see also *United States Dep't of Justice v. FLRA*, 709 F.2d 724, 730 (D.C. Cir. 1983); *Bartholomew v. United States*, 740 F.2d 526, 530 (7th Cir. 1984); *United States Postal Serv. v. Am. Postal Workers Union*, 553 F.3d 686, 690 (D.C. Cir. 2009).

The rule merely prevents the representative (when such representative is a Federal employee) from performing representational functions while in a duty status (including while on official time) or from claiming agency reimbursement for any expenses incurred while performing such representational function.

OPM believes that part 751 appeals should not be conducted through paid representational activity by Federal employees in a duty status. Part 751 appeals are regulatory probationary-appeal proceedings established by OPM under Civil Service Rule XI. They are not negotiated grievance proceedings under chapter 71, and the final rule does not require agencies to provide official time for the preparation or presentation of these appeals. Section 7131(d) allows official time for representational activity in amounts the agency and exclusive representative agree to be reasonable, necessary, and in the public interest, subject to applicable law and governmentwide regulation. This final rule establishes a governmentwide procedural limitation for this OPM appeal process. Other commenters, such as Commenters 0086, 0283, 0516, 0570, and 0584, asserted that official time is essential to ensuring that probationary and trial period employees can effectively challenge improper agency actions. OPM has considered these comments but declines to revise the rule. The final rule preserves an appellant's ability to select a representative, including a union representative, subject to the limitations in § 751.104. It does not require appellants to proceed without assistance, prohibit union representatives from advising or representing employees, require appellants to retain private counsel, or limit representation in proceedings outside part 751 where official time is independently authorized. What the final rule does is narrower: it provides that a Federal employee who serves as a representative in this OPM regulatory appeal process may not perform that representational work in a duty status, including on official time under 5 U.S.C. 7131.

OPM disagrees that taxpayer-funded official time is necessary to make representation meaningful in this limited appeal process. Part 751 appeals are not negotiated grievance proceedings under chapter 71, nor are they statutory adverse-action appeals under chapter 75.

They are limited regulatory appeals established under Civil Service Rule XI for employees whose appointments have not yet been finalized. The issues are correspondingly narrow: partisan-political reasons, marital status, and specified procedural claims involving terminations based in whole or in part on conditions arising before appointment. Given that limited scope, OPM concludes that the public interest is better served by preserving the right to representation while not requiring agencies to subsidize preparation or presentation of these appeals through official time.

Further, official time would be statutorily unavailable to represent probationary employees in part 751 appeals even if this regulation were silent on the topic. 5 U.S.C. 7131(d) authorizes agencies to provide official time for (1) “any employee representing an exclusive representative” and (2) “in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative.”

Ground (1) is unavailable because a Federal employee who assists a probationer in a part 751 appeal is not “representing an exclusive representative” within the meaning of the statute. That phrase describes an employee acting on behalf of the labor organization in its institutional capacity—that is, performing the representational functions the FSLMRS assigns to an exclusive representative, such as negotiating a collective bargaining agreement, processing grievances under a negotiated grievance procedure, or participating in proceedings under chapter 71. See 5 U.S.C. 7114(a)(1); *AFGE, AFL-CIO, Local 1692 and Headquarters, 323rd Flying Training Wing (ATC), Mather Air Force Base*, 3 FLRA No. 47 (1980) (official time under 5 U.S.C. 7131 concerns activities involving an “interface” between the labor organization and agency management under the Statute, such as negotiations, grievances, negotiability disputes, and unfair labor practice proceedings, and preparation for such activities); cf. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89 (1983) (declining to extend the benefits associated with official time beyond those Congress provided in the Statute).

A part 751 appeal involves none of these functions. The representative's authority in such an appeal derives solely from the individual appellant's personal designation under § 751.104, not from the union's status as exclusive representative. Indeed, the FSLMRS itself distinguishes between representation by an exclusive representative and an employee's separate right to be represented "by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action." 5 U.S.C. 7114(a)(5)(A). A Federal employee designated by a probationer under § 751.104 acts in the latter, personal capacity. The exclusive representative is not a party to a part 751 appeal, has no statutory or regulatory role in the proceeding, and asserts no institutional interest of its own; part 751 appeals are not grievances, and the union's chapter 71 representational authorities are therefore not implicated. This conclusion does not change merely because the individual the appellant selects happens to hold union office: an employee's union title does not convert personal representation of an individual appellant into representation of the exclusive representative.

Thus, because employees representing colleagues in probationary appeals are representing the probationer, not the union, such hearings are not grievances where the union's institutional authorities are implicated. As a result, ground (1) for official time is unavailable. As discussed above, courts have consistently held that Chapter 71 of Title 5, United States Code does not cover appeals of probationary terminations. *See NTEU v. FLRA*, 737 F.3d at 279-80; *NTEU v. FLRA*, 848 F.2d at 1276 (D.C. Cir. 1988); *Dep't of Justice v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983); *NTEU*, 67 FLRA 24, 26 (2012), *aff'd sub nom. NTEU v. FLRA*, 737 F.3d 273 (4th Cir. 2013). Consequently, probationary appeals are not "any other matter covered by" Chapter 71 and ground (2) is also unavailable. Commenters do not explain how it would be lawful for agencies to provide paid official time to represent probationary employees without statutory authorization under 5 U.S.C. 7131. The provisions in the final rule that prohibit providing paid official time for such appeals reflect the statutory limits Congress placed on provision of official time. Thus, official time for these appeals would be unlawful regardless of whether this rule

addressed the subject; the rule's prohibition merely makes that pre-existing statutory limitation explicit.

Commenter 0500 argued that private attorneys are cost prohibitive and that, without official time, probationary employees will lose a realistic opportunity to challenge potentially improper or unlawful terminations. OPM recognizes that representation can assist employees in presenting their claims. For that reason, the final rule does not bar representation and does not prevent an appellant from selecting a union official, attorney, non-attorney representative, or other permissible representative. But the possibility that some appellants may prefer representation by a Federal employee during that representative's duty hours does not create a statutory entitlement to official time in this proceeding. Employees may represent themselves, obtain assistance from a union representative outside the representative's duty status, seek private or pro bono assistance, or pursue other independently available remedies in the appropriate forum.

Commenter 0500 also contended that restricting a Federal employee representative from claiming official time for representational work in a probationary or trial period appeal is arbitrary and capricious under the APA. OPM disagrees. Section 7131(d) does not create an automatic entitlement to official time for every form of representational activity. It permits official time in amounts agreed to by the agency and exclusive representative, subject to applicable law, rule, and regulation, and only where the time is reasonable, necessary, and in the public interest. As discussed above, section 7131(d) expressly does not authorize official time for matters not covered by Chapter 71 and not related to representing a labor organization. Thus, official time is statutorily unavailable under 7131(d) for probationary appeals. Conforming OPM regulations to statutory limits on agency authority is neither arbitrary nor capricious.

Further, even if 7131(d) did permit official time for probationary appeals, this final rule is a governmentwide regulation governing a specific OPM appeal process. OPM has determined that official time for the preparation or presentation of part 751 appeals is not warranted because

these appeals concern limited regulatory rights of employees still serving probationary or trial periods, are not part of the negotiated grievance process, and are designed to be resolved through a streamlined written-record procedure.

OPM also concludes that the restriction is reasonably tailored. The final rule does not regulate representational activity generally; it applies only to representational functions performed by a Federal employee representative in connection with an appeal under part 751 while in a duty status. It does not restrict communications on non-duty time, prevent employees from consulting a union representative, limit union activity unrelated to a part 751 appeal, or affect official time that may be available in other proceedings under a separate statutory or regulatory framework, including EEO proceedings where applicable. Nor does the rule prevent a union from choosing to assist a probationary employee; it simply does not require the employing agency to pay another Federal employee to perform that assistance during duty hours in this particular regulatory appeal process.

OPM further declines to limit the restriction only to the “presentation” of an appeal. Preparation and presentation are both core representational functions in an adjudicatory proceeding. A rule that barred official time only for the moment of filing or presenting an appeal, but allowed official time for all factual development, drafting, consultation, and strategy related to that appeal, would not meaningfully serve OPM’s objective of maintaining a streamlined and resource-conscious process. It is also not clear how section 7131(d) would authorize official time for preparation of an appeal in a matter not covered by Chapter 71. The final rule therefore applies to both preparation and presentation of part 751 appeals while preserving the appellant’s ability to obtain representation outside duty status. The final rule does not prohibit representational communications generally; it limits the use of duty time for representational functions in this specific OPM appeal process and in accordance with the limits Congress placed on negotiated official time.

Commenter 0516 asserted that the rule chills whistleblowing and protected union activity, and that the restriction on official time compounds those effects by signaling that employees who speak up will have little meaningful recourse. OPM disagrees. The final rule does not alter statutory whistleblower protections, prohibited personnel practice remedies, OSC jurisdiction, EEO rights, Inspector General processes, or any other independent remedy available by law. A protected disclosure, protected union activity, or complaint to an authorized forum does not lose protection because official time is unavailable for a Federal employee representative in a part 751 appeal. Likewise, the rule does not prohibit probationary employees from engaging in protected union activity during their probationary or trial periods. It addresses only whether a Federal employee representative may perform representational work for a part 751 appeal while in a paid duty status.

Commenter 0516 also contended that the rule would prevent employees from engaging in union activity during their probationary period by limiting a representative's use of official time to prepare an appeal for a removed probationary employee. OPM does not agree that this conclusion follows. Part 751 appeals are not proceedings under the FSLMRS, and probationary termination appeals do not become chapter 71 proceedings merely because an appellant selects a union representative. The final rule therefore does not diminish employees' rights to engage in protected union activity; it declines to attempt to circumvent the limits Congress placed on negotiated official time by purporting to create a taxpayer-funded official-time subsidy for representation in this limited OPM appeal process.

H. Limitation on Judicial Review

OPM is specifying in § 751.101(e) that “[a] party cannot obtain judicial review of a decision under this part.” It is also providing in § 751.109(d) that “[t]here is no further right of appeal of a final decision of OPM.” Commenters 0341, 0431, 0440, 0450, and others contended that, although lawful, restricting judicial review is unfair.

OPM disagrees. Section 751.101(e) does not withdraw a statutory right to judicial review. Rather, it reflects the absence of any statutory right to obtain judicial review of an OPM decision adjudicating a probationary or trial period appeal under this part. 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 the decisions issued under this rule are OPM decisions, not MSPB decisions. Nothing in 5 U.S.C. 7703, chapter 75, or chapter 77 grants a party a right to obtain judicial review of an OPM decision issued under a regulatory probationary-appeal process. Nor does the prior existence of MSPB review under former § 315.806 create an independent statutory entitlement to judicial review. Any judicial review previously available flowed from OPM's regulatory decision to route certain probationary appeals to the MSPB, whose final decisions are governed by 5 U.S.C. 7703. OPM has now exercised its authority, consistent with Civil Service Rule 11.6, to prescribe a different forum and different procedures for this limited class of appeals.

This conclusion follows from the structure of the CSRA. The CSRA “creates an integrated scheme of administrative and judicial review, wherein the Congress intentionally provided—and intentionally chose not to provide—particular forums and procedures for particular kinds of claims.” *Am. Fed’n of Gov’t Emps. v. Sec’y of the Air Force*, 716 F.3d 633, 636 (D.C. Cir. 2013) (alterations, citation, and quotation marks omitted). Congress allowed certain individual Federal employees who are affected by agency personnel decisions to challenge those decisions “by litigating their claims through the statutory scheme in the context of [a] concrete” dispute, with limitations imposed by Congress on the kinds of claims and remedies available. *See Am. Fed’n of Gov’t Emps. v. Trump*, 929 F.3d 748, 757 (D.C. Cir. 2019).

That structure is not accidental. The CSRA's review scheme is both “comprehensive and exclusive.” *Grosdidier v. Broad. Bd. of Govs.*, 560 F.3d 495, 497 (D.C. Cir. 2009). It is “comprehensive” in that “[i]t regulates virtually every aspect of Federal employment and prescribes in great detail the protections and remedies applicable to adverse personnel actions,

including the availability of administrative and judicial review.” *Nyunt v. Broad. Bd. of Gov.*, 589 F.3d 445, 448 (D.C. Cir. 2009) (cleaned up). It is “exclusive,” meanwhile, in that “[i]t constitutes the remedial regime for Federal employment and personnel complaints.” *Id.* The CSRA’s review scheme is exclusive even when “the CSRA provides no relief,” and in fact, “precludes other avenues of relief.” *Graham v. Ashcroft*, 358 F.3d 931, 935 (D.C. Cir. 2004). In other words, “the CSRA is the exclusive avenue for suit even if the plaintiff cannot prevail in a claim under the CSRA.” *Grosdidier*, 560 F.3d at 497. “Congress designed the CSRA’s remedial scheme with care, ‘intentionally providing—and intentionally not providing—particular forums and procedures for particular kinds of claims.’” *Id.* (quoting *Filebark v. Dep’t of Transp.*, 555 F.3d 1009, 1010 (D.C. Cir. 2009)).

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 (1988). Similarly, 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 the employees raised constitutional claims. 567 U.S. 1 (2012). These decisions confirm that the question is not whether judicial review might be desirable as a policy matter, but whether Congress has provided it for the action, employee, claim, and forum at issue.

In contrast to covered employees, probationers generally do not enjoy the same guaranteed right to appeal termination decisions to the MSPB, as Congress excluded them from the definition of “employee[s]” for purposes of the CSRA’s Chapter 75. *See* 5 U.S.C. 7511(a)(1). The probationary period has long been treated as an extension of the examining process, and Congress generally withheld ordinary chapter 75 adverse-action appeal rights from employees who have not completed the applicable service or status requirements.

Courts have repeatedly recognized that probationary employees’ appeal rights are “extremely limited” and that there is no statutory basis for ordinary MSPB jurisdiction over

probationary removals. *Mastriano*, 714 F.2d at 1155. The former MSPB appeal right for probationary employees was regulatory, not statutory. OPM's decision to provide a limited OPM administrative appeal therefore does not trigger the judicial-review provisions applicable to MSPB decisions, nor does it require OPM to create a new layer of judicial review by regulation.

Commenters 0341, 0371, and 0450 suggested that OPM's decisions cannot be final without court review, and that the ability to challenge agency decisions in court serves as a check on agency mistakes. Commenter 0483 added that denying access to Article III courts may also be unconstitutional since the Supreme Court has held that judicial review provides a forum for claims after administrative exhaustion requirements have been met by litigants. Commenters 0410 and 0483 asserted that the Supreme Court has recognized a presumption in favor of judicial review, having rejected arguments in cases like *Kucana v. Holder* that such a right may only be stripped by express exclusion in statute. *See Kucana v. Holder*, 558 U.S. 233 (2010). Other commenters, like 0255 and 0444, asserted that there is a generalized right of judicial review.

Unlike the circumstances cited in *Kucana*, the CSRA does not establish a right to judicial review for *any* aspect of the administrative process for resolving the probationary or trial period assessment. To the extent that OPM previously delegated this review authority to the MSPB, whose decisions are in turn subject to judicial review by the Federal Circuit, this grant of review by OPM is best described as an act of grace. In hindsight, rather than serving as an efficient way to resolve disputes arising during the probationary period, OPM believes that this grant unduly restricted agencies' ability to conduct probationary assessments by introducing the possibility of multiple rounds of administrative review and subsequent judicial review in a Federal appellate court.

While the CSRA does include a comprehensive remedial scheme, which may include judicial review, this review is limited. The CSRA provides that "[t]he reviewable agency actions are removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less." *Elgin*, 567 U.S. at 5-6. But courts have repeatedly dismissed a litany of other actions

arising under the CSRA (including, but not limited to, those relating to the APA). For example, in *United States v. Fausto*, 484 U.S. 439 (1988), the Court said “the absence of provision for . . . employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment . . . This conclusion emerges not only from the statutory language, but also from what we have elsewhere found to be an indicator of nonreviewability, the structure of the statutory scheme.” Similarly, in *Zummer v. Sallet*, 37 F.4th 996 (5th Cir. 2022), the court held the CSRA prohibits district courts from hearing claims seeking to reverse suspensions and terminations. Indeed, for decades, courts have consistently held “that it would be inappropriate . . . to supplement [the CSRA] regulatory scheme with a new judicial remedy.” *Bush v. Lucas*, 462 U.S. 367, 368 (1983). See also *Krafsur v. Davenport*, 736 F.3d 1032, 1034 (6th Cir. 2013) (“The [CSRA] spells out in painstaking detail the path an employee must follow if he wants to challenge a prohibited personnel practice”); *Fornaro v. James*, 416 F.3d 63, 67 (D.C. Cir. 2005) (Roberts, J.); *Dotson v. Griesa*, 398 F.3d 156, 163 (2d Cir. 2005) (“the CSRA creates an integrated scheme of administrative and judicial review for adverse employment actions . . . That scheme . . . affords no administrative or judicial review to judicial branch employees”) (internal quotation marks omitted); *Pathak v. Dep’t of Veterans Aff.*, 274 F.3d 28 (1st Cir. 2001) (holding the CSRA stripped the district court of subject matter jurisdiction to consider a suspension of less than 14 days); *Ryon v. O’Neill*, 894 F.2d 199, 204 (6th Cir. 1990) (“In short, the text of the CSRA, the structure of the review it establishes, and the legislative history of the Act, all lead ineludibly to the conclusion that Congress intended review of agency reassignment decisions to be confined to the specific procedures set out in the text of the CSRA”); and *Yokum v. U.S. Postal Serv.*, 877 F.2d 276 (4th Cir. 1989) (holding the CSRA “precludes judicial review of administrative personnel decisions adverse to the interests of nonpreference eligible postal workers”) (internal quotations omitted).

This is because the “CSRA nowhere grants any employee, whether in the excepted or competitive service, the right to bring an action in Federal district court.” *Galvin v. F.D.I.C.*, 48

F.3d 531 (5th Cir. 1995). “It is well established that the appeal rights of a probationary employee are extremely limited.” *Mastriano*, 714 F.2d at 1155. In fact, “Congress excluded probationary employees from the definition of ‘employee’ for most adverse action purposes.” *Piskadlo v. Veterans’ Administration, Merit Sys. Prot. Bd.*, 669 F.2d 82, 83 (1st Cir. 1982). Further, “[t]he language of the current statute establishes that Congress clearly intends review of the termination of probationary employees to be more limited than that of other employees.” *Bante v. Merit Sys. Prot. Bd.*, 966 F.2d 647, 650 (Fed. Cir. 1992). Put plainly, Congress intended to provide more review rights to regular employees than probationary employees. It does not stand to reason, therefore, that when taking great pains to, “in great detail,” prescribe the avenues of redress available under the CSRA, “including the availability of administrative and judicial review,” *Fausto*, 484 U.S. at 443, Congress intended to provide probationary appellants greater access to Article III judicial review than it provided to non-probationary employees.

Commenters’ reliance on the general presumption favoring judicial review is misplaced in this context. OPM recognizes that courts ordinarily presume that agency action is subject to judicial review. But that presumption may be overcome by the structure and purpose of a comprehensive statutory scheme. The CSRA is such a scheme. Unlike the statute at issue in *Kucana*, this is not a case in which OPM is attempting to make an otherwise reviewable statutory claim unreviewable merely by labeling the matter discretionary by regulation. Instead, Congress enacted a detailed personnel-review scheme that provides judicial review for some personnel actions, employees, and forums, while withholding it for others. The absence of judicial review here is therefore not an “extraordinary delegation” to OPM to insulate its own decisions from review; it is a consequence of Congress’s decision not to provide judicial review for probationary appeal decisions of this type.

OPM also disagrees that additional judicial review is necessary to make the process fair. Fairness must be assessed in light of the limited status of probationary and trial period employees, the narrow issues appealable under this part, and the government’s strong interest in

preserving the probationary and trial period as a meaningful extension of the examining process. The final rule provides a neutral administrative forum within OPM; requires an agency response and production of the agency record; allows the appellant to reply; permits representation; authorizes OPM to audit or investigate where necessary to determine an issue of material fact; permits a hearing where the written record is insufficient or credibility issues make one necessary and efficient; provides written decisions; authorizes appropriate corrective relief, including back pay where available; allows reconsideration; permits Director review before finality; and requires publication of final merits decisions, subject to applicable limits. In OPM's judgment, those procedures are adequate and proportionate for the limited regulatory appeal rights at issue, ensuring a fair process for an appellant.

Nor does this rule foreclose independent remedies that Congress or another lawful authority has made available outside part 751. Section 751.101(e) expressly preserves the ability of an employee to file a complaint, appeal, or other matter within the jurisdiction of the EEOC, an Inspector General, the MSPB, or OSC where an independent legal basis for such jurisdiction exists. Employees may continue to pursue discrimination claims through the EEO process and may obtain judicial review where the applicable civil-rights statutes and EEOC regulations authorize it. Employees may also pursue claims before OSC, MSPB, or another forum to the extent Congress has independently authorized such claims. What the final rule does not provide is a further administrative appeal or judicial review of OPM's own final decision under this limited probationary-appeal process.

Commenters also invoked *Wesson v. Jenkins*⁴¹ and *McLaughlin Chiropractic Associates, Inc. v. McKesson Corp.*⁴² to argue that OPM may not make its part 751 decisions final without judicial review. OPM disagrees. Neither decision addresses the CSRA, probationary

⁴¹ 2020 WL 1066531 (N.D. Ohio Mar. 5, 2020), *aff'd sub nom. Wesson v. Shoop*, 17 F.4th 700 (6th Cir. 2021).

⁴² 606 U.S. 146 (2025).

employment, OPM's authority to prescribe probationary-appeal procedures, or the availability of judicial review of an OPM decision issued under a regulatory civil service appeal process.

The facts and applicable legal requirements of both cases also diminish their relevancy. *Wesson* is a Federal habeas case involving collateral review of an Ohio capital conviction under 28 U.S.C. 2254. It says nothing about the CSRA's integrated remedial scheme for Federal personnel actions or the scope of review available to probationary Federal employees.

McLaughlin is likewise inapposite. There, the Supreme Court considered whether the Hobbs Act required a district court, in a private Telephone Consumer Protection Act enforcement action, to treat an FCC statutory interpretation as binding. The Court held that the Hobbs Act did not bind district courts in later civil enforcement proceedings because the Hobbs Act was silent as to that distinct enforcement-proceeding question. The Court's analysis turned on the structure of pre-enforcement review statutes and the absence of language or statutory context precluding later review in that specific setting.

The CSRA is materially different. This rule does not involve a civil enforcement proceeding, a private damages action, or a regulated party defending against liability. It involves a Federal employment dispute governed by the CSRA and Civil Service Rule XI. Unlike the Hobbs Act provision at issue in *McLaughlin*, the CSRA is not silent about review of Federal personnel actions. It creates a detailed and integrated system that specifies which employees may obtain administrative review, which actions are appealable, which forum may hear the appeal, and when judicial review is available.

Accordingly, OPM concludes that adding judicial review to this regulatory process would effectively recreate the multi-layered adjudicatory structure that E.O. 14284 directed OPM to replace, and would undermine the efficiency and accountability benefits of resolving probationary appeals through a limited administrative process tailored to the narrow issues historically available to probationary appellants. Further, OPM cannot unilaterally subject its decisions to judicial review; that takes an act of Congress. No provision in the CSRA provides

jurisdiction to Federal courts to review OPM decisions in probationary appeals. OPM cannot waive the Federal Government's sovereign immunity by regulation without Congressional authorization. OPM therefore declines to revise the final rule to provide any further administrative appeal or judicial review of final OPM decisions under part 751.

I. Reliance Interests, Recruitment, Retention, and Workforce Concerns

Commenter 0198 argued that Federal employees serving probationary or trial periods have a reliance interest in having appeals concerning terminations heard by MSPB. The commenter also argues that this rule will undermine the American public's reliance on a nonpartisan civil service.

OPM has considered these reliance concerns but concludes that they do not warrant reestablishing MSPB as the forum for these limited regulatory appeals. The reliance interest asserted by Commenter 0198 concerns a forum and set of procedures created by regulation, not a statutory entitlement to MSPB adjudication. Congress did not provide most probationary employees with the same statutory adverse-action appeal rights available to employees who have completed the applicable period of service. The former MSPB appeal route existed because OPM regulations assigned a narrow category of probationary appeals to MSPB. Because that forum was regulatory, OPM may prospectively revise it, provided OPM acknowledges reliance concerns and gives a reasoned explanation for the change.

OPM has done so here. The final rule is prospective and does not disturb terminations effected before the effective date of the rule, pending appeals, or final decisions issued under the prior framework. It also preserves the core substantive protections historically available to covered probationary appellants: claims that the action was based on partisan political reasons or marital status, and specified procedural claims for terminations based in whole or in part on conditions arising before appointment. The rule therefore does not leave covered employees without a remedy for the historically recognized grounds of probationary appeal; it changes the adjudicatory forum and procedures for those claims.

Further, employees currently serving an initial probationary period in the competitive service do not have a cognizable reliance interest in the Merit Systems Protection Board as the forum for probationary termination appeals, because any such expectation was extinguished when the President issued Executive Order 14284 over a year ago. That order rendered inoperative and without effect the prior regulatory framework in subpart H of part 315 that had designated MSPB as the venue for probationary appeals. Once those regulations were revoked, any prior, purely regulatory expectation that MSPB would hear probationary appeals ceased to exist, and probationary employees were on notice that continued service during the probationary period did not carry with it a right to MSPB adjudication of termination decisions. OPM notes that every competitive service employee currently serving their one-year probationary period was hired after the issuance of Executive Order 14284. Accordingly, they had no expectation of limited MSPB probationary appeals as those appeals did not exist when they were hired.

In addition, even if E.O. 14284 had not rescinded the prior MSPB forum for competitive service employees serving an initial probationary period, OPM would still find any reliance interests in that forum to be limited. Probationary and trial period employees enter service with notice that their appointments have not yet been finalized and that the probationary or trial period is part of the examining and assessment process. The historical appeal rights available during that period have been narrow. OPM does not discount that some applicants and employees may value the prior MSPB forum, but OPM does not believe that employees generally accepted or continued Federal employment principally in reliance on the availability of MSPB review for the limited grounds historically available to probationary appellants. In any event, any such reliance is outweighed by the benefits of establishing a streamlined process better tailored to the limited regulatory rights at issue.

Nor does the final rule undermine public reliance on a nonpartisan civil service. The rule does not authorize politically based dismissals, favoritism, retaliation, discrimination, or arbitrary personnel action. The Merit System Principles, prohibited personnel practices, EEO protections,

whistleblower protections, OSC jurisdiction, Inspector General authorities, and other independent accountability mechanisms remain in effect. The final rule also expressly preserves appeals alleging partisan political reasons or marital status. In addition, OPM will issue written decisions and has committed to making final merits decisions publicly available, subject to applicable legal limits. Public availability of those decisions will promote transparency, consistency, and public accountability in OPM's administration of part 751. Rather, OPM expects the final rule to strengthen the nonpartisan nature of the civil service. This is because it creates an appeals process to adjudicate allegations of discrimination based upon political affiliation. Currently no such process exists. If OPM were to decline to finalize the rule probationary employees would remain generally unable to appeal terminations based upon political discrimination.⁴³

Several commenters also argued that the rule will harm recruitment and retention by creating an actual or perceived degradation of due process. Commenters asserted that the rule could reduce the Government's ability to compete with the private sector for top talent; make it harder to fill specialized positions; increase the need to train replacement employees; discourage new ideas and viewpoints; deter employees from moving into better-fitting positions or management roles; and, in some cases, harm national security by making it harder to retain highly trained employees.

OPM has considered these concerns but does not agree that they justify retaining the prior MSPB process. The rule should be evaluated in light of what it actually does. It does not reduce the rights of employees who have completed probationary or trial periods and obtained the statutory protections associated with continued service. It does not eliminate EEO rights, whistleblower protections, prohibited-personnel-practice remedies, veterans' rights, or other independent statutory remedies. It does not eliminate all appeal rights for covered probationary

⁴³ OPM notes that other forums available for contesting discrimination based upon political affiliation, such as the Office of Special Counsel or an Inspector General report, permit employees to file a complaint but do not provide a direct right of appeal, as this rule does.

employees. And it does not authorize agencies to separate employees for unlawful reasons. Rather, it expands employees' rights by creating a focused adjudicatory process for a narrow category of appeals by employees whose appointments have not yet been finalized.

OPM further concludes that a clear and effective probationary system supports, rather than undermines, recruitment and retention. The Federal Government's ability to attract and keep high-performing employees depends not only on procedural protections but also on public trust, mission effectiveness, performance accountability, and the ability of agencies to build strong teams. A system that makes the probationary or trial period meaningful helps agencies identify employees who should receive finalized appointments, address poor fit or inadequate performance early, and avoid imposing long-term burdens on coworkers, supervisors, agency missions, and the public. High-performing employees benefit from a workplace in which performance matters and agencies can act before performance or conduct problems become entrenched.

OPM does not agree that the Government's prior investment in recruiting, onboarding, or training a probationary employee means the appointment should be finalized regardless of the agency's assessment. Those investments are important, but they are not dispositive. The purpose of the probationary and trial period is to determine, before an appointment becomes final, whether continued employment advances the public interest, the agency's mission, and the efficiency of the service. Treating sunk costs as a reason to retain an employee whose continued service does not satisfy that standard would defeat the purpose of the probationary system and would not serve agencies, employees, or the public.

OPM also does not agree that the final rule will deter talented applicants from Federal service. Applicants who seek a career in public service should expect both merit-based protections and meaningful performance accountability. The final rule advances both interests. It establishes limited appeal rights for unlawful or procedurally defective actions, provides a written-record process with agency record production and appellant reply, permits OPM to

require additional information and conduct audits, investigations, or hearings where necessary and efficient, provides reconsideration and Director review before finality, and requires public availability of final merits decisions subject to applicable legal limits. At the same time, it avoids importing procedures designed for tenured adverse-action appeals into the distinct probationary and trial period context.

OPM recognizes the importance of recruiting and retaining talented employees in specialized, mission-critical, and national-security-related positions. But OPM does not believe that resuscitating the prior MSPB forum for narrow probationary appeals is necessary to accomplish that objective. Agencies can and should recruit by communicating the value of Federal service, the importance of mission, the protections that continue to apply, and the expectation that employees will demonstrate during the probationary or trial period that continued service is in the public interest. A transparent, predictable, and timely appeal process supports that message better than a more complex process that is disproportionate to the limited rights at issue.

Accordingly, OPM concludes that the asserted reliance, recruitment, and retention concerns do not outweigh the benefits of the final rule. The rule strengthens the merit-based civil service by providing limited appeals, maintains the substantive protections historically available to covered probationary appellants, leaves independent statutory remedies intact, increases transparency through public final merits decisions, and establishes a streamlined adjudicatory process that better reflects the limited status of employees whose appointments have not yet been finalized.

J. Major Questions Doctrine

Commenters 0206 and 0207 asserted that this rule violates the major questions doctrine, suggesting the substance of this rule concerns an issue of vast “economic and political significance” and the “history and the breadth of the authority that [the agency] has asserted”

creates a question as to whether the CSRA provides the authority asserted, citing the Supreme Court's decision in *West Virginia v. EPA*, 597 U.S. 697, 721 (2022).

Commenters' reliance on *West Virginia v. EPA* is misplaced. The major questions doctrine applies only in "extraordinary cases" where the history and breadth of the authority asserted, together with the economic and political significance of that assertion, give a court reason to hesitate before concluding that Congress delegated the authority claimed. *Id.* at 721–24. This final rule does not present such a case. In *West Virginia*, EPA asserted novel authority under section 111(d) of the Clean Air Act to require generation shifting across the electric-power sector. The Court emphasized that EPA's approach would restructure the national mix of electricity generation, impose billions of dollars in compliance costs, affect electricity prices, require coal-plant retirements, eliminate jobs, and require EPA to balance national energy-policy considerations outside its traditional expertise. *Id.* at 714–16, 728–30.

This rule is materially different in both scope and statutory footing. It concerns the internal administration of a narrow class of Federal personnel appeals involving employees serving probationary or trial periods and certain supervisory or managerial probationary actions. It does not regulate private conduct, impose compliance obligations on the public, restructure any industry, or resolve a question of nationwide economic or social policy. OPM estimates the rule will result in first-year governmentwide costs of approximately \$2.75 million and recurring annual governmentwide costs of approximately \$1.5 million. Those figures are not remotely comparable to the economic consequences at issue in *West Virginia*, but the distinction is not merely one of dollars. OPM also does not claim an unheralded power from a vague, ancillary statutory phrase. Congress authorized the President to prescribe rules, regulations, and directives governing probationary periods before certain Federal appointments become final; assigned OPM responsibility for executing, administering, and enforcing civil service rules and regulations and advising the President on matters including tenure and separation; and provided that MSPB appeals exist only for actions made appealable to the Board by "law, rule, or

regulation.” 5 U.S.C. 1103(a)(5), (a)(7), 3301, 3302, 3321(a), 7701(a). Further, OPM’s predecessor agency, the Civil Service Commission, formerly exercised precisely this authority in hearing limited appeals of probationary terminations.

Congress also did not give probationary and trial period employees the same statutory adverse-action appeal rights provided to covered employees under chapter 75. Chapter 75’s definition of “employee” generally excludes individuals serving probationary or trial periods under initial appointments, and courts have long recognized that MSPB jurisdiction over probationary termination appeals was created by OPM regulation rather than by an independent statutory right. *See* 5 U.S.C. 7511(a)(1); *Mastriano*, 714 F.2d at 1155; *Bante*, 966 F.2d at 650.

Accordingly, this rule creates a forum and procedures for a limited regulatory appeal that OPM previously channeled to the MSPB. It does not assert the type of transformative, novel authority of vast economic and political significance that triggered the major questions doctrine in *West Virginia*. In any event, the rule rests on clear civil service authorities and longstanding regulatory practice.

K. Length of Comment Period

OPM received several comments, including Commenter 0013, that the proposed rule violated the APA. Specifically, this Commenter argued the 30-day comment period following the proposed rule was unlawfully short in violation of the APA. The Commenter 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; and E.O.s 12866 and 13563, which specify 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.⁴⁴

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 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 632 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.

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, "[e]xecutive [o]rders are not judicially enforceable."⁴⁵ 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

⁴⁴ 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.").

⁴⁵ *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).

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 13563.⁴⁶

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.

OPM also declines to reopen the comment period based on objections to the earlier rule implementing E.O. 14284 and Civil Service Rule XI. This rulemaking concerns the circumstances and procedures for covered appeals under part 751. To the extent commenters addressed Rule XI or the June 2025 rule, OPM has considered those comments where relevant to the design of the part 751 appeal process. But this rulemaking is not the vehicle for reopening all issues resolved in the prior rulemaking. OPM has provided notice and an opportunity to comment on the procedural rule now being finalized.

L. Comments from Federal Agencies

Federal agency commenters (0302, 0324, 0355, 0401, 0402, 0428, 0446, and 0508) supported the proposed rule. These commenters generally stated that probationary and trial periods are intended to allow agencies to determine whether employees should continue in Federal service before receiving the full procedural protections associated with completed probationary or trial service. The commenters stated that substituting a single appeal to OPM for MSPB appeals would better reflect the limited scope of these appeals and would promote more efficient, predictable, and timely resolution.

Several commenters stated that the current appeals process can discourage supervisors from taking timely action during probationary or trial periods. Commenters 0324, 0355, 0402, 0428, 0446, and 0508 stated that litigation risk, procedural burden, or uncertainty may lead

⁴⁶ *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).

supervisors to tolerate poor performance or misconduct, reassign employees, or allow employees to pass beyond the probationary or trial period without appropriate action. Commenters 0302 and 0401 also stated that many probationary appeals are dismissed for lack of jurisdiction or otherwise do not reach the merits, while still requiring agency resources.

Commenters 0324, 0355, 0446, and 0508 raised concerns about delay in MSPB proceedings, including delay associated with periods when MSPB lacks a quorum. Commenter 0446 described an appeal that remained unresolved for more than six years, and Commenter 0508 stated that delays can increase potential back pay exposure. Commenters 0324, 0355, 0401, 0402, 0446, and 0508 stated that OPM is an appropriate forum because of its Federal human resources role, adjudicatory experience, and ability to administer a centralized process.

Commenters further stated that the rule would support accountability, morale, and mission effectiveness by enabling agencies to address performance, conduct, and suitability concerns during the probationary or trial period. Commenter 0446 also recommended that OPM make final decisions publicly available and searchable online.

OPM agrees with commenters that probationary and trial periods serve an important evaluative function and that the appeal process for the limited matters covered by this rule should be efficient, predictable, and consistent with that function. OPM also agrees that routing these appeals to OPM will reduce unnecessary procedural burden, conserve MSPB resources, and promote timely resolution while preserving the employee appeal rights addressed in the rule. OPM is finalizing the rule to establish a single OPM appeal process for the matters covered by the rule.

OPM agrees with Commenter 0446 that public availability of final merits decisions will promote transparency, consistency, and predictability in the administration of these appeals. Accordingly, the final rule includes a publication provision at § 751.109(e). Subject to applicable legal limits, including requirements protecting privacy, privileged information, protected personal information, law-enforcement-sensitive information, and other information that may not

lawfully be disclosed, OPM will maintain a publicly accessible website containing final decisions issued under this part that address a party's claim on the merits.

IV. Section-by-Section Analysis

Part 11—Probationary and Trial Periods

OPM is adding part 11 to the amendatory instructions and list of subjects because this final rule includes conforming and corrective amendments to Civil Service Rule XI. These amendments are being made in the same rulemaking because they concern the same probationary and trial period framework that governs the appeal procedures established in new part 751.

OPM is correcting § 11.2(a)(2) by replacing the phrase “Reinstatement Priority List” with “Reemployment Priority List.” This is a technical correction. The applicable list is the Reemployment Priority List, and the amendment corrects the terminology used in the regulation without changing the substantive operation of § 11.2. This correction conforms § 11.2(a)(2) to the terminology used throughout OPM's existing placement regulations (under 5 CFR part 330, subpart B) and guidance, replacing an inaccurate label with the correct regulatory name of the existing program.

OPM is also amending § 11.5 to incorporate into the CFR certain forward-looking procedures established by E.O. 14284 for review during initial probationary and trial periods. Specifically, paragraphs (b)-(d) of Section 5 of E.O. 14284 set forth certain procedures for agencies to follow as part of their certification process for continued employment of employees serving probationary or trial periods. In the proposed rule, OPM specifically invited comment on whether and how Rule XI should be modified to expressly incorporate those provisions.

Although these provisions are already in effect and controlling, these requirements from E.O. 14284 are not currently reflected in Civil Service Rule 11. Therefore, OPM amends Rule 11 to incorporate these provisions into the regulations to provide administrative convenience and greater clarity for employees, supervisors, agency officials, and human resources practitioners.

OPM has structured the new requirements as paragraphs (e)-(h) in 5 CFR 11.5 and redesignated existing paragraphs accordingly to conform to CFR drafting conventions.

New § 11.5(e) requires each agency head to designate, in writing, one or more agency officials responsible for evaluating the continued employment of employees serving initial probationary or trial periods. This provision ensures that agencies identify accountable officials before the end of the probationary or trial period and that those officials are positioned to assess the needs and interests of the agency, the organizational goals of the agency or the Federal Government, and the efficiency of the service.

New § 11.5(f) requires the designated official to meet with the employee at least 60 days before the end of the employee's initial probationary or trial period. The meeting requirement is intended to make the end-of-period assessment a meaningful management judgment rather than a purely ministerial personnel action.

New § 11.5(g) requires the agency head or designated official, within 30 days before the end of the employee's initial probationary or trial period, to determine whether to finalize the employee's appointment or terminate the employee's service. OPM is adding this provision to align the regulatory text with the structure of Civil Service Rule XI, under which the agency must make an affirmative determination before the appointment is finalized.

New § 11.5(h) requires the agency head or designated official to certify in writing, before finalizing the appointment, that the employee's continued employment will advance the public interest. This certification requirement is central to Civil Service Rule XI. It confirms that completion of a probationary or trial period is not merely the result of the passage of time, but instead reflects an affirmative agency determination that finalizing the appointment is warranted.

OPM is redesignating former paragraphs (e) through (g) of § 11.5 as paragraphs (i) through (k). The redesignation is necessary to accommodate the new procedural provisions added as paragraphs (e) through (h).

OPM is not codifying as a standing CFR requirement the one-time provision in E.O. 14284 requiring agency heads, within 15 days of the order, to identify employees whose initial probationary or trial periods ended 90 days or more from the date of the order. That directive was time-limited and implementation-specific. The permanent CFR text instead codifies the continuing obligations that agencies must follow for employees serving initial probationary or trial periods on an ongoing basis.

Part 230—Organization of the Government for Personnel Management

OPM is revising § 230.402(f) to conform the appeal procedures for emergency-indefinite employees to new part 751. The final rule clarifies that the first year of service of an emergency-indefinite employee is a probationary period and that an agency may terminate the appointment during that period. Where an emergency-indefinite employee is entitled to appeal a termination during the probationary period, the applicable procedures are those set forth in part 751. This conforming change ensures that the appeal route for emergency-indefinite employees is consistent with the new OPM-administered probationary appeal process.

Part 315—Career and Career-Conditional Employment

OPM is revising § 315.201(a) to conform the career-conditional employment regulations to Civil Service Rule XI. The revised text provides that a person employed in the competitive service for other than temporary, term, or indefinite employment is appointed as a career or career-conditional employee subject to the probationary period required by part 11. This amendment clarifies that the probationary-period requirement for career and career-conditional employees is now governed by Civil Service Rule XI in part 11, while preserving the existing career-tenure service requirement.

OPM is also revising § 315.908(b) to replace MSPB with OPM as the forum for appeals by supervisors or managers assigned to nonsupervisory or nonmanagerial positions for failure to complete a supervisory or managerial probationary period. The appealable issues remain limited to allegations that the agency action was based on partisan political reasons or marital status.

This amendment conforms § 315.908 to the new appeal procedures in part 751 and to E.O. 14284's direction that OPM prescribe the circumstances and procedures for probationary and trial period appeals.

Part 432—Performance-Based Reduction in Grade and Removal Actions

OPM is revising § 432.102(f) to clarify which employees are excluded from the performance-based action procedures in part 432. The revised exclusions distinguish between competitive service employees serving probationary periods under initial appointments, competitive service employees in appointments requiring no probationary period who have not completed one year of current continuous employment, preference eligible employees in the excepted service who have not completed one year of current continuous employment, and non-preference eligible employees in the excepted service who have not completed two years of current continuous service in the same or similar positions in an Executive agency under other than a qualifying temporary appointment. These amendments align part 432 coverage with the statutory definitions governing adverse-action coverage and with the new probationary and trial period appeal framework.

Part 751—Probationary and Trial Period Appeals

OPM is adding new part 751 to establish the procedures for appeals that were formerly routed to the MSPB under regulations that have been rescinded or superseded following E.O. 14284. New part 751 identifies the employees who may appeal to OPM, the issues that may be appealed, the deadlines and procedures for filing appeals, the required agency response, representation rules, OPM's adjudication procedures, reconsideration, Director review, finality, and publication of final decisions.

Section 751.101—Right To Appeal

Section 751.101(a) establishes the basic right to appeal to OPM. Covered employees may appeal a termination during a probationary or trial period required under part 11 or another authority administered by OPM, and covered supervisors or managers may appeal assignment to

a nonsupervisory or nonmanagerial position for failure to complete a supervisory or managerial probationary period required under subpart I of part 315. This provision implements Civil Service Rule 11.6 and replaces the prior MSPB forum with an OPM-administered appeal process.

In the final rule, OPM has revised § 751.101(a) to conform the general right-of-appeal provision to the appealable actions already addressed elsewhere in § 751.101. In addition to terminations during a probationary or trial period and assignments to nonsupervisory or nonmanagerial positions following failure to complete a supervisory or managerial probationary period, the final text now expressly references an agency's decision not to certify continuation of an appointment and an agency's failure to certify and finalize an appointment. This revision is clarifying and nonsubstantive. It does not create any new appeal right, expand the grounds for appeal, alter the burden of proof, or change the procedures governing appeals under part 751. Rather, it ensures that paragraph (a) accurately reflects the actions addressed in paragraph (c) and avoids any implication that noncertification or failure-to-certify claims identified in paragraph (c) fall outside the threshold right-of-appeal provision. Such claims remain appealable only to the extent permitted by paragraphs (b) through (d), including the limited grounds specified in paragraph (c).

Section 751.101(a) also establishes that an individual serving a probationary period does not have a right to appeal their termination under this part if the employee has completed one year of current continuous service under other than a temporary appointment limited to one year or less and is not otherwise excluded by the provisions of that subpart. Instead, the appropriate procedures established under 5 CFR part 432 or 752 may apply unless otherwise excluded by the provisions of those parts. OPM notes that it has amended referenced provisions of 5 CFR parts 432 and 752 in its rulemaking under RIN 3206-AO80 (90 FR 17182); however, the cross-references in this rule would be unaffected by the changes initiated in that rulemaking.

Section 751.101(b) places the burden on the appellant to establish timeliness, OPM jurisdiction, and the appealable issue by a preponderance of the evidence. OPM is adopting this standard because the appellant is the party invoking OPM's limited regulatory jurisdiction. The standard is also consistent with the narrow scope of probationary and trial period appeal rights and with OPM's intent to provide a streamlined process focused on threshold jurisdictional and appealability issues.

Section 751.101(c) identifies the issues that may be appealed to OPM. These issues mirror those under subpart I and the now-rescinded subpart H of part 315. An employee may appeal allegations that a covered action was based on partisan political reasons or marital status. For this purpose, the covered actions include terminations not required by statute, assignments to nonsupervisory or nonmanagerial positions under § 315.907, an agency's decision not to certify continuation of an appointment during a probationary or trial period, and an agency's failure to certify and finalize such an appointment.

Section 751.101(c)(2) preserves a limited procedural appeal for terminations based in whole or in part on conditions arising before appointment. In those cases, the employee may challenge whether the agency failed to provide advance written notice stating the reasons for the proposed action, a reasonable time to answer and furnish affidavits, and a written decision at or before the effective date of the action. These procedures preserve the historically limited procedural protections associated with pre-appointment reasons without converting probationary or trial period terminations into ordinary adverse actions under chapter 75.

Section 751.101(d) provides that no other issues are appealable under part 751. OPM is adopting this limitation to maintain the narrow historical scope of probationary appeal rights and to implement E.O. 14284's direction to establish streamlined procedures. The rule does not make every alleged violation of Civil Service Rule XI independently appealable. For example, an alleged failure to provide written notice of the effective date under § 11.5(i), or an alleged failure to conduct the meeting required under § 11.5(f), is not by itself an independent basis for reversal

under part 751 unless the employee also establishes one of the appealable issues identified in § 751.101(c).

Section 751.101(e) provides that part 751 is the sole means of appealing terminations during probationary or trial periods, but clarifies that the rule does not preclude an employee from filing a complaint, appeal, or other matter within the jurisdiction of the EEOC, an Inspector General, the MSPB, the Department of Labor Veterans' Employment and Training Service, or OSC where an independent legal basis for such jurisdiction exists. OPM is revising the exclusivity language to make clear that part 751 is exclusive only for appeals covered by this part and that the rule does not displace independent statutory or regulatory remedial schemes administered by other entities.

Section 751.101(e) also provides that a party cannot obtain judicial review of a decision under part 751. OPM is including this language to reflect the limited regulatory nature of the appeal right and the absence of a statutory judicial-review provision for OPM decisions issued under this part. This limitation does not bar judicial review where another statute independently provides it, such as in certain discrimination matters processed through the EEO framework.

OPM has revised the exclusivity language in § 751.101(e) to refer to the “sole means of appealing a covered action under § 751.101(a),” rather than the sole means of appealing “terminations.” This change is clarifying and nonsubstantive. As revised, § 751.101(a) identifies several covered actions, including termination during a probationary or trial period, assignment to a nonsupervisory or nonmanagerial position after failure to complete a supervisory or managerial probationary period, noncertification of continuation of an appointment, and failure to certify and finalize an appointment. Referring only to “terminations” in the exclusivity provision could create unnecessary ambiguity about whether the same OPM appeal procedures apply to the other covered actions identified in § 751.101(a).

Section 751.101(f) defines “employee” for purposes of part 751. The definition limits part 751 coverage to employees who had comparable regulatory appeal rights before E.O. 14284

or who are otherwise specifically covered by the final rule. The definition includes certain competitive service probationers, supervisors and managers serving supervisory or managerial probationary periods, emergency-indefinite employees in their first year of service, and employees appointed under part 307 before the end of their first year on an initial appointment.

OPM is also clarifying that excepted service employees outside part 307 are not covered by part 751 and may not appeal a trial period termination under this part unless otherwise entitled by statute. This limitation preserves the pre-E.O. scope of appeal rights. Before E.O. 14284, subpart H of part 315 did not create a general appeal right for all excepted service employees serving trial periods. The final rule therefore does not create a new across-the-board trial period appeal right for excepted service employees who did not previously possess one.

Section 751.102—Procedures for Submitting Appeals

Section 751.102 establishes the procedures for filing appeals and requests for reconsideration. OPM is requiring use of an electronic filing system to promote efficient case intake, consistent service, reliable records, and timely adjudication.⁴⁷ OPM is replacing the placeholder reference to a specific URL with a reference to the electronic filing system identified on OPM's website. This approach avoids placing a particular web address in regulatory text and allows OPM to update filing instructions as technology or system design changes.

Section 751.102(b) establishes a 30-calendar-day deadline for filing an appeal. The rule specifies how to compute the filing deadline, including treatment of weekends and Federal holidays, and provides that late filings may be excused only upon a showing of good cause. This deadline promotes prompt resolution of probationary and trial period appeals while preserving limited flexibility for circumstances warranting an extension.

Section 751.102(c) requires parties and representatives to register as e-filers and accept electronic service, unless OPM grants an exemption for good cause. The final rule also removes

⁴⁷ Commenter 0483 suggests that establishing an e-filing system is more complex than OPM anticipates. OPM disagrees and has already established an e-filing system.

the sentence suggesting that withdrawal of e-filing registration may preclude future re-registration. OPM is deleting that language to avoid an unnecessarily categorical consequence that could impair access to the appeal process. OPM will instead administer registration, withdrawal, re-registration, and good-cause exemptions through the procedures posted on OPM's website and case-specific instructions.

Section 751.103—Form and Content of Appeal and Agency Response

Section 751.103(a) establishes the required contents of the initial appeal, including the basis for the appeal, identifying and contact information for the appellant and any representative, and supporting documentation. This provision ensures that OPM and the agency have sufficient information to identify the appealed action and the issues the appellant is raising.

Section 751.103(b) establishes the agency response requirement. The final rule adds a list of documents that must be included, at a minimum, in the agency record of the action. The agency record must include all documents considered or relied upon by the agency in taking the action, the notice of action and effective date, documents showing the appellant's appointment, service history, and probationary or trial period status, any written certification, noncertification, or failure-to-certify record under 5 CFR part 11, any documents supporting the agency's asserted reasons, and a certification that the agency has produced the complete record considered by the deciding official or otherwise relied upon by the agency. In addition, OPM is specifying that the agency must produce the complete agency record to OPM, but may redact or withhold information on the copy served upon the appellant to the extent necessary to comply with 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.

OPM is adding this minimum-record requirement to promote fairness, transparency, and efficient adjudication. Because part 751 appeals will generally be decided on the written record, it is important that the agency provide the materials necessary for OPM to determine jurisdiction,

timeliness, appealability, and the merits of any appealable claim. The agency certification requirement also addresses concerns that an agency could selectively produce records or omit materials relevant to the appealed action.

Section 751.103(c) permits the appellant to file a reply to the agency response within 15 calendar days. The final rule clarifies that the reply generally may address only factual and legal issues raised by the agency response but may raise a new allegation of error if the basis for that allegation rests on information first disclosed in the agency response or if OPM grants leave for good cause. OPM is adding this exception to avoid unfairness where an appellant could not reasonably have raised an issue before seeing the agency's record or response. This change balances the need for a streamlined process with the need to provide a meaningful opportunity to respond to newly disclosed information.

Section 751.103(d) allows the appellant, the appellant's representative, and the agency to inspect OPM's appellate record upon request, subject to any Privacy Act requirements, classified information or national security restrictions, OPM protective orders, or any other applicable limitations required by law. Section 751.103(e) requires parties to serve each other with copies of information submitted to OPM and to include a certificate of service, 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. These provisions help ensure that each party has access to the materials OPM may consider.

Section 751.103(f) allows OPM to accept untimely filings upon a showing of good cause. This provision gives OPM limited flexibility to address unusual circumstances while preserving the overall timeliness requirements of part 751.

Section 751.104—Employee Representatives

Section 751.104 permits an appellant to select a representative of the appellant's choice, subject to specified limitations. OPM is retaining the appellant's ability to obtain assistance while clarifying that, if the selected representative is a Federal employee, the representative may

not perform representational functions in a 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. OPM is adopting this limitation because part 751 appeals are regulatory probationary or trial period appeals and are not proceedings under chapter 71. Nothing in § 751.104 prevents an appellant from selecting a union official or other representative, but the rule does not create a right to paid official time for that representation.

Section 751.104 also permits OPM or the responsible agency 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. Because Federal employee representatives may not perform representational functions while in a duty status, additional exceptions for priority Government needs or unreasonable Government costs are unnecessary, and the final rule does not include them. This limitation is consistent with OPM's existing approach in other administrative appeal contexts and is intended to protect agency operations and the integrity of the adjudicatory process.

Section 751.105—Adjudication of Appeals

Section 751.105(a) provides that OPM will assign personnel to adjudicate appeals filed by employees of agencies other than OPM. The final rule adds safeguards to ensure that OPM adjudicators are insulated from officials who participated personally and substantially in the challenged personnel action or provided case-specific advice concerning that action. OPM is adding this language to strengthen the appearance and reality of neutral adjudication.

Section 751.105(a) also prohibits OPM adjudicators from considering material *ex parte* communications concerning the merits of an appeal. If such 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. This provision promotes fairness and transparency while recognizing that some information may be protected from disclosure by statute, regulation, privilege, or other applicable legal limits.

The final rule further provides that no employee may adjudicate an appeal if the employee has a relationship with the appellant or, during the preceding two years, was an employee of the agency that is a party to the appeal. This restriction is designed to reduce conflict concerns and promote confidence in OPM's adjudicatory process. When necessary, OPM may assign or obtain the services of an administrative law judge to preside over an appeal.

Section 751.105(b) provides special procedures for appeals filed by OPM employees. OPM will assign an administrative law judge to adjudicate such appeals. To preserve both decisional independence and constitutionally sufficient supervision, OPM will not disturb the administrative law judge's initial decision in an OPM-employee appeal unless a party shows harmful procedural irregularity, clear error of law, or a material factual error that affected the outcome. This approach provides an additional structural safeguard when OPM is both the employing agency and the adjudicatory agency.

OPM has considered whether assigning an administrative law judge to adjudicate appeals is consistent with 5 U.S.C. 554, 556, and 557. OPM concludes that it is. Those provisions do not prohibit OPM from assigning a properly appointed administrative law judge to serve as a neutral adjudicator in appeals filed by OPM employees or where there are other conflict-of-interest concerns. Section 554 applies only to adjudications required by statute to be determined on the record after opportunity for an agency hearing and, in any event, excludes matters involving the selection or tenure of an employee, except matters involving administrative law judges appointed under 5 U.S.C. 3105. Sections 556 and 557 apply when a hearing is required to be conducted under section 556. Probationary termination appeals under this part are employee-tenure matters and are not formal APA adjudications under sections 554, 556, and 557.

OPM is assigning an administrative law judge in OPM employee appeals for a narrower and different reason: to insulate adjudication of appeals filed by OPM's own employees from ordinary agency involvement and to promote the appearance and reality of neutral decision-making. This approach is consistent with the approach used by the MSPB at 5 CFR 1201.13 to

adjudicate appeals arising from its employees. The assignment of an administrative law judge under this section does not, by itself, make sections 554, 556, or 557 applicable to the appeal, nor does it create any procedural right not otherwise provided by this part.

Section 751.105(c) authorizes OPM to audit or investigate an agency's action. Where OPM conducts an audit or investigation to ascertain additional facts, it will provide the parties with the results and provide a reasonable opportunity to submit arguments or additional information in support of their positions. OPM notes that the final rule removes the phrase "and exclusive" from "sole and exclusive discretion" as an editorial simplification; OPM retains discretion to determine whether an audit or investigation is warranted. The section also explains when a hearing may be used: where the written record is insufficiently developed to decide a material factual issue, or where a disputed issue of witness credibility is material to the outcome. OPM is adopting this approach to preserve a primarily written, streamlined process while allowing additional fact development when necessary and efficient.

Commenters 0004, 0454, 0455, and others asserted that the phrase "in the interest of justice," which describes when OPM may audit or investigate an agency's action, is unclear. OPM agrees and is revising the standard for audits and investigations in § 751.105 to provide greater clarity and to address commenters' concerns that the proposed phrase "in the interest of justice" is vague. Under the final rule, OPM may request additional information from a party, and it may audit or investigate an agency action when it determines, in its sole discretion, that the existing record is insufficient to resolve a material issue within OPM's jurisdiction, and that the audit or investigation is reasonably likely to produce information material to resolving that issue.

This standard preserves OPM's ability to develop the record where necessary while preventing audits or investigations from becoming routine discovery. Part 751 appeals will generally be resolved on the written record because the appealable issues are narrow. But OPM recognizes that a written-record process must include a mechanism to address material gaps, inconsistencies, or credibility issues that cannot fairly be resolved on the existing submissions.

The final rule therefore permits targeted audits or investigations where additional fact development is needed to decide jurisdiction, timeliness, appealability, or the merits of a claim properly before OPM.

The standard also limits OPM's authority. An audit or investigation must be tied to a material issue within OPM's jurisdiction under § 751.101(c). OPM will not conduct an audit or investigation based solely on speculation, generalized disagreement with the agency's action, or a request for discovery unrelated to an appealable issue. The rule thus provides a safeguard against incomplete or unreliable records without creating an automatic right to discovery or a hearing in every case.

Paragraph (d) establishes that OPM will provide written notification of its decision. Paragraph (e) establishes OPM's authority to award remedies under 5 U.S.C. 1103(a)(5) and 5596(b). Where OPM grants an employee's appeal, it will order relief including correction of the personnel action and any back pay, interest, and reasonable attorney fees consistent with 5 CFR part 550 subpart H. Paragraph (e) also establishes that if an agency timely requests reconsideration of an initial decision or OPM reopens and reconsiders an initial decision, the agency must continue to provide the relief ordered unless OPM issued an order staying any such relief. OPM will not order a stay, however, that would deprive the employee of pay and benefits while the initial decision is pending reconsideration.

Section 751.106—Sanctions and Protective Orders

Section 751.106 authorizes OPM to issue protective orders and cease-and-desist directives. OPM stated in the proposed rule that it believes that MSPB procedures, while providing for protective orders, are inadequate to protect Federal employees from threats and harassment.

Some commenters objected that proposed § 751.106 gave OPM broad protective order authority and could chill lawful communications by appellants, witnesses, employees, or union representatives. Commenters objected in particular to language that could be read to restrict

communications that might foreseeably lead to harassment or to prohibit use of any information related to an appeal for any purpose unrelated to the adjudication.

OPM has considered these comments and is narrowing § 751.106 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 751, 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 751 and to the specific purposes identified in § 751.106(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, § 751.106 is a tailored case-management provision designed to protect the fairness and integrity of the adjudicatory process.

Commenter 0111 suggested that OPM should revise MSPB regulations including, for example, by directing MSPB to be more generous in its use of protective orders to prevent harassment and other types of improper behavior and address other areas in which OPM believes the MSPB's actions, or lack thereof, are deficient.

Commenter 0111 is not the first to propose OPM issue regulations superimposing its preferred approach on MSPB when handling classes of appeals before the Board. In fact, OPM has previously issued regulations directing MSPB how to handle appeals from reduction in force (RIF) actions. 50 FR 35507 (1985). However, OPM lacks statutory authority to dictate appeal procedures—whether RIFs, or any other class of personnel appeals—to the MSPB when the venue for the appeal is the MSPB. As explained in *American Federation of Government Employees v. OPM*, OPM exceeds “its designated statutory authority by issuing a regulation that purports to instruct the MSPB how to conduct personnel appeals.” 821 F.2d 761, 768 (D.C. Cir. 1987). That authority lies with the MSPB itself. “Congress’ specific delegation to MSPB of autonomy over its own appellate procedures compels just the opposite conclusion: if OPM chooses to use the MSPB for dispute resolutions, it must take that statutory device as it finds it.” *Id.*, at 769.

Section 751.106(b) authorizes OPM to impose case-related consequences when a party fails to comply with an order issued under § 751.106(a). OPM may draw adverse inferences, prohibit the noncompliant party from introducing evidence or relying on parts of the record, or eliminate appropriate portions of the noncompliant party's filings or submissions from consideration. These sanctions are necessary to give effect to OPM's orders and to protect the fairness and integrity of the adjudicatory process.

Commenter 0292 raised a concern that OPM's authority to issue preventative protective orders could be exercised in bad faith and that an appellant could lose an appeal based on an alleged violation of such an order. OPM has considered this concern and has revised the final rule to reduce the risk of overbroad or improper use of protective-order authority.

As finalized, § 751.106 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 751.106 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 § 751.101(c).

OPM further disagrees that the possibility of bad faith justifies eliminating protective-order authority altogether. Any adjudicatory system requires tools to protect parties, witnesses, personal information, nonpublic appeal materials, and the integrity of the record. The final rule addresses the risk identified by Commenter 0292 by narrowing the grounds for protective orders, requiring tailoring, preserving lawful protected communications, limiting available sanctions to case-related consequences, and providing written decisions subject to reconsideration and Director review before finality. OPM therefore declines to remove preventative protective-order authority, but has narrowed and clarified § 751.106 to ensure that the authority is used only to protect the fairness and integrity of the part 751 adjudication.

Sections 751.107, 751.108 and 751.109—Reconsideration, Director Review, and Finality

Section 751.107 creates a process for reconsideration of an initial decision. Either party may request reconsideration within 30 calendar days, and OPM may also reopen and reconsider an initial decision on its own initiative. The grounds for reconsideration include erroneous material factual findings, legal error affecting the outcome, new and material evidence or legal argument that was unavailable despite due diligence when the record closed, or other good cause. OPM is including this reconsideration process to provide an internal mechanism for correcting material errors while preserving the streamlined nature of part 751 appeals.

Section 751.108 permits the OPM Director, on the Director's own initiative and before a decision becomes final under § 751.109, to reopen and reconsider an initial decision or a reopened and reconsidered decision. In response to comments expressing concern that Director review could be too open-ended, the final rule identifies nonexclusive considerations that may inform the Director's exercise of this authority. These include whether the decision may contain clear legal error, may rest on an erroneous finding of material fact, may involve an issue of exceptional importance, may affect the governmentwide administration of civil service laws, rules, regulations, or OPM policy, may conflict with another OPM decision, or may otherwise warrant Director review.

This revision preserves the Director's responsibility for final agency action and ensures principal-officer oversight of important legal, factual, consistency, policy, and governmentwide civil service issues before finality attaches. At the same time, the final rule clarifies that Director review is sua sponte and does not create a separate right for a party to request Director review; parties seeking reconsideration must proceed under § 751.107. If the Director reopens and reconsiders a decision under § 751.108, the Director may take any action available under § 751.107(c).

Commenters 0206, 0207, 0440, 0452, and others contended that the rule violates the Appointments Clause of the Constitution, pursuant to *Lucia v. SEC*, in which the Supreme Court

held that ALJs presiding over enforcement proceedings were exercising significant authority and therefore constituted Officers of the United States. *See Lucia v. SEC*, 585 U.S. 237 (2018).

Commenters argue that adjudicators under this rule will similarly exercise significant authority.

OPM agrees in part. Although it is not judicially established that adjudicators under this rule will be Officers of the United States, there are substantial arguments that they will be. To ensure consistency with the Appointments Clause, the Director of OPM—who is authorized by 5 U.S.C. 1103(a)(2) to appoint individuals to be employed by OPM—will appoint, or ratify the appointment of, each official who adjudicates appeals under this rule. Article II vests executive power in the President, who may rely on subordinate officials to carry out that authority. OPM recognizes, however, that supervision and review by the Director do not by themselves resolve the Appointments Clause question. In both *Freytag v. Commissioner*, 501 U.S. 868 (1991), and *Lucia v. SEC*, 585 U.S. 237 (2018), the adjudicators held to be officers were subject to review by principal officers; the availability of higher-level review therefore does not mean that an adjudicator is not an officer subject to the Appointments Clause. *United States v. Arthrex, Inc.*, 594 U.S. 1 (2021), in turn, addressed whether administrative patent judges were principal or inferior officers—not whether they were officers at all—and confirmed that decisions of inferior officers must be subject to direction and review by duly appointed principal officers. Because the Director will appoint or ratify the appointments of the officials who adjudicate appeals under this rule and retains full review authority over their decisions, the rule satisfies both requirements. This final rule thus responds to neutrality and accountability concerns raised by commenters while preserving final agency supervision within OPM’s record-based adjudicatory framework.

Section 751.109 describes the process by which OPM’s initial decision becomes its final decision. Under § 751.109(a), 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 § 751.107 or the Director reopens the decision under § 751.108. Under § 751.109(b), a timely reconsideration request 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 intervenes, and if OPM grants the request, the resulting reopened and reconsidered decision becomes final as provided in that paragraph. Under § 751.109(c), an untimely request does not suspend finality. Under § 751.109(d), a decision by the Director 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 § 751.109.

OPM views this appellate process as necessary to ensure that the Director is able to sufficiently supervise adjudicators and avoid any serious constitutional concerns from having subordinate officials wield executive authority. Under Article II, the Constitution vests executive power in the President who must rely upon subordinates to exercise his authority. Adjudicators assigned to adjudicate appeals under this rule exercise significant authority and are therefore likely inferior officers of the United States. Accordingly, their appointments will be made, or ratified, by the Director consistent with the Appointments Clause and 5 U.S.C. 1103(a)(2), and their decisions will be supervised and reviewable by the Director, a principal officer appointed by the President with Senate consent.

Section 751.109(e) requires OPM to maintain a publicly accessible website containing final decisions issued under part 751 that address a party's claim on the merits, subject to applicable limits. Final merits decisions not made publicly available must be made available upon request by a concerned party. OPM is including this provision to promote transparency, consistency, and predictability in the administration of part 751 while preserving appropriate limits on public disclosure.

Part 752—Adverse Actions

OPM is revising § 752.201(b)(1) and (2) to clarify coverage for suspensions of 14 days or less. The revised text distinguishes between competitive service employees who have completed a probationary period and competitive service employees who have completed one year of

current continuous employment in the same or similar positions under other than a temporary appointment limited to one year or less. This amendment aligns the coverage language with the statutory and regulatory distinction between probationary employees and employees who have acquired coverage under the adverse-action procedures.

OPM is revising §§ 752.401(c)(1), 752.401(c)(2)(i), 752.401(d)(10), and 752.401(d)(12) to conform part 752 coverage to Civil Service Rule XI and the new part 751 process. The revised text excludes competitive service employees serving probationary periods unless they meet the applicable coverage requirements and separately addresses nonpreference eligible employees serving trial periods under initial excepted service appointments pending conversion to the competitive service. These conforming amendments ensure that employees who remain in probationary or trial period status are directed to the appropriate limited appeal procedures, while employees who have obtained statutory adverse-action coverage remain governed by part 752 where applicable.

V. Regulatory Analysis and Related Comments

A. Statement of Need

On April 24, 2025, the President issued E.O. 14284, which rescinded the regulations in subpart H of part 315 of title 5, including the circumstances and procedures for filing an appeal from removal during a probationary period. Thus, this rulemaking is necessary to prescribe the circumstances under, and procedures by which, employees terminated during a probationary or trial period may appeal to OPM. OPM believes this rule balances the needs of promoting greater accountability of the Federal workforce while also providing an avenue for probationary or trial period employees to appeal removals. Reinstating MSPB procedures would unnecessarily add complexity to a process designed for Federal agencies to evaluate whether it is in the public's interest to retain newly hired employees into the Federal service. When appealing to the MSPB, employees have a statutory right to a hearing when the matter is within the MSPB's jurisdiction. 5 U.S.C. 7701(a). And before reaching a hearing, MSPB regulations allow the parties to engage

in discovery. 5 CFR 1201.71 - 1201.75. These procedures unnecessarily delay and increase costs of the adjudication of appeals that could be more efficiently accomplished by limiting the transactional costs of litigation and adjudication.

Many Federal agencies and several commenters who support the shift of probationary appeals from MSPB to OPM cite the fact that MSPB was designed for tenured employee appeals and that OPM can adjudicate probationary appeals more efficiently and expediently. This shift is expected to reduce unnecessary litigation. Furthermore, agencies cite the administrative burden of litigation at MSPB as a troublesome reason why supervisors and managers do not remove ineffective employees during probationary or trial periods and allow these employees to become tenured.

As of September 30, 2025, roughly 1,037 cases were pending before the full Board at MSPB headquarters awaiting petition-for-review decisions, following a period when the Board lacked a quorum to issue decisions. Backlogs of that size do not clear quickly. Moreover, of the 9,050 cases that the MSPB processed in FY 2025, only 55.8 percent were resolved within 120 days. This means that nearly half of Federal employees who filed appeals waited more than four months for an initial decision. This is before any petition for review to the full Board.⁴⁸ Allowing probationary appeals to take months, or even years, when accounting for full MSPB review is inconsistent with notions of efficient adjudication. There is a cost to delay, and this is especially the case for agencies and probationary employees where the grounds for review are statutorily limited.

Under this rule, OPM will adjudicate a limited number of issues using streamlined procedures that reduce the administrative burden to the government. OPM believes, along with the Federal agencies that commented, that this administrative burden has been one factor that has

⁴⁸ Merit Systems Protection Board, *FY 2025 Annual Performance Report 14* (2025), available at https://www.mspb.gov/about/annual_reports/MSPB_APR_for_FY_2025.pdf.

inhibited supervisors from fully utilizing probationary periods.⁴⁹ Additionally, this rule gives OPM jurisdiction over appeals from supervisors and managers assigned to nonsupervisory and nonmanagerial positions who fail their probationary period. This is necessary to streamline the procedures of all appeals related to probationary periods and promote consistency between how such probationary periods are treated.

Numerous commenters argued that OPM has not adequately explained the benefits of the rule or justified moving probationary appeals from MSPB to OPM. Many commenters defended current MSPB procedures. Commenters 0342, 0400, 0409, and 0503 maintained that the proposed rule does not identify a failure in the MSPB process, evidence of a problem requiring change, or any benefit from that change. Commenters 0440 and 0450 argued that the rule transfers adjudications from MSPB to OPM without explaining why that transfer is beneficial, and state that MSPB is a preferable adjudicatory organization. Commenters 0444 and 0587 stated that OPM must explain in greater detail why MSAC would be a better channel for adjudicating appeals, rather than relying on criticism of MSPB's prior lack of a quorum. Commenters 0312, 0394, 0423, and others asserted that MSPB's lack of a quorum was a manufactured crisis used to justify permanent structural change and suggested that the rule would not be necessary if MSPB were fully staffed. Commenter 0494 stated that OPM has not provided sufficient empirical evidence that MSPB procedures are unworkable or that transferring appeals to OPM will improve efficiency, including through analysis of case volume, resource requirements, and safeguards. Commenters 0175, 0202, 0212, 0220, and 0237 further stated that placing probationary and trial period appeals at OPM instead of MSPB creates a risk of inconsistent implementation across agencies and components.

OPM has considered these comments and disagrees. OPM does not premise this final rule on a conclusion that MSPB is unable to adjudicate personnel matters generally, or that MSPB

⁴⁹ See U.S. Government Accountability Office, *Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance* 7 (2015), available at <https://www.gao.gov/assets/gao-15-191.pdf>.

administrative judges are not capable adjudicators. The issue is narrower. Probationary and trial period appeals are limited regulatory appeals involving a narrow set of issues. They are not ordinary chapter 75 adverse-action appeals, and Congress did not create a general statutory right for probationary employees to appeal probationary terminations to MSPB. MSPB's prior role in this limited class of appeals existed because OPM regulations assigned that role to MSPB. Following E.O. 14284 and Civil Service Rule XI, MSPB no longer hears probationary appeals under 5 CFR Part 315, subpart H. OPM has determined that these limited appeals should be adjudicated through a streamlined OPM process tailored to the narrow grounds that remain appealable.

Under the prior regulatory framework, a probationary or trial period appeal within MSPB's jurisdiction could proceed through the same multi-stage adjudicative structure that governs other MSPB appellate cases, even though the issues in such appeals are narrow. The prior subpart H probationary appeal rights were limited: under 5 CFR 315.806, an employee could appeal certain probationary terminations to MSPB only on specified grounds, including partisan political reasons, marital status, certain procedural defects for actions covered by the prior § 315.805, and discrimination claims only when raised in addition to those limited grounds. Despite the limited nature of those grounds, however, appeals raising these claims would nonetheless have to proceed through the following multi-stage process:

First, once an appeal was filed, the matter could be assigned to an MSPB administrative judge. MSPB part 1201 procedures authorize administrative judges to manage the proceeding, rule on motions, regulate hearings, address discovery disputes, receive evidence, and issue an initial decision. MSPB procedures also provide that an appellant generally has a right to a hearing on the merits if the appeal is timely and within MSPB's jurisdiction, and they authorize discovery into relevant, nonprivileged matters.

Second, after the administrative judge issued an initial decision, either party could seek review by the full Board. Under MSPB rules, an initial decision becomes final after 35 days

unless a petition for review or other specified filing prevents finality. If a petition for review is filed, the Board may deny review, grant review, reopen the case, or issue a final decision disposing of the action.

Third, after a final MSPB decision, judicial review may be available under 5 U.S.C. 7703. That provision allows an employee or applicant adversely affected or aggrieved by a final MSPB order or decision to obtain judicial review, generally by filing a petition in the Federal Circuit or another court of appeals of competent jurisdiction, depending on the type of case, within the statutory time period.

That multi-stage process may be appropriate for actions Congress made appealable to MSPB under chapter 75 or other statutes. But OPM has determined that it is not necessary or well-tailored for the limited regulatory appeal rights available to employees serving probationary or trial periods. A probationary or trial period exists before an appointment becomes final and is designed to allow the Government to determine whether the employee should continue in Federal service. See 5 U.S.C. 3321(a). The issues in these appeals ordinarily turn on threshold and record-based questions, such as whether the appellant was serving a covered probationary or trial period, whether OPM has jurisdiction, whether the appeal was timely and properly filed, whether the termination falls within the limited grounds for appeal, whether required procedures were followed, and whether any violation prejudiced the appellant.

Rather than reinstating these multi-stage MSPB procedures designed to adjudicate adverse actions, the final rule provides a streamlined OPM process tailored to probationary and trial period appeals. Under revised § 751.101, a covered employee may file an appeal with OPM on the grounds specified in the regulation. Under § 751.102, the appeal must be filed within the prescribed time limits and through OPM's electronic filing system unless OPM grants an exemption for good cause. This filing structure is intended to provide a uniform intake process, reduce procedural disputes, and allow OPM to identify jurisdictional and timeliness issues promptly.

The OPM process is designed to put the relevant agency record before the adjudicator early. Under revised § 751.103, the agency must file a response within the prescribed period and produce the complete agency record to OPM. For a probationary or trial period appeal, that record should include the appointment documents, personnel-action records, probationary or trial period status documentation, notice of termination, effective-date materials, documents relied upon by the agency in taking the action, any required notice or opportunity-to-respond materials, and any other records necessary to determine jurisdiction, compliance with applicable procedures, and prejudice. The agency must serve the appellant with the agency record, subject only to legally required redactions or withholding, such as those required by the Privacy Act, applicable privileges, classified-information or national-security requirements, OPM protective orders, or other disclosure limits required by law.

The final rule also preserves meaningful fact development without making discovery and hearings automatic in every case. The appellant may reply to the agency response, and OPM may permit new allegations where the basis rests on information first disclosed in the agency response or where good cause exists. Under revised § 751.105, OPM may require additional information and may conduct further proceedings where necessary and efficient to resolve a material issue within OPM's jurisdiction. A hearing remains available where the written record is insufficiently developed to decide a material fact or where a material credibility issue requires live testimony. This approach preserves the tools needed to resolve disputed material issues while avoiding unnecessary discovery, hearing practice, and litigation costs in cases that can be decided on the record.

Finally, instead of Board-level review and subsequent MSPB-based judicial review, the final rule provides for OPM reconsideration, limited Director review before finality, and final OPM action. Under revised § 751.107, either party may seek reconsideration of an initial decision on the grounds specified in the rule, and OPM may reopen and reconsider where appropriate. Under revised § 751.108, the Director may review a nonfinal decision on the

Director's own initiative before finality, including where review is warranted by potential legal error, material factual error, an issue of exceptional importance, governmentwide civil service administration, conflict among OPM decisions, or another comparable reason. Once a decision becomes final under § 751.109, there is no further administrative appeal under part 751. The final rule separately preserves collateral matters within the jurisdiction of other forums where applicable.

OPM concludes that this structure better fits the nature of probationary and trial period appeals. The MSPB process can involve administrative-judge proceedings, discovery, hearings, petitions for review to the full Board, possible reopening or remand, and subsequent judicial review. By contrast, the final rule provides a single, record-focused OPM process that requires the agency to produce the complete record, gives the appellant an opportunity to respond, permits targeted fact development where needed, and provides reconsideration and final agency supervision before finality. This approach reduces delay, cost, and uncertainty while preserving administrative review of whether the agency complied with the limited legal and regulatory requirements governing probationary and trial period terminations.

OPM also disagrees that it must prove MSPB "failed" before deciding against reinstituting MSPB as the forum for limited probationary appeals. An agency may revise a regulatory process when it reasonably concludes that a different process better implements the governing law and policy. Here, OPM is implementing Civil Service Rule XI, exercising its authority to prescribe the circumstances and procedures for probationary and trial period appeals, and aligning the appeal forum with OPM's responsibility for administering the civil service rules governing probationary and trial periods. The final rule therefore rests on OPM's independent policy judgment about the appropriate forum and procedures for these appeals, not solely on MSPB's prior quorum issues.

MSPB's prior lack of a quorum and associated backlog are nevertheless relevant practical considerations. They illustrate the risks of routing narrow regulatory appeals through a multi-

layered adjudicatory system that may be affected by Board vacancies and backlogs. The MSPB's periodic losses of a quorum have significantly delayed its ability to adjudicate cases. But the rule would be justified even if OPM had guarantees that the MSPB would retain a quorum in perpetuity going forward. The central problem is not merely delay caused by a lack of quorum; it is the mismatch between the limited scope of probationary appeal rights and the more elaborate procedures associated with MSPB adjudication. OPM concludes that a written-record process, with targeted fact development and hearings only where necessary and efficient, is better suited to resolving these narrow claims.

OPM further disagrees with commenters who suggest that MSPB funding, faster confirmations, or internal MSPB case-management reforms are adequate substitutes for this rule. Increasing MSPB funding and changing the speed of Senate confirmations are outside OPM's regulatory authority. OPM also cannot simply retain MSPB as the venue while directing MSPB to use OPM's preferred procedures. The courts have already held that OPM cannot do this. When appeals are assigned to MSPB, MSPB generally controls its own adjudicatory procedures. Thus, a rule directing MSPB to adjudicate these cases differently would raise separate legal concerns and would not accomplish OPM's objective of establishing an OPM-administered process under Civil Service Rule XI.

The final rule provides concrete benefits. It clarifies the appeal route for covered probationary and trial period employees; separates OPM appeals from claims that belong in other forums, such as EEOC discrimination claims; establishes—where the current status quo affords no appeal at all—the limited substantive appeal grounds historically available to covered probationary employees; reduces unnecessary procedural complexity; and supports timely resolution of appeals involving employees whose appointments have not yet been finalized. The rule also provides a process more proportionate to the narrow issues at stake: partisan-political reasons, marital status, and specified procedural claims involving terminations based in whole or in part on pre-appointment reasons.

OPM also expects the rule to produce administrative efficiencies, including faster disposition of narrow regulatory appeals, clearer claim routing, reduced duplication between MSPB and EEOC processes, more consistent administration of Civil Service Rule XI, and a process that better supports agency use of probationary and trial periods as meaningful final stages of the examining process.

OPM does not agree that moving these appeals to OPM will create inconsistency across agencies or components. Under the final rule, the employing agency will make the underlying personnel decision, but OPM will adjudicate the limited appealable issues under a single governmentwide regulation. Centralizing these appeals within OPM is more likely to promote consistency than leaving agencies to develop different practices for issues arising under Civil Service Rule XI. OPM has also committed to issue written decisions and to make final merits decisions publicly available, subject to applicable limits protecting privacy, privileged information, protected personal information, law-enforcement-sensitive information, and other information that may not lawfully be disclosed. Public availability of final merits decisions will promote consistent interpretation of part 751, provide guidance to agencies and employees, and allow the public to evaluate how OPM applies the rule over time.

The final rule also includes safeguards to address concerns about record integrity and fairness. Agencies must submit a response and all documents in the agency record supporting the action. Appellants may reply. OPM may require additional information, audit or investigate the agency's action when doing so is necessary to determine a material fact, and conduct a hearing where the written record is insufficient or where credibility issues make a hearing necessary and efficient. OPM will issue written decisions and provide reconsideration and Director review before finality. For appeals filed by OPM employees, the final rule provides an additional safeguard by assigning the matter to an administrative law judge. These procedures provide a record-based, reviewable administrative process tailored to the limited rights at issue.

Commenters 0443, 0507, and 0588 claimed that OPM is not more efficient than the current system, citing delays in OPM's retirement appeals branch and arguing that MSPB's quorum issue is an insufficient basis for the rule because appeals can continue to be processed during a lack of quorum. Commenters 0421, 0448, and 0610 suggested that the appropriate solution to MSPB's quorum or efficiency issues is faster Senate confirmation and more funding, rather than a change in venue. Commenter 0421 further stated that the current system already heavily favors agencies, noting that 94.7 percent of appeals were dismissed in FY 2024 and arguing that OPM has not cited instances of MSPB wrongly overturning agency decisions.

OPM disagrees. OPM's retirement-related processes are governed by different statutes, involve different claims, and do not show that MSAC cannot adjudicate this narrow class of probationary and trial period appeals. The final rule establishes a streamlined process specifically designed for these cases. It uses electronic filing, defined deadlines, required agency records, appellant replies, targeted record development, and hearings only when necessary and efficient. OPM has assessed the expected caseload and resource needs and has determined that MSAC and OPM adjudicatory staff can administer the process efficiently. OPM will monitor implementation and may adjust staffing, case-management practices, and guidance as appropriate.

OPM also does not need to show that MSPB wrongly overturned agency decisions in order to provide a different forum when reestablishing probationary appeals. The question is not whether MSPB reached incorrect results in particular cases. The question is whether the existing forum and procedures remain the best fit for a narrow regulatory appeal right after E.O. 14284 and Civil Service Rule XI. Commenter 0421's assertion that a high percentage of probationary appeals are dismissed does not undermine the rule. To the contrary, a high dismissal rate may indicate that many appeals turn on threshold jurisdictional, timeliness, or appealability issues that can be resolved efficiently through a more tailored written-record process. OPM concludes that

such cases do not require the full procedural structure used for broader statutory adverse-action appeals.

Commenters 0351, 0352, 0399, 0400, and 0593 claimed that the current system is working well, that only the most qualified individuals are selected for government employment through rigorous evaluation, and that supervisors already have discretion to ensure successful performance. Commenter 0366 asserted that the government should adopt shorter probationary periods, while Commenter 0506 stated that it is already too easy to fire probationary employees.

OPM does not adopt those views. The final rule is not an assessment of the qualifications or performance of the Federal workforce as a whole. Nor does the rule rest on a premise that most Federal employees are unsuitable. The rule addresses a more specific issue: the procedures and forum for resolving limited appeals by employees whose appointments have not yet been finalized. A probationary or trial period is part of the examining and assessment process. During that period, the agency must be able to determine whether continued employment advances the public interest and the efficiency of the service. OPM concludes that a limited and streamlined appeal process is consistent with that function.

Commenter 0399 claimed that the proposed rule contains no demonstrated nexus between its guidance and improved performance or accountability. Commenters 0432 and 0585 stated that the rule will increase waste and inefficiency. Commenter 0567 suggested that the rule solves a problem that does not exist and that OPM has ulterior motives. Commenter 0586 maintained that the costs of probationary appeals are a small price to pay for confidence in the system's legitimacy. Commenter 0601 argued that there is no economic sense in separating probationary employees because the government has already incurred the costs of hiring and onboarding them.

OPM disagrees. The nexus between the rule and accountability is straightforward. The probationary and trial period is intended to allow agencies to assess whether an individual should receive a finalized appointment to the Federal service. A lengthy or procedurally disproportionate appeal system can discourage full use of that assessment period and can impose

unnecessary costs when the appealable issues are narrow. By creating a focused OPM process, the final rule supports more timely resolution of the limited claims that remain appealable while preserving appropriate protections against unlawful actions.

OPM also rejects the suggestion that prior government investment in an employee should dictate finalization of the appointment. Hiring, onboarding, and training costs are important, but they are not dispositive. Those costs do not establish that continued employment advances the public interest, the agency's organizational goals, or the efficiency of the service. Indeed, treating sunk costs as a reason to retain an employee who has not demonstrated suitability for finalized appointment would undermine the purpose of the probationary and trial period system. The public interest is served by allowing agencies to make a timely and meaningful determination before an appointment becomes final.

Nor does OPM agree that confidence in the system requires reestablishing the prior MSPB forum and procedures. Confidence is promoted by lawful authority, clear rules, consistent adjudication, a defined record, reasoned written decisions, public availability of final merits decisions, and preservation of independent remedies where Congress or another lawful authority has provided them. The final rule provides those features while avoiding procedures that OPM has determined are not necessary for the limited regulatory appeal rights at issue.

Commenter 0584 stated that OPM should release data on the number of appeals filed since agencies undertook termination actions after January 20, 2025, to provide transparency about the impact of the proposed changes. OPM declines to delay or alter the rule on that basis. This final rule is prospective. It governs covered appeals from terminations effected on or after the effective date of the rule, and it does not reopen, extinguish, or determine the outcome of prior personnel actions, pending appeals, or pending litigation. Data concerning agency actions taken before the effective date would not change the legal authority for this rule or the policy judgment that future covered appeals should be adjudicated under part 751.

OPM has provided the information necessary to support this rulemaking, including the legal basis for the rule, the historical and policy reasons for preserving a limited probationary appeal process, the reasons for moving the forum to OPM, the expected case volume and resource assumptions, and the safeguards included in the final rule. OPM also has committed to public availability of final merits decisions under part 751, subject to applicable legal limits. That commitment will provide ongoing transparency into how OPM applies the rule in future cases.

For these reasons, OPM declines to reestablish MSPB as the adjudicatory forum or to withdraw the rule based on commenters' objections concerning need, benefits, efficiency, or transparency. OPM concludes that the final rule is a lawful and appropriately tailored means of implementing Civil Service Rule XI, preserving the limited substantive appeal rights historically available to covered probationary employees, and establishing a more efficient administrative process for resolving those claims.

B. Regulatory Alternatives

An alternative to this rulemaking is a rule that would mirror the appeal rights and procedures under subpart H of part 315 including allowing employees to file appeals with the MSPB. As explained, reinstituting employee appeals to the MSPB would not be as efficient as having OPM adjudicate appeals. OPM does not believe that returning appeals of probationary actions to MSPB is the best alternative for agencies or employees.

OPM also considered whether to include an agency's failure to provide written notice required under 5 CFR 11.5(e) as a basis for appeal. OPM stated in the proposed rule that it believed that including this ground for appeal would be unnecessary for two reasons. First, employees serving a probationary or trial period understand that, as a condition of employment, their employment will terminate before the end of their tour of duty on the last day of their appointment unless the agency issues the certification required under 5 CFR 11.5. Second, an agency's failure to adhere to a purely administrative requirement would not affect the outcome of the employee's separation.

Commenter 0341 challenged this reasoning and urged OPM to add an appeal right for an agency's failure to provide written notice under § 11.5(e). OPM also independently considered whether to expand the appeal right for probationary employees under this rule to cover the agency's failure to hold a meeting with the employee as described in section 5(b) of E.O. 14284 and incorporated into § 11.5 by this final rule. After extensive consideration, OPM declines to make those alleged procedural defects independent grounds for appeal under part 751.

OPM emphasizes that agencies must comply with Civil Service Rule XI, E.O. 14284, and the regulations in part 11. The final rule incorporates additional Rule XI procedures into § 11.5 to provide greater clarity and administrative convenience for agencies, employees, supervisors, and human resources practitioners. OPM's decision not to make every Rule XI procedural requirement independently appealable does not make those requirements optional. Rather, OPM concludes that noncompliance with those requirements is better addressed through management oversight, OPM accountability reviews, corrective guidance, agency-level compliance mechanisms, and, where applicable, the administrative-error petition process in § 11.5.

The written notice requirement in § 11.5(e), redesignated in this final rule as § 11.5(i), requires an agency to notify the employee in writing of the effective date of the action before terminating the service of an employee serving a probationary or trial period. That notice requirement serves an important administrative function. It informs the employee of when the separation will occur and provides clarity for personnel, payroll, benefits, and recordkeeping purposes. But it does not create a substantive standard for determining whether the employee's appointment should be finalized, nor does it provide a right to advance notice of charges, an opportunity to respond, or a hearing before termination.

For that reason, OPM concludes that a failure to provide written notice of the effective date should not be an independent basis for reinstatement or reversal of a termination. The omission of such notice does not establish that the agency's decision was based on partisan political reasons or marital status, and it does not establish that the agency failed to follow the

separate procedures applicable when a termination is based in whole or in part on conditions arising before appointment. Nor would the absence of written notice, standing alone, change the substantive public-interest determination required by Civil Service Rule 11.5. OPM may, however, consider the absence or timing of written notice where relevant to a procedural matter properly before OPM, including whether an appeal was timely filed or whether good cause exists for an untimely filing.

OPM also declines to make the meeting described in section 5(b) of E.O. 14284 an independent ground for appeal. That meeting is part of the agency's internal assessment and certification process near the end of an initial probationary or trial period. It is designed to help agency officials evaluate the employee's performance and conduct, the needs and interests of the agency, and whether continued employment would advance the public interest, the organizational goals of the agency or the Federal Government, and the efficiency of the service. It is not an adversarial pre-termination hearing and does not transform a probationary or trial period termination into an adverse action subject to the procedures applicable to tenured employees.

Treating the meeting requirement as an independent appeal right would substantially alter the function of the probationary and trial period system. It would require OPM to adjudicate collateral disputes over the scheduling, timing, content, and adequacy of meetings, even where the employee does not allege partisan-political discrimination, marital-status discrimination, or failure to follow procedures for a termination based on pre-appointment reasons. That result would recreate the type of procedural litigation E.O. 14284 sought to avoid and would undermine the streamlined appellate framework established in part 751.

OPM also notes that section 7(c) of E.O. 14284 provides that the order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity against the United States, its agencies, officers, employees, or any other person. OPM therefore does not construe the meeting requirement or the written-notice requirement as

independently enforceable appeal rights unless OPM expressly provides such a right by regulation. OPM has chosen not to do so here.

Another alternative to this rulemaking is to not issue a rule that provides covered employees with a right to appeal. However, employees terminated during their probationary or trial periods would not be able to seek relief for discrimination based on partisan political reasons or marital status. Supervisors and managers reassigned to nonsupervisory or nonmanagerial positions would still be allowed to appeal to the MSPB under subpart I of part 315, which OPM views as suboptimal given the efficiency gains from having OPM adjudicate these appeals under its own authority.

OPM considered whether an agency's decision not to certify continuation of an appointment, or failure to certify and finalize an appointment, should be independently appealable beyond the grounds specified in § 751.101(c); as reflected in § 751.101(d), OPM declines to make it so. OPM views an agency's inaction or decision not to finalize an employee's appointment beyond the probationary or trial period as the natural conclusion of the appointment akin to the expiration of a term employee's appointment.⁵⁰ Under OPM regulations, the Board similarly views an agency's inaction to renew or extend a term employee's appointment beyond the initial term as not an appealable adverse action.⁵¹

OPM also concludes that granting employees a right to appeal the OPM Director's decision to deny an agency's petition to reinstate an employee to the Federal service under 5 CFR 11.5(j) is inappropriate. Consistent with OPM's view that the employee's appointment naturally comes to an end as described in 5 CFR 11.5(a), the agency, and not the employee, retains the right to seek the OPM Director's approval to reinstate the employee. It would be inconsistent with E.O. 14284 and 5 CFR 11.5 to establish a right to challenge the OPM

⁵⁰ In the event an agency fails to make the required certification due to administrative error, the agency head can petition the Director of OPM to reinstate an employee. OPM Memorandum to Heads and Acting Heads of Departments and Agencies, "Initial Guidance on President Trump's Executive Order Strengthening Probationary Periods in the Federal Service" (Apr. 28, 2025).

⁵¹ 5 CFR 752.401(b)(11); *Scott v. Dep't of the Air Force*, 113 MSPR 434, ¶9 (2010).

Director's decision to deny a petition from the agency given the nature of the employee's appointment and the lack of standing of the employee.

Commenter 0516 argued that OPM failed to consider obvious and less restrictive alternatives, including increasing MSPB funding, streamlining procedures within MSPB, improving supervisor training and guidance, and using enhanced case-management tools to improve timeliness. Commenters 0488 and 0500 likewise asserted that OPM has not provided sufficient data showing that the rule will produce cost savings and has failed to consider less disruptive alternatives.

OPM disagrees. OPM has considered these alternatives, but concludes that they either are outside OPM's authority, would not accomplish the objectives of this rule, or are complementary measures rather than substitutes for the final rule. The purpose of this rule is not merely to reduce the number of days needed to process a case. It is to implement E.O. 14284 and Civil Service Rule XI; to prescribe the circumstances and procedures for limited probationary and trial period appeals; to align the adjudicatory forum with OPM's responsibility for administering the civil service rules governing probationary and trial periods; and to establish a process proportionate to the narrow regulatory issues that may be appealed.

Increasing MSPB funding, accelerating Board-member confirmations, or otherwise addressing MSPB quorum and staffing issues are not remedies OPM can adopt by regulation. MSPB appropriations are a matter for Congress, and MSPB membership depends on nomination and confirmation processes outside this rulemaking. Nor may OPM simply direct MSPB to use different procedures for cases that remain before MSPB. When OPM chooses to route appeals to MSPB, it must take MSPB's statutory adjudicatory structure as it exists; OPM may not superimpose its preferred procedures on MSPB adjudications. For that reason, retaining MSPB as the venue while attempting to streamline MSPB procedure is not a viable regulatory alternative for OPM.

OPM also considered whether improved supervisor training and guidance could address the concerns underlying the rule. OPM agrees that training and guidance are important, and OPM expects to continue supporting agencies in using probationary and trial periods effectively. But training addresses front-end management practices; it does not address the separate question of what forum and procedures should govern appeals after a covered action has occurred. Even with better training, agencies will continue to take probationary and trial period actions, and covered employees will continue to need a clear process for raising the limited appealable claims preserved by this rule. Training therefore complements the final rule, but it is not a substitute for establishing the adjudicatory framework required after E.O. 14284 and Civil Service Rule XI.

OPM likewise considered whether enhanced case-management tools alone would be sufficient. The final rule incorporates several case-management features, including electronic filing, defined filing deadlines, required agency responses, required production of the agency record, appellant replies, OPM authority to require additional information, audits or investigations where necessary to determine a material fact, and hearings where the written record is insufficient or credibility issues make a hearing necessary and efficient. But case-management tools would not, by themselves, resolve the mismatch between the limited regulatory nature of probationary appeals and the more elaborate MSPB procedures developed for broader statutory adverse-action appeals. OPM has therefore adopted case-management tools as part of the final rule, but declines to rely on case-management changes alone.

OPM also disagrees that the rule lacks support because commenters would prefer additional or different cost data. OPM's regulatory analysis identifies the expected case volume, resource assumptions, and costs associated with adjudicating these appeals at OPM, and compares that process to the more resource-intensive adjudication previously available through MSPB. In any event, the rule does not rest solely on monetized cost savings. OPM also relies on non-monetized benefits, including faster resolution of narrow regulatory appeals, greater consistency in administration of Civil Service Rule XI, clearer routing of claims between OPM

and other forums, reduced duplication, and a process better tailored to the limited issues available to covered probationary appellants.

OPM further notes that the final rule is not the most disruptive possible alternative. OPM is not eliminating all appeal rights for probationary supervisors covered by subpart I. The final rule preserves their appeals alleging partisan-political reasons, marital status, and specified procedural defects where a termination is based in whole or in part on conditions arising before appointment, while also establishing such appeals for nonsupervisory employees in their probationary period. It also preserves independent remedies before EEOC, OSC, MSPB, Inspectors General, or other forums where an independent legal basis for jurisdiction exists. And OPM has included procedural safeguards, including a written record, agency record-production requirements, appellant replies, reconsideration, Director review before finality, public availability of final merits decisions subject to applicable legal limits, and assignment of an administrative law judge for appeals filed by OPM employees.

Accordingly, OPM declines to adopt the alternatives proposed by Commenter 0516 and Commenters 0488 and 0500. Those alternatives either fall outside OPM's authority, do not address the adjudicatory structure governed by this rule, or are already reflected in part in the final rule's streamlined case-management procedures. OPM concludes that the final rule is a reasonable and appropriately tailored means of implementing Civil Service Rule XI while preserving the limited substantive appeal rights historically available to covered probationary employees.

C. Impact

The final rule promotes greater accountability while making efficient use of taxpayer resources. Although establishing an appeals process where none currently exists necessarily imposes some cost, streamlining appeals by reducing unnecessary legal processes to adjudicate a narrow set of appealable issues and locating adjudicative responsibilities at OPM holds those costs well below what reinstituting the prior MSPB-style process would have entailed.

Employees alleging discrimination will continue, as under the current baseline, to file complaints with the EEOC, and the adjudication of those claims at the EEOC may result in better outcomes as the EEOC administers and oversees nearly all anti-discrimination laws protecting Federal employees. Employees seeking relief before the EEOC may also experience longer times to receive a decision given the number of charges pending at the end of Fiscal Year 2024.⁵² However, employees will gain the ability to bypass delays in the processing of their complaints by filing a lawsuit in Federal district court under certain circumstances.⁵³

Several commenters, such as 0434, 0475, 0527, and 0586, bring up the perceived unfairness this rule creates for Federal employees. They maintain that employees will have fewer tools to fight their terminations and the process will be more confusing, which could lead to employees filing in the wrong place and losing based on time considerations.

OPM notes that this rule creates an appeals process for probationary employees that does not currently exist. The rule thus gives employees tools they would not otherwise possess to fight, e.g., unlawful politically-motivated terminations. OPM further notes that, while the process for filing appeals and who will hear those appeals may differ from the prior subpart H, the appeal structure remains relatively the same. Furthermore, OPM will provide guidance to managers, supervisors, and employees concerning these changes in order to avoid the types of concerns voiced by commenters.

Several commenters expressed concern that the rule could be used to permit agencies to separate probationary employees for reasons related to lack of funding, lack of work, abolishment of positions, or reorganization, while avoiding the statutory and regulatory requirements governing reductions in force.

The rule does not authorize agencies to use probationary status to evade reduction-in-force requirements. Reductions in force are governed by 5 U.S.C. chapter 35 and 5 CFR part

⁵² Equal Employment Opportunity Commission, *Fiscal Year 2024 Annual Performance Report* (Jan. 17, 2025), available at https://www.eeoc.gov/sites/default/files/2025-01/24-126_EEOC_2024_APR_508_1.16.25_508.pdf.

⁵³ 29 CFR 1614.407.

351, including the rules governing when those procedures apply. Nothing in this rule alters those authorities, expands an agency's ability to separate employees for reasons that constitute a reduction in force, or permits an agency to characterize a reduction-in-force action as a probationary separation in order to avoid applicable statutory or regulatory requirements.

Rather, this rule addresses the scope and processing of appeals from probationary separations. Agencies remain responsible for determining and applying the correct legal authority for any separation action, and the availability or limits of appeal rights under this rule do not change the substantive requirements applicable to reductions in force.

D. Costs

This final rule affects how a Federal employee may pursue an administrative appeal from a covered probationary or trial period action, including termination during a probationary or trial period, assignment to a nonsupervisory or nonmanagerial position after failure to complete a supervisory or managerial probationary period, noncertification of continuation of an appointment, or failure to certify and finalize an appointment. The final rule grants OPM authority to adjudicate these appeals and removes MSPB authority to adjudicate discrimination claims that previously could attach to certain probationary appeals. Employees may continue to pursue discrimination claims through the Federal-sector EEO process.

The appropriate baseline for this analysis is the current status quo: following E.O. 14284 and the rescission of subpart H of part 315, no administrative appeals process exists for covered probationary and trial period terminations. Measured against that no-appeals baseline, the final rule imposes the new adjudication and agency-defense costs of the OPM appeal process it establishes. For the reasons explained below, OPM estimates that the final rule will result in recurring annual costs of approximately \$1.5 million, and first-year costs of approximately \$2.75 million, including one-time implementation costs. Because discrimination claims are already pursued through the Federal-sector EEO process under the current baseline, EEO-processing costs are not incremental costs of this rule.

1. Changes from the proposed analysis

OPM has updated the final cost analysis in several respects.

First, OPM updated labor rates from 2025 to 2026 rates because the final rule will take effect after publication of the proposed rule. The proposed rule used 2025 Washington, DC locality pay rates; this final analysis uses 2026 rates.

Second, OPM revised the annual appeal-volume baseline. The proposed rule cited 622 covered appeals in FY 2024 but calculated the annual baseline using only FY 2021 through FY 2023 data, resulting in an estimate of 457 appeals annually. In the final analysis, OPM includes FY 2024 in the baseline because those appeals occurred before the post-January 20, 2025 period that OPM treats as anomalous. OPM therefore averages FY 2021 through FY 2024 appeal volumes: 486, 424, 461, and 622 appeals, respectively. This produces an annual baseline of approximately 498 covered appeals. This assumption is more conservative than the proposed rule's 457-appeal baseline and better reflects the full scope of covered appeals identified in the proposed rule.

Third, OPM clarifies that the 498-appeal baseline is used as a proxy for all covered actions under part 751. Historical MSPB data are primarily organized around probationary termination appeals and supervisory or managerial probationary-period appeals. Because certification and finalization procedures under Civil Service Rule XI are newly implemented, OPM does not yet have a separate historical dataset for certification-related appeals. OPM expects those appeals generally to arise from the same population of probationary or trial period employees and to substitute for, rather than materially add to, historical probationary termination appeal volumes.

Fourth, OPM corrected and clarified several component calculations. The proposed rule's OPM adjudication discussion stated that each appeal would require 30 hours of adjudicator time, while the proposed per-case cost and annual estimate were consistent with 3 hours of adjudicator time. In the final analysis, OPM uses 3 hours of adjudicator time, which reflects the intended

assumption and is consistent with the proposed rule's explanation that most probationary appeals require limited processing time because many are resolved on jurisdictional grounds.

Fifth, OPM uses the same appeal-review rate for comparable MSPB and OPM review stages. The proposed rule used an 11 percent MSPB petition-for-review rate but applied that rate inconsistently. The final analysis applies 11 percent to the revised 498-appeal baseline, resulting in approximately **55** petitions for review or requests for reconsideration annually.

Sixth, OPM has corrected the baseline used in the analysis. The proposed rule implicitly measured costs and savings against the prior MSPB process. That process, however, was rendered inoperative by E.O. 14284 before this rulemaking, and the correct baseline is the current status quo, under which no administrative appeals process exists for covered terminations. Measured against that baseline, the rule imposes the costs of the new OPM adjudication process it establishes. The prior MSPB process is discussed below for comparison purposes only, and EEO-processing costs are not attributed to this rule because discrimination claims are already routed through the Federal-sector EEO process under the baseline.

2. One-time implementation costs

OPM estimates that this rulemaking will require individuals employed by more than 80 Federal agencies, including MSPB and EEOC, to review the final rule, modify regulations, policies, and procedures, and train human resources practitioners, hiring managers, attorneys, adjudicators, and other relevant personnel.

For purposes of this cost analysis, OPM assumes that Federal employees performing this work will have an average salary equivalent to GS-14, step 5, on the 2026 Washington, DC locality pay table, with an hourly locality rate of \$78.15. OPM assumes that the total dollar value of labor, including wages, benefits, and overhead, equals 200 percent of the wage rate, resulting in a loaded hourly labor cost of \$156.30.

OPM estimates that implementation will require an average of 100 hours per affected agency. This results in one-time implementation costs of approximately \$15,630 per agency, or approximately \$1.25 million governmentwide, assuming 80 affected agencies.

3. Recurring costs and savings

OPM estimates that approximately 498 covered appeals will be filed annually. This estimate is based on MSPB appeal volumes for FY 2021 through FY 2024, including 486 appeals in FY 2021, 424 appeals in FY 2022, 461 appeals in FY 2023, and 622 appeals in FY 2024.

OPM does not include post-January 20, 2025 appeal volumes in the recurring annual baseline. OPM continues to view that period as anomalous and not sufficiently predictive of recurring annual appeal volumes. At the same time, including FY 2024 in the final baseline makes the estimate more conservative than the proposed rule's estimate and avoids understating annual appeal volume.

4. EEO-related costs

Under both the current baseline and the final rule, discrimination claims by covered probationary and trial period employees are pursued through the appropriate Federal-sector EEO process. E.O. 14284 eliminated the prior MSPB probationary appeal—and with it the ability to attach discrimination claims to such an appeal—before this rulemaking; this rule does not change how discrimination claims are routed. Accordingly, EEO-processing costs are not incremental costs of this final rule. For transparency, OPM notes that the proposed rule estimated total annual EEO-related processing costs of approximately \$3.0 million; to the extent such costs are incurred, they arise under the baseline and would be incurred whether or not OPM finalized this rule.⁵⁴

⁵⁴ OPM used Federal Workforce Data (FWD) information to estimate grade levels of MSPB and EEOC personnel assigned to adjudicate appeals covered by this rule.

Accordingly, OPM does not attribute EEO-processing costs to this final rule. Any such costs arise under the current baseline—in which discrimination claims are already pursued through the Federal-sector EEO process—and would be identical whether or not OPM finalized this rule.

Commenters argued that routing discrimination claims through the EEO process may increase Federal court litigation. As an initial matter, any change in the routing of discrimination claims resulted from E.O. 14284 and the rescission of subpart H, not from this rule. OPM does not quantify Federal court litigation costs because such costs depend on future claimant choices, agency decisions, case outcomes, exhaustion of administrative remedies, settlement behavior, and judicial proceedings. OPM also notes that some judicial-review costs may already exist under the baseline for discrimination claims attached to MSPB mixed cases. OPM therefore does not have a reliable basis to estimate incremental Federal court costs attributable to this final rule.

5. Comparison: adjudication costs under the prior MSPB process

Although the prior MSPB process is not the baseline for this analysis, OPM provides the following estimates for comparison purposes, to illustrate the relative cost of the process this rule establishes. OPM estimates that under the prior MSPB process, each initial appeal would have required 3 hours of MSPB administrative judge time at the GS-15, step 5 level, 1 hour of GS-11, step 5 paralegal time, and 0.25 hours of chief administrative judge review at the GS-15, step 5 level. Using loaded hourly labor costs of \$183.85 for GS-15 time and \$92.81 for GS-11 time, OPM estimates an MSPB initial-adjudication cost of approximately \$690 per appeal. For 498 appeals annually, this results in annual MSPB initial-adjudication costs of approximately \$344,000.

OPM estimates that petitions for review would be filed in approximately 11 percent of appeals, or approximately 55 petitions annually. OPM assumes that each petition for review

would require 1 hour each from the MSPB Chairman and one Board Member,⁵⁵ 2 hours from one GS-15, step 5 attorney, and 6 hours from one GS-13, step 5 attorney. Using loaded hourly labor costs of \$188.98 for each Board official, \$183.85 for the GS-15 attorney, and \$132.27 for the GS-13 attorney, OPM estimates a cost of approximately \$1,539 per petition, or approximately \$85,000 annually.

OPM also estimates agency defense costs under the prior MSPB process. OPM assumes each initial appeal required 15 hours of GS-14, step 5 agency attorney time, 4 hours of GS-11, step 5 paralegal time, and 1 hour of GS-15, step 5 supervisory attorney time. OPM further assumes each petition for review required 10 hours of GS-14, step 5 agency attorney time. Using loaded hourly labor costs of \$156.30, \$92.81, and \$183.85, respectively, OPM estimates total annual agency defense costs under the prior MSPB process of approximately **\$1.53 million**.

Accordingly, OPM estimates total annual costs under the prior MSPB process of approximately \$2.0 million, consisting of MSPB initial adjudication, MSPB Board-level review, and agency defense costs. These figures are presented for comparison purposes only; because the prior MSPB process is no longer in effect, they are not baseline costs avoided by this rule.

6. OPM adjudication costs under the final rule

OPM estimates that each appeal adjudicated by OPM will require 3 hours of GS-13, step 5 adjudicator time, 1 hour of GS-11, step 5 paralegal time, and 1 hour of GS-14, step 5 supervisory adjudicator time. Using loaded hourly labor costs of \$132.27, \$92.81, and \$156.30, respectively, OPM estimates a cost of approximately \$646 per appeal. For 498 appeals annually, OPM estimates annual initial OPM adjudication costs of approximately \$322,000.

OPM estimates that approximately 55 requests for reconsideration will be filed annually. OPM assumes each request will require 4 hours of GS-14, step 5 adjudications officer time and 1 hour of senior executive review. Using loaded hourly labor costs of \$156.30 and \$218.50,

⁵⁵ Based on the past decade and the current outlook, MSPB is unlikely to have three concurrently sitting Board members for the foreseeable future. Therefore, OPM has estimated the work of only two Board members and staff.

respectively, OPM estimates reconsideration costs of approximately \$844 per request, or approximately \$46,000 annually.

OPM also estimates the incremental cost of Director review under § 751.108. OPM expects that only a small number of cases, approximately 10 annually, will be reviewed by the Director before finality. For purposes of this analysis, OPM assumes that each Director review will require 1 hour of senior executive review and 1 hour of GS-14, step 5 adjudicatory support to prepare the record and decision materials. Using loaded hourly labor costs of \$218.50 and \$156.30, respectively, OPM estimates an incremental Director-review cost of approximately \$375 per case, or approximately \$4,000 annually.

OPM also estimates agency defense costs under the OPM process. OPM assumes each initial appeal will require 10 hours of GS-14, step 5 agency attorney time, 4 hours of GS-11, step 5 paralegal time, and 1 hour of GS-15, step 5 supervisory attorney time. OPM further assumes each request for reconsideration will require 8 hours of GS-14, step 5 agency attorney time. Using loaded hourly labor costs of \$156.30, \$92.81, and \$183.85, respectively, OPM estimates total annual agency defense costs under the OPM process of approximately \$1.12 million.

Accordingly, OPM estimates total annual costs under the OPM adjudication process of approximately \$1.5 million, consisting of OPM initial adjudication, OPM reconsideration, Director review, and agency defense costs.

Summary of recurring annual costs

Cost category	Prior MSPB process (comparison only)	Final OPM process
Initial adjudication	\$344,000	\$322,000
Petition/reconsideration and Director review	\$85,000	\$50,000
Agency defense costs	\$1,530,000	\$1,124,000
Subtotal: adjudication and defense costs	\$1,959,000	\$1,496,000
EEO-related costs (not attributable to this rule; see section 4)	—	—
Total recurring annual cost	\$1,959,000	\$1,496,000

Based on these estimates, and measured against the current no-appeals baseline, OPM estimates recurring annual costs of approximately \$1.5 million, consisting of OPM adjudication, reconsideration, Director review, and agency defense costs. In the first year, OPM also estimates one-time implementation costs of approximately \$1.25 million, for total first-year costs of approximately \$2.75 million. For comparison, the prior MSPB process would have cost approximately \$2.0 million annually in adjudication and defense costs; the OPM process established by this rule is thus approximately \$463,000 less costly per year than reinstituting an MSPB-style process would have been.

7. Response to cost-related comments

Commenters 0421, 0501, 0503, 0584, 0599, and 0602 argued that moving discrimination claims to the EEO process may increase costs, including potential costs associated with Federal court litigation. As explained above, EEO-processing costs are not incremental costs of this rule: discrimination claims are routed through the Federal-sector EEO process under the current baseline, and this rule does not change that routing. OPM has not quantified Federal court litigation costs because those costs depend on future decisions by employees, agencies, EEOC administrative judges, and courts, and because any change in the routing of discrimination claims resulted from E.O. 14284 rather than from this rule.

OPM also recognizes that the final analysis reaches a different quantified conclusion than the proposed rule. The proposed rule measured the rule against the prior MSPB process and characterized the rule as likely producing net cost savings. The final analysis instead measures the rule against the current no-appeals baseline and estimates recurring annual costs of approximately \$1.5 million. OPM concludes that providing covered employees a limited appeal—including for claims of partisan-political or marital-status discrimination—is worth those costs, and that the streamlined OPM process holds those costs well below what an MSPB-style process would have entailed. The final rule provides administrative review of covered probationary and trial period appeals where none currently exists, clarifies claim routing,

provides a record-based process tailored to the limited issues appealable under part 751, avoids the higher adjudication and agency-defense costs that reinstituting the prior MSPB process would have entailed, and promotes faster finality for employees and agencies. Several benefits, including reduced uncertainty, clearer procedures, better allocation of adjudicatory resources, and improved agency ability to manage probationary and trial period appointments, are difficult to quantify but are substantial.

OPM further notes that, even if EEO-processing costs were considered, the proposed rule's estimate would have substantially overstated any effect of this rule. That estimate assumed that every appellant would seek EEO counseling, even though not every appellant will allege discrimination, and employees may pursue EEO counseling and complaints under the current baseline regardless of this rule. Because discrimination claims are routed through the Federal-sector EEO process under the baseline in any event, the final analysis does not attribute those costs to this rule.

Accordingly, OPM concludes that the final rule will impose quantified recurring annual costs of approximately \$1.5 million, and first-year costs of approximately \$2.75 million including implementation costs, while avoiding the higher costs of an MSPB-style process and producing important non-quantified benefits from a streamlined, OPM-administered appeal process.

E. Benefits

First, and most fundamentally, the final rule provides covered probationary and trial period employees with a limited administrative appeal—including for claims that a termination was based on partisan political reasons or marital status—where the current baseline affords no appeal at all. By creating a forum to adjudicate allegations of politically motivated or marital-status-based terminations, the rule strengthens the nonpartisan character of the civil service and promotes fairness, while keeping those appeals appropriately cabined to the narrow grounds historically available. In addition, OPM expects the final rule to produce further non-quantified

benefits for employees, agencies, and the Federal Government, including prompt resolution of covered appeals, clearer claim routing, avoidance of unnecessary litigation burden, timely corrective action where warranted, and better use of probationary and trial periods as assessment tools.

Second, the final rule will provide employees with a prompt and clear process for resolution of covered appeals—a process that does not exist at all under the current baseline. A probationary or trial period termination, a reassignment following failure to complete a supervisory or managerial probationary period, a noncertification decision, or a failure to certify and finalize an appointment may have significant professional and financial consequences for the affected individual. Timely adjudication benefits employees by providing prompt clarity as to whether the action will be sustained or corrected. If the agency erred, the final rule allows corrective relief to be ordered—relief that is not available at all under the current baseline. If the agency action is sustained, the individual receives earlier certainty for purposes of employment planning, benefits decisions, and future career choices.

Third, prompt adjudication benefits the Government by reducing avoidable remedial exposure. Where an agency action is found to be erroneous, delay may increase potential back pay, interest, attorney-fee exposure, and administrative disruption. A more prompt decision limits the period of uncertainty and allows the agency to implement any required corrective action sooner. This benefit serves both affected individuals and agencies by reducing the time between the challenged action and final administrative resolution.

Fourth, the final rule provides review without imposing an unnecessary litigation burden. Had OPM instead reinstituted the prior MSPB process, even appeals involving narrow probationary or trial period issues could have required substantial agency time for litigation preparation, motion practice, discovery disputes, hearing preparation, and related activity. The final rule instead adopts a record-based OPM process tailored to the limited issues that remain appealable. The rule requires the agency to produce the agency record, permits the appellant to

respond, and allows OPM to require additional information or conduct further proceedings when necessary and efficient. This approach preserves meaningful review while avoiding routine use of costly procedures in cases that can be resolved on the written record.

Fifth, the final rule promotes clearer and more efficient claim routing. Appeals before OPM under part 751 will be limited to the grounds specified in the rule, including claims involving partisan political reasons or marital status and claims that an agency failed to follow required procedures for terminations based in whole or in part on pre-appointment reasons. Other statutory claims, including discrimination claims within the jurisdiction of the EEOC, remain available in the forums Congress or applicable law has designated. This structure reduces confusion over forum, separates limited probationary appeal issues from collateral statutory claims, and allows specialized forums to adjudicate matters within their respective jurisdiction.

Sixth, the final rule supports more effective use of probationary and trial periods. Congress and the civil service rules have long treated probationary and trial periods as a continuation of the examining and assessment process. These periods allow agencies to determine whether a new employee, supervisor, or manager has demonstrated the performance, conduct, judgment, and suitability necessary for continued Federal service. OPM expects that a focused, streamlined appeal process—rather than one modeled on the prior MSPB procedures—will provide accountability without the litigation-driven hesitation associated with those procedures, and will allow supervisors and managers to devote more time to training, mentoring, observing, and evaluating employees during the period in which those assessments are most important.

Seventh, OPM expects the rule to improve the efficiency of the service. When supervisors are able to make timely, evidence-based decisions during probationary or trial periods, agencies are better positioned to retain employees who meet mission needs and address situations in which continued employment does not advance the efficiency of the service. This benefits the public by helping agencies maintain a capable workforce and by reducing the long-term costs

associated with retaining employees whose performance, conduct, or supervisory capacity has not been demonstrated during the probationary or trial period.

Eighth, the final rule provides transparency and accountability appropriate to the limited appeal rights at issue. OPM will issue written decisions, provide reconsideration, allow Director review before finality, and make final merits decisions publicly available subject to privacy, privilege, law-enforcement-sensitive information, and other legal limits. These features will promote consistency, provide guidance to agencies and employees, and permit public understanding of how OPM applies the final rule over time.

OPM recognizes that some of these benefits are difficult to quantify with precision. The absence of precise quantification does not make the benefits less substantial. Faster finality, reduced uncertainty, clearer claim routing, more efficient use of supervisory and human-resources time, and better use of probationary and trial periods are significant operational benefits that support the final rule.

Accordingly, OPM concludes that the final rule will produce benefits beyond the quantified savings reflected in the cost analysis. The rule preserves administrative review of the limited matters appealable under part 751, provides a more focused and timely adjudicatory process, reduces unnecessary litigation burden, allows prompt correction of agency error where warranted, and supports the effective use of probationary and trial periods to promote the efficiency of the Federal service.

VI. Procedural Issues and Regulatory Review

A. Regulatory Flexibility Act

The Director of the Office of Personnel Management certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities because the rule involves the authority of Federal agencies to adjudicate appeals filed by current and former Federal employees. While small entities representing current or former Federal employees will be affected by the change in venue for appeals and complaints of

discrimination, the procedures employed by OPM and EEOC will not cause a significant economic impact on these small entities.

B. Regulatory Review

The Office of Information and Regulatory Affairs in the Office of Management and Budget has designated this as a significant regulatory action under E.O. 12866 section 3(f). Accordingly, 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 that have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities. This rulemaking does not reach that threshold. This rule is not considered an E.O. 14192 regulatory action. As explained in the cost analysis above, measured against the current no-appeals baseline, the rule imposes quantified recurring annual costs of approximately \$1.5 million, which OPM concludes are justified by the rule's quantified and non-quantified benefits.

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 (Aug. 10, 1999), 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 standards set forth in subsections 3(a) and (b)(2) of E.O. 12988 (Feb. 5, 1996).

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 one 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). The final rule establishes procedures for filing and adjudicating appeals before OPM under part 751, including electronic filing, appellant submissions, representative information, requests for e-filing

exemptions, agency responses, agency-record submissions, agency certifications, appellant replies, requests for reconsideration, and related case-processing submissions.

The information collected will be used to receive, docket, serve, process, adjudicate, and maintain records of appeals from covered actions under part 751, including terminations during probationary or trial periods, assignments to nonsupervisory or nonmanagerial positions following failure to complete a supervisory or managerial probationary period, noncertification of continuation of an appointment, and failure to certify and finalize an appointment. The final rule requires use of the electronic filing system identified on OPM's website, except where OPM grants an exemption for good cause.

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 11

Government employees.

5 CFR Part 230

Civil defense, Government employees.

5 CFR Parts 315 and 432

Government employees.

5 CFR Parts 751 and 752

Administrative practice and procedure, Government employees.

Signing Statement

The Director of OPM, Scott Kuper, 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 parts 11, 230, 315, 432, 751 and 752 as follows:

PART 11—PROBATIONARY AND TRIAL PERIODS (RULE XI)

1. The authority citation for part 11 continues to read as follows:

Authority: 5 U.S.C. 3301, 3302; E.O. 14284, 90 FR 17729.

§ 11.2 [Amended]

2. Amend § 11.2, in paragraph (a)(2), by removing the phrase “Reinstatement Priority List” and adding in its place the phrase “Reemployment Priority List”.

3. Amend § 11.5 by redesignating paragraphs (e) through (g) as paragraphs (i) through (k) and adding new paragraphs (e) through (h) to read as follows:

§ 11.5 Completion of probationary or trial period.

* * * * *

(e) Each agency head shall designate, in writing, one or more agency officials responsible for evaluating the continued employment of employees serving an initial probationary or trial period in the Federal service. The agency head should limit such designations to officials who can properly assess the needs and interests of the agency, the organizational goals of the agency or the Federal Government, and the efficiency of the service.

(f) At least 60 days before the end of an employee’s initial probationary or trial period, an

official designated under paragraph (e) of this section shall meet with the employee to discuss the employee's performance and conduct, based in part on input from the employee's supervisor; the needs and interests of the agency; and whether the employee's continued employment would advance the public interest, the organizational goals of the agency or the Federal Government, and the efficiency of the service.

(g) Within 30 days before the end of an employee's initial probationary or trial period, the agency head or an official designated under paragraph (e) of this section shall determine, consistent with this section and other applicable law, whether to finalize the employee's appointment to the Federal service or terminate the employee's service.

(h) Before finalizing an employee's appointment to the Federal service at the conclusion of the probationary or trial period, the agency head or an official designated under paragraph (e) of this section must certify in writing that the employee's continued employment will advance the public interest.

* * * * *

PART 230—ORGANIZATION OF THE GOVERNMENT FOR PERSONNEL MANAGEMENT

4. The authority citation for part 230 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302. E.O. 10577, 3 CFR 1954-1958 Comp., p. 218; E.O. 14284, 90 FR 17729. Sec. 230.402 also issued under 5 U.S.C. 1104.

Subpart D—Agency Authority To Take Personnel Actions in a National Emergency

5. Amend § 230.402 by revising paragraph (f) to read as follows:

§ 230.402 Agency authority to make emergency-indefinite appointments in a national emergency.

* * * * *

(f) *Probationary period.* (1) The first year of service of an emergency-indefinite employee is a probationary period.

(2) The agency may terminate the appointment of an emergency-indefinite employee at any time during the probationary period. The employee is entitled to the procedures set forth in part 751 of this chapter as appropriate.

* * * * *

PART 315—CAREER AND CAREER-CONDITIONAL EMPLOYMENT

6. The authority citation for part 315 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, and 3302. E.O. 10577, 3 CFR, 1954-1958 Comp., p. 218, unless otherwise noted; E.O. 14284, 90 FR 17729. Secs. 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 3652. Secs. 315.602 and 315.604 also issued under 5 U.S.C. 1104. Sec. 315.603 also issued under 5 U.S.C. 8151. Sec. 315.605 also issued under E.O. 12034, 43 FR 1917, 3 CFR, 1978 Comp., p.111. Sec. 315.606 also issued under E.O. 11219, 30 FR 6381, 3 CFR, 1964-1965 Comp., p. 303. Sec. 315.607 also issued under 22 U.S.C. 2560. Sec. 315.608 also issued under E.O. 12721, 55 FR 31349, 3 CFR, 1990 Comp., p. 293. Sec. 315.610 also issued under 5 U.S.C. 3304(c). Sec. 315.611 also issued under 5 U.S.C. 3304(f). Sec. 315.612 also issued under E.O. 13473, 73 FR 56703, 3 CFR, 2009 Comp., p. 241. Sec. 315.613 also issued under 5 U.S.C. 9602. Sec. 315.710 also issued under E.O. 12596, 52 FR 17537, 3 CFR, 1987 Comp., p. 264.

Subpart B—The Career-Conditional Employment System

7. Amend § 315.201 by revising paragraph (a) to read as follows:

§ 315.201 Service requirement for career tenure.

(a) *Service requirement.* A person employed in the competitive service for other than temporary, term, or indefinite employment is appointed as a career or career-conditional employee subject to the probationary period required by part 11 of this chapter. Except as provided in paragraph (c) of this section, an employee must serve at least 3 years of creditable service as defined in paragraph (b) of this section to become a career employee.

* * * * *

Subpart I—Probation on Initial Appointment to a Supervisory or Managerial Position

8. Amend § 315.908 by revising paragraph (b) to read as follows:

§ 315.908 Appeals.

* * * * *

(b) An employee who alleges that an agency action under this subpart was based on partisan political reasons or marital status may appeal to the Office of Personnel Management using the procedures in 5 CFR part 751.

PART 432—PERFORMANCE BASED REDUCTION IN GRADE AND REMOVAL ACTIONS

9. The authority citation for part 432 is revised to read as follows:

Authority: 5 U.S.C. 4303, 4305; E.O. 14284, 90 FR 17729.

10. Amend § 432.102 by:

- a. Revising paragraphs (f)(1), (2), and (3);
- b. Redesignating paragraphs (f)(4) through (13) as paragraphs (f)(5) through (14); and
- c. Adding a new paragraph (f)(4).

The revisions and addition read as follows:

§ 432.102 Coverage.

* * * * *

(f) * * *

(1) An employee in the competitive service who is serving a probationary period under an initial appointment;

(2) An employee in the competitive service serving in an appointment that requires no probationary period, who has not completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less;

(3) A preference eligible employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions;

(4) A nonpreference eligible employee in the excepted service who has not completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment (see 5 CFR 213.104(a)) limited to 2 years or less;

* * * * *

11. Add part 751 to read as follows:

PART 751—PROBATIONARY AND TRIAL PERIOD APPEALS

Sec.

751.101 Right to appeal.

751.102 Procedures for submitting appeals.

751.103 Form and content of probationary or trial period appeal and agency response.

751.104 Employee representatives.

751.105 Adjudication of appeals.

751.106 Sanctions and protective orders.

751.107 Requests for reconsideration of an initial decision.

751.108 Review by the OPM Director.

751.109 Final decision.

Authority: 5 U.S.C. 1103, 1302, 3301, 3302, 3321, 5596; E.O. 14284, 90 FR 17729; 5 CFR 11.6.

§ 751.101 Right to appeal.

(a) *Right of appeal.* (1) Subject to paragraphs (b) through (d) of this section, an employee may appeal the following actions to the Office of Personnel Management (OPM):

(i) Termination during a probationary or trial period required under 5 CFR part 11 or other authority administered by OPM;

(ii) Assignment to a nonsupervisory or nonmanagerial position for failure to complete a supervisory or managerial probationary period required under subpart I of part 315 of this chapter;

(iii) An agency's decision not to certify the continuation of the appointment of an employee serving a probationary or trial period; or

(iv) An agency's failure to certify and finalize the appointment of an employee serving a probationary or trial period.

(2) An individual serving a probationary or trial period does not have a right to appeal their termination under this part if the individual has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. Such individual may have a right to appeal under the provisions of 5 CFR 432.106 or 752.405, as appropriate, provided that such appeal is not excluded by the provisions of § 432.102(b), (d), or (f), or § 752.401(b) or (d), of this chapter.

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

(1) The timeliness of the written appeal,

(2) That OPM possesses jurisdiction over the appeal, and

(3) The agency's action was discriminatory based on partisan political reasons or marital status or failed to follow the procedures for terminating the employee for reasons based in whole or in part on conditions arising before the employee's appointment.

(c) *Appealable issues*—(1) *Discrimination.* An employee may appeal one of the following actions that he or she alleges was based on partisan political reasons or marital status:

(i) Termination not required by statute;

(ii) Assignment to a nonsupervisory or nonmanagerial position under § 315.907 of this chapter;

(iii) An agency's decision not to certify the continuation of the appointment of an employee serving a probationary or trial period; or

(iv) An agency's failure to certify and finalize the appointment of an employee serving a probationary or trial period.

(2) *Improper procedure.* An employee whose termination is based in whole or in part on conditions arising before his or her appointment may appeal to OPM challenging that the agency failed to provide:

(i) Advance written notice stating the reasons, specifically and in detail, for the proposed action;

(ii) A reasonable time for filing a written answer to the notice of proposed termination and for furnishing affidavits in support of his or her answer. If the employee answers, the agency shall consider the answer in reaching its decision; and

(iii) A written decision at the earliest practicable date delivered at or before the effective date of the action. The decision shall inform the employee of the reasons for the action, the right to appeal to OPM, the need to include documented supporting facts, and time limits within which the appeal must be submitted under this section.

(d) *Nonappealable issues.* An employee may not appeal under this part any other issue not specified in paragraph (c) of this section.

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

(f) *Definition of employee.* For purposes of this part, an employee means an individual appointed:

(1) To the competitive service as described in 5 CFR 11.2 who has not completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(2) To the competitive service and serving a probationary period on an initial appointment to a supervisory or managerial position under subpart I of part 315 of this chapter;

(3) To the competitive service under an emergency-indefinite appointment in a national emergency serving a probationary period under subpart D of part 230 of this chapter and who is in the first year of service; or

(4) To the excepted service before the end of their first year on an initial appointment under part 307 of this chapter. Employees serving in an appointment in the excepted service outside of part 307 of this chapter are not covered under this section and, therefore, may not appeal a termination during their trial period unless otherwise entitled by statute.

§ 751.102 Procedures for submitting appeals.

(a) *Filing an appeal.* An employee, or his or her authorized representative, seeking to file an appeal or reconsideration under this part 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 employee may file an appeal within 30 calendar days from the effective date of the action. An appeal is deemed timely when it is electronically filed by 11:59 p.m. Eastern Time on the 30th 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 an agency action. 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 employee does not file an appeal within the time set by this section, the appeal will be dismissed as untimely filed unless the employee 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 reconsideration must register as instructed by OPM on its e-filing 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 unless exempted under paragraph (c)(7) of this section for good cause.

(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 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 part. 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 the electronic submission is timestamped by OPM based on the Eastern Time Zone.

§ 751.103 Form and content of probationary or trial period appeal and agency response.

(a) *Initial appeal.* An employee's appeal shall be in writing and shall state the basis of the employee'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.* The agency response to an appeal must be filed within 30 calendar days after service of the initial appeal; contain the name of the appellant and of the agency whose action the appellant is appealing; a statement identifying the agency action taken against the appellant and stating the reasons for taking the action; all documents contained in the agency record of the action; designation of and signature by the authorized agency representative; and any other documents or responses requested by the Office. The agency's 30 calendar days to respond begins upon service of the appeal. The agency record of the action shall include, at a minimum:

- (1) All documents considered or relied upon by the agency in taking the action;
- (2) The notice of action and effective date;
- (3) Documents showing the appellant's appointment, service history, and probationary or trial period status;
- (4) Any written certification, noncertification, or failure-to-certify record under 5 CFR part 11;

(5) Any documents supporting the agency's basis for the action under appeal; and

(6) A certification that the agency has produced the complete record considered by the deciding official or otherwise relied upon by the agency.

(i) The agency must produce the complete agency record to OPM.

(ii) The agency must serve the appellant with the agency record, except that the agency may redact or withhold information from the copy served on the appellant to the extent necessary to comply with 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.

(c) *Reply.* An employee may file a reply to an agency response to an initial appeal within 15 calendar days of the date the agency submits its response. The reply may only address the factual and legal issues raised by the agency in response to the initial appeal. 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.

(d) *Inspection of OPM's appellate record.* The employee, an employee's representative, and the agency will be permitted to 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.

(e) *Service of documents.* The employee, employee's representative, and agency 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 legal 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.

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

§ 751.104 Employee 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.

§ 751.105 Adjudication of appeals.

(a) *Appeals by non-OPM employees.* OPM will assign personnel to adjudicate an appeal under this subpart by an employee of an agency other than OPM. OPM personnel assigned to adjudicate an appeal under this part 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 relationship with the appellant or, during the preceding two years, that person was an employee of the agency that is party to the action to be assigned. When

necessary, OPM may assign an administrative law judge to preside over the adjudication of an appeal.

(b) *Appeals by OPM employees.* OPM will assign an administrative law judge to adjudicate an appeal under this subpart by an OPM employee and to issue an initial decision. To insulate the adjudication of its own employees' appeals from agency involvement, OPM will not disturb initial decisions in those cases unless a party shows that there has been harmful procedural irregularity in the proceedings before the administrative law judge, a clear error of law, or a material factual error that affected the outcome of the appeal. For purposes of this paragraph (b), 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 (b) or under paragraph (a) of this section does not make 5 U.S.C. 554, 556, or 557 applicable to an appeal under this part except to the extent those provisions are independently required by law or expressly incorporated in this part.

(c) *Ascertainment of facts.* OPM may require either party to provide additional information, and it may audit or investigate an agency's action in the course of adjudicating an appeal if it determines, in its sole discretion, that the existing record is insufficient to resolve a material issue within OPM's jurisdiction, and that the audit or investigation is reasonably likely to produce information material to resolving that issue. An individual serving as a representative of either party may not participate in an audit or investigation unless OPM specifically requests them to do so. The review of an agency action must be based solely on the developed written record unless OPM determines that a hearing is necessary and efficient in resolving an appeal. For purposes of this section, the phrase *necessary and efficient* means circumstances in which the written record is insufficiently developed to make a determination regarding one or more facts material to the outcome of the appeal, or where there is a disputed issue of witness credibility

that is material to the outcome of the appeal. Where an investigation or audit is conducted, OPM will:

(1) Inform the employee, the employee's representative, and the agency of an investigation or audit; and

(2) Provide the employee, the employee's representative, and the agency with the results of an investigation or audit, and a reasonable opportunity to submit arguments or additional information to support their positions.

(d) *Initial decision.* OPM will notify the employee, employee's representative, and agency in writing of its decision.

(e) *Remedies.* (1) If the employee is the prevailing party, OPM will order relief including correction of the personnel action and any back pay, interest, and reasonable attorney fees consistent with subpart H of part 550 of this chapter. The employee as a prevailing party is not entitled to compensatory damages or other relief not authorized under 5 U.S.C. 5596(b).

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

§ 751.106 Sanctions and protective orders.

(a) *Cease-and-desist directive.* 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 must file such request in accordance with § 751.102(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 directive.* 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.

(c) *Scope of sanctions.* Any sanction issued under paragraph (b) of this section must be proportionate, causally related to the violation, and no broader than necessary to protect the adjudicatory process.

§ 751.107 Requests for reconsideration of an initial decision.

(a) Upon a timely request from either party to the dispute or upon its own initiative, OPM may, in its sole and exclusive discretion, reopen and reconsider an initial decision issued under this subpart. An employee, the employee's representative, or agency may request reconsideration of an initial decision within 30 calendar days from issuance of the decision. The request for reconsideration must be filed as directed in the initial decision.

(b) Grounds for which OPM may grant a request for reconsideration are:

(1) The initial decision contains erroneous findings of material fact sufficient to warrant an outcome different from that of the initial decision;

(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 reconsider an appeal.

(c) In any case that is reopened or reviewed, OPM may:

(1) Issue a reopened and reconsidered decision (“R&R decision”) that affirms, reverses, modifies, vacates, or otherwise decides the case, 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.

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

§ 751.108 Review by the OPM Director.

The Director may, on the Director’s own initiative and before a decision becomes final under § 751.109, 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 may contain clear legal error; may rest on an erroneous finding of material fact; may involve an issue of exceptional importance, an issue affecting the 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 § 751.107(c).

§ 751.109 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 § 751.107 or the Director reopens the decision under § 751.108.

(b) A timely request under § 751.107 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 § 751.108 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 § 751.108 before that time.

(c) An untimely request under § 751.107 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 Director pursuant to § 751.108 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 of OPM.

(f) Subject to applicable legal limits, including requirements protecting privacy, privileged information, protected personal information, law-enforcement-sensitive information, and other information that may not lawfully be disclosed, OPM shall maintain a publicly accessible website containing final decisions issued under this part that address a party's claim on the merits. Any final merits decision not made publicly available because of such legal limits shall be made available upon request to the Federal employee or former Federal employee involved in a proceeding under this subpart, his or her representative selected pursuant to § 751.104, or a representative of the Federal agency or office involved in the proceeding who has a need to know.

PART 752—ADVERSE ACTIONS

12. The authority citation for part 752 is revised to read as follows:

Authority: 5 U.S.C. 6329b, 7504, 7514, 7515, and 7543; 38 U.S.C. 7403; Sec. 512, Pub. L. 114–328, 130 Stat. 2112; E.O. 10577, 19 FR 7521, 3 CFR, 1954-1958 Comp., p. 218; E.O. 14284, 90 FR 17729.

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

13. Amend § 752.201 by revising paragraphs (b)(1) and (2) to read as follows:

§ 752.201 Coverage.

* * * *

(b) * * *

(1) An employee in the competitive service who has completed a probationary period, or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less;

(2) An employee in the competitive service serving in an appointment which requires no probationary period, and who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less;

* * * *

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

14. Amend § 752.401 by revising paragraphs (c)(1), (c)(2)(i), and (d)(10) and (12) to read as follows:

§ 752.401 Coverage.

* * * *

(c) * * *

(1) A career or career conditional employee in the competitive service who is not serving a probationary period;

(2) * * *

(i) Who is not serving a probationary period under an initial appointment; or

* * * * *

(d) * * *

(10) A nonpreference eligible employee serving a trial period under an initial appointment in the excepted service pending conversion to the competitive service, unless he or she meets the requirements of paragraph (c)(5) of this section;

* * * * *

(12) An employee in the competitive service serving a probationary period, unless he or she meets the requirements of paragraph (c)(2) of this section.

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