e: 6325-39-P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 351

[Docket ID: OPM-2025-0239]

RIN 3206–AO99

Reduction in Force Appeals

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to revise how an employee may appeal a furlough of more than 30 days, separation, or demotion by a reduction-in-force (RIF) action. OPM will replace the Merit Systems Protection Board (MSPB) as the adjudicative agency for such appeals. The rule establishes a uniform, record-based OPM appeal process; clarifies the appellant's burden; requires production of the complete agency record; preserves collateral statutory remedies; and applies prospectively to improve timeliness, consistency, and cost-effectiveness while maintaining administrative review.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. This final rule applies only to a RIF action for which an agency issues the employee a specific RIF notice under 5 CFR 351.802 on or after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Aaron Gottesman, Senior Advisor to the Director, by email at employeeaccountability@opm.gov or by phone at (202) 606-7400.

SUPPLEMENTARY INFORMATION:

OPM is issuing this final rule to modernize the administrative process for appeals by employees who are furloughed for more than 30 days, separated, or demoted by a reduction-in-force action under 5 CFR part 351. Congress charged OPM with prescribing regulations governing the release of competing employees in a RIF, and OPM has historically implemented

RIF appeal procedures through regulation. This final rule revises that regulatory framework by replacing the prior MSPB forum for future non-SES RIF appeals with a uniform OPM-administered process. The rule does not alter agencies' responsibility to determine their workforce needs or whether a RIF is necessary. By requiring a complete RIF-specific agency record, permitting an appellant reply, authorizing additional information, audits, investigations, and hearings when necessary and efficient, and preserving collateral statutory remedies, the final rule provides meaningful administrative review while reducing delay, fragmentation, and unnecessary litigation burden.

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

In response to the proposed rule, OPM received 1,252 comments during the 30-day public comment period from a variety of individuals, including current and former civil servants, members of Congress, as well as organizations, including local and national unions and Federal agencies. Of the 1,252 comments, 1,251 were posted on www.regulations.gov, and one was not posted because it contained vulgar language unrelated to the rulemaking in question. 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. Less than 1 percent of the overall comments were supportive, neutral, or mixed, and 99 percent opposed the proposed regulation.

OPM found many of the comments helpful. OPM has revised the final rule to clarify, narrow, or supplement the proposed RIF appeal procedures in response to comments, including comments concerning burden of proof, access to the agency record, information asymmetry, due process, neutrality, hearings, protective orders, collective bargaining, and public disclosure. In response to those comments, the final rule adds more precise appeal standards, a detailed RIF-specific agency-record requirement, disclosure and privilege protections, stronger adjudicator-separation and *ex parte* safeguards, narrower e-filing sanctions, more flexible reply rules, and more carefully tailored protective order and public posting provisions. The revisions are summarized below.

Clarifying appealable actions. The final text clarifies the appealable actions set forth in § 351.901(a). The proposal allowed an employee "who has been the subject of a reduction-in-force action" to appeal an action taken under part 351. The final text specifies that only an employee furloughed for more than 30 days, separated, or demoted by a RIF action taken under part 351 may appeal that action to OPM.

Revising the merits standard. The final text replaces the proposed "would not have suffered the same or another RIF action" standard in § 351.901(b) with a more precise two-part merits showing: the appellant must prove that the agency failed to comply with an applicable statute or OPM regulation governing RIF actions under part 351, and the failure prejudiced the appellant by causing the appealed action or the loss of a materially more favorable outcome. This is clearer and better focused on prejudicial RIF-compliance error.

Revising exclusivity language.. The final text continues to provide that part 351 procedures are the sole and exclusive means of appealing a RIF action, and adds that RIFs and matters related to the appeals of RIFs cannot be raised in grievance procedures or challenged through grievance arbitration, while expressly preserving collateral matters within the independent jurisdiction of Equal Employment Opportunity Commission (EEOC), Inspectors General, MSPB, Department of Labor Veterans' Employment and Training Service (DOL VETS), and the Office of Special Counsel (OSC). The final text also retains the no-judicial-review provision.

Updating filing-system language. The final text replaces the proposed placeholder for the electronic filing system with a reference to the system identified on OPM's website. It also replaces "statements, evidence, or documents" with "pleadings, evidence, or documents," better aligning the filing provision with adjudicatory terminology.

Clarifying filing deadlines. The final text changes the filing deadline from 11:59 p.m. Eastern Standard Time to 11:59 p.m. Eastern Time, avoiding confusion during daylight saving time. It also consolidates the untimely-filing rule in § 351.902(b)(2) and provides that good-cause determinations are within OPM's sole and exclusive discretion.

Adding a limited tolling rule for collateral matters. The final text adds § 351.902(b)(3), which permits an employee who timely filed a collateral matter within the independent jurisdiction of an entity identified in § 351.901(c) to file a RIF appeal within 30 calendar days after the final decision on that matter, where that decision materially affects the employee's retention standing, order of release, assignment rights, or other rights under part 351. The final text provides that a decision is final for this purpose when it is no longer subject to further administrative review and that OPM determines, in its sole and exclusive discretion, whether the decision materially affects the employee's rights.

Requiring filing-information detail in the RIF notice. The final text amends § 351.802(a)(6) to require the specific RIF notice to state, in addition to the employee's right to appeal to OPM, the time limit for filing an appeal under § 351.902(b) and the electronic filing system through which an appeal must be filed.

Narrowing e-filing enforcement. The final text narrows the proposed e-filing enforcement provisions. Rather than authorizing broader orders regulating filing methods, sanctions, misuse, or termination of e-filer participation, the final text provides that OPM may strike a document when an e-filer repeatedly fails to follow filing instructions after a show-cause order. The final text also removes the proposed statement that withdrawal from e-filing may preclude future re-registration and clarifies that withdrawal of e-filing registration is not good cause for staying a case.

Simplifying initial-appeal information. The final text simplifies the contact-information requirements in § 351.903(a) by replacing "legal name, best address" with "name, address." The core requirement remains unchanged: the appeal must be written, state the basis for the appeal, identify the appellant and any representative, and include supporting documentation.

Defining the agency record. The final text adds a RIF-specific minimum agency-record requirement to § 351.903(b). The proposal required the agency response to include the agency record but did not define its contents. The final text specifies that the agency record includes, at a minimum, the RIF notice and effective-date documents, documents supporting the RIF reason, coverage and appointment records, competitive-area and competitive-level records, retention-register and retention-standing records, order-of-release records, assignment-rights records, special RIF-circumstance records, and a certification that the complete agency record has been produced.

Distinguishing production to OPM from service on the appellant. The final text requires the agency to produce the complete agency record to OPM while serving the appellant with the agency record subject to legally required limits. The agency may redact or withhold information from the appellant's copy only to the extent necessary to comply with the Privacy Act, applicable legal privileges, classified-information or national-security requirements, OPM protective orders, or other disclosure limits required by law.

Allowing limited new matters in reply. The final text revises § 351.903(c) to permit an appellant's reply to 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.

Adding disclosure limits for inspection and service. The final text makes inspection of OPM's appellate record and service of documents subject to the Privacy Act, applicable legal privileges, classified-information or national-security requirements, OPM protective orders, and other applicable disclosure limits required by law. The proposal allowed inspection and required service but did not include the same express disclosure limitations.

Reorganizing representative provisions. The final text reorganizes § 351.904 into separate paragraphs addressing designation of a representative, Federal employee representatives and restrictions on official time and reimbursement, and disallowance of representatives. The final text also narrows the grounds for disallowing a representative. Because a Federal employee representative may not perform representational functions while in a duty status, the final text does not adopt the proposed additional grounds for disallowance based on the priority needs of the Government or unreasonable costs to the Government; OPM or the responsible agency may disallow an employee's choice of representative only where the representative is an employee of the responsible agency or OPM and the representative's activities would cause a conflict of interest or position. The remaining changes are primarily organizational and clarifying.

Adding adjudicator-separation and ex parte safeguards. The final text adds safeguards in § 351.905(a) requiring OPM adjudicators to be insulated from officials who participated personally and substantially in the challenged action or provided case-specific advice. It also prohibits adjudicators from considering material *ex parte* communications on the merits and requires any such communication to be summarized in the record with an opportunity for party response, unless disclosure is prohibited by law.

Clarifying OPM employee appeals. The final text clarifies that an administrative law judge (ALJ) assigned to adjudicate an OPM employee's appeal will issue an initial decision. It also adds material factual error affecting the outcome as a ground on which OPM may disturb the ALJ's decision and clarifies that assigning an ALJ does not make 5 U.S.C. 554, 556, or 557 applicable unless independently required by law or expressly incorporated.

Tightening audits and investigations. The final text narrows the standard for OPM audits or investigations. The proposal allowed OPM to conduct an audit or investigation when the "interest of justice" would be served. The final text requires OPM to determine 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 material information. The final text also provides that representatives may not participate in an audit or investigation unless OPM specifically requests it.

Removing a separate ascertainment sanction. The final text removes the proposed separate paragraph authorizing sanctions for failure to participate in ascertainment of facts and renumbers the initial-decision and remedies provisions.

Refining protective-order authority. The final text revises § 351.906(a). The proposal focused on harassing communications and use of appeal information for unrelated purposes. The final text authorizes protective orders or cease-and-desist directives to protect the integrity of the adjudicatory process and to prevent threats, intimidation, targeted harassment, improper witness contact, disclosure of protected personal information, or misuse of nonpublic information obtained through the appeal. It also requires protective orders to be no broader than reasonably necessary and not to restrict lawful communications protected by law.

Clarifying OPM-initiated reconsideration. The final text clarifies in § 351.907(a) that OPM may reopen and reconsider an initial decision either upon request of a party or on its own initiative. The proposal allowed party-requested reconsideration, while Director sua sponte review was addressed separately.

Clarifying Director review. The final text revises § 351.908 to preserve the Director's sua sponte authority to reopen and reconsider a nonfinal initial decision or reopened and reconsidered decision, while identifying nonexclusive considerations that may guide that review. The proposal gave the Director broad discretion to reopen and reconsider any nonfinal decision. The final text clarifies that the Director may consider whether the decision contains clear legal error, rests on an erroneous material factual finding, involves an issue of exceptional importance, affects governmentwide civil service administration, conflicts with another OPM decision, or otherwise warrants review. It also clarifies that § 351.908 does not create a party right to request Director review and that, upon reopening, the Director may take any action available under § 351.907(c).

Revising finality of initial decisions. The final text revises § 351.909 so that an initial decision becomes final 30 calendar days after issuance unless, before that time, a party timely requests reopening and reconsideration under § 351.907 or the Director reopens the decision under § 351.908. A timely 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 reopens it before that time, and if OPM grants the request, the reopened and reconsidered decision becomes final 30 calendar days after issuance unless the Director reopens that decision before that time. An untimely request does not suspend or otherwise affect finality. The final text also clarifies that a decision by the Director that disposes of the appeal is final and effective upon issuance and that, if the Director remands the appeal or directs further proceedings, any resulting decision becomes final under § 351.909. These changes conform finality to the reconsideration and Director-review provisions of the final rule.

Adding public-posting disclosure limits. The final text adds express legal limits on public posting of final merits decisions, including requirements protecting privacy, privileged information, protected personnel information, law-enforcement-sensitive information, and other information that may not lawfully be disclosed. It also clarifies that final merits decisions not publicly posted because of such legal limits must 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 § 351.904, or a representative of the Federal agency or office involved in the proceeding who has a need to know.

OPM is finalizing the RIF appeals rule as amended. After considering the comments, OPM concludes that the final rule, as amended, better balances timely adjudication, governmentwide consistency, employee access to meaningful administrative review, and agencies' need for finality in workforce restructuring than the current MSPB appeal process for non-SES RIFs.

II. Background

When agencies face workforce restructuring, RIF procedures provide a mechanism for realigning staff through objective criteria. These procedures are governed by 5 U.S.C. 3501-3504 and are implemented through OPM regulations at 5 CFR 351. These regulations provided employees subject to a RIF action with an avenue to appeal to the MSPB. Under the previous 5 CFR 351.901, replaced by this rule, employees furloughed for more than 30 days, separated, or demoted by a RIF action were able to appeal to the MSPB.

Federal RIF procedures govern the release of competing employees when a release is required because of lack of work, shortage of funds, insufficient personnel ceiling, reorganization, or the exercise of reemployment or restoration rights. Congress has directed OPM to prescribe regulations governing the release of competing employees in a RIF, giving due effect to the statutory retention factors specified in 5 U.S.C. 3502. OPM implements those requirements in 5 CFR part 351.

Part 351 does not determine whether an agency should conduct a RIF in the first instance. Each agency remains responsible for determining the categories of positions required, where positions are to be located, and when positions are to be filled, abolished, or vacated. The RIF regulations govern how an agency must apply retention, notice, assignment, and related requirements once the agency determines that a RIF action is required.

RIF appeal procedures have historically been established through civil service regulation. Early RIF procedures were administered by the Civil Service Commission and its predecessors. The first uniform RIF regulations were issued in 1925 by the Personnel Classification Board, which was subsumed by the Commission.[1] Those regulations were bolstered again in 1929, when President Calvin Coolidge issued E.O. 5068, prescribing how veterans were to be treated "when

[1] U.S. Merit Sys. Prot. Bd., *Reduction-in-Force in the Federal Government, 1981: What Happened and Opportunities for Improvement* (June 1983), *available at* https://babel.hathitrust.org/cgi/pt?id=uc1.31210024942615&seq=31.

reductions are being made in the force."[2] President Roosevelt similarly invoked presidential authority to institute the regulatory procedures by which RIFs may be executed.[3]

Following enactment of the Veterans' Preference Act of 1944,[4] Commission regulations provided administrative appeal procedures for employees who believed RIF regulations had not been correctly applied.[5] Those procedures were revised over time, including in 1963, when the Commission provided that an employee who received a notice of specific RIF action and believed the regulations had not been correctly applied could appeal to the Commission.[6]

Central to this regulatory framework was the understanding that there was no right of judicial review of Commission decisions. "Employees sought to appeal the decisions of [the Commission] through the various forms of action traditionally used for so-called nonstatutory review of agency action, including suits for mandamus… injunction… and declaratory judgment." *United States v. Fausto*, 484 U.S. 439, 444 (1988). But "so long as there was substantial compliance with applicable procedures and statutes, the administrative determination was not reviewable." *Hargett v. Summerfield*, 243 F.2d 29, 32 (D.C. Cir. 1957). It was long understood that RIFs "are matters peculiarly within the province of those who are in charge of and superintending the departments, and, until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers." *Keim v. United States*, 177 U.S. 290, 296 (1900).

In 1978, Congress enacted the CSRA, which reorganized the civil service system and established a comprehensive remedial structure for Federal personnel matters.[7] Congress excluded RIF actions under 5 U.S.C. 3502 from the adverse action provisions in chapter 75.

---

[2] E.O. 5068, *Amendment of Civil Service Rule VI* (Mar. 2, 1929), *available at* https://www.presidency.ucsb.edu/documents/executive-order-5068-amendment-civil-service-rule-vi.
[3] E.O. 6175, *Separation Ratings of Departmental Employees* (June 16, 1933), *available at* https://www.presidency.ucsb.edu/documents/executive-order-6175-separation-ratings-departmental-employees.
[4] Act of June 27, 1944, ch. 287, sec. 12, 58 Stat. 390 (codified as amended at 5 U.S.C. 861).
[5] S. Comm. on Post Office & Civ. Serv., *Reduction-in-Force System in the Federal Government* 89 (July 4, 1952), *available at* https://babel.hathitrust.org/cgi/pt?id=uc1.aa0005567177&seq=67&q1=rule.
[6] 28 FR 10021 (Sept. 14, 1963).
[7] *See Grosdidier v. Broad. Bd. of Govs.*, 560 F.3d 495, 497 (D.C. Cir. 2009); *Filebark v. Dep't of Transp.*, 555 F.3d 1009, 1010 (D.C. Cir. 2009); *Graham v. Ashcroft*, 358 F.3d 931, 935 (D.C. Cir. 2004); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 773 (1985).

Congress also did not create an express statutory right for non-Senior Executive Service (SES) employees to appeal RIF actions to MSPB. OPM therefore continued to implement RIF appeal procedures through regulation.

In 1983, OPM revised part 351 to provide for MSPB adjudication of non-SES RIF appeals. 48 FR 49462 (Oct. 25, 1983). That provision reflected OPM's regulatory choice to use MSPB as the adjudicative forum. OPM now revises that regulatory framework and establishes OPM as the forum for appeals under subpart I of part 351.

Under the final rule, an employee who is furloughed for more than 30 days, separated, or demoted by a RIF action for which the agency issued a specific RIF notice under 5 CFR 351.802 on or after the effective date of the final rule under RIN 3206-AO86 may appeal that action to OPM. A RIF action for which the agency issued that notice before the effective date of the RIN 3206-AO86 final rule remains subject to adjudication by the MSPB under the procedures applicable to that action. The final rule also establishes filing procedures, agency-record requirements, adjudication procedures, reconsideration, Director review, and finality provisions for OPM RIF appeals. The appellant bears the burden to prove timely and proper filing, OPM jurisdiction, a failure to comply with an applicable statute or OPM regulation governing RIF actions under part 351, and prejudice caused by that failure.

The rule also preserves collateral statutory avenues administered by other entities. Employees may continue to file matters within the jurisdiction of EEOC, an Inspector General, MSPB where it has independent statutory jurisdiction, DOL VETS, or OSC. Finally, the rule applies to a RIF action for which the agency issued a specific RIF notice under 5 CFR 351.802 on or after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], the effective date of the final rule under RIN 3206-AO86; an appeal of a RIF action for which the agency issued that notice before that date, including an appeal pending before the MSPB, remains subject to adjudication by the MSPB under the procedures applicable when the action was taken.

III. Responses to Major Issues Raised by Commenters

A. OPM's Authority to Transfer RIF Appeals from MSPB to OPM

Commenters 0370, 0928, 1025, 1092, 1099, 1165, 1217, and 1252 argued that OPM lacks authority to transfer RIF appeals from MSPB to OPM. These commenters asserted that Congress created MSPB as the independent adjudicatory body for Federal personnel appeals, that RIF appeals are part of MSPB's statutory role, and that any removal of MSPB jurisdiction must be accomplished by Congress rather than by regulation. Commenters 1252, 1223, 1219, 1206, and 1119 argued that returning RIF appeal authority to OPM from MSPB violates a requirement, whether express or implied, that the CSRA mandates that personnel policymaking and personnel claims adjudication functions maintain structural separation. In support, commenters cite the legislative history of the CSRA to support the proposition that the CSRA was designed to decouple the adjudication function from the policymaking function under the Civil Service Commission. Commenter 1099 further argued that the proposed rule rested on an overbroad conception of Presidential and agency RIF authority.

OPM disagrees that congressional action is required to revise the forum for non-SES RIF appeals. 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).

With respect to RIFs, Congress gave broad authority to OPM to "prescribe regulations for the release of competing employees in a reduction in force." 5 U.S.C. 3502. That authority, together with OPM's related regulatory authority under 5 U.S.C. 1302(b) and (c) to administer veterans' preference in retention, reasonably encompasses regulations governing how an employee may challenge whether an agency complied with those RIF requirements.

In passing the CSRA, Congress carefully created the MSPB review scheme and determined that there should be no RIF appeal right to MSPB. In 5 U.S.C. 7512(B), Congress expressly excluded "a reduction-in-force action under § 3502 of this title" from the list of adverse actions covered under Chapter 75. 5 U.S.C. 7512(B). The MSPB appeal right in chapter 75 applies to actions covered by that subchapter, see 5 U.S.C. 7513(d), and chapter 77 provides procedures only for actions otherwise "appealable to the Board under any law, rule, or regulation." 5 U.S.C. 7701(a). Thus, chapter 77 does not itself create an independent statutory MSPB appeal right for non-SES RIF actions;

The MSPB has long acknowledged that it derives its authority to review agency RIF actions from OPM regulations at 5 CFR 351.901, not from the CSRA itself. See *Kohfield v. Dep't of the Navy*, 75 M.S.P.R. 1, 4 (1997) (citing *Grubb v. Dep't of the Interior*, 73 M.S.P.R. 296, 299 (1997)); *Gaxiola v. U.S. Dep't of the Air Force*, 6 M.S.P.R. 515, 519 (1981).

By carving out RIFs conducted under 5 U.S.C. 3502 from the MSPB's jurisdiction, Congress distinguished this type of reorganization activity from the individually targeted personnel actions for which employees have traditionally been accorded formal procedural protections. In the CSRA, Congress did not direct that the MSPB have jurisdiction over RIF appeals. Instead of altering the existing statutory scheme, the CSRA affirmed 5 U.S.C. 3502 as the governing statute on the issue of RIF appeal procedure for non-SES employees. In the nearly 50 years since its original enactment, Congress has not amended the statute to provide for such a right, nor has it provided for an appeal process for RIFs that includes judicial review.

At the time the CSRA was passed, RIF appeals were housed within the Civil Service Commission. Nothing in the CSRA altered that arrangement. Indeed, the D.C. Circuit has stated that "***if OPM chooses to use the MSPB for dispute resolutions***, it must take that statutory device as it finds it." *American Federation of Government Employees v. Office of Personnel Management* (*AFGE v. OPM*), 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 RIF appeal process.

OPM is not persuaded that the general CSRA structure or legislative history cited by commenters displaces the specific statutory text governing RIFs. Under general principles of statutory construction, the CSRA's plain and unambiguous language controls. Courts "assum[e] that the ordinary meaning of that language accurately expresses the legislative purpose."[8]

Commenters identified no provision that grants non-SES employees a statutory right to appeal RIF actions to MSPB or prohibits OPM from revising the regulatory forum for such appeals. General statements in the CSRA's legislative history about MSPB's independent role cannot transform OPM's prior regulatory delegation into an irrevocable statutory jurisdictional grant. Congress expressly excluded RIF actions under section 3502 from the chapter 75 adverse action scheme, which is the statutory path that provides MSPB appeal rights and judicial review for covered removals, suspensions, reductions in grade or pay, and furloughs of 30 days or less. 5 U.S.C. 7512(B). Where Congress wanted to provide an MSPB appeal right for a RIF-related action, it did so expressly, as it did for certain SES RIF actions. *See* 5 U.S.C. 3595(c). The absence of comparable language for non-SES RIF actions is therefore significant.

---

[8] *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 296 (2011); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–76 (2009) (quoting *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)) (internal quotation marks omitted); *Christiana Tr. v. Riddle*, 911 F.3d 799, 806 (5th Cir. 2018) ("If a statute's text is 'plain and unambiguous, it must be given effect.'" (quoting *BMC Software, Inc. v. Comm'r*, 780 F.3d 669, 674 (5th Cir. 2015))); *see also BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous").

Commenters 0928, 1099, and 1165 argued that OPM's statutory authority under 5 U.S.C. 3502 is limited to prescribing retention-order rules and does not authorize OPM to create an internal adjudicatory process for RIF appeals. OPM disagrees that its authority under 5 U.S.C. 3502 is limited to the mechanics of retention standing and does not include appeal procedures. Section 3502 directs OPM to prescribe regulations for the release of competing employees in a RIF. Regulations governing how an employee may challenge whether the agency complied with those RIF requirements fall comfortably within the regulatory framework OPM is authorized to establish. Under this authority, OPM may regulate matters such as whether to establish RIF appeal rights, the entity responsible for accepting RIF appeals, and the procedures under which an employee may appeal a RIF action. Thus, OPM has long used part 351 not only to prescribe retention rules but also to prescribe notice, assignment, record, certification, and appeal provisions. The final rule revises one component of that regulatory framework: the forum and procedure for administrative appeals.

Commenters 0343, 0928, 1092, 1099, and 1165 argued that Congress acquiesced in or ratified MSPB adjudication of RIF appeals by leaving OPM's regulatory delegation in place for decades. Some commenters also argued that because MSPB's jurisdiction includes matters appealable to the Board under any law, rule, or regulation, OPM's prior regulatory delegation effectively became part of MSPB's "organic jurisdiction." Commenters further cited the statutory MSPB appeal right for SES RIF actions as evidence that Congress expected RIF appeals generally to be heard by MSPB.

OPM disagrees. Congressional acquiescence is not lightly inferred, particularly where the statutory text does not require the asserted result.[9] Congress has not enacted a provision making non-SES RIF actions under 5 U.S.C. 3502 statutorily appealable to MSPB. The fact that

---

[9] *See Brown v. Gardner*, 513 U.S. 115, 121–22 (1994) ("congressional silence lacks persuasive significance") (internal quotation marks and citations omitted); *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) ("And when, as here, Congress has not comprehensively revised a statutory scheme but has only made isolated amendments, we have spoken more bluntly: it is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the statutory interpretation.") (internal citations omitted).

Congress has amended title 5 at various times without displacing OPM's prior regulatory delegation does not transform that delegation into a statutory mandate.

Nor does MSPB's jurisdiction over actions appealable to it by "law, rule, or regulation" prevent OPM from amending its own regulation. That formulation recognizes that MSPB may hear matters made appealable to it by regulation. It does not freeze every such regulation in place. Where MSPB jurisdiction exists only because an OPM regulation makes an action appealable to MSPB, OPM may revise that regulation through notice-and-comment rulemaking.

OPM's prior decision to use MSPB as the adjudicative forum for RIF appeals was a regulatory policy choice, not a statutory requirement. In adopting related RIF revisions, OPM explained that its objectives included giving "greater recognition to performance as a retention factor, strengthen[ing] the objectivity of the RIF process, and improv[ing] the efficiency of the system." 51 FR 318 (Jan. 3, 1986). OPM continues to agree that performance should be meaningfully reflected in RIF retention standing and that employees should receive objective and efficient review of alleged RIF errors. But those objectives do not require MSPB adjudication.

Congress assigned OPM a central role in administering and safeguarding the merit-based civil service: the OPM Director is charged with executing, administering, and enforcing the civil-service laws and regulations, 5 U.S.C. 1103(a)(5); advising the President on actions to promote an efficient civil service and the systematic application of merit system principles, including policies concerning performance, tenure, and separation, 5 U.S.C. 1103(a)(7); and designing systems to assess agency human-capital management, including standards for holding managers and human-resources officials accountable for efficient and effective human-resources management in accordance with merit system principles, 5 U.S.C. 1103(c)(1), (2)(F).

Congress also directed OPM to establish and maintain an oversight program to ensure that delegated personnel activities comply with merit system principles and applicable standards, 5 U.S.C. 1104(b)(2); preserved the Director's responsibility to prescribe regulations and ensure compliance with civil-service laws, rules, and regulations, 5 U.S.C. 1104(b)(3); and authorized

OPM to require corrective action when agency actions under delegated authority are contrary to law, rule, regulation, or applicable standards, 5 U.S.C. 1104(c). In the RIF context specifically, Congress directed OPM to prescribe regulations governing the release of competing employees and to give due effect to tenure, military preference, length of service, and efficiency or performance ratings, 5 U.S.C. 3502(a), while also assigning OPM responsibility for administering veterans' preference in retention, 5 U.S.C. 1302(b), (c).

These authorities operate within the merit system framework of 5 U.S.C. 2301, including the principles that the Federal workforce should be used efficiently and effectively and that employees should be retained on the basis of the adequacy of their performance, 5 U.S.C. 2301(b)(5), (6), as well as the prohibited-personnel-practice provisions barring unauthorized preferences, violations of veterans' preference, and actions contrary to laws, rules, or regulations implementing or directly concerning merit system principles, 5 U.S.C. 2302(b)(6), (11), (12).

Accordingly, OPM concludes that transferring RIF appeals to OPM is consistent with, rather than contrary to, Congress's merit system design. The final rule preserves objective review of RIF actions while allowing OPM, through its merit system compliance and adjudicatory functions, to ensure that agencies correctly apply the RIF regulations OPM is charged with prescribing and enforcing. OPM therefore declines to retain MSPB adjudication merely to preserve a forum-based connection to merit principles, where OPM has determined that a more focused OPM process will better promote performance-based retention, uniform interpretation of part 351, efficient adjudication, and timely corrective relief where an appellant proves prejudicial RIF error.

B. Separation of Policymaking and Adjudication Functions and Adequacy of OPM as a RIF Appeals Forum

Commenters 0370, 0928, 0962, 1025, 1092, 1099, 1165, 1217, and 1252 argued that the final rule improperly combines personnel policymaking and adjudication within OPM. These commenters cited the CSRA's division of the Civil Service Commission's functions between

OPM and MSPB and argued that Congress intended MSPB to provide independent adjudication separate from OPM's personnel-management role. Commenters also argued that OPM's responsibility for issuing RIF regulations, advising agencies, and in some circumstances reviewing competitive-area matters, creates an institutional conflict if OPM also adjudicates RIF appeals and denies employees a meaningful opportunity for review.

OPM recognizes that Congress created MSPB as an independent adjudicator for matters Congress made appealable to MSPB. But the CSRA does not require that every regulatory personnel appeal be adjudicated by MSPB. Administrative agencies routinely perform adjudicative functions concerning matters within their regulatory responsibilities, and OPM itself adjudicates a variety of Federal personnel matters. The question here is not whether MSPB is an independent adjudicatory body, but whether Congress required non-SES RIF appeals to remain with MSPB. OPM concludes that Congress did not impose such a requirement.

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.

Further, the CSRA currently provides for a broad range of venues to hear various claims arising out of the CSRA and the employment relationship with the government, including OPM which itself has long performed adjudicative or quasi-adjudicative processes in personnel matters.[10] For example, OPM's Office of Merit Systems Accountability and Compliance (MSAC) 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's MSAC office 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 Federal Labor Relations Authority (FLRA) likewise provides governmentwide leadership and guidance on Federal labor-management relations while resolving representation, negotiability, unfair-labor-practice, and

[10] *See* 5 U.S.C. 1104(b)(2), 1216(a)(1)–(2), 2302, 3330a, 3702, ch. 4, ch. 51, 5366, 7116; 42 U.S.C. 2000e-16; 29 U.S.C. 633a, 204; 38 U.S.C. ch. 43; 5 CFR parts 178, 536, and 771.

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 management 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.[11] 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 RIF appeals; the premise is inaccurate. Because MSPB members now serve at will, the MSPB possesses no greater structural independence from the President than does OPM.

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).

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

The APA itself reflects the same principle. It permits agency review of initial decisions by presiding employees and provides that, on review, the 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 RIF appeals. OPM concludes that it does. Here, the final rule provides a defined administrative process, requires decisions to be based on the record, preserves administrative review of whether the agency complied with applicable RIF statutes and OPM regulations and whether any failure prejudiced the appellant, and includes safeguards against arbitrary or predetermined decision-making.

Those safeguards are substantial. The final rule includes separation-of-functions safeguards tailored to the RIF appeal context. Under § 351.905(a), OPM personnel assigned to adjudicate appeals by non-OPM employees 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 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.

The final rule also restricts adjudicator assignments. 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, was an employee of the agency that is a party to the action or was subject to an action covered by part 351. When necessary, OPM may assign an administrative law judge to preside over an appeal. Appeals by OPM employees receive additional protection: under § 351.905(b), OPM will assign an administrative law judge to adjudicate the appeal and issue an initial decision, and OPM will not disturb that decision except on specified grounds.

OPM further disagrees that its review of certain competitive-area matters prejudges later appeals. OPM's regulatory review of a competitive area, where required, is not approval of an individual RIF action, not approval of an agency's decision to conduct a RIF, and not a determination that any later action against any employee is lawful. If a competitive area issue is raised in an appeal, the agency must produce the relevant record, including competitive area and competitive level documentation, and OPM will adjudicate the appeal based on the record and applicable legal standards.

Commenter 1252 asserted that "OPM has not demonstrated that it possesses the adjudicatory capacity necessary to replace MSPB's established system," and that effectuating this transfer "without evidence of readiness would risk inconsistent determinations, procedural delays, and diminished confidence in outcomes."

OPM respectfully disagrees. OPM currently serves as the appellate venue for classification, Fair Labor Standards Act, compensation and leave, and declination of reasonable offers, which are conducted by its MSAC office under the supervision of the Director of OPM. MSAC is an external-facing organization within OPM with longstanding responsibility for oversight of agency compliance with civil service laws, merit-system principles, and related regulations.[12] MSAC also has substantial experience adjudicating Federal personnel matters, including classification appeals, Fair Labor Standards Act claims, compensation and leave claims, and declination-of-reasonable-offer claims.[13] In those matters, MSAC provides

[12] U.S. Off. of Pers. Mgmt., Off. of Inspector Gen., *Final Evaluation Report: Evaluation of the Merit System Accountability and Compliance Office*, Rep. No. 2021-OEI-001 (Dec. 12, 2022), *available at* https://www.oversight.gov/sites/default/files/documents/reports/2022-12/Final-Report-2021-OEI-001.pdf.
[13] U.S. Off. of Pers. Mgmt., *Adjudications*, *available at* https://www.opm.gov/compliance/adjudications/.

employees with administrative review of agency personnel determinations and issues OPM's final administrative decision.

RIF appeals are well suited to MSAC's existing institutional role. A RIF appeal generally turns on whether the agency properly applied OPM's governmentwide RIF regulations to the appellant, including requirements concerning coverage, competitive area, competitive level, retention standing, order of release, assignment rights, notice, and related part 351 requirements. MSAC's mission and experience place it in a strong position to evaluate whether agencies complied with OPM regulations and whether any failure prejudiced the appellant. Locating RIF appeals in MSAC also allows OPM to bring its subject-matter expertise in part 351 directly to bear while maintaining an adjudicatory process separate from the employing agency that took the RIF action. Housing RIF appeals within MSAC would additionally separate the RIF adjudicative function within OPM from OPM's RIF policymaking function, which is housed in its Workforce Policy & Innovation (WPI) office.[14]

Commenters 0442, 0714, 0975, and 1147 asserted that assigning RIF appeals to MSAC would overwhelm that office, particularly if RIF appeal volume increases. OPM considered those comments but does not agree that they warrant retaining MSPB as the forum for RIF appeals. OPM expects MSAC to administer the appeal process through the streamlined, record-based procedures established in this final rule. Those procedures are designed to avoid unnecessary litigation burden while preserving the tools needed to resolve material issues. MSAC may require additional information, conduct an audit or investigation where the existing record is insufficient to resolve a material issue within OPM's jurisdiction, and hold a hearing when necessary and efficient. This structure permits MSAC to focus resources on appeals that require additional development, rather than applying the same litigation model to every case.

[14] U.S. Off. of Pers. Mgmt., *FY 2026 Congressional Budget Justification and Annual Performance Plan* 26, *available at* https://www.opm.gov/about-us/fy-2026-congressional-budget-justification/fy-2026-congressional-budget-justification.pdf.

OPM also does not agree that a temporary or anomalous increase in RIF activity provides a reason to retain a fragmented appeal structure indefinitely.[15] This rule applies only to appeals of RIF actions for which the agency issued a specific RIF notice under 5 CFR 351.802 on or after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], the effective date of the final rule under RIN 3206-AO86, and OPM will administer the process prospectively. OPM will monitor appeal volume, staffing needs, processing times, and operational requirements as implementation proceeds. Because MSAC already performs external adjudicatory and compliance functions, OPM expects that MSAC can incorporate RIF appeals into its existing adjudicatory framework more efficiently than creating a new office or continuing to rely on an external forum whose procedures OPM cannot control.

Commenters 0483, 0303, 0308, 0332, and others argued that transferring the appeal forum to OPM will deny appellants meaningful review because, in their view, it would consolidate the conception, execution, and adjudication of RIFs within a single agency. OPM disagrees. The final rule does not give OPM authority to decide whether another agency should conduct a RIF, what positions that agency should abolish, or which organizational components should be restructured. Those workforce management decisions remain with the employing agency. Consistent with § 351.201, each agency remains responsible for determining the categories of positions required, where positions are located, and when positions are filled, abolished, or vacated. OPM's role is different: OPM prescribes governmentwide RIF regulations, provides general regulatory guidance and technical assistance, and, where the regulations require it, reviews discrete matters such as certain competitive-area determinations or shortened notice requests. Those functions do not make OPM the proponent or executing agency for an individual RIF action, nor do they prejudge whether the employing agency complied with part 351 as applied to a particular appellant.

[15] There have only been 141 separations resulting from a RIF from January to April 2026, a far slower pace than 2025. (Source: OPM FWD (June 3, 2026)).

The final rule also reinforces this distinction procedurally. OPM's adjudicatory role is limited to determining whether the agency failed to comply with an applicable statute or OPM regulation governing RIF actions under part 351 and whether that failure prejudiced the appellant. The agency must produce the complete agency record to OPM, including RIF-specific documentation such as the RIF notice, effective-date materials, records supporting the reason for the RIF, competitive-area and competitive-level documentation, retention-register materials, order-of-release records, assignment-rights records, and documentation concerning any special RIF circumstance. In addition, OPM adjudicators must be insulated from officials who participated personally and substantially in the challenged personnel action or provided case-specific advice concerning that action, and they may not consider material *ex parte* communications concerning the merits of an appeal. Thus, commenters' characterization of the rule as placing "conception, execution, and appeal" of RIFs entirely within OPM conflates OPM's governmentwide regulatory and advisory responsibilities with the employing agency's independent decision to conduct and implement a RIF, and it overlooks the final rule's record-production, separation-of-functions, and *ex parte* safeguards.

C. Due Process, Neutrality, and Impartiality

Commenters 0343 and 1219 argued that the relocation of the RIF appellate venue as provided for in this rule violates the constitutional due process principles articulated in *Cleveland Board of Education v. Loudermill* (*Loudermill*), 470 U.S. 532 (1985). As a matter of constitutional due process, public sector employees can have a property interest in their continued employment which may not be terminated without certain pretermination procedures. Pursuant to *Loudermill*, public sector employees are entitled to written or oral notice of charges or rationale underlying their dismissal, an explanation of the evidence supporting that rationale or charges, and an opportunity to present their side of the issues. *Id*. The right to "some kind of hearing," consistent with the three *Loudermill* protections, attaches only when the employee faces a deprivation of a protected property interest. Since *Loudermill*, several courts have recognized that RIFs present different due-process considerations than disciplinary removals, and some have held that post-deprivation procedures may satisfy due process in bona fide RIF or reorganization contexts.[16]

Further, as opposed to adverse actions taken for disciplinary or performance reasons, RIFs target positions, not individuals, and do not stigmatize affected employees in light of the considerable differences in the treatment of employees subject to a RIF and those subject to an adverse action.[17] Also weighing in favor of the "reorganization exception" to *Loudermill* is the significant practical challenge of conducting pretermination hearings when a RIF involves a large number of employees. Consistent with these principles, both the Fifth and Federal Circuits have concluded that employees do not have a right to due process under the Constitution where a RIF initiated under 5 U.S.C. 3502 is concerned.[18]

OPM also notes that some courts have found an employee can be entitled to *Loudermill* protections when they assert a RIF was pretextual rather than "bona fide."[19] In recognition of that possibility, the revised 5 CFR 351.901 does not restrict employees from pursuing claims that an agency's RIF was pretext for improper retaliation, discrimination, or other unlawful rationales. However, those claims must be pursued in alternative forums where employees and agencies will most benefit from the specialized knowledge housed within such venues. As these claims are collateral to whether an agency's RIF action was executed in compliance with the statutory and regulatory requirements governing RIFs, they are outside the scope of an appeal under the regulations promulgated pursuant to this rule.

Commenter 0370 argued that transferring RIF appeals from MSPB to OPM would violate due process by eliminating independent adjudication and judicial review and create a

---

[16] *See, e.g.*, *Wash. Tchrs.' Union Loc. No. 6, Am. Fed'n of Tchrs., AFL-CIO v. Bd. of Educ. of D.C.*, 109 F.3d 774, 789–91 (D.C. Cir. 1997); *Duffy v. Sarault*, 892 F.2d 139, 147 (1st Cir. 1989); *Dwyer v. Regan*, 793 F.2d 457 (2d Cir. 1986), modifying 777 F.2d 825 (2d Cir. 1985); *Misek v. City of Chi.*, 783 F.2d 98, 100–01 (7th Cir. 1986).-

[17] *See West v. Grand Cnty.*, 967 F.2d 362, 367 (10th Cir. 1992); *Am. Fed'n of Gov't Emps., AFL-CIO v. Off. of Pers. Mgmt.*, 821 F.2d 761, 767–68 (D.C. Cir. 1987).

[18] *See, e.g., Grier v. Dep't of Health & Hum. Servs.*, 750 F.2d 944, 947 (Fed. Cir. 1984); *Am. Fed'n of Gov't Emps., AFL-CIO v. Stetson*, 640 F.2d 642, 645 (5th Cir. 1981).

[19] *See*, *e.g.*, *West*, 967 F.2d at 367–68; *Misek*, 783 F.2d at 101.

constitutionally unacceptable risk of structural bias under cases such as *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), and *Gibson v. Berryhill*, 411 U.S. 564 (1973). The commenter also asserted that OPM's involvement in reviewing competitive areas would make subsequent OPM adjudication improper, and that agencies may exercise less care if RIF actions are reviewed by OPM adjudicators rather than MSPB administrative judges. OPM disagrees.

First, OPM disagrees that the final rule violates due process by locating RIF appeal adjudication within OPM. The Supreme Court has recognized a presumption of honesty and integrity in administrative adjudicators, and the mere combination of policymaking, investigative, supervisory, or adjudicative functions within an agency does not, without more, establish unconstitutional bias. *Withrow*, 421 U.S. at 47, 58. The cases cited by the commenter involved materially different circumstances, such as a judge's extraordinary personal campaign-related relationship to a litigant in *Caperton* or an adjudicatory body composed of market participants with a direct pecuniary interest in the outcome in *Gibson*. OPM adjudicators will not have a personal financial interest in RIF appeal outcomes, and a generalized governmentwide interest in efficient personnel administration is not the type of personal, direct, or pecuniary interest that due process treats as disqualifying.

The final rule also includes safeguards to ensure record-based and impartial adjudication. OPM personnel assigned to adjudicate RIF 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 concerning the merits of an appeal. If such a communication occurs, OPM must place a summary in the record and provide the parties a reasonable opportunity to respond, unless disclosure is prohibited by law. The rule also provides assignment restrictions, written decisions, reconsideration procedures, Director review before finality, and public availability of final merits decisions subject to privacy and other legal limits. For appeals by OPM employees, the rule provides for adjudication by an administrative law judge.

Second, OPM disagrees that its role in reviewing certain competitive-area matters makes OPM an improper adjudicator of later RIF appeals. Agencies, not OPM, remain responsible for determining their workforce needs, including what positions are required, where positions are located, and when positions are to be filled, abolished, or vacated. OPM's review of a competitive area, where required by regulation, is a regulatory safeguard concerning the competitive area used in the RIF; it is not approval of the agency's decision to conduct a RIF, approval of any individual RIF action, or prejudgment of any future appeal. If a competitive-area determination is relevant to an appeal, the agency must produce the pertinent agency record, and OPM will adjudicate the appellant's claim on the appeal record under the standards in part 351.

Commenter 0370 asserted that OPM approved certain competitive areas in less than an hour. OPM does not adjudicate in this rulemaking the validity of any particular competitive-area approval or any particular agency RIF. Nor does an alleged processing time, standing alone, establish that OPM's review was inadequate or that OPM cannot fairly adjudicate future appeals. Some requests may present straightforward issues or be supported by complete organizational documentation. In an appeal, an appellant may challenge whether the agency failed to comply with applicable statutes or OPM regulations governing RIF actions, including requirements concerning competitive areas, and the agency must produce the complete agency record to OPM.

Third, OPM disagrees that RIF appeals necessarily require MSPB administrative judges or MSPB-style procedures to provide meaningful review consistent with due process. Due process is flexible and calls for procedures appropriate to the nature of the governmental action and the interests at stake. RIF appeals generally concern whether the agency complied with statutory and regulatory requirements governing the conduct of a RIF, including coverage, competitive area, competitive level, retention standing, order of release, assignment rights, notice, and related requirements. Those issues are ordinarily well suited to review on the written agency record, supplemented where necessary by party submissions, requests for additional information, audits, investigations, or hearings when OPM determines that such procedures are necessary and efficient. Requiring discovery and hearings in all RIF appeals would impose significant cost and delay on employees, agencies, witnesses, and OPM, even in cases resolvable on the record.

The D.C. Circuit has instructed OPM that "if OPM chooses to use the MSPB for dispute resolutions, it must take that statutory device as it finds it."[20] OPM cannot tailor MSPB procedures to the nature of the action at issue. In light of that legal requirement, OPM has chosen to provide RIF appeals in an alternative forum better suited to efficiently adjudicate the relevant matters. The final rule provides targeted fact-development tools where needed without importing the full MSPB litigation model into every RIF appeal.

D. Claims of Politicization, Merit-System Harm, and Retaliatory RIFs

Commenters 0370, 0962, 0976, 1025, 1092, 1099, 1165, 1217, and 1252 asserted that the rule would politicize the civil service, weaken merit-system protections, enable politically motivated mass firings, or allow agencies to use sham RIFs to evade MSPB review of adverse actions. Commenter 0370 specifically raised concern that agencies could conduct one-person RIFs or rescind pending RIF actions and reissue them after the effective date to avoid MSPB review.

OPM rejects the assertion that the final rule authorizes politicized or retaliatory RIFs. The final rule does not change the basic requirement that a RIF be a position-based action taken for reasons recognized under part 351, such as lack of work, shortage of funds, insufficient personnel ceiling, reorganization, or the exercise of reemployment or restoration rights. The final rule also does not authorize agencies to use RIF procedures to accomplish a disciplinary, retaliatory, discriminatory, or otherwise unlawful personnel action.

The final rule's revised merits standard directly addresses these concerns. An appellant may obtain relief by proving that the agency failed to comply with an applicable statute or OPM regulation governing RIF actions under part 351 and that the failure prejudiced the appellant by

[20] *AFGE v. OPM*, 821 F.2d 761, 769 (D.C. Cir. 1987).

causing the appealed action or the loss of a materially more favorable outcome. If an agency labels an action a RIF but fails to satisfy the requirements of part 351, that issue falls within OPM's RIF-compliance review.

The final rule's agency-record requirements also reduce the risk of rubber-stamp review. The agency must produce documents supporting the reason for the RIF; documents establishing the appellant's coverage, position, appointment, tenure subgroup, veterans' preference status, service computation date, competitive area, and competitive level; retention registers; order-of-release records; assignment-rights records; and records concerning special circumstances such as abolishment of an entire competitive area, transfer of function, exclusion from RIF competition, or restoration protection. These requirements give OPM and the appellant a concrete record against which to test the agency's compliance with part 351.

OPM also notes that collateral protections remain available. Allegations of discrimination, whistleblower reprisal, prohibited personnel practices, veterans' rights violations, or other unlawful conduct may be pursued in the forums Congress or applicable law has designated, including EEOC, OSC, DOL VETS, Inspectors General, or MSPB where it has independent jurisdiction. The final rule channels direct RIF-compliance appeals to OPM; it does not immunize unlawful conduct.

Commenter 0370 expressed concern that an agency could rescind RIF actions pending before MSPB and later reissue them after the final rule's effective date to avoid MSPB review. OPM declines to adopt a special rule prohibiting agencies from rescinding pending RIF actions and later taking new RIF actions. Agencies must be able to rescind, correct, and reissue personnel actions where appropriate. Any new RIF action taken after the effective date must comply with the statutes and regulations then in effect. If an employee believes the new action is unlawful, pretextual, discriminatory, retaliatory, or otherwise improper, the employee may pursue the OPM RIF appeal and any collateral statutory remedies preserved by the final rule.

Commenter 0370 also contended that the rule permits agencies to use sham RIFs to evade MSPB review of removals. OPM disagrees. The rule does not alter the basic distinction between a bona fide RIF and an adverse action. A RIF remains a position-based action taken for reasons recognized under part 351, such as lack of work, shortage of funds, insufficient personnel ceiling, reorganization, or the exercise of reemployment or restoration rights. An agency may not convert a disciplinary or performance-based removal into a RIF merely by labeling it as such. If an appellant contends that the agency failed to comply with applicable RIF statutes or OPM regulations, including by using RIF procedures where the action did not satisfy the requirements of part 351, OPM may consider that claim within the scope of the RIF appeal and order corrective action. If the employee alleges that the agency acted for discriminatory, retaliatory, or otherwise prohibited reasons, the employee may also pursue any collateral statutory claims that are within the jurisdiction of the EEOC, OSC, MSPB, an Inspector General, or another authorized forum.

E. Procedural Protections in OPM Appeals

Several commenters urged OPM to provide RIF appellants with procedures similar to those available to employees appealing adverse actions before MSPB, including broader discovery and a hearing as of right. OPM declines to adopt that approach. RIF appeals and chapter 75 adverse-action appeals involve materially different actions and different issues. An adverse-action appeal generally concerns an agency action directed at an individual employee for conduct or performance reasons. A RIF action, by contrast, is a position-based workforce action governed by part 351 and focused on whether the agency properly applied the statutory and regulatory RIF requirements governing matters such as coverage, competitive area, competitive level, retention standing, order of release, assignment rights, and notice. Those issues ordinarily can be resolved through the agency record, party submissions, and targeted supplementation where necessary.

OPM has therefore determined that the final rule should not replicate MSPB's adverse-action procedures. The final rule provides a RIF-specific appeal process tailored to the issues presented in part 351 appeals. It requires the agency to produce the complete agency record to OPM, requires service of the agency record on the appellant subject only to legally required disclosure limitations, permits the appellant to file a reply, authorizes OPM to require additional information, and permits audits, investigations, or hearings when the record requires further development. This structure balances the employee's interest in meaningful review with the interests of employees, agencies, and the Government in timely, efficient, and accurate resolution of RIF appeals. The commenters' preference for MSPB-style procedures does not establish that OPM is legally required to apply MSPB's chapter 75 or part 1201 procedures to RIF appeals adjudicated by OPM under part 351.

Commenters 0408, 0483, 0709, and 1119, among others, argued that employees are entitled to a hearing in a RIF appeal as a matter of law. OPM disagrees. The final rule does not bar hearings; it provides for hearings when they are necessary and efficient to resolve the appeal. Revised § 351.905(c) expressly authorizes OPM to conduct a hearing where the written record is insufficiently developed to determine one or more facts material to the outcome of the appeal, or where a disputed issue of witness credibility is material to the outcome. Thus, the final rule addresses the concern that some appeals may present material factual disputes requiring more than written submissions, while avoiding the delay and expense of requiring a hearing in every appeal regardless of whether one would assist the decisionmaker.

OPM also disagrees with commenters' suggestion that a hearing should be required whenever a party characterizes a fact as disputed. Not every factual disagreement is material, and not every material issue requires live testimony. In many RIF appeals, the dispositive questions will be resolved by applying part 351 to records the agency is required to create and produce, including the RIF notice, competitive-area and competitive-level documentation, retention register, records supporting retention standing, order-of-release materials, assignment-rights documentation, and records concerning any special RIF circumstance. Requiring a hearing absent a particularized need would impose unnecessary costs on appellants, agencies, witnesses, representatives, and OPM, while delaying final resolution for employees who need prompt certainty regarding their employment status and any available remedy.

In the unusual case in which the written record is insufficient, the final rule provides multiple tools for further development. OPM may require either party to provide additional information, audit or investigate an agency action when the existing record is insufficient to resolve a material issue within OPM's jurisdiction and the audit or investigation is reasonably likely to produce material information, and conduct a hearing when necessary and efficient. Where OPM conducts an audit or investigation, the final rule requires OPM to inform the employee, the employee's representative, and the agency; provide them with the results; and give them a reasonable opportunity to submit arguments or additional information. These procedures provide meaningful fact development without importing a full MSPB litigation model into every RIF appeal.

Commenter 0113 supported placing the burden of proof on the initiating party, noting that this approach is consistent with administrative and civil litigation standards. OPM agrees. The appellant is the party invoking OPM's appellate jurisdiction and challenging the agency's RIF action, and it is appropriate for the appellant to bear the burden of proving timely and proper filing, OPM jurisdiction, a violation of an applicable statute or OPM regulation governing RIF actions under part 351, and prejudice. At the same time, the final rule does not leave the appellant without access to the information needed to pursue the appeal. The agency must produce the complete agency record to OPM and serve the appellant with the agency record, subject only to applicable disclosure limitations. That requirement ensures that the appellant's burden of proof operates within a record-based process in which the relevant RIF documentation is before OPM and available to the appellant to the extent permitted by law.

Commenters 0370, 0386, 0928, 0962, 1089, 1092, 1099, 1165, 1217, and 1252 raised numerous procedural concerns, including burden of proof, access to records, discovery, hearings, written-record adjudication, e-filing, reconsideration, Director review, protective orders, and remedies. For example, Commenter 1089 asserted that the documents necessary to challenge a RIF—including retention registers, competitive-area definitions, scoring and ranking decisions, internal planning documents, communications leading to the RIF, and records showing how the agency applied OPM's rules—are generally in the agency's possession. The commenter argued that it would be unfair to require employees to prove RIF error while limiting access to the records needed to test the agency's action. OPM has revised the final regulatory text in several respects that address many of the procedural concerns raised by commenters.

First, OPM revised the merits standard in § 351.901(b). The proposal required an appellant to prove that the employee would not have suffered the same or another RIF action if the RIF had been properly conducted. Commenters 1089, 1099, and 1165 argued that this standard was too demanding and required employees to disprove hypothetical RIF actions. OPM revised the final rule to require the appellant to prove that the agency failed to comply with an applicable statute or OPM regulation governing RIF actions under part 351 and that the failure prejudiced the appellant by causing the appealed action or the loss of a materially more favorable outcome. This revised formulation focuses on prejudicial RIF-compliance error and avoids the concern that the proposed standard could be read to require proof about every possible alternative RIF.

Second, OPM revised § 351.903(b) to specify the minimum contents of the agency record in a RIF appeal. Commenters 1089, 1099, and 1165 argued that appellants would bear the burden of proof while the agency controlled most relevant evidence. The final rule requires the agency response to include the agency record of the action, and the regulation now identifies RIF-specific categories of documents that must be included, as applicable. These include the appellant's specific written RIF notice, any amended notice, proof of service or receipt, and documents showing the effective date of the action; documents supporting the reason for the RIF; documents establishing the appellant's coverage, position, appointment, tenure group and subgroup, veterans' preference status, service computation date, work schedule, competitive area, competitive level, and status as a competing employee; documents establishing the competitive area and competitive level used for the RIF; the retention register applicable to the appellant and related retention records affecting retention standing, order of release, or assignment rights; documents showing application of the order of release; documents concerning assignment rights; documents concerning special RIF circumstances such as abolishment of an entire competitive area, transfer of function, exclusion from RIF competition, or restoration protection; and a certification that the agency has produced the complete agency record.

This revision directly addresses Commenter 1089's concern that employees may lack access to the information needed to evaluate a RIF action. The final rule requires the agency to produce the complete agency record to OPM and to serve the appellant with the agency record, subject only to redaction or withholding necessary to comply with the Privacy Act, applicable legal privileges, classified-information or national-security requirements, OPM protective orders, or other legally required disclosure limits. OPM also revised § 351.903(d) and (e) to make inspection of OPM's appellate record and service of documents subject to those same legal limitations. These provisions are intended to ensure that OPM adjudicates the appeal on the complete record while protecting information that may not lawfully be disclosed in full to the appellant or the public.

Third, OPM revised the appellant's reply right. Under final § 351.903(c), an employee may file a reply within 15 calendar days of the agency response. Although the reply generally may address only factual and legal issues raised by the agency response, the final rule permits the appellant to raise a new allegation of error when the basis rests on information first disclosed in the agency response or when OPM grants leave for good cause. This revision addresses the concern that an appellant may not know the basis for a RIF-compliance challenge until after receiving the agency's record and explanation.

Fourth, the final rule preserves fact development where needed. Section 351.905(c) authorizes OPM to require either party to provide additional information. OPM may audit or investigate an agency action where the existing record is insufficient to resolve a material issue within OPM's jurisdiction and the audit or investigation is reasonably likely to produce material information. If OPM conducts an audit or investigation, OPM must inform the employee, the employee's representative, and the agency; provide them the results; and give them a reasonable opportunity to submit arguments or additional information.

Fifth, the final rule permits hearings when necessary and efficient. Commenters 0408, 0483, 0709, 1119, 0928, 1092, 1089, and 1217 argued that hearings should be available as of right or whenever material facts are disputed. OPM disagrees that a hearing is required in every case, but the final rule authorizes hearings where the written record is insufficiently developed to determine material facts or where witness credibility is material to the outcome. Commenter 0386 requested further definition of "necessary and efficient"; OPM has addressed that concern by defining the standard in the regulatory text and declines to adopt an exhaustive list that could either require unnecessary hearings or preclude useful ones.

Sixth, the final rule adds adjudicator-separation and *ex parte* protections. Section 351.905(a) requires OPM adjudicators to be insulated from officials who participated personally and substantially in the challenged action or provided case-specific advice. It also prohibits material *ex parte* communications concerning the merits and requires any such communication to be summarized in the record with an opportunity for party response, unless disclosure is prohibited by law. The final rule also restricts assignment of adjudicators with specified relationships to the appellant or the agency and permits OPM to assign an administrative law judge when necessary. For appeals by OPM employees, § 351.905(b) requires ALJ adjudication and limits OPM's ability to disturb the ALJ's initial decision.

Seventh, OPM narrowed and clarified the protective order provision. Commenters 0928 and 1165 argued that the proposed protective-order language was vague and could restrict protected speech. Final § 351.906 now authorizes protective orders or cease-and-desist directives to protect the integrity of the adjudicatory process and prevent threats, intimidation, targeted harassment, improper witness contact, disclosure of protected personal information, or 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.

Eighth, OPM retained reconsideration. Section 351.907 permits either party to request reconsideration within 30 calendar days and permits OPM to reopen and reconsider an initial decision on its own initiative. Reconsideration may be granted for material factual error, legal error affecting the outcome, new and material evidence or legal argument unavailable despite due diligence, or other good cause. OPM may require additional argument or evidence and may take any action necessary for final disposition.

OPM disagrees with Commenter 1089's assertion that reconsideration is not meaningful under the final rule. Section 351.907 permits either party to request reconsideration within 30 calendar days from issuance of the initial decision and authorizes OPM to reopen and reconsider an initial decision on its own initiative. The final rule identifies several grounds for reconsideration, including erroneous findings of material fact sufficient to warrant a different outcome, 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 may require the parties to submit argument and evidence and may take any other action necessary for final disposition of the case.

F. Recruitment, Retention, and Workforce Concerns

Commenters 0962, 0976, 1089, 1092, 1099, and 1252 asserted that the rule would harm recruitment and retention, reduce confidence in Federal service, damage institutional knowledge, chill public servants, and undermine agency missions or public services. Commenters argued that Federal employees accept the obligations of public service in reliance on a merit-based system with independent review, and that reducing procedural protections could deter qualified individuals from joining or remaining in Federal employment.

OPM considered these concerns but concludes that the final rule will not undermine the merit system or Federal recruitment and retention. The final rule preserves a meaningful administrative appeal process for employees who are furloughed for more than 30 days, separated, or demoted by a RIF action. It does not eliminate appeal rights. It revises the forum and procedures for future RIF appeals and establishes safeguards to ensure that OPM adjudicates those appeals on a complete record.

OPM also concludes that timely resolution of RIF appeals benefits employees as well as agencies. When an agency commits a prejudicial error, faster adjudication allows corrective relief to be ordered sooner, reducing uncertainty and potential back-pay exposure. When the agency action is sustained, employees and agencies receive finality sooner, allowing employees to make informed decisions about future employment and allowing agencies to plan staffing and operations.

OPM further concludes that a consistent, record-based process administered by the agency responsible for governmentwide RIF regulations will support agency missions and reduce uncertainty. RIFs may arise in response to budgetary, technological, mission, or organizational changes. When they do, agencies and employees benefit from clear rules, a complete record, prompt adjudication, and consistent interpretation of part 351. All core merit-system protections—including safeguards against retaliation and politicized personnel decisions—remain intact under the final rule. OPM expects the improved clarity and efficiency of the appeals process to reinforce, not erode, employee trust.

OPM does not rely solely on agency efficiency. The final rule balances efficiency with procedural protections, including detailed agency-record requirements, employee replies, inspection of the appellate record, additional information requests, audits, investigations, hearings when necessary and efficient, written decisions, reconsideration, and corrective relief. OPM therefore concludes that the final rule supports, rather than undermines, the effective and merit-based operation of the civil service.

Indeed, the final rule preserves protections against unlawful or arbitrary layoffs that substantially exceed the baseline protections generally available to private-sector workers. Federal employees affected by a RIF remain protected by governmentwide retention rules, notice requirements, assignment-right provisions where applicable, an administrative appeal to OPM, production of the complete agency record, an opportunity to reply, corrective relief where warranted, and collateral statutory remedies in the appropriate forums.

In addition, employees separated or facing separation by RIF receive priority consideration for continued Federal employment through OPM's reemployment and career-transition regulations. The Reemployment Priority List is a required agency placement program for competitive service employees who will be or were separated by RIF, and agencies must give RPL registrants placement priority for most competitive service vacancies before hiring from outside their permanent competitive service workforce. 5 CFR part 330, subpart B; 5 CFR 330.201. Eligible surplus or displaced employees may also receive CTAP and ICTAP selection priority under 5 CFR part 330, subparts F and G. These protections—objective retention criteria, notice, assignment consideration, administrative review, record production, corrective relief, and priority reemployment consideration—go well beyond the ordinary Federal law baseline in the private sector, where WARN generally provides advance notice only for covered plant closings and mass layoffs and does not create a comparable Federal right to retention standing, assignment rights, administrative appeal, or priority reemployment. The streamlined OPM appeal process therefore does not place Federal employees in a private-sector layoff regime; it preserves a more protective civil-service framework while providing faster finality. Faster adjudication benefits employees as well as agencies: if the RIF action is unlawful, corrective relief can be ordered sooner; if the action is sustained, the employee receives prompt certainty for financial planning.

Commenters 0447, 0424, 0455, and others asserted that the rule would contribute to disruptions in government services, including emergency response, veterans' healthcare, national security, scientific integrity, long-term projects, and foreign affairs. Commenters 0858, 0829, 1201, 1200, and others similarly argued that RIFs may reduce workforce continuity, slow operations, diminish institutional expertise, and impair agencies' ability to fulfill statutory missions.

OPM has considered these comments but concludes that they do not warrant changes to the final rule. To the extent commenters challenge whether agencies should conduct RIFs, how many employees agencies should retain, or how agencies should balance mission needs, expertise, staffing levels, and service delivery when restructuring, those issues are outside the scope of this rulemaking. This rule governs the forum and procedures for appeals after an agency has taken a covered RIF action. It does not direct any agency to conduct a RIF, determine which agency functions should be reduced or preserved, or substitute OPM's judgment for the employing agency's determination of the positions, skills, locations, or organizational structures needed to carry out its mission.

Agencies remain responsible for managing their own workforces consistent with applicable law. That responsibility includes determining whether conditions exist that warrant a RIF, evaluating mission needs, maintaining continuity of operations, and deciding how to structure the workforce before and after a reduction. The final rule does not alter those responsibilities. Nor does it diminish the substantive requirements that apply when an agency conducts a RIF, including requirements governing coverage, competitive area, competitive level, retention standing, order of release, assignment rights, notice, and other protections under part 351.

To the extent commenters argue that a more efficient appeal process may make agencies more willing to use RIF procedures where lawful and appropriate, OPM does not view that as a defect in the rule. Congress and OPM's regulations contemplate that agencies may need to conduct RIFs in response to lack of work, shortage of funds, insufficient personnel ceiling, reorganization, or the exercise of reemployment or restoration rights. When those circumstances arise, agencies and employees alike benefit from an appeal process that resolves RIF-compliance disputes accurately and promptly. Prolonged uncertainty can itself disrupt agency operations, delay corrective relief where an error occurred, and leave affected employees without timely clarity as to reinstatement, reemployment, or future career planning.

G. Judicial Review and CSRA Exclusivity

Many commenters, including but not limited to 0033, 0046, 0114, 0308, 0386, and others, criticized the proposed rule's foreclosure of judicial review for RIF appeals adjudicated under the amended 5 CFR part 351. Commenters 0033, 0908, and 1114 asserted that the APA requires OPM to maintain judicial review of RIF appeals, while Commenter 0343 argued that OPM barring judicial review would be an *ultra vires* action. Commenters 0370, 0928, 1025, 1089, 1092, 1099, and 1165 argued that OPM cannot eliminate judicial review by regulation, that judicial review is constitutionally required, that APA review should remain available, and that Federal Circuit review of MSPB decisions has long served as an important external check on RIF adjudication.

OPM disagrees that the final rule eliminates judicial review that Congress provided. The prior Federal Circuit review path for non-SES RIF appeals depended on two things: OPM's regulation making RIF actions appealable to MSPB and the statutory provisions governing judicial review of MSPB decisions. Once OPM revises its regulation and no longer provides MSPB as the forum for non-SES RIF appeals, the MSPB-to-Federal-Circuit review path no longer applies.

Congress did not provide a separate statutory judicial-review route for non-SES RIF appeals under 5 U.S.C. 3502. The CSRA and related title 5 provisions establish a comprehensive remedial scheme for Federal personnel matters, "prescrib[ing] in great detail the protections and remedies applicable to such action[s], including the availability of judicial review." *Fausto*, 484 U.S. at 443; *see also Margolin v. Nat'l Ass'n of Immigr. Judges*, No. 25-767, slip op. at 1–3 (U.S. May 26, 2026) (Thomas, J., concurring). Where Congress provides review, it does so expressly. Where Congress does not provide a judicial-review route for a particular personnel matter, employees may not use the APA to create an alternative route for challenging that personnel action. *See Filebark v. U.S. Dep't of Transp.*, 555 F.3d 1009 (D.C. Cir. 2009), *cert. denied*, 558 U.S. 1007 (2009); *Fornaro v. James*, 416 F.3d 63, 66–67 (D.C. Cir. 2005); *Graham v. Ashcroft*, 358 F.3d 931, 933–35 (D.C. Cir. 2004); *Carducci v. Regan*, 714 F.2d 171, 172 (D.C. Cir. 1983).

The CSRA prescribes in precise detail the types of actions that result in eventual judicial review, and it does not provide for such review of non-SES RIFs. 5 U.S.C. 3595(c). Under the CSRA, "[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 v. Dep't of the Treasury*, 567 U.S. 1, 5–6 (2012). Courts have repeatedly dismissed actions brought outside the proper CSRA channels (such as under the APA) by individuals regarding their employment under the comprehensive statutory scheme provided for in the CSRA. *See*, *e.g.*, *Bush v. Lucas*, 462 U.S. 367, 368 (1983); *Zummer v. Sallet*, 37 F.4th 996 (5th Cir. 2022); *Dotson v. Griesa*, 398 F.3d 156, 163 (2d Cir. 2005).

What is given by the comprehensive statutory scheme in the way of RIF procedures are codified at 5 U.S.C. 3501-3504. While those statutes technically predate the CSRA's enactment in 1978, it has long been recognized that the statutes and regulations regarding reductions-in-force in the Federal Government are part of the "comprehensive employment scheme" created by the CSRA.[21] While RIF separations can result in job loss or reassignment, they are specifically excluded as adverse actions under Chapter 75 of Title 5, U.S. Code, which governs removals and discipline for misconduct and, in some cases, performance deficiencies. *See* 5 U.S.C. 7512(B) ("This subchapter . . . does not apply to . . . a reduction in force action under [§] 3502 of this title.").

"A RIF is an administrative procedure by which agencies eliminate jobs and account for employees who occupied abolished positions. It is not an adverse action against a particular employee, but it is directed solely at a position within an agency." *Huber v. Merit Systems Protection Bd.*, 793 F.2d 284, 286 (Fed. Cir. 1986). "Unlike adverse actions, RIFs are not aimed at removing particular individuals; rather they are directed solely at positions." *Grier v. Dep't of Health & Human Servs.*, 750 F.2d 944, 945 (Fed. Cir. 1984). MSPB concurs, noting the Board's authority "is not plenary," but rather "the scope of the Board's jurisdiction to review an agency's RIF actions [are] under OPM's regulations at 5 C.F.R. part 351," which do not implement Chapter 75. *Adams v. Dep't of Defense*, 96 M.S.P.R. 325, 329 (2004).

The final rule therefore provides that a party cannot obtain judicial review of a decision under part 351. That provision governs decisions issued under the regulatory RIF appeal process established by this rule. It does not displace collateral statutory claims that Congress has assigned to other forums or that carry their own review provisions. Final § 351.901(c) expressly preserves matters within the jurisdiction of the EEOC, Inspectors General, MSPB where it has independent jurisdiction, DOL VETS, and OSC.

OPM also disagrees that due process requires Article III review of every RIF appeal. A RIF is a position-based workforce action governed by part 351, not a disciplinary or performance-based adverse action under chapter 75. The final rule preserves notice, a written

[21] *Filebark v. U.S. Dep't of Transp.*, 555 F.3d 1009, 1010 (Fed. Cir. 2009); *see also Nat'l Treasury Emps. Union v. Vought*, 149 F.4th 762, 774–75 (D.C. Cir. 2025) (applying CSRA claims-channeling in a lawsuit challenging, inter alia, reductions in force); *Nat'l Treasury Emps. Union v. Trump*, 770 F. Supp. 3d 1, 11 (D.D.C. 2025) (same); *Gober v. Collins*, No. 25-cv-714 (RC), 2025 WL 1360434, at *6 (D.D.C. May 8, 2025) (same).

appeal, production of the agency record, service on the appellant subject only to legally required disclosure limits, a reply, inspection of OPM's appellate record, additional fact development where warranted, hearings when necessary and efficient, written decisions, reconsideration, and corrective relief. OPM concludes that these procedures provide meaningful administrative review for the regulatory RIF appeal right established under part 351.

Commenters 0033 and 0846 argue that Congress has not spoken clearly on judicial review of RIF appeals. OPM disagrees. The statutory scheme speaks through both text and structure. Congress expressly excluded "a reduction-in-force action under section 3502" from the chapter 75 adverse-action provisions, 5 U.S.C. 7512(B), and the chapter 75 MSPB appeal right applies only to actions covered by that subchapter. See 5 U.S.C. 7513(d). Chapter 77 likewise does not independently create a statutory RIF appeal right; it provides procedures for matters otherwise "appealable to the Board under any law, rule, or regulation." 5 U.S.C. 7701(a). Judicial review under 5 U.S.C. 7703(a)(1), in turn, attaches to a "final order or decision" of MSPB. Once OPM withdraws the regulatory delegation that made non-SES RIF actions appealable to MSPB, there is no MSPB decision for judicial review under section 7703. Commenters identify no provision in 5 U.S.C. 3501 through 3504, chapter 75, chapter 77, or any other Federal employment statute that creates judicial review for non-SES RIF appeals under section 3502. The omission is significant. As the Supreme Court explained in *Fausto*, Congress's failure to provide review in the CSRA is not a statutory accident but reflects "a considered congressional judgment." 484 U.S. at 448. Congress also demonstrated that it knows how to provide MSPB review of RIF-related actions when it chooses to do so, as it did for certain SES RIF actions. See 5 U.S.C. 3595(c). It did not enact comparable language for non-SES RIF actions under section 3502. This omission is significant. It is a basic canon of statutory construction that if "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[22]

Commenter 0343 argued that OPM cannot preclude judicial review by regulation. The final rule does not withdraw judicial review that Congress provided; it reflects the review scheme Congress enacted. The prior route to Federal Circuit review existed only because OPM's regulation made non-SES RIF actions appealable to MSPB, and section 7703 then provided review of final MSPB decisions. OPM may revise that regulatory delegation through notice-and-comment rulemaking. Nor does the APA supply an independent route around the CSRA. The APA does not apply where "statutes preclude judicial review," 5 U.S.C. 701(a)(1), and courts have repeatedly held that the CSRA is the exclusive remedial scheme for Federal personnel disputes, even where the CSRA provides limited or no relief.[23] Accordingly, there is no statutory basis for extending judicial review to OPM decisions in non-SES RIF appeals under part 351. OPM's regulations stating that judicial review of RIF actions is unavailable informs the public of the operative legal parameters. Judicial review would be equally unavailable if the final rule said nothing on the subject.

H. Scope of RIF Appeals and Collateral Claims

Commenters 0370, 0928, 0962, 1025, 1089, 1092, 1099, 1165, and 1217 raised concerns about the scope of OPM review and the preservation of collateral claims. Commenters argued that the proposal could weaken civil-rights enforcement, eliminate mixed-case processing, prevent employees from raising pretext or retaliation, or force employees into multiple forums. Commenters 0046, 0074, 0540, and 1252 contended that the rule would eliminate the ability to appeal discrimination claims in connection with RIFs entirely and allow agencies to RIF employees in protected classes with impunity.

[22] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).
[23] *See Elgin v. Dep't of Treasury*, 567 U.S. 1, 11–12 (2012); *Grosdidier v. Chair. of Broad. Bd. of Governors*, 560 F.3d 495, 497 (D.C. Cir. 2009); *Filebark v. Dep't of Transp.*, 555 F.3d 1009, 1010 (D.C. Cir. 2009); *Graham v. Ashcroft*, 358 F.3d 931, 935 (D.C. Cir. 2004); *Fornaro v. James*, 416 F.3d 63, 67 (D.C. Cir. 2005).

The final rule clarifies the scope of OPM's review. OPM will adjudicate whether the agency failed to comply with an applicable statute or OPM regulation governing RIF actions under part 351 and whether that failure prejudiced the appellant. This includes RIF-compliance issues such as coverage, competitive area, competitive level, retention standing, order of release, assignment rights, notice, special RIF circumstances, and related requirements.

At the same time, the final rule preserves collateral statutory avenues. Final § 351.901(c) states that the procedures in part 351 are the sole and exclusive means of appealing a RIF action, but do not otherwise preclude an employee from filing a complaint, appeal, or other matter within the jurisdiction of EEOC, an Inspector General, MSPB, DOL VETS, or OSC. This provision reflects OPM's intent to channel direct challenges to RIF compliance through OPM while preserving matters Congress or applicable law has assigned to other forums.

OPM acknowledges that some claims previously could have been combined with a RIF appeal before MSPB because OPM's regulation made RIF actions appealable to MSPB. That prior combined forum was a consequence of OPM's regulatory delegation to MSPB, not an independent statutory requirement that OPM retain MSPB jurisdiction. The final rule preserves the substantive availability of discrimination, whistleblower, veterans' rights, prohibited-personnel-practice, and Inspector General matters in the proper forums.

Commenter 0463 asserted that the exclusive RIF appeal procedure could abrogate or supersede appeal rights available to preference eligible veterans under 5 U.S.C. 3330a and 3330b. OPM disagrees. The final rule's exclusivity provision governs direct appeals of RIF actions under part 351; it does not displace independent statutory causes of action that Congress assigned to other forums. Final § 351.901(c) expressly preserves an employee's ability to file a complaint, appeal, or other matter within the jurisdiction of, among others, MSPB and the Department of Labor Veterans' Employment and Training Service. That preservation language includes claims under the Veterans Employment Opportunities Act. Under 5 U.S.C. 3330a, a preference eligible who alleges that an agency violated the individual's rights under a statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor, and, if the matter is not resolved, may appeal to MSPB under the procedures Congress specified. 5 U.S.C. 3330a. Section 3330b separately provides for judicial redress in district court in lieu of continuing the administrative redress procedure after the statutory prerequisites are met. 5 U.S.C. 3330b. Nothing in this final rule alters those statutory rights, filing deadlines, forum assignments, or judicial-redress provisions.

The final rule also reinforces, rather than weakens, the ability to identify and address veterans' preference issues in a RIF appeal. Section 351.903(b) requires the agency record to include documents establishing the appellant's veterans' preference status and related retention information, including records supporting veterans' preference credit, tenure subgroup, service computation date, the retention register, order of release, assignment rights, and any special RIF circumstance relevant to the appellant. Thus, where the issue is whether the agency complied with part 351's RIF requirements as applied to a preference eligible, OPM will have the relevant RIF record before it. Where the issue is an independent veterans' preference claim under 5 U.S.C. 3330a or 3330b, the final rule leaves that statutory route undisturbed.

Commenter 0074 similarly asserted that the revised RIF appeal procedure would allow agencies to engage in pretextual terminations of employees with disabilities in violation of the Rehabilitation Act of 1973. OPM disagrees. The final rule does not authorize agencies to use RIF procedures as a pretext for disability discrimination or any other unlawful personnel practice. Federal employees and applicants remain protected by section 501 of the Rehabilitation Act, 29 U.S.C. 791, and the remedies, procedures, and rights available under 29 U.S.C. 794a, including the Federal-sector procedures incorporated from Title VII. In addition, disability discrimination remains a prohibited personnel practice under 5 U.S.C. 2302(b)(1)(D). The final rule expressly preserves matters within the jurisdiction of the EEOC and OSC and therefore does not redirect Rehabilitation Act claims into OPM's RIF appeal process or limit the remedies available under those statutes.

I. Collective Bargaining, Grievance Arbitration, and CBAs

Commenters 0962, 1025, 1092, 0928, and 1217 objected to the proposal's treatment of negotiated grievance procedures, arbitration, and collective bargaining agreements. These commenters argued that the Federal Service Labor-Management Relations Statute protects negotiated grievance and arbitration procedures; that RIF matters are not among the matters excluded from negotiated grievance procedures under 5 U.S.C. 7121(c); that questions of arbitrability should be resolved through negotiated grievance procedures; and that OPM may not use a governmentwide regulation to eliminate existing collective-bargaining rights or union representation. Other commenters, including 0221, 0584, 0587, 0591, and 0621, asserted that the proposal would unlawfully supersede existing CBAs, while commenters 0386 and 1004 requested a clearer legal basis for OPM's position. Commenters 0049, 0092, 0483, and others objected as a policy matter to any prospective limitation on negotiated RIF appeal procedures.

OPM has considered these comments and has decided to finalize the regulatory text as initially proposed, with some modifications. The final § 351.901(c) provides that the procedures in part 351 are the "sole and exclusive means" of appealing a RIF action, and matters relating to such actions may not be raised under a negotiated grievance procedure or contested through grievance arbitration, but employees are not otherwise impeded from filing a complaint, appeal, or other matter within the jurisdiction of the EEOC, an Inspector General, MSPB, DOL VETS, or OSC.

OPM continues to conclude that a single governmentwide process for direct RIF-compliance appeals is necessary to ensure uniform interpretation and application of part 351. RIF appeals under part 351 involve governmentwide rules governing competitive areas, competitive levels, retention standing, order of release, assignment rights, notice, and related requirements. Allowing agencies to create or bargain for parallel direct appeal mechanisms for the same RIF-compliance claim would undermine the consistency, finality, and efficiency the final rule is designed to achieve.

This conclusion is consistent with 5 U.S.C. 7117(a)(1). That provision states that the duty to bargain extends only “to the extent not inconsistent with any Federal law or any governmentwide rule or regulation,” and, for matters that are the subject of a rule or regulation, applies only where the rule or regulation is not governmentwide. 5 U.S.C. 7117(a)(1). This final rule is a governmentwide regulation: it applies across agencies to appeals of covered RIF actions under part 351. To that end, it firmly and completely limits the flexibility of agencies to provide processes not contemplated by this rule, including grievance arbitration. *See U.S. Dep’t of Treasury, I.R.S. v. FLRA*, 996 F.2d 1246, 1250 (D.C. Cir. 1993) (*IRS*) (5 U.S.C. 7117(a)(1) “permits the government to pull a subject out of the bargaining process by issuing a governmentwide rule that creates a regime inconsistent with bargaining,” including where a regulation “sets out an exclusive method of resolving any claims”). Accordingly, agencies may not bargain for a claims-channeling process that conflicts with the final rule’s designation of part 351 as the sole and exclusive means of directly appealing a RIF action.

OPM is not persuaded by commenters’ argument that 5 U.S.C. 7121(a)(1) overrides this conclusion. Section 7121(a)(1) requires CBAs to provide procedures for settlement of grievances, including questions of arbitrability, and makes those procedures the exclusive administrative procedures for grievances that fall within their coverage. But that provision must be read together with section 7117(a)(1), which limits the duty to bargain where the matter is inconsistent with Federal law or a governmentwide rule or regulation. The broad definition of “grievance” in 5 U.S.C. 7103(a)(9) likewise does not displace section 7117(a)(1). The fact that RIFs are not listed in section 7121(c) does not mean parties may bargain for an alternative direct RIF appeal procedure that conflicts with a governmentwide regulation establishing a single appeal process.

The D.C. Circuit Court of Appeal’s decision in *IRS* addressed exactly this issue. The court held that a union proposal that would permit grievances over contracting out was non-negotiable as it conflicted with OMB Circular A-76, a government-wide rule that prescribed the exclusive method for resolving disputes over contracting decisions. The court thus held that Circular A-76 prohibited bargaining over conflicting appeals processes. The final § 351.901(c) similarly prohibits creating an alternative RIF appeals process through collective bargaining.

OPM also disagrees with Commenter 0962's assertion that section 7121(a)(1) has primacy over section 7117(a)(1). Sections 7103, 7117, and 7121 are part of the same statutory scheme and must be read together. Section 7121 establishes negotiated grievance procedures for matters properly within a CBA's coverage; section 7117(a)(1) defines the outer boundary of the bargaining obligation where Federal law or a governmentwide regulation has occupied the field. Reading section 7121 to require negotiated grievance arbitration of direct RIF appeals notwithstanding section 7117 would effectively nullify section 7117(a)(1) for any matter that could be characterized as a grievance. In *IRS* the D.C. Circuit expressly rejected that statutory construction. OPM accordingly declines to adopt that reading.

Nor is this final rule merely a restatement of management rights under 5 U.S.C. 7106. Section 7106 preserves agency authority, subject to subsection (b), to determine mission, budget, organization, number of employees, internal security practices, and to lay off and retain employees, while also preserving bargaining over procedures and appropriate arrangements in appropriate circumstances. 5 U.S.C. 7106(a), (b). The final rule does not simply repeat those management rights. It establishes a detailed governmentwide appellate process governing who may appeal, the burden of proof, filing deadlines, agency-record production, service, replies, inspection of the appellate record, representation, adjudication, protective orders, reconsideration, Director review, and finality.

For that reason, commenters' reliance on *Office of Personnel Management v. FLRA*, 864 F.2d 165 (D.C. Cir. 1988), is misplaced. In that case, the court addressed whether a governmentwide regulation that merely restated management rights could displace bargaining obligations. This rule does not merely restate a management right; it creates a specific, comprehensive appeal procedure for covered RIF actions. The final rule is therefore more closely aligned with the principle that a governmentwide rule may establish an exclusive method for resolving a particular category of claims, rather than simply invoking management rights at a high level of generality.

OPM also considered comments invoking the general purposes of the FSLMRS, including 5 U.S.C. 7101(a)(1), which recognizes that collective bargaining safeguards the public interest, contributes to the effective conduct of public business, and facilitates amicable dispute resolution. OPM does not dispute those principles. But section 7101 must be read with the rest of chapter 71, including section 7117(a)(1), and with section 7101(b)'s direction that chapter 71 be interpreted consistently with the requirements of an effective and efficient Government. Those provisions support, rather than preclude, a governmentwide rule establishing one uniform process for direct RIF-compliance appeals and prohibiting grievances over matters pertaining to RIF appeals.

In addition to the benefits of maintaining a uniform process for direct RIF-compliance appeals, OPM believes it is beneficial to foreclose grievance arbitration in particular as a forum for adjudicating RIF appeals. As OPM explained in the proposed rule, the arbitrators who adjudicate Federal-sector grievances are private contractors who typically do not have a background in agency operations or Federal employment law. This makes them ill-suited to evaluate potentially complex issues involved in arbitration appeals. OPM is aware of multiple studies showing that, across multiple administrations, the FLRA overturns arbitral awards at a high rate.[24] The author of one of these studies, himself an arbitrator, concluded that "Federal sector arbitration is more complex than private sector arbitration. The federal field is full of land mines in the form of laws with which federal sector arbitrators may be less familiar."[25]

---

[24] *See* James Sherk, "Federal Union Arbitrators Frequently Misapply the Law," (Aug. 2, 2023), https://www.americafirstpolicy.com/issues/expert-insight-federal-union-arbitrators-frequently-misapply-the-law (finding that between 2019 and 2023 over 40 percent of arbitration awards were overturned or remanded upon appeal); *see also* Helburn, B. (2019). *The Trump FLRA: Fair or foul* (Helburn), at 6. https://cdn.govexec.com/media/gbc/docs/pdfs_edit/060619ew1.pdf (finding the FLRA set aside or remanded arbitration awards 80, 50, and 43 percent of the time in a sampling of cases arising under the Trump 45, Obama, and George W. Bush Administrations, respectively)

[25] Helburn at 10.

Foreclosing grievance arbitration ensures adjudication will be handled by MSAC employees with specialized legal and subject matter expertise who are less likely to make reversible errors.

Additionally, under 5 U.S.C. 7122(a) arbitral awards concerning RIF appeals are subject to FLRA review. This review can be protracted, especially if the FLRA loses a quorum or the FLRA has a vacancy and the remaining members deadlock.[26] Authorizing grievance arbitration over RIF actions would thus create a protracted second level of appeals that would undermine the expeditious resolution of cases. OPM declines to adopt this approach.

OPM also clarifies that the final rule does not retroactively invalidate existing CBAs or purport to adjudicate particular CBA disputes in this rulemaking. To the extent commenters argued that the proposal would automatically vitiate existing agreements mid-term, OPM does not adopt that position in the final rule. Rather, when agreements are renegotiated, this governmentwide rule will limit agencies' duty and ability to bargain for provisions that create a direct RIF appeal process inconsistent with part 351. Questions concerning the effect of particular existing agreement provisions, negotiability disputes, or unfair-labor-practice allegations remain matters for resolution under chapter 71 by the appropriate forum.

OPM also disagrees that the final rule eliminates union representation. Final § 351.904(a) provides that an appellant may select a representative of the appellant's choice to assist in preparing and presenting an appeal, provided the appellant submits a written designation of representative for the specific appeal. That representative may be a union representative where otherwise appropriate. Separate limitations on official time, duty status, and reimbursement for Federal employee representatives are addressed in the representation and official-time discussion.

[26] The FLRA has reported that in FY 2024 the average age of pending (not decided) arbitration cases undergoing review was 307 days. *See* U.S. Federal Labor Relations Authority, Congressional Budget Justification 2026, at 19. https://www.flra.gov/system/files/webfm/FLRA%20Agency-wide/Public%20Affairs/CBJ/FLRA%20FY26%20CBJ%20-%20Final.pdf

OPM therefore declines to revise the final rule to permit negotiated grievance arbitration to serve as an alternative direct appeal mechanism for covered RIF actions under part 351. The final rule establishes a uniform OPM process for direct RIF appeals while preserving collateral statutory matters in the forums Congress or applicable law has designated. This approach gives effect to both the RIF appeal framework in part 351 and the limits on bargaining imposed by 5 U.S.C. 7117(a)(1), while avoiding retroactive invalidation of existing CBAs in this rulemaking.

J. Representation and Official Time

Commenters 0147, 0155, 0674, 1105, 0928, 1092, 1217, and others objected to the rule's treatment of Federal employee representatives, official time, and reimbursement. These commenters argued that unions should be able to use official time to assist employees in preparing and presenting RIF appeals; that 5 U.S.C. 7131(d) authorizes official time for representational activity; and that limiting official time would reduce employees' practical ability to obtain assistance. Commenters 0161, 0166, 0199, 0204, 0270, 0346, and 0653 made similar policy arguments that labor organizations should be able to use official time in RIF appeals. Commenters 0166 and 0553 also objected to OPM's authority to disallow a representative in specified circumstances. Commenters 0199, 0200, 0243, 0466, and 0278 asserted that restricting official time would impair meaningful exercise of appeal rights, particularly for employees without independent resources. Commenter 0928 argued that OPM had not adequately justified the official-time restriction under the APA.

OPM disagrees that the final rule unlawfully eliminates representation or prevents employees from obtaining assistance. Final § 351.904(a) expressly preserves an appellant's ability to select a representative of the appellant's choice to assist in preparing and presenting the appeal, provided the appellant submits a written designation of representative for the specific appeal. That representative may be a union representative, attorney, non-Federal representative, or other representative where otherwise appropriate. The final rule therefore does not deny employees representation; it addresses when a Federal employee representative may perform representational functions in a duty status and whether the employing agency must subsidize that activity through official time or reimbursement.

OPM also disagrees that 5 U.S.C. 7131(d) requires official time for representation in an OPM RIF appeal under part 351. Section 7131(d) authorizes official time in amounts the agency and exclusive representative agree are reasonable, necessary, and in the public interest for certain representational matters under chapter 71. The direct RIF appeal established by this final rule is not a negotiated grievance proceeding or other chapter 71 process; it is a governmentwide appellate procedure under part 351 for determining whether an agency failed to comply with an applicable RIF statute or OPM regulation and whether that failure prejudiced the appellant. To the extent commenters contend that official time for RIF appeals must be bargainable, OPM concludes that this governmentwide rule establishes the controlling procedure for such appeals and limits inconsistent future bargaining obligations under 5 U.S.C. 7117(a)(1).[27]

OPM adopted § 351.904(b) to prevent the RIF appeal process from imposing additional duty-time and reimbursement burdens on agencies during workforce restructuring. If a selected representative is a Federal employee, the representative may not perform representational functions while 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 that representational function. OPM has determined that agencies should not be required to divert duty time or agency funds to subsidize litigation against their own RIF actions, except where otherwise required by law. This limitation is particularly appropriate in a RIF context, where agencies may already be operating under staffing, budgetary, or organizational constraints.

OPM is not persuaded that limiting official time makes the appeal right illusory or meaningfully impairs representation. The final rule preserves the right to a representative of

[27] *See, e.g., Patent Office Professional Association and United States Patent and Trademark Office, Alexandria, Virginia*, 71 FLRA 1223, 1225 (2020) (there is a duty to bargain over official time … [but] that duty to bargain is limited by § 7117, which provides that the duty to bargain in good faith only applies to the extent a proposal is not inconsistent with any Federal law or any Government-wide rule or regulation) (cleaned up)

choice; it does not require an appellant to proceed alone. A Federal employee may serve as a representative outside duty status, and appellants may also select non-Federal representatives, attorneys, union representatives, or others where otherwise appropriate. Moreover, the final rule is designed to reduce the need for resource-intensive representation by requiring the agency to produce the complete agency record to OPM, requiring service of the agency record on the appellant subject only to legally required disclosure limitations, permitting an appellant reply, allowing OPM to require additional information, and authorizing audits, investigations, or hearings when necessary and efficient. Those procedures provide meaningful access to the information needed to challenge a RIF action without requiring agencies to subsidize representational activity through official time.

OPM also declines commenters' request to remove the representative-disallowance provision. Final § 351.904(c) does not authorize arbitrary disallowance of representatives. It permits OPM or the responsible agency to disallow a representative only when the representative is an employee of the responsible agency or OPM and the representational activity would cause a conflict of interest or position. This limit is tailored to conflicts of interest or position. It preserves orderly administration of the appeal process while maintaining the appellant's general right to representation.

OPM further disagrees with Commenter 0928 that the official-time provision is arbitrary and capricious. OPM has provided a reasoned basis for the rule: reducing unnecessary costs, avoiding diversion of duty time during workforce restructuring, maintaining agency operations, and preventing agencies from being required to fund representational activity in direct appeals challenging their own RIF actions. OPM also balanced those interests against the employee's interest in representation by preserving the right to designate a representative and by strengthening the final rule's procedural protections, including agency-record production, service, reply rights, inspection of OPM's appellate record, and targeted fact-development authority. OPM therefore concludes that § 351.904 reasonably balances employee representation interests with the Government's interests in efficient adjudication, mission continuity, and responsible use of agency resources.

K. Adequacy of the Comment Period

Commenters such as 0372, 1045, 0501, 1043, and others asserted the comment period for this rule, which ran from February 10, 2026, to March 12, 2026, was unlawfully short under the Administrative Procedure Act (APA). Many commenters requested an extension of this period. In support of this argument, commenters cited 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.

Respectfully, OPM rejects the argument that the comment period was inadequate. The APA requires a meaningful opportunity to comment, and OPM provided such an opportunity. Numerous courts have upheld a 30-day comment period as sufficient to comply with the APA.[28] With respect to this rule, OPM received substantial comments from current and former Federal employees, unions, organizations, Members of Congress, and agencies, including detailed legal, procedural, economic, and policy objections. The breadth and specificity of the comments demonstrate that interested parties were able to engage meaningfully with the proposal.

Commenters' reliance on E.O. 12866 and E.O. 13563 is similarly unpersuasive in this context. These orders only mandate that comment periods should "generally" be at least 60 days. The policy rationale for that mandate is to provide stakeholders with adequate opportunity to meaningfully participate in the notice-and-comment process. That rationale was fully satisfied here. OPM received 1,251 substantive comments, offering perspectives on many aspects of the proposed rule, as discussed herein. The volume and breadth of that participation is itself

[28] *See Chamber of Com. of the U.S. v. SEC*, 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. FCC*, 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.").

evidence that the comment period was adequate to allow for informed and meaningful engagement with the proposed rule.

Further, in the years since those orders were issued, comment periods have not infrequently been shorter, often 30 or 45 days. This is, in part, because agencies, working with the White House, have a great deal of discretion in shortening the comment period based on the facts of the situation. As courts have repeatedly held, "executive orders are not judicially enforceable."[29] That is, as a general matter, an Executive Order (E.O.) or other White House guidance on the regulatory process binds executive agencies only as a matter of the internal management of the executive branch. Thus, several Federal courts have specifically held that there is no legally enforceable requirement that agencies comply with the requirements specified in E.O. 12866 and E.O. 13563.[30]

Accordingly, the 30-day comment period provided by OPM was fully consistent with the APA's requirements and well within the bounds of established agency practice and legal precedent. OPM does not agree with the assertion that the comment period was procedurally deficient.

Commenters 1099 and others argued that the 30-day comment period was inadequate because OPM issued related rulemakings around the same time. OPM disagrees that related rulemakings required a single consolidated proceeding. The RIF appeals rule concerns the forum and procedures for administrative review of RIF actions. Separate rulemakings concerning substantive RIF procedures, performance management, suitability, or probationary matters

---

[29] *Sierra Club v. U.S. Dep't of Energy*, 134 F.4th 568, 573 (D.C. Cir. 2025) (citing *Marin Audubon Soc'y v. FAA*, 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) (holding that there is no private right of action to enforce an executive order unless it was issued pursuant to a statutory mandate or congressional delegation).

[30] *Nat'l Mining Ass'n v. United Steel Workers*, 985 F.3d 1309, 1326–27 (11th Cir. 2021) (holding that E.O. 12,866 and E.O. 13,563 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. 12,866 is not judicially enforceable).

address distinct regulatory provisions and distinct issues. Interested parties were free to address interactions among the rules, and many did so.

L. Comments from Federal Agencies

Federal agency commenters (0351, 0352, 0418, 0434, and 0537) supported the transfer of RIF appeals from MSPB to OPM. These commenters stated that OPM, as the agency responsible for issuing and interpreting the governing RIF regulations, is better positioned to adjudicate RIF appeals efficiently, consistently, and in alignment with the underlying regulatory framework. The agency commenters asserted that centralizing adjudication within OPM would improve timeliness, predictability, accountability, and consistency, while preserving employee procedural protections and corrective remedies.

These commenters also stated that the current MSPB process can be litigation-heavy, costly, and time intensive for agencies. Commenter 0352 stated that, although it had not recently handled suitability or RIF appeals before MSPB, it had substantial experience defending other MSPB appeals and that such proceedings require significant time from legal representatives, supervisors, managers, and executives. Commenter 0352 further stated that MSPB proceedings may require an agency file, discovery, depositions, evidentiary hearings, petitions for review, and Federal Circuit litigation, and that the absence of summary judgment and the application of technical standards can make the process inefficient. Commenters 0418 and 0434 similarly stated that MSPB's adversarial and multilayered process, including discovery, hearings, and periods of delay associated with quorum lapses, can discourage timely use of appropriate workforce-management tools and complicate workforce planning, reorganization, and mission execution.

Commenters further stated that a streamlined OPM process would reduce administrative burden and litigation aversion, allow agencies to address lawful RIF and suitability actions more predictably, and reduce the risk that appeals linger for years. Commenter 0351 asserted that OPM's economic analysis may understate recurring cost savings because it does not fully account for recent RIF activity, internal resources devoted to MSPB litigation preparation, or potential future use of RIF, transfer-of-function, and transfer-of-work procedures. Commenter 0351 also stated that prolonged adjudication can create uncertainty for staffing, budget planning, and workforce reshaping, and may result in significant remedial and back-pay consequences when final resolution is delayed.

OPM agrees with these commenters that the final rule will improve the efficiency, consistency, and timeliness of RIF appeal adjudication. OPM also agrees that the current MSPB process can impose substantial burdens on agencies and employees, including burdens associated with discovery, hearing preparation, extended litigation timelines, petitions for review, and uncertainty pending final resolution. Although the experience of individual agencies varies, the supportive comments provide practical confirmation that the existing process can affect workforce planning, consume legal and management resources, and complicate implementation of lawful RIF actions.

IV. Section-by-Section Analysis

In this section, OPM discusses the regulatory amendments to 5 CFR chapter I, subchapter B, part 351, subpart I, governing appeals of and corrective action with respect to RIFs.

A. Section 351.802 — Content of Notice

OPM is revising § 351.802(a)(6), which governs the information an agency must include in a written notice to an employee affected by a reduction in force. Current § 351.802(a)(6) refers to the employee's right to appeal to the Merit Systems Protection Board. Because this final rule transfers adjudication of covered RIF appeals from MSPB to OPM, revised § 351.802(a)(6) replaces the MSPB reference with a reference to OPM.

The revised provision requires an agency's RIF notice to inform the employee, as applicable, of the employee's right to appeal to OPM. As revised in this final rule, the notice must also state the time limit for filing an appeal under § 351.902(b) and identify the electronic filing system, available on OPM's website, through which an appeal must be filed. This requirement preserves the practical filing information previously conveyed through the cross-reference to § 1201.21 of this title and forecloses any contention that a RIF notice failed to apprise an employee of how and when to appeal. The provision is conforming in nature and is intended to ensure that employees receive accurate notice of the administrative appeal forum established by revised subpart I. The revision does not eliminate any independently applicable statutory notice requirement or any separately available remedial process administered by another entity.

The proposed rule retained legacy language in § 351.802(a)(6) requiring agencies to comply with § 1201.21 of this title, as applicable. OPM is removing that cross-reference in the final rule. Section 1201.21 is an MSPB notice provision that applies when an agency issues a decision notice in a matter appealable to the Board. It requires MSPB-specific information, including notice of the time limits for appealing to the Board, the address of the appropriate Board office, access to the Board's regulations, and access to the MSPB appeal form. Because this final rule replaces MSPB with OPM as the adjudicative forum for RIF appeals under part 351, retaining an unqualified cross-reference to § 1201.21 in the RIF notice provision could create confusion about where an affected employee must file a RIF appeal.

This deletion is conforming, clarifying, and nonsubstantive. It does not eliminate any appeal right, shorten any filing period, alter the information an agency must provide about the OPM RIF appeal right, or affect any matter that remains independently appealable to MSPB. Rather, it removes an obsolete MSPB-specific notice cross-reference from a provision that now concerns OPM RIF appeals. To the extent an employee has an independent statutory or regulatory right to proceed before MSPB on a collateral matter, that right remains governed by the statutes and regulations applicable to that matter consistent with § 351.901(c).

B. Section 351.807—Certification of Expected Separation

OPM is revising § 351.807(e), which concerns agency determinations of eligibility for certification of expected separation. The prior provision referred to appeal to MSPB. Revised §

351.807(e) removes that MSPB reference and states that an agency determination of eligibility for certification may not be appealed.

This change is also conforming in nature. It aligns § 351.807(e) with revised subpart I and clarifies that certification determinations under § 351.807 are not independently appealable under part 351. Employees who are actually furloughed for more than 30 days, separated, or demoted by RIF action may pursue any appeal available under revised § 351.901.

C. Subpart I—Appeals

OPM is revising subpart I of part 351 in full. Revised subpart I establishes the procedures governing appeals to OPM by employees who are subject to covered RIF actions. The revised subpart identifies who may appeal, the burden of proof, filing requirements, party submissions, representation rules, adjudication procedures, remedies, sanctions, reconsideration, Director review, and finality.

1. Section 351.901—Right to Appeal

Revised § 351.901 establishes the right to appeal a covered reduction-in-force action to OPM, identifies the appellant's burden of proof, and defines the relationship between the OPM RIF appeal process and other remedial forums.

Paragraph (a) provides that an employee who has been furloughed for more than 30 days, separated, or demoted by a reduction-in-force action taken under part 351 may appeal that action to OPM. This paragraph identifies the covered actions that may be appealed under subpart I and implements the rule's central procedural change: OPM, rather than MSPB, will adjudicate appeals of covered RIF actions, subject to the applicability provision described below.

Paragraph (b) establishes the employee's burden of proof. The appellant must prove, by a preponderance of the evidence, that the written appeal was timely and in the required form; that OPM has jurisdiction over the appeal; that the agency failed to comply with an applicable statute or OPM regulation governing reduction-in-force actions under part 351; and that the failure prejudiced the appellant.

Paragraph (b)(4) defines the prejudice requirement. The appellant must show that the agency's failure to comply with an applicable RIF statute or OPM regulation caused the appellant to be subjected to the appealed action or to lose a materially more favorable outcome under part 351. This standard is intended to distinguish prejudicial errors from technical or immaterial errors. OPM will not grant relief solely because an agency committed a procedural or technical error if the appellant would have been subject to the same action, or would not have received a materially more favorable outcome, had the agency complied with the applicable requirement. Conversely, prejudice may exist where the violation affected the appellant's retention standing, order of release, assignment rights, notice rights, or other RIF determination in a way that materially affected the outcome of the RIF action as applied to the appellant.

Paragraph (c)(1) provides that the procedures in part 351 are the sole and exclusive means of appealing a RIF action covered by this subpart. This provision is intended to avoid duplicative or overlapping RIF appeal processes and to channel covered RIF appeals through the OPM procedure established by this final rule. It also promotes consistent application of OPM's governmentwide RIF regulations and avoids parallel adjudication of the same RIF-compliance issues in multiple forums.

Paragraph (c)(2) provides that a reduction-in-force action taken under part 351, and any matter relating to an appeal of such an action, may not be raised under a negotiated grievance procedure or contested through grievance arbitration. This provision forecloses negotiated grievance procedures and grievance arbitration as alternative forums for direct RIF-compliance challenges, for the reasons discussed in Section III.I of this preamble.

At the same time, paragraph (c)(3) makes clear that the OPM RIF appeal process does not displace matters within the independent jurisdiction of other entities. Employees may continue to file complaints, appeals, or other matters that fall within the independent jurisdiction of the Equal Employment Opportunity Commission, an Inspector General, MSPB, the Department of Labor Veterans' Employment and Training Service, or the Office of Special Counsel. Thus, OPM will adjudicate whether the RIF action complied with applicable RIF statutes and OPM regulations, while collateral statutory claims remain available in the forums Congress or applicable law has designated for those claims.

Paragraph (c)(4) also provides that a party cannot obtain judicial review of a decision under this subpart. OPM addresses comments concerning judicial review and the CSRA remedial scheme in Section III.G.

Consistent with the DATES section of this preamble, the appeal process established by revised § 351.901 and subpart I is available for a reduction-in-force action for which the agency issued the employee a specific RIF notice under § 351.802 on or after the effective date of the final rule under RIN 3206-AO86. An appeal of a reduction-in-force action for which the agency issued that notice before that date—including an appeal pending before the MSPB—continues to be adjudicated by the MSPB under the procedures applicable when the action was taken. This applicability provision is stated in the preamble, and the final regulatory text accordingly does not include a separate applicability note in § 351.901.

2. Section 351.902—Procedures for Submitting Appeals

Revised § 351.902 describes the procedures and timeline an employee must adhere to when submitting an appeal.

Paragraph (a) requires a party, or the party's authorized representative, to file an initial appeal or request for reconsideration through the electronic filing system identified on OPM's website. Unless a party demonstrates good cause and obtains approval from OPM, OPM will not accept pleadings, evidence, or documents submitted by electronic mail or postal mail. This requirement is intended to promote consistent intake, reliable service, accurate case tracking, and efficient adjudication.

Commenters 0066, 0272, 0296, 0299, 0304, and others, criticized the requirement that employees use e-filing exclusively, absent a showing of good cause. OPM disagrees with these criticisms. The good cause requirement permits nonelectronic filing methods for filers with a bona fide need while furthering OPM's legitimate interest in maintaining a streamlined case intake system that minimizes errors and delays. OPM notes that the e-filing requirement for RIF appeals for which this rule provides is consistent with the National Labor Relations Board's policy for requiring parties to e-file documents absent justification to file in paper format.[31] Other agencies, including the FLRA and OSC, also have adopted restrictions on electronic filing.[32] OPM acknowledges Commenter 0553's concern that the e-filing system described in the proposed rule was not operational and available for public inspection at the time the proposed rule was submitted for public comment. However, OPM is confident that it will have an e-filing system in place by this final rule's effective date.

Paragraph (b) establishes a 30-calendar-day deadline for filing an appeal. An employee may submit an appeal within 30 calendar days from the effective date of the RIF action. The appeal is timely if electronically filed by 11:59 p.m. Eastern Time on the 30th calendar day after the effective date of the action.

Paragraph (b)(1) explains how to compute the filing period. The first day counted is the day after the effective date of the agency action. If the last day for filing falls on a Saturday, Sunday, or Federal holiday, the filing period extends to the first workday after that date.

Paragraph (b)(2) provides that an untimely appeal will be dismissed unless the employee demonstrates good cause for the untimely filing. OPM will determine good cause in its sole discretion.

Paragraph (b)(3) adds a limited tolling rule for employees who timely pursue collateral matters. The resolution of a matter within the independent jurisdiction of another entity identified

---

[31] 29 CFR 102.5(c) (providing that "[u]nless otherwise permitted under this section, all documents filed in cases before the [National Labor Relations Board] must be filed electronically," and requiring paper filers to include "a statement explaining why the party does not have access to the means for filing electronically or why filing electronically would impose an undue burden").

[32] .*See*, *e.g.*, 5 CFR 2429.24 ("To file documents by personal delivery, you must schedule an appointment at least one business day in advance."); Office of Special Counsel, File a Complaint, *available at* https://www.osc.gov/file-complaint/ (last visited June 2, 2026) (requesting that parties submit documents electronically because "OSC is unable to process paper filings").

in § 351.901(c)—for example, a prohibited-personnel-practice complaint that results in correction of a performance rating—may materially alter an employee's retention standing or other rights under part 351. Paragraph (b)(3) therefore permits an employee who timely filed such a collateral matter to file a RIF appeal within 30 calendar days after the final decision on that matter, where that decision materially affects the employee's retention standing, order of release, assignment rights, or other rights under this part. This provision ensures that an employee is not foreclosed from pursuing a meritorious RIF appeal solely because the predicate for the appeal did not arise until the collateral matter was resolved. For purposes of paragraph (b)(3), a decision on a collateral matter is final when it is no longer subject to further administrative review. OPM will determine, in its sole and exclusive discretion, whether such a decision materially affects the employee's rights under part 351.

Paragraph (c) establishes e-filing procedures. All parties and representatives must register as instructed by OPM using a unique email address. Registration as an e-filer constitutes consent to electronic service of pleadings, evidence, notices, orders, decisions, and other documents. Parties and representatives may not electronically file documents or access case materials unless registered as e-filers.

The e-filing system will make OPM-issued documents and party-filed documents available for viewing and downloading, with access limited to the parties and their representatives in the relevant case. Parties and representatives must follow OPM's filing instructions. OPM may strike a document if an e-filer repeatedly fails to follow those instructions after issuance of a show-cause order.

Paragraph (c) also requires e-filers to keep their contact information current, notify OPM and other parties of changes in address, telephone number, or email address by filing a pleading in each pending case, and regularly monitor case activity in the e-filing system. A party or representative may withdraw e-filing registration in accordance with OPM's posted requirements. After OPM processes a proper withdrawal, the person will no longer receive electronic service or have electronic access to case records through the e-filing system. OPM may continue processing the appeal or reconsideration request after withdrawal, and withdrawal will not be considered good cause for staying a case.

OPM may, in its sole and exclusive discretion, exempt a party or representative from registering as an e-filer for good cause. A party or representative seeking an exemption must promptly contact OPM as instructed on OPM's website. OPM will not find good cause for failing to timely file an appeal or seek reconsideration if the party or representative failed to contact OPM to request an exemption before the applicable deadline. Documents filed through OPM's e-filing system are deemed received on the date of electronic submission.

3. Section 351.903 — Form and Content of RIF Appeal and Agency Response

Revised § 351.903 identifies the required contents of the employee's appeal, the agency's response, the agency record, any employee reply, inspection of OPM's appellate record, service requirements, and treatment of untimely filings.

Paragraph (a) requires the employee's appeal to be in writing and to state the basis for the appeal. The appeal must include the name, address, and email address or telephone number of the appellant and, if applicable, the appellant's representative. The employee must also include any documentation supporting the appeal.

Paragraph (b) requires the agency to file its response within 30 calendar days after service of the initial appeal. The agency response must identify the appellant and the agency whose action is being appealed; identify the reduction-in-force action taken against the appellant and state the reasons for the action; include all documents contained in the agency record of the action; designate and be signed by the authorized agency representative; and include any other documents or responses requested by OPM.

Paragraph (b) also identifies the minimum contents of the agency record for a RIF appeal. The agency record must include, at a minimum and as applicable, the appellant's specific written RIF notice, any amended notice, proof of service or receipt, and documents showing the effective date of the action. The record must also include documents supporting the agency's stated reason for the RIF, including whether the action was based on lack of work, shortage of funds, insufficient personnel ceiling, reorganization, or the exercise of reemployment or restoration rights.

The agency record must include documents establishing the appellant's coverage, position, appointment, tenure group and subgroup, veterans' preference status, service computation date, work schedule, competitive area, competitive level, and status as a competing employee. It must also include documents establishing the competitive area and competitive level used for the RIF, including any required agency or OPM approval, written competitive-area justification, organizational chart, position descriptions, classification records, representative-rate determinations, and related records.

In addition, the agency record must include the retention register applicable to the appellant, if one was prepared, and related retention records that affected the appellant's retention standing, order of release, or assignment rights. These records include, as applicable, records supporting performance credit, veterans' preference credit, tenure subgroup, and service computation date. The record must also include documents showing how the agency applied the order of release, including any tie determination, correction of retention standing, and mandatory or discretionary exception to the order of release.

Where assignment rights are at issue, the agency record must include documents concerning the appellant's assignment rights, including positions considered for assignment, qualification determinations, job analysis or assessment materials, offers of assignment, and any declination. Where a special RIF circumstance is relevant to the appellant, the record must include documents concerning that circumstance, including abolishment of an entire competitive area, transfer of function, exclusion from RIF competition under § 351.202(d), restoration protection, or another basis for modified notice or treatment under part 351.

Finally, paragraph (b) requires a certification that the agency has produced the complete agency record of the RIF action. The final rule distinguishes between production to OPM and service on the appellant. The agency must produce the complete agency record to OPM so that OPM may adjudicate the appeal on the full record relevant to the action under review. 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. This distinction ensures that OPM receives the full record necessary to decide the appeal while protecting information that may not lawfully be disclosed in full to the appellant or the appellant's representative.

Paragraph (c) permits the employee to file a reply within 15 calendar days of the agency response. The reply may address only the factual and legal issues raised by the agency response. The employee may not raise new allegations of error in the reply unless the basis for the new allegation rests on information first disclosed in the agency response or unless OPM grants leave for good cause.

Paragraph (d) provides that the employee, the employee's representative, and the agency may inspect OPM's appellate record on request. Inspection is subject to the Privacy Act, classified-information or national-security requirements, protective orders issued by OPM, and any other applicable limitation required by law. This limitation reflects that OPM's appellate record may include personnel records, RIF records, performance information, veterans' preference documentation, records concerning other employees, privileged material, or other protected information.

Paragraph (e) establishes service requirements. The employee, the employee's representative, and the agency must serve one another with copies of information submitted to OPM in connection with the appeal, subject to the disclosure limitations in paragraph (b).

Service must occur at the same time the information is submitted to OPM, and each submission must be accompanied by a certificate of service stating how and when service was made.

Paragraph (f) permits OPM to accept untimely filings upon a party's showing of good cause. OPM will determine whether good cause exists in its sole and exclusive discretion.

4. Section 351.904—Employee Representatives

Revised § 351.904 governs representation in OPM RIF appeals.

Paragraph (a) provides that an appellant may select a representative of the appellant's choice to assist in preparing and presenting the appeal, provided the employee submits a written designation of representative for the specific appeal. This provision preserves an employee's ability to obtain representation while requiring a clear written designation for the proceeding. Paragraph (b) addresses representatives who are Federal employees. If the selected representative is a Federal employee, the representative may not perform representational functions while in a duty status, including while on official time under 5 U.S.C. 7131. The representative also may not claim agency reimbursement for expenses incurred while performing the representational function. This provision limits the use of agency time and resources in connection with RIF appeals under this subpart.

Paragraph (c) authorizes OPM or the responsible agency to disallow a representative in specified circumstances. OPM or the agency may disallow the employee'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. Because paragraph (b) prohibits a Federal employee representative from performing representational functions while in a duty status, the final rule does not adopt the proposed additional grounds for disallowance based on the priority needs of the Government or unreasonable costs to the Government.

5. Section 351.905—Adjudication of Appeals

Revised § 351.905 establishes the procedures for adjudicating RIF appeals.

Paragraph (a) governs appeals by employees of agencies other than OPM. OPM will assign personnel to adjudicate those appeals. Assigned OPM personnel 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 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.

Paragraph (a) also establishes assignment restrictions. 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, was an employee of the agency that is a party to the appeal or was subject to an action covered under part 351. When necessary, OPM may assign an administrative law judge to preside over the adjudication of an appeal by a non-OPM employee.

Paragraph (b) establishes a separate procedure for appeals by OPM employees. OPM will assign an administrative law judge to adjudicate an appeal by an OPM employee. The administrative law judge will issue an initial decision. To insulate adjudication of OPM employees' appeals from agency involvement, OPM will not disturb the initial decision in those cases unless a party shows a harmful procedural irregularity before the administrative law judge, a clear error of law, or a material factual error that affected the outcome of the appeal.

Under this construction, the OPM Director would be proactively exercising restraint in permitting decisions pertaining to OPM employees to lie undisturbed, not delegating his authority to the ALJ. In essence, the OPM Director is regulatorily tying his own hands but can nevertheless choose to regulatorily untie them. This leaves the ALJ as a properly supervised inferior officer, not a principal officer. *See United States v. Arthrex, Inc.*, 594 U.S. 1, 6 (2021) (holding that the Appointments Clause provides that inferior officers may exercise executive power provided they are directed and supervised by a principal officer.).

Paragraph (b) defines "harmful procedural irregularity" as an irregularity in the application of procedures likely to have caused the administrative law judge to reach a conclusion different from the one the judge would have reached in the absence or cure of the irregularity. The assignment of an administrative law judge under paragraphs (a) or (b) does not make 5 U.S.C. 554, 556, or 557 applicable to an appeal under part 351, except to the extent those provisions are independently required by law or expressly incorporated in the rule.

Paragraph (c) addresses ascertainment of facts. OPM may require either party to provide additional information. OPM may also audit or investigate an agency's action if OPM determines, in its sole discretion, that the existing record is insufficient to resolve a material issue within OPM's jurisdiction and that an audit or investigation is reasonably likely to produce information material to resolving that issue. A representative of either party may not participate in an audit or investigation unless OPM specifically requests that participation.

The review of an agency action will be based on the developed written record unless OPM determines that a hearing is necessary and efficient. Paragraph (c) defines "necessary and efficient" to mean circumstances in which the written record is insufficiently developed to determine 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. If OPM conducts an investigation or audit, OPM will inform the employee, the employee's representative, and the agency, provide them the results, and give them a reasonable opportunity to submit arguments or additional information supporting their positions.

Paragraph (d) requires OPM to notify the employee, the employee's representative, and the agency in writing of its decision.

Paragraph (e) addresses remedies. 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 is not entitled to compensatory damages or other relief not authorized under 5 U.S.C. 5596(b).

Paragraph (e) also provides that 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 that relief. OPM may not order a stay that would deprive the employee of pay and benefits while the initial decision is pending reconsideration.

6. Section 351.906—Sanctions and Protective Orders

Revised § 351.906 authorizes OPM to issue protective orders and cease-and-desist directives, and identifies available consequences for noncompliance. 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.

Paragraph (a) permits OPM to 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 act sua sponte or at the request of a party, either preemptively or at any point in the appeal process.

A party requesting a protective order or cease-and-desist directive must file the request through the prescribed e-filing procedures and include a statement of reasons supporting the request, along with 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.

Commenters 0442, 0443, 0513, and 1119 objected to section 351.906(a) of the proposed rule, asserting the standards under which it permitted OPM to issue cease-and-desist directives were overly broad and vague such that it would chill employees from exercising their First Amendment right to speak publicly about RIF adjudications.

OPM has considered these comments and is narrowing § 351.906 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 subpart I of part 351, 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 subpart I of part 351 and to the specific purposes identified in § 351.906(a).

Paragraph (b) identifies consequences for failure to comply with an OPM directive issued under paragraph (a). Except where prohibited by law, OPM may draw inferences against the noncompliant party, prohibit the noncompliant party from introducing evidence or additional evidence or otherwise relying on the record, or eliminate from consideration an appropriate part of the noncompliant party's filings or submissions.

OPM is additionally specifying in paragraph (c) that any sanction issued under paragraph (b) must be proportionate, causally related to the violation, and no broader than necessary to protect the adjudicatory process.

7. Section 351.907—Reconsideration of an Initial Decision

Revised § 351.907 establishes the process for reconsideration of an initial decision.

Paragraph (a) authorizes OPM, in its sole discretion, to reopen and reconsider an initial decision upon request of either party or on OPM's own initiative. An employee, the employee's representative, or the agency may request reconsideration within 30 calendar days from issuance of the initial decision. The request must be filed in the same manner as an initial appeal.

Paragraph (b) identifies the grounds on which OPM may grant reconsideration. OPM may grant reconsideration if the initial decision contains erroneous findings of material fact sufficient to warrant a different outcome; if the initial decision is based on an erroneous interpretation of statute or regulation or an erroneous application of law to the facts; if new and material evidence or legal argument is available that, despite the party's due diligence, was not available when the record closed; or if OPM finds good cause to reconsider the appeal.

When a party alleges legal error, the party must explain how the error affected the outcome of the case. For new evidence, the relevant question is whether the information contained in the documents, not merely the documents themselves, was unavailable despite due diligence when the record closed.

Paragraph (c) describes OPM's authority in a reopened or reviewed case. OPM may issue a reopened and reconsidered decision that affirms, reverses, modifies, vacates, or otherwise decides the case in whole or in part. OPM may require the parties to submit argument and evidence, take any other action necessary for final disposition of the case, and issue an order with a date for compliance.

Paragraph (d) provides that there is no further right of administrative appeal from the reopened and reconsidered decision.

8. Section 351.908—Review by the OPM Director

Section 351.908 reserves to the OPM Director the authority, in the Director's discretion and sua sponte, to reopen and reconsider any appeal in which OPM has issued a decision that has not yet become final. Once a decision becomes final under § 351.909, § 351.908 does not provide a separate mechanism for reopening that decision.

Many commenters (including 0177, 0395, 0411, 0555, 1020, and others) objected to providing the OPM Director with the authority to reopen and reconsider decisions at his or her direction, *sua sponte*, contending that it violated due process.

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 § 351.908 to identify nonexclusive considerations that may inform the Director's decision to reopen and reconsider a nonfinal RIF appeal decision. Under the final rule, the Director may act on the Director's own initiative and only before a decision becomes final under § 351.909. In determining whether to exercise that authority, the Director may consider, among other things, whether the decision contains clear legal error, rests on an erroneous finding of material fact, involves an issue of exceptional importance, affects the governmentwide administration of civil service laws, rules, regulations, or OPM policy, conflicts with another OPM decision, or otherwise warrants Director review.

This revision responds to commenters who objected to Director review as insufficiently cabined, while preserving final agency supervision over important legal, factual, policy, consistency, and governmentwide civil service issues. OPM has retained sua sponte Director review because final agency oversight promotes decisional consistency and accountability within OPM's adjudicatory process. The revision does not create a separate right for parties to request Director review; parties may seek reconsideration under § 351.907. If the Director reopens and reconsiders a decision under § 351.908, the Director may take any action available under § 351.907(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 351 across agencies. That review function is especially important in a governmentwide personnel system, where inconsistent interpretations by subordinate adjudicators could produce uneven appeal rights for similarly situated employees in different agencies. 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, § 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). The rule preserves supervision by the Director, a principal officer, before OPM’s decision becomes final. Consistent with *Freytag*, *Lucia*, and related precedents, the Director will appoint, or ratify the appointments of, the OPM personnel assigned to adjudicate appeals under this subpart, ensuring that any adjudicator who exercises significant authority as an inferior officer has been properly appointed.

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.

The appeals process established in this rule 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 subpart I of part 351.

OPM does not agree that the possibility of Director review establishes bias or a due-process violation. Agency heads commonly retain final decisional authority within administrative adjudication systems, and the mere availability of final agency review does not show prejudgment, bad faith, or inability to decide a matter fairly.[33] The Director's review authority applies only before a decision becomes final. It does not permit adjudication outside the regulatory framework, and it does not eliminate the requirement that decisions be based on

[33] *See Fogo de Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1148–49 (D.C. Cir. 2014) (declining to find a due process violation where plaintiff did not establish that the individual agency decisionmaker "ha[d] a closed mind" and was "impervious to evidence or argument"); *Riggins v. Goodman*, 572 F.3d 1101, 1115 (10th Cir. 2009) (denying claim of due process violation absent evidence that administrative adjudicators had a pecuniary interest in the case or personal animosity against a party).

the record and the governing standards in part 351. In addition, OPM has revised § 351.908 to identify nonexclusive considerations that may inform the Director's decision to reopen and reconsider a nonfinal RIF appeal decision, including whether the decision contains clear legal error, rests on an erroneous finding of material fact, involves an issue of exceptional importance, affects the governmentwide administration of civil service laws, rules, regulations, or OPM policy, conflicts with another OPM decision, or otherwise warrants Director review.

The final rule thus ensures that Director review occurs within a structured adjudicatory process that includes record-based decision-making, separation-of-functions protections, *ex parte* safeguards, reconsideration, and public availability of final merits decisions. Commenters did not identify specific evidence that the OPM Director would prejudge individual RIF appeals or direct outcomes contrary to the record. OPM therefore declines to eliminate Director review.

9. Section 351.909—Final Decision

Revised § 351.909 explains when decisions issued under subpart I become final and the effect of finality.

Paragraph (a) provides that 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 § 351.907 or the Director reopens the decision under § 351.908.

Paragraph (b) provides that a timely request for reconsideration under § 351.907 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 § 351.908 before that time. If OPM grants the request, the reopened and reconsidered decision becomes OPM's final decision 30 calendar days after issuance unless the Director reopens that decision under § 351.908 before that time.

Paragraph (c) provides that an untimely request under § 351.907 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).

Paragraph d) provides that a decision by the Director under § 351.908 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 § 351.909.

Paragraph (e) states that there is no further right of appeal of a final decision of OPM. This provision works together with § 351.901(c), which establishes the OPM process as the sole and exclusive means of appealing covered RIF actions under part 351 and provides that a party cannot obtain judicial review of a decision under this subpart.

As stated above, OPM is limiting judicial review of decisions issued under this subpart to adhere to the CSRA's specific and well-defined statutory scheme for judicial review and prevent unnecessarily protracted litigation regarding RIFs. OPM recognizes the status quo that RIF appeals are appealable to the MSPB and then, in turn, to the Federal Circuit. 5 U.S.C. 7701, 7703(b). However, this pathway currently exists because of an OPM regulation, not because the CSRA itself specifically requires it. The detailed discussion above regarding the structure of the CSRA supports both the legal and prudential bases for limiting judicial review in accordance with the comprehensive statutory scheme. OPM believes that there is little added value from the review that an Article III court could provide relative to OPM's adjudicatory venue.

Paragraph (f) requires OPM to maintain, subject to legal limits, a publicly accessible website containing final decisions issued under this subpart that address a party's claim on the merits. Those legal limits include requirements protecting privacy, privileged information, protected personnel information, law-enforcement-sensitive information, and other information that may not lawfully be disclosed.

Final merits decisions that are not posted publicly because of such legal limits must be made available upon request to the Federal employee or former Federal employee involved in the proceeding, the representative selected under § 351.904, or a representative of the Federal agency or office involved in the proceeding who has a need to know.

V. Regulatory Analysis and Related Comments

A. Statement of Need

OPM is issuing this final rule to modernize the administrative process for appealing a furlough of more than 30 days, separation, or demotion by reduction-in-force action under part 351. OPM has determined that the current RIF appeal process is more formal, costly, and time-consuming than necessary to resolve the RIF-compliance issues ordinarily presented in such appeals. This final rule streamlines the appeal process, promotes more consistent application of OPM's governmentwide RIF regulations, reduces unnecessary litigation burden, and provides employees and agencies with more timely finality. The final rule rests on several grounds: OPM's statutory responsibility for part 351; the regulatory nature of MSPB's prior RIF jurisdiction; the record-based nature of many RIF disputes; the cost and delay associated with MSPB-style litigation, discovery, and hearing procedures; the benefit of uniform interpretation of OPM's RIF regulations; and the importance of timely finality for employees and agencies.

Many commenters, such as Commenters 0045, 0372, 0546, 0561, 0598, and 1084, contended that the current and longstanding RIF appeal procedures work properly and do not require revision. OPM disagrees. The fact that a regulatory framework has existed for many years does not preclude OPM from revising that framework when it concludes that a different approach better serves the statutory objectives and the needs of the civil service.

MSPB RIF appeals may involve discovery, hearing preparation, evidentiary hearings, petitions for review, and subsequent judicial review where MSPB jurisdiction exists. That process can impose substantial costs on agencies and employees and can delay final resolution. Delay is not merely an agency concern. If an agency committed a prejudicial RIF error, an employee benefits from prompt corrective relief. If the agency action is sustained, the employee benefits from prompt certainty in pursuing reemployment opportunities within the Federal Government, other Federal placement programs, or non-Federal employment.

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

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

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

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

This multi-stage process may be appropriate for matters Congress made appealable to MSPB under chapter 75 or other statutes. But OPM has determined that it is not necessary or well-tailored for the regulatory RIF appeal right under part 351. RIF appeals generally concern whether the agency correctly applied governmentwide RIF requirements governing coverage, competitive area, competitive level, retention standing, order of release, assignment rights, notice, and related part 351 requirements. Those issues ordinarily can be resolved by reviewing the agency's RIF record, supplemented when necessary by targeted requests for information, audits, investigations, or hearings.

OPM also notes that RIF separations differ materially from chapter 75 removals and chapter 43 performance-based actions. A RIF is a position-based workforce action, not an adverse action taken against an employee for misconduct or unacceptable performance. *See Huber v. MSPB*, 793 F.2d 284, 286 (Fed. Cir. 1986); *Grier v. Department of Health & Human Services*, 750 F.2d 944, 945 (Fed. Cir. 1984); *Schall v. U.S. Postal Service*, 73 F.3d 341, 344 (Fed. Cir. 1996). Employees affected by a RIF also receive protections not available to employees removed for misconduct or unacceptable performance, including RIF notice rights, assignment rights where applicable, priority reemployment rights, and career-transition assistance. See 5 CFR 351.803(a); 5 CFR part 351, subpart G; 5 CFR part 330, subparts B, F, and G.

Those differences support an appeal process tailored to RIF-compliance issues rather than one modeled on adverse-action litigation. A RIF appeal generally concerns whether the agency properly applied governmentwide RIF requirements governing coverage, competitive area, competitive level, retention standing, order of release, assignment rights, notice, and related matters. Those issues are ordinarily capable of resolution through the agency record, supplemented where necessary by targeted requests for information, audits, investigations, or hearings.

The final rule therefore replaces the MSPB's multi-stage litigation model with a streamlined OPM process tailored to RIF-compliance issues. Under the final rule, an employee who is furloughed for more than 30 days, separated, or demoted by a RIF action may file an appeal with OPM. The appellant must show timely and proper filing, OPM jurisdiction, a failure to comply with an applicable statute or OPM regulation governing RIF actions under part 351, and that the failure must have prejudiced the appellant by causing the appealed action or the loss of a materially more favorable outcome.

The OPM process is designed to put the relevant RIF record before the adjudicator promptly. This final rule also responds to the concern that a streamlined process could deprive employees of meaningful review. The agency must file a response within 30 calendar days after service of the appeal and must produce the complete agency record to OPM. The final rule specifies RIF-specific record categories, including the RIF notice, effective-date materials, documents supporting the reason for the RIF, coverage and appointment records, competitive-area and competitive-level documentation, retention-register materials, order-of-release records, assignment-rights records, special RIF-circumstance records, and a certification that the complete agency record has been produced. The agency must serve the appellant with the agency record, subject only to legally required disclosure limitations.

The final rule also preserves meaningful fact development without making discovery and hearings automatic in every case. The appellant may file a reply after the agency response and may raise new allegations based on information first disclosed in the agency response or with OPM's leave for good cause. OPM may require additional information, conduct an audit or investigation where the existing record is insufficient to resolve a material issue within OPM's jurisdiction, and hold a hearing when necessary and efficient, including where the written record is insufficiently developed or a material credibility dispute must be resolved.

Finally, the final rule replaces MSPB Board-level review and Federal Circuit review with OPM reconsideration, limited Director review before finality, and final OPM action. Either party may seek reconsideration of an initial decision, and OPM may reopen and reconsider an initial decision. The Director may review a nonfinal decision on the Director's own initiative before finality. Once the decision becomes final under § 351.909, there is no further appeal of the OPM

RIF decision under part 351. The rule separately preserves collateral matters within the jurisdiction of EEOC, Inspectors General, MSPB where it has independent jurisdiction, DOL VETS, and OSC.

OPM concludes that this structure better fits the nature of RIF appeals. The MSPB process can involve administrative-judge proceedings, discovery, hearings, petitions for review to the full Board, possible remands or reopening, and subsequent judicial review. By contrast, the final rule provides a single, record-focused OPM process that requires the agency to produce the complete RIF record, gives the appellant an opportunity to respond, permits targeted fact development where needed, and provides corrective relief for prejudicial RIF error. This approach reduces delay, cost, and uncertainty while preserving administrative review of whether the agency complied with applicable RIF statutes and OPM regulations.

OPM also considered historical and contemporary evidence concerning the burden of the prior appeal process. For many years, agencies and oversight bodies have expressed concern that Federal personnel appeal procedures can become complex, costly, and time-consuming.[34] Those concerns remain relevant because RIF appeals often involve application of detailed regulatory criteria to an established agency record. OPM has determined that a record-focused OPM process, with additional procedures available when necessary and efficient, better aligns the appeal process with the issues presented in RIF cases.

Since OPM first delegated non-SES RIF appeals to MSPB by regulation, the practical consequences of that delegation have changed substantially. The delegation was not a statutory command; it was a regulatory choice made under OPM's authority to prescribe regulations governing the release of competing employees in a RIF. See 5 U.S.C. 3502. Congress did not make non-SES RIF actions appealable to MSPB by statute, and Congress expressly excluded RIF actions under section 3502 from the chapter 75 adverse-action scheme. See 5 U.S.C.

---

[34] *Streamlining Federal Appeals Procedures: Hearings Before the Subcomm. on Civ. Serv. of the H. Comm. on Gov't Reform & Oversight*, 104th Cong. (1995) (statement held Nov. 29, 1995).

7512(B). Thus, the prior MSPB forum for non-SES RIF appeals existed because OPM's regulations made those actions appealable to MSPB, not because Congress required MSPB adjudication.

When OPM revised the RIF regulations in the 1980s, it attempted to retain a record-focused model of review. OPM's rule provided that, unless MSPB determined there were material factual disputes, "the review of the matter in the RIF appeal will be confined to the written record." 51 FR 318, 319 (Jan. 3, 1986). The D.C. Circuit invalidated that restriction in *AFGE v. OPM*, 821 F.2d 761, 768–69 (D.C. Cir. 1987), holding that if OPM elected to use MSPB as the adjudicatory forum, OPM could not control MSPB's adjudicatory procedures in the manner OPM had attempted. The practical effect of *AFGE v. OPM* was that OPM could continue delegating RIF appeals to MSPB, but could not require MSPB to use the streamlined, written-record process OPM considered appropriate for RIF appeals.

Commenters 0308 and 0386 recommended that OPM instead streamline MSPB's procedures. OPM appreciates those recommendations and agrees with the general premise that RIF appeals should be adjudicated through more focused procedures. Indeed, several of the commenters' suggested efficiencies are reflected in this final rule, including record-based review, targeted fact development, hearings only when necessary and efficient, and clearer filing and reconsideration procedures. But OPM declines to adopt recommendations that would require OPM to dictate MSPB procedure in contravention of *AFGE v. OPM*. The final rule instead addresses the problem at its source by revising OPM's regulatory delegation and establishing OPM procedures for the regulatory RIF appeal right preserved in part 351.

The MSPB's processing time has been considerably delayed due to exceedingly long backlogs. MSPB has recognized the problem its recurring backlog of cases presents, as well as the cause: lack of quorum because the Senate has not confirmed a sufficient number of Board members. Between January 7, 2017, and March 3, 2022, and between April 10 and October 27, 2025, MSPB lacked a quorum, which prevented it from reviewing cases.[35] In light of the Senate's failure to confirm nominees to the MSPB in a timely way, a process over which OPM lacks any meaningful control, prudent governance requires the executive to minimize disruption in personnel operations caused by loss of a quorum at MSPB. It is notable that MSPB too has mitigated, as far as practicable, the effects of a future lack of quorum on delays. 89 FR 72957 (Sept. 9, 2024).

The risk of an additional backlog is also significant in light of the significantly increased number of cases received in calendar year 2025.[36] Not only is this frustrating for agencies that must be able to efficiently and effectively manage their workforces, but so too for employees. If an employee is subject to a RIF, the Federal Government owes it to that individual to efficiently adjudicate his or her appeal so that he or she may receive any remedies, if proper, or seek alternative employment or reemployment elsewhere in the Federal Government. Recent agency restructuring activity thus underscores the importance of a clear and efficient RIF appeal process.

OPM does not rely solely on MSPB quorum history or case backlogs. Those circumstances reinforce OPM's conclusion that the regulatory RIF appeal process should not depend on an external adjudicative forum whose procedures and institutional availability OPM cannot control. But the final rule rests on broader grounds: OPM's statutory and regulatory responsibility for part 351; OPM's subject-matter expertise in RIF administration; the record-based nature of many RIF disputes; the cost and delay associated with default discovery, hearing, and multi-stage review procedures; and the benefits of a single governmentwide process tailored to RIF appeals.

Several commenters supported the proposed rule on these grounds. Commenters 0351, 0352, 0418, 0434, and 0657 stated that MSPB adjudication can be time-consuming, costly, and

[35] U.S. Merit Sys. Prot. Bd., *Frequently Asked Questions About the Lack of Quorum Period and Restoration of the Full Board* (Nov. 14, 2025), *available at* https://www.mspb.gov/FAQs%20Absence%20of%20Board%20Quorum%2011-14-25.pdf.

[36] U.S. Merit Sys. Prot. Bd., *Weekly Number of Cases Received in the Regional and Field Offices Fiscal Year 2025* (Sept. 29, 2025), *available at* https://www.mspb.gov/Recent%20ROFO%20Case%20Receipts.pdf.

resource-intensive, and that transferring RIF appeals to OPM would improve efficiency, consistency, predictability, and finality. These commenters also stated that lengthy appeals can consume legal, human-resources, management, and operational resources; complicate workforce planning; and delay corrective relief or final resolution. OPM agrees. A more streamlined OPM process will benefit both employees and agencies by reducing uncertainty, focusing adjudication on the RIF record and applicable legal standards, and allowing RIF-compliance disputes to be resolved more promptly.

Accordingly, OPM concludes that retaining the prior MSPB forum is no longer the best regulatory approach. The final rule preserves an administrative appeal for employees furloughed for more than 30 days, separated, or demoted by a RIF action; requires a complete RIF-specific agency record; provides reply and inspection rights; authorizes additional fact development where warranted; permits hearings when necessary and efficient; and provides corrective relief for prejudicial violations of applicable RIF law or regulation. At the same time, the rule avoids importing MSPB procedures that OPM cannot control and that OPM has determined are not necessary in every RIF appeal.

In addition, OPM has long been responsible for prescribing, interpreting, and overseeing governmentwide RIF regulations. The prior framework divided responsibility between OPM, which issued and interpreted the RIF rules, and MSPB, which adjudicated RIF appeals under procedures outside OPM's control. OPM has determined that this divided structure creates unnecessary fragmentation, and that consolidating RIF appeal adjudication within OPM will reduce fragmentation and improve accountability in the administration of part 351. As the Administrative Conference of the United States has recognized, when agencies share closely related responsibilities for different aspects of the same regulatory or management enterprise, that arrangement can produce redundancy, inefficiency, gaps, and other coordination problems. [37]

[37] Admin. Conf. of the U.S., *Improving Coordination of Related Agency Responsibilities* (June 15, 2012), *available at* https://www.acus.gov/document/improving-coordination-related-agency-responsibilities.

GAO has similarly recognized that reducing fragmentation can improve the efficiency and effectiveness of government operations.[38] Those concerns are present here. Under the prior framework, OPM prescribed and interpreted the governmentwide RIF regulations, while MSPB adjudicated RIF appeals under procedures OPM could not control. That divided structure created unnecessary separation between the agency responsible for the substantive RIF rules and the forum responsible for applying those rules in individual appeals. OPM believes that centralizing RIF appeal adjudication within OPM will allow the agency responsible for part 351 to apply its specialized expertise directly, improve consistency in the interpretation of OPM's RIF regulations, and reduce the procedural complexity associated with the prior forum.

OPM is the agency Congress charged with prescribing regulations governing the release of competing employees in a RIF. 5 U.S.C. 3502. OPM also has governmentwide responsibility for administering civil-service laws and regulations, promoting merit-system principles, overseeing delegated personnel authorities, and ensuring agency compliance with applicable personnel standards. See 5 U.S.C. 1103(a)(5), 1103(a)(7), 1103(c), 1104(b)(2), 1104(c). OPM implements the RIF statutory framework through part 351, provides governmentwide guidance to agencies on workforce reshaping and RIF administration, and oversees compliance with merit-system requirements. Locating RIF appeal adjudication within OPM therefore aligns interpretation, oversight, and adjudication of the RIF regulations in the agency with the most direct statutory and regulatory responsibility for those rules.

Accordingly, OPM concludes that this final rule is needed to provide a more efficient, consistent, and cost-effective RIF appeal process while preserving meaningful review for employees who allege that a covered RIF action was conducted in violation of an applicable statute or OPM regulation and that the violation prejudiced them. Consolidating RIF appeals in OPM reduces fragmentation, leverages OPM's statutory responsibility and subject-matter

[38] U.S. Gov't Accountability Off., *Opportunities to Reduce Fragmentation, Overlap, and Duplication and Achieve an Additional One Hundred Billion Dollars or More in Future Financial Benefits*, GAO-25-107604 (May 13, 2025), *available at* https://www.gao.gov/assets/gao-25-107604.pdf.

expertise, improves uniform interpretation of part 351, and provides employees and agencies with a clearer and more timely path to final resolution.

B. Regulatory Alternatives

OPM considered several alternatives before adopting the final rule.

First, OPM considered taking no action and retaining the existing regulatory delegation of RIF appeals to MSPB. OPM rejected that alternative. The current framework separates responsibility for the RIF regulations from responsibility for adjudicating disputes under those regulations. OPM prescribes and interprets the governmentwide RIF rules, while MSPB adjudicates RIF appeals under procedures OPM cannot control. OPM has determined that this divided structure produces unnecessary fragmentation, delay, and cost, and does not best serve employees, agencies, or the public. Retaining the status quo also would not address the concerns that prompted this rulemaking, including the burden of MSPB-style litigation, the need for more consistent interpretation of part 351, and the need for a process better tailored to the record-based issues ordinarily presented in RIF appeals.

Second, OPM considered eliminating administrative RIF appeals entirely. Congress directed that a RIF notice include a description of any appeal or other rights that "may be available," 5 U.S.C. 3502(d)(2)(E), and OPM has discretion to determine the contours of any regulatory RIF appeal procedure for non-SES employees. OPM declined to eliminate administrative RIF appeals. Employees have long had an administrative mechanism to challenge whether a RIF action was conducted consistently with applicable statute and regulation. Eliminating that mechanism would reduce adjudication costs, but it would also remove an orderly process for correcting prejudicial errors in the application of RIF requirements. OPM concluded that employees should continue to have a direct administrative avenue to challenge covered RIF actions, provided the process is structured to resolve RIF-compliance issues efficiently and consistently.

Third, OPM considered delegating RIF appeal adjudication to employing agencies. OPM rejected that alternative because it would create greater risk of inconsistent results and diminished confidence in the neutrality of the process. A decentralized agency-level appeal system would require each agency conducting a RIF to adjudicate direct challenges to its own RIF actions, which would heighten the very impartiality concerns commenters raised. It would also undermine governmentwide consistency in applying part 351 and reduce the efficiency gains expected from a single OPM-administered process.

Fourth, OPM considered retaining MSPB as the forum while attempting to impose OPM-designed streamlined procedures, including more limited discovery, record-based review, and hearings only where necessary. OPM rejected this alternative because it would not accomplish OPM's objective. In *AFGE v. OPM*, 821 F.2d 761, 768–69 (D.C. Cir. 1987), the D.C. Circuit explained that where OPM elects to use MSPB as the adjudicative forum, OPM may not dictate MSPB's adjudicatory procedures in the manner OPM had attempted. Thus, recommendations to streamline MSPB procedures, including those advanced by Commenters 0308 and 0386, cannot be implemented by OPM while leaving RIF appeals at MSPB. Several of those procedural concepts are instead reflected in the final OPM process, including written-record review, targeted fact development, and hearings when necessary and efficient.

Fifth, OPM considered moving RIF appeals to OPM while retaining MSPB-style procedures, including broader discovery and a hearing as of right. OPM rejected that alternative because it would preserve many of the features that make the current process costly, lengthy, and poorly suited to many RIF appeals. The final rule is not merely a forum change. Its purpose is to establish a RIF-specific process tailored to the issues ordinarily presented in part 351 appeals: coverage, competitive area, competitive level, retention standing, order of release, assignment rights, notice, and related RIF-compliance requirements. OPM concluded that written-record adjudication, supported by a complete agency record and supplemented by additional procedures when necessary and efficient, better balances fairness, accuracy, speed, and administrative cost.

Sixth, OPM considered relying on negotiated grievance arbitration or agency-specific appeal procedures as an alternative to a governmentwide OPM appeal process. OPM rejected that approach for direct RIF-compliance appeals. RIF appeals require uniform application of governmentwide regulations, and allowing parallel direct appeal mechanisms across agencies or bargaining units would undermine consistency and finality. Arbitrators also lack the expertise necessary to adjudicate RIF appeals effectively. At the same time, OPM revised the final regulatory text to address comments concerning collateral forums outside of collective bargaining and grievance arbitration. Final § 351.901(c) provides that the procedures in part 351 are the sole and exclusive means of appealing a covered RIF action, bars raising such actions and matters relating to their appeal under negotiated grievance procedures or through grievance arbitration, and preserves matters within the jurisdiction of the EEOC, Inspectors General, MSPB where it has independent jurisdiction, DOL VETS, and OSC.

Seventh, OPM considered retaining MSPB review while seeking increased MSPB staffing, specialized MSPB RIF tracks, expedited MSPB procedures, or other MSPB case-management reforms. OPM rejected these alternatives because they depend on institutional, budgetary, or procedural choices outside OPM's control and would not resolve the fundamental fragmentation created by locating adjudication outside the agency responsible for part 351. Additional MSPB resources also would not give OPM authority to require the RIF-specific process OPM has determined is appropriate.

Commenters 0928, 1092, and 1099 argued that OPM failed to consider less disruptive alternatives, including retaining MSPB review, improving MSPB procedures, creating expedited MSPB tracks, preserving grievance arbitration, or otherwise modifying the existing system. OPM has considered those alternatives and disagrees that they would better accomplish the goals of this rulemaking. Retaining MSPB would preserve the divided structure OPM seeks to correct. Attempting to dictate MSPB procedures would conflict with *AFGE v. OPM*. Mirroring MSPB procedures at OPM would preserve unnecessary procedural burden. Agency-level adjudication would reduce consistency and raise neutrality concerns. Eliminating appeals entirely would go too far by removing a useful mechanism for correcting prejudicial RIF errors.

OPM selected the final approach because it best balances fairness, efficiency, consistency, and cost. The final rule preserves an administrative appeal right for employees furloughed for more than 30 days, separated, or demoted by a RIF action; clarifies the appellant's burden and prejudice standard; requires the agency to produce the complete RIF-specific agency record to OPM; requires service of the agency record on the appellant subject only to legally required disclosure limits; permits an appellant reply; authorizes additional information, audits, investigations, and hearings when necessary and efficient; provides reconsideration and limited Director review before finality; preserves collateral statutory forums; and authorizes corrective relief where the appellant proves prejudicial RIF error.

Accordingly, OPM concludes that the selected alternative is preferable to the status quo and to the other alternatives considered. It preserves meaningful administrative review while reducing fragmentation, aligning adjudication with OPM's governmentwide RIF expertise, and establishing procedures better tailored to the nature of RIF appeals.

C. Expected Impact

OPM expects the final rule to produce a more streamlined, consistent, and administrable RIF appeal process. The rule does not alter the substantive requirements agencies must follow when conducting a RIF, nor does it authorize OPM to substitute its judgment for an agency's workforce-management determinations. Rather, it changes the forum and procedures for adjudicating whether an agency complied with applicable statutes and OPM regulations governing RIF actions under part 351 and whether any failure prejudiced the appellant.

The revised process is designed to match the issues ordinarily presented in RIF appeals. RIF appeals typically turn on the application of established statutory and regulatory criteria to an agency record, including coverage, competitive area, competitive level, retention standing, order of release, assignment rights, notice, and related part 351 requirements. These issues generally are well suited to record-based adjudication, supplemented where necessary by targeted requests for information, audits, investigations, or hearings when OPM determines that such procedures are necessary and efficient.

OPM will administer this process through MSAC, an external-facing OPM component with longstanding oversight and adjudicatory responsibilities. MSAC already adjudicates Federal personnel matters, including classification appeals, Fair Labor Standards Act claims, compensation and leave claims, and declination-of-reasonable-offer claims. RIF appeals are well suited to MSAC's institutional role because they require application of OPM's governmentwide personnel regulations to agency records and because MSAC is responsible for evaluating agency compliance with civil service laws, merit system principles, and related regulations.

The final rule also strengthens the record on which appeals will be decided. The agency must produce the complete agency record to OPM and must serve the appellant with the agency record, subject only to legally required disclosure limitations. The required record includes, as applicable, the RIF notice, effective-date documentation, records supporting the reason for the RIF, coverage and appointment records, competitive-area and competitive-level documentation, retention-register materials, order-of-release records, assignment-rights materials, special RIF-circumstance records, and a certification that the complete agency record has been produced. These requirements will allow OPM to adjudicate RIF appeals on a complete and reviewable record while giving appellants meaningful access to the materials needed to test whether the agency complied with part 351.

For employees, the final rule is expected to provide faster and clearer resolution of RIF appeals while preserving meaningful administrative review. An employee who is furloughed for more than 30 days, separated, or demoted by a RIF action may appeal to OPM. The employee may submit supporting documentation, review the agency response, file a reply, inspect OPM's appellate record subject to legal limits, and obtain corrective relief if the employee proves a prejudicial violation of an applicable RIF statute or OPM regulation. Faster resolution benefits employees whether the action is corrected or sustained: if the agency committed a prejudicial error, relief can be ordered sooner; if the action is upheld, the employee receives earlier certainty for purposes of Federal reemployment, non-Federal employment, financial planning, and career decisions.

For agencies, the final rule is expected to reduce litigation burden, improve predictability, and promote finality. Under the prior framework, RIF appeals could proceed through MSPB's multi-stage process, including discovery, hearing preparation, evidentiary hearings, petitions for review, and judicial review where available. That process can require substantial participation by agency counsel, human-resources staff, supervisors, managers, and witnesses. The OPM process preserves the ability to develop the record where necessary but avoids applying the same litigation model to every appeal regardless of whether the issues can be resolved on the written record.

For OPM, the final rule consolidates interpretation, oversight, and adjudication of part 351 within the agency charged with prescribing and administering governmentwide RIF regulations. This alignment will promote more consistent interpretation of OPM's RIF rules and reduce the fragmentation created when one agency writes and interprets the regulations while another adjudicates appeals under procedures outside OPM's control. OPM expects that MSAC's existing adjudicatory infrastructure and compliance experience will allow OPM to administer RIF appeals efficiently while maintaining record-based decision making and appropriate separation between policy and adjudicatory functions.

The final rule also includes safeguards designed to support fair and consistent adjudication. OPM adjudicators 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 concerning the merits of an appeal, and any such communication must be summarized in the record with an opportunity for the parties to respond unless disclosure is prohibited by law. OPM may require additional information, conduct an audit or investigation when the existing record is insufficient to resolve a material issue within OPM's jurisdiction, and hold a hearing when necessary and efficient. These safeguards allow OPM to achieve the efficiency benefits of record-based review without eliminating tools needed to resolve material factual or legal issues.

For MSPB, the rule will remove future part 351 RIF appeals from its docket, except where MSPB has independent statutory jurisdiction over a matter not displaced by this rule. That change will allow MSPB to focus resources on matters Congress made appealable to MSPB by statute, while OPM adjudicates the regulatory RIF appeal right established under part 351.

Overall, OPM expects the final rule to reduce delay, decrease unnecessary litigation costs, improve consistency in the application of part 351, and provide employees and agencies with more timely finality. The rule preserves an administrative appeal mechanism, strengthens the agency-record requirement, allows targeted fact development where needed, and provides corrective relief for prejudicial RIF error. OPM concludes that this structure better serves employees, agencies, and the public than the prior fragmented process.

D. Costs

This final rule affects how a Federal employee may pursue an administrative appeal of a furlough of more than 30 days, separation, or demotion by reduction-in-force action under part 351. The final rule transfers adjudication of covered RIF appeals from MSPB to OPM and establishes a streamlined OPM process focused on the written agency record, with targeted supplementation through additional information requests, audits, investigations, or hearings when OPM determines that such procedures are necessary and efficient.

OPM expects the final rule to result in net cost savings to the Federal Government. Under the prior process, RIF appeals before MSPB could involve party-conducted discovery, hearing preparation, evidentiary hearings, petitions for review to the full Board, and, where available, judicial review. The final rule replaces that litigation model with an OPM process that requires the agency to produce the complete agency record to OPM, requires service of that record on the appellant subject only to legally required disclosure limitations, permits an appellant reply, and allows OPM-directed fact development where necessary. The detailed agency-record requirement added in the final rule is not expected to impose substantial new record-creation costs because the required materials are documents agencies must generate, maintain, or rely upon in conducting a RIF, including RIF notices, competitive-area and competitive-level records, retention registers, order-of-release materials, assignment-rights records, and related documentation. Rather than adding a separate litigation burden, the requirement is intended to substitute a complete, reviewable agency record for routine discovery.

1. Changes from the proposed analysis

The final analysis uses the same general methodology as the proposed rule, but OPM has made several updates and corrections. First, OPM updated labor rates from 2025 rates to 2026 rates because the final rule will take effect after the proposed rule's publication. The proposed rule used 2025 Washington, DC locality rates and estimated first-year implementation costs using a loaded GS-14, step 5 hourly rate of $154.76; the final analysis uses the 2026 GS-14, step 5 hourly rate of $78.15 and a loaded hourly rate of $156.30.

Second, OPM retains the proposed rule's estimate of approximately 292 RIF appeals annually but clarifies that the estimate is based on historical RIF appeal data from 1995 through the most recent available data, excluding the anomalously high volume of RIF activity in 2025. The proposed rule used the same 292-appeal annual estimate and acknowledged recent elevated RIF activity as anomalous; the final analysis makes that exclusion explicit and explains that including 2025 would likely overstate recurring annual appeal volume, while retaining earlier periods of higher RIF activity avoids understating long-run costs.

Third, OPM corrected several arithmetic issues in the proposed estimates. Most significantly, the proposed rule stated that procedural OPM appeals would cost about $2,085 per appeal but also stated that 219 such appeals would cost approximately $135,025 annually. Based on the proposed rule's own stated staffing and hour assumptions, that annual total should have been substantially higher. The final analysis corrects that calculation using 2026 rates.

As a result of these updates and corrections, OPM no longer estimates annual recurring savings of over $6.1 million, as stated in the proposed rule. OPM now estimates annual recurring savings of approximately $5.65 million. OPM concludes that this revised estimate is more conservative and more accurate, while still demonstrating substantial recurring savings from the final rule. The proposed rule estimated annual status quo costs of more than $7.3 million and annual OPM-process costs of just over $1.1 million; the final analysis estimates annual status quo costs of approximately $7.51 million and annual OPM-process costs of approximately $1.87 million.

2. One-time implementation costs

OPM estimates that more than 80 Federal agencies, including MSPB and EEOC, will incur one-time implementation costs to review the final rule, update regulations, policies, and procedures, and train human resources practitioners, managers, attorneys, adjudicators, and other relevant personnel.

For purposes of this estimate, OPM assumes that the 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 a one-time cost of approximately $15,630 per agency and approximately $1.25 million governmentwide, assuming 80 affected agencies.

3. Recurring costs and savings

OPM estimates that approximately 292 employees will file RIF appeals annually. This estimate is based on historical RIF appeal data from 1995 through the most recent available data, excluding 2025. OPM acknowledges comments asserting that recent RIF activity may indicate higher future appeal volume. OPM declines to use 2025 as the recurring baseline because RIFs are episodic and OPM does not have reason to conclude that the 2025 volume will recur annually. OPM's estimate retains earlier periods of higher RIF activity, which guards against underestimating annual appeal volume, while excluding 2025, which guards against overstating recurring costs.

4. Costs under the prior MSPB process

OPM estimates that, under the prior process, each initial RIF appeal before MSPB required 40 hours of administrative judge time at the GS-14, step 5 level and 4 hours of paralegal time at the GS-11, step 5 level. Using loaded hourly rates of $156.30 for the administrative judge and $92.81 for the paralegal, OPM estimates an MSPB initial-adjudication cost of approximately $6,623 per appeal. For 292 appeals annually, this results in approximately $1.93 million in annual MSPB initial-adjudication costs.

OPM estimates that MSPB would receive petitions for review in approximately 53 percent of RIF appeals, or approximately 155 petitions annually. This estimate is based on MSPB annual report data for recent years, excluding the anomalously high volume of RIF activity in 2025. OPM estimates that each petition for review requires 4 hours each from the MSPB Chairman and two Board Members, at the loaded Executive Schedule Level IV hourly rate of $188.98, and 16 hours from one GS-15, step 5 attorney, at a loaded hourly rate of $183.85. On that basis, OPM estimates annual MSPB Board-review costs of approximately $807,000.

OPM also estimates agency litigation costs under the prior MSPB process. For each initial appeal, OPM estimates 80 hours of GS-14, step 5 agency attorney time, 4 hours of GS-11, step 5 paralegal time, and 8 hours of GS-15, step 5 supervisory attorney time. Using loaded hourly rates of $156.30, $92.81, and $183.85, respectively, OPM estimates agency litigation costs of approximately $14,346 per initial appeal, or approximately $4.19 million annually for 292 appeals.

For petitions for review, OPM estimates 24 hours of GS-14, step 5 agency attorney time per petition. At a loaded hourly rate of $156.30, this equals approximately $3,751 per petition, or approximately $581,000 annually for 155 petitions.

Accordingly, OPM estimates annual costs under the prior MSPB process of approximately $7.51 million, consisting of MSPB initial-adjudication costs, MSPB Board-review costs, agency initial-appeal litigation costs, and agency petition-for-review litigation costs.

5. Costs under the final OPM process

OPM estimates that approximately 219 of the 292 annual appeals will be resolved on procedural grounds, including untimeliness or lack of jurisdiction. OPM estimates that each such appeal will require 20 hours of GS-11, step 5 paralegal time and 4 hours of GS-7, step 5 staff assistant time. Using loaded hourly rates of $92.81 and $62.71, respectively, OPM estimates a procedural-appeal cost of approximately $2,107 per appeal, or approximately $461,000 annually for 219 appeals.

OPM estimates that approximately 73 appeals annually will be timely and within OPM's jurisdiction and will require merits adjudication. OPM estimates that each such appeal will require 20 hours of GS-13, step 5 adjudicator time and 1 hour of GS-11, step 5 paralegal time. Using loaded hourly rates of approximately $132.28 and $92.81, respectively, OPM estimates a merits-adjudication cost of approximately $2,738 per appeal, or approximately $200,000 annually for 73 appeals.

OPM estimates that approximately 15 requests for reconsideration will be filed annually. OPM estimates that each request will require 16 hours of GS-14, step 5 adjudicator time and 1 hour of GS-11, step 5 paralegal time. Using loaded hourly rates of $156.30 and $92.81, respectively, OPM estimates a reconsideration cost of approximately $2,594 per request, or approximately $39,000 annually.

OPM also estimates agency litigation costs under the OPM process. OPM expects that approximately 128 appeals annually will require more than negligible agency litigation resources. For those appeals, OPM estimates 40 hours of GS-14, step 5 agency attorney time, 4 hours of GS-11, step 5 paralegal time, and 8 hours of GS-15, step 5 supervisory attorney time. Using loaded hourly rates of $156.30, $92.81, and $183.85, respectively, OPM estimates agency initial-appeal litigation costs of approximately $1.04 million annually.

For reconsideration requests, OPM estimates 24 hours of GS-14, step 5 agency attorney time for each of 15 requests. At a loaded hourly rate of $156.30, this equals approximately $56,000 annually. OPM therefore estimates total agency litigation costs under the OPM process of approximately $1.09 million annually.

OPM also considered potential EEO-related costs. The final rule does not limit an employee’s ability to pursue discrimination claims through the appropriate statutory process. OPM estimates that approximately 1 percent of employees who otherwise would file a RIF appeal may instead file an EEO complaint related to a RIF action, resulting in approximately 3 complaints annually. OPM estimates that each such complaint will require 125 hours of GS-14, step 5 attorney time, at a loaded hourly rate of $156.30, plus $5,000 in miscellaneous litigation costs. This results in approximately $73,600 in annual EEO-related costs. This estimate uses the same 1 percent assumption as the proposal, updates the labor rate to 2026, and corrects the arithmetic in the proposed estimate.

6. Summary of recurring annual costs

Cost category	**Prior MSPB process**	**Final OPM process**
MSPB/OPM initial procedural or merits adjudication	$1,934,000	$661,000
MSPB Board review / OPM reconsideration	$807,000	$39,000
Agency initial-appeal litigation	$4,189,000	$1,036,000
Agency petition/reconsideration litigation	$581,000	$56,000
EEO-related incremental costs	—	$74,000
Total recurring annual cost	**$7,511,000**	**$1,866,000**

OPM therefore estimates recurring annual savings of approximately $5.65 million. In the first year after publication, those savings will be offset by approximately $1.25 million in one-time implementation costs, resulting in estimated first-year net savings of approximately $4.40 million. In subsequent years, OPM expects the recurring savings to continue without those one-time implementation costs.

7. Response to cost-related comments

Commenter 0351 stated that OPM may have underestimated recurring cost savings by relying on a historical average rather than recent RIF activity. OPM appreciates the comment and agrees that higher appeal volumes would increase the absolute value of savings from a streamlined process. OPM nevertheless declines to use 2025 as the baseline for recurring annual costs because OPM does not direct agencies to conduct RIFs and does not have reason to conclude that the unusually high 2025 volume will recur annually. OPM's approach is conservative in that it excludes the anomalous 2025 volume while retaining earlier periods of comparatively higher RIF activity.

Several commenters, including Commenters 0235, 0332, 0336, 0548, 0877, 0908, and 1237, argued that OPM should include additional costs, including possible litigation challenging the rule, costs of replacing employees separated by RIF, workforce-disruption costs, or other collateral consequences. OPM declines to include those costs in the quantified estimate. Litigation challenging the final rule depends on future decisions by third parties and courts and cannot be reliably estimated. Replacement costs, workforce-planning costs, and other operational costs generally arise from the underlying RIF action or agency restructuring decision, not from the appeal forum established by this rule. This rule governs the process for adjudicating RIF appeals after an agency has taken a covered action; it does not direct agencies to conduct RIFs or determine which positions agencies must abolish or retain.

OPM also has not quantified several benefits that may result from the final rule, including reduced back-pay exposure from faster correction of prejudicial errors, reduced management and witness time, reduced uncertainty for employees, faster finality for agencies, and improved consistency in applying part 351. These benefits are real but difficult to quantify with precision. Accordingly, OPM's quantified estimate likely understates the full benefits of the final rule.

OPM concludes that the final rule will produce substantial recurring savings while preserving meaningful administrative review. The final rule requires a complete RIF-specific agency record, permits an appellant reply, authorizes additional information, audits, investigations, and hearings when necessary and efficient, and provides corrective relief where the appellant proves a prejudicial violation of an applicable RIF statute or OPM regulation. OPM therefore concludes that the final rule's benefits justify its costs.

E. Benefits

In addition to the quantified cost savings discussed above, OPM expects the final rule to produce substantial non-quantified benefits for employees, agencies, and the Federal Government. These benefits include faster resolution of RIF appeals, reduced uncertainty, more consistent application of OPM's governmentwide RIF regulations, reduced litigation burden, and more timely corrective relief where an agency commits a prejudicial RIF error.

First, the final rule is expected to provide employees with faster and clearer resolution of RIF appeals. A RIF action can significantly affect an employee's employment, finances, career planning, benefits, and ability to seek other employment. A prolonged appeal process can leave an employee uncertain as to whether the action will be sustained, corrected, or followed by reinstatement, back pay, priority reemployment consideration, or other relief. A streamlined OPM process benefits employees by providing a more prompt determination. If the agency committed a prejudicial RIF error, the employee will receive corrective relief sooner. If the agency action is sustained, the employee receives earlier certainty for purposes of Federal reemployment programs, non-Federal employment, financial planning, and career decisions.

Second, the final rule is expected to benefit agencies by reducing unnecessary litigation burden. Under the prior MSPB process, RIF appeals could involve party-conducted discovery, motions practice, hearing preparation, evidentiary hearings, petitions for review, and additional review where available. Those procedures require substantial time from agency counsel, human-resources staff, managers, supervisors, and witnesses. The final rule replaces that default litigation model with a record-focused process in which the agency must produce the complete RIF-specific agency record, the appellant may reply, and OPM may require additional information, conduct an audit or investigation, or hold a hearing when necessary and efficient. This approach preserves tools needed to resolve material disputes while avoiding routine use of costly procedures in cases that can be resolved on the written record.

Third, faster adjudication can reduce remedial costs where an employee prevails. Delayed resolution may increase potential back pay, interest, and attorney-fee exposure if a RIF action is later found to have violated applicable statute or OPM regulation in a way that prejudiced the appellant. A more prompt administrative decision can limit the period of uncertainty and reduce the accumulation of remedial costs. This benefit serves both employees and agencies: employees receive relief sooner where relief is warranted, and agencies receive earlier notice of any corrective action required.

Fourth, OPM expects the final rule to promote greater consistency in RIF appeal outcomes. OPM is the agency responsible for prescribing and administering governmentwide RIF regulations under part 351. RIF appeals generally require application of those regulations to an agency record concerning coverage, competitive area, competitive level, retention standing, order of release, assignment rights, notice, and related requirements. Assigning appeals to OPM will better align interpretation, oversight, and adjudication of part 351 and reduce fragmentation between the agency that issues the RIF regulations and the forum that applies them in individual appeals. MSAC's existing adjudicatory and civil-service compliance functions further support consistent adjudication of these record-based personnel matters.

Fifth, the final rule strengthens the record available for decision. In response to comments expressing concern about information asymmetry and the appellant's ability to prove RIF error, the final rule requires the agency to produce the complete agency record to OPM and to serve the appellant with the agency record, subject only to legally required disclosure limitations. The final rule also identifies RIF-specific categories of required record materials, including the RIF notice, documents supporting the reason for the RIF, competitive-area and competitive-level documentation, retention-register materials, order-of-release records, assignment-rights records, and records concerning special RIF circumstances. These requirements promote accurate adjudication and meaningful employee participation without requiring routine discovery in every case.

Sixth, the final rule is expected to maintain transparency and accountability. OPM decisions will be issued in writing, reconsideration will be available under specified standards, and final merits decisions will be made publicly available subject to privacy, privilege, protected personnel information, law-enforcement-sensitive information, national-security, and other legal limits. OPM acknowledges that final MSPB decisions likewise are issued in writing and made publicly available; the final rule carries those transparency and accountability features forward to the new OPM forum rather than diminishing them. The rule also includes adjudicator-separation and *ex parte* safeguards to ensure that appeals are decided on the record and not through case-specific policy direction. These features help preserve confidence in the administrative process while allowing OPM to adjudicate appeals more efficiently than the prior multi-stage MSPB process.

OPM considered comments from 0928, 1089, and 1092 asserting that the cost-benefit analysis undervalued procedural protections, did not adequately account for confidence in the civil service, and improperly treated recent RIF activity as anomalous. OPM disagrees that the final rule undervalues procedural protections. The final rule does not eliminate administrative review; it preserves an appeal right for employees furloughed for more than 30 days, separated, or demoted by RIF action. It also adds protections not included in the proposal, including a more precise prejudice standard, a detailed agency-record requirement, appellant access to the record subject only to legal limits, a reply right that permits new allegations based on information first disclosed in the agency response, targeted fact-development authority, hearings when necessary and efficient, adjudicator-separation requirements, *ex parte* protections, reconsideration, Director review before finality, and public posting of final merits decisions subject to legal limits.

OPM also considered supportive comments from 0351, 0352, 0418, 0434, and 0657 stating that MSPB adjudication can be costly, time-intensive, and resource-intensive, and that transferring RIF appeals to OPM would improve efficiency, predictability, consistency, and finality. OPM agrees that the final rule will reduce unnecessary process costs and will provide benefits beyond those quantified in the cost analysis, including reduced management and witness time, reduced litigation-driven uncertainty, improved workforce planning, and more timely resolution for employees. Some of these benefits are difficult to quantify with precision, but OPM concludes they are substantial and reinforce the quantified savings discussed above.

OPM continues to treat unusually high recent RIF activity as anomalous for purposes of estimating recurring annual costs, but that assumption does not diminish the benefits of the final rule. If future RIF appeal volumes are higher than the historical average used in the cost analysis, the benefits of a streamlined process would likely increase because more employees and agencies would avoid the delay and expense of the prior process. If future RIF appeal volumes are lower, the rule still provides a clearer, more consistent, and more administrable process for the appeals that are filed.

Accordingly, OPM concludes that the final rule will produce benefits beyond direct cost savings. It will provide employees with faster resolution and earlier access to any warranted relief; reduce unnecessary litigation burden on agencies; limit avoidable back-pay and attorney-fee exposure; promote uniform interpretation of part 351; improve the completeness of the record before the adjudicator; and provide a more predictable, transparent, and efficient process for resolving RIF-compliance disputes. These benefits support OPM’s conclusion that the final rule better serves employees, agencies, and the public than the prior fragmented process.

F. Reliance Interests

In the proposed rule, OPM invited comments on any reliance interests that OPM should consider before finalizing revisions to the RIF appeal process. OPM received comments on this issue and has considered them consistent with the APA's requirement that an agency changing policy consider serious reliance interests engendered by the prior policy. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009); *Department of Homeland Security v. Regents of the University of California*, 591 U.S. 1, 30–33 (2020).

Commenters 0310, 0846, 1089, 1092, and 1219 argued that employees, unions, and agencies have relied for decades on the availability of MSPB adjudication for RIF appeals. Commenters asserted that employees entered or remained in Federal service with the expectation that any future RIF appeal would be heard by an adjudicative body outside OPM, and that limiting the final rule to prospective application does not fully address those broader expectations. Commenter 1089, for example, stated that employees accepted the obligations and constraints of Federal service in reliance on a rules-based civil service system that included meaningful procedural protections and independent review. Commenters 1092, 1165, and others similarly argued that MSPB review has been part of the civil service system for decades and that employees and unions have structured expectations around that forum.

OPM has considered these asserted reliance interests. OPM recognizes that the prior regulatory framework has existed for many years and that employees, unions, and agencies may have expected future RIF appeals to proceed before MSPB under the prior version of § 351.901. OPM also recognizes the general importance of stability in civil service procedures. OPM concludes, however, that the reliance interests identified by commenters do not warrant retaining MSPB as the forum for future non-SES RIF appeals.

First, the asserted reliance interest is principally an interest in the continuation of a particular regulatory forum and procedural model, not an interest in the continued existence of administrative review. The final rule does not eliminate administrative review of covered RIF actions. Employees who are furloughed for more than 30 days, separated, or demoted by a RIF action may appeal to OPM. The final rule preserves the ability to obtain corrective relief where the appellant proves that the agency failed to comply with an applicable statute or OPM regulation governing RIF actions under part 351 and that the failure prejudiced the appellant by causing the appealed action or the loss of a materially more favorable outcome.

Second, the final rule strengthens the OPM process in ways that address many of the procedural reliance concerns commenters raised. The rule requires the agency to produce the complete agency record to OPM; requires service of the agency record on the appellant, subject only to legally required disclosure limitations; identifies RIF-specific categories of required record materials; permits an appellant reply; allows OPM to require additional information; authorizes audits, investigations, and hearings when necessary and efficient; provides written decisions; permits reconsideration; and authorizes corrective relief where warranted. These features preserve meaningful administrative review while replacing the prior MSPB forum with a process tailored to RIF-compliance issues.

Third, the final rule preserves collateral statutory avenues that are independent of the part 351 RIF appeal process. Employees may continue to file complaints, appeals, or other matters within the jurisdiction of EEOC, an Inspector General, MSPB where it has independent jurisdiction, DOL VETS, or OSC. Thus, the final rule does not alter the availability of independently authorized statutory remedies for discrimination, prohibited personnel practices, veterans' rights claims, whistleblower reprisal, or other collateral claims.

Fourth, OPM has addressed concrete transition concerns by applying the rule prospectively. The final rule does not apply to appeals of RIF actions for which the agency issued a specific RIF notice under 5 CFR 351.802 before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], the effective date of the final rule under RIN 3206-AO86. Those appeals remain subject to adjudication by the MSPB under the procedures applicable to those actions. Thus, any appeals currently pending before the MSPB and any potential appeals of RIF actions that have been effectuated will proceed before the MSPB. This transition rule avoids disrupting pending appeals, prevents confusion for parties already litigating before MSPB, and provides a clear line for future cases.

OPM does not find that commenters identified concrete, individualized reliance interests requiring broader grandfathering or retention of MSPB review for all future RIF appeals. Federal employees may have relied generally on the existence of a merit-based civil service system and procedural protections, but the final rule preserves both. Employees remain protected by the substantive RIF requirements in part 351, the merit system principles, prohibited-personnel-practice protections, veterans' preference requirements, applicable anti-discrimination laws, and the administrative appeal process established by this final rule. What changes is the regulatory forum and procedure for future direct RIF-compliance appeals.

OPM also concludes that additional transition relief would substantially undermine the purpose of the rule. Extending MSPB adjudication to future RIF appeals based on generalized expectations would perpetuate the divided structure OPM has determined is inefficient and unnecessary: OPM would continue to prescribe and interpret the RIF regulations while MSPB adjudicated appeals under procedures OPM cannot control. OPM has determined that a single, record-focused OPM process will better promote timely resolution, consistent interpretation of part 351, reduced litigation burden, and prompt corrective relief where an agency commits prejudicial RIF error.

Accordingly, OPM concludes that the final rule reasonably accounts for reliance interests. The rule preserves administrative review, strengthens record-production and fact-development procedures, preserves collateral statutory remedies, and applies only prospectively. Any reliance interest in maintaining MSPB as the forum for future regulatory RIF appeals is outweighed by OPM's reasoned determination that the final rule will provide a more efficient, consistent, and cost-effective process for resolving RIF appeals.

VI. Procedural Issues and Regulatory Review

A. 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 an E.O. 14192 deregulatory action. OPM estimates this rule generates $4.6 million in annualized savings in 2024 dollars at a 7% discount rate, discounted relative to year 2024, over a perpetual time horizon.

B. 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.

C. 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 the OPM and EEOC will not cause a significant economic impact on these small entities.

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 1 year of $100 million in 1995 dollars, updated annually for inflation. That threshold is currently approximately $206 million. This rulemaking will not result in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, in excess of the threshold. Thus, no written assessment of unfunded mandates is required.

G. Congressional Review Act

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act or CRA) (5 U.S.C. 801 et seq.) requires most final rules to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this rule before its effective date.

The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this rule is not a major rule as defined by the CRA (5 U.S.C. 804).

H. Paperwork Reduction Act

This final rule contains information collection requirements within the meaning of the Paperwork Reduction Act of 1995, as amended (44 U.S.C. chapter 35). The final rule establishes procedures for filing and adjudicating RIF appeals before OPM, including electronic filing, appellant submissions, representative information, requests for e-filing exemptions, agency responses, appellant replies, requests for reconsideration, and related case-processing submissions. The final rule also requires use of the electronic filing system identified on OPM's website, except where OPM grants an exemption for good cause.

OPM has requested approval from the Office of Management and Budget for this information collection. See 91 FR 46802. 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 in 5 CFR part 351

Administrative practice and procedure, Government employees.

Signing Statement

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

Office of Personnel Management.

____

Jerson Matias,

Federal Register Liaison

Accordingly, for the reasons stated in the preamble, OPM amends 5 CFR part 351 as follows:

PART 351—REDUCTION IN FORCE

1. The authority citation for part 351 is revised to read as follows:

Authority: 5 U.S.C. 1103, 1104, 1302, 2301, 3502, 3503, 38 U.S.C. 4331; E.O. 14284, 90 FR 17729; 5 CFR 2.2(c). Sec. 351.801 also issued under E.O. 12828, 58 FR 2965, 3 CFR, 1993 Comp., p. 569.

Subpart H—Notice to Employee

2. Amend § 351.802 by revising paragraph (a)(6) to read as follows:

§ 351.802 Content of notice.

(a) * * *

(6) The employee's right, as applicable, to appeal to OPM, including the time limit for filing an appeal under § 351.902(b) of this part and the electronic filing system, identified on OPM's website, through which an appeal must be filed.

* * * * *

3. Amend § 351.807 by revising paragraph (e) to read as follows:

§ 351.807 Certification of expected separation.

* * * * *

(e) An agency determination of eligibility for certification may not be appealed.

* * * * *

4. Revise subpart I to read as follows:

Subpart I—Appeals

Sec.

§ 351.901 Right to appeal.

(a) *Right of appeal*. An employee who has been furloughed for more than 30 days, separated, or demoted by a reduction-in-force action taken under this part may appeal that action to OPM.

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

(1) The timeliness of the written appeal;

(2) That OPM possesses jurisdiction over the appeal;

(3) That the agency failed to comply with an applicable statute or OPM regulation governing reduction-in-force actions under this part; and

(4) That the failure prejudiced the appellant by causing the appellant to be subjected to the appealed action or to lose a materially more favorable outcome under this part.

(c) *Exclusive appeal procedure*. (1) The procedures in this part are the sole and exclusive means of appealing a reduction-in-force action taken under this part.

(2) A reduction-in-force action taken under this part, and any matter relating to an appeal of such an action, may not be raised under a negotiated grievance procedure or contested through grievance arbitration.

(3) Paragraphs (c)(1) and (2) of this section do not 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 the Office of Special Counsel.

(4) A party cannot obtain judicial review of a decision under this subpart.

§ 351.902 Procedures for submitting appeals.

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

(b) *Time limits*. An employee may submit an appeal of a reduction-in-force action 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 submit 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.

(3) If, before the expiration of the filing period in this paragraph (b), the employee timely filed a complaint, appeal, or other matter within the independent jurisdiction of an entity identified in § 351.901(c), and the final decision on that matter materially affects the employee's retention standing, order of release, assignment rights, or other rights under this part, the employee may file an appeal under this subpart within 30 calendar days after the date on which the decision on that matter becomes final and is no longer subject to further administrative review. OPM will determine, in its sole and exclusive discretion, whether the decision on the collateral matter materially affects the employee's rights under this part.

(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 or 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 e-filing system means that, effective upon OPM's processing of a proper withdrawal, pleadings, evidence, orders, and other documents filed by a party or party's representative and 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 e-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 e-filing system are deemed received on the date of the electronic submission.

§ 351.903 Form and content of RIF 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*. (1) The agency response to an appeal must be filed within 30 calendar days after service of the initial appeal and contain:

(i) The name of the appellant and of the agency whose action the appellant is appealing;

(ii) A statement identifying the agency action taken against the appellant and stating the reasons for taking the action;

(iii) All documents contained in the agency record of the action;

(iv) Designation of and signature by the authorized agency representative; and

(v) Any other documents or responses requested by OPM.

(2) The agency's 30 days to respond begins upon service of the appeal.

(3) The agency record of the action shall include, at a minimum:

(i) The appellant's specific written reduction-in-force notice, any amended notice, proof of service or receipt, and documents showing the effective date of the action;

(ii) Documents supporting the reason for the reduction in force, including whether the action was based on lack of work, shortage of funds, insufficient personnel ceiling, reorganization, or the exercise of reemployment or restoration rights;

(iii) Documents establishing the appellant's coverage, position, appointment, tenure group and subgroup, veterans' preference status, service computation date, work schedule, competitive area, competitive level, and status as a competing employee;

(iv) Documents establishing the competitive area and competitive level used for the reduction in force, including any required agency or OPM approval, written competitive area justification, organizational chart, position descriptions, classification records, representative rate determinations, and related records;

(v) The retention register applicable to the appellant, if one was prepared, and any related retention records that affected the appellant's retention standing, order of release, or assignment rights, including records supporting performance credit, veterans' preference credit, tenure subgroup, and service computation date;

(vi) Documents showing how the agency applied the order of release, including any tie determination, any correction of retention standing, and any mandatory or discretionary exception to the order of release;

(vii) Documents concerning the appellant's assignment rights, if any, including positions considered for assignment, qualification determinations, job analysis or assessment materials, offers of assignment, and any declination;

(viii) Documents concerning any special reduction-in-force circumstance relevant to the appellant, including abolishment of an entire competitive area, transfer of function, exclusion from RIF competition under § 351.202(d), restoration protection, or other basis for modified notice or treatment under this part; and

(ix) A certification that the agency has produced the complete agency record of the reduction-in-force action.

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

§ 351.904 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 employee 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 employee'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.

§ 351.905 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 subpart shall be insulated from officials who participated personally and substantially in the challenged personnel action or provided case-specific advice concerning that action. OPM adjudicators shall not consider material *ex parte* communications concerning the merits of an appeal. If such a communication occurs, OPM will place a summary of the communication in the record and provide the parties a reasonable opportunity to respond, unless disclosure is prohibited by law. In addition, no OPM employee may be assigned to adjudicate an appeal if the employee has a relationship with the appellant or, during the preceding two years, that person was an employee of the agency that is a party to the action to be assigned, or the employee was subject to an action covered under this part. 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 the purposes of paragraph (b) of this section, 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 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 subpart 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.

§ 351.906 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 directive should file such request using the e-filing procedures prescribed at § 351.902(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 a directive 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.

§ 351.907 Reconsideration of an initial decision.

(a) Upon a 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 the agency may request reconsideration of an initial decision within 30 calendar days from issuance of the initial decision. The request for reconsideration must be filed in the same manner as an initial appeal.

(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.

§ 351.908 Review by the OPM Director.

The Director may, on the Director's own initiative and before a decision becomes final under § 351.909, reopen and reconsider any initial decision or reopened and reconsidered decision. In determining whether to exercise this authority, the Director may consider, among other things, whether the decision contains clear legal error; rests on an erroneous finding of material fact; involves an issue of exceptional importance, an issue affecting the governmentwide administration of the civil service laws, rules, regulations, or OPM policy, or a conflict among OPM decisions; or otherwise warrants Director review. This section does not create a right to request Director review. Upon reopening and reconsideration, the Director may take any action described in § 351.907(c).

§ 351.909 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 § 351.907 or the Director reopens the decision under § 351.908.

(b) A timely request under § 351.907 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 § 351.908 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 § 351.908 before that time.

(c) An untimely request under § 351.907 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 § 351.908 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 personnel 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 subpart 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 § 351.904, or a representative of the Federal agency or office involved in the proceeding who has a need to know.

[FR Doc. 2026-15666 Filed: 7/31/2026 8:45 am; Publication Date: 8/3/2026]