

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR parts 315, 432 and 752

RIN 3206-AN60

#### Probation on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade and Removal Actions and Adverse Actions

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing proposed regulations governing probation on initial appointment to a competitive position, performance-based reduction in grade and removal actions, and adverse actions. The proposed rule will effect a revision of OPM's regulations to make procedures relating to these subjects more efficient and effective. The proposed rule also amends the regulations to incorporate other statutory changes and technical revisions.

**DATES:** Comments must be received on or before October 17, 2019.

**ADDRESSES:** You may submit comments, identified by the docket number or Regulation Identifier Number (RIN) for this proposed rulemaking, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for sending comments.

*Instructions:* All submissions must include the agency name and docket number or RIN for this rulemaking. Please arrange and identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number. All comments received will be posted without change, including any personal information provided. Please ensure your comments are submitted within the specified open comment period. Comments received after the close of the comment period

will be marked "late," and OPM is not required to consider them in formulating a final decision. Before acting on this proposal, OPM will consider and respond to all comments within the scope of the regulations that we receive on or before the closing date for comments. Changes to this proposal may be made in light of the comments we receive.

**FOR FURTHER INFORMATION CONTACT:**

Timothy Curry by email at [employeeaccountability@opm.gov](mailto:employeeaccountability@opm.gov) or by telephone at (202) 606-2930.

**SUPPLEMENTARY INFORMATION:** The Office of Personnel Management (OPM) is proposing revisions to regulations governing probation on initial appointment to a competitive position; performance-based reduction in grade and removal actions; and adverse actions under statutory authority vested in it by Congress in 5 U.S.C. 3321, 4305, 4315, 7504, 7514 and 7543. The regulations will assist agencies in carrying out, consistent with law, certain of the President's directives to the Executive Branch in Executive Order 13839 that are not currently enjoined, and update current procedures to make them more efficient and effective. The proposed regulations also will update references and language due to statutory changes; and clarify procedures and requirements to support managers in addressing unacceptable performance and promoting employee accountability for performance-based reduction-in-grade, removal actions and adverse actions. The proposed regulations support agencies in implementing their plans to maximize employee performance as required by Office of Management and Budget (OMB) M-17-22 (April 12, 2017) and elements of the President's Management Agenda relating to the Workforce for the 21st Century.

OPM is aware of the judicially-imposed limitations on implementing other portions of Executive Order 13839. OPM has and will continue to comply fully with the injunction, and will not issue regulations implementing the invalidated parts of the Executive Order as long as the judicial injunction is in place. OPM will heed the court's reaffirmation that "Congress has clearly vested OPM with the authority to '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 . . ." and with the authority to 'aid [ ] the President, as the President may request, in preparing such civil service rules as the President prescribes.'" OPM further relies upon the court's statement that, "given the wellsprings of authority that OPM enjoys in this area, OPM can surely receive directions from the President to promulgate regulations that are consistent with the rights and duties that the FSLMRS or CSRA prescribe, and setting aside the invalidity of some of the underlying substantive mandates." *American Federation of Government Employees, AFL-CIO v. Trump*, 318 F. Supp. 3d 370, 438 (D.D.C. 2018). OPM is proposing these regulations under its congressionally-granted authority to regulate the Parts that it proposes to revise subject to the notice-and-comment process set forth in the Administrative Procedure Act, and mindful of the President's expressed policy direction.

#### The Case for Action

"\* \* \* I call on Congress to empower every Cabinet Secretary with the authority to reward good workers and to remove Federal employees who undermine the public trust or fail the American people."

With that statement on January 29, 2018, President Trump set a new direction for promoting efficient and effective use of the Federal workforce—reinforcing Federal employees should be both rewarded and held accountable for performance and conduct. Merit system principles provide a framework for responsible behavior that is aligned with the broader responsibility Federal government employees agree to when they take the oath to preserve and defend the Constitution. In keeping with merit system principles, the President's Management Agenda (PMA) recognizes that Federal employees underpin nearly all the operations of the Government, ensuring the smooth functioning of our democracy. The Federal personnel system needs to keep pace with changing workplace needs and return to its root principles. Notably, as demonstrated in the Federal Employee Viewpoint Survey, a majority of both employees and managers agree that the performance management system fails to reward the best and address unacceptable performance. Finally, the PMA calls for agencies to establish

processes that help agencies retain top employees and efficiently remove those who fail to perform or to uphold the public's trust.

Prior to establishment of the PMA, the Office of Management and Budget (OMB) issued a memorandum to agencies on April 12, 2017 entitled "M-17-22—Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce." M-17-22 called on agencies to take near-term actions to ensure that the workforce they hire and retain is as effective as possible. OMB called on agencies to determine whether aspects of their current policies and practices present barriers to hiring and retaining the workforce necessary to execute their missions as well as appropriately managing it and, if necessary, removing poor performers and employees who commit misconduct. Notably, M-17-22 directed agencies to ensure that managers have the tools and support they need to manage performance and conduct effectively to achieve high-quality results for the American people.

More recently, E.O. 13839 notes that merit system principles call for holding Federal employees accountable for performance and conduct. The merit system principles state that employees should maintain high standards of integrity, conduct, and concern for the public interest, and that the Federal workforce should be used efficiently and effectively. They further state that employees should be retained based on the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards. E.O. 13839 further notes that implementation of America's civil service laws has fallen far short of these ideals. It acknowledged that the Federal Employee Viewpoint Survey has consistently found that less than one-third of Federal employees believe that the Government deals with poor performers effectively. E.O. 13839 finds that failure to address unacceptable performance and misconduct undermines morale, burdens good performers with subpar colleagues, and inhibits the ability of executive agencies to accomplish their missions.

E.O. 13839 requires executive agencies (as defined in section 105 of title 5, U.S. Code, excluding the Government Accountability Office) to facilitate a Federal supervisor's ability to promote civil servant accountability while simultaneously recognizing employee's procedural rights and protections. Agencies should recognize

and reward good performers, while unacceptable performers should be separated if they do not improve their performance to meet the required standards. A probationary period is one effective tool to evaluate a candidate's potential to be an asset to an agency before the candidate's appointment becomes final. Therefore, probationary periods, as the final step in the hiring process of new employees, should be used to the greatest extent possible to assess how well they are performing the duties of their jobs; and instances of poor performance and misconduct should be dealt with promptly.

OPM is proposing changes to regulations to implement those requirements of E.O. 13839 not judicially enjoined as well as to implement the vision of the PMA and the objectives of M-17-22. These proposed changes not only support agency efforts in implementing E.O. 13839, the PMA, and M-17-22, but also will facilitate the ability of agencies to deliver on their mission and on providing service to American people. Ultimately, these changes support President Trump's goal of effective stewardship of taxpayers' money by our government.

#### Data Collection of Adverse Actions

Section 6 of E.O. 13839 outlines certain types of data for agencies to collect and report to OPM as of fiscal year 2018. To enhance public accountability of agencies, OPM will collect and, consistent with applicable law, publish the information received from agencies aggregated at a level necessary to protect personal privacy. OPM may withhold particular information if publication would unduly risk disclosing information protected by law, including personally identifiable information. Section 6 requires annual reporting of various categories of data, including: (1) The number of civilian employees in a probationary period or otherwise employed for a specific term who were removed by the agency; (2) the number of civilian employees reprimanded in writing by the agency; (3) the number of civilian employees afforded an opportunity period by the agency under section 4302(c)(6) of title 5, United States Code, breaking out the number of such employees receiving an opportunity period longer than 30 days; (4) the number of adverse actions taken against civilian employees by the agency, broken down by type of adverse action, including reduction in grade or pay (or equivalent), suspension, and removal; (5) the number of decisions on proposed removals by the agency taken

under chapter 75 of title 5, United States Code, not issued within 15 business days of the end of the employee reply period; (6) the number of adverse actions by the agency for which employees received written notice in excess of the 30 days prescribed in section 7513(b)(1) of title 5, United States Code; (7) the number and key terms of settlements reached by the agency with civilian employees in cases arising out of adverse actions; and (8) the resolutions or outcomes of litigation about adverse actions involving civilian employees reached by the agency.

On July 5, 2018, OPM issued guidance for implementation of E.O. 13839. This guidance included instructions for each department or agency head to coordinate the collection of data from their components and compile one consolidated report for submission to OPM using the form attached to the guidance memo. Forms must be submitted electronically to OPM via email at [employeeaccountability@opm.gov](mailto:employeeaccountability@opm.gov) generally no later than 60 days following the conclusion of each fiscal year. In lieu of outlining the data collection requirements in OPM regulations, OPM will issue reminders of this requirement annually and provide periodic guidance consistent with the requirements of E.O. 13839.

#### 5 CFR PART 315, SUBPART H— PROBATION ON INITIAL APPOINTMENT TO A COMPETITIVE POSITION

Section 2(i) of E.O. 13839 provides that a probationary period should be used as the final step in the hiring process of a new employee. The E.O. further notes that supervisors should use that period to assess how well an employee can perform the duties of a job. OPM guidance has stated previously that the probationary period is the last and crucial step in the examination process. The probationary period is intended to give the agency an opportunity to assess, on the job, an employee's overall fitness and qualifications for continued employment and permit the termination, without Chapter 75 procedures, of an employee whose performance or conduct does not meet acceptable standards to deliver on the mission. Thus it provides an opportunity for supervisors to address problems in an expeditious manner and avoid long-term problems inhibiting effective service to the American people. Employees may be terminated from employment during the probationary period for reasons including demonstrated inability to perform the duties of the position, lack

of cooperativeness, or other unacceptable conduct or poor performance. To achieve the objective of maximizing the effectiveness of this probationary period, OPM believes that timely notifications to supervisors regarding probationary periods can be a useful tool for agencies and should be used. OPM is proposing amendments to regulations at Subpart H of 5 CFR part 315 to require agencies to notify supervisors that an employee's probationary period is ending, at least three months or 90 days prior to expiration of the probationary period, and then again one month or 30 days prior to expiration of the probationary period, and advise a supervisor to make an affirmative decision regarding the employee's fitness for continued employment or otherwise take appropriate action. OPM believes this requirement will assist agencies in making more effective use of the probationary period. Agencies have discretion to determine the method for making this communication, but are encouraged to make use of existing automated tools to facilitate timely notifications.

#### **5 CFR part 432—Performance-Based Reduction in Grade and Removal Actions**

##### *Section 432.101 Statutory Authority*

Part 432 applies to reduction in grade and removal of covered employees based on performance at the unacceptable level. Congress enacted chapter 43, in part, to create a simple, dedicated, though not exclusive, process for agencies to use in taking adverse actions based on unacceptable performance. Since that time however, chapter 43 has not worked as well as Congress intended. In particular, interpretations of chapter 43 have made it difficult for agencies to take actions against unacceptable performers and to have those actions upheld.

##### *Section 432.104 Addressing Unacceptable Performance*

The proposed rule at § 432.104 clarifies that, other than those requirements listed, there is no specific requirement regarding the nature of any assistance provided during an opportunity period, and is not determinative of the ultimate outcome with respect to reduction in grade or pay, or a removal.

The proposed rule also states that no additional performance improvement period or similar informal period to demonstrate acceptable performance to meet the required performance standards shall be provided prior to or

in addition to the opportunity period under this part. This change supports the stated principles of E.O. 13839 which provide that removing unacceptable performers should be a straightforward process furthering effective stewardship of taxpayer money. Establishing limits on the opportunity to demonstrate acceptable performance by precluding additional opportunity periods beyond what is required by law encourages efficient use of the procedures under chapter 43 and furthers effective delivery of agency mission while still providing employees sufficient opportunity to demonstrate acceptable performance as required by law.

The proposed rule is intended to clarify the requirements in chapter 43 of title 5 of the United States Code. The goal of these amendments, consistent with E.O. 13839, is to streamline civil service removal procedures related to unacceptable performance. Nothing in the proposed amendments to 5 CFR part 432 should be construed to relieve agencies of their continuing obligations under Federal law, e.g., 5 U.S.C. 6384 and 29 U.S.C. 791(g). Finally, we note that 5 U.S.C. 2301(b)(2) provides that employees should receive fair and equitable treatment without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, and handicapping condition, and with proper regard for their privacy and rights. All personnel actions must meet this statutory requirement.

##### *Section 432.105 Proposing and Taking Action Based on Unacceptable Performance*

5 U.S.C. 4302(c)(5) provides for “assisting employees in improving unacceptable performance;” and 5 U.S.C. 4302(c)(6) provides for “reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.” The proposed rule de-links 5 U.S.C. 4302(c)(5) and (6) by clarifying in § 432.105 that the opportunity to demonstrate acceptable performance required prior to initiating an action pursuant to 5 U.S.C. 4303 may include any and all performance assistance measures taken during the performance appraisal period to assist employees pursuant to 5 U.S.C. 4302(c)(5), not just those taken during the formal opportunity period.

##### *Section 432.108 Settlement Agreements*

Section 5 of E.O. 13839 establishes a new requirement that an agency shall not agree to erase, remove, alter, or

withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse action. Such agreements have traditionally been referred to as “clean record” agreements. This new requirement is intended to promote the high standards of integrity and accountability within the Federal workforce by requiring agencies to maintain personnel records that reflect complete information, and not to alter the information contained in those records in connection with a formal or informal complaint or adverse action. It is further intended to ensure that those records are preserved so that agencies can make appropriate and informed decisions regarding an employee's qualification, fitness, and suitability as applicable to future employment.

Section 5 requirements should not be construed to prevent agencies from correcting records of an action taken by the agency illegally or in error. In such cases, an agency has the authority—unilaterally or by agreement—to modify an employee's personnel file to remove inaccurate information or the record of an erroneous or illegal action. Specifically, the proposed rule states that the Section 5 requirements of E.O. 13839 should not be construed to prevent agencies from taking corrective action should it come to light, including during or after the issuance of an adverse personnel action, that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel file to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. An agency should report any agreements relating to removal of such information as part of its annual report to the OPM Director, as required by Section 6 of E.O. 13839. Documents subject to withdrawal or

modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action, or an employee performance appraisal. See discussion above concerning “Data Collection of Adverse Actions.” Section 5 requirements should also not be construed to prevent agencies from entering into partial clean record settlements with regard to information provided to non-Federal employers. Finally, to the extent that an employee’s personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee’s personnel file or other agency files. The proposed rule states that when persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee’s personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee’s personnel file or other agency files. However, the requirements described in Section 5 would continue to apply to any accurate information about the employee’s performance or conduct which comes to light prior to issuance of a final agency decision on an adverse action. Based on the foregoing, the proposed rule at § 432.108 reflects E.O. 13839’s restrictions on settlement agreements arising from chapter 43 actions.

#### Technical Amendments

The proposed rule corrects the spelling of the word “incumbents” within § 432.103(g) and the word “extension” at § 432.105(a)(4)(i)(B)(3). OPM proposes to replace the term “handicapping condition” with “disability” at § 432.105(a)(4)(i)(B)(4) to bring the definition into conformance with 29 U.S.C. 705. In this rule, OPM also revises § 432.105(a)(4)(i)(C) to correctly identify the office that an agency shall contact if it believes that an extension of the advance notice period is necessary for a reason other than those listed in § 432.105(a)(4)(i)(B). OPM proposes to revise § 432.106(b)(1) to replace “i.g.” with “i.e.” within the parenthetical concerning non-exclusion

by the parties to a collective bargaining agreement. Finally, OPM corrects the use of the word “affected” versus “effected” within § 432.107(b).

### 5 CFR Part 752—Adverse Actions

#### Subpart A—Discipline of Supervisors Based on Retaliation Against Whistleblowers

5 U.S.C. 7515 provides agencies the ability to deal with retaliation by supervisors for whistleblowing. The regulations reinforce the responsibility of agencies to protect whistleblowers from retaliation. These requirements are significant because of the essential protections they provide. Prohibited personnel actions are not consistent with the notion of a system based on merit and failure to observe these prohibitions must be addressed promptly and resolutely.

Based on this need, OPM is proposing a new addition to the current adverse action system. We are revising our regulations to incorporate the changes created by the statute and ensure that agencies understand how to meet the additional requirements in connection with prohibited personnel actions. This new proposed rule falls under subpart A of 5 CFR part 752 as “Discipline of supervisors based on retaliation against whistleblowers.” The proposed language implements the statutory authority and procedures of 5 U.S.C. 7515 which require that certain actions be taken against a supervisor who retaliates against a whistleblower. These provisions reinforce the principle that increased accountability is warranted in situations where a supervisor commits a prohibited personnel action against an employee of an agency, in violation of paragraph (8), (9), or (14) of 5 U.S.C. 2302(b). The proposed rule subjects an action taken under subpart A to many of the same procedural requirements as an action taken under subparts B, D, and F of this chapter. For example, Subpart A incorporates the standard for action from each of the related subparts in this chapter. However, the proposed rule also includes some key exceptions. These proposed regulations help to undergird and support agencies in meeting their requirements to take action against any supervisor who retaliates against whistleblowers. The following section identifies the major additions proposed by this subpart and briefly describes the purpose of each addition.

#### Section 752.101 Coverage

The proposed rule describes the adverse actions covered and defines key terms used throughout the subchapter.

The proposed rule includes a definition for the term “business day.” This addition is necessary to implement the 15 business day decision period described in E.O. 13839. The proposed rule also includes a definition for “insufficient evidence.” OPM defines this new term as evidence that fails to meet the substantial evidence standard described in 5 CFR 1201.4(p).

#### Section 752.102 Standard for Action and Penalty Determination

5 U.S.C. 7515 incorporates many of the procedural elements of 5 U.S.C. 7503, 7513 and 7543, to include the standards of action applied to each type of adverse action. For supervisors not covered under subchapter V of title 5, the proposed rule applies the efficiency of the service standard. For supervisors who are members of the Senior Executive Service, the proposed rule defines the standard of action as misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment, or to accompany a position in a transfer of function.

5 U.S.C. 7515 enhances statutory protection for whistleblowers through the creation of proposed mandatory penalties. Specifically, for the first incident of a prohibited personnel action, an agency is required to propose the penalty at a level no less than a 3-day suspension. Further, the agency may propose an additional action, including a reduction in grade or pay. For the second incident of a prohibited personnel action, an agency is required to propose that the supervisor be removed.

#### Section 752.103 Procedures

The proposed rule establishes the procedures to be utilized for actions taken under this subpart. The procedures in the subpart are the same as those described in 5 U.S.C. 7503, 7513 and 7543, with the exception of provisions concerning advance notice and the reply period. Agencies must implement the related procedures on taking action, which have a shortened time period and require agencies to issue a final decision on a proposed action against a supervisor after the end of the 14-day advance notice period. Under this subpart, supervisors against whom an action is proposed are entitled to no more than 14 days to answer after receipt of the proposal notice. At the conclusion of the 14-day reply period, the agency shall carry out the proposed action if the supervisor fails to provide evidence or provides evidence that the head of the agency deems insufficient. Notably, the proposed rule also includes the requirement that, if the head of an

agency is responsible for determining whether a supervisor has committed a prohibited personnel action, that responsibility may not be delegated.

Finally, the proposed rule at § 752.103 (d) includes language that, to the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond.

#### *Section 752.104 Settlement Agreements*

The proposed language in this section establishes the same requirement that is detailed in the proposed rule changes at § 432.108, Settlement agreements. Please see discussion in § 432.108.

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

This subpart addresses the procedural requirements for suspensions of 14 days or less for covered employees.

#### *Section 752.201 Coverage*

Pursuant to the creation of subpart A within the proposed rule, § 752.201(c) reflects an exclusion for actions taken under 5 U.S.C. 7515.

#### *Section 752.202 Standard for Action and Penalty Determination*

While the standard for action under this subpart remains unchanged, the proposed rule makes clear that an agency is not required to use progressive discipline under this subpart. Further, OPM has decided to adopt formally by regulation in this section the standard applied by MSPB in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981) to removals, suspensions and demotions, including suspensions of fewer than 15 days. Specifically, the proposed rule adopts the requirement to propose and impose a penalty that is within the bounds of tolerable reasonableness. This is a principle that is embedded deeply in Federal civil-service law. Arbitrators are required to defer to an agency decision, and may not mitigate a penalty unless it is beyond the bounds of tolerable reasonableness. We now make it clear that this standard applies not only to those actions taken under 5 U.S.C. 7513, but apply as well to those taken under 5 U.S.C. 7503. Any collective-bargaining proposal in conflict with this government-wide regulation will be contrary to law and non-negotiable. There is no legal principle in the Federal Government that requires agencies to impose the least penalty to rehabilitate an employee. A proposed penalty is in the sole and exclusive discretion of the proposing official, and the penalty

decision is in the sole and exclusive discretion of the deciding official, subject to appellate or other review procedures prescribed in law and cannot be the subject of collective bargaining.

The penalty for an instance of misconduct should be tailored to the facts and circumstances of each case. Further, employees should be treated equitably. Nevertheless, conduct that justifies discipline of one employee at one time by a particular deciding official does not necessarily justify the same or similar disciplinary decision for a different employee at a different time. So agencies should consider appropriate comparators when evaluating a potential disciplinary action. The Court of Appeals for the Federal Circuit has held that an agency need only provide “proof that the proffered comparator was in the same work unit, with the same supervisor, and was subjected to the same standards governing discipline.” *Miskill v. Social Security Administration*, 863 F.3d 1379 (Fed. Cir. 2017). It should not tie the hands of a different deciding official at a different time or in a different context, or under different circumstances. We are proposing adoption of the *Miskill* test. This reinforces the key principle that each case stands on its own factual and contextual footing. Finally, among other relevant factors, an agency should consider an employee's disciplinary record and past work record, including all prior misconduct, when taking an action under this subpart. These guidelines reflect established principles, but stress management discretion to promote efficient Government while protecting the interests of all involved.

With respect to penalty determination, it is also noteworthy that some agencies develop and use tables of penalties to assist supervisors in identifying the level of discipline that may be appropriate to an individual case. The creation and use of a table of penalties is not required by statute, case law or OPM regulation, and OPM does not provide written guidance on this topic. The applicable standard, “to promote the efficiency of the service,” is broad and supple enough to encompass all occurrences that may occasion an adverse action. Thus, agencies have the ability to address misconduct appropriately without a table of penalties, and with sufficient flexibility to determine the appropriate penalty for each instance of misconduct. Tables of penalties may create significant drawbacks to the viability of a particular action and to effective management. Specifically, tables of penalties, by creating a range of penalties for an

offense, limit the scope of management's discretion to tailor the penalty to the facts and circumstances of a particular case by excluding certain penalties along the continuum. Agencies that specify a range of penalties should expect that adjudicators may be, and have been, impervious to agency pleas that someone who holds a particular position may not be restored to the workplace. Although the law permits the agency to impose the maximum reasonable penalty, some adjudicators have responded that the existence of an agency promulgated range of penalties belies this claim. Although such adjudications are contrary to and undermine settled legal principles, they resist further administrative or judicial review of penalty decisions.

Further, OPM encourages managers to think carefully and coherently about when and how to impose discipline in a way that fosters an effective and efficient workplace, in the best interests of all employees and the agency's mission. By contrast, tables of penalties can foster a “by-the-numbers” approach in which managers may hide behind a chart imposed from above rather than take direct responsibility for their workplace.

A further risk of having an agency table of penalties is that a supervisor may apply it so inflexibly as to impair consideration of other factors relevant to an individual case. This type of rigid application of a table of penalties runs counter to the overall directive of *Douglas* to consider all of the criteria that may apply to an individual set of factual circumstances. A table of penalties does not, and should not, replace supervisory judgment. It is vital that supervisors use independent judgment, take appropriate steps in gathering facts, and conduct a thorough analysis to decide the appropriate penalty. However, once an agency establishes a table of penalties, it will be held accountable for striking a balance between ensuring that supervisors use their best judgment in applying the full spectrum of *Douglas* factors, with accountability for ensuring a level of consistency with the range of penalties described for a particular charge within the agency's table. For that reason, the proposed amendments to this section emphasize that an agency is not required to use progressive discipline and that the penalty for an instance of misconduct should be tailored to the facts and the circumstances, in lieu of the type of formulaic and rigid penalty determination that frequently results from agency publication of tables of penalties.

Finally, there is a significant body of decisional law concerning elucidating required manners of labelling and charging misconduct with attendant proof of an employee's state of mind. See for example, *Nazelrod v. Department of Justice*, 43 F.3d 663 (Fed. Cir. 1994). This type of common-law pleading is unusual in American law and is burdensome on agencies, spawning reams of costly training material and charging guides. It also slows the charging and decision making process. A table of penalties can exacerbate these problems further by implying that if an employee acts in a way that does not appear in a table of penalties' list of "offenses," the behavior is beyond the agency's capacity to charge and penalize.

In short, there is no substitute for managers thinking independently and carefully about each incident as it arises, and, as appropriate, proposing or deciding the best penalty to fit the circumstances. Progressive discipline and table of penalties are inimical to good management principles. Finally, the proposed rule at § 752.202(f) adds language stating that a suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or demoted before a proposing official may propose removal, except as may be appropriate under applicable facts.

#### *Section 752.203 Procedures*

Section 752.203(b) discusses the requirements for a proposal notice issued under this subpart. This section provides that the notice of proposed action must state the specific reason(s) for the proposed action, and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The proposed rule includes language that the notice must also provide detailed information with respect to any right to appeal the action pursuant to Public Law 115–91 section 1097(b)(2)(A); specifically, the forum in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file. This additional language implements the requirement within Public Law 115–91 section 1097(b)(2)(A), which mandates that information on whistleblower appeal rights be included in any notice provided to an employee under 5 U.S.C. 7503(b)(1), 7513(b)(1), or 7543(b)(1).

Finally, the proposed language in § 752.203(h) establishes the same

requirement that is detailed in the proposed rule changes at § 432.108, Settlement agreements. See discussion in § 432.108.

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

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

#### *Section 752.401 Coverage*

Pursuant to the creation of subpart A within the proposed rule, § 752.401(b)(14) reflects an exclusion for actions taken under 5 U.S.C. 7515.

Section 752.401(c) identifies employees covered by this subpart. The proposed rule at § 752.401(c)(2) updates coverage to include an employee in the competitive service who is not serving a probationary or trial period under an initial appointment or, except as provided in section 1599e of title 10, United States Code, who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. This language has been updated to align with 5 U.S.C. 7511(a)(1)(A)(ii).

#### *Section 752.402 Definitions*

The proposed rule includes a definition for the term "business day." This addition is necessary to implement the 15 business day decision period described in E.O. 13839.

#### *Section 752.403 Standard for Action and Penalty Determination*

As with the rule changes proposed for § 752.202, the standard for action under this subpart remains unchanged and incorporates a penalty determination based on the principles of E.O. 13839. Please see discussion in § 752.202. In addition, the proposed rule at § 752.403 adds paragraph (f) which states that a suspension or a reduction in pay or grade should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or reduced in pay or grade before a proposing official may propose removal, except as may be appropriate under applicable facts.

#### *Section 752.404 Procedures*

Section 752.404(b) discusses the requirements for a notice of proposed action issued under this subpart.

Specifically, § 752.404(b)(1) provides that, to the extent an agency, in its sole and exclusive discretion deems practicable, agencies should limit written notice of adverse actions taken under this subpart to the 30 days prescribed in 5 U.S.C. 7513(b)(1). Any notice period greater than 30 days must be reported to OPM. The proposed rule also includes the requirement that the notice must provide detailed information with respect to any right to appeal the action pursuant to Public Law 115–91 section 1097(b)(2)(A); specifically, the forum in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file. This additional language implements the requirement in Public Law 115–91 section 1097(b)(2)(A), which mandates that information on whistleblower appeal rights be included in any notice provided to an employee under 5 U.S.C. 7503(b)(1), 7513(b)(1), or 7543(b)(1).

The proposed rule at § 752.404(b)(3)(iv) also incorporates by reference the provisions of 5 U.S.C. 6329b, the Administrative Leave Act of 2016, related to placing an employee in a paid non-duty status during the advance notice period. Until OPM has published the final regulation for 5 U.S.C. 6329b, and after conclusion of the agency implementation period, in those rare circumstances where the agency determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, an agency will continue to have as an alternative the ability to place an employee in a paid, nonduty status for such time to effect the action. Thereafter, an agency may use the provisions of 5 U.S.C. 6329b as applicable.

Finally, the proposed rule at § 752.404(g) discusses the requirements for an agency decision issued under this subpart. Specifically, the proposed rule at § 752.404(g)(3) includes new language that, to the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond to reflect a key principle of E.O. 13839. These proposed changes facilitate timely resolution of adverse actions while preserving employee rights.

### *Section 752.407 Settlement Agreements*

The proposed language in this section establishes the same requirement that is detailed in the proposed rule changes at § 432.108, Settlement Agreements. See discussion regarding § 432.108 above.

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

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

#### *Section 752.601 Coverage*

Pursuant to the creation of subpart A within the proposed rule, § 752.601(b)(2) reflects an exclusion for actions taken under 5 U.S.C. 7515.

#### *Section 752.602 Definitions*

The proposed rule includes a definition for the term “business day.” This addition is necessary to implement the 15 business day decision period described in E.O. 13839.

#### *Section 752.603 Standard for Action and Penalty Determination*

As with the rule changes proposed for §§ 752.202 and 752.403, the standard for action under this subpart remains unchanged and incorporates a penalty determination based on the principles of E.O. 13839. Please see discussion in § 752.202. In addition, the proposed rule at § 752.603 adds paragraph (f) which states that a suspension or a reduction in pay or grade should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or reduced in pay or grade before a proposing official may propose removal, except as may be appropriate under applicable facts.

#### *Section 752.604 Procedures*

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

The proposed rule also includes additional language that the notice must

provide detailed information with respect to any right to appeal the action pursuant to Public Law 115–91 section 1097(b)(2)(A); specifically, the forum in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file. This additional language implements the requirement within Public Law 115–91 section 1097(b)(2)(A), which mandates that information on whistleblower appeal rights be included in any notice provided to an employee under 5 U.S.C. 7503(b)(1), 7513(b)(1), or 7543(b)(1).

The proposed rule at § 752.604(b)(2)(iv) also incorporates by reference the provisions of 5 U.S.C. 6329b, The Administrative Leave Act of 2016, related to placing an employee in a paid non-duty status during the advance notice period. However, as noted above, until OPM has published the final regulation for 5 U.S.C. 6329b, and after conclusion of the agency implementation period, in those rare circumstances where the agency determines that the employee’s continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, an agency will continue to have as an alternative the ability to place an employee in a paid, nonduty status for such time to effect the action. Thereafter, an agency may use the provisions of 5 U.S.C. 6329b as applicable.

Finally, the proposed rule at § 752.604(g) discusses the requirements for an agency decision issued under this subpart. Specifically, the proposed rule at § 752.604(g)(3) includes new language that, to the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee’s opportunity to respond to reflect one of the key principles of E.O. 13839.

### *Section 752.607 Settlement Agreements*

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

### **Regulatory Flexibility Act**

I certify that this regulation will not have a significant impact on a substantial number of small entities

because it applies only to Federal agencies and employees.

### **E.O. 13563 and E.O. 12866, Regulatory Review**

Executive Orders 13563 and 12866 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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action,” under Executive Order 12866.

### **Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs**

This proposed rule is not expected to be subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because this proposed rule is expected to be related to agency organization, management, or personnel.

### **E.O. 13132, Federalism**

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

### **E.O. 12988, Civil Justice Reform**

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

### **Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local or tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

### **Congressional Review Act**

This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory

Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

**Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)**

This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

**List of Subjects in Title 5 CFR Parts 351, 430, 432 and 752**

*5 CFR Part 315*

Government employees.

*5 CFR Part 432*

Government employees.

*5 CFR Part 752*

Government employees.

Office of Personnel Management.

**Stephen Hickman,**

*Federal Register Liaison.*

Accordingly, for the reasons stated in the preamble, OPM proposes to amend 5 CFR parts 315, 432 and 752 as follows:

**PART 315—CAREER AND CAREER-CONDITIONAL EMPLOYMENT**

■ 1. Revise the authority citation for part 315 to read as follows:

**Authority:** 5 U.S.C. 1302, 2301, 2302, 3301, and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp. p. 218, unless otherwise noted; E.O. 13162, and E.O. 13839. Secs. 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 3652. Secs. 315.602 and 315.604 also issued under 5 U.S.C. 1104. Sec. 315.603 also issued under 5 U.S.C. 8151. Sec. 315.605 also issued under E.O. 12034, 3 CFR, 1978 Comp. p.111. Sec. 315.606 also issued under E.O. 11219, 3 CFR, 1964–1965 Comp. p. 303. Sec. 315.607 also issued under 22 U.S.C. 2506. Sec. 315.608 also issued under E.O. 12721, 3 CFR, 1990 Comp. p. 293. Sec. 315.610 also issued under 5 U.S.C. 3304(c). Sec. 315.611 also issued under 5 U.S.C. 3304(f). Sec. 315.612 also issued under E.O. 13473. Sec. 315.708 also issued under E.O.13318, 3 CFR, 2004 Comp. p. 265. Sec. 315.710 also issued under E.O. 12596, 3 CFR, 1987 Comp. p. 229. Subpart I also issued under 5 U.S.C. 3321, E.O. 12107, 3 CFR, 1978 Comp. p. 264.

**Subpart H—Probation on Initial Appointment to a Competitive Position**

■ 2. Revise § 315.803(a) to read as follows:

**§ 315.803 Agency action during probationary period (general).**

\* \* \* \* \*

(a) The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his or her services during this period if the employee fails

to demonstrate fully his or her qualifications for continued employment. The agency must notify its supervisors that an employee’s probationary period is ending at least three months or 90 days prior to the expiration of an employee’s probationary period, and then again one month or 30 days prior to the expiration of the probationary period, and advise a supervisor to make an affirmative decision regarding an employee’s fitness for continued employment or otherwise take appropriate action.

\* \* \* \* \*

**PART 432—PERFORMANCE BASED REDUCTION IN GRADE AND REMOVAL ACTIONS**

■ 3. Revise the authority citation for part 432 to read as follows:

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

\* \* \* \* \*

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

\* \* \* \* \*

(g) *Similar positions* mean positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbents could be interchanged without significant training or undue interruption to the work.

\* \* \* \* \*

■ 5. Revise § 432.104 to read as follows:

**§ 432.104 Addressing unacceptable performance.**

At any time during the performance appraisal cycle that an employee’s performance is determined to be unacceptable in one or more critical elements, the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position. The agency should also inform the employee that unless his or her performance in the critical element(s) improves to and is sustained at an acceptable level, the employee may be reduced in grade or removed. For each critical element in which the employee’s performance is unacceptable, the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee’s position. Other than the requirement described in 5 U.S.C. 4302(c)(5), there is no requirement regarding any assistance to be offered or provided by the agency

during the opportunity period. The nature of such assistance is not determinative of a reduction in grade or pay, or a removal. No additional performance assistance period or similar informal period shall be provided prior to or in addition to the opportunity period provided under this section.

\* \* \* \* \*

■ 6. Amend § 432.105 by revising paragraphs (a)(1), (a)(4)(i)(B)(3) through (4) and paragraph (a)(4)(i)(C) to read as follows:

**§ 432.105 Proposing and taking action based on unacceptable performance.**

(a) \* \* \*

(1) Once an employee has been afforded a reasonable opportunity to demonstrate acceptable performance pursuant to § 432.104, an agency may propose a reduction-in-grade or removal action if the employee’s performance during or following the opportunity to demonstrate acceptable performance is unacceptable in one or more of the critical elements for which the employee was afforded an opportunity to demonstrate acceptable performance. For the purposes of this section, the opportunity to demonstrate acceptable performance includes measures taken during the opportunity period as well as any other measures taken during the appraisal period for the purpose of assisting employees pursuant to 5 U.S.C. 4302(c)(5). Agencies may satisfy the requirement to provide assistance before or during the opportunity period.

\* \* \* \* \*

(4) \* \* \*

(i) \* \* \*

(B) \* \* \*

(3) To consider the employee’s answer if an extension to the period for an answer has been granted (e.g., because of the employee’s illness or incapacitation);

(4) To consider reasonable accommodation of a disability;

\* \* \* \* \*

(C) If an agency believes that an extension of the advance notice period is necessary for another reason, it may request prior approval for such extension from the Manager, Employee Accountability, Accountability and Workforce Relations, Employee Services, Office of Personnel Management, 1900 E Street NW, Washington, DC 20415.

\* \* \* \* \*

■ 7. Revise § 432.106(b)(1) to read as follows:

**§ 432.106 Appeal and grievance rights.**

\* \* \* \* \*

(b) *Grievance rights.* (1) A bargaining unit employee covered under

§ 432.102(e) who has been removed or reduced in grade under this part may file a grievance under an applicable negotiated grievance procedure if the removal or reduction in grade action falls within its coverage (i.e., is not excluded by the parties to the collective bargaining agreement) and the employee is:

\* \* \* \* \*

■ 8. Revise § 432.107(b) to read as follows:

§ 432.107 Agency records.

\* \* \* \* \*

(b) When the action is not effected. As provided at 5 U.S.C. 4303(d), if, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for one year from the date of the advanced written notice provided in accordance with § 432.105(a)(4)(i), any entry or other notation of the unacceptable performance for which the action was proposed shall be removed from any agency record relating to the employee.

\* \* \* \* \*

■ 9. Add § 432.108 to read as follows:

§ 432.108 Settlement agreements.

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

(b) Corrective action based on discovery of agency error. The requirements described in paragraph (a) should not be construed to prevent agencies from taking corrective action should it come to light, including during or after the issuance of an adverse personnel action, that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In

all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by Section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action, or an employee performance appraisal.

(c) Corrective action based on discovery of material information prior to final agency action. When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency records. The requirements described in paragraph (a) would, however, continue to apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.

PART 752—ADVERSE ACTIONS

Subpart A—Discipline of Supervisors Based on Retaliation Against Whistleblowers

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

- Sec. 752.201 Coverage. 752.202 Standard for action and penalty determination. 752.203 Procedures.

Subpart C [Reserved]

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

- Sec. 752.401 Coverage. 752.402 Definitions. 752.403 Standard for action and penalty determination. 752.404 Procedures. 752.405 Appeal and grievance rights. 752.406 Agency records.

752.407 Settlement agreements.

Subpart E [Reserved]

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

- Sec. 752.601 Coverage. 752.602 Definitions. 752.603 Standard for action and penalty determination. 752.604 Procedures. 752.605 Appeal rights. 752.606 Agency records. 752.607 Settlement agreements.

■ 10. Revise the authority citation for part 752 to read as follows:

Authority: 5 U.S.C. 7504, 7514, and 7543, Pub. L. 115–91.

\* \* \* \* \*

■ 11. Add subpart A to part 752 to read as follows:

Subpart A—Discipline of Supervisors Based on Retaliation Against Whistleblowers

- Sec. 752.101 Coverage. 752.102 Standard for action and penalty determination. 752.103 Procedures. 752.104 Settlement agreements.

§ 752.101 Coverage.

(a) Adverse actions covered. This subpart applies to actions taken under 5 U.S.C. 7515.

(b) Definitions. In this subpart— Agency—

(1) Has the meaning given the term in 5 U.S.C. 2302(a)(2)(C), without regard to whether any other provision of this chapter is applicable to the entity; and

(2) Does not include any entity that is an element of the intelligence community, as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 3003).

Business day means any day other than a Saturday, Sunday, or legal public holiday under 5 U.S.C. 6103(a).

Day means a calendar day.

Grade means a level of classification under a position classification system.

Insufficient evidence means evidence that fails to meet the substantial evidence standard described in 5 CFR 1201.4(p).

Pay means the rate of basic pay fixed by law or administrative action for the position held by the employee, that is, the rate of pay before any deductions and exclusive of additional pay of any kind.

Prohibited personnel action means taking or failing to take an action in violation of paragraph (8), (9), or (14) of 5 U.S.C. 2302(b) against an employee of an agency.

*Supervisor* means an employee who would be a supervisor, as defined in 5 U.S.C. 7103(a)(10), if the entity employing the employee was an agency.

*Suspension* means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

**§ 752.102 Standard for action and penalty determination.**

(a) Except for actions taken against supervisors covered under subchapter V of title 5, an agency may take an action under this subpart for such cause as will promote the efficiency of the service as described in 5 U.S.C. 7503(a) and 7513(a). For actions taken under this subpart against supervisors covered under subchapter V of title 5, an agency may take an action based on the standard described in 5 U.S.C. 7543(a).

(b) Subject to 5 U.S.C. 1214(f), if the head of the agency in which a supervisor is employed, an administrative law judge, the Merit Systems Protection Board, the Special Counsel, a judge of the United States, or the Inspector General of the agency in which a supervisor is employed has determined that the supervisor committed a prohibited personnel action, the head of the agency in which the supervisor is employed, consistent with the procedures required under this subpart—

(1) For the first prohibited personnel action committed by the supervisor—

(i) Shall propose suspending the supervisor for a period that is not less than 3 days; and

(ii) May propose an additional action determined appropriate by the head of the agency, including a reduction in grade or pay; and

(2) For the second prohibited personnel action committed by the supervisor, shall propose removing the supervisor.

**§ 752.103 Procedures.**

(a) *Non-delegation.* If the head of an agency is responsible for determining whether a supervisor has committed a prohibited personnel action for purposes of § 752.102(b), the head of the agency may not delegate that responsibility.

(b) *Scope.* An action carried out under this subpart—

(1) Except as provided in paragraph (b)(2) of this section, shall be subject to the same requirements and procedures, including those with respect to an appeal, as an action under 5 U.S.C. 7503, 7513, or 7543; and

(2) Shall not be subject to—

(i) Paragraphs (1) and (2) of 5 U.S.C. 7503(b);

(ii) Paragraphs (1) and (2) of subsection (b) and subsection (c) of 5 U.S.C. 7513; and

(iii) Paragraphs (1) and (2) of subsection (b) and subsection (c) of 5 U.S.C. 7543.

(c) *Notice.* A supervisor against whom an action is proposed to be taken under this subpart is entitled to written notice that—

(1) States the specific reasons for the proposed action;

(2) Informs the supervisor about the right of the supervisor to review the material that is relied on to support the reasons given in the notice for the proposed action;— and

(3) Provides notice of any right to appeal the action pursuant to section 1097(b)(2)(A) of Public Law 115–91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

(d) *Answer and evidence.* (1) A supervisor who receives notice under paragraph (c) of this section may, not later than 14 days after the date on which the supervisor receives the notice, submit an answer and furnish evidence in support of that answer.

(2) If, after the end of the 14-day period described in paragraph (d)(1) of this section, a supervisor does not furnish any evidence as described in that clause, or if the head of the agency in which the supervisor is employed determines that the evidence furnished by the supervisor is insufficient, the head of the agency shall carry out the action proposed under § 752.102(b), as applicable.

(3) To the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond under paragraph (d)(1) of this section.

**§ 752.104 Settlement agreements.**

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

(b) *Corrective action based on discovery of agency error.* The requirements described in paragraph (a)

should not be construed to prevent agencies from taking corrective action should it come to light, including during or after the issuance of an adverse personnel action, that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by Section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF–50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action, or an employee performance appraisal.

(c) *Corrective action based on discovery of material information prior to final agency action.* When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency records. The requirements described in paragraph (a) would, however, continue to apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.

■ 12. In § 752.201, revise paragraphs (c)(4) and (5) and add paragraph (c)(6) to read as follows:

**§ 752.201 Coverage.**

\* \* \* \* \*

(c) \* \* \*

- (4) Of a re-employed annuitant;
- (5) Of a National Guard Technician; or
- (6) Taken under 5 U.S.C. 7515.

\* \* \* \* \*

■ 13. In § 752.202, revise the section heading and add paragraphs © through (f) to read as follows:

**§ 752.202 Standard for action and penalty determination.**

\* \* \* \* \*

(c) An agency is not required to use progressive discipline under this subpart. The penalty for an instance of misconduct should be tailored to the facts and circumstances. In making a determination regarding the appropriate penalty for an instance of misconduct, an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness. Within the agency, a proposed penalty is in the sole and exclusive discretion of a proposing official, and a penalty decision is in the sole and exclusive discretion of the deciding official. Penalty decisions are subject to appellate or other review procedures prescribed in law.

(d) Employees should be treated equitably. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. An agency should consider appropriate comparators as the agency evaluates a potential disciplinary action. Appropriate comparators are individuals in the same work unit, with the same supervisor who were subjected to the same standards governing discipline.

(e) Among other relevant factors, agencies should consider an employee's disciplinary record and past work record, including all prior misconduct, when taking an action under this subpart.

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

\* \* \* \* \*

■ 14. Amend § 752.203 by revising paragraph (b) and by adding paragraph (h) to read as follows:

**§ 752.203 Procedures.**

\* \* \* \* \*

(b) *Notice of proposed action.* The notice must state the specific reason(s) for the proposed action, and inform the employee of his or her right to review the material which is relied on to

support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Public Law 115–91, the forum in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

\* \* \* \* \*

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

(2) The requirements described in paragraph (1) should not be construed to prevent agencies from taking corrective action should it come to light, including during or after the issuance of an adverse personnel action that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by Section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF–50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action, or an employee performance appraisal.

(3) Corrective action based on discovery of material information prior to final agency action. When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the

ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency records. The requirements described in paragraph (h)(1) of this section would, however, continue to apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.

■ 15. In § 752.401, revise paragraphs (b)(14) and (15), add paragraphs (b)(16) and revise paragraph (c)(2) to read as follows:

**§ 752.401 Coverage.**

\* \* \* \* \*

(b) \* \* \*

(14) Placement of an employee serving on an intermittent or seasonal basis in a temporary nonduty, nonpay status in accordance with conditions established at the time of appointment;

(15) Reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation, including a reduction necessary to comply with the amendments made by Public Law 108–411, regarding pay-setting under the General Schedule and Federal Wage System and regulations implementing those amendments; or

(16) An action taken under 5 U.S.C. 7515.

(c) \* \* \*

(2) An employee in the competitive service—

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

(ii) Except as provided in section 1599e of title 10, United States Code, who has completed one year of current continuous service under other than a temporary appointment limited to one year or less;

\* \* \* \* \*

■ 16. In § 752.402, add the definition for "Business day" in alphabetical order to read as follows:

**§ 752.402 Definitions.**

\* \* \* \* \*

*Business day* means any day other than a Saturday, Sunday, or legal public holiday under 5 U.S.C. 6103(a).

\* \* \* \* \*

■ 17. In § 752.403, revise the section heading and add paragraphs (c) through (f) to read as follows:

**§ 752.403 Standard for action and penalty determination.**

\* \* \* \* \*

(c) An agency is not required to use progressive discipline under this subpart. The penalty for an instance of misconduct should be tailored to the facts and circumstances. In making a determination regarding the appropriate penalty for an instance of misconduct, an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness. Within the agency, a proposed penalty is in the sole and exclusive discretion of a proposing official, and a penalty decision is in the sole and exclusive discretion of the deciding official. Penalty decisions are subject to appellate or other review procedures prescribed in law.

(d) Employees should be treated equitably in that conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. An agency should consider appropriate comparators as the agency evaluates a potential disciplinary action. Appropriate comparators are individuals in the same work unit, with the same supervisor who were subjected to the same standards governing discipline.

(e) Among other relevant factors, agencies should consider an employee's disciplinary record and past work record, including all prior misconduct, when taking an action under this subpart.

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

■ 18. Amend § 752.404 by revising paragraphs (b)(1) and (b)(3)(iv), and adding paragraph (g)(3) to read as follows:

**§ 752.404 Procedures.**

\* \* \* \* \*

(b) \* \* \*

(1) An employee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. However, to the extent an agency in its sole and exclusive discretion deems practicable,

agencies should limit a written notice of an adverse action to the 30 days prescribed in section 7513(b)(1) of title 5, United States Code. Advance notices of greater than 30 days must be reported to the Office of Personnel Management. The notice must state the specific reason(s) for the proposed action, and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Public Law 115-91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

\* \* \* \* \*

(3) \* \* \*

(iv) Placing the employee in a paid, nonduty status for such time as is necessary to effect the action. After publication of regulations for 5 U.S.C. 6329b, and the subsequent agency implementation period in accordance with 5 U.S.C. 6329b, an agency may place the employee in a notice leave status when applicable.

\* \* \* \* \*

(g) \* \* \*

(3) To the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond under paragraph (c) of this section.

\* \* \* \* \*

■ 19. Add § 752.407 to read as follows:

**§ 752.407 Settlement agreements.**

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

(b) *Corrective action based on discovery of agency error.* The requirements described in paragraph (a) of this section should not be construed to prevent agencies from taking corrective action, should it come to light, including during or after the issuance of an adverse personnel action

that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee's personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by Section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF-50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action, or an employee performance appraisal.

(c) *Corrective action based on discovery of material information prior to final agency action.* When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee's personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee's personnel file or other agency records. The requirements described in paragraph (a) would, however, continue to apply to any accurate information about the employee's conduct leading up to that proposed action or separation from Federal service.

■ 20. Revise § 752.601(b)(2) to read as follows:

**§ 752.601 Coverage.**

\* \* \* \* \*

(b) \* \* \*

(2) This subpart does not apply to actions taken under 5 U.S.C. 1215, 3592, 3595, 7532, or 7515.

\* \* \* \* \*

■ 21. Amend § 752.602 by adding a definition for “Business day” in alphabetical order to read as follows:

§ 752.602 Definitions.

\* \* \* \* \*

Business day means any day other than a Saturday, Sunday, or legal public holiday under 5 U.S.C. 6103(a).

\* \* \* \* \*

■ 22. In § 752.603, revise the section heading and add paragraphs (c) through (f) to read as follows:

§ 752.603 Standard for action and penalty determination.

\* \* \* \* \*

(c) An agency is not required to use progressive discipline under this subpart. The penalty for an instance of misconduct should be tailored to the facts and circumstances. In making a determination regarding the appropriate penalty for an instance of misconduct, an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness.

(d) Employees should be treated equitably in that conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. An agency should consider appropriate comparators as the agency evaluates a potential disciplinary action. Appropriate comparators are individuals in the same work unit, with the same supervisor who were subjected to the same standards governing discipline.

(e) Among other relevant factors, agencies should consider an employee’s disciplinary record and past work record, including all prior misconduct, when taking an action under this subpart.

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

\* \* \* \* \*

■ 23. Amend § 752.604 by revising paragraphs (b)(1) and (b)(2)(iv), and adding paragraph (g)(3) to read as follows:

§ 752.604 Procedures.

\* \* \* \* \*

(b) \* \* \*

(1) An appointee against whom an action is proposed is entitled to at least 30 days’ advance written notice unless

there is an exception pursuant to paragraph (d) of this section. However, to the extent an agency in its sole and exclusive discretion deems practicable, agencies should limit a written notice of an adverse action to the 30 days prescribed in section 7543(b)(1) of title 5, United States Code. Advance notices of greater than 30 days must be reported to the Office of Personnel Management. The notice must state the specific reason(s) for the proposed action, and inform the appointee of his or her right to review the material that is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Public Law 115–91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

(2) \* \* \*

(iv) Placing the appointee in a paid, no duty status for such time as is necessary to effect the action. After publication of regulations for 5 U.S.C. 6329b, and the subsequent agency implementation period in accordance with 5 U.S.C. 6329b, an agency may place the employee in a notice leave status when applicable.

\* \* \* \* \*

(g) \* \* \*

(3) To the extent practicable, an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee’s opportunity to respond under paragraph (c) of this section.

\* \* \* \* \*

■ 24. Add § 752.607 to read as follows:

§ 752.607 Settlement agreements.

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

(b) Corrective action based on discovery of agency error. The requirements described in paragraph (a) of this section should not be construed to prevent agencies from taking corrective action, should it come to

light, including during or after the issuance of an adverse personnel action that the information contained in a personnel record is not accurate or records an action taken by the agency illegally or in error. In such cases, an agency would have the authority, unilaterally or by agreement, to modify an employee’s personnel record(s) to remove inaccurate information or the record of an erroneous or illegal action. An agency may take such action even if an appeal/complaint has been filed relating to the information that the agency determines to be inaccurate or to reflect an action taken illegally or in error. In all events, however, the agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error. And an agency should report any agreements relating to the removal of such information as part of its annual report to the OPM Director required by Section 6 of E.O. 13839. Documents subject to withdrawal or modification could include, for example, an SF–50 issuing a disciplinary or performance-based action, a decision memorandum accompanying such action, or an employee performance appraisal.

(c) Corrective action based on discovery of material information prior to final agency action. When persuasive evidence comes to light prior to the issuance of a final agency decision on an adverse personnel action casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation, an agency may decide to cancel or vacate the proposed action. Additional information may come to light at any stage of the process prior to final agency decision including during an employee response period. To the extent an employee’s personnel file or other agency records contain a proposed action that is subsequently cancelled, an agency would have the authority to remove that action from the employee’s personnel file or other agency records. The requirements described in paragraph (a) would, however, continue to apply to any accurate information about the employee’s conduct leading up to that proposed action or separation from Federal service.

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