

Office of Personnel Management

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written notice must include information on the applicable penalties or injunctions that may be imposed under 18 U.S.C. 216(a), (b), and (c) for violations of the post-employment restrictions in 18 U.S.C. 207(c). The notice also must indicate that employees covered by 18 U.S.C. 207(c) are subject to 18 U.S.C. 207(f), which imposes additional post-employment restrictions on representing, aiding, or advising certain foreign entities.

(b) Notwithstanding paragraph (a) of this section, the post-employment restrictions in 18 U.S.C. 207(c) apply to covered employees without regard to whether they receive written notice from their employing agency.

§ 730.105 Savings provision.

Any post-employment restrictions established under 18 U.S.C. 207 and applicable prior to the first day of the first pay period beginning on or after January 1, 2004, remain in effect.

PART 731—SUITABILITY

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AUTHORITY: 5 U.S.C. 1302, 3301, 7301, 7701; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; E.O. 12731, 3 CFR, 1990 Comp., p. 306., 5 CFR, part 5.

SOURCE: 65 FR 82243, Dec. 28, 2000, unless otherwise noted.

Subpart A—Scope

§ 731.101 Purpose.

(a) The purpose of this part is to establish criteria and procedures for making determinations of suitability for employment in positions in the competitive service and for career appointment in the Senior Executive Service (hereinafter in this part, “competitive service”) pursuant to 5 U.S.C. 3301 and Executive Order 10577 (3 CFR, 1954–1958 Comp., p. 218). Section 3301 of title 5, United States Code, directs consideration of “age, health, character, knowledge, and ability for the employment sought.” Executive Order 10577 directs OPM to examine “suitability” for competitive Federal employment. This part concerns only determinations of “suitability” based on an individual’s character or conduct that may have an impact on the integrity or efficiency of the service. Determinations made under this part are distinct from determinations of eligibility for assignment to, or retention in, sensitive national security positions made under Executive Order 10450 (3 CFR, 1949–1953 Comp., p. 936), Executive Order 12968, or similar authorities.

(b) *Definitions.* In this part:

Applicant. A person being considered for employment.

Appointee. A person who has entered on duty and is in the first year of a subject to investigation appointment (as defined in § 731.104).

Employee. A person who has completed the first year of a subject to investigation appointment.

Material. A “material” statement is one that is capable of influencing, or

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has a natural tendency to affect, an official decision.

§ 731.102 Implementation.

(a) An investigation conducted for the purpose of determining suitability under this part may not be used for any other purpose except as provided in a Privacy Act system of records notice published by the agency conducting the investigation.

(b) Under OMB Circular No. A-130 Revised, issued February 8, 1996, the Director of OPM is to establish policies for Federal personnel associated with the design, operation, or use of Federal automated information systems. Agencies are to implement and maintain a program to ensure that adequate protection is provided for all automated information systems. Agency programs should be consistent with government-wide policies and procedures issued by OPM. The Computer Security Act of 1987 (Public Law 100-235) provides additional requirements for Federal automated information systems.

(c) Policies, procedures, criteria, and guidance for the implementation of this part shall be set forth in OPM issuances. OPM may revoke an agency's delegation to adjudicate suitability under this part if an agency fails to conform to OPM issuances.

§ 731.103 Delegation to agencies.

(a) OPM delegates to the heads of agencies limited authority for adjudicating suitability in cases involving applicants for and appointees to competitive service positions in the agency (including limited, agency-specific debarment authority under § 731.205). OPM retains jurisdiction in all competitive service cases involving evidence of material, intentional false statement or deception or fraud in examination or appointment. Agencies must refer these cases to OPM for adjudication, or contact OPM for prior approval if the agency wants to take action under its own authority (5 CFR part 315 or 5 CFR part 752). Also, this delegation does not include cases involving refusal to furnish testimony as required by § 5.4 of this chapter, title, or pass over requests involving preference eligibles who are 30 percent or more compensably disabled which must

be referred to OPM for adjudication, as provided under Civil Service Reform Act of 1978, Public Law 95-454, 92 Stat. 1111 *et seq.* (Codified as amended in scattered sections of 5 U.S.C.)

(b) Any adjudication by an agency acting under delegated authority from OPM which indicates that an extended general, across agency lines, debarment by OPM under § 731.204(a) may be an appropriate action should be referred to OPM for debarment consideration if not favorably adjudicated by the agency. Referral should be made prior to any proposed action, but after sufficient resolution of the suitability issue(s) through subject contact or investigation to determine if an extended general debarment period appears warranted.

(c) Agencies exercising authority under this part by delegation from OPM must show by policies and records that reasonable methods are used to ensure adherence to regulations, standards, and quality control procedures established by OPM.

(d) Before making any applicant suitability determination, the agency should first ensure the applicant is eligible for the position, among the best qualified, and/or within reach of selection. Because suitability issues may not be disclosed until late in the application/ appointment process, only the best qualified should require a suitability determination, with appropriate procedures followed and appeal rights provided, if suitability issues would form the only basis for elimination from further consideration.

(e) When an agency, exercising authority under this part by delegation from OPM, makes an adjudicative decision under this part, or changes a tentative favorable placement decision to an unfavorable decision, based on an OPM report of investigation or upon an investigation conducted pursuant to OPM-delegated authority, the agency should:

(1) Ensure that the records used in making the decision are accurate, relevant, timely, and complete to the extent reasonably necessary to ensure fairness to the individual in any determination;

(2) Ensure that all applicable administrative procedural requirements provided by law, the regulations in this part, and OPM policy guidance have been observed;

(3) Consider all available information in reaching its final decision, except information furnished by a non-corroborated confidential source. Information furnished by a non-corroborated confidential source can only be used for limited purposes, such as lead information or in interrogatories to a subject if the identity of the source is not compromised in any way; and

(4) Keep any record of the agency action as required by OPM in its supplemental guidance.

(f) Paragraph (a) of this section notwithstanding, OPM may exercise its jurisdiction under this part in any case when it, in its discretion, deems necessary.

(g) Any applicant or appointee who is found unsuitable by any agency acting under delegated authority from OPM under this part may appeal the adverse suitability decision to the Merit Systems Protection Board under the Board's regulations.

§ 731.104 Appointments subject to investigation.

(a) To establish a person's suitability for employment, appointments to positions in the competitive service require the person to undergo an investigation by OPM or by an agency with delegated authority from OPM to conduct investigations. Certain appointments do not require investigation. Except when required because of risk level changes, a person in the competitive service who has undergone a suitability investigation need not undergo another one simply because the person has been:

- (1) Promoted;
- (2) Demoted;
- (3) Reassigned;
- (4) Converted from career-conditional to career tenure;
- (5) Appointed or converted to an appointment if the person has been serving continuously with the agency for at least 1 year in one or more positions under an appointment subject to investigation; and
- (6) Transferred, provided the individual has served continuously for at

least 1 year in a position subject to investigation.

(b)(1) OPM or an agency with delegated suitability authority may investigate and take a suitability action against an applicant, appointee, or employee in accordance with § 731.105. There is no time limit on the authority of OPM or an agency with delegated suitability authority to conduct an investigation of an applicant who has been appointed to a position.

(2) An employee does not have to serve a new probationary or trial period merely because his or her appointment is subject to investigation under this section. An employee's probationary or trial period is not extended because his or her appointment is subject to investigation under this section.

(3) The subject to investigation condition also does not eliminate the need to conduct investigations required under § 731.106 for public trust positions.

§ 731.105 Authority to take suitability actions.

(a) OPM may take a suitability action under this part against an applicant or appointee based on any of the criteria of § 731.202;

(b) An agency, exercising delegated authority, may take a suitability action under this part against an applicant or appointee based on the criteria of § 731.202 subject to the agency limitations prescribed in § 731.103;

(c) OPM may take a suitability action under this part against an employee only in cases involving material, intentional false statement or deception or fraud in examination or appointment, or refusal to furnish testimony as required by § 5.4 of this title, or statutory or regulatory bar. A statement may be a material statement even if an agency does not rely upon it.

(d) An agency may not take a suitability action against an employee under this part. Nothing in this part precludes, or is intended to preclude, an agency from taking an adverse action against an employee under the procedures and standards of part 752 of this title or terminating a probationary employee under the procedures of part 315 of this title.

§ 731.106 Designation of public trust positions and investigative requirements.

(a) *Risk designation.* Agency heads shall designate every competitive service position within the agency at a high, moderate, or low risk level as determined by the position's potential for adverse impact to the efficiency and integrity of the service. OPM will provide an example of a risk designation system for agency use in supplemental guidance.

(b) *Public Trust positions.* Positions at the high or moderate risk levels would normally be designated as "Public Trust" positions. Such positions may involve policy making, major program responsibility, public safety and health, law enforcement duties, fiduciary responsibilities, or other duties demanding a significant degree of public trust; and positions involving access to or operation or control of financial records, with a significant risk for causing damage or realizing personal gain.

(c) *Investigative requirements.* Persons receiving an appointment made subject to investigation under this part must undergo a background investigation. Minimum investigative requirements correlating to risk levels will be established in supplemental guidance provided by OPM. Investigations should be initiated before appointment or, at most, within 14 calendar days of placement in the position.

(d) *Suitability reinvestigations.* Agencies, relying on authorities such as the Computer Security Act of 1987 and OMB Circular No. A-130 Revised (issued February 8, 1996), may require incumbents of certain public trust positions to undergo periodic reinvestigations. The appropriate level of any reinvestigation will be determined by the agency, but may be based on supplemental guidance provided by OPM.

(e) *Risk level changes.* If an individual experiences a change in position risk level (moves to a higher risk level position, or the risk level of the position itself is changed) the individual may encumber or remain in the position. Any upgrade investigation required for the new risk level should be initiated within 14 calendar days after the move or the new designation is final.

(f) Any suitability investigation completed by an agency under provisions of paragraphs (d) or (e) of this section must be adjudicated by the employing agency. The subject's employment status will determine the applicable agency authority and procedures to be followed in any action taken.

Subpart B—Suitability Determinations

§ 731.201 Standard.

Subject to subpart A of this part, an applicant, appointee, or employee may be denied Federal employment or removed from a position only when the action will protect the integrity or promote the efficiency of the service.

§ 731.202 Criteria.

(a) *General.* In determining whether its action will protect the integrity or promote the efficiency of the service, OPM, or an agency to which OPM has delegated authority, shall make its determination on the basis of the specific factors in paragraph (b) of this section, with appropriate consideration given to the additional considerations outlined in paragraph (c) of this section.

(b) *Specific factors.* When making a determination under paragraph (a) of this section, the following may be considered a basis for finding an individual unsuitable:

- (1) Misconduct or negligence in employment;
- (2) Criminal or dishonest conduct;
- (3) Material, intentional false statement or deception or fraud in examination or appointment;
- (4) Refusal to furnish testimony as required by § 5.4 of this title;
- (5) Alcohol abuse of a nature and duration which suggests that the applicant or appointee would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of others;
- (6) Illegal use of narcotics, drugs, or other controlled substances, without evidence of substantial rehabilitation;
- (7) Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force;
- (8) Any statutory or regulatory bar which prevents the lawful employment

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of the person involved in the position in question.

(c) *Additional considerations.* In making a determination under paragraphs (a) and (b) of this section, OPM and agencies shall consider the following additional considerations to the extent they deem them pertinent to the individual case:

- (1) The nature of the position for which the person is applying or in which the person is employed;
- (2) The nature and seriousness of the conduct;
- (3) The circumstances surrounding the conduct;
- (4) The recency of the conduct;
- (5) The age of the person involved at the time of the conduct;
- (6) Contributing societal conditions; and
- (7) The absence or presence of rehabilitation or efforts toward rehabilitation.

§ 731.203 Actions by OPM and other agencies.

(a) *List of actions.* For purposes of this part, an action is one or more of the following:

- (1) Cancellation of eligibility;
- (2) Denial of appointment;
- (3) Removal;
- (4) Cancellation of reinstatement eligibility;
- (5) Debarment.

(b) An applicant's eligibility may be cancelled, an applicant may be denied employment, or an appointee may be removed when OPM or an agency exercising delegated authority under this part finds that the applicant or appointee is unsuitable for the reasons cited in § 731.202 subject to the agency limitations of § 731.103(a).

(c) OPM may require that an employee be removed on the basis of a material, intentional false statement, or deception or fraud in examination or appointment; or refusal to furnish testimony; or a statutory or regulatory bar. OPM may also cancel any reinstatement eligibility obtained as a result of false statement, deception or fraud in the examination or appointment process.

(d) An action to remove an appointee or employee for suitability reasons under this part is not an action under

parts 752 or 315 of this title. Where behavior covered by this part may also form the basis for a part 752 or 315 action, agencies may use part 315 or 752, as appropriate, instead of this part.

(e) Agencies are required to report to OPM all unfavorable adjudicative actions taken under this part, and all actions based on an OPM investigation.

§ 731.204 Debarment by OPM.

(a) When OPM finds a person unsuitable for any reason listed in § 731.202, OPM, in its discretion, may deny that person examination for, and appointment to, a competitive service position for a period of not more than 3 years from the date of determination of unsuitability.

(b) On expiration of a period of debarment, OPM or an agency may redetermine a person's suitability for appointment in accordance with the procedures of this part.

(c) OPM, in its sole discretion, determines the duration of any period of debarment imposed under this section.

§ 731.205 Debarment by agencies.

(a) Subject to the provisions of § 731.103, when an agency finds an applicant or appointee unsuitable for reasons listed in § 731.202, the agency may deny that person examination for, and appointment to, all, or specific, positions within the agency for a period of not more than 1 year from the date of determination of unsuitability.

(b) On expiration of a period of agency debarment, the agency may redetermine a person's suitability for appointment by the agency, in accordance with the procedures of this part.

(c) The agency is responsible for enforcing the period of debarment and taking appropriate action should the individual apply or be inappropriately appointed during the debarment period. This does not limit OPM's ability to exercise jurisdiction and take an action if it deems appropriate.

(d) The agency, in its sole discretion, determines the duration of any period of debarment imposed under this section.

Subpart C—OPM Suitability Action Procedures

§ 731.301 Scope.

(a) *Coverage.* This subpart sets forth the procedures to be followed when OPM proposes to take, or instructs an agency to take, a final suitability action against an applicant, appointee or employee.

(b) *Definition.* In this subpart, *days* mean calendar days.

[65 FR 82243, Dec. 28, 2000; 66 FR 11100, Feb. 21, 2001]

§ 731.302 Notice of proposed action.

(a) OPM shall notify the applicant, appointee, or employee (hereinafter, the “respondent”) in writing of the proposed action and of the charges against the respondent (including the availability for review, upon request, of the materials relied upon). The notice shall state the specific reasons for the proposed action and that the respondent has the right to answer the notice in writing. If the respondent is an employee, the notice shall further state that the employee may also make an oral answer, as specified in § 731.303(a). The notice shall further inform the respondent of the time limits for response as well as the address to which such response should be made.

(b) The notice of proposed action shall be served upon the respondent by being mailed or hand delivered to the respondent’s last known residence, and/or duty station, no less than 30 days prior to the effective date of the proposed action. If the respondent is employed in the competitive service on the date the notice is served, the respondent shall be entitled to be retained in a pay status during the notice period.

(c) OPM shall send a copy of this notice to any employing agency that is involved.

§ 731.303 Answer.

(a) *Respondent’s answer.* A respondent may answer the charges in writing and furnish documentation and/or affidavits in support of the response. A respondent who is an employee may also answer orally. The respondent may be represented by a representative of the

respondent’s choice, and such representative shall be designated in writing. To be timely, a written answer shall be made no more than 30 days after the date of the notice of proposed action. In the event an employee requests to make an oral answer, the request must be made within this 30 day time frame, and OPM shall determine the time and place thereof, and shall consider any answer the respondent makes in reaching a decision.

(b) *Agency’s answer.* An employing agency may also answer the notice of proposed action. The time limit for filing an answer is 30 days from the date of the notice. OPM shall consider any answer the agency makes in reaching a decision.

§ 731.304 Decision.

The decision shall be in writing, dated, and inform the respondent of the reasons for the decision. The employing agency shall remove the appointee or employee from the rolls within 5 work days of receipt of OPM’s final decision. The respondent shall also be informed that an adverse decision can be appealed in accordance with subpart E of this part. OPM shall also notify the respondent’s employing agency of its decision.

[65 FR 82243, Dec. 28, 2000; 66 FR 11100, Feb. 21, 2001]

Subpart D—Agency Suitability Action Procedures

§ 731.401 Scope.

(a) *Coverage.* This subpart sets forth the procedures to be followed when an agency proposes to take a final suitability action against an applicant or appointee.

(b) *Definition.* In this subpart, *days* mean calendar days.

§ 731.402 Notice of proposed action.

The agency shall provide the applicant or appointee (hereinafter, the “respondent”) reasonable notice in writing of the proposed action and of the charges against the respondent (including the availability for review, upon request, of the materials relied upon). The notice shall state the specific reasons for the proposed action,

and that the respondent has the right to answer the notice in writing. The notice shall inform the respondent of the time limits for response as well as the address to which such response should be made. If the respondent is employed in the competitive service on the date the notice is served, the respondent shall be entitled to be retained in a pay status during the notice period.

§ 731.403 Answer.

A respondent may answer the charges in writing and furnish documentation and/or affidavits in support of the response.

§ 731.404 Decision.

The decision shall be in writing, dated, and inform the respondent of the reasons for the decision. The respondent shall also be informed that an adverse decision can be appealed in accordance with subpart E of this part. The employing agency shall remove an appointee from the rolls within 5 work days of their final decision.

Subpart E—Appeal to the Merit Systems Protection Board

§ 731.501 Appeal to the Merit Systems Protection Board.

(a) *Appeal to the Merit Systems Protection Board.* An individual who has been found unsuitable for employment may appeal the determination to the Merit Systems Protection Board. If the Board finds that one or more charges are supported by a preponderance of the evidence, it shall affirm the determination. If the Board sustains fewer than all the charges, the Board shall remand the case to OPM or the agency to determine whether the action taken is still appropriate based on the sustained charge(s). This determination of whether the action taken is appropriate shall be final without any further appeal to the Board.

(b) *Appeal procedures.* The procedures for filing an appeal with the Board are found at part 1201 of this chapter.

Subpart F—Savings Provision

§ 731.601 Savings provision.

No provision of the regulations in this part shall be applied in such a way as to affect any administrative proceeding pending on January 29, 2001. An administrative proceeding is deemed to be pending from the date of the agency or OPM “notice of proposed action” described in § 731.402.

PART 732—NATIONAL SECURITY POSITIONS

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732.202 Waivers and exceptions to investigative requirements.

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Subpart D—Security and Related Determinations

732.401 Reemployment eligibility of certain former Federal employees.

AUTHORITY: 5 U.S.C. 3301, 3302, 7312; 50 U.S.C. 403; E.O. 10450, 3 CFR, 1949–1953 Comp., p. 936.

SOURCE: 56 FR 18654, Apr. 23, 1991, unless otherwise noted.

Subpart A—Scope

§ 732.101 Purpose.

This part sets forth certain requirements and procedures which each agency shall observe for determining national security positions pursuant to Executive Order 10450—Security Requirements for Government Employment (April 27, 1953), 18 FR 2489, 3 CFR 1949–1953 Comp., p. 936, as amended.