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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 731

RIN 3206-AC19

Suitability

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final changes to the rule on personnel suitability which OPM previously issued as a proposed rule for comments. OPM received and considered public comments. This rule addresses the significant concerns expressed and incorporates some of the suggestions received.

DATES: January 29, 2001.

FOR FURTHER INFORMATION CONTACT: Thomas DelPozzo, (724) 794-5612.

SUPPLEMENTARY INFORMATION: OPM promulgated the proposed final suitability regulations with a request for comments in *Federal Register*, Vol. 64, No. 18, p. 4336. Comments were received from 13 sources, including Federal agencies, individuals, and a labor organization. The following summarizes the principal comments and suggestions received and actions that were taken.

Part 731

Non-Specific General Comments

An agency commenter suggested that OPM cross-reference 5 CFR 339.201, which authorizes OPM to disqualify an applicant based on mental or physical unfitness. We conclude that a revision to Part 731 in the manner suggested is unnecessary. We will cross-reference Part 339 and include some clarification of this issue in our supplemental guidance.

An agency suggested that OPM establish a time limit for investigation and/or adjudication of suitability cases to ensure completion a minimum of 90-120 days before expiration of the probationary period.

Certain time frames to ensure timely processing are already in the regulations (for example, section 731.106 provides that investigations should be initiated before appointment or, at most, within 14 calendar days of placement in the position). The variances that are a natural part of investigation and adjudication make it difficult to require specific time limits. Agencies can manage adjudicative time frames in a number of ways, such as by dealing with applicant suitability issues prior to appointment; by investigating prior to appointment; by submitting required case papers for investigation, completed properly, within required time frames; by requesting the appropriate investigation service timeliness levels to ensure completion of the investigation in time to take the adjudicative action before the end of the probationary period; and by processing adjudicative actions more efficiently.

Section 731.101 Purpose

A commenter recommended that the definition of "material, intentional false statement" be altered to define the term "material" rather than the term "material, intentional false statement" since the proposed definition did not include definitions for "intentional" and "false." We agreed to the suggested wording with a slight modification.

One commenter suggested that the proposed definition of "material, intentional false statement" is excessively broad and vague in that virtually any statement would meet this definition. The commenter suggested that it was objectionable for OPM to state that reliance on a false statement is irrelevant to the test of materiality.

OPM disagrees. Virtually the same definition of materiality has been enunciated by the Supreme Court in other contexts. See *e.g.*, *United States v. Gaudin*, 515 U.S. 506 (1995). Clearly, the Supreme Court did not create and apply a test for materiality that was unlawfully vague. Further, it is entirely appropriate that actions be taken against falsifiers whether or not they succeed in their attempts to deceive. OPM's suitability program seeks to deter applicants from falsifying statements to

gain an advantage in the appointment process, as well as to detect applicants who falsify.

Section 731.102 Implementation

Two commenters suggested agencies be afforded up to one year to implement an adjudication program to re-assess position designation, develop internal operating procedures, and undergo comprehensive training. We agreed to give agencies up to one year to modify their existing suitability adjudication program to accommodate the increased delegation of applicant suitability authority. Thus, although agencies must implement the new regulations now, OPM will continue to accept applicant suitability referrals, under our current procedures, for up to a year from the effective date of the new regulations. Additionally, OPM will provide supplemental guidance and suitability training to assist agencies.

Section 731.103 Delegation to Agencies

An agency asked whether agencies to which OPM previously had delegated authority will now be required to refer any cases involving falsification to OPM for adjudication. If so, the agency commented that this would be an additional burden.

OPM's policy concerning material falsification cases has not changed. In supplemental guidance issued in 1991 with our current regulations, OPM policy stated, "OPM is responsible for adjudicating all cases (applicants, eligibles, appointees, and employees) involving material, intentional false statement, deception, or fraud in examination or appointment." Additionally, as stated in a 1995 Federal Investigations Notice (FIN 95-1), "All agencies, including those with delegated suitability adjudication authority, should refer any competitive service applicant situation where there is evidence of intentional false statement or deception or fraud in examination or appointment process, to the same office (OPM, Federal Investigations Processing Center, Suitability Adjudications Branch)."

In employee cases (a person who has completed the first year of a subject to investigation appointment), this policy applies only to fraud in the examination or appointment process for a "subject to investigation" appointment. Our basis for maintaining adjudicative control in

these cases is basically two-fold: (1) A violation of the merit system has occurred that affects the integrity of the competitive appointment process; and (2) OPM's action can include debarment for up to three years.

A commenter objected to any use of confidential sources. The comment suggests that the proposed regulation would permit the unlimited use of corroborated confidential sources. The comment suggests that reliance on information provided by confidential sources would be contrary to due process principles.

The comment mischaracterized the intent and effect of the proposed regulations. Section 731.203(e) [now in 731.302(a) and 731.402] specifically provided that before a final suitability action is taken, an agency or OPM must provide for review, upon request, all materials relied upon in taking the action. Under the regulations, the deciding official, in taking his or her action, must consider all information made available to him or her except information furnished by confidential sources themselves. This satisfies all due process concerns. Any improperly-considered information will be subject to the statutory harmful error rule in any appeal challenging the action.

Of course, the deciding official may rely on any information, including similar or identical information, from any other source. This includes (a) non-confidential sources that are located through information provided by confidential sources or (b) information from a non-confidential source that corroborates information initially provided by a confidential source, as long as the material relied upon is made available under section available.

Upon reflection, we recognize that the reference in the last sentence of the regulation, which uses the phrase "such information," is ambiguous and confusing. Inasmuch as this sentence was intended to summarize the entire regulation, we believe it to be redundant, and we are deleting it to eliminate any ambiguity.

A commenter believes delegation will have a workload impact on agencies, and supplemental guidance and training from OPM will be required. Although there will be an impact on agencies, we do not believe the impact will be that significant, since OPM will continue to adjudicate material, intentional falsification cases, and cases where a general extended debarment is warranted. The major agency impact occurs in the suitability examining process, *i.e.*, reviewing application material and deciding the appropriate action to take. The actions most

commonly taken would be to favorably adjudicate the applicant's suitability, or refer to OPM for adjudication if warranted. OPM will also issue supplemental guidance, offer adjudicative products, provide assistance through training, and allow agencies up to a year to train personnel and develop processes to handle their new applicant suitability responsibilities.

An agency asked what skill level would be required for agency personnel assigned to adjudication responsibilities and whether the GS-1800 series was appropriate, as the agency was concerned about limited resources. OPM is not requiring a particular job series to handle this work; however, agencies will need to assess the inherent responsibilities associated with adjudication when determining who will do the work. They will have to ensure employees are properly trained and qualified to do the work.

731.104 Appointments Subject to Investigation and 731.105 Jurisdiction

One commenter suggested that OPM confused rather than clarified the length of time that employees, applicants, and appointees would be subject to investigation by deleting section 731.301(b). The commenter believes that the substitute language in sections 731.104 and 105 may accomplish the same purpose in a more complicated fashion—barring the removal of an employee as unsuitable after a year in the position based on information truthfully set forth in the application.

In the supplementary material accompanying the proposed regulations, we explained that the one-year period applies only to the time period during which OPM or an agency may take a suitability action against an applicant or appointee. It is not a time limitation on an OPM or an agency suitability investigation of an individual. However, our efforts to clarify and simplify the regulatory language have not succeeded. The text of the regulation, as opposed to the explanation in the supplementary material, remains somewhat unclear.

Therefore, we have again modified the language of section 731.104 to conform more clearly to the purpose we have articulated as follows:

- The right of OPM or an agency with delegated authority to conduct a suitability investigation has no time limit even though in some cases, enumerated in section 104, OPM or an agency with delegated authority is not required to conduct a suitability investigation.

- OPM's authority to take a suitability action for fraud in examination or appointment also has no time limit.

- An agency with delegated suitability authority may not take a suitability action of any kind against an "employee" as defined in 5 CFR 731.101 of the regulations.

For suitability action purposes, an agency that has discerned evidence of material, intentional false statement or deception or fraud in examination or appointment may refer evidence to OPM for possible action.

We have also modified the title of section 731.105 to read "Authority to take suitability actions" instead of "Jurisdiction" to clarify that this regulation concerns only authority to take suitability actions and has nothing to do with an agency or OPM's authority to conduct investigations.

Commenters felt this section needed clarification to eliminate the perception that if the investigation is not conducted within the first year, it can never be conducted. To address this concern we added language to 731.104(b) and also modified 731.106(c).

An agency requested further clarification of this section to avoid the interpretation that agencies are restricted from conducting investigations on transfers for individuals serving continuously for less than one year.

The agency misreads the regulation. A transfer is not subject to investigation unless investigation is required by a change in risk level or because an investigation required by law did not occur. Therefore, we have not changed the proposed regulation.

A commenter requested that we clarify whether investigation and negative suitability action are permitted when an individual moves from a position that is not subject to investigation to one with a higher risk designation. We revised 731.106(e) to require an investigation at the appropriate level when an individual moves to a position with a higher risk designation. We also added a new section, 731.106(f), to explain that how these investigations are adjudicated depends on the person's employment status.

Section 731.105 Jurisdiction

One commenter found the language in 731.105(d) regarding the authority for agency actions on employees unclear. Another suggested adding specific clarifying language, and that reference to "efficiency of the service" be deleted since all 752 actions, by definition, must promote the efficiency of the service.

We agreed to clarify the language, which could be interpreted as intermingling adverse actions and suitability actions. The minor changes in the language ensure that readers understand that suitability actions and adverse actions arise under different authorities and that adverse actions are to be taken under the substantive standards of part 752, as well as its procedures. Although an agency may take an adverse action based upon conduct that would also form the basis for a suitability action, part 752 standards and jurisprudence govern an adverse action rather than the substantive standards set forth in part 731.

Section 731.106 Designation of Public Trust Positions and Investigative Requirements

One commenter stated that OPM has significantly broadened the definition of a public trust position. The commenter conceded that the differences between the proposed regulation and existing regulations are subtle. The commenter asserts that this subtle modification will encourage agencies to indulge in what is deemed their natural tendencies to exaggerate the sensitivity of positions.

There is no indication that this change will create a significant increase in the number of investigations conducted. Further, we reject the unsupported assertion that agencies are naturally impelled to exaggerate the sensitivity of positions. Rather, agencies are entitled to a presumption of good faith, and OPM expects that they will not abuse any authority arising from these regulations. Of course, agency implementation of any OPM regulation is subject to periodic OPM oversight.

A suggestion to simplify designation to coincide with the three investigative forms (SF85, SF85P, and SF86), eliminate the levels of public trust and the requirement that agencies evaluate all their positions to determine risk levels and decide which of the positions meet public trust definitions, was not adopted. In the comments we previously received to the proposed regulations published in the **Federal Register** on January 5, 1996, a number of agencies expressed concern that OPM had eliminated risk level designations and left too much agency discretion in determining what constituted "Public Trust" positions.

We agreed and made appropriate revisions. We also believe agencies should look closely at all their positions to determine the level of risk involved, and since public trust responsibilities vary in their impact on the integrity or on the efficiency of the service,

investigative requirements should also vary commensurate with the risk level. Furthermore, public trust and national security need to be appropriately considered in tandem when evaluating position responsibilities and investigative levels. A national security case (SF-86) where an individual only needs a secret clearance (relatively low level of investigation) might also be a high risk public trust position (higher level of investigation). A person in a low risk public trust position (low level investigation) might require access to top secret information (high level investigation).

One commenter stated that the proposed regulations imply that where there is no existing authority for agencies to conduct periodic investigations of public trust employees, agencies may grant themselves this authority by promulgating their own regulations. The comment describes this as inconsistent with the position that OPM took in its 1996 proposed regulations, namely, that there was no statutory authority for agencies to conduct reinvestigations.

There is no inconsistency. Read in its entirety, the supplementary material accompanying the 1996 proposed regulations makes clear that OPM does not possess statutory authority to require that reinvestigations be conducted unless employees occupy positions affecting national security. The 1999 proposed regulations clarify that agencies may possess their own authority to require periodic reinvestigations for employees occupying certain public trust positions. These final regulations do not purport to create any additional authority for agencies to conduct this type of reinvestigation.

Two commenters found "731.106(e) Risk level changes" language confusing. We agreed and changed the wording.

Sections 731.201 Standard and 731.202 Criteria

One commenter suggested that the revised language in section 731.201 represents a significant change in the suitability standard and that the "integrity and efficiency" language was too vague and gave deciding officials too much discretion. The commenter suggested that deletion of language in section 731.202 would mean there is no limitation on criminal misconduct deemed to be unsuitable. The commenter suggested not revising the existing regulation.

The comment is not accepted. The revised regulation is designed primarily to be a rewording and reordering of the regulation in order to place affected

applicants and employees on even clearer notice of the suitability standards.

The current efficiency of the service language might inadvertently lead some to believe that efficiency and effectiveness are limited to their dictionary definitions, namely, the capacity to produce desired results with a minimum expenditure of energy, time or money, or the ability to produce results. In fact, the efficiency of the service standard as used by OPM in a suitability context always has been a broader concept that involves, among other things, the integrity of the competitive examination system. To give one example, decisional law correctly recognizes when an applicant obtains an appointment through falsifying an application, he or she is unsuitable and may be removed from his or her position even if he or she efficiently carries out tasks in the job he or she has obtained. *McCreary v. OPM*, 27 M.S.P.R. 459 (1985); *DeAngelis v. OPM*, 28 M.S.P.R. 456 (1985). Adding the word integrity makes it even clearer that integrity and honest conduct always have been an important part of the existing efficiency of the service standard.

The revised standard is not vague. Indeed, it is somewhat more specific than the existing efficiency of the service standard. The courts have upheld similar language against legal challenges of constitutional vagueness, for example, in *Arnett v. Kennedy*, 416 U.S. 134 (1974); see also *Meehan v. Macy*, 392 F.2d 822 (D.C. Cir. 1968).

The suggestion that the revised regulations recognize no limit on the type of misconduct or criminal misconduct that will justify a suitability action is incorrect. The additional considerations set forth in section 731.202(c) make clear that a suitability determination may be made after considering the nature of the position, the nature and seriousness of the conduct and the circumstances surrounding the conduct, among other things.

An agency asked whether the specific factor at 731.201(b)(4) "Refusal to furnish testimony as required by § 5.4 of this chapter" referred to section 5.4 of 731. It does not. The proposed regulation as written was confusing. Federal regulations are organized by Title in the Code of Federal Regulation rather than by "chapters."

Therefore, we have modified the proposed regulation by substituting the word "title" for "chapter" to clarify that this provision refers to section 5.4 of title 5, Code of Federal Regulations, one of the Civil Service Rules.

The same agency suggested that we add, in accordance with section 5.4, that this suitability factor also pertains to the requirement to provide forms, releases, answers to questions of investigators, and security adjudicators, among others. We have not adopted this suggestion. Although section 5.4 does list other requirements, the suitability factor is limited to the requirement in section 5.4 to provide testimony when required by OPM. We decline to expand the scope of the disqualifying factor.

Section 731.203 Actions by OPM and Other Agencies

One commenter suggested that there appeared to be a conflict between the procedures set forth in section 731.203(e) and those at subpart C of the regulations.

OPM did not intend a conflict between the two provisions. Section 203(e) was intended to provide general procedures for both agencies and OPM to follow when taking a suitability action. Subpart C was designed to provide the specific procedures OPM was to follow when taking an action.

We acknowledge this could cause some confusion. Therefore, we have eliminated the subsection on general procedures and have substituted a subpart D that applies when agencies take an action.

Because we have expanded agencies' authority in the areas of debarment and applicant adjudication, we decided to set forth several of the procedures applicable to them with greater specificity. We have modified both the regulatory provisions applying to OPM and agencies to make clear that whenever OPM or an agency takes an action, a written notice must be provided of the specific reasons for the action, a written response must be permitted, and notice must be provided of the time limit for the response and appeal rights.

Still, to give agencies a bit more flexibility, we have retained some differences in the provisions. We have not set forth a specific time limit for agency notice. Rather, we clarified that reasonable notice must be afforded. For OPM actions, we have retained a 30-day notice period. Of course, if an action is appealed, the harmful error rule at 5 U.S.C. § 7701(c)(2)(A) applies both to agency and OPM actions.

For clarity, we have added subsection 731.203(a) defining the term "action" for suitability purposes.

Two commenters questioned whether 731.203(f) [now 731.203(e)] represents an additional reporting requirement since agencies are already required to report actions on OPM investigations

via INV form 79A, *Report of Adjudicative Action on OPM Personnel Investigations*. This section does contain a new reporting requirement. All negative adjudications based on delegated 5 CFR 731 authority must now be reported to OPM, even when those actions are not based on an OPM conducted investigation. This is necessary to permit OPM to adequately oversee the suitability adjudication responsibilities we have delegated to agencies. A new form is being created for this purpose, but agencies will not need to provide a duplicate report if the action is based on an OPM investigation and they are already reporting the action on the INV form 79A.

Section 731.204 Debarment by OPM

An agency requested that agencies be given the ability to appeal an OPM-imposed debarment when the position is critical and difficult to fill and there are no other suitable applicants. We made no change since agencies already have the right to respond to an OPM proposed action under section 731.303(b), and may provide evidence upon request in any MSPB appeal.

Section 731.205 Debarment by Agencies

An agency welcomed the opportunity to bar unsuitable employees. Another found the agency debarment language unclear. We believe the language satisfactory, and made no change. The language in this section states that agencies may impose a period of debarment of "no more than" one year, and that the agency has sole discretion to determine length of debarment "under this section." It is within their discretion to determine the duration of the bar, up to the maximum period of one year.

Section 731.302 Notice of Proposed Action

A commenter objected to the provision "shall be entitled to be retained in a pay status during the notice period" because the individual may be involved in misconduct apart from the reasons for the suitability action which would warrant an agency action.

We have retained the proposed language. But, we emphasize that this provision does not preclude an agency from taking any other appropriate action during the suitability action notice period. Appropriate actions may include an adverse action under chapter 75 U.S. Code or a termination under part 315, title 5, Code of Federal Regulations.

Section 731.303 Answer

One commenter suggested the agency be permitted to determine the time and place of an oral response. Another suggested that reference to agency actions should be added to paragraph (a). No change was made since this section now only applies to OPM. Furthermore, only OPM, not agencies, may take action against "employees" under 731. The reference to the oral response here applies *only* to employees.

Section 731.304 Decision

A commenter felt the agency should have discretion to allow the employee to remain in an active duty status pending results of an appeal. We made no change for several reasons. OPM directs removal primarily in cases involving fraud in the application or appointment process, and an individual generally should not retain a position obtained fraudulently. Further, OPM gives agencies an opportunity to comment and express their views before OPM takes the action.

Section 731.401 Appeal to the Merit Systems Protection Board

One commenter stated that section 731.401 (now 731.501) should make clear that the Board lacks the authority to reverse a removal action, as well as lacking the authority to modify a debarment period, when it affirms a determination of unsuitability. It noted correctly that under OPM regulation, an agency could remove the employee and not impose a debarment. OPM has adopted this suggestion, which is entirely in keeping with OPM's intent to clarify that once the Board has found that any of the charges of unsuitability is supported by preponderance of the evidence, it lacks authority to modify the action taken.

Another commenter took issue with OPM's section 731.401 (now 731.501), asserting that, in the past, the courts have rejected OPM's attempts to limit the Board's authority to hear appeals.

The comment does not acknowledge the difference between an appeal right to the Board granted by Congress, such as an adverse action appeal under Chapter 75, title 5, United States Code, which OPM may not limit, and one granted solely by OPM through regulation. The comment also does not recognize that when Congress or OPM authorizes the Board to hear a particular kind of appeal, the Board's grant of authority is limited by the terms of the statute or OPM regulation and its underlying intent.

The Board's authority to decide matters is strictly limited to those

agency decisions placed within its jurisdiction by law or regulation. See, for example, *King v. Jerome*, 42 F.3d 1371 (Fed. Cir. 1994). An OPM suitability action is not taken under the same authority as an adverse action. Unlike adverse action appeals, suitability appeals to MSPB are not created by an act of Congress but by OPM regulations under substantive standards promulgated by OPM in Part 731. These standards need not be the same as those in Chapter 75, just as those contained in Chapter 43, title 5, United States Code pertaining to performance-based actions are not the same as those in Chapter 75. *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558 (Fed. Cir. 1985).

The new regulation seeks to demarcate the differences between suitability actions and adverse actions so that no one will confuse them in the future. Specifically, the regulation is designed to clarify that the Board's role in reviewing OPM or agency unsuitability decisions always has been a limited one. The Board may determine only whether a charge of unsuitability is sustained by a preponderance of the evidence in accordance with the substantive standard set forth in section 731.202.

In addition, the proposed regulation provides OPM or the agency with an additional opportunity to amend the action taken if the Board sustains fewer than all of the suitability charges, something that the existing regulations do not provide for. Therefore, rather than limiting the Board's authority, as the comment suggests, the new regulation allows the agency or OPM to review the action taken after taking into account only the charges that the Board sustained.

Regulatory Flexibility Act

I certify that this rule will not have significant economic impact on a substantial number of small entities because it affects only Federal applicants, employees and agencies.

List of Subjects in 5 CFR Part 731

Administrative practice and procedure, Government employees.

Office of Personnel Management.

Janice R. Lachance,
Director.

Accordingly, the Office of Personnel Management revises 5 CFR part 731 as follows:

PART 731—SUITABILITY

Subpart A—Scope

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Subpart E—Appeal to the Merit Systems Protection Board

- 731.501 Appeal to the Merit Systems Protection Board.

Subpart F—Savings Provision

- 731.601 Savings provision.

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.

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 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 passover 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 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* means calendar days.

§ 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 DE of this part. OPM shall also notify the respondent’s employing agency of its decision.

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.

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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 225

RIN 0584–AC23

Summer Food Service Program Implementation of Legislative Reforms

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule, with technical amendments.

SUMMARY: This rule makes final an interim rule published in the **Federal Register** on December 28, 1999. This final rule adopts the changes made to the Summer Food Service Program by the interim rule as mandated by three public laws—the Healthy Meals for