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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 315, 432, and 752

RIN 3206–AO23

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: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations governing probation on initial appointment to a competitive position, performance-based reduction in grade and removal actions, and adverse actions. The final rule rescinds certain regulatory changes made effective on November 16, 2020, and implements new statutory requirements for Merit Systems Protection Board (MSPB) procedural and appeal rights for dual status National Guard technicians for certain adverse actions. OPM believes the final revisions will support implementation of an Executive order to empower agencies to rebuild the career Federal workforce and protect the civil service rights of their employees, while preserving appropriate mechanisms for pursuing personnel actions where warranted.

DATES: Effective December 12, 2022.

FOR FURTHER INFORMATION CONTACT: Timothy Curry by email at *employeeaccountability@opm.gov* or by telephone at (202) 606–2930.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is issuing revised regulations governing probation on initial appointment to a competitive position; performance-based reduction in grade and removal actions; and adverse actions, mindful of the President's expressed policy direction and under its congressionally granted authority in 5 U.S.C. 3321, 4305, 4315, 7504, 7514 and 7543. On January 22, 2021, President Biden issued Executive Order (E.O.) 14003 on ''Protecting the Federal Workforce'' which, among other things, revoked E.O. 13839 and directed agencies to ''as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, the actions'' implementing various E.O.s, including E.O. 13839, ''as appropriate and consistent with applicable law.'' E.O. 14003 states that ''[c]areer civil servants are the backbone of the Federal workforce, providing the expertise and experience necessary for the critical functioning of the Federal Government. It is the policy of the United States to protect, empower, and rebuild the career Federal workforce. It is also the policy of the United States to encourage employee organizing and collective bargaining. The Federal Government should serve as a model employer.''

These revisions both effect statutory requirements and support agency efforts in implementing E.O. 14003, as well as advance agencies' efforts to fulfill their mission and achieve superior results for the American people. With respect to statutory requirements, we have made changes to be consistent with the requirements for dual status National Guard technicians in Public Law 114–328 (Dec. 23, 2016). Additionally, we have made regulation changes to be consistent with statutory requirements for procedures under the Whistleblower Protection Act. Therefore, in accordance with E.O. 14003, OPM issued proposed regulations published at 87 FR 200, January 4, 2022, to rescind portions of the final rule published at 85 FR 65940, October 16, 2020. The proposed regulations provide agencies the necessary tools and flexibility to address matters related to unacceptable performance and misconduct or other matters contrary to the efficiency of the service, by Federal employees when they arise, consistent with the policies of E.O. 14003. Pursuant to Public Law 114–328 (Dec. 23, 2016), OPM also proposed to revise its regulations on coverage for performance-based actions and adverse actions appealable to the MSPB in accordance with statutory changes that extend title 5 rights to dual status National Guard technicians under certain conditions.

After consideration of public comments on the proposed regulations, OPM is now issuing these revised regulations. These revisions not only implement statutory requirements and support agency efforts in implementing E.O. 14003 but also facilitate the ability of agencies to deliver on their mission and provide the best possible service to the American people.

Public Comments

In response to the proposed rule, OPM received 31 comments during the 30-day public comment period from a variety of individuals, including current and retired Federal employees, labor organizations, Federal agencies, management associations, organizations, a law firm, and the general public. At the conclusion of the public comment period, OPM reviewed and analyzed the comments. In general, comments ranged from enthusiastic support of the proposed regulations to categorical rejection. Many commenters expressed support or non-support only on particular portions of the regulations without addressing other aspects of the rule. Many of those in support of the regulatory changes cited the benefit of returning more discretion to agencies to allow them to best manage the Federal workforce with efficiency and effectiveness.

OPM's discussion in the supplementary information of *Santos* v. *Nat'l Aeronautics and Space Admin.,* 990 F.3d 1355 (Fed. Cir. 2021), received a significant number of comments. The national unions and other commenters except for one agency who specifically mentioned *Santos* voiced objection to OPM's discussion regarding *Santos,* with a national union requesting that the discussion be clarified or withdrawn. The agency stated no opinion on OPM's treatment of *Santos*.

The clean-record agreement was another issue that received a substantial number of comments. Some commenters expressed agreement with the clean-record settlement portion of the rule. Other commenters vigorously commended the restoration of clean-record agreements but disagreed with certain aspects of this provision, and finally there were commenters who disagreed with the rescission.

The commenters who categorically disagreed with the proposed rule and those commenters who were silent on the rule overall and only cited

opposition to particular portions raised various areas of concern such as: OPM's position on *Santos,* clean-record agreements, removal of the notification for the end of the probationary period, the rescission of the requirements regarding penalty determination, the agency's obligation to provide assistance to an employee who has demonstrated unacceptable performance, and the lifting of the requirement to issue the decision on a proposed removal within 15 business days of the conclusion of the employee's opportunity to respond.

OPM reviewed and carefully considered all comments in support of and in opposition to the proposed changes. The significant comments are summarized below, along with the suggestions for revisions that we considered and did not adopt. In addition to substantive comments, we received some comments that were not addressed below because they were beyond the scope of the proposed changes to regulations or were vague or incomplete. Finally, comments that were received after the due date for comments or not identified by the docket number or Regulation Identifier Number (RIN) for this proposed rulemaking, as required by the notice of proposed rulemaking, were not addressed below.

In the first section below, we address general or overarching comments. In the sections that follow, we address comments related to specific portions of the regulations.

General Comments

National unions, as well as some organizations, Federal employees, and members of the public expressed strong support for many of the changes. Some national unions urged OPM to issue its final rule promptly, notwithstanding their objections to portions of the rule. A national union remarked that OPM's adoption of the proposed rule changes as written as soon as possible would provide immediate benefit to the employees they represent. Another national union declared that rescission of certain regulatory changes that implemented E.O. 13839 and which were made effective on November 16, 2020, was not only necessary because of E.O. 14003 but also ''sound policy.'' This national union declared that given E.O. 14003's explicit direction, OPM's rescission of its November 2020 regulatory changes is ''appropriate and indeed imperative as a matter of law'' and that ''[r]escission is also sound policy.'' Further, the national union emphasized that E.O. 13839 and OPM's implementing regulations ''eviscerated federal employees' rights and were grossly unfair to hard working civil servants.'' Another national union observed that the proposed rule would bring OPM's regulations into better alignment with the plain text of chapter 43 and chapter 75 of title 5 of the U.S. Code. The national union further asserted that ''Title V does not elevate the need for efficient government above the requirement of due process and fundamental fairness for federal employees.'' Additionally, this national union stated that ''[r]escission would therefore be appropriate even in the absence of Executive Order 14003 because the changes made by the 2020 Rule were contrary to law.'' A local union endorsed the rulemaking action, especially restoring the ability to make clean-record agreements.

Some organizations stated that they generally supported revocation of E.O. 13839 through the issuance of E.O. 14003 and as a result welcomed OPM's rulemaking. An organization reported that their members have observed the damaging effects of the November 2020 rule that this organization predicted in their comments at the time. Another organization concurred with this observation. These organizations, one concurring with the other's comment submissions, welcomed OPM's compliance with E.O. 14003 in the present rulemaking and looked forward to ''the striking of the harmful provisions of E.O. 13839 from the Code of Federal Regulations at the earliest practicable date.''

A commenter said the proposed rule was a ''necessity'' in certain areas of the Federal Government. Another individual voiced support for the changes as well and remarked that ''[t]his proposed rule is [a] necessity in high flux parts of federal agencies.'' Many commenters in support of the regulatory changes noted the benefit of returning more discretion to agencies to allow them to best manage the Federal workforce with efficiency and effectiveness.

Pursuant to E.O. 14003, OPM has reviewed the prior regulations, which implemented certain requirements of E.O. 13839, and concluded that some provisions of the amendments of November 2020 are contrary to the current policy of the United States. The final rule effectuates E.O. 14003 requirements and allows agencies to implement policies most suitable for each respective agency based on its unique circumstances. OPM believes the rule establishes procedures and requirements needed to support managers in addressing unacceptable performance and misconduct and related matters impacting the successful operation of the Federal Government while simultaneously preserving employees' rights and protections.

An individual commenter asked ''[t]o what extent will this rule affect removal and adverse actions?'' As discussed in each pertinent portion of this final rule, this rulemaking affects adverse actions, including removals, in several ways. Regarding penalty considerations, the rule rescinds these provisions and explains in detail the reasons for doing so and OPM's views. They are: an express provision that an agency is not required to use progressive discipline; adoption of the test for appropriate comparators in *Miskill* v. *Social Security Administration,* 863 F.3d 1379 (Fed. Cir. 2017); adoption of the standard that requires consideration of, among other factors, an employee's disciplinary record and past work record as applied by the Merit Systems Protection Board (MSPB or the Board) in *Douglas* v. *Veterans Administration,* 5 M.S.P.R. 280 (1981); and the requirement that suspension should not be a substitute for removal. As well, OPM removed the express language limiting response and decisional periods for adverse actions, including removals. In addition, as discussed above, the rule changes the coverage criteria for dual status National Guard technicians to be consistent with Public Law 114–328 for certain adverse actions.

Other commenters expressed concerns about the proposed rule. An organization commented that ''the wholesale rescinding of these commonsense ideas was not only premature, but ill-advised and harmful to the overall management of the federal workforce.'' Another individual expressed that ''the proposed rules do the exact opposite of its stated purpose to empower agencies to rebuild the career Federal workforce and protect the civil service rights of their employees.'' This commenter went on to state that the proposed rule instead limits both an agency's ability to take an action against a Federal employee when warranted and the agency's ability to rebuild a productive Federal workforce. Also expressing disagreement with the rescissions of certain regulatory changes that implemented E.O. 13839 and which were made effective on November 16, 2020, an individual said it was ''an attack'' on the former administration. Additionally, a commenter stated that the November 2020 regulations should remain as they were better suited to hold a workforce accountable. Another commenter supported keeping the regulations the way they were, except for the rescission of the clean-record agreement, because ''[s]ome of the

changes implemented by the subject regulations made it easier to ensure good order and discipline within the civilian workforce and to ensure that the relevant processes are more streamlined than before them. There are certain aspects that should be kept.''

We disagree with the general assertions contesting promulgation of these rules and the characterization that they are ill-considered, detrimental, and ineffective. We also do not concur with the commenters' depiction that the proposed rules are restrictive and the prior rules were better suited for workforce accountability. E.O. 14003 requires OPM to rescind portions of the OPM final rule which implemented certain requirements of E.O. 13839. In fact, E.O. 14003 directs agencies to ''as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, the actions.'' We believe that the proposed revisions retain applicable statutory mandates while continuing to provide agencies the necessary tools and flexibility to address matters related to unacceptable performance and misconduct or other matters contrary to the efficiency of the service by Federal employees when they arise, consistent with the policies of E.O. 14003. For example, this final rule provides several necessary tools, such as previous longstanding flexibilities enjoyed by agencies in how to address performance issues with their employees under chapter 43 of title 5 of the United States Code regarding decisions on when and how performance assistance is provided to employees. The final rule also restores agencies' ability to resolve informal and formal complaints at an early stage and with minimal costs to the agency.

A management association stated they are ''[o]verall extremely concerned by and confused about the proposed changes to current regulations.'' Another management association stated that it was ''deeply concerned by these proposals and the impact they may have across our workforce.'' One of these management associations declared with regard to the November 2020 rule: ''where clarity had been provided, it has been replaced with opacity and confusion.'' Correspondingly, the other management association asserted that the clarity of the November 2020 rule ''has been replaced with bureaucratic doublespeak.''

We disagree with the management associations' claim that the proposed rule is obscure and confusing. We do not believe that the rule is unclear or is difficult to comprehend as these regulatory changes restore well-established principles and practices that are familiar to Federal agencies and have proven to be successful tools to support managers in addressing unacceptable performance and promoting employee accountability for performance-based reduction-in-grade, removal actions, and adverse actions while recognizing employee rights and protections.

Two management associations expressed that it is ''disconcerting'' that the proposed rule is based entirely on a shift in policy rather than on well-founded data and evidence which should be the approach used by OPM. They emphasized this point by stating that OPM has virtually no data on the extent to which adverse actions were pursued under the current regulations that are being proposed for rescission, and OPM's lack of collection of basic data or discontinuance of data collection from agencies on performance-based and adverse actions and settlement agreements ''is not a way to run the largest employer in the nation.''

An agency's ability to repeal an existing regulation through notice-and-comment rulemaking is well-grounded in the law. The APA defines ''rule making'' to mean ''agency process for formulating, amending, or repealing a rule.'' 5 U.S.C. 551(5). Agencies ''are free to change their existing policies as long as they provide a reasoned explanation for the change.'' *See Encino Motorcars, LLC* v. *Navarro,* 136 S. Ct. 2117, 2125 (2016); *see also* 82 FR 34901; 83 FR 32231. Agencies may seek to revise or repeal regulations based on changes in circumstance or changes in statutory interpretation or policy judgments. *See, e.g., FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 514–15 (2009) (''*Fox*''); *Ctr. for Sci. in Pub. Interest* v. *Dep't of Treasury,* 797 F.2d 995, 998–99 & n.1 (D.C. Cir. 1986). Indeed, the agencies' interpretation of the statutes they administer are not ''instantly carved in stone''; quite the contrary, the agencies ''must consider varying interpretations and the wisdom of [their] policy on a continuing basis, . . . for example, in response to . . . a change in administrations.'' *Nat'l Cable & Telecommunications Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 981–82 (2005) (''*Brand X*'') (internal quotation marks omitted) (quoting *Chevron U.S.A., Inc.* v. *NRDC,* 467 U.S. 837, 863–64 (1984)) (citing *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part)). Revised rulemaking based ''on a reevaluation of which policy would be better in light of the facts'' is ''well within an agency's discretion,'' and ''[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal'' of its regulations and programs. *Nat'l Ass'n of Home Builders* v. *EPA,* 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (''*NAHB*'').

Agencies are free to change their existing policies as long as they provide a ''reasoned'' explanation. *See, e.g., National Cable & Telecommunications Assn.,* 545 U.S. at 981–982; *Chevron,* 467 U.S. at 863–864. This does not require the agency to ''demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one.'' *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 514, (2009). A stronger justification may be required if the agency's prior position ''may have engendered serious reliance interests that must be taken into account.'' *Encino Motorcars, LLC* v. *Navarro,* 136 S. Ct. 2117, 2131 (2016) (internal quotation marks and citation omitted). Here, however, the 2020 final rule was effective on November 16, 2020, and Executive Order 14003 issued just two months later, on January 22, 2021. Under the circumstances, OPM does not believe that the November 2020 final rule was in effect long enough to create significant reliance interests because of the brief time period to effect a change in agency policy to conform to any new final OPM regulation or for agencies to actually apply any change that may have been made. With almost 57% of the Executive Branch workforce represented by labor unions in over 1,800 bargaining units, agencies also needed to satisfy any applicable collective bargaining obligations with unions prior to implementation of the new final OPM regulation and related agency policy which conforms to the OPM regulation.

5 CFR Part 315, Subpart H—Probation on Initial Appointment to a Competitive Position

The regulations at subpart H of 5 CFR part 315 provide information regarding agency action during a probationary period. The November 2020 amendment required agencies to notify supervisors, at least three months prior to expiration of the probationary period, that an employee's probationary period is ending, and then again one month prior to expiration of the probationary period, and to advise a supervisor to make an affirmative decision regarding the employee's fitness for continued employment or otherwise take appropriate action. Under its authority at 5 U.S.C. 3321, OPM proposed to rescind its November 16, 2020,

amendment to regulations at § 315.803(a) for two reasons. First, E.O. 14003 directs OPM to rescind any regulations effectuated by E.O. 13839, as appropriate and consistent with applicable law. Second, OPM has concluded that the amendment to the regulations at § 315.803(a), although useful to some agencies that may not have used the probationary period to full effect, placed unnecessarily restrictive procedural requirements on agencies regarding how agencies administer the probationary period. OPM has reconsidered the wisdom of a categorical, centralized rule, and has concluded that it is more efficacious and eminently reasonable to rescind this provision so that agencies feel free to adopt any procedures that work best for them for reminding supervisors not to overlook the expiration of employee probationary periods.

Some national unions supported OPM's proposed rescission of the probationary period expiration notice requirements with one national union describing the current requirements as being ''unnecessary''. This national union expounded that these requirements sent the wrong message ''that termination should be at the forefront of a supervisor's mind.'' Further, this commenter expressed hope that OPM's proposed change will reinforce to agencies that supervisors should instead be focused on helping probationary employees succeed. Another national union commented that OPM is correct to amend this provision. However, this national union mischaracterized the change by stating that OPM is ''eliminating the language requiring an affirmative supervisory determination prior to the expiration of the probationary period''. The former regulation merely provided for specific points during an employee's probationary period (*i.e.,* three months and one month) at which agencies must give advance notice to supervisors of expiration of probationary periods.

This commenter further asserted that the current regulation created the incorrect impression that an employee must receive an affirmative supervisory determination to successfully complete the probationary period. This national union added that the probationary period for Federal civilian employees, however, is controlled by statute and contains no such requirement.

While OPM recognizes one national union's support of the rescission of the November 2020 probationary period amendments, OPM notes that it is incorrect to interpret the proposed rule at § 315.803(a) as instructing agencies to focus on ''helping probationary employees succeed'' during the probationary period rather than termination. The probationary period is the final step in the examination process. Thus, probationers are candidates for final appointment, and, accordingly, the focus of supervisors should be to assess probationers to determine whether they should be retained beyond the probationary period. At most, the November 2020 regulatory amendment reminded supervisors of their responsibility to make an affirmative decision and not allow a probationer to become a career employee merely by default; it did not alter the decision-making process nor did it in any way alter the regulatory structure currently in place that governs the decision-making process for probationers.

Another commenter recommended changing the language ''The agency shall utilize the probationary period as fully as possible'' to the language ''The agency shall utilize the probationary period fully'' in the first sentence of § 315.803(a).

We are not adopting this recommendation because the proposed regulatory language better emphasizes that an agency must utilize the probationary period to the maximum extent based on the particular facts and circumstances, recognizing that the probationary period is the last and crucial step in the examination process. Supervisors must determine the employee's fitness for continued employment; this can be assessed in several ways, including but not limited to, closely monitoring and documenting the employee's performance and progress during the employee's first year of employment and providing timely and meaningful feedback to the employee; providing training that would enable the employee to more successfully perform the duties of the position; and placing the employee on a performance improvement plan as appropriate.

Despite some support for the proposed rule, OPM received comments from those who expressed opposition and concern. One organization expressed that the probationary period has not been effectively used and supported the requirement to notify management at the 90-day point. This commenter was perplexed by the rescission of the requirement to notify management at the 90-day point of an employee's probationary period which they viewed as an ''innocuous notice.'' The organization stated that they understood the rescission was required by E.O. 14003 and appreciated that OPM continues to encourage agencies to provide managers with notifications when probationary periods are expiring.

Two management associations also strongly opposed OPM's proposal to rescind the requirements at § 315.803(a). In the management associations' view, ''[t]his issue is too important to leave up to agencies, who have proven themselves incapable of self- regulation and proper use of the probationary period.'' The management associations stated that probationary periods are a critical tool for effective employee onboarding. These commenters discussed ''countless reports'' from the MSPB and Government Accountability Office (GAO) that highlight the ''government's inconsistent and poor use of the probationary period for new hires and for new supervisors.'' These management associations also asserted that a core finding of those reports is that managers do not properly use the probationary period because managers are not reminded when an employee's probationary period is reaching its conclusion. They contended that when the probationary period ends, employees are automatically deemed fit for service. These commenters further maintained that the probationary period ''is meant to be the last crucial step in the examination process, yet instead, it is largely obsolete and formalistic.'' The management associations stated that to improve the practical usefulness of probationary periods, agencies need to create systems for providing many advance notices that an employee's probationary period is concluding and require supervisors to make an affirmative determination regarding the employee's completion of their probationary period. The commenters declared that when the probationary period is not used appropriately then employees are not ''set up for success and may be entrenched in roles they cannot perform.'' One association opined that determinations regarding probationary periods should be made by permanent managers while another association stated that it is imperative that agencies make appropriate use of the probationary periods for not only new hires, but also for new supervisors and executives.

OPM will not make any revisions based on these comments. As stated earlier, E.O. 14003 directs OPM to rescind any regulations effectuated by E.O. 13839, as appropriate and consistent with applicable law. OPM has concluded that the amendment to the regulations at § 315.803(a) placed centralized categorical procedural requirements on how agencies administer the probationary period. OPM believes these requirements

prevented agencies from implementing policies most suitable for each respective agency based on their unique circumstances. While agencies are encouraged to notify supervisors that an employee's probationary period is ending, OPM believes the frequency and timing of notifications should be left up to the discretion of each agency. The commenters noted the critical nature of the probationary periods, and 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 expeditiously, with minimum burden to the agency, 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. As a matter of good administration, agencies should ensure that their practices make effective use of the probationary period. While OPM proposed to rescind a government-wide requirement to notify supervisors at prescribed intervals when an employee's probationary period is ending, agencies would not be precluded from providing such notifications under their own authorities and are strongly encouraged to do so. OPM plans to issue a Chief Human Capital Officers (CHCO) Memorandum to encourage agencies to adopt a notification process.

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

Section 432.102 Coverage

Section 432.102 identifies actions and employees covered by this part. The final rule at § 432.102 updates coverage to align with the National Defense Authorization Act (NDAA) for Fiscal Year 2017, Public Law 114–328 (Dec. 23, 2016). Specifically, section 512(a)(1)(C) of the 2017 NDAA provides appeal rights under 5 U.S.C. 7511, 7512, and 7513 to dual status National Guard technicians for certain adverse actions. Section 512(c) repealed 5 U.S.C. 7511(b)(5), which excluded National Guard technicians from the definition of ''employee.''

The repeal of 5 U.S.C. 7511(b)(5) and the coverage of National Guard technicians under 5 U.S.C. 7511, 7512, and 7513 required that OPM review 5 U.S.C. 4303. Section 4303(e) provides that any employee who is a preference eligible, in the competitive service, or in the excepted service and covered by subchapter II of chapter 75, and who has been reduced in grade or removed under this section is entitled to appeal the action to the MSPB under section 7701.

Accordingly, MSPB appeal rights must be extended to National Guard technicians who are defined in section 4303(e) for consistency with the statutory requirements in Public Law 114–328. OPM will revise paragraphs (b) and (f) of § 432.102 to reflect that certain performance-based actions against dual status National Guard technicians are no longer excluded. Specifically, the final rule adds as an exclusion an action against a technician in the National Guard concerning any activity under section 709(f)(4) of title 32, United States Code, except as provided by section 709(f)(5) of title 32, United States Code. In addition, the final rule removes the exclusion at § 432.102(f)(12): ''A technician in the National Guard described in 5 U.S.C. 8337(h)(1), employed under section 709(b) of title 32.'' The impact of the repeal of 5 U.S.C. 7511(b)(5) on adverse actions taken under chapter 75 will be further discussed below in the Supplementary Information for § 752.401.

Two organizations, one concurring with the other's comment submissions, expressed support for the extension of civil service protections to National Guard technicians under Public Law 114–328 as well as support for OPM's inclusion of an implementing regulation for that statute in this rule.

Section 432.104 Addressing Unacceptable Performance

This section provides requirements in chapter 43 of title 5 of the United States Code for addressing unacceptable performance. While the regulatory amendments to part 432 made effective November 16, 2020, are within OPM's existing authority under 5 U.S.C. 4303 and 4305, E.O. 13839 was the catalyst for the changes. OPM proposed to amend the regulation at § 432.104 to remove the following language: ''The requirement described in 5 U.S.C. 4302(c)(5) refers only to that formal assistance provided during the period wherein an employee is provided with an opportunity to demonstrate acceptable performance, as referenced in 5 U.S.C. 4302(c)(6). The nature of assistance provided is in the sole and exclusive discretion of the agency. 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.'' In addition, OPM will re-insert at § 432.104 a statement that was in the regulation prior to the November 2020 amendment: ''As part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance.''

Some national unions expressed support for OPM's proposed changes to § 432.104. One union stated that OPM's November 2020 regulatory changes limited the types of assistance and opportunities that agencies could offer to employees to help them demonstrate acceptable performance. The union added, ''Employees deserve a full and fair opportunity to improve their performance with assistance from their employer.'' Moreover, this national union stated agencies should have the needed flexibility to help employees improve their performance to an acceptable level. One of these national unions offered comments of support on sections §§ 432.104 and 432.105 which were identical to each other and are addressed in § 432.105.

Indeed, this rule reverts to the language in § 432.104 prior to the November 2020 amendments regarding the agency's obligation to provide assistance to an employee who has demonstrated unacceptable performance. The language restates the statutory requirement described in 5 U.S.C. 4302(c)(5) that agencies are obligated to provide performance assistance during the opportunity period. In the proposed rule, OPM emphasized that the employee has a right to a reasonable opportunity to improve, which includes assistance from the agency in improving unacceptable performance.

Though two organizations expressed general support for this rulemaking, they mischaracterized OPM's November 2020 rulemaking. One organization, with which the other concurred, erroneously referred to ''rules which set fixed durations for Performance Improvement Periods (PIPs)'' and stated that such rules ''resulted in arbitrarily inflexible PIP timeframes rather than the prior tailoring of PIPs to the nature of the work involved''. The organizations credit OPM with restoring agencies' discretion in these matters. OPM points out that there was no restriction on the duration of PIPs or tailoring of PIPs to

the nature of the work involved in our prior rulemaking. Specifically, OPM did not amend the language in § 432.104 that reads, ''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.''

Two management associations disagreed with OPM's proposal to amend § 432.104. The management associations expressed concern that the proposed revisions to § 432.104 would rescind OPM's prior regulation governing the process for addressing unacceptable performance. The organizations asserted, ''OPM's proposed regulation would return performance management to allow for additional processes not provided for in the plain language reading'' of 5 U.S.C. 4302 and 4303, which the organizations also described as ''extra-statutory protections'' which would be ''at the expense of taxpayer accountability at a time when public trust in government remains dangerously low, regardless of political ideology.'' The organizations stated that research indicates only about one-quarter of Americans say they can trust the government in Washington to do what is right ''just about always'' (2%) or ''most of the time'' (22%) and that public distrust is deepened each time administrative agencies impose additional burdens on a supervisor's capacity to hold employees accountable. One of the associations shared that its ''members are effectively unable to remove an employee for unacceptable performance. Instead, they find themselves hoping to identify misconduct because they know those cases are easier to adjudicate and have a clear path to removal.'' Both associations stated that employee protections are critical to the merit system, and the ''imposition of excessive hurdles to successful employee performance management frustrates the effective functioning of our government and is not in the public interest.'' In further criticism, one of these commenters added that this ''imposition'' also ''discourages well-qualified candidates from joining leadership's ranks.''

OPM disagrees with the associations' characterization that the rescission of the November 2020 changes to § 432.104 allows for extra-statutory protections at the expense of taxpayer accountability. OPM reiterates that agencies should take swift action to address and resolve poor performance, including by communicating clear performance standards and expectations to employees; providing periodic feedback on performance; making full use of the probationary period for employees; and maintaining effective lines of communication with a well-trained human resources staff and agency legal counsel. We believe that agencies can deliver on their mission and uphold public trust and at the same time provide employees assistance and a reasonable opportunity to demonstrate acceptable performance through efficient and effective use of chapter 43 and amended § 432.104.

A commenter recommended that OPM edit § 432.104 to read, ''For each critical element in which the employee's performance is unacceptable, the agency shall afford the employee 120 days to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position. There's only one year in the evaluation period.'' OPM disagrees with the commenter's suggested changes to the current regulation. First, OPM is opposed to prescribing an opportunity period of any specific length. We note that § 432.104 requires the agency to ''afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position.'' OPM believes the supervisor is in the best position to determine the length of the opportunity to demonstrate acceptable performance. The duration of the opportunity period should be left to the discretion of each agency, to include consultation with human resources staff and any applicable collective-bargaining agreement.

Second, it is unclear why the commenter suggested insertion of the sentence ''There's only one year in the evaluation period.'' OPM will not adopt the suggestion because it is unnecessary and contrary to OPM's performance management regulations in 5 CFR part 430. The length of a covered agency's appraisal period must be established in accordance with § 430.206 of title 5, Code of Federal Regulations, which states, ''The appraisal period generally shall be 12 months so that employees are provided a rating of record on an annual basis. A program's appraisal period may be longer when work assignments and responsibilities so warrant or performance management objectives can be achieved more effectively.'' The length of the appraisal period does not determine the length of the opportunity period.

A commenter disagreed with OPM's proposal to amend § 432.104, and in particular, OPM's rationale for the change. With regard to the statement ''[w]hile the regulatory amendments to part 432 made effective November 16, 2020, are within OPM's existing authority under 5 U.S.C. 4303 and 4305 . . . .'', the commenter asked if the current language is within the existing authority, why does it need to be changed. Moreover, the commenter explained, ''The current language does not place any unnecessary restrictions or limitations on agencies regarding their decision on providing assistance, it provides clear guidance on what the agency is responsible for in addressing performance issues.''

We disagree with this comment. Although the current language for regulatory amendments to part 432 made effective November 16, 2020, is within OPM's existing authority under 5 U.S.C. 4303 and 4305, the proposed changes also are a reasonable interpretation of the statute and within OPM's authority. The provision is being removed from part 432 through the required regulatory process. In addition, as we explained in the proposed rule, E.O. 13839 was the catalyst for the changes made effective on November 16, 2020. E.O. 14003, among other things, revoked E.O. 13839 and directed agencies to ''as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, the actions'' implementing various Executive Orders, including E.O. 13839, ''as appropriate and consistent with applicable law.'' OPM did not require an Executive Order to effect this change.

As discussed in the proposed rule, OPM believes that the November 2020 amendments placed restrictions and limitations on agencies regarding decisions on when performance assistance is provided to employees that, upon further consideration, were unhelpful. These constraints removed previous flexibilities enjoyed by agencies in addressing performance issues with their employees under chapter 43. By placing these restrictions on agencies, OPM believes it was not supporting agencies and supervisors in determining the most effective assistance for struggling employees.

Section 432.105 Proposing and Taking Action Based on Unacceptable Performance

This section specifies the procedures for proposing and taking action based on unacceptable performance once an employee has been afforded an opportunity to demonstrate acceptable performance. The regulatory amendments to § 432.105(a)(1) that became effective November 16, 2020,

were made for consistency with and promotion of the principles of E.O. 13839 within the bounds of OPM's regulatory authority conferred by Congress. For consistency with and promotion of the principles of E.O. 14003 and in accordance with its authority under 5 U.S.C. 4302, OPM proposed to revise the regulation at § 432.105(a)(1).

The regulatory change to § 432.105(a)(1) removes the language: ''For the purposes of this section, the agency's obligation to provide assistance, under 5 U.S.C. 4302(c)(5), may be discharged through measures, such as supervisory assistance, taken prior to the beginning of the opportunity period in addition to measures taken during the opportunity period. The agency must take at least some measures to provide assistance during the opportunity period in order to both comply with section 4302(c)(5) and provide an opportunity to demonstrate acceptable performance under 4302(c)(6).''

OPM believes that the November 2020 amendment to the regulations at § 432.105(a)(1) placed too much emphasis on supervisory assistance taken prior to the beginning of the opportunity period and placed too little emphasis on supervisory assistance taken during the opportunity period and could result in some agencies relying too much on supervisory assistance outside of the opportunity period to support any performance-based action taken against an employee. Two national unions support OPM's proposal to rescind the language in 5 CFR 432.105(a)(1) that pertains to assistance offered to employees prior to and during an opportunity period. One of these national unions agreed with OPM that the November 2020 amendments placed too much emphasis on agencies providing assistance before the opportunity period and not enough emphasis on assistance given during the opportunity period. Similarly, another national union stated that OPM is correctly concerned that the regulatory language could result in agencies relying too much on supervisory assistance offered outside of the opportunity period to support a performance-based action against an employee. The union stated also, ''Employees are entitled to supervisory assistance and a meaningful opportunity to improve, and help offered both prior to *and* during the opportunity period will aid in achieving this.'' (emphasis in original)

After agreeing with OPM's rationale for the decision, a national union erroneously asserted that the prior regulatory changes were inconsistent with the language and intent of the Civil Service Reform Act (CSRA) ''because they failed to ensure that employees were provided with a reasonable opportunity to improve during the performance improvement period, which is a 'substantive guarantee[ ] and may not be diminished by regulation.' '' In support of this statement, the union cited *Sandland* v. *General Services Admin.,* 23 M.S.P.R. 583, 589 (1984). The union added that rescission of the prior amendments to §§ 432.104 and 432.105 will better enable agencies to effectively utilize the Federal workforce by requiring and encouraging agencies to provide employees with meaningful opportunities to improve. OPM believes the union is in error because the prior regulatory changes were not contrary to the language and intent of the CSRA. The changes did not inhibit an agency's ability to ensure that employees were provided with a reasonable opportunity to improve during the performance improvement period.

A commenter recommended that OPM edit § 432.105(a)(1) to insert ''120 days'' as the duration of the opportunity to demonstrate acceptable performance. The commenter made a similar suggestion to edit § 432.104 to require a 120-day opportunity period. As explained above under § 432.104, OPM will not prescribe an opportunity period of any length. The supervisor is in the best position to determine the length of the opportunity to demonstrate acceptable performance. OPM believes the duration of the opportunity period should be left to the discretion of each agency, to include consultation with human resources staff and any applicable provision of a collective-bargaining agreement.

Regardless of the length of the opportunity period, OPM reminds agencies that they must provide assistance during the opportunity period in accordance with 5 U.S.C. 4302(c)(5). OPM has long encouraged agencies to act promptly to address performance concerns as soon as they arise. Supervisors should continually monitor performance, provide ongoing feedback, and assist employees who exhibit performance issues. Agencies should also remain mindful that third parties (for example, arbitrators and judges) place a strong emphasis on a supervisor's effort to assist the employee in improving the employee's performance. Evidence that the supervisor engaged an employee in discussion, counseling, training, or the like prior to the opportunity period may assist the agency in developing a stronger case before a third party that the employee was given a reasonable opportunity to demonstrate acceptable performance before a performance-based action is taken.

Several commenters noted disagreement with OPM's inclusion in the supplementary information of a discussion of *Santos* v. *National Aeronautics and Space Admin.,* 990 F.3d 1355 (Fed. Cir. 2021). In particular, commenters stated that inclusion was unnecessary for the purposes of this regulation and that the *Santos* court relied on statutory language and not on OPM's interpretation in reaching its conclusion. In *Santos,* the court remarked on OPM's statement in prior supplementary information, and OPM's discussion of *Santos* was for the sole purpose of clarifying the meaning of that prior supplementary information. OPM's reference to *Santos* did not concern the proposed regulation. Accordingly, OPM is not making any changes to the proposed regulation in response to these comments. OPM further recognizes that, until and unless *Santos* is revisited, agencies proposing a removal under 5 U.S.C. 4302(c)(6) must establish that the employee performed unacceptably both prior to and during the performance improvement period.

In addition, § 432.105 addresses notice requirements when an agency proposes to take action based on an employee's unacceptable performance during or after the opportunity period once the employee has been afforded an opportunity to demonstrate acceptable performance. An agency must afford the employee a 30-day advance notice of the proposed action that identifies both the specific instances of unacceptable performance by the employee on which the proposed action is based and the critical element(s) of the employee's position involved in each instance of unacceptable performance. An agency may extend this advance notice period for a period not to exceed 30 days under regulations prescribed by the head of the agency. For the reasons listed in § 432.105(a)(4)(i)(B), an agency may further extend this advance notice period without OPM approval.

OPM proposed to revise the reason at § 432.105(a)(4)(i)(B)(*6*), which was derived from 5 U.S.C. 1208(b), because the statutory provision was repealed by section 3(a)(8) of Public Law 101–12, the Whistleblower Protection Act (WPA) of 1989. Section 1208(b) granted agencies the authority to extend the advance notice period for a performance-based action in order to comply with a stay ordered by a member of the MSPB. Concurrent with the repeal of 5 U.S.C. 1208(b), the WPA established 5 U.S.C. 1214(b)(1)(A)(i),

wherein the Office of Special Counsel is granted the authority to request any member of the Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice. Further, under 5 U.S.C. 1214(b)(1)(B), the Board may extend the period of any stay granted under subparagraph (A) for any period which the Board considers appropriate. If the Board lacks a quorum, any remaining member of the Board may, upon request by the Special Counsel, extend the period of any stay granted under subparagraph (A). Therefore, OPM proposed to change the reason at subparagraph (B)(6) to read as follows: ''[t]o comply with a stay ordered by a member of the MSPB under 5 U.S.C. 1214(b)(1)(A) or (B).'' A national union supports this change.

Section 432.108 Settlement Agreement

Section 5 of E.O. 13839 established a 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 personnel action. Such agreements have traditionally been referred to as ''clean-record'' agreements. Consistent with the rescission of E.O. 13839 and pursuant to its authorities under 5 U.S.C. 2951 to maintain personnel records and under 5 U.S.C. 1103(a)(5) to execute, administer, and enforce the law governing the civil service, OPM proposed to rescind § 432.108, Settlement agreements. OPM's proposal to rescind the current regulations for settlement agreements applies to actions taken under parts 432 and 752. All comments related to settlement agreements are addressed here in the **SUPPLEMENTARY INFORMATION** for the change at § 432.108, where the change appears first.

Three national unions, a local union, an organization, and five individual commenters expressed explicit support for OPM's proposal to rescind the settlement agreement provisions in 5 CFR parts 432 and 752. One of the national unions stated that settlements are less costly and burdensome than litigation or arbitration, and it is in employees' as well as management's interest to encourage resolution of employment disputes through settlement. The national union described a clean-record agreement as a reasonable and frequently used tool that agencies and employees should have. One particular benefit this union highlighted is the removal of the November 2020 regulations that allow an agency to cancel or vacate a personnel action when persuasive evidence casts doubt on the validity of the action. The union labeled this standard as confusing and said that it appears to wrongly place the burden of proof on the employee facing the action. This union welcomed OPM's proposed rescission of this language.

The second national union stated that removal of the regulatory provisions barring clean record settlements will lead to more efficient government administration while also promoting fairness and the effective resolution of employment disputes. This union added that the prior regulations created a substantial amount of unnecessary and wasteful litigation. Moreover, this union stated that the proposed changes will reduce the likelihood of ''arbitrary and capricious'' agency action by removing the incentive for agencies to unilaterally modify an employee's personnel record to avoid litigation.

The third national union voiced overall support for the rescission, though they objected to a related statement in the proposed rule that is discussed below along with other commenters who expressed a similar concern. Furthermore, a local union described clean-record agreements as an effective labor-management relations tool that benefits workers, management, and taxpayers. This local union added that agency and union officials at the lowest levels know how best to resolve issues and should have maximum flexibility to do so.

An organization also stated that the prohibition on clean-record agreements is harmful to employees and employers because it removes a valid and useful tool that promotes productive settlement of employment disputes. This organization shared that it has experience with several settlements that it reached on behalf of clients that were possible ''only because of the availability of clean record terms.'' Additionally, this organization expressed particular concern for public employees who engage in protected whistleblower activity, stating that they are often retaliated against with unfounded or exaggerated claims of poor performance or misconduct and unwarranted disciplinary actions. The organization stated further that the existing rule prevents agencies from correcting personnel records that employees allege contain false and retaliatory material. The organization also observed that in order to avoid lengthy and costly litigation over the accuracy and validity of matters reflected in the personnel record, the employee and the agency often wish to adopt a clean record as part of a settlement. This organization believes this rulemaking ''would reestablish a workable standard where agencies and employees can negotiate in good faith to provide employees with clean record settlements that do not obstruct future employment within or outside the federal government.'' Finally, the organization believes this rulemaking will conserve agency resources that otherwise would be used in protracted litigation and will make it more possible for employees who engaged in protected activity to move on after retaliation by former supervisors.

Another commenter discussed ''first-hand knowledge'' that regardless of the type or severity of the matter in dispute, or the organizational levels of the relevant parties, the prohibition on clean-record agreements has adversely impacted agency mission accomplishment and degraded the employees' well-being. The commenter stated that the prohibition has severely limited opportunities for agencies to efficiently and cost-effectively manage employee disputes at the lowest possible level in that settlement officials have few, if any, alternatives to taxpayer-funded monetary remedies and, consequently, have little incentive to resolve conflict early. The commenter represented that removing this overly broad restriction is greatly appreciated by all in the dispute resolution field, and will have significant, measurable positive outcomes throughout the Federal Government.

Several of the supportive commenters observed that the prohibition on clean-record agreements impacted settlement of employment discrimination or Equal Employment Opportunity (EEO) matters. OPM notes that for the purpose of this rule the settlement agreements addressed are those arising from agency actions covered by chapter 43 and chapter 75. One commenter stated that clean-record provisions have made it ''extraordinarily more difficult'' for employment law practitioners and employees to reasonably resolve matters they believe to be unjust without resorting to clogging the already taxed MSPB or Equal Employment Opportunity Commission systems. The commenter observed, ''Many matters could have been resolved with, for example[,] a simple restoration of leave

and removal of so-called bad paper or coding a termination as a resignation.'' Moreover, the commenter added that considerations ''such as job references and the interview process in general may serve to root out employees who should not be re-hired as government employees without tying the hands of those who are having [to] endure unnecessary litigation.''

Another supportive commenter stated that the courts are currently overwhelmed with employment discrimination cases, many of which could be resolved with a clean-record agreement. The commenter continued that it is costly and inefficient and results in unnecessary court congestion, unfair expense to employees and the agency, and backlogs cases affecting all subsequent cases. The commenter opined that if it takes a court order to remove a record, it should have taken a court order to place the record. The commenter asked, ''Why should the standard be higher to remove the record than to place the record in the first place?'' The commenter added that if the agency has discretion to put the record into official personnel files, the agency should have the discretion to remove them.

Yet another commenter stated that in representing several employees in Equal Employment Opportunity (EEO) complaints the ban on clean-record agreements has created incredible harm to many parties, but most of all to EEO complainants. The commenter remarked that the prohibition resulted in ''a huge waste of time'' in litigation which usually takes years when the employee just urgently needs to move on. Further, the commenter claimed that a few agency attorneys and judges confided privately about the waste of time and backlog. The commenter observed that all parties simply would have preferred to move on with little interest in litigation.

OPM recognizes the commenters' support for rescission of the clean-record provisions in §§ 432.108, 752.104, 752.203(h), 752.407, and 752.607.

Three management associations and four individuals disagreed with OPM's proposal to rescind the settlement agreement provisions. One management association described the prohibition on clean-record agreements as one of the most valuable parts of the rule that took effect in November 2020. This management association stated that some of its members were ''victims'' of clean-record settlements and ''lied to by previous supervisors because the agreement had a confidentiality clause.'' The management association said this is a practice that should be eliminated from the civil service. While another commenter discussed seeing clean-record agreements typically accompanied by ''muzzling supervisors and directing personnel to withhold or destroy information.'' This commenter recommended that OPM explicitly prohibit clean-record agreements in the regulation.

We believe that clean-record agreements should be an option for agencies to resolve informal and formal complaints when the agency deems it is in the best interests of effective and efficient management to achieve the agency's mission. OPM believes that alleged anecdotal instances of misuse of the discretion to use clean-record agreements should not deprive agencies of the option to use clean-record agreements to resolve informal and formal complaints and settle administrative challenges in a manner that balances the needs of the agency and fairness to the employee. In regard to the commenter's assertions that supervisors are silenced and personnel are directed to withhold or destroy information, we note that merit system principles require that Federal employees should maintain high standards of integrity, conduct, and concern for the public interest. After a settlement agreement is reached, the agency should properly advise supervisors on how to adhere to its terms regarding permitted disclosures and records management. As noted by supportive commenters, there are many disadvantages to prohibiting clean-record agreements: reduced likelihood of parties reaching a mutually agreeable resolution of informal or formal complaints; increase of costly litigation and arbitration; and crowding of the dockets of third-party investigators, mediators, and adjudicators. Cases languishing impact the agency's credibility, supervisor morale, and efficient execution of the agency's mission. OPM's own conclusions as well as the feedback from stakeholders weigh in favor of rescission.

Some commenters asserted that clean-record settlements are wasteful of taxpayer dollars while another commenter stated it was unlawful and an additional commenter posited that this provision should be withdrawn. Some management associations opined that the American taxpayer is entitled to an accurate recording of an employee's performance. One management association asserted that taxpayers should not suffer the results of employees committing the same offenses repeatedly across government while another management association stated that taxpayers should not endure the consequences of inadequate employee job performance or employees committing the same offenses time and again across government. Both management associations contended that ''flexibility should not be the code word for diminished accountability.''

One commenter posited that ''arbitrary'' rule changes cause undue hardship and waste taxpayer dollars by paying employees who need to be removed and are not. Similarly, another commenter stated that clean-record agreements ''perpetuate[] that sense of entitlement that some Federal employee[s] have, that the Federal Government somehow owes them''. This commenter asserted that this is offensive to the American taxpayer and unfair to Federal employees who adhere to the rules and do their job. The commenter requested that OPM withdraw the proposal to rescind the clean-record provisions. Finally, an individual stated that removal of the clean-record rule is unlawful.

OPM disagrees with the commenters. The purpose of the prohibition rescission is to remove a provision that hampers agencies' ability to resolve workplace disputes at an early stage and with minimal costs to the agency when appropriate. Rather than adverse consequences for taxpayers, the numerous benefits of clean-record settlements have been detailed by agencies and stakeholders as providing greater efficiency and effectiveness. These significant advantages include minimizing the burden of the substantial cost of litigation in relation to the issues at stake and achieving a result that benefits agencies and taxpayers. Further, this rule is not unlawful or arbitrary. E.O. 14003 requires that OPM rescind the prohibition, and OPM, pursuant to its authorities under 5 U.S.C. 2951 to maintain personnel records and under 5 U.S.C. 1103(a)(5) to execute, administer, and enforce the law governing the civil service, has decided to rescind §§ 432.108, 752.104, 752.203(h), 752.407, and 752.607. We believe this rule will have a positive impact on the Federal Government's ability to accomplish its mission for the American taxpayers.

Some commenters remarked that clean records prevent holding employees accountable for their performance and conduct. Among these commenters, a management association stated that we should all be striving to maintain high standards of integrity and accountability, not longevity and seniority at all costs. Another commenter expressed disagreement

with the proposed rule by stating that ''too many employees'' are not held accountable for issues that warrant discipline and ''it all just goes away.'' This commenter recommended, ''Do not change back to the way of hiding history of bad employees.'' Yet another individual related seeing clean records used as a tool to undermine the agency's decision to hold an employee accountable for their actions or lack thereof, basically rewarding an employee for their bad behavior or performance.

OPM agrees that all members of the Federal Government should strive to maintain high standards and accountability. However, we disagree that clean-record agreements are inconsistent with accountability. In adhering to the principles of high standards of integrity and accountability, each agency decision as to whether and how to settle a case should be based on valid considerations, such as litigation risk. Further, OPM notes that the statutory and regulatory frameworks for addressing poor performance and misconduct and rewarding satisfactory or better performance remain intact. Effective utilization of the available tools and flexibilities will permit agencies to address poor performance and misconduct when they arise, consistent with the policies of E.O. 14003.

Some management associations asserted that the proposed rescission overvalues the agencies' ''ability to resolve informal and formal complaints at an early stage and with minimal costs to the agency,'' while undervaluing the process provided by the merit system.

OPM disagrees with these comments. Decisions to resolve informal and formal complaints at an early stage are at the discretion of the agency's authority. Thus, returning this firmly established discretion to agencies for resolving informal and formal complaints gives the proper value to agencies' authority in this area without imposed restrictions. Further, granting agencies a degree of flexibility to resolve individual workplace disputes does not undervalue the merit system process. Clean-record agreements provide agencies with an important tool and flexibility, consistent with the policies of E.O. 14003.

Commenters expressed that clean-record agreements have a negative impact on hiring practices. A management association asserted that clean-record settlements are a favored way to help their constituents get re-hired. Other management associations asserted that OPM emphasizes ''flexibility'' to resolve disputes, but in reality the proposed changes in this rule enable agencies to pass problematic employees between one another. In fact, a commenter stated that clean records result in a ''vicious cycle'' whereby the employee is allowed to pursue employment at another agency, where their behavior/performance does not improve, and that agency bears the cost, time, and effort to hold the employee accountable. A management association added that failing to document a reason for removal leads directly to ''dangerous situations for Federal workers who serve honorably and places managers in impossible situations.''

OPM disagrees with these characterizations of rescinding this regulatory provision. We are simply rescinding a rigid regulation that, upon reflection and further consideration, we deem impracticable, unrealistic, and unhelpful because it absolutely prohibits agencies from altering or removing information about performance or misconduct as a condition to resolve or settle a complaint or challenge to a personnel action, even where doing so furthers the best interests of an effective and efficient Government and the interests, voluntarily expressed, of both parties to personnel litigation. OPM's rescission does not take a position on whether any particular case should be settled, and does not prohibit settlements, which through lessening a penalty or permitting resignation, may in certain circumstances lessen the risk of outright reversal with its high costs without benefit, or may otherwise adversely affect governmental interests.

Some management associations stressed the importance of maintaining accurate official personnel records and stated that they are ''extremely concerned by OPM's proposal to delete § 432.108, 752.104, 752.407, and 752.607''. They believe the proposed rule lacks the balance that existed in the regulations that were effective in November 2020 whereby OPM banned clean-record settlements but permitted an agency to correct errors, either unilaterally or pursuant to a settlement agreement, based on discovery of agency error or illegality. To further illustrate their views on the balance that currently exists, the management associations quoted OPM's November 2020 final rule, which stated that agencies are permitted to ''modify an employee's personnel file'' when persuasive evidence comes to light prior to the issuance of a final agency decision on adverse action ''casting doubt on the validity of the action or the ability of the agency to sustain the action in litigation''. These management associations assert that the record should reflect what is correct. Another commenter discussed seeing a large amount of destruction and altering of official personnel records, which the commenter described as ''fraudulent, unethical, and demoralizing to the workforce.'' This commenter asserted that there is no legitimate reason to alter an official record. The commenter believes that 5 CFR 432.108(a) correctly prohibits such dishonesty and should be left standing. Regarding correcting errors in records, the commenter offered that the proper approach is to add a statement to the existing record explaining why it is in error and updating it, thus maintaining the correct history of the record. The commenter asserted that this standard is ''the only way that ''agencies [c]ould still adhere to the principles of promoting high standards of integrity and accountability within the Federal workforce.'' The commenter stated that the corrective actions currently allowed in 5 CFR 432.108(b) and (c) are too open-ended and should be amended to require a correct historical record.

OPM will not make any changes based on these comments. Agencies are still permitted to correct errors based on discovery of error or illegality, but there are other considerations at play, including evolving, unforeseen litigation risks, among others. Nor is OPM asserting a general and all-encompassing position that settlement of disputes or its opposite is to be commended or favored. Each matter is to stand on its own footing. Still less is OPM suggesting that agencies should lightly change personnel records, and certainly not in a way that undermines Government integrity. Agencies are expected to exercise good judgment in determining whether and how to settle a case after due consideration of all relevant factors, including litigation risk.

We also disagree with the comment that there is ''no legitimate reason'' to alter an official record. Legitimate reasons include a cancellation or correction ordered by a third party or discovery of agency error, and such corrections do in fact promote integrity and ethical standards. Moreover, the purpose of paragraphs (b) and (c) that one commenter asks OPM to retain was to clarify for agencies that the prohibition on clean-record agreements did not preclude agencies from taking corrective action based on discovery of agency error or discovery of material information prior to final agency action. The removal of the prohibition on clean-record agreements means that the

clarifications for corrective action are no longer needed in parts 432 and 752. These clarifications are rooted in statutes, regulations, and policies that are still applicable to Federal agencies, including agencies' obligation to maintain accurate personnel records in accordance with the Privacy Act, 5 CFR part 293, and OPM's *Guide to Personnel Recordkeeping.* Agencies continue to have the authority to modify an employee's personnel file or other agency files to remove inaccurate information or the record of an erroneous or illegal action.

In further disagreement with the change in the clean-record agreement requirements, some management associations remarked, ''Even OPM's efficiency argument fails.'' They posited that OPM presented ''no data or evidence that agencies were impeded in their ability to adjudicate employee complaints and disputes'' and simply listened to recurring objections from agencies that were required to enforce the law and comply with procedures enacted by Congress and implemented through OPM regulation.

OPM disagrees with the commenters' characterization that OPM's rulemaking requires data or evidence that agencies were adversely impacted in their ability to resolve employee complaints and disputes. OPM acknowledged in the Expected Impact section of the proposed rule, that OPM has virtually no data on the extent to which adverse actions were pursued under the regulations proposed for rescission here. As discussed above, agencies ''are free to change their existing policies as long as they provide a reasoned explanation for the change.'' *See Encino Motorcars, LLC* v. *Navarro.* Among other factors, OPM considered both opposing and supporting perspectives raised by stakeholders during the notice-and-comment period.

For the reasons discussed above, OPM will rescind §§ 432.108, 752.104, 752.203(h), 752.407, and 752.607 in their entirety.

While some commenters voiced overall support for rescission of this requirement, they opposed the provision related to the obligation to speak truthfully to Federal investigators performing background investigations. One national union, two organizations, and one individual objected to OPM's statement in the January 2022 proposed rule that, ''In addition, agencies are advised that, in any such [clean-record] agreement, they have an obligation to speak truthfully to Federal investigators performing future background investigations with respect to the employee and may not agree to withhold information about the circumstances of an individual's departure from the agency.''

Though a national union expressed overall support for rescinding the prohibition on clean-record agreements, the union stated that the advice in question is vague and could give rise to potential breaches, particularly in settlements that contain ''no admission'' and confidentiality clauses. The union requested that OPM work with all Federal employee unions, and other stakeholders as appropriate, to develop a shared understanding of this section of the commentary and to advise agencies appropriately thereafter.

We disagree. OPM believes the language in question is clear and consistent with what agencies have always been required to do regarding the need to speak truthfully to Federal investigators performing background investigations with respect to an employee covered by a settlement agreement. On any matters involving employees or former employees covered by a settlement agreement, agency officials should always consult with agency legal counsel before responding to inquiries about these individuals to avoid violating enforceable settlement agreements.

One organization wrote that the statement concerning speaking truthfully to Federal investigators in the proposed rule is contrary to the President's policy in E.O. 14003 of rescinding restrictions on agencies' discretion to enter into clean-record settlements in disputed cases. The organization stated that its members have observed that agencies are often guilty of giving incomplete information to background investigators in a fashion skewed to denigrate targeted employees, selectively including information adverse to subject employees while materially omitting the employees' counterarguments (in particular, if the employee challenged agency actions against them as unlawful discrimination, unlawful EEO reprisal or whistleblower reprisal, etc.). The organization added that efficiency of the Federal service is not promoted by ''giving license to continuing retaliation through providing negatively skewed information to future employers; to the contrary, doing so represents further retaliatory action in violation of 5 U.S.C. 2302(b)(1, 8, 9, 10) and other statutes.'' The second organization concurred with this organization's comments.

OPM's reminder to agencies concerning the need to be truthful to Federal investigators is in connection with background investigations. Accordingly, agencies may not agree to withhold information about an individual's departure from the agency. The requirement for agencies to be truthful applies also to suitability determinations and other inquiries related to vetting for personnel security. This reminder does not give license to retaliate. In fact, the requirement to be truthful to background investigators necessarily includes that the agency makes full disclosure of information provided by the employee. Full disclosure is inherent in speaking truthfully.

A commenter wrote that it seems inconsistent to withhold agency discretion when it comes to divulging the particulars of clean-record separation agreements to future Federal employers. The commenter asserted that if the agency is mandated to ''adhere to the principles of promoting high standards of integrity and accountability within the Federal workforce,'' then it should be the agency's responsibility to balance that standard against the value of a conflict resolved. The commenter raised a concern that an investigator will likely be adversely influenced by the revelation of the particulars of a clean-record agreement. The individual characterized this as a form of ''backdoor'' retaliation that can have a ''chilling effect'' for employees. The commenter offered that a middle ground would be to permit agencies to include language that stipulates what will be divulged and what will not to any future Federal investigator. The commenter added that if this avenue is not widely used, it is a further negotiation point that will help parties reach resolution.

While a different commenter also stated support for the rescission of the clean-record prohibition, this individual suggested that the final rule should clearly allow clean-record agreements to stipulate what will be divulged and what will not be divulged to any future Federal investigator. The commenter offered an example: ''if a settlement agreement, legally approved by a federal judge, calls for permanent and irrevocable removal of a specific personnel action, that action should never be represented by either party as ever having legitimately occurred.'' The commenter added that ''clean'' should truly mean ''clean'' to preserve and avoid undermining the integrity of such agreements.

OPM will not adopt the suggestion that the final rule address any stipulation in clean-record agreements as to what will be divulged and what will not be divulged to any future Federal investigator. As stated earlier, agencies must provide truthful information about the circumstances of

an individual's departure from the agency during the course of investigations. These investigations include those conducted for the purpose of determining suitability or eligibility for sensitive national security positions. OPM will defer to agency officials, including agency counsel, with regard to negotiating the specific terms of settlement agreements necessary to enable the agency to fulfill any disclosure obligation based on the particular facts .

Additionally, if an agency wishes to maintain an agency policy that prohibits clean-record agreements, the agency is reminded that E.O. 14003 directs heads of affected agencies to, as soon as practicable, suspend, revise, or rescind actions arising from E.O. 13839. Given that E.O. 13839 was the sole reason for the clean-records prohibition and E.O. 13839 has been rescinded by E.O. 14003, it would be contrary to the spirit and intent of E.O. 14003 for an agency to broadly prohibit clean-record agreements. Instead, OPM strongly encourages each agency to make determinations about clean records on a case-by-case basis.

A Federal agency expressed concern that the proposed rescission of the settlement agreement provisions competes with the agency's ability to comply with 5 CFR part 731.101 regarding suitability determinations; Security Executive Agent Directive 4, which requires a risk assessment to make an informed national security determination; and Trusted Workforce 2.0 fundamentals such as improving policies, procedures, and automation to streamline and enhance the government's posture against national security risks. The agency requested that OPM address the interplay of these parts of the CFR, and the potential impact that this change may have on the ability of agencies to make fully informed decisions relative to risk. Additionally, one commenter disagreed with OPM's rescission of the settlement agreement provision. This commenter asserted that the November 2020 amendments were intended to promote the highest standards of integrity and accountability in the Federal workforce and were implemented to aid in records being preserved so that agencies can make appropriate and informed decisions regarding qualifications such as fitness and suitability for future employment.

OPM disagrees that the rescission of §§ 432.108, 752.104, 752.203(h), 752.407, and 752.607 will compete with an agency's ability to comply with 5 CFR 731.101, Security Executive Agent Directive 4, and Trusted Workforce 2.0 fundamentals as asserted by the agency. The agency did not provide an explanation or examples of how the clean-record prohibition impacted the agency's ability to make fully informed decisions relative to risk. Without additional information, it is difficult to address the agency's concern in more detail. Sections 432.108, 752.104, 752.203(h), 752.407 and 752.607 were in effect for less than two months at the time E.O. 14003 rescinded E.O. 13839. Consistent with the requirements that existed before and during the implementation of the clean-record prohibitions, when negotiating settlement agreement terms that involve disclosure of information about the employee, agency officials should consult with agency legal counsel.

In conclusion, OPM believes that the prohibition of clean-record agreements hampers agencies' ability to resolve informal and formal complaints at an early stage and with minimal costs to the agency. The removal of the prohibition on clean-record agreements will allow agencies discretion to resolve informal and formal complaints and settle administrative challenges in a manner that balances the needs of the agency and fairness to the employee. In doing so, agencies should still adhere to the principles of promoting high standards of integrity and accountability within the Federal workforce.

5 CFR Part 752—Adverse Actions

Subpart A—Discipline of Supervisors Based on Retaliation Against Whistleblowers

This subpart addresses mandatory procedures for addressing retaliation by supervisors for whistleblowing.

An organization emphasized its support of the requirements for whistleblower protection. This organization elaborated on its longstanding advocacy in favor of ''robust protection for whistleblowers, which necessarily includes disciplinary consequences for those federal managers who abuse their authority to retaliate against whistleblowers in defiance of federal law.'' The organization expressed that thus it supported the policy behind 5 U.S.C. 7515 and 5 CFR part 752, subpart A, and encouraged OPM to continue in its enforcement. A second organization concurred with this commenter.

Section 752.101 Coverage

This section describes the adverse actions covered and defines key terms used throughout the subchapter. Section 752.101 includes a definition for the term ''business day.'' Given the revocation of E.O. 13839 and under its congressionally granted authority to regulate part 752, OPM rescinds § 752.101, and given that there is no other use for the definition of ''business day'' in subpart A, in this rule OPM revises the regulation at § 752.101(b) to remove the definition of ''Business day''.

We received no comments on this section.

Section 752.103 Procedures

This section establishes the procedures to be utilized for actions taken under this subpart. With the rescission of E.O. 13839 and under its congressionally granted authority to regulate chapter 75 adverse actions, OPM rescinds the requirement at § 752.103(d)(3) 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 under paragraph (d)(1) of this section. All comments related to the rescission of the requirement that an agency issue the decision on a proposed removal within 15 business days of the conclusion of the employee's opportunity to respond are addressed here in the Supplementary Information for the change at § 752.103, where the change appears first.

Some commenters including national unions voiced support regarding the removal of the requirement that an agency must issue the decision on a proposed removal within 15 days of the conclusion of the employee's opportunity to respond. Two national unions commented that the elimination of the 15-day requirement to issue a decision on a proposal was warranted and that the deadline imposed by the November 2020 amendment was arbitrary. In fact, a national union commented that the requirement to issue a decision on a proposal within 15 business days ''is an arbitrary and unnecessarily short time frame and that it might not allow thoughtful well-reasoned disciplinary decisions.'' Further, another national union stated that there was no statutory antecedent for this requirement and this mandate was counterproductive because it forced agencies to rush in issuing decisions ''which in turn weakened the agency's action upon review.'' This national union commented that agencies must engage in reasoned decision making and that a ''decision reached merely to comply with an arbitrary deadline is itself arbitrary and capricious and subject to reversal.'' Additionally, this national union observed that every proposed adverse action is different and

some proposed adverse actions require more time than others for full consideration of the employee's response and the underlying facts. In further support of this rescission, the national union commented by providing agencies added flexibility the proposed change will ''lead to the more efficient and effective resolution of employment disputes.''

Two organizations, one concurring with the other's comment submissions, objected to the 15-day restriction on decisional periods for adverse actions and pronounced that these restrictions resulted in inferior rushed disciplinary decisions on incomplete information by agencies. Moreover, these organizations remarked that E.O. 14003 and OPM's rule ''restor[ed] agencies' reasonable discretion'' and ''bring[s] to a close a misguided policy.''

While some commenters voiced support, other commenters disagreed with this change to the regulations. Two management associations erroneously stated that OPM only made a change regarding the 15-day requirement to issue the decision on a proposed removal in ''a very narrow section of Part 752 focused on whistleblower retaliation.'' These commenters also remarked that establishing dissimilar, seemingly arbitrary timelines across government appears ''contrary to the policy of the United States government, per E.O. 14003.'' The organizations commented that the proposed rule does not change the 15-day requirement in other portions of the rule. In response to this incorrect assertion, we note that OPM proposed to rescind the 15-day requirement to issue a decision on a proposal at §§ 752.404(g)(3) and 752.604(g)(3), not only at § 752.103(d)(3).

These management associations also raised concerns that removing the 15-day requirement ''without offering any guidance on a minimum or maximum acceptable timeline . . . agencies may continue practices that include abuse of administrative leave and failing to make timely decisions.'' Further, these commenters said that lacking OPM guidance, including the final regulations for the Administrative Leave Act of 2016, agencies will be enabled in such practices. The management associations remarked that taxpayers rather than employees are ''ultimately paying for the delayed decision.''

We disagree with these comments. Regarding the commenters' objection that no OPM guidance is provided to agencies as to when a decision must be issued, as we stated in the proposed rule, it is good practice for agency deciding officials to resolve proposed removals promptly. However, some actions present complications that warrant a longer period of time to achieve careful crafting of the final decision. In executing due diligence concerning the employee's performance or alleged misconduct, agencies have an opportunity to obtain all of the available relevant information to make an informed and defensible decision. This latitude allows agencies to continue fact-finding in a deliberate fashion and avoids a rush to judgment. It is not in the Government's best interests to force decisions to be completed on an arbitrary timetable that may not allow for the deciding official to prepare a thoughtful, well-reasoned decision document as this may lead to prolonged litigation resulting in unnecessary cost to the taxpayer. Further, with respect to the commenters' concern regarding agencies' use of administrative leave and failing to make timely decisions, we note that while administrative leave may be appropriate under various circumstances, administrative leave is an option that should be used sparingly. We provide several alternatives for an agency to use during the advance notice period, depending on the facts and circumstances of the situation. OPM regulations at § 752.404(b)(3)(i) through (iv) explain that ''[u]nder ordinary circumstances, an employee whose removal or suspension, including indefinite suspension, has been proposed will remain in a duty status in his or her regular position''. In the rare circumstances where the employee's continued presence in the workplace during the notice period may present ''a threat to the employee or others'' or involve other extenuating circumstances as outlined in the regulation, the agency may choose one or a combination of options: assigning the employee to other duties, granting leave or otherwise carrying the individual in an appropriate leave status, shortening the notice period when an agency invokes the ''crime provision'', and, finally, placing the employee in a paid nonduty status for such time as is necessary to effect the action. Until OPM has published the final regulation for 5 U.S.C. 6329b and after the conclusion of the agency implementation period, these provisions may be used. After publication of 5 U.S.C. 6329b, and the subsequent agency implementation period, an agency may place the employee in a notice leave status when applicable.

Section 752.104 Settlement Agreements

The language in this section establishes the same requirements that are detailed in §§ 432.108, 752.203, 752.407, and 752.607, Settlement agreements. This final rule removes § 752.104, Settlement agreements. Please see the discussion in § 432.108 regarding the rescission of OPM requirements related to settlement agreements.

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

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

Section 752.202 Standard for Action and Penalty Determination

Consistent with the rescission of E.O. 13839 and under its congressionally granted authority to regulate part 752, OPM amends this section to revise the section heading to ''Standard for action'' and rescinds paragraphs (c) through (f). These paragraphs address the use of progressive discipline; appropriate comparators as the agency evaluates a potential disciplinary action; consideration of, among other factors, an employee's disciplinary record and past work record; and the requirement that a suspension should not be a substitute for removal in circumstances in which removal would be appropriate.

All comments related to the rescission of the requirement for the use of progressive discipline; appropriate comparators as the agency evaluates a potential disciplinary action; consideration of, among other factors, an employee's disciplinary record and past work record; and the requirement that a suspension should not be a substitute for removal in circumstances in which removal would be appropriate are addressed here in the Supplementary Information for the change at § 752.202 where the change appears first.

Several commenters, including national unions, voiced support for rescission of this section in its entirety, and additional commenters endorsed removal of various portions. In fact, one national union declared that ''OPM is correct to remove these provisions as they existed solely to encourage agencies to remove employees from federal service, which is not a purpose expressed or countenanced by the controlling statutes.''

This final rule removes from regulation the provision regarding the use of progressive discipline. Describing the November 2020 regulations as ''ill-advised provisions discouraging the use of progressive discipline,'' a national union commended the removal of this regulatory language and lauded progressive discipline as a ''well-

established and equitable way to ensure employees are treated fairly.''

In non-support of the rescission, a management association articulated that in their view the November 2020 amendments provided advantages for management. One member of the association declared this section as the best part of the former rule. The management association went on to state that ''eliminating the 'requirement' for progressive discipline and codifying that elimination was a huge management benefit.'' The association further noted that the amendments of November 2020 also formalized the requirement for a penalty to be '''within the bounds of tolerable reasonableness,' instead of a cookie-cutter progression.'' The management association noted that there has never been a legal requirement for progressive discipline or rehabilitation and viewed progressive discipline as something that ''has grown within most agencies to the point of being a roadblock in many instances to removals or suspensions that would promote the efficiency of the service because there was no prior discipline. They also commented that ''[f]ar too many union contracts require management to utilize progressive discipline, which eliminates a key management flexibility when dealing with conduct/performance issues.'' Further, the management association asserted that ''[r]estricting an arbitrator's ability to mitigate reasonable penalties was good for management.'' The management association also viewed the November 2020 rules favorably because they ''took the penalty out of the bargaining arena'' and remarked that ''[i]t never belonged there in the first place as 5 U.S.C. 7106 (a)(2) reserved the right (authority) to discipline employees to management without bargaining.''

OPM will not make any modifications based on these comments. OPM disagrees with the management association's assessment that the requirement in regulation as to agencies' optional use of progressive discipline was beneficial to management and that the use of progressive discipline is a ''roadblock'' to suspensions and removals. As we have previously said each action stands on its own footing and demands careful consideration of facts, circumstances, context, and nuance. OPM reminds agencies to calibrate discipline to the unique facts and circumstances of each case, which is consistent with the flexibility afforded agencies under the ''efficiency of the service'' standard for imposing discipline contained in the CSRA. Proposing and deciding officials should consult with the agency counsel and the agency's human resources office to determine the most appropriate penalty. In regard to the commenter's statement that there is no requirement in law for progressive discipline and progressive discipline provisions in union contracts eliminate a management flexibility, bargaining proposals involving penalty determinations such as mandatory use of progressive discipline impermissibly interfere with the exercise of a statutory management right to discipline employees, and are thus contrary to law.

Moreover, the final rule at § 752.202 rescinds the prior regulations' reliance on the test pronounced in *Miskill* v. *Social Security Administration,* 863 F.3d 1379 (Fed. Cir. 2017). A national union applauded OPM's rescission and described the provisions of OPM's November 2020 regulations as ''ill-advised provisions'' and ''as narrowly defining appropriate comparators''. This national union concurred with OPM removing this language and allowing agencies to be guided by court precedent on this issue.

However, some management associations disagreed with the rescission saying, ''The proposed changes result in guidance to agencies and supervisors that is far less clear and actionable.'' These commenters questioned whether human resources specialists clearly understand the *Miskill* test and would be able to apply it ''the same way as peers in other agencies.'' They protested that ''in the name of flexibility OPM simply continues its history of abdicating its own responsibility'' to provide guidance that is ''coherent and useful'' despite responsibility for providing government-wide guidance for a vast, robust statutory scheme with over 40 years of Congressional amendments and as many years of accompanying case law. One of these management associations emphasized that absent additional, specific OPM guidance the system is not clear at all and will continue to provoke confusion in the employing agencies. To illustrate their point of view, the management association stated they are seeking additional educational resources to help understand regulations, guidance, case law and other resources to understand the Civil Service. They asserted that ''OPM should not rely on associations like ours to fill in the vast knowledge gaps that it and agencies are leaving.''

OPM will not make any revisions based on these comments. The adoption of the *Miskill* test reinforced the key principle that each case stands on its own factual and contextual footing. Federal human resources specialists involved in advising management and agency counsel routinely apply case law with overwhelmingly successful outcomes for agencies. We do not believe the *Miskill* case is an exception to this consistent track record in support of efficient and effective disciplinary actions taken by agencies. OPM believes that agencies can be sufficiently guided by *Miskill* and other applicable case law without a regulatory amendment. Note that OPM provides guidance to agencies through its accountability toolkit, which includes some of the key practices and lessons learned as discussed in the GAO report. OPM frequently communicates these strategies and approaches to the Federal community through the OPM website and ongoing outreach to agencies.

Furthermore, the final rule removes from regulation the standard applied by the MSPB in *Douglas* v. *Veterans Administration,* 5 M.S.P.R. 280 (1981). This rule specifically rescinds the requirement that among other factors, agencies should consider an employee's disciplinary record and past work record, including all applicable prior misconduct, when taking an action under this subpart.

Two organizations, one concurring with the other's comment submission, declared that although they previously had supported placing the *Douglas* factor analysis in OPM regulations, these organizations understood the necessity to comply with E.O. 14003 to rescind this provision. They applauded OPM's recognition of the importance of the *Douglas* standard and expressed the hope that OPM will consider future rulemaking activity to re-include the *Douglas* factor analysis in its regulations when the occasion permits. OPM will not commit to or rule out any specific future rulemaking activity at this time.

In another rescission to the final rule at § 752.202, OPM rescinds the requirement that a suspension may not be a substitute for removal. In support of this rescission, a national union commented that the November 2020 amendments to OPM's regulations ''contain ill-advised provisions'' and commended the rescission of those requirements which ''promot[ed] removals over suspensions.'' In its endorsement of OPM's rescission of this provision, the national union asserted that supervisors should exercise their judgment regarding appropriate penalties after their consideration of all of the pertinent factors and should not be compelled to impose removals over other disciplinary alternatives.

Another national union supported this rescission in §§ 752.202 and 752.403 with comments which were

identical to each other and are addressed here. This national union expounded that ''disproportionate and unreasonable penalties do not promote the efficiency of the service. The primary purpose of disciplinary actions is to correct misconduct—not to serve as a punishment.'' Additionally, the national union posited that removal should be limited for ''egregious misconduct'' or when it is evident that rehabilitation cannot be achieved. The national union opined that each removal results in lost time, effort, and funds invested in training that employee and loss of institutional knowledge, which may be irreplaceable. In further comment, this national union stated, ''It is remarkably inefficient for an agency to remove an employee regardless of the offense.'' Also with respect to penalties, the national union said that agencies are ''best served'' by taking action with the minimum penalty necessary to correct the misconduct which improves employee morale and minimizes the disruption to the agency. This national union affirmed, ''OPM's proposed changes are consistent with the CSRA and will better protect the due process rights of federal employees.''

While some commenters agreed with the rescission concerning the requirement that a suspension should not be a substitute for removal, a management association disagreed with this change. This management association questioned, ''Why keep an unacceptable employee?'' and observed that if the issue is conduct, ''a new position isn't going to 'fix' the underlying problem.'' This commenter stated that it understood that ''the rescission of E.O. 13839 led to rescinding this section.''

OPM will not make any changes based on this comment. If agencies implement a penalty other than removal, when it is appropriate, it does not follow that the employee is reassigned to a new position. The concept that suspension should not be a substitute for removal in circumstances in which removal would be appropriate is a straightforward principle that OPM believes agencies can apply without regulation. If a penalty is disproportionate to the alleged violation or is unreasonable, it is subject to being reduced or reversed even when the charges are sustained. Although OPM has decided to remove the provision regarding a suspension should not be a substitute for removal and defer to agency management in selecting an appropriate penalty, OPM reiterates that imposing a suspension when removal is appropriate may adversely impact employee morale and productivity and hamper the agency's ability to achieve its mission and promote effective stewardship. OPM reminds agencies that supervisors are responsible for ensuring that a disciplinary penalty is fair, reasonable, and appropriate to the facts and circumstances. In doing so, supervisors will address misconduct in a manner that has the greatest potential to avert harm to the efficiency of the service.

Section 752.203 Procedures

This section discusses the requirements for a proposal notice issued under this subpart. The language in this section establishes the same requirements for settlement agreements in the final rule that are detailed in §§ 432.108, 752.104, 752.407, and 752.607. Given the revocation of E.O. 13839 and under OPM's congressionally granted authority to regulate part 752, this final rule removes the requirement set forth in § 752.203(h). Please see the discussion in § 432.108 regarding the rescission of OPM requirements related to settlement agreements.

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

This section discusses adverse actions and employees covered under this subpart. The National Defense Authorization Act (NDAA) for Fiscal Year 2017 added MSPB appeal rights for National Guard technicians for certain adverse actions taken against them when they are not in a military pay status or when the issue does not involve fitness for duty in the reserve component.

In § 752.401(b), the final rule adds an exclusion for an action taken against a technician in the National Guard as provided in section 709(f)(4) of title 32, United States Code, and in § 752.401(d) removes from the list of employees excluded from coverage of this subpart ''a technician in the National Guard described in section 8337(h)(1) of title 5, United States Code, who is employed under section 709(a) of title 32, United States Code.''

An organization supported the extension of civil service protections to National Guard technicians under Public Law 114–328, and stated that, accordingly, the organization supported OPM's inclusion of an implementing regulation for that statute in this proposed rule. Another organization concurred with this organization's comments.

Section 752.402 Definitions

This section defines key terms used throughout the subchapter. With the rescission of E.O. 13839 and given that there is no other use for the definition of ''business day'' in subpart D, the final rule revises the regulation at § 752.402 to remove the definition of ''Business day''.

We did not receive any comments for this section.

Section 752.403 Standard for Action and Penalty Determination

Given the rescission of E.O. 13839 and under OPM's congressionally granted authority to regulate part 752, as with the final rule changes for § 752.202, the final regulatory changes to this section revise the heading to ''Standard for action'' and, as with §§ 752.202(c), 752.202(d), 752.202(e), and 752.202(f), rescind §§ 752.403(c), 752.403(d), 752.403(e), and 752.403(f). Please see the discussion in § 752.202.

Section 752.404 Procedures

Section 752.404(b) discusses the requirements for a notice of proposed action issued under this subpart. In particular, under OPM's authority to regulate 5 CFR part 752, the final rule rescinds the requirements in § 752.404(b)(1) 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), as well as the requirement that any notice period greater than 30 days must be reported to OPM. All comments related to the rescission of the requirement that an agency limit written notice of adverse actions to 30 days, as well as the reporting requirement to OPM, are addressed here in the Supplementary Information for the change at § 752.404, where the change appears first.

Two organizations, one concurring with the other's comment submissions, endorsed the rescission of this regulatory requirement. The organizations asserted that the restrictions on response periods for adverse actions had an adverse impact on an employee's ability to respond appropriately and impaired their ''due process rights,'' as well as resulted in substandard and hurried decisions based on incomplete information.

Two national unions expressed their overall support for rescinding the requirements to issue a decision within 30 days of the end of the employee's response period. One union further commented that this language wrongly took a negotiable topic, notice periods, off the bargaining table and the reporting requirement would chill agencies from providing notice beyond 30 days. Another national union agreed with OPM's assessment that there are many legitimate reasons to provide a longer notice period. They commented that the reporting requirement was also ''inefficient, inasmuch as it placed an additional and unnecessary burden on OPM and on agencies seeking to take an adverse action.''

Additionally, this section discusses the requirements for an agency decision issued under § 752.404(g). Under OPM's authority to regulate 5 CFR part 752, the final rule rescinds the requirement at § 752.404(g)(3) 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. All comments related to the rescission of the § 752.404(g)(3) requirement for agencies to issue decisions, to the extent practicable, within 15 business days of the conclusion of the employee's opportunity to respond under this subpart are addressed in the Supplementary Information for the change at § 752.103, where the change appears first.

Section 752.407 Settlement Agreements

The language in this section establishes the same requirement that is detailed in the final rule changes at §§ 432.108, 752.104, 752.203, and 752.607, Settlement agreements. This final rule removes § 752.407, Settlement agreements. Please see the discussion regarding settlement agreements in § 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 752.602 Definitions

This section defines key terms used throughout the subchapter. Section 752.602 includes a definition for the term ''business day.'' With the rescission of E.O. 13839 and given that there is no other use for ''business day'' in subpart F, OPM revises the regulation at § 752.602 to remove the definition of ''Business day''.

We did not receive any comments for this section.

Section 752.603 Standard for Action and Penalty Determination

Given the rescission of E.O. 13839 and under its congressionally granted authority to regulate part 752, as with the final rule changes for §§ 752.202 and 752.403, the final regulatory change to § 752.603 revises the heading to ''Standard for action'' and as with §§ 752.202(c), 752.202(d), 752.202(e), 752.202(f), 752.403(c), 752.403(d), 752.403(e), and 752.403(f), OPM rescinds §§ 752.603(c), 752.603(d), 752.603(e), and 752.603(f). Please see the discussion in § 752.202.

Section 752.604 Procedures

This section discusses requirements for a notice of proposed action. Due to the revocation of E.O. 13839 and under its congressionally granted authority to regulate 5 CFR part 752, as with the rule changes made for §§ 752.103(d)(3) and 752.404(b)(1), and for the same reasons, OPM rescinds the language at § 752.604(b)(1) that requires, to the extent an agency in its sole and exclusive discretion deems practicable, that 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. As well, in this rule OPM removes the language in § 752.604(b)(1) that requires that advance notices of greater than 30 days must be reported to OPM.

Additionally, OPM rescinds § 752.604(g)(3), which requires that an agency issue the decision on a proposed removal, to the extent practicable, within 15 business days of the conclusion of the employee's opportunity to respond. As with the discussion concerning the 15-day requirement for issuance of decisions in §§ 752.103(d)(3) and 752.404(g)(3), while recognizing it is good practice for agency deciding officials to resolve proposed removals promptly, some actions present complexities that necessitate a longer period of time to prepare the final decision. All comments related to the procedural requirements are addressed in the Supplementary Information for the changes at §§ 752.103 and 752.404, where the changes appear first.

Section 752.607 Settlement Agreements

The language in this section establishes the same requirements that are detailed in §§ 432.108, 752.104, 752.203 and 752.407, Settlement agreements. This final rule removes § 752.607, Settlement agreements. Please see the discussion at § 432.108.

Expected Impact of This Rule

OPM is issuing this final rule to implement requirements of E.O. 14003 and new statutory requirements for procedural and appeal rights for dual status National Guard technicians for certain adverse actions. E.O. 14003 requires OPM to rescind portions of the OPM final rule published at 85 FR 65940 which implemented certain requirements of E.O. 13839. In addition, section 512(a)(1)(C) of the 2017 NDAA provides MSPB appeal rights under 5 U.S.C. 7511, 7512, and 7513 to dual status National Guard technicians for certain adverse actions.

OPM believes that portions of the final rule which became effective on November 16, 2020, and which implemented certain requirements of E.O. 13839, are inconsistent with the current policy of the United States to protect, empower and rebuild the career Federal workforce as well as its current policy to encourage employee organizing and collective bargaining. The revisions implement applicable statutory mandates and provide agencies the necessary tools and flexibility to address matters related to unacceptable performance and misconduct or other behavior contrary to the efficiency of the service by Federal employees when they arise, consistent with the policies of E.O. 14003.

Given that the November 16, 2020, regulations OPM rescinds in this rule were in effect only for a brief period before E.O. 14003 was issued on January 22, 2021, agencies had limited opportunity to implement changes under the regulations. With the issuance of E.O. 14003, OPM discontinued collecting agency data on performance-based actions, adverse actions, and settlement agreements as was required by Section 5 of E.O. 13839. OPM does not otherwise collect agency data about the matters covered by the November 2020 regulatory amendments that OPM rescinds in this rule (namely, the timing and frequency of probationary period expiration notifications; the timing and nature of performance assistance for employees who have demonstrated unacceptable performance; penalty determination guidelines; advance notice and decision notice timeframes for adverse action; and settlement agreements). For these reasons, OPM has virtually no data on the extent to which adverse actions were pursued under the regulations for rescission

here. This rule will relieve agencies of the administrative burden of implementing the November 2020 regulatory amendments to the extent that agencies did not already have such policies and practices in place. Out of an abundance of caution, we clarify that OPM still is requiring that agencies submit to it arbitration awards taken under 5 U.S.C. 4303 or 5 U.S.C. 7512 so that OPM can efficiently carry out its authority under 5 U.S.C. 7703(d) to seek judicial review of any arbitration award that the Director of OPM determines is erroneous and would have a substantial impact on civil service law, rule, or regulation affecting personnel management that will have a substantial impact on a civil service law, rule, regulation, or policy directive.

Costs

This final rule will affect the operations of over 80 Federal agencies—ranging from cabinet-level departments to small independent agencies. Regarding implementation of E.O. 14003 requirements, we estimate that this rule will require individuals employed by these agencies to revise and rescind policies and procedures to implement certain portions of the OPM final rule published at 85 FR 65940 to the extent agencies have not already done so. Section 3(e) of E.O. 14003 directs heads of agencies whose practices were covered by E.O. 13839 to review and identify existing agency actions related to or arising from E.O. 13839 and ''as soon as practicable, suspend, revise, or publish for notice and comment proposed rules suspending, revising, or rescinding, the actions identified in the review'' described in Section 3(e). On March 5, 2021, OPM issued ''Guidance for Implementation of Executive Order 14003—Protecting the Federal Workforce'' to heads of agencies. In this guidance, OPM advised that ''agencies should not delay in implementing the requirements of Section 3(e) of E.O. 14003 as it relates to any changes to agency policies made as a result of OPM's regulations.'' Therefore, some agencies may not need to make any updates to agency policies as a result of this revised OPM rule. For the purpose of this cost analysis, the assumed average salary rate of Federal employees performing this work will be the rate in 2022 for GS–14, step 5, from the Washington, DC, locality pay table ($143,064 annual locality rate and $68.55 hourly locality rate). We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $137.10 per hour.

In order to comply with the regulatory changes in this final rule, affected agencies will need to review the rule and update their policies and procedures. We estimate that, in the first year following publication of the final rule, this will require an average of 200 hours of work by employees with an average hourly cost of $137.10. This would result in estimated costs in that first year of implementation of about $27,420 per agency, and about $2,193,600 in total government-wide. We do not believe this final rule will substantially increase the ongoing administrative costs to agencies.

Regarding the portion of the rule regarding appeal rights under 5 U.S.C. 7511, 7512, and 7513 for dual status National Guard technicians for certain adverse actions, this only impacts the Army National Guard and Air National Guard for dual status National Guard technicians that are covered by policies of the National Guard Bureau. Since this portion of the final rule reflects statutory changes in the 2017 NDAA which have been effective for several years, these statutory requirements should already be applied by the National Guard notwithstanding any regulatory changes by OPM. However, for the purpose of this cost analysis, the assumed average salary rate of Federal employees performing this work at the National Guard Bureau will be the rate in 2022 for GS–14, step 5, from the Washington, DC, locality pay table ($143,064 annual locality rate and $68.55 hourly locality rate). We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $137.10 per hour. In order to comply with the regulatory changes in this rule, the affected agency will need to review the rule and update its policies and procedures. We estimate that, in the first year following publication of the final rule, this will require an average of 40 hours of work by employees with an average hourly cost of $137.10. This would result in estimated costs in that first year of implementation of about $5,484 for the impacted agency. We do not believe this rule will substantially increase the ongoing administrative costs to the National Guard.

Executive Order 12866

Executive Order 12866 directs 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). In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget as a significant, but not economically significant rule.

Regulatory Flexibility Act

The Director of the Office of Personnel Management certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

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 final rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This final rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act or CRA) (5 U.S.C. 801 *et seq.*) requires rules to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this final rule before its effective date, as required by 5 U.S.C. 801. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this final rule is not a major rule as defined by the CRA (5 U.S.C. 804). The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this final rule is not a major rule as defined by the CRA (5 U.S.C. 804).

Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521)

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

List of Subjects in 5 CFR Parts 315, 432, and 752

Government employees.

Office of Personnel Management.

Stephen Hickman,

Federal Register Liaison.

Accordingly, for the reasons stated in the preamble, OPM amends 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, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218, unless otherwise noted; and E.O. 13162, 65 FR 43211, 3 CFR, 2000 Comp., p. 283. Secs. 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 365. Secs. 315.602 and 315.604 also issued under 5 U.S.C. 1104. Sec. 315.603 also issued under 5 U.S.C. 8151. Sec. 315.605 also issued under E.O. 12034, 43 FR 1917, 3 CFR, 1978 Comp., p. 111. Sec. 315.606 also issued under E.O. 11219, 30 FR 6381, 3 CFR, 1964–1965 Comp., p. 303. Sec. 315.607 also issued under 22 U.S.C. 2506. Sec. 315.608 also issued under E.O. 12721, 55 FR 31349, 3 CFR, 1990 Comp., p. 293. Sec. 315.610 also issued under 5 U.S.C. 3304(c). Sec. 315.611 also issued under 5 U.S.C. 3304(f). Sec. 315.612 also issued under E.O. 13473, 73 FR 56703, 3 CFR, 2008 Comp., p. 241. Sec. 315.708 also issued under E.O. 13318, 68 FR 66317, 3 CFR, 2003 Comp., p. 265. Sec. 315.710 also issued under E.O. 12596, 52 FR 17537, 3 CFR, 1987 Comp., p. 229. Subpart I also issued under 5 U.S.C. 3321, E.O. 12107, 44 FR 1055, 3 CFR, 1978 Comp., p. 264.

Subpart H—Probation on Initial Appointment to a Competitive Position

■ 2. Amend § 315.803 by revising paragraph (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.

* * * * *

PART 432—PERFORMANCE BASED REDUCTION IN GRADE AND REMOVAL ACTIONS

■ 3. The authority for part 432 continues to read as follows:

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

■ 4. Amend § 432.102 by:
■ a. Revising paragraphs (b)(14) and (15);
■ b. Adding paragraph (b)(16);
■ c. Removing paragraph (f)(12); and
■ d. Redesignating paragraphs (f)(13) and (14) as paragraphs (f)(12) and (13).

The revisions and additions read as follows:

§ 432.102 Coverage.

* * * * *

(b) * * *

(14) A termination in accordance with terms specified as conditions of employment at the time the appointment was made;

(15) An involuntary retirement because of disability under part 831 of this chapter; and

(16) An action against a technician in the National Guard concerning any activity under 32 U.S.C. 709(f)(4), except as provided by 32 U.S.C. 709(f)(5).

* * * * *

■ 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. As part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance.

■ 6. Amend § 432.105 by revising paragraphs (a)(1) and (a)(4)(i)(B)(*6*) 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.

* * * * *

(4) * * *

(i) * * *

(B) * * *

(*6*) To comply with a stay ordered by a member of the Merit Systems Protection Board under 5 U.S.C. 1214(b)(1)(A) or (B).

* * * * *

§ 432.108 [Removed]

■ 7. Remove § 432.108.

PART 752—ADVERSE ACTIONS

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

Authority: 5 U.S.C. 7504, 7514, and 7543, Pub. L. 115–91, 131 Stat. 1283, and Pub. L. 114–328, 130 Stat. 2000.

Subpart A—Discipline of Supervisors Based on Retaliation Against Whistleblowers

§ 752.101 [Amended]

■ 9. Amend § 752.101 in paragraph (b) by removing the definition for ''Business day''.

§ 752.103 [Amended]

■ 10. Amend § 752.103 by removing paragraph (d)(3).

§ 752.104 [Removed]

■ 11. Remove § 752.104.

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

■ 12. Amend § 752.202 by:
■ a. Revising the section heading; and
■ b. Removing paragraphs (c) through (f).

The revision reads as follows:

§ 752.202 Standard for action.

* * * * *

§ 752.203 [Amended]

■ 13. Amend § 752.203 by removing paragraph (h).

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

■ 14. Amend § 752.401 by:
■ a. Revising paragraphs (b)(15) and (16);
■ b. Adding paragraph (b)(17);
■ c. Removing paragraph (d)(5); and
■ d. Redesignating paragraphs (d)(6) through (13) as paragraphs (d)(5) through (12).

The revisions and additions read as follows:

§ 752.401 Coverage.

* * * * *

(b) * * *

(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 in this subchapter implementing those amendments;

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

(17) An action taken against a technician in the National Guard concerning any activity under 32 U.S.C. 709(f)(4), except as provided by 32 U.S.C. 709(f)(5).

* * * * *

§ 752.402 [Amended]

■ 15. Amend § 752.402 by removing the definition for ''Business day''.

■ 16. Amend § 752.403 by:
■ a. Revising the section heading; and
■ b. Removing paragraphs (c) through (f).

The revision reads as follows:

§ 752.403 Standard for action.

* * * * *

■ 17. Amend § 752.404 by:
■ a. Revising paragraph (b)(1); and
■ b. Removing paragraph (g)(3).

The revision reads 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. 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.

* * * * *

§ 752.407 [Removed]

■ 18. Remove § 752.407.

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

■ 19. Amend § 752.602 by removing the definition for ''Business day''.

■ 20. Amend § 752.603 by:
■ a. Revising the section heading; and
■ b. Removing paragraphs (c) through (f).

The revision reads as follows:

§ 752.603 Standard for action.

* * * * *

■ 21. Amend § 752.604 by:
■ a. Revising paragraph (b)(1); and
■ b. Removing paragraph (g)(3).

The revision reads 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. 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.

* * * * *

§ 752.607 [Removed]

■ 22. Remove § 752.607.

[FR Doc. 2022–24309 Filed 11–9–22; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–0688; Project Identifier MCAI–2022–00409–T; Amendment 39–22206; AD 2022–21–07]

RIN 2120–AA64

Airworthiness Directives; Deutsche Aircraft GmbH (Type Certificate Previously Held by 328 Support Services GmbH; AvCraft Aerospace GmbH; Fairchild Dornier GmbH; Dornier Luftfahrt GmbH) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Deutsche Aircraft GmbH (Type Certificate Previously Held by 328 Support Services GmbH; AvCraft Aerospace GmbH; Fairchild Dornier GmbH; Dornier Luftfahrt GmbH) Model 328–100 and –300 airplanes. This AD was prompted by a safety analysis that lithium batteries installed in the personal electronic devices (PED) are a potential risk of an in-flight fire in the flight deck stowage boxes. This AD requires installing a placard and stowing the fire gloves on the left-hand (LH) flap door of the flight deck step; and installing the placards on the LH and right-hand (RH) flight deck stowage boxes. This AD also requires revising the operator's existing airplane flight manual (AFM) to include emergency procedures, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective December 15, 2022.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 15, 2022.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2022–0688; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.