

Office of Personnel Management

§ 731.101

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

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

§ 730.105 Savings provision.

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

PART 731—SUITABILITY AND FITNESS

Subpart A—Scope

Sec.

731.101 Purpose.

731.102 Implementation.

731.103 Delegation to agencies.

731.104 Appointments subject to investigation.

731.105 Authority to take suitability actions.

731.106 Designation of public trust positions and investigative requirements.

Subpart B—Suitability Determinations and Actions

731.201 Standard.

731.202 Criteria for making suitability determinations.

731.203 Suitability actions by OPM and other agencies.

731.204 Debarment by OPM.

731.205 Debarment by agencies.

731.206 Reporting requirements.

Subpart C—OPM Suitability Action Procedures for the Competitive Service or Senior Executive Service

731.301 Scope.

731.302 Notice of proposed action.

731.303 Answer.

731.304 Decision.

Subpart D—Agency Suitability Action Procedures for the Competitive Service or Career Senior Executive Service

731.401 Scope.

731.402 Notice of proposed action.

731.403 Answer.

731.404 Decision.

Subpart E—Appeal to the Merit Systems Protection Board of Suitability actions in cases involving the Competitive Service or Career Senior Executive Service

731.501 Appeal to the Merit Systems Protection Board.

Subpart F—Savings Provision

731.601 Savings provision.

AUTHORITY: 5 U.S.C. 1302, 3301, 7301, 9201–9206; Pub. L. 116–92, sec. 1122(b)(1); E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218, as amended; E.O. 13467, 3 CFR, 2009 Comp., p. 198; E.O. 13488, 3 CFR, 2010 Comp., p. 189; 5 CFR, parts 1, 2 and 5; Presidential Memorandum on Enhancing Safeguards to Prevent the Undue Denial of Federal Employment Opportunities to the Unemployed and Those Facing Financial Difficulty Through No Fault of Their Own, January 31, 2014.

EFFECTIVE DATE NOTE: At 89 FR 102691, Dec. 18, 2024, the authority citation for part 731 was revised, effective Jan. 17, 2025. For the convenience of the user, the revised text is set forth as follows:

AUTHORITY: 5 U.S.C. 1302, 3301, 7301. E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218, as amended. E.O. 13467, 73 FR 38103, 3 CFR, 2009 Comp., p. 198, as amended. E.O. 13488, 74 FR 4111, 3 CFR, 2010 Comp., p. 189, as amended. E.O. 13764, 82 FR 8115, 3 CFR, 2017 Comp. p. 243. Presidential Memorandum of January 31, 2014, 3 CFR, 2014 Comp., p. 340. 5 CFR parts 1, 2, 5, and 6.

SOURCE: 73 FR 20154, Apr. 15, 2008, unless otherwise noted.

Subpart A—Scope

EFFECTIVE DATE NOTE: At 89 FR 102691, Dec. 18, 2024, subpart A of part 731 was revised, effective Jan. 17, 2025. For the convenience of the user, the new subpart A of part 731 follows the text of this subpart.

§ 731.101 Purpose.

(a) The purpose of this part is to establish criteria and procedures for making determinations of suitability

§ 731.102

and for taking suitability actions regarding employment in covered positions (as defined in paragraph (b) of this section) pursuant to 5 U.S.C. 3301, E.O. 10577 (3 CFR, 1954–1958 Comp., p. 218), as amended, and 5 CFR 1.1, 2.1(a) and 5.2. Section 3301 of title 5, United States Code, directs consideration of “age, health, character, knowledge, and ability for the employment sought.” E.O. 10577 (codified in relevant part at 5 CFR 1.1, 2.1(a) and 5.2) directs OPM to examine “suitability” for competitive Federal employment. This part concerns only determinations of “suitability,” that is, those determinations based on a person’s character or conduct that may have an impact on the integrity or efficiency of the service. Determinations made and actions taken under this part are distinct from objections to eligibles or pass overs of preference eligibles, and OPM’s and agencies’ decisions on such requests, made under 5 U.S.C. 3318 and 5 CFR 332.406, as well as determinations of eligibility for assignment to, or retention in, sensitive national security positions made under E.O. 10450 (3 CFR, 1949–1953 Comp., p. 936), E.O. 12968, or similar authorities.

(b) *Definitions.* In this part:

Applicant means a person who is being considered or has been considered for employment.

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

Core Duty means a continuing responsibility that is of particular importance to the relevant covered position or the achievement of an agency’s mission.

Covered position means a position in the competitive service, a position in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and a career appointment to a position in the Senior Executive Service.

Days means calendar days unless otherwise specified in this part.

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

Material means, in reference to a statement, one that is capable of influencing, affects, or has a natural tend-

5 CFR Ch. I (1–1–25 Edition)

ency to affect, an official decision even if OPM or an agency does not rely upon it.

Suitability action means an outcome described in § 731.203 and may be taken only by OPM or an agency with delegated authority under the procedures in subparts C and D of this part.

Suitability determination means a decision by OPM or an agency with delegated authority that a person is suitable or is not suitable for employment in covered positions in the Federal Government or a specific Federal agency.

[73 FR 20154, Apr. 15, 2008, as amended at 73 FR 66492, Nov. 10, 2008]

§ 731.102 Implementation.

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

(b) Under OMB Circular No. A–130 Revised, issued November 20, 2000, agencies are to implement and maintain a program to ensure that adequate protection is provided for all automated information systems. Agency personnel screening programs may be based on procedures developed by OPM. The Computer Security Act of 1987 (Pub. L. 100–235) provides additional requirements for Federal automated information systems.

(c) OPM may set forth policies, procedures, criteria, standards, quality control procedures, and supplementary guidance for the implementation of this part in OPM issuances.

§ 731.103 Delegation to agencies.

(a) Subject to the limitations and requirements of paragraphs (f) and (g) of this section, OPM delegates to the heads of agencies authority for making suitability determinations and taking suitability actions (including limited, agency-specific debarments under § 731.205) in cases involving *applicants* for and *appointees* to covered positions in the agency.

(b) When an agency, acting under delegated authority from OPM, determines that a Governmentwide debarment by OPM under § 731.204(a) may be

an appropriate action, it must refer the case to OPM for debarment consideration. Agencies must make these referrals prior to any proposed suitability action, but only after sufficient resolution of the suitability issue(s), through subject contact or investigation, to determine if a Governmentwide debarment appears warranted.

(c) Agencies exercising authority under this part by delegation from OPM must adhere to OPM requirements as stated in this part and OPM's issuances described in § 731.102(c). Agencies must also implement policies and maintain records demonstrating that they employ reasonable methods to ensure adherence to these OPM issuances.

(d)(1) A hiring agency may not make specific inquiries concerning an applicant's criminal or credit background in oral or written form (including through the OF-306 or other forms used to conduct suitability investigations for Federal employment, USAJOBS, or any other electronic means) unless the hiring agency has made a conditional offer of employment to the applicant. Agencies may request an exception to the provision for making credit inquiries in advance of a conditional offer in accordance with the provisions in 5 CFR part 330, subpart M. For criminal inquiries prior to a conditional offer, this prohibition does not apply to applicants for positions excepted under 5 CFR 920.201(b). Agencies may make inquiries into an applicant's Selective Service registration, military service, citizenship status, where applicable, or previous work history, prior to making a conditional offer of employment to an applicant.

(2) OPM reserves the right to undertake a determination of suitability based upon evidence of falsification or fraud relating to an examination or appointment at any point when information giving rise to such a charge is discovered. OPM must be informed in all cases where there is evidence of material, intentional false statements, or deception or fraud in examination or appointment, and OPM will take a suitability action where warranted.

(e) When an agency, exercising authority under this part by delegation from OPM, makes a suitability determination or changes a tentative favor-

able placement decision to an unfavorable decision, based on an OPM report of investigation or upon an investigation conducted pursuant to OPM-delegated authority, the agency must:

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

(2) Ensure that all applicable administrative procedural requirements provided by law, the regulations in this part, and OPM issuances as described in § 731.102(c) have been observed;

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

(4) Keep any record of the agency suitability determination or action as required by OPM issuances as described in § 731.102(c).

(f) OPM may revoke an agency's delegation to make suitability determinations and take suitability actions under this part if an agency fails to conform to this part or OPM issuances as described in § 731.102(c).

(g) OPM retains jurisdiction to make final determinations and take actions in all suitability cases where there is evidence that there has been a material, intentional false statement, or deception or fraud in examination or appointment. OPM also retains jurisdiction over all suitability cases involving a refusal to furnish testimony as required by § 5.4 of this chapter. Agencies must refer these cases to OPM for suitability determinations and suitability actions under this authority. Although no prior approval is needed, notification to OPM is required if the agency wants to take, or has taken, action under its own authority (5 CFR part 315, 5 CFR part 359, or 5 CFR part 752) in cases involving material, intentional false statement in examination or appointment, or deception or fraud in examination or appointment; or refusal to furnish testimony as required

§ 731.104

5 CFR Ch. I (1–1–25 Edition)

by § 5.4 of this title. In addition, paragraph (a) of this section notwithstanding, OPM may, in its discretion, exercise its jurisdiction under this part in any case it deems necessary.

[73 FR 20154, Apr. 15, 2008, as amended at 81 FR 86561, Dec. 1, 2016; 88 FR 60330, Sept. 1, 2023]

§ 731.104 Appointments subject to investigation.

(a) To establish a person's suitability for employment, appointments to covered positions identified in § 731.101 require the person to undergo an investigation by OPM or by an agency with delegated authority from OPM to conduct investigations. However, except as provided in paragraph (b)(2), an appointment will not be subject to investigation when the person being appointed has undergone a background investigation and the appointment involves:

(1) Appointment or conversion to an appointment in a covered position if the person has been serving continuously with the agency for at least 1 year in one or more covered positions subject to investigation;

(2) Transfer to a covered position, provided the person has been serving continuously for at least 1 year in a covered position subject to investigation;

(3) Transfer or appointment from an excepted service position that is not a covered position to a covered position, provided the person has been serving continuously for at least 1 year in a position where the person has been determined fit for appointment based on criteria equivalent to the factors provided at 5 CFR 731.202;

(4) Appointment to a covered position from a position as an employee working as a Federal Government contract employee, provided the person has been serving continuously for at least 1 year in a job where a Federal agency determined the contract employee was fit to perform work on the contract based on criteria equivalent to the factors provided at 5 CFR 731.202; or

(5) Appointment to a covered position where there has been a break in service of less than 24 months, and the service immediately preceding the break was in a covered position, an excepted serv-

ice position, or a contract employee position described in paragraphs (a)(1) to (a)(4) of this section.

(b)(1) Either OPM or an agency with delegated suitability authority may investigate and take a suitability action against an applicant, appointee, or employee in accordance with § 731.105. There is no time limit on the authority of OPM or an agency with delegated suitability authority to conduct the required investigation of an applicant who has been appointed to a position. An employee does not have to serve a new probationary or trial period merely because his or her appointment is subject to investigation under this section. An employee's probationary or trial period is not extended because his or her appointment is subject to investigation under this section.

(2) An appointment to a covered position also will be subject to investigation when:

(i) The covered position requires a higher level of investigation than previously conducted for the person being appointed; or

(ii) An agency obtains new information in connection with the person's appointment that calls into question the person's suitability under § 731.202;

(3) Suitability determinations must be made for all appointments that are subject to investigation.

(c) Positions that are intermittent, seasonal, per diem, or temporary, not to exceed an aggregate of 180 days per year in either a single continuous appointment or series of appointments, do not require a background investigation as described in § 731.106(c)(1). The employing agency, however, must conduct such checks as it deems appropriate to ensure the suitability of the person.

(d) Reinvestigation requirements under § 731.106 for public trust positions are not affected by this section.

(e) For purposes of this section, "criteria equivalent to the factors provided at 5 CFR 731.202" are criteria that provide adequate assurance that the person to be appointed, converted to an appointment, or transferred is suitable to be employed in a covered position, as determined by OPM, in issuances under this regulation. A decision by

OPM, or by an agency applying guidance from OPM, that a prior fitness determination was not based on criteria equivalent to the factors provided at 5 CFR 731.202, and that a new investigation or adjudication is necessary is not subject to review under section 731.501 of this part.

[73 FR 20154, Apr. 15, 2008, as amended at 73 FR 66492, Nov. 11, 2008; 76 FR 69608, Nov. 9, 2011]

§ 731.105 Authority to take suitability actions.

(a) Neither OPM nor an agency acting under delegated authority may take a suitability action in connection with any application for, or appointment to, a position that is not subject to investigation or check under § 731.104.

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

(c) Except as limited by § 731.103(g), an agency, exercising delegated authority, may take a suitability action under this part against an *applicant* or *appointee* based on the criteria of § 731.202;

(d) OPM may take a suitability action under this part against an *employee* based on the criteria of § 731.202(b)(3), (4), or (8).

(e) An agency may not take a suitability action against an *employee*. Nothing in this part precludes an agency from taking an adverse action against an employee under the procedures and standards of part 752 of this chapter or terminating a probationary employee under the procedures of part 315 or part 359 of this chapter. An agency must notify OPM to the extent required in § 731.103(g) if it wants to take, or has taken, action under these authorities.

§ 731.106 Designation of public trust positions and investigative requirements.

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

of a risk designation system for agency use in an OPM issuance as described in § 731.102(c).

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

(c) *Investigative requirements.* (1) Persons receiving an appointment made subject to investigation under this part must undergo a background investigation. OPM is authorized to establish minimum investigative requirements correlating to risk levels. Investigations should be initiated before appointment but no later than 14 calendar days after placement in the position.

(2) All positions subject to investigation under this part must also receive a sensitivity designation of Special-Sensitive, Critical-Sensitive, or Non-critical-Sensitive, when appropriate. This designation is complementary to the risk designation, and may have an effect on the position's investigative requirement. Sections 732.201 and 732.202 of this chapter detail the various sensitivity levels and investigative requirements. Procedures for determining investigative requirements for all positions based upon risk and sensitivity will be published in OPM issuances, as described in §§ 731.102(c) and 732.201(b).

(3) If suitability issues develop prior to the required investigation, OPM or the agency may conduct an investigation sufficient to resolve the issues and support a suitability determination or action, if warranted. If the person is appointed, the minimum level of investigation must be conducted as required by paragraph (c)(1) of this section.

(d) *Reinvestigation requirements.* (1) Agencies must ensure that reinvestigations are conducted and a determination made regarding continued employment of persons occupying public trust

positions at least once every 5 years. The nature of these reinvestigations and any additional requirements and parameters will be established in supplemental guidance issued by OPM.

(2) If, prior to the next required re-investigation, a separate investigation is conducted to determine a person's eligibility (or continued eligibility) for access to classified information or to hold a sensitive position, or as a result of a change in risk level as provided in paragraph (e) of this section, and that investigation meets or exceeds the requirements for a public trust reinvestigation, a new public trust reinvestigation is not required. Such a completed investigation restarts the cycle for a public trust reinvestigation for that person.

(3) Agencies must notify all employees covered by this section of the reinvestigation requirements under this paragraph.

(e) *Risk level changes.* If an employee or appointee experiences a change to a higher position risk level due to promotion, demotion, or reassignment, or the risk level of the employee's or appointee's position is changed to a higher level, the employee or appointee may remain in or encumber the position. Any upgrade in the investigation required for the new risk level should be initiated within 14 calendar days after the promotion, demotion, reassignment or new designation of risk level is final.

(f) *Completed investigations.* Any suitability investigation (or reinvestigation) completed by an agency under paragraphs (d) and (e) of this section must result in a determination by the employing agency of whether the findings of the investigation would justify an action under this part or under another applicable authority, such as part 315, 359, or 752 of this chapter. Section 731.103 addresses whether an agency may take an action under this part, and whether the matter must be referred to OPM for debarment consideration.

[73 FR 20154, Apr. 15, 2008, as amended at 73 FR 66492, Nov. 11, 2008; 76 FR 69608, Nov. 9, 2011]

EFFECTIVE DATE NOTE: At 89 FR 102691, Dec. 18, 2024, subpart A of part 731 was revised, effective Jan. 17, 2025. For the conven-

ience of the user, the revised text is set forth as follows:

Subpart A—Scope

§ 731.101 Purpose.

(a) The following definitions apply for the purposes of this part:

Applicant means an individual who is being considered or has been considered for employment in the competitive service or career Senior Executive Service.

Appointee means an individual who has entered on duty and is in the first year of employment in a competitive service or career Senior Executive Service position when it is employment subject to investigation. When the individual is serving a probationary or trial period, the individual's status as an appointee will extend through the end of the initial probationary/trial period, if longer than one year.

Competitive service or career Senior Executive Service, for the purposes of this part, refers to a position in the competitive service, a position in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and a career appointment to a position in the Senior Executive Service.

Contractor employee means an individual who performs work for or on behalf of any agency under a contract and who, to perform the work specified under the contract, will require access to space, information, information technology systems, staff, or other assets of the Federal Government, and who could, by the nature of their access or duties, adversely affect the integrity or efficiency of the Government. Such contracts include but are not limited to: personal service contracts; contracts between any non-Federal entity and any agency; and subcontracts between any non-Federal entity and another non-Federal entity to perform work related to the primary contract with the agency. The term contractor employee includes employees of a grantee of any agency or any other category of person who performs work for or on behalf of an agency but does not include a Federal employee.

Core duty means a continuing responsibility that is of particular importance to the relevant covered position or the achievement of an agency's mission.

Days means calendar days unless otherwise noted in this part.

Employee means an individual who has completed the first year of an appointment in the competitive service or career Senior Executive Service when it is employment subject to investigation and is no longer serving the initial probation or trial period, if applicable. In the case of an appointee whose initial probation or trial period is for more than one year, the individual will be

considered an employee at the completion of the initial probation or trial period.

Employment subject to investigation, except as described elsewhere in this part, includes an appointment to the competitive service or career Senior Executive Service, an appointment to the excepted service, employment as a contractor employee, or employment as a nonappropriated fund employee.

Excepted service means any position of the executive branch either excepted from the competitive service or which is not in the Senior Executive Service.

(1) For the purposes of this part, excepted service does not include:

(i) Any position in an element of the intelligence community as defined in the National Security Act of 1947, as amended, to the extent that the individual is not otherwise subject to OPM appointing authorities;

(ii) Any position where OPM is statutorily precluded from prescribing such standards; and

(iii) Any position when filled by political appointment.

(2) Senior Executive Service noncareer, limited term, and limited emergency appointments are not subject to suitability actions under this part.

(3) Excepted service does not mean any position excepted from the competitive service of the executive branch that could be non-competitively converted to the competitive service.

Fitness is the level of character or conduct determined necessary for an individual to perform work for a Federal agency as an employee in the excepted service, as a contractor employee, or as a nonappropriated fund employee.

Fitness determination means a decision by an agency that an individual has or does not have the required level of character and conduct necessary to perform work for a Federal agency as an excepted service employee. These determinations are based on whether an individual's character or conduct may have an adverse impact on the integrity or efficiency of the service.

Material means, in reference to a statement, one that affects, or has a natural tendency to affect, or is capable of influencing, an official decision even if OPM or an agency does not rely upon it.

Nonappropriated fund employee means an employee paid from nonappropriated funds of an instrumentality of the United States under the jurisdiction of the Armed Forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Armed Forces as described in 5 U.S.C. 2105.

Political appointment means an appointment by Presidential nomination for confirmation by the Senate, an appointment by the President without Senate confirmation (except those appointed under 5 CFR

213.3102(c)); an appointment to a position compensated under the Executive Schedule (5 U.S.C. 5312 through 5316); an appointment of a White House Fellow to be assigned as an assistant to a top-level Federal officer (5 CFR 213.3102(z)); a Schedule C appointment (5 CFR 213.3301 and 213.3302); a noncareer, limited term, or limited emergency Senior Executive Service appointment (5 CFR part 317, subpart F); an appointee to serve in a political capacity under agency-specific authority; and a provisional political appointment.

Suitability action means one or more of the following outcomes:

(1) Cancellation of eligibility;

(2) Removal;

(3) Cancellation of reinstatement eligibility; and

(4) Debarment.

Suitability determination means a decision by OPM or an agency with delegated authority that an individual is suitable or is not suitable for employment in the competitive service or career Senior Executive Service in the Federal Government or a specific Federal agency. A suitability determination is based on whether an individual's character or conduct may have an adverse impact on the integrity or efficiency of the service.

(b) The purpose of this part is as follows:

(1) To establish investigation, continuous vetting, and reciprocity requirements for an appointment to a position in the competitive service and excepted service and for career appointment in the Senior Executive Service. Contractor employee fitness and non-appropriated fund employee fitness, as addressed in sections 3(b) and 3(c) of Executive Order 13488, are also subject to the position designation requirements, investigative standards, and reciprocity-requirements in this part.

(2) To establish the criteria for making determinations of suitability for the competitive service or career Senior Executive Service and to establish a minimum standard of fitness for the excepted service.

(3) To establish the procedures for taking suitability actions in the case of the competitive service or career Senior Executive Service.

(c) An Agency shall exercise due regard to this part and supplemental guidance if determining fitness for employment as a contractor employee or as a nonappropriated fund employee.

(d) Any determination made and action taken under this part are distinct from: an objection to an eligible or pass over of a preference eligible; OPM's or an agency's decision on a request, made under 5 U.S.C. 3318 and 5 CFR 332.406; and any determination of eligibility for access to classified information or for assignment to, or retention in, sensitive national security positions made under E.O. 12968, E.O. 10865, or E.O. 13467, as amended, or similar authorities.

§ 731.102 Implementation.

(a) An investigation conducted under this part may not be used for any other purpose except as provided in a Privacy Act system of records notice published by the agency conducting the investigation and section 1.1(e) of Executive Order 13467, as amended.

(b) OPM may set forth any policy, procedure, criteria, standard, quality control procedure, and supplementary guidance to implement this part in an OPM or joint Executive Agent issuance.

§ 731.103 Delegation to agencies for the competitive service and career Senior Executive Service.

(a) Subject to the limitations and requirements of paragraphs (b), (d), and (f) of this section, OPM delegates to the head of an agency authority for making a suitability determination and taking a suitability action (including limited, agency-specific debarments under § 731.205) in a case involving an *applicant* or *appointee*.

(b) When an agency, acting under delegated authority from OPM, determines that a government-wide debarment by OPM under § 731.204(a) may be an appropriate action, it must refer the case to OPM for debarment consideration. An agency must make a referral prior to any proposed suitability action, but only after sufficient resolution of the suitability issue(s) to determine if a Government-wide debarment appears warranted.

(c) An agency exercising authority under this part by delegation from OPM must adhere to OPM requirements as stated in this part and issuances described in § 731.102(b). An Agency must also implement policies and maintain records demonstrating that they employ reasonable methods to ensure adherence to these issuances.

(d) OPM reserves the right to undertake a determination of suitability based upon evidence of falsification or fraud relating to an examination or appointment at any point when information giving rise to such a charge is discovered. OPM must be informed in all cases where there is evidence of material, intentional false statements, or deception or fraud, in examination or appointment, and OPM will take a suitability action where warranted.

(e) OPM may revoke an agency's delegation to make suitability determinations and take suitability actions under this part if an agency fails to conform to this part or OPM issuances as described in § 731.102(b).

(f) OPM retains sole jurisdiction to make a final suitability determination and take an action under this part in any case where there is evidence that there has been a material, intentional false statement, or deception or fraud, in examination or appointment. OPM also retains sole jurisdiction to make a final suitability determination and take an action under this part in any case

when there is evidence that there has been knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force. An Agency must refer these cases to OPM for suitability determinations and suitability actions under this authority. Although no prior approval is needed, notification to OPM is required if the agency wants to take, or has taken, action under its own authority (such as 5 CFR part 315, 359, or 752) in cases involving conduct fitting within any of these factors. In addition, paragraph (a) of this section notwithstanding, OPM may, in its discretion, exercise its jurisdiction under this part in any case it deems necessary regardless of whether the agency may adjudicate under another authority.

§ 731.104 Investigation and reciprocity requirements.

(a) To establish an individual's suitability or fitness, employment subject to investigation (see definitions § 731.101(a)) requires the individual to undergo investigation by an agency with authority to conduct investigations except as described in paragraphs (a)(1) through (3) of this section.

(1) An agency must reciprocally accept a prior background investigation in the event of promotion, demotion, reassignment, or transfer from employment subject to investigation to other employment subject to investigation without a break in service, unless the new employment is at a higher risk level.

(2) An agency must reciprocally accept a prior background investigation when the person entering employment subject to investigation has undergone a background investigation that is at or above the level required for the position as determined by position designation and has a qualifying break in service specified in supplemental guidance, unless the agency obtains new information in connection with the person's employment that calls into question the person's suitability or fitness under § 731.202. Agencies must request such checks as may be specified in implementing guidance and must enroll individuals re-entering service after a break in service into continuous vetting, consistent with the requirements in § 731.106(d).

(3) Positions that are intermittent, per diem, or temporary in nature, not to exceed an aggregate of 180 days per year in either a single continuous appointment or series of appointments, do not require a background investigation for suitability or fitness. The employing agency, however, must conduct such checks as it deems appropriate to ensure the suitability or fitness of the person. The employing agency must conduct such vetting as required under OPM issuances.

(b) An individual does not have to serve a new probationary or trial period in the Civil

Service merely because the individual's employment is subject to investigation under this section. An individual's probationary or trial period in the Civil Service is not extended because the individual's employment is subject to investigation under this section.

(c) A suitability determination must be made for each appointment in the competitive service or career Senior Executive Service and a fitness determination must be made for each appointment in the excepted service, except as described in paragraph (c)(2) of this section.

(1) In the case of a prior investigation that is reciprocally accepted, if the record in the Central Verification System or its successor system does not reflect a prior favorable suitability or fitness determination, the agency must review the prior investigation for the purpose of making a suitability or fitness determination.

(2) In the case of a prior investigation that is reciprocally accepted, if the prior investigation was favorably adjudicated for suitability or fitness, the agency must accept the prior determination except that the agency must make a new determination where:

(i) The investigative record on file for the individual shows conduct that is incompatible with the core duties of the relevant covered position; or

(ii) The agency has prescribed additional factors as permitted under § 731.202(b) that were not addressed in the prior favorable adjudication, in which case the agency must conduct an adjudication using only those additional factors.

(d) Continuous vetting requirements under § 731.106 are not affected by this section.

§ 731.105 Authority to take suitability actions in cases involving the competitive service or career Senior Executive Service.

(a) OPM or an agency acting under delegated authority may take a suitability action in connection with any application for, or appointment to, the competitive service or career Senior Executive Service.

(1) OPM's or an agency's authority to complete a suitability action continues when an application is withdrawn, when an offer of employment is withdrawn, or when an individual appointed separates from employment.

(2) OPM's or an agency's authority to take a suitability action includes the case of an application for or appointment to the competitive service or career Senior Executive Service from another type of position when a prior investigation is being reciprocally accepted as described in § 731.104(a).

(b) OPM may take a suitability action under this part against an *applicant* or *appointee* based on the criteria in § 731.202.

(c) Except as limited by § 731.103(b), (d), and (f), an agency, exercising delegated authority, may take a suitability action under this part against an *applicant* or *appointee* based on the criteria of § 731.202.

(d) Only OPM may take a suitability action under this part against an *employee* in the competitive service or career Senior Executive Service based on the criteria of § 731.202(b)(3), (7), or (8).

(e) An agency may not take a suitability action against an *employee* in the competitive service or career Senior Executive Service. Nothing in this part precludes an agency from taking an adverse action against an employee under the procedures and standards of 5 CFR part 752 or terminating a probationary employee under the procedures of 5 CFR part 315 or 359 or under agency specific authorities. An agency must notify OPM to the extent required in § 731.103(d) and (f) if it wants to take, or has taken, action under these authorities. OPM retains the right to take a suitability action even in those cases where the agency makes an adjudicative determination under another authority.

§ 731.106 Designation of public trust positions and investigative requirements.

(a) *Risk designation.* For every position in the competitive service; in the excepted service; to be filled with a career appointment in the Senior Executive Service; or in which the occupant performs a service as a contractor employee or as a nonappropriated fund employee, an agency head must designate the position at high, moderate, or low risk level (in accordance with the risk designation system issued jointly by the Executive Agents; see § 731.102(b)), as determined by the position's potential for adverse impact to the efficiency or integrity of the service.

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

(c) *Investigative requirements.* (1) An individual entering employment subject to investigation under this part must undergo a background investigation as described in § 731.104. OPM establishes minimum investigative requirements correlating to the risk level. An investigation should be initiated before the individual is appointed or otherwise becomes employed by or on behalf of the agency; however, where an agency does not timely initiate the investigation, it must do so as soon as possible, even if the appointment has already occurred.

(2) Any position subject to risk designation under this section must also receive a sensitivity designation of Special-Sensitive, Critical-Sensitive, Noncritical-Sensitive, or Non-sensitive, as appropriate. This designation is complementary to the risk designation and may have an effect on the position's investigative requirement. Part 1400 of this title details the various sensitivity levels and investigative requirements for positions designated as sensitive. Procedures for determining investigative requirements for a position based upon risk and sensitivity will be published in issuances, as described in § 731.102(b) and 5 CFR part 1400.

(3) If a suitability or fitness issue develops prior to the required investigation, OPM or the agency may request investigation from an authorized investigative service provider sufficient to resolve the issue and support an unfavorable suitability or fitness determination. However, inquiries into criminal or credit history cannot occur until a conditional offer has been made, as specified in § 731.106(g). If warranted for positions in the competitive service or career Senior Executive Service, an agency may also take suitability action, in accordance with the authorities described in this part. If the individual is then appointed or otherwise becomes employed by or on behalf of the agency, the minimum level of investigation must be conducted as required by paragraph (c)(1) of this section.

(d) *Continuous vetting requirements.* (1) Individuals occupying positions of employment subject to investigation are also subject to continuous vetting through periodic checks of their background at any time in accordance with standards issued by OPM. Checks must be conducted at regular intervals, based on the type of check and with consideration of position risk and sensitivity. The nature of a continuous vetting check, and any additional requirements and parameters, are specified in supplemental issuances as described in § 731.102(b). An individual may be subjected to continuous vetting only if they have signed an authorization for release of information permitting a disclosure for continuous vetting purposes. Continuous vetting for an individual in a public trust position satisfies the requirement for a periodic re-investigation of an individual in a public trust position as directed in E.O. 13488, as amended. An agency must ensure that each continuous vetting check is conducted and a determination made regarding continued employment.

(2) An individual in a sensitive position who is continually vetted to standards established by the Security Executive Agent for satisfying periodic reinvestigation and/or continuous vetting requirements meets the continuous vetting requirements for a public trust position.

(3) An agency must notify each employee covered by this section of the continuous vetting requirements under this paragraph (d).

(e) *Risk level changes.* If an individual in employment subject to investigation experiences a change to a higher position risk level due to promotion, demotion, reassignment, or transfer, or the risk level of the individual's position is changed to a higher level, the individual may remain in or encumber the position. Any upgrade in the investigation required for the new risk level should be initiated within 14 days after the promotion, demotion, reassignment, transfer or new designation of risk level is final or as otherwise required by 5 CFR part 1400.

(f) *Completed investigations.* An investigation or continuous vetting check under paragraphs (c) through (e) of this section supports a determination by the employing agency of whether the findings of the investigation would justify an action under this part or under another applicable authority, such as 5 CFR part 315, 359, or 752. Section 731.103 addresses whether an agency may take an action under this part, and whether the matter must be referred to OPM for debarment consideration.

(g) *Criminal or credit history inquiries.* A hiring agency may not make specific inquiries concerning an applicant's criminal background in oral or written form (including through the OF-306 or other forms used to conduct vetting for Federal employment, USAJOBS, or any other electronic means) unless the hiring agency has made a conditional offer of employment to the applicant. For criminal inquiries prior to a conditional offer, this prohibition does not apply to applicants for positions excepted under 5 CFR 920.201(b). For competitive service or career Senior Executive Service, a hiring agency may not make specific inquiries concerning an applicant's credit background in oral or written form (including through the OF-306 or other forms used to conduct vetting for Federal employment, USAJOBS, or any other electronic means) unless the hiring agency has made a conditional offer of employment to the applicant. Agencies may request an exception to the provision for making credit inquiries in advance of a conditional offer in accordance with the provisions in 5 CFR part 330, subpart M. Agencies may make an inquiry into an applicant's Selective Service registration, military service, citizenship status, where applicable, or previous work history, prior to making a conditional offer of employment to an applicant.

(h) *Recordkeeping and use of information.* When an agency makes a suitability or fitness determination based on an investigation, the agency must:

(1) Ensure that any record used in making the determination is accurate, relevant,

timely, and complete to the extent reasonably necessary to ensure fairness to the individual in any determination;

(2) Ensure that all applicable administrative procedural requirements provided by law, including the regulations in this part and issuances as described in § 731.102(b) have been observed;

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

(4) Keep any record of the agency determination or action as required by issuances as described in § 731.102(b).

Subpart B—Suitability Determinations and Actions

EFFECTIVE DATE NOTE: At 89 FR 102695, Dec. 18, 2024, subpart B of part 731 was revised, effective Jan. 17, 2025. For the convenience of the user, the new subpart B of part 731 follows the text of this subpart.

§ 731.201 Standard.

The standard for a suitability action defined in § 731.203 and taken against an applicant, appointee, or employee is that the action will protect the integrity or promote the efficiency of the service.

§ 731.202 Criteria for making suitability determinations.

(a) *General.* OPM, or an agency to which OPM has delegated authority, must base its suitability determination on the presence or absence of one or more of the specific factors (charges) in paragraph (b) of this section.

(b) *Specific factors.* In determining whether a person is suitable for Federal employment, only the following factors will be considered a basis for finding a person unsuitable and taking a suitability action:

(1) Misconduct or negligence in employment;

(2) Criminal or dishonest conduct;

(3) Material, intentional false statement, or deception or fraud in examination or appointment;

(4) Refusal to furnish testimony as required by § 5.4 of this chapter;

(5) Alcohol abuse, without evidence of substantial rehabilitation, of a nature and duration that suggests that the applicant or appointee would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of the applicant or appointee or others;

(6) Illegal use of narcotics, drugs, or other controlled substances without evidence of substantial rehabilitation;

(7) Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force; and

(8) Any statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question.

(c) *Additional considerations.* OPM and agencies must consider any of the following additional considerations to the extent OPM or the relevant agency, in its sole discretion, deems any of them pertinent to the individual case:

(1) The nature of the position for which the person is applying or in which the person is employed;

(2) The nature and seriousness of the conduct;

(3) The circumstances surrounding the conduct;

(4) The recency of the conduct;

(5) The age of the person involved at the time of the conduct;

(6) Contributing societal conditions; and

(7) The absence or presence of rehabilitation or efforts toward rehabilitation.

(d) *Reciprocity.* An agency cannot make a new determination under this section for a person who has already been determined suitable or fit based on character or conduct unless a new investigation is required under § 731.104 or § 731.106, or no new investigation is required but the investigative record on file for the person shows conduct that is incompatible with the core duties of the relevant covered position.

[73 FR 20154, Apr. 15, 2008, as amended at 73 FR 66493, Nov. 11, 2008]

§ 731.203

5 CFR Ch. I (1–1–25 Edition)

§ 731.203 Suitability actions by OPM and other agencies.

(a) For purposes of this part, a suitability action is one or more of the following:

- (1) Cancellation of eligibility;
- (2) Removal;
- (3) Cancellation of reinstatement eligibility; and
- (4) Debarment.

(b) A non-selection, or cancellation of eligibility for a specific position based on an objection to an eligible or pass over of a preference eligible under 5 CFR 332.406, is *not* a suitability action even if it is based on reasons set forth in § 731.202.

(c) A suitability action may be taken against an applicant or an appointee when OPM or an agency exercising delegated authority under this part finds that the applicant or appointee is unsuitable for the reasons cited in § 731.202, subject to the agency limitations of § 731.103(g).

(d) OPM may require that an appointee or an employee be removed on the basis of a material, intentional false statement, deception or fraud in examination or appointment; refusal to furnish testimony as required by § 5.4 of this chapter; or a statutory or regulatory bar which prevents the person's lawful employment.

(e) OPM may cancel any reinstatement eligibility obtained as a result of a material, intentional false statement, deception or fraud in examination or appointment.

(f) An action to remove an appointee or employee *for suitability reasons* under this part is not an action under part 315, 359, or 752 of this chapter. Where behavior covered by this part may also form the basis for an action under parts 315, 359, or 752 of this chapter, an agency may take the action under part 315, 359, or 752 of this chapter, as appropriate, instead of under this part. An agency must notify OPM to the extent required in § 731.103(g) if it wants to take, or has taken, action under these authorities.

(g) Agencies do not need approval from OPM before taking unfavorable suitability actions. However, they are required to report to OPM all unfavorable suitability actions taken under this part within 30 days after they take

the action. Also, all actions based on an OPM investigation must be reported to OPM as soon as possible and in no event later than 90 days after receipt of the final report of investigation.

§ 731.204 Debarment by OPM.

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

(b) OPM may impose an additional period of debarment following the expiration of a period of OPM or agency debarment, but only after the person again becomes an applicant, appointee, or employee subject to OPM's suitability jurisdiction, and his or her suitability is determined in accordance with the procedures of this part. An additional debarment period may be based in whole or in part on the same conduct on which the previous suitability action was based, when warranted, or new conduct.

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

§ 731.205 Debarment by agencies.

(a) Subject to the provisions of § 731.103, when an agency finds an applicant or appointee unsuitable based upon reasons listed in § 731.202, the agency may, for a period of not more than 3 years from the date of the unfavorable suitability determination, deny that person examination for, and appointment to, either all, or specific covered, positions within that agency.

(b) The agency may impose an additional period of debarment following the expiration of a period of OPM or agency debarment, but only after the person again becomes an applicant or appointee subject to the agency's suitability jurisdiction, and his or her suitability is determined in accordance with the procedures of this part. An additional debarment period may be based in whole or in part on the same conduct on which the previous suitability action was based, when warranted, or new conduct.

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

(d) The agency is responsible for enforcing the period of debarment and taking appropriate action if a person applies for, or is inappropriately appointed to, a position at that agency during the debarment period. This responsibility does not limit OPM's authority to exercise jurisdiction itself and take any action OPM deems appropriate.

§ 731.206 Reporting requirements.

Agencies must report to OPM the level or nature, result, and completion date of each background investigation or reinvestigation, each agency decision based on such investigation or reinvestigation, and any personnel action taken based on such investigation or reinvestigation, as required in OPM issuances.

[76 FR 69608, Nov. 9, 2011]

EFFECTIVE DATE NOTE: At 89 FR 102695, Dec. 18, 2024, subpart B of part 731 was revised, effective Jan. 17, 2025. For the convenience of the user, the revised text is set forth as follows:

Subpart B—Determinations of Suitability or Fitness; Suitability Actions in Cases Involving the Competitive Service or Career Senior Executive Service

§ 731.201 Standard.

The standard for a suitability and fitness determination and for a suitability action defined in § 731.203 is that the action will protect the integrity or promote the efficiency of the service.

§ 731.202 Criteria for making suitability and fitness determinations.

(a) *General.* OPM, or an agency to which OPM has delegated suitability authority, must base its suitability determination on the presence or absence of one or more of the specific factors in paragraph (b) of this section. An agency is responsible for making a fitness determination for an excepted service position covered by this part but must apply the specific factors in paragraph (b) as the minimum standards for making the determination. When applying these criteria, an agency must also apply guidance in supplemental issuances, as described in § 731.102(b). If using these factors to also make a Personal Identity Verification (PIV) Credential

determination as outlined in OPM issuances regarding PIV credentialing eligibility, an agency must also ensure they have verified the individual's identity.

(b) *Specific factors.* Only OPM may take a suitability action considering the factors in paragraph (b)(3) or (7) of this section. Agencies may use the factor in paragraph (b)(8) of this section in applicant and appointee suitability cases but not employee cases; however, OPM may use this factor in employee cases. When making a suitability determination, OPM or an agency will consider only the following factors to determine if one is suitable. When making fitness determinations, an agency must consider these factors as a minimum standard, but it may prescribe additional factors to protect the integrity and promote the efficiency of the service, when job-related and consistent with business necessity.

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

(c) *Additional considerations.* OPM and an agency must consider any of the following additional considerations to the extent OPM or the relevant agency, in its sole discretion, deems any of them pertinent to the individual case:

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

§ 731.203 Suitability actions by OPM and other agencies for the competitive service or career Senior Executive Service.

(a) This section pertains only to the competitive service or career Senior Executive Service as defined in § 731.101.

(b) A suitability action may be taken only by OPM or an agency with delegated authority under the procedures in subparts C and D of this part.

(c) A non-selection, or cancellation of eligibility for the competitive service based on an objection to an eligible or pass over of a preference eligible under 5 CFR 332.406, is *not* a suitability action even if it is based on reasons set forth in § 731.202.

(d) A suitability action may be taken against an applicant or an appointee to the competitive service or career Senior Executive Service when OPM or an agency exercising delegated authority under this part finds that the applicant or appointee is unsuitable for the reasons cited in § 731.202, subject to the agency limitations of § 731.103(b), (d), and (f).

(e) OPM may require that an employee in the competitive service or career Senior Executive Service be removed on the basis of one or more of the following:

(1) A material, intentional false statement, deception, or fraud in examination or appointment;

(2) Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by illegal or unconstitutional means; and/or

(3) Statutory or regulatory bar that prevents the individual's lawful employment.

(f) OPM may cancel any reinstatement eligibility obtained as a result of a material, intentional false statement, deception, or fraud in examination or appointment.

(g) An action to remove an appointee or employee *for suitability reasons* under this part is not an action under 5 CFR part 315, 359, or 752. Where conduct covered by this part may also form the basis for an action under 5 CFR part 315, 359, or 752, an agency may take the action under 5 CFR part 315, 359, or 752, as appropriate, instead of under this part. An agency must notify OPM to the extent required in § 731.103(f) if it wants to take, or has taken, action under these authorities. OPM reserves the right to also take an action under this part.

(h) An agency does not need approval from OPM before taking an unfavorable suitability action. However, it is required to report to the Central Verification System or its successor, each unfavorable suitability action taken under this part within 30 days after it takes the action. Also, each suitability determination based on an investigation must be reported to the Central Verification System or its successor as soon as possible and in no event later than 90 days

after receipt of the final report of investigation.

§ 731.204 Debarment by OPM in cases involving the competitive service and career Senior Executive Service.

(a) When OPM finds an individual unsuitable for any reason listed in § 731.202, OPM, in its discretion, may, for a period of not more than 3 calendar years from the date of the unfavorable suitability determination, deny that individual examination for, and appointment to, the competitive service and career appointment in the Senior Executive Service.

(b) OPM may impose an additional period of debarment following the expiration of a period of OPM or agency debarment or when new conduct arises while under debarment, but only after the individual again becomes an applicant, appointee, or employee subject to OPM's suitability jurisdiction, and the individual's suitability is determined in accordance with the procedures of this part. An additional debarment period may be based in whole or in part on the same conduct on which the previous suitability action was based, when warranted, or new conduct.

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

§ 731.205 Debarment by agencies in cases involving the competitive service and career Senior Executive Service.

(a) Subject to the provisions of § 731.103, when an agency finds an applicant or appointee unsuitable based upon reasons listed in § 731.202, the agency may, for a period of not more than 3 years from the date of the unfavorable suitability determination, deny that individual examination for, and appointment to, either all, or specific competitive service positions and career appointment to all, or specific Senior Executive Service positions within that agency.

(b) The agency may impose an additional period of debarment following the expiration of a period of OPM or agency debarment, but only after the individual again becomes an applicant or appointee subject to the agency's suitability jurisdiction, and his or her suitability is determined in accordance with the procedures of this part. An additional debarment period may be based in whole or in part on the same conduct on which the previous suitability action was based, when warranted, or new conduct.

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

(d) The agency is responsible for enforcing the period of debarment and taking appropriate action if an individual applies for a position at that agency during the debarment period or is examined for or appointed

Office of Personnel Management

§ 731.304

to a position at that agency during the debarment period. This responsibility does not limit OPM's authority to exercise jurisdiction itself and take any action OPM deems appropriate.

§ 731.206 Reporting requirements for investigations and suitability and fitness determinations.

An agency must report to the Central Verification System or its successor the level or nature, result, and completion date of each background investigation, reinvestigation, or enrollment in Continuous Vetting; each agency decision based on such investigation, reinvestigation, or Continuous Vetting; and any personnel action taken based on such investigation or reinvestigation, as required in supplemental guidance.

Subpart C—OPM Suitability Action Procedures for the Competitive Service or Senior Executive Service

§ 731.301 Scope.

This subpart covers OPM-initiated suitability actions against an *applicant, appointee, or employee*.

§ 731.302 Notice of proposed action.

(a) OPM will notify the applicant, appointee, or employee (hereinafter, the “respondent”) in writing of the proposed action, the charges against the respondent, and the availability of review, upon request, of the materials relied upon. The notice will set forth the specific reasons for the proposed action and state that the respondent has the right to answer the notice in writing. The notice will further inform the respondent of the time limit for the answer as well as the address to which an answer must be made.

(b) The notice will inform the respondent that he or she may be represented by a representative of the respondent's choice and that if the respondent wishes to have such a representative, the respondent must designate the representative in writing.

(c) OPM will serve the notice of proposed action upon the respondent by mail or hand delivery no less than 30 days prior to the effective date of the proposed action to the respondent's last known residence or duty station.

(d) If the respondent encumbers a position covered by this part on the date

the notice is served, the respondent is entitled to be retained in a pay status during the notice period.

(e) OPM will send a copy of the notice to any employing agency that is involved.

EFFECTIVE DATE NOTE: At 89 FR 102696, Dec. 18, 2024, § 731.302 was amended by revising paragraph (c), effective Jan. 17, 2025. For the convenience of the user, the revised text is set forth as follows:

§ 731.302 Notice of proposed action.

* * * * *

(c) OPM will serve the notice of proposed action upon the respondent by mail, secure email, or hand delivery no less than 30 days prior to the effective date of the proposed action to the respondent's last known residence or duty station.

* * * * *

§ 731.303 Answer.

(a) *Respondent's answer.* A respondent may answer the charges in writing and furnish documentation and/or affidavits in support of the answer. To be timely, a written answer must be submitted no more than 30 days after the date of the notice of proposed action.

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

§ 731.304 Decision.

The decision regarding the final suitability action will be in writing, be dated, and inform the respondent of the reasons for the decision and that an unfavorable decision may be appealed in accordance with subpart E of this part. OPM will also notify the respondent's employing agency of its decision. If the decision requires removal, the employing agency must remove the appointee or employee from the rolls within 5 work days of receipt of OPM's final decision.

§ 731.401

5 CFR Ch. I (1–1–25 Edition)

Subpart D—Agency Suitability Action Procedures for the Competitive Service or Career Senior Executive Service

proposed action to the respondent's last known residence or duty station.

* * * * *

§ 731.401 Scope.

This subpart covers agency-initiated suitability actions against an *applicant* or *appointee*.

§ 731.403 Answer.

A respondent may answer the charges in writing and furnish documentation and/or affidavits in support of the answer. To be timely, a written answer must be submitted no more than 30 days after the date of the notice of proposed action.

§ 731.402 Notice of proposed action.

(a) The agency must notify the applicant or appointee (hereinafter, the “respondent”) in writing of the proposed action, the charges against the respondent, and the availability for review, upon request, of the materials relied upon. The notice must set forth the specific reasons for the proposed action and state that the respondent has the right to answer the notice in writing. The notice must further inform the respondent of the time limit for the answer as well as the address to which such answer must be delivered.

§ 731.404 Decision.

The decision regarding the final action must be in writing, be dated, and inform the respondent of the reasons for the decision and that an unfavorable decision may be appealed in accordance with subpart E of this part. If the decision requires removal, the employing agency must remove the appointee from the rolls within 5 work days of the agency's decision.

(b) The notice must inform the respondent that he or she may be represented by a representative of the respondent's choice and that if the respondent wishes to have such a representative, the respondent must designate the representative in writing.

Subpart E—Appeal to the Merit Systems Protection Board of Suitability actions in cases involving the Competitive Service or Career Senior Executive Service

(c) The agency must serve the notice of proposed action upon the respondent by mail or hand delivery no less than 30 days prior to the effective date of the proposed action to the respondent's last known residence or duty station.

§ 731.501 Appeal to the Merit Systems Protection Board.

(d) If the respondent is employed in a position covered by this part on the date the notice is served, the respondent is entitled to be retained in a pay status during the notice period.

(a) *Appeal to the Merit Systems Protection Board.* When OPM or an agency acting under delegated authority under this part takes a suitability action against a person, that person may appeal the action to the Merit Systems Protection Board (hereinafter “Board”).

EFFECTIVE DATE NOTE: At 89 FR 102696, Dec. 18, 2024, § 731.402 was amended by revising paragraph (c), effective Jan. 17, 2025. For the convenience of the user, the revised text is set forth as follows:

§ 731.402 Notice of proposed action.

* * * * *

(c) The agency must serve the notice of proposed action upon the respondent by mail, secure email, or hand delivery no less than 30 days prior to the effective date of the

(b) *Decisions by the Merit Systems Protection Board.* (1) If the Board finds that one or more of the charges brought by OPM or an agency against the person is supported by a preponderance of the evidence, regardless of whether all specifications are sustained, it must affirm the suitability determination. The Board must consider the record as a whole and make a finding on each charge and specification in making its decision.

(2) If the Board sustains fewer than all the charges, the Board must remand

Office of Personnel Management

§ 732.102

the case to OPM or the agency to determine whether the suitability action taken is appropriate based on the sustained charge(s). However, the agency must hold in abeyance a decision on remand until the person has exhausted all rights to seek review of the Board's decision, including court review.

(3) Once review is final, OPM or an agency will determine whether the action taken is appropriate based on the sustained charges and this determination will be final without any further appeal to the Board.

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

Subpart F—Savings Provision

EFFECTIVE DATE NOTE: At 89 FR 102696, Dec. 18, 2024, subpart F of part 731 was removed, effective Jan. 17, 2025.

§ 731.601 Savings provision.

No provision of the regulations in this part is to be applied in such a way as to affect any administrative proceeding pending on June 16, 2008. An administrative proceeding is deemed to be pending from the date of the agency or OPM “notice of proposed action” described in §§ 731.302 and 731.402.

PART 732—NATIONAL SECURITY POSITIONS

Subpart A—Scope

Sec.

732.101 Purpose.

732.102 Definition and applicability.

Subpart B—Designation and Investigative Requirements

732.201 Sensitivity level designations and investigative requirements.

732.202 Waivers and exceptions to investigative requirements.

732.203 Periodic reinvestigation requirements.

Subpart C—Due Process and Reporting

732.301 Due process.

732.302 Reporting to OPM.

Subpart D—Security and Related Determinations

732.401 Reemployment eligibility of certain former Federal employees.

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

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

Subpart A—Scope

§ 732.101 Purpose.

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

§ 732.102 Definition and applicability.

(a) For purposes of this part, the term “national security position” includes:

(1) Those positions that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States; and

(2) Positions that require regular use of, or access to, classified information. Procedures and guidance provided in OPM issuances apply.

(b) The requirements of this part apply to competitive service positions, and to Senior Executive Service positions filled by career appointment, within the Executive Branch, and agencies may apply them to excepted service positions within the Executive Branch.

[56 FR 18654, Apr. 23, 1991, as amended at 66 FR 66711, Dec. 27, 2001]