

U.S. Office of Personnel Management
Questions and Answers on Regulation Amendments to 5 CFR Parts 315, 432, 752 and
the Sections of Executive Order 13839 Previously Enjoined

Note: The portions of the Executive Order that were previously enjoined are now fully effective and binding on executive agencies.

5 CFR Part 315

1. Will new employees be required to serve a longer probationary period?

No. Employees serve a one-year probationary period on initial appointment to a competitive position, as established in 5 CFR 315.801. Agencies are now required to notify supervisors three months and one month prior to the expiration of an employee's probationary period and to advise the supervisor to consider whether the employee should be retained beyond the one-year probationary period. The supervisor's decision should be made long enough before the period elapses to permit termination, where appropriate.

2. What happens if an agency fails to notify a supervisor that an employee's probationary period is ending at three months and again at one month before the expiration date?

The purpose of the three-month and one-month notifications is to encourage supervisors to be more conscious of the passage of time and make more effective use of the probationary period. The probationary period is the final, evaluative stage in the hiring process. The three-month and one-month reminders are designed to help supervisors take full advantage of the probationary period in order to make informed decisions about whether to retain an individual in the agency's permanent workforce. If an employee completes the probationary period before his or her supervisor considers the individual's continued employment, the individual receives a finalized appointment as a Federal employee.

Supervisors who fail to make timely decisions regarding their probationary employees may create the potential for retention, at least in the short run, of an employee unfit to perform the duties of the position and the imposition of additional burden if the agency determines to attempt to remove the employee through a performance-based or adverse action.

3. Can an agency still terminate a probationer if the agency failed to notify the supervisor of the employee's probationary period expiration date?

Yes. An agency may terminate a probationer even if the agency failed to notify the supervisor of the employee's probationary period expiration date as long as the termination action is taken before the expiration of the probationary period and is based

on reasons such as the employee's inability to perform the duties of his or her position, lack of cooperativeness or other unsatisfactory performance or misconduct, and complies with the provisions of 5 CFR 315.804.

4. If the agency failed to notify the supervisor of the employee's probationary period expiration date and the employee is terminated, will the employee be able to appeal the termination?

No. The purpose of the notice is to benefit the agency by making the supervisor more conscious of the need to make a prompt decision about retention. An agency's failure to notify supervisors three months and one month prior to the end date of an employee's probationary period does not give the employee any additional appeal rights beyond those the employee may already have. Appeal rights for probationers are described in 5 CFR 315.806.

5. My agency already notifies supervisors six months before a probationary period expiration date. Are we required to stop?

OPM believes the three-month and one-month intervals before expiration are sufficient, but agencies may adopt more frequent reminder periods if they choose to do so.

6. Doesn't notifying supervisors three months and again one month before the end of a probationary period require them to take action, thereby effectively shortening the employee's probationary period?

No. Termination may appropriately occur at any time during the probationary period that a basis for termination arises. The probationary period is not an entitlement for the probationer; it is a service requirement before his or her appointment will be deemed finalized. The length of a probationary period on initial appointment to a competitive position is currently established as one year in 5 CFR 315.801. An agency's notifications to supervisors as required by 5 CFR 315.803 are intended solely to remind supervisors that an employee's probationary period will be ending soon, and of the need to consider whether the employee is fit for continued employment. Supervisors should monitor progress and performance continually throughout the probationary period and may take action at any appropriate time during that period based on their assessments.

7. How will revisions to 5 CFR part 315 impact probationers' procedural and appeal rights?

The procedures for terminating probationers for unsatisfactory performance or conduct are contained in 5 CFR 315.804 and probationer appeal rights are described in 5 CFR 315.806. These provisions are not impacted by the regulatory amendments at 5 CFR 315.803. The changes implement Section 2(i) of E.O. 13839, which emphasizes more

efficient use of the probationary period through prior notification of the probationary period end date. The rule does not impact appeal rights for employees covered by 5 U.S.C 7511. Agencies are not prevented from informing an employee covered by 5 U.S.C. 7511 of any procedural rights he or she may be entitled to receive.

5 CFR Part 432

1. Are agencies still required to provide assistance to an employee who has performance issues?

Yes. OPM encourages managers to engage in continuous performance feedback and early correction of performance concerns, thereby supporting the principles espoused in E.O. 13839 for promoting accountability. If an employee exhibits unacceptable performance and is given an opportunity to demonstrate acceptable performance, pursuant to 5 CFR 432.104, an agency is required to offer assistance to the employee during a formal opportunity period. The assistance offered to the employee during the opportunity period need not take any particular form to satisfy the statutory requirement. For example, the assistance need not be training.

2. May an agency use an informal or additional assistance period to help an employee with performance problems?

No. Additional performance assistance periods are not required by statute. They are now prohibited by regulation. The revised regulations provide that “no additional performance assistance period or similar informal period shall be provided prior to or in addition to the opportunity period” provided under the revised regulations. Prohibiting agency use of additional informal opportunity periods encourages efficient use of chapter 43 procedures for addressing unacceptable performance and advances the ability to address performance problems in a timely manner. The opportunity period afforded an unacceptable performer under the current statutory framework is a sufficient opportunity to demonstrate acceptable performance.

Furthermore, Section 4 of E.O. 13839 prohibits agencies from making any agreement, including a collective bargaining agreement, that requires the use of any performance assistance period or similar informal period to demonstrate improved performance prior to the initiation of an opportunity period under section 4302(c)(6) of title 5, United States Code, before removing an employee for unacceptable performance.

However, this does not preclude an agency from providing continuous feedback to allow for early correction of any performance issues.

3. How long may a formal opportunity period last?

Section 4 of E.O. 13839 generally limits an opportunity period to no more than a 30-day period to demonstrate acceptable performance under section 4302(c)(6) of title 5, United States Code, except when the agency determines in its sole and exclusive discretion that a longer period is necessary to provide sufficient time to evaluate an employee's performance.

4. Is an agency limited to chapter 43 procedures to address an employee's unacceptable performance?

No. Chapter 75 procedures may be used in appropriate cases to address an employee's unacceptable performance. In fact, Section 4 of E.O. 13839 prohibits an agency from making any agreement, including a collective bargaining agreement, that limits an agency's discretion to employ chapter 75 procedures to address unacceptable performance of an employee.

5. Are agencies prohibited from using settlement agreements to resolve employees' informal or formal complaints?

No. While Section 5 of E.O. 13839 places restrictions on agency management with regard to certain matters within settlement agreements, it does not prevent agencies from pursuing settlement agreements and other forms of alternative dispute resolution to resolve formal or informal complaints. However, agencies are prohibited from agreeing to erase, remove, alter or withhold from another agency any information about an employee's performance or conduct in the employee's official personnel records in order to resolve a formal or informal complaint or settle an administrative challenge to an adverse personnel action. Such agreements are traditionally referred to as "clean record" agreements.

In contrast, an agency may agree to withhold negative information from prospective future non-Federal employers. Such an agreement is sometimes referred to as a partial clean record settlement.

6. How will the prohibition of clean record agreements benefit Federal agencies?

Agencies may experience fewer matters that give rise to arbitration and litigation because the prohibition on clean record agreements facilitates the sharing of records between Federal agencies. Agencies will be better able to make appropriate and informed decisions regarding a prospective employee's qualification, fitness and suitability as applicable to future employment.

7. May an agency remove or alter inaccurate information in an employee's personnel records (OPF)?

Yes. An agency is permitted, unilaterally or by agreement, to modify an employee's personnel file to remove inaccurate information or the record of an erroneous or illegal action. The agency must ensure that it removes only information that the agency itself has determined to be inaccurate or to reflect an action taken illegally or in error.

In addition, an agency may cancel or vacate a proposed action if persuasive evidence comes to light prior to issuance of a final agency decision on an adverse personnel action that casts doubt on the validity of the action or the ability of the agency to sustain the action in litigation. If a proposed action is subsequently canceled, the agency may modify the employee's personnel files.

8. What information about settlement agreements must agencies report to OPM?

As part of its annual report to the OPM Director required by Section 6 of E.O. 13839, an agency must report how many agency settlement agreements were reached with employees arising out of adverse personnel actions as well as key terms reached in those agreements. The agency's annual report should also include the number of any agreements relating to the removal of information that the agency itself determined to be inaccurate or to reflect an action taken illegally or in error. OPM will issue reminders of this requirement annually and provide periodic guidance consistent with the requirements of E.O. 13839.

5 CFR Part 752

1. What are the requirements for disciplining a supervisor found to have retaliated against a whistleblower?

Subject to 5 U.S.C. 1214(f), for the first incident of a prohibited personnel action, an agency is required to propose a suspension of at least three days. The agency may propose an additional action, including a reduction in grade or pay. For the second incident of a prohibited personnel action, an agency is required to propose that the supervisor be removed. The proposed mandatory penalties are statutory requirements, imposed by Public Law 115-91, sec. 1097, and codified at 5 U.S.C. 7515, as is the agency's responsibility to carry out the penalty if the supervisor cannot provide an answer and evidence sufficient to clear himself or herself.

2. May an agency impose a suspension of longer than three days for a supervisor's first-time offense of whistleblower retaliation?

Yes. For the first incident of a prohibited personnel practice, an agency is required to propose the penalty at a level *no less than a three-day suspension*. The agency may propose an additional action, such as a reduction in grade or pay. Agencies should propose a penalty suited to the facts and circumstances of the alleged whistleblower retaliation, including severity of the offense.

3. May an agency notify the whistleblower of the penalty imposed upon the supervisor who retaliated against the whistleblower?

No. An agency may only share information from an individual's personnel records with those who have a need to know, such as human resources staff involved in advising management and any management official responsible for approving the action.

4. Are the procedures for retaliation against whistleblowers different from procedures for other adverse actions?

The procedures under subpart A of 5 CFR 752 for discipline against supervisors who retaliate against whistleblowers are nearly the same as those described in subparts B, D, and F for other adverse actions. For example, subpart A incorporates the same standard of action from each of the related subparts. However, there are some key exceptions, namely the provisions concerning the reply period and advance notice. Under subpart A, supervisors against whom an action is proposed are entitled to no more than 14 days to answer after receipt of the proposal notice. At the conclusion of the 14-day advance notice period, the agency shall carry out the proposed action if the supervisor fails to provide evidence or provides evidence that the head of the agency deems insufficient.

5. Can an agency extend the 14-day reply period for a supervisor to respond to a notice of proposed adverse action for whistleblower retaliation?

No. The requirement to submit an answer and furnish supporting evidence within 14 days is derived directly from 5 U.S.C. 7515(b)(2)(B). The statute states that if after the end of the 14-day period, a supervisor does not furnish any evidence, the head of the agency "shall" carry out the action proposed. The language of the statute is mandatory and not permissive. Therefore, no extension is allowed under the statute.

6. May an agency use progressive discipline?

An agency is not required to use progressive discipline. In fact, progressive discipline has never been required by law or OPM regulations. If the facts and circumstances of a case warrant removal, an agency should not substitute a suspension, even if the employee has not been previously suspended or demoted. An agency must propose and impose a

penalty that is tailored to the facts and circumstances of the case and within the bounds of tolerable reasonableness.

Furthermore, Section 4 of E.O. 13839 prohibits agencies from making any agreement, including a collective bargaining agreement, that limits the agency's discretion to remove an employee from Federal service without first engaging in progressive discipline.

7. May an agency use a table of penalties?

Creation and use of a table of penalties is not required by statute, case law or OPM regulation. Penalty consideration requires an individual assessment of all relevant facts and circumstances rather than a formulaic and rigid application of a penalty table. Employees should be treated equitably, and an agency should consider appropriate comparators as the agency evaluates a potential disciplinary action, as well as other relevant factors including an employee's disciplinary record and past work record, including all applicable prior misconduct. Agencies must ensure, however, that supervisors use independent judgement, take appropriate steps in gathering facts, and conduct a thorough analysis to decide the appropriate penalty in individual cases.

8. Are agencies required to provide appeal rights information in an adverse action proposal notice?

Yes. The requirement to provide the appeal rights information at the proposal notice stage is a statutory requirement under section 1097(b)(2)(A) of Pub. L. 115-91. Part 752 is amended in part to effectuate the statute, which requires that a notice of proposed action under subparts B, D and F include detailed information about any right to appeal any action upheld, the forum in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file. This regulatory change does not confer on an employee a right to seek redress at the proposal stage that an employee did not have previously. This information may assist an employee to make decisions such as whether he or she should seek representation. While there are specific circumstances where there may be a cause of action at the proposal stage, such as when an employee alleges that a proposed action constitutes retaliation for previous whistleblower activity, an employee would generally not have a colorable claim under any of the venues discussed in the appeal rights section unless and until a decision was issued that triggered such rights for the employee.

The appeal rights language included at the proposal stage specifically relating to choice of forum and limitations related to an employee's choice of forum will vary depending on circumstances, the nature of a claim and the type of employee. Appeal rights may include but are not be limited to filing an Equal Employment Opportunity complaint with the Equal Employment Opportunity Commission; a prohibited personnel practice complaint with the U.S. Office of Special Counsel (OSC); a grievance under a negotiated grievance procedure; or an appeal with the Merit Systems Protection Board. Each process has

different requirements and standards that must be satisfied. Meanwhile, the extent to which a choice of venue may preclude subsequent pursuit of a claim in a different venue will be determined by a statutory patchwork that includes 5 U.S.C. 7121 and 5 U.S.C. 7702.

OPM does not view the addition of procedural appeal rights language in the regulation to constitute a requirement to provide substantive legal guidance at the proposal stage or to serve as a substitute for advice an employee may receive from an employee representative. Given this observation, as well as the divergent circumstances and individualized nature of any particular adverse action, agencies are encouraged and advised to consult closely with their agency counsel to develop the best course of action for implementation of this requirement. Employees are encouraged to consult with their representatives to determine the best options available to them at the proposal and/or decision stage if an employee believes that an agency has taken an action which triggers the right to file a complaint, an appeal or a grievance.

9. What must an agency prove to establish that an individual is a comparator for the purposes of evaluating a potential adverse action?

Appropriate comparators are primarily individuals in the same work unit, with the same supervisor, who engaged in the same or similar misconduct. See *Miskill v. Social Security Administration*, 863 F.3d 1379 (Fed. Cir. 2017). An agency must consider appropriate comparators as the agency evaluates a potential disciplinary action. Proposing and deciding officials are not bound by previous decisions in similar cases, but should, as they deem appropriate, consider such decisions, in a manner consistent with their own managerial authority and responsibilities and independent judgment. Accordingly, if an outcome differs from the outcome for a comparator, officials should explain their reasoning in a manner that distinguishes the instant case from previous proposals and outcomes.

10. How can agencies prevent employees in different work units from receiving vastly different penalties for the same misconduct?

The use of comparator information is but one factor of many that must be considered in determining the reasonableness of a penalty. Agencies should address the unique aspects of each instance of misconduct and tailor discipline to the specific situation. Disciplinary action that may have sufficed in one situation may not be appropriate in another, which may warrant either a higher or lower level of discipline, depending on the complete set of circumstances.

11. Is an agency required to limit advance notice of an adverse action to 30 days?

OPM has not changed the regulatory provision that an employee against whom an adverse action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to 5 CFR 752.404(d) (commonly referred to as the "crime

provision”). However, to the extent practicable and in its sole and exclusive discretion, an agency should limit advance notice of an adverse action to no more than 30 days. OPM regulations regarding advance written notice of an adverse action are derived directly from 5 U.S.C. 7513(b)(1) and 7543(b)(1) and promote swift and appropriate action for addressing misconduct, as required by E.O. 13839.

12. What is required if an agency’s advance notice period exceeds 30 days?

Agencies must report advance notice periods of greater than 30 days to OPM. As required by Section 6 of E.O. 13839, agencies should submit this information as part of their annual report to the OPM Director.

13. By when must an agency issue a decision on a proposed removal taken under chapter 75?

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.

Labor Relations

1. What is the standard for negotiating grievance procedures with regard to removal from Federal service based on misconduct or unacceptable performance?

Section 3 of E.O. 13839 requires an agency head, whenever reasonable in view of the particular circumstances, to endeavor to exclude from the application of any grievance procedures negotiated under section 7121 of title 5, United States Code, any dispute concerning decisions to remove an employee from Federal service for misconduct or unacceptable performance. Each agency must commit the time and resources necessary to achieve this goal, while fulfilling its obligation to bargain in good faith. If an agreement cannot be reached, the agency will, to the extent permitted by law, promptly request the assistance of the Federal Mediation and Conciliation Service (FMCS) and, as necessary, the Federal Service Impasses Panel (FSIP) in the resolution of the disagreement. Within 30 days after the adoption of any collective bargaining agreement that fails to achieve this goal, the agency head must provide an explanation to the President, through the Director of OPM. Such an explanation is not required if the agreement was adopted pursuant to an FSIP order or an arbitrator engaging in interest arbitration, provided that the agency had proposed excluding from the negotiated grievance procedure the decision to remove an employee from the Federal service for misconduct or unacceptable performance.

2. Under E.O. 13839, what matters must agencies exclude from negotiated grievance procedures?

To the extent consistent with law, an agency’s negotiated grievance and binding arbitration procedures must exclude coverage of disputes over the assignment of ratings of record and awards of any form of incentive pay, including cash awards; quality step

increases; or recruitment, retention or relocation payments. Such matters may still be covered by internal agency administrative grievance procedures.