

FEDERAL ENERGY REGULATORY COMMISSION
ADJUDICATION REVIEW BOARD
GUIDELINES FOR ADJUDICATION STANDARDS AND ACTIONS

1. Suitability and Security Adjudication Standards.

A. Suitability Standards.

The Office of Personnel Management (OPM) issued, at 5 CFR Part 731, procedures for determining a person's suitability for Federal employment. Determining a person's suitability for Federal employment involves an assessment of past and present conduct as it may indicate probable future actions. This assessment is based upon record data and personal testimony developed through investigation by OPM or by the Commission's Security and Safety Office. The suitability criteria provided by OPM (5 CFR § 731.202) will be used by the Commission's Security and Safety Office as appropriate in determining employment or retention of employment in positions of public trust, as defined in 5 CFR § 731.106. The assessment is made to establish a reasonable expectation that the initial employment or continued employment of a person would protect the integrity or promote the efficiency of the Federal service. A reasonable expectation that the employment would not protect the integrity or promote the efficiency of the service is established when an adverse "nexus" or connection can be shown between the conduct in question and the job performance of the person or others (employees, employing agency, other agencies), i.e., the conduct itself would have a direct, adverse effect, or indicates a potential for future actions by the person that would adversely impact on job performance.

B. Security Standards.

Executive Order 10450 and Executive Order 12968 contain criteria for evaluating the conduct of individuals for determining initial employment or retention of employment in positions involving access to classified information (sensitive positions). The Security and Safety Office, when adjudicating conduct using security standards, will determine if the conduct indicates that employment or continued employment of the person would pose a risk of damage to the interests of national security. In such cases, the person must be denied appointment or removed from employment even though such action may not be warranted under the suitability criteria. The adjudicative process shall determine whether the person has indicated unreliability, untrustworthiness, lack of dependability,

potential for subornation or blackmail, dishonesty, or disregard for the law and established authority. This assessment will be based upon a completed and current investigation and criteria provided by OPM. Each investigative case must be adjudicated within 90 days of receipt of the report of investigation unless additional information has been formally requested to be supplied by OPM. If the case has been reopened to obtain additional pertinent information, the case is to be adjudicated within 90 days of the receipt of the additional information.

2. Adjudication Actions.

A. General.

(1) The authority for the Security and Safety Office and servicing Human Resource Division to evaluate information relating to the suitability criteria cited in 5 CFR Part 731 and to take an adverse suitability disqualification action from the standpoint of the efficiency of the Federal service is included in 5 U.S.C. 3301, 7301, 7502, and 7512. The Commission will follow the procedures of 5 CFR § 731.401-404 in adjudicating suitability actions. An adverse suitability decision by the Commission may be appealed to the Merit Systems Protection Board pursuant to 5 CFR § 731.501.

(2) The authority for the Security and Safety Office to evaluate information relating to the security criteria cited in EO 10450, EO 12968 and 5 CFR Part 732 and to deny appointment or remove from employment is included in 5 U.S.C. 7532. The use of the removal procedures authorized by 5 U.S.C. 7532 will be limited to cases in which the interests of the national security are involved. Maximum use will be made of normal removal procedures of the Office of Personnel Management where such procedures are adequate and appropriate to achieve security purposes.

(3) Whenever information is developed or received indicating that the retention of an individual in a sensitive position may not be clearly consistent with the efficiency of the Federal Government and/or interests of national security, the individual's supervisor or the servicing Human Resources Division will forward this information to the Security and Safety Office. The Security and Safety Office will initiate the investigation required to resolve derogatory information which cannot be adjudicated through personal interview.

B. Favorable Determination. If the final suitability or security adjudication is favorable, the Security and Safety Office will sign the OPM Certification of Investigation Notice for filing on the permanent side of the Official Personnel Folder (OPF). Also when required, the Security and Safety Office will sign the OPM OFI-79A, Report of Agency Adjudicative Action on OPM Personnel

Investigations, and return the form to OPM. As part of a favorable determination, the Security and Safety Office may require that a code of conduct briefing be provided to the subject on such issues as alcohol, drug, and financial matters.

C. Unfavorable Determination. If the final adjudication is unfavorable, the individual will be provided administrative due process as delineated below.

(1) **Applicants.** The Security and Safety Office will follow the procedures outlined below when unfavorable security actions are taken based on the results of an investigation with regard to an applicant to a sensitive position of the Federal service.

(a) The individual will be provided a written Statement of Reasons (SOR) for the decision, which will be stated as specifically as security considerations will permit. The individual should be advised that he/she may obtain legal counsel or other assistance at his/her own expense, may request any documents, records and reports in the investigative file upon which the denial is based, which, if requested and as permitted by the national security and the Freedom of Information Act and Privacy Act and other applicable law, will be provided prior to the time set for a written reply

(b) The applicant must have an opportunity to respond to the SOR, and to request a review of the determination. The written response to the SOR, including any related request for documents upon which the SOR is based, must be submitted within 15 days from the date the person received and signed for the SOR. If there is a timely request for documents, the individual's written response to the SOR must be submitted within 15 days of the Commission's response to the request for documents. (Upon request by the individual and approval of the Security and Safety Office, if warranted, up to an additional 30 days may be granted to respond to the SOR.) If the individual does not respond to the SOR, the person shall be notified that a timely response was not received, and their eligibility for access to classified information or performance of sensitive duties is denied/revoked.

(c) A Letter of Decision will be provided to the individual that shall include the reasons for the decision.

(d) If the decision is unfavorable, the individual shall be informed as to the rights to appeal that decision in writing to the Adjudication Review Board (ARB). The ARB is a high-level panel, appointed by the Executive Director which shall be comprised of at least three members, all of whom shall be selected from outside the security field.

(e) The individual will also have an opportunity to appear personally before the Security and Safety Office or the ARB, as determined by the Commission.

(f) If the individual chooses not to appeal to the ARB, the determination made by the Commission's Security and Safety Officer shall be the final decision and is not subject to further appeal.

(2) **Employees.** The Security and Safety Office will follow the procedures outlined below when unfavorable security actions are taken based on the results of an investigation with regard to an employee in a sensitive position of the Federal service.

(a) An employee may be suspended without pay for a period of up to 30 days before employment is terminated under 5 U.S.C. 7532 and Executive Order 10450. Under other authorities available to the Commission, an employee may be reassigned or detailed temporarily to a Non-Sensitive position, or a position with the sensitive duties withheld, in which the interests of national security cannot be adversely affected by the employee. In the event of suspension, reassignment, or detail, the Security and Safety Officer may decide to initiate removal proceedings against the employee. However, whether the employee is suspended without pay, or reassigned or detailed temporarily to a Non-Sensitive position, the Security and Safety Officer must comply with the procedures set out herein before terminating the employment.

(b) Prior to removal under the U.S.C. and Executive Order:

(i) The Safety and Security Office must issue a written Statement of Reasons (SOR) for the decision, which will be stated as specifically as security considerations will permit. The individual should be advised that he/she may obtain legal counsel or other assistance at his/her own expense, may request any documents, records and reports in the investigative file that provided a basis for the decision, which, if requested and as permitted by the national security and other applicable law, will be provided prior to the time set for a written reply.

(ii) The employee must have an opportunity to respond to the SOR, and to request a review of the determination. The written response to the SOR, including any related request for documents upon which the SOR is based, must be submitted within 15 days from the date the person received and signed for the SOR. If there is a timely request for documents, the individual's written response to the SOR must be submitted within 15 days of the Commission's response to the request for documents. (Upon request by the individual and approval of the Security and Safety Office, if warranted, up to an additional 30 days may be granted to respond to the SOR.) If the individual does not respond to the SOR, the person shall be

notified that a timely response was not received, and their eligibility for access to classified information or performance of sensitive duties is denied/revoked.

(iii) A Letter of Decision will be provided to the individual that shall include the reasons for the decision.

(iv) If the decision is unfavorable, the individual shall be informed as to the rights to appeal that decision in writing to the ARB.

(v) The individual will also have an opportunity to appear personally before the Security and Safety Officer or the ARB, as determined by the Commission.

(vi) If the individual chooses not to appeal to the ARB, the determination made by the Security and Safety Officer shall be the final decision and is not subject to further appeal.

(c) Upon completion of the due process procedure, the Security and Safety Office will sign the OPM Certification of Investigation Notice for filing on the permanent side of the OPF. Also, the Security Management Office will sign the OPM OFI-79A, Report of Agency Adjudicative Action on OPM Personnel Investigations, and return the form to OPM.