October 17, 2019

The Honorable Dale Cabaniss
Director
Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Re: Office of Personnel Management Proposed Rules related to 5 CFR parts 315, 432 and 752

RIN: 3206-AN60

Dear Director Cabaniss:

On behalf of the managers and supervisors currently serving our nation in the federal government and whose interests are represented by the Federal Managers Association (FMA), I am forwarding our response to the Office of Personnel Management (OPM) regulations proposed in the Federal Register Vol. 84, No. 180, on September 17, 2019, affecting 5 CFR parts 315, 432, and 752 (RIN 3206-AN60). Below, please see comments from the Federal Managers Association:

FMA stands broadly in favor of these proposed rules. Some FMA members expressed concern in the area of subjectivity, if someone has a boss that is "out to get them." However, overall, there is broad agreement in favor of these proposed rules.

Prior to explaining our rationale regarding the proposed rules, and pursuant to the spirit of the proposed changes, FMA offers a related suggestion for OPM to consider during this rulemaking process. Specifically, FMA recommends adding a mandatory code or remark on the separation Notice of Personnel Action (SF 50) that requires a gaining agency to contact the losing or former agency for a reference. Currently, this is often a skipped step and the new agency ends up with the same issues in a fairly short period of time. Most agencies require the employee to furnish a copy of their latest SF 50 with their application, so this information would be readily available to selecting supervisors/HR professionals.

FMA agrees with the lead-in to the case for action, related to the efficient and effective use of the federal workforce, that federal employees, "should be both rewarded and held accountable for performance and conduct."

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- **5 CFR PART 315, SUBPART H: PROBATION ON INITIAL APPOINTMENT TO A COMPETITIVE POSITION**

The probationary period has always been intended to be an extension or the final step of the hiring process. Unfortunately, it has not been effectively utilized. FMA supports the requirement to notify management at the 90-day point, but many agencies still have cumbersome and time-consuming review processes for terminations which may make the 90 day notice insufficient. We recommend a reminder at the 180-day point with follow-ups at 90 and 30 days. This would be the same for 1year or 2year periods, so that shouldn't make any difference. Adding the 180-day reminder would not be excessively burdensome on agencies with the current level of technology. Most use automated (email) notices to supervisors anyway so it would just be a matter of programming three dates instead of two.

The narrative in this section also clarifies that employees may be terminated during probation for such things as lack of cooperativeness or other unacceptable conduct as well as performance issues. We argue this is an important point that is often overlooked by managers. If an employee has an attitude/behavior problem when they are on probation, it rarely improves once they feel more secure in their jobs. As the Proposed rule says, **"Thus it provides an opportunity for supervisors to address problems in an expeditious manner and avoid long-term problems inhibiting effective service to the American people."**

- **5 CFR part 432: Performance-Based Reduction in Grade and Removal Actions**

The explanation of the statutory authority in 432.101 is excellent. We need to focus on the "simple, … dedicated process for agencies to use" and emphasize the need for agencies to stop throwing up roadblocks for managers who are trying to do the right thing by terminating an employee whose performance is unacceptable.

Far too many agencies and sub-components of agencies require multiple opportunities to improve (aka Performance Improvement Periods or PIPs). One formal period should be all that a manager is required to provide. One of the basic staffing tenets of civil service is that the individual is fully qualified when selected. We are not allowed to refer applicants based on their potential or any other speculation. They have to already be qualified when we hire them. Therefore, there should be no question about lengthy or extensive requirements – beyond what the law requires – to improve performance. The clarification in 432.105 that the PIP may include any and all performance assistance measures during the rating cycle is really valuable. Often, managers try to provide training/assistance before contacting HR for help and end up having to do it all over again. This eliminates that requirement. Managers would just have to show that the training was provided – even if it was before the start of the PIP. This is a great clarification. Maintaining competence is the responsibility of every employee and it is the responsibility of every manager to ensure that competence is maintained.

- **Section 432.108: Settlement Agreements**

FMA feels this is one of the most valuable parts of the Proposed Rule. Clean Record Settlements are a favored way to "help" their constituents get re-hired. FMA strongly supports this for performance, as well as conduct issues. The quote in the Proposed Rule that jumped out at our members was:

> "This new requirement is intended to promote the high standards of integrity and accountability within the Federal workforce by requiring agencies to maintain personnel records that reflect complete information, and not to alter the information contained in those records in connection with a formal or informal complaint or adverse action."

High standards of integrity and accountability are what we all should be striving to promote and maintain, not longevity and seniority at all costs. The new Rule allows for corrections and deletions when appropriate, but maintains the intent of the EO and is a good management practice.

- **5 CFR Part 752—SUBPART A: Discipline of Supervisors Based on Retaliation Against Whistleblowers**

- **Section 752.101: Coverage**

FMA believes the clarification of definitions in this section are helpful and necessary.

- **Section 752.103: Procedures**

FMA members are unsure how having the Agency Head be the determining authority for Prohibited Personnel Practices (PPPs) is going to work. From installation to Agency Head, there are an awful lot of steps/stops that take time to work through. Technically, at the Department of Defense, the Secretary of Defense is the Agency Head, but has traditionally delegated authority to component Secretaries who may further delegate within their command structure. Our members are not sure when the Agency Head would be responsible for determining whether or not a supervisor committed a PPP. Therefore, some clarification here would be warranted.

The 15 business days to issue decisions is do-able and will speed up the process. Senior-level leaders sometimes don't give their attention to these types of actions in a timely manner. This will require some training for them; however, the reporting requirement should emphasize the importance of meeting this timeline. FMA members reported they have seen removal decisions hang for months with the employee in limbo and the duty section scrambling to get the work done.

- **Section 752.104: Settlement Agreements**

See comments in Section 432.108. FMA members report they were victims of a Clean Record Settlement and were lied to by previous supervisors because the settlement agreement had a confidentiality clause. We need to eliminate this practice from civil service.

SUBPART B: Regulatory Requirements for Suspension for 14 Days or Less

- **Section 752.202**: Standard for Action and Penalty Determination

One FMA member declared this is one of the best parts of the Proposed Rule. Eliminating the "requirement" for progressive discipline and codifying that elimination is a huge management benefit. Far too many union contracts require management to utilize progressive discipline, which eliminates a key management flexibility when dealing with conduct/performance issues. This also formalizes the requirement for a penalty to be "within the bounds of tolerable reasonableness," instead of a cookie-cutter progression. Restricting an arbitrator's ability to mitigate reasonable penalties will be great for management. There has never been a legal requirement for progressive discipline or rehabilitation but it has grown within most agencies to the point of being a roadblock in many instances to removals or suspensions that would promote the efficiency of the service because there was no prior discipline. This also takes the penalty out of the bargaining arena. It never belonged there in the first place as 5 USC7106 (a)(2) reserved the right (authority) to discipline employees to management without bargaining.

The government-wide application of ***Miskill*** is also a huge benefit for management. All too often, we have inactive managers who set a practice of not taking appropriate action on employees who misbehave. Clarifying the standard for comparators is very helpful and we agree with the proposed rule that it "reinforces the key principle that each case stands on its own factual and contextual footing." Management should have been doing this all along, including the provision that agencies should consider ALL prior disciplinary actions and the past work records.

We also think the references to Tables of Penalties being contrary to the efficiency of the service by limiting management's discretion to tailor the penalty to the facts/circumstances of each case is right on point. We have repeatedly had grievances and arbitrations on cases where bargaining unit employees have cited the failure to follow the Agency's Tables of Penalties as a fault on the part of management. The Proposed Rule states:

> "A table of penalties does not, and should not, replace supervisory judgment. It is vital that supervisors use independent judgment, take appropriate steps in gathering facts, and conduct a thorough analysis to decide the appropriate penalty."

FMA whole-heartedly endorses the Proposed Rule's determinations that "Progressive discipline and table of penalties are inimical to good management principles."

- **Section 752.203: Procedures**

One FMA member reported they do not see any problem with this from a management perspective. They think it is a benefit from an employee perspective as they see early on (used to only be in the decision letter) what options may be available so they can seek legal counsel early if they feel they need it.

- **SUBPART D: Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less**

- **Section 752.403: Standard for Action and Penalty Determination**

Demotion/suspension should not be substituted for removal when removal is appropriate follows the efficiency of the service argument. Why keep an unacceptable employee? If it is a conduct issue, a new position isn't going to "fix" the underlying problem.

- **SUBPART F: Regulatory Requirements for Taking Adverse Actions Under the Senior Executive Service**

We do not see much difference between SES and the rest of the workforce in this situation.

The Federal Managers Association thanks you for the opportunity to comment on the proposed rules.

Sincerely,

Renee M. Johnson
National President