

Rules and Regulations

Federal Register

Vol. 91, No. 154

Wednesday, August 12, 2026

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

RIN 3124-AA33

Appellate Jurisdiction Update II

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or Board) is amending its regulations to remove references to MSPB's jurisdiction over probationary termination, suitability, and reduction-in-force (RIF) appeals. This revision reflects the Office of Personnel Management's (OPM's) rescission of the MSPB's jurisdiction to hear these types of appeals. The rule retains MSPB's statutory jurisdiction over Foreign Service reduction-in-force appeals under 22 U.S.C. 4010a.

DATES: This final rule is effective on September 2, 2026. However, consistent with OPM's rulemakings, the MSPB will not apply this rule to pending cases or to newly filed cases relating to agency actions taken before the effective date of OPM's rulemakings, and will continue to adjudicate such probationary termination appeals, suitability appeals, and RIF appeals.

FOR FURTHER INFORMATION CONTACT: Gina K. Grippando, Clerk of the Board, Merit Systems Protection Board, 1615 M Street NW, Washington, DC 20419; phone: (202) 653-7200; fax: (202) 653-7130; or email: mspb@mspb.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Civil Service Reform Act grants MSPB jurisdiction to hear appeals of any action made appealable to MSPB under law, rule, or regulation. 5 U.S.C. 7701(a). For the ease of MSPB's stakeholders, MSPB's regulation at 5 Code of Federal Regulations (CFR) 1201.3 contains a list of the types of

appeals MSPB has been granted jurisdiction to hear. The current list includes 1201.3(a)(3), which reflects appeal rights for employees who are terminated during their initial or supervisory probationary period; 1201.3(a)(6), which reflects appeals rights for employees subjected to a reduction-in-force; and 1201.3(a)(9), which reflects appeal rights for employees subjected to a suitability action. OPM regulations previously granted MSPB jurisdiction over each of these types of appeals, except for reduction-in-force actions affecting a career or career candidate appointee in the Foreign Service, over which MSPB exercises jurisdiction pursuant to statute.

A. Appeals for Terminations During Probationary or Trial Periods

On June 24, 2025, OPM issued a final rule which stated that Executive Order (E.O.) 14284, "Strengthening Probationary Periods in the Federal Service" (90 FR 17729), issued on April 24, 2025, "'supersede[d] subpart H' [of part 315 of CFR title 5] and 'rendered [it] inoperative and without effect.'" Accordingly, OPM's final rule rescinded subpart H of CFR part 315, including 5 CFR 315.806, which provided appeal rights to MSPB for employees serving an initial appointment to a competitive service position who are terminated during their probationary or trial period.

Subsequently, effective September 2, 2026, OPM issued a final rule revising 5 CFR 315.908(b) [of subpart I of part 315 CFR title 5] which previously granted MSPB appeal rights to competitive service, managerial or supervisory employees who alleged that an action under that subpart, such as return to a nonsupervisory or nonmanagerial position for failure to complete the probationary period, was based on partisan political affiliation or marital status. The revised rule rescinds MSPB appeal rights for these employees and instead provides a right to appeal such actions to OPM.

Consequently, MSPB now amends 5 CFR 1201.3(a)(3) to reflect the rescission of these MSPB appeal rights. MSPB notes that OPM has provided in its final rule that the rule covers actions effected from September 2, 2026, forward, and therefore does not apply to any pending MSPB appeals or future MSPB appeals

filed based on actions effected before September 2, 2026.

B. Reduction in Force Appeals

Effective September 2, 2026, OPM issued a final rule revising 5 CFR 351.901, which previously granted MSPB appeal rights to federal employees subjected to a reduction-in-force. The new rule, in relevant part, rescinds these MSPB appeal rights and instead provides reduction-in-force appeal rights exclusively to OPM. Consequently, MSPB now amends 5 CFR 1201.3(a)(6) to reflect OPM's rescission of these previously codified MSPB appeal rights. This amendment does not affect the separate statutory right of a career or career candidate appointee in the Foreign Service to appeal a RIF action to MSPB under 22 U.S.C. 4010a. The final rule retains that appeal right in redesignated paragraph (a)(5) of 5 CFR 1201.3 but changes the referenced citation from 22 U.S.C. 4011 to 22 U.S.C. 4010a, where the precise statutory appeal reference is found.

MSPB notes that OPM's final rule on RIF appeals applies only to a RIF action for which an agency issues the employee a specific RIF notice on or after the effective date of the RIF appeals rule, and that MSPB appeals of RIF actions taken before the effective date of OPM's final rule may continue to be adjudicated through the MSPB process. MSPB will therefore continue to adjudicate RIF appeals that are not covered by OPM's final RIF appeals rule (*i.e.*, because the RIF actions were taken before the rule's effective date), and will accept such cases for filing where the agency's RIF notice was issued before the rule's effective date, and will not dismiss such appeals on the ground that OPM's final rule displaced the MSPB's jurisdiction.

C. Suitability Appeals

Effective September 2, 2026, OPM issued a final rule revising 5 CFR 731.501, which previously granted MSPB appeal rights to individuals subjected to a suitability action, which includes the cancellation of eligibility, removal, cancellation of reinstatement eligibility, and debarment. The new rule, in relevant part, rescinds these MSPB appeal rights and provides suitability action appeal rights exclusively to OPM. MSPB now amends 5 CFR 1201.3(a)(9) to reflect OPM's

rescission of these previously codified MSPB appeal rights.

MSPB notes that OPM’s suitability appeals rule does not apply to suitability appeals filed with the MSPB before the effective date of OPM’s final rule, and that the MSPB may continue to adjudicate such suitability appeals. MSPB will therefore continue to adjudicate such suitability appeals that are not covered by OPM’s final suitability appeals rule, and will not dismiss such appeals on the ground that OPM’s final rule displaced the MSPB’s jurisdiction.

II. Summary of Changes

Section 1201.3 Appellate Jurisdiction

This amendment amends the list of appealable actions in section 1201.3(a) to remove references to appeal rights for employees in the competitive service or in a managerial or supervisory position who are terminated during their probationary or trial period; federal employees subjected to a reduction in force; and federal applicants, appointees, and employees subjected to a suitability action which includes the cancellation of eligibility, removal, cancellation of reinstatement eligibility, and debarment.

III. Effective Date of Amendment

The amendment described above will go into effect on September 2, 2026. However, as described above, and consistent with OPM’s rulemakings, the MSPB will not apply this amendment to probationary termination, RIF, or suitability appeals pending as of September 2, 2026. Additionally, MSPB will adjudicate any RIF appeals it receives after September 2, 2026, in which the RIF effective date preceded September 2, 2026; and any probationary termination appeals pursuant to 5 CFR 315.908(b) it receives after September 2, 2026, in which the probationary termination action was effected prior to September 2, 2026.

IV. Regulatory Compliance

A. Administrative Procedure Act

Pursuant to 5 U.S.C. 553(b)(B), MSPB finds that there is good cause to issue this final rule without prior notice and comment. This final rule merely reflects the rescission of the regulatory bases for MSPB’s jurisdiction. MSPB lacks any discretion regarding this change, and thus lacks discretion in this rulemaking action. Accordingly, notice and public comment procedures are unnecessary.

Similarly, pursuant to 5 U.S.C. 553(d)(3), MSPB finds that there is good cause to make this final rule effective immediately upon publication. This

final rule merely reflects the rescission of the regulatory bases for MSPB’s jurisdiction.

B. Regulatory Impact Analysis: Executive Order 12866

The MSPB has examined the impact of this rulemaking as required by Executive Orders 12866 (Sept. 30, 1993) and 13563 (Jan. 18, 2011), which direct agencies to evaluate the benefits and costs of the action. A regulatory impact analysis must be prepared for rules with effects of \$100 million or more in any one year. This rulemaking does not reach that threshold but has otherwise been designated as a “significant regulatory action” under section 3(f) of Executive Order 12866, as supplemented by Executive Order 13563.

C. Regulatory Flexibility Act

The MSPB certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities because OPM’s rule will apply only to Federal agencies, employees, or applicants for employment, and the MSPB’s rule does not in itself effect any change, but only reflects OPM’s amendments to MSPB’s jurisdiction.

D. Paperwork Reduction Act

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. Chapter 35).

E. Executive Order 13132, Federalism

This regulation will not have substantial direct effect on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132 (Aug. 10, 1999), it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

F. Executive Order 12988, Civil Justice Reform

This regulation meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988 (Feb. 5, 1996).

G. Unfunded Mandates Reform Act of 1995

This rulemaking will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than \$100 million annually. Thus, no written

assessment of unfunded mandates is required.

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

Under the authority of 5 U.S.C. 1204, 1305, and 7701, and 38 U.S.C. 4331, and for the reasons stated in the preamble, 5 CFR part 1201 is amended as follows:

PART 1201—PRACTICES AND PROCEDURES

■ 1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204, 1305, and 7701, and 38 U.S.C. 4331, unless otherwise noted.

■ 2. Amend § 1201.3 in paragraph (a) by removing paragraphs (a)(3) and (a)(9).

■ 3. Further amend § 1201.3 by redesignating paragraphs (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), (a)(10), and (a)(11) as follows:

Old paragraph	New paragraph
(a)(4)	(a)(3).
(a)(5)	(a)(4).
(a)(6)	(a)(5).
(a)(7)	(a)(6).
(a)(8)	(a)(7).
(a)(10)	(a)(8).
(a)(11)	(a)(9).

■ 4. Revise newly redesignated paragraph (a)(5) to read as follows:

§ 1201.3 Appellate jurisdiction.

(a) * * *

(5) *Reduction in force.* Reduction-in-force action affecting a career or career candidate appointee in the Foreign Service (22 U.S.C. 4010a);

* * * * *

Gina K. Grippando,

Clerk of the Board.

[FR Doc. 2026–16456 Filed 8–11–26; 8:45 am]

BILLING CODE 7400–01–P