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this part takes a suitability action against a person, that person may appeal the action to the Merit Systems Protection Board (hereinafter “Board”).

(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 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

§ 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

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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,

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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]

Subpart B—Designation and Investigative Requirements

§ 732.201 Sensitivity level designations and investigative requirements.

(a) For purposes of this part, the head of each agency shall designate, or cause to be designated, any position within the department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive.

(b) Investigative requirements for each sensitivity level are provided in OPM issuances.

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

§ 732.202 Waivers and exceptions to investigative requirements.

(a) *Waivers*—(1) *General*. A waiver of the preappointment investigative requirement contained in section 3(b) of Executive Order 10450 for employment in a sensitive national security position may be made only for a limited period: (i) In case of emergency if the head of the department or agency concerned finds that such action is necessary in the national interest; and (ii) when such finding is made a part of the records of the department or agency.

(2) *Specific waiver requirements*. (i) The preappointment investigative requirement may not be waived for appointment to positions designated Special-Sensitive under this part.

(ii) For positions designated Critical-Sensitive under this part, the records of the department or agency required by § 732.202(a)(1) of this part shall show what decision was made on obtaining prewaiver checks, as follows: (A) The nature of the emergency precluded obtaining prewaiver checks; or (B) checks were initiated but not all responses were received within 5 days; or (C)

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checks made and favorably completed are listed.

(iii) The waiver restriction is optional for positions designated Noncritical-Sensitive under this part.

(iv) When waiver is authorized, the required investigation must be initiated within 14 days of placement of the individual in the position.

(b) *Exceptions to investigative requirements*. (1) Pursuant to section 3(a) of E.O. 10450, the following positions are exempt from the investigative requirements of E.O. 10450, providing that the employing agency conducts such checks as it deems appropriate to insure that the employment or retention of individuals in these positions is clearly consistent with the interests of the national security:

(i) Positions that are intermittent, seasonal, per diem, or temporary, not to exceed an aggregate of 180 days in either a single continuous appointment or series of appointments; or

(ii) Positions filled by aliens employed outside the United States.

(2) Other positions that OPM, in its discretion, deems appropriate may be made exempt based on a written request to OPM by the agency head in whose department or agency the positions are located.

§ 732.203 Periodic reinvestigation requirements.

The incumbent of each position designated Special-Sensitive or Critical-Sensitive under this part shall be subject to periodic reinvestigation of a scope prescribed by OPM 5 years after placement, and at least once each succeeding 5 years. The employing agency will use the results of such periodic reinvestigation to determine whether the continued employment of the individual in a sensitive position is clearly consistent with the interests of the national security.

Subpart C—Due Process and Reporting

§ 732.301 Due process.

When an agency makes an adjudicative decision under this part based on an OPM investigation, or when an agency, as a result of information in an OPM investigation, changes a tentative

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favorable placement or clearance decision to an unfavorable decision, the agency must:

(a) Insure that the records used in making the decision are accurate, relevant, timely, and complete to the extent reasonably necessary to assure fairness to the individual in any determination.

(b) Comply with all applicable administrative due process requirements, as provided by law, rule, or regulation.

(c) At a minimum, provide the individual concerned:

(1) Notice of the specific reason(s) for the decision; and

(2) An opportunity to respond; and

(3) Notice of appeal rights, if any.

(d) Consider all available information in reaching its final decision.

(e) Keep any record of the agency action required by OPM as published in its issuances.

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

§ 732.302 Reporting to OPM.

(a) In accordance with section 9(a) of E.O. 10450, each agency conducting an investigation under E.O. 10450 is required to notify OPM when the investigation is initiated.

(b) In accordance with section 14(c) of E.O. 10450, agencies shall report to OPM the action taken with respect to individuals investigated pursuant to E.O. 10450 as soon as possible and in no event later than 90 days after receipt of the final report of investigation.

Subpart D—Security and Related Determinations

§ 732.401 Reemployment eligibility of certain former Federal employees.

(a) *Request.* A former employee who was terminated, or who resigned while charges were pending, from a department or agency of the Government under a statute or executive order authorizing termination in the interest of national security or on grounds relating to loyalty, and authorizing OPM to determine the eligibility for employment in another department or agency of the Government, may request OPM in writing to determine whether the individual is eligible for employment in

another department or agency of the Government.

(b) *Action by OPM.* (1) OPM shall determine, and will notify the former employee, after appropriate consideration of the case, including such investigation as it considers necessary, whether the individual may be employed in another department or agency of the Government.

(2) If a former Federal employee found ineligible under this section has had an opportunity to comment on the reasons for the action, or has furnished them to OPM or to the former employing agency, OPM may cancel the reinstatement eligibility if the eligibility resulted from the last Federal employment and was obtained through fraud, and OPM may prescribe a period of debarment not to exceed 3 years.

PART 733—POLITICAL ACTIVITY— FEDERAL EMPLOYEES RESIDING IN DESIGNATED LOCALITIES

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733.102 Exclusion of employees in the Criminal Division of the United States Department of Justice.

733.103 Permitted political activities—employees who reside in designated localities.

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733.106 Prohibited political activities—employees who reside in designated localities and are employed in certain agencies and positions.

733.107 Designated localities.

AUTHORITY: 5 U.S.C. 7325; sec. 308 of Pub. L. 104-93, 109 Stat. 961, 966 (Jan. 6, 1996).

SOURCE: 63 FR 4558, Jan. 30, 1998, unless otherwise noted.

§ 733.101 Definitions.

In this part:

Accept means to come into possession of something from a person officially on behalf of a candidate, a campaign, a political party, or a partisan political group, but does not include ministerial activities which precede or follow this official act.