

Re: Promoting Employee Accountability

Docket ID: OPM-[2025-0012](#) (searchable at

[\[OPM-2025-0012\]\(#\)\)](https://www.regulations.gov/docket/</p></div><div data-bbox=)

RINs: 3206-A091 (Office of Personnel Management), 3124-AA35 (Merit Systems Protection Board)

Filed via: [Regulations.gov](#), [\[OPM-2025-0012-0001\]\(#\)](https://www.regulations.gov/commenton/</p></div><div data-bbox=)

Comment deadline: [August 3, 2026](#)

To the Office of Personnel Management and the Merit Systems Protection Board:

This comment is submitted in opposition to the proposed rule Promoting Employee Accountability, and is intended to enter into the administrative record a specific factual and legal accounting of the procedural protections

the rule would eliminate, so that the record is preserved for any subsequent oversight, litigation, or judicial review that may follow from the rule's implementation. The proposed rule makes three changes of particular legal significance. First, it compresses and restructures the notice and response procedures that agencies must follow before imposing performance-based reductions in grade, removals, non-disciplinary separations, and other adverse actions under chapter 75 of title 5 of the United States Code, including capping the performance improvement opportunity period at 30 calendar days, establishing removal as the default penalty for unacceptable performance, narrowing the employee's window to respond to a proposed removal to between 7 and 10 calendar days, and restricting the ability of a federal employee to be represented by a fellow federal employee acting

in a duty status. Second, it replaces the Merit Systems Protection Board's existing structured penalty-review framework, the twelve-factor test established in *Douglas v. Veterans Administration*, 5 [M.S.P.R.](#) 280 (1981), with what the agencies themselves describe as a more flexible totality of the circumstances standard under which the Board will determine only whether a penalty is within the tolerable limits of reasonableness. Third, it bars agencies from agreeing, as part of settling a formal or informal complaint or an administrative challenge to an adverse action, to erase, remove, alter, or withhold from another federal agency any information about an employee's performance or conduct contained in that employee's official personnel folder or employee performance file.

The compression of pre-action procedures should be evaluated against the constitutional

floor the Supreme Court has already established for public employees with a property interest in continued employment. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Court held that the essential requirements of due process for a tenured public employee facing termination are notice of the charges, an explanation of the employer's evidence, and a meaningful opportunity to respond before the action is taken, precisely because a pretermination hearing serves as an initial check against mistaken decisions rather than a mere formality. The Court reached a comparable result in *Arnett v. Kennedy*, 416 U.S. 134 (1974), where a majority of the Justices concluded that federal employees removable only for cause possess a due-process interest requiring, at minimum, written notice of the charges, disclosure of the evidence supporting them, and a reasonable opportunity to answer

both orally and in writing before removal. Congress codified and elaborated on these constitutional minimums in the Civil Service Reform Act of 1978, which at chapter 75 of title 5 requires that an agency show cause to promote the efficiency of the service before imposing an adverse action and, at section 7513, requires advance written notice, a reasonable time to answer, the right to be represented, and a written decision stating the reasons for it, while chapter 77 and section 7701 establish the employee's right to appeal an adverse action to the Merit Systems Protection Board for independent review. Narrowing the response window to as little as 7 calendar days, making removal the default penalty rather than a discretionary agency judgment, and restricting an employee's choice of a fellow federal employee as representative do not eliminate notice and an opportunity to respond in name,

but they meaningfully diminish the substance of that opportunity as *Loudermill* and *Arnett* describe it, by compressing the time and practical means available to marshal evidence and prepare a considered response before the decision is made.

Neither the notice of proposed rulemaking's stated rationale nor the record accompanying it, as reflected in the Federal Register publication of this rule, identifies particularized evidence that the existing notice, response, and representation procedures under chapter 75 have proven inadequate to protect the efficiency of the service, as opposed to being merely inconvenient to agency managers seeking faster removals. The Administrative Procedure Act's requirement of reasoned decisionmaking, articulated in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile*

Insurance Co., 463 U.S. 29 (1983), and codified in the notice-and-comment obligations of 5 U.S.C. 553(c), requires an agency to examine the relevant data, consider the important aspects of the problem before it, and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. An agency's mere preference for expedited removal authority does not, by itself, satisfy that standard where the practical effect is to displace procedural safeguards that Congress deliberately built into the statutory scheme to protect employees from arbitrary or retaliatory action. This comment respectfully submits that OPM and MSPB have not carried that burden with respect to the specific procedural compressions this rule would impose.

The proposed replacement of the Douglas

factors with a totality of the circumstances standard for penalty review independently warrants rejection. The Douglas framework requires the Board to weigh twelve specifically enumerated considerations before sustaining a penalty, including the nature and seriousness of the offense and its relation to the employee's duties, the employee's job level and type of employment, the employee's past disciplinary and work record, the consistency of the penalty with those imposed on other employees for similar conduct and with any applicable agency table of penalties, the clarity of the notice the employee received regarding the rule violated, the employee's potential for rehabilitation, any mitigating circumstances such as unusual job tension or provocation, and the adequacy of alternative sanctions. That structure gives both the employee and the reviewing body a fixed, known set of considerations against which a

penalty's reasonableness can be tested and, if warranted, mitigated. A totality of the circumstances standard, by contrast, permits the same ultimate inquiry, whether the penalty was within the tolerable limits of reasonableness, without requiring the Board to work through any defined set of considerations in reaching that conclusion. The predictability that Loudermill's due-process framework depends upon rests on the assumption that a reviewing body's assessment of an adverse action can be meaningfully tested against ascertainable standards. Removing the enumerated factors in favor of an undefined discretionary standard makes the outcome of penalty review less predictable for the employee preparing a defense, less consistent across similarly situated employees, and correspondingly harder to challenge on appeal, even though the nominal right of Board review is

retained.

The restriction on settlement agreements that would remove documentation of misconduct from an employee's personnel file is framed in the proposed rule as a transparency and accountability measure, but its most likely practical effect deserves independent scrutiny. Adverse-action cases are frequently resolved through negotiated settlements in which an agency agrees to modify or remove certain personnel documentation in exchange for an employee's agreement to resign, retire, or forgo further appeal, a mechanism that reduces the volume of contested cases proceeding to hearing before the Merit Systems Protection Board. Barring agencies from offering that specific form of consideration removes a significant incentive for employees to settle, which will likely increase the number of adverse

actions litigated to a final Board decision rather than resolved by agreement. That outcome runs counter to the efficient and timely resolution of personnel disputes that the due-process framework described in *Loudermill* contemplates, since *Loudermill*'s balancing test explicitly weighs the government's interest in avoiding unnecessary administrative burden alongside the employee's interest in retaining employment. A rule that predictably shifts more disputes into adversarial litigation, in the name of accountability, should be justified with evidence that the transparency gained outweighs the litigation costs and delay it will impose on both agencies and employees, and no such evidentiary justification appears in the proposed rule.

The cumulative effect of compressing pre-action procedures, replacing a structured

penalty-review test with an undefined discretionary standard, and restricting negotiated settlements carries a heightened risk of chilling protected activity, including whistleblowing and equal employment opportunity complaints, that the Civil Service Reform Act of 1978 and the Whistleblower Protection Act were specifically designed to guard against. A 2020 report by the Government Accountability Office found that probationary federal employees who filed whistleblower disclosures or retaliation complaints were terminated at meaningfully higher rates than permanent employees who did the same, and that both groups filing such complaints were terminated at higher rates than the federal workforce generally, illustrating that adverse-action authority has in practice been associated with elevated separation risk for employees who engage in protected activity. Where the standard

governing penalty review becomes less structured and therefore harder for an employee or a reviewing body to test against fixed considerations, an employee who suspects that a proposed adverse action is retaliatory in substance, even if not in its stated charge, faces a correspondingly harder task in identifying and proving that a materially inconsistent or disproportionate penalty reflects retaliation rather than a legitimate exercise of managerial discretion. This is a structural risk inherent in trading a factor-based test for an undefined totality standard, independent of the intent behind any individual removal decision.

This comment, and the legal and factual record it cites, is submitted so that the basis for future oversight and accountability is preserved in the administrative record, should the loss of these procedural safeguards result in demonstrable

harm to affected federal employees. OPM and MSPB should withdraw or substantially revise the proposed rule to retain the structured, factor-based penalty-review framework currently supplied by *Douglas v. Veterans Administration*, to preserve response and representation procedures consistent with the due-process floor described in *Cleveland Board of Education v. Loudermill* and *Arnett v. Kennedy*, and to provide a reasoned, evidence-based justification, consistent with the requirements of *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.* and 5 U.S.C. 553(c), for any departure from the procedural framework Congress established in the Civil Service Reform Act of 1978.

Respectfully submitted,
Concerned Citizen

