



*A New Day for the Civil Service*

## **Taking Adverse Actions Based on Suitability or Security Issues**



# Objectives

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- Discuss the various purposes for personnel investigations
  - HSPD-12 (PIV access)
  - Suitability/Fitness (character and conduct)
  - National Security/Access to classified information
- Outline agency authorities and options for adjudication and the procedural requirements for action when issues arise
- Discuss reciprocity policies and guidance



# Purposes of Personnel Investigations

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- Requirement for access to Federal facilities and logical systems
  - Eligibility for a Personal Identification Verification (PIV) card as mandated by HSPD-12
- Need to evaluate character and conduct of Government workers
  - Suitability determinations for positions covered by 5 CFR 731
  - Continuous evaluation through reinvestigation of individuals in positions of public trust as required by E.O. 13488



# Purposes of Personnel Investigations

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## Need to evaluate character and conduct of Government workers

- Eligibility and qualifications for excepted service or other positions not covered by 5 CFR 731 or National Security requirements
- Fitness determinations for contractor employment per contractual requirements



# Purposes of Personnel Investigations

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## Protection of National Security

- Eligibility for a National Security position under E.O. 10450
- Eligibility for a clearance to access classified information under E.O. 12968
- Continuous evaluation through reinvestigation of individuals holding clearances under E.O. 12968



# PIV Card Requirements (Resulting from HSPD-12)

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- Mandatory, Governmentwide standard for a secure and reliable form of identification issued by the Federal Government for employees and contract employees
  - Physical access to Federally controlled facilities
  - Logical access to Federally controlled information systems
- Requirements established in Federal Information Processing Standards (FIPS) publication 201-1
  - Completion and successful adjudication of National Agency Check with Written Inquiries investigation or other investigation as required for Federal employment



# What is Suitability?

**“Suitability” refers to a person’s identifiable character traits and conduct sufficient to decide whether employment or continued employment would or would not protect the integrity or promote the efficiency of the service**



# Suitability Requirements

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- Code of Federal Regulations (5 CFR 731) establishes criteria and procedures for suitability investigations, determinations, and actions
- Covered positions include only:
  - Competitive service positions
  - Career appointments in the Senior Executive Service
  - Excepted service positions that can be non-competitively converted to competitive service
- Suitability investigations are conducted under this authority for all covered positions. Agency suitability actions under 5 CFR 731 are limited to applicants and appointees





# Suitability Investigations

- All covered positions require background investigations unless:
  - The person has already undergone an investigation; and
  - Is being appointed, converted, or transferred with one year of continuous service; and
  - Has been previously determined suitable or fit under criteria equivalent to 5 CFR 731 (adequate assurance of suitability for covered positions, as determined by OPM)
- When the above conditions apply, investigation is still permitted when:
  - Position requires higher level of investigation
  - New information raises suitability questions



# Suitability Risk Levels

- High Risk (HR)
  - Moderate Risk (MR)
  - Low Risk (LR)
- } **Public Trust**

**Level of investigation depends on  
risk level of position**



# Suitability Reinvestigations

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- E.O. 13488 established authority to reinvestigate persons in positions of public trust
- Issues developed in reinvestigations must be evaluated to determine whether or not the person's continued employment promotes the efficiency of the service
- However, agencies have no jurisdiction to take actions on employees (continuous service for more than a year) under 5 CFR 731. Any necessary action, must be taken under other agency authority (e.g., 5 CFR 752)



# What is Fitness?

**“Fitness” refers to the level of character and conduct determined necessary for an individual to perform work for, or on behalf of, a Federal agency as an employee in the excepted service (other than in a position subject to suitability) or as a contractor employee**

- Excepted service positions are covered by 5 CFR 302
- Contracts should specify investigative and adjudicative requirements for contract employees



# What is Security?

**“Security” refers to a reasonable expectation that the employment or continued employment of an individual would or would not be clearly consistent with the interests of National Security**

- Government workers in sensitive positions and/or requiring access or eligibility for access to classified material
- National Security authorities include: Executive Order 10450; Executive Order 12968; Executive Order 13467; 5 CFR Part 732; and 5 U.S.C § 7532
- The security determination is a discretionary agency responsibility made **in addition to and subsequent to** the suitability or fitness determination



# National Security Sensitivity Levels

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- **Special Sensitive**
- **Critical Sensitive**
- **Non-Critical Sensitive**
- **Non-sensitive**

**National  
Security  
Positions**

**Level of investigation depends on  
sensitivity level of position**



# Security Reinvestigations

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- E. O. 12968 establishes authority for reinvestigations of positions requiring eligibility for access to classified information
- Issues developed in reinvestigations must be evaluated to determine whether or not continued access is in the best interest of National Security



# Adjudications

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- HSPD 12 adjudication
- Suitability adjudication under 5 CFR 731
- Fitness determinations that are equivalent to criteria in 5 CFR 731
- Security adjudication under E.O. 12968
- Other agency authorities





# HSPD-12 Adjudication

- 7/31/08 Final Credentialing Standards for Issuing PIV Cards under HSPD-12 issued by OPM
- No PIV card may be granted if:
  - Known or reasonable suspicion of terrorism
  - Unable to verify identity
  - Fraudulent identity information submitted
  - Reasonable belief attempt will be made to gain unauthorized access to sensitive or protected information
  - Reasonable belief credential will be used unlawfully or inappropriately
  - Reasonable belief individual will use Federally-controlled information systems unlawfully, make unauthorized modifications, corrupt or destroy, or inappropriately use such systems



# HSPD-12 Adjudication

- Agencies may use Supplemental Credentialing Standards when position is not covered by other adjudicative criteria. These include reasonable basis to believe there is an unacceptable risk due to:
  - Misconduct or negligence in employment
  - Criminal or dishonest conduct
  - Material, intentional false statement, deception or fraud
  - Alcohol abuse without substantial rehabilitation
  - Illegal use of narcotics, drugs, or other controlled substances without substantial rehabilitation
  - Statutory or regulatory bar
  - Willful engagement in acts or activities designed to overthrow the U.S. Government by force
- Equivalent to suitability factors in 5 CFR 731

# Suitability Adjudication Under 5 CFR 731



<i><b>OPM retains authority to adjudicate:</b></i>	<i><b>Agencies have delegated authority to adjudicate:</b></i>
<p>Covered <b>applicants, appointees and employees</b> with evidence of material, intentional falsification, refusal to furnish testimony, or cases in which Governmentwide debarment is warranted</p>	<p>Covered <b>applicants and appointees</b>, <u>unless</u> there is evidence of material, intentional falsification or refusal to furnish testimony</p> <p>Note: No prior approval is needed, but notification to OPM is required, for actions taken by agencies under other authority (5 CFR 315, 5 CFR 359, or 5 CFR 752)</p>



# Agency Delegated Adjudicative Authority

- Agencies may begin to determine an applicant's suitability at any time during the hiring process
- Agencies must refer cases warranting Governmentwide debarment to OPM
- Agency authority is subject to revocation by OPM



# Suitability Standards and Criteria

## 5 CFR 731.201 and 202

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- A suitability action taken against an applicant, appointee, or employee will protect the integrity or promote the efficiency of the service
- Suitability determinations must be based on the presence or absence of one or more specific factors (charges)
- Only the eight specific factors outlined on the following slides are considered a basis for finding a person unsuitable and taking a suitability action



# Specific Suitability Factors

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## 1. **Misconduct or negligence in employment**

- Inability to perform and other qualification issues are not suitability issues

## 2. **Criminal or dishonest conduct**

- Financial irresponsibility is included only if dishonesty is established



# Specific Suitability Factors

## 3. Material, intentional false statement, or deception or fraud in examination or appointment\*

- A “material” statement is one that is capable of influencing, affects, or has a natural tendency to affect an official decision, even if OPM or an agency does not rely upon it

## 4. Refusal to furnish testimony as required by 5 CFR 5.4\*

- Limited to testimony required by the Office of Personnel Management, Office of the Special Counsel, or Merit Systems Protection Board

\* Only OPM can cite this factor



## Specific Suitability Factors

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- 5. Alcohol abuse, without evidence of substantial rehabilitation, of a nature and duration that suggests that the applicant or appointee would be prevented from performing the duties of the position in question or would constitute a direct threat to the property or safety of the applicant or appointee or others\***
  
- 6. Illegal use of narcotics, drugs or other controlled substances without evidence of substantial rehabilitation\***

\* Neither factor applies if there is clear evidence of substantial rehabilitation (measurable efforts and noticeable results)





## Specific Suitability Factors

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- 7. Knowing and willful engagement in acts or activities designed to overthrow the United States Government by force**
  - Membership in an organization, alone, is not disqualifying
  
- 8. Any statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question**
  - There must be a specific legal restriction to employment



# Origins of Suitability Issues

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- Application or appointment forms
- Interviews/examinations
- Pre-employment inquiries
- Investigative data forms
- Personal subject interview (PRSI)
- Investigation



# Additional Considerations

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**OPM and agencies must consider the listed additional considerations to the extent OPM or the relevant agency, in its sole discretion, deems any of them pertinent to the individual case**



# Additional Considerations

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## 1. Nature of the position

- The more authority, responsibility, sensitivity and public trust associated with the position, the higher the risks involved and the more potential adverse impact there is
- Consider **Core duties** – continuing responsibility of particular importance to the relevant covered position or the achievement of an agency's mission



# Nature of the Position

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## Examples of core duties

- Law Enforcement positions - sale of narcotics
- Fiduciary positions - embezzlement
- Motor Vehicle Operator - habitual traffic offender
- Computer Security Manager - using company computer to access porn sites
- Staffing Specialist - prohibited personnel practices

**NOTE: LIST IS NOT ALL-INCLUSIVE**



# Additional Considerations

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## **2. Nature and seriousness of the conduct**

- The more serious the conduct, the greater the potential for disqualification

## **3. Circumstances surrounding the conduct**

- Full facts and circumstances are essential to insure justice to the person and to protect the interests of the Government



# Additional Considerations

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## 4. Recency of the conduct

- The more recent the conduct is, the greater the potential for disqualification

## 5. Age of person at time of conduct

- Offenses committed as a minor may be less serious than those committed as an adult
- Not normally pertinent if conduct is very recent, part of a pattern or particularly heinous



# Additional Considerations

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## 6. Contributing societal conditions

- Economic and cultural conditions might be a mitigating factor if the conditions are now removed

## 7. Absence or presence of rehabilitation or efforts toward rehabilitation

- Time elapsed since conduct last occurred (no set time frame; must be considered in tandem with other factors)
- Results of treatment/counseling; prognosis and past history of treatment
- Other aspects of the individual's life, such as stable employment record, positive changes in personal life, etc.





# Suitability Determinations and Actions

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- A suitability action (defined at 5 CFR 731.203) is an outcome taken by OPM or an agency under the procedures of 5 CFR 731
  - Cancellation of eligibility
  - Removal
  - Cancellation of reinstatement eligibility
  - Debarment
- A non-selection, alone, is not a suitability action  
Objections to eligible or pass-over of preference eligible decisions are made under 5 CFR 332 and are not appealable to the Merit Systems Protection Board



# What is NOT a Suitability Action?

- Rescission of tentative offer of employment
- Non selection, including
  - the cancellation of a tentative offer for a single position
  - cancellation of eligibility for a specific position based on an objection to an eligible or pass over of a preference eligible under 5 CFR 332.406

is not a suitability action even if it is based on the criteria for making suitability determinations set forth at 5 CFR 731.202



# Debarment by OPM and Agencies

- OPM may deny a person examination for, or appointment to, all covered positions for up to 3 years (Governmentwide)
- Agencies may deny a person examination for, or appointment to, all or specific covered positions within the agency for up to 3 years (Agency-specific)
- An additional period of debarment may be imposed by OPM or an agency
  - Person must again be an applicant or appointee for a covered position and 5 CFR 731 procedures must be followed
  - May be based in whole or in part on the same conduct or new conduct



# Part 731 Procedural Requirements

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- **Proposed Action**

- Must give reasonable notice to subject in writing, stating specific reasons
- Must notify subject of right to “materials relied upon”
- Must inform subject of time limits for response and right to respond in writing
- Must retain subject in pay status during response time, if employed
- Must advise subject of right to representation

- **Respondent’s Answer**

- May answer charges in writing
- May furnish documentation and/or affidavits



# Part 731 Procedural Requirements

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## Final Decision

- Must be in writing and dated
- Must inform respondent of reasons for decision
- Must give appeal rights to MSPB
- Removal is effective within five workdays following the date of the decision



# Reporting

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- Agencies must report all actions taken as a result of an OPM suitability investigation
- Agencies must report to OPM when they believe a Governmentwide debarment might be appropriate in a specific case
- Agencies must provide information about the level and result of each background investigation, suitability determination, and suitability action taken to OPM



## **Is the Decision/Action Reviewable?**

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**Employees/Appointees may appeal an unfavorable suitability determination to the Merit Systems Protection Board**

The procedures for filing an appeal with the Board are found at 5 CFR part 1201



# Establishing Fitness Criteria

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- Agency heads have the authority to establish fitness criteria and make fitness determinations based on them
- Agency heads have discretion to determine if their criteria is equivalent to suitability standards under 5 CFR 731
- Agency heads shall take into account OPM guidance when determining whether their criteria is equivalent



# Suitability vs. Security



<b>SUITABILITY/FITNESS</b>	<b>SECURITY</b>
<p><b><u>Objective</u></b> – The examination of individual personal character and conduct</p> <p><b>Suitability</b> – Would the person’s employment in a covered position promote the efficiency and protect the integrity of the Service?</p> <p><b>Fitness</b> – Does the person have the required level of character and conduct necessary to perform work for or on behalf of a Federal agency?</p>	<p><b><u>Objective</u></b> – A determination regarding whether employment would constitute a risk to <b>National Security</b>. Influences such as foreign associates or ties are also considered in this determination</p> <p>Does the person have personal conduct or influences that could affect or potentially affect his or her trustworthiness?</p>



# Guidelines for Determining Eligibility for Access to Classified Material

**Guidelines list security concerns, conditions that may be disqualifying, and conditions that could mitigate in thirteen areas:**

- A. Allegiance to the United States
- B. Foreign Influence
- C. Foreign Preference
- D. Sexual Behavior
- E. Personal Conduct
- F. Financial Considerations
- G. Alcohol Consumption
- H. Drug Involvement
- I. Psychological Conditions
- J. Criminal Conduct
- K. Handling Protected Information
- L. Outside Activities
- M. Misuse of Information Technology



# Procedural Requirements for Access Denials and Revocations

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- Comprehensive and detailed written explanation
- Information upon which revocation or denial is based (upon request, within 30 days)
- Right to representation at own expense and entire investigative file if requested (and permitted by law)
- Reasonable time to reply in writing and request a review of the determination
- Written notice of results of review, identity of deciding official, and written notice of right to appeal
- Appeal in writing to high level panel appointed by agency head (3 members, 2 outside security)
- Opportunity to appear in person at some point in the process



# What Actions May be Taken?

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- Transfer to a non-sensitive position
- Indefinite Suspension pending final revocation.  
(Follow agency policy on placement in other position if required)
- Removal



# Is the Decision/Action Reviewable?

MSPB may not review the substance of the decision to remove an employee based on revocation of a clearance, only whether:

- the employee's position required a security clearance;
- his/her security clearance was denied or revoked;
- transfer to a non-sensitive position was not feasible; and
- the agency followed the procedural requirements in processing the removal action.



# Other Adjudicative Authorities

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- 5 CFR 315 – Competitive Service probationary employees
- 5 CFR 359 – SES probationary employees
- 5 CFR 752 – Adverse actions (employees past probationary period, etc.)



# Reciprocity of Suitability Determinations

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- No new suitability determination when person already determined suitable or fit based on character or conduct unless:
  - New investigation is required because the position requires a higher level of investigation than previously conducted
  - New information calls suitability into question
  - Investigative record shows conduct that is incompatible with core duties of position
- Favorable decisions on cases with issues should be reviewed and re-adjudicated if warranted
- Agencies cannot appoint an individual to a position covered by 5 CFR 731 when the person is under an OPM debarment



# Reciprocity for Fitness Determinations

- **When reciprocity is required**
  - Gaining agency uses equivalent criteria
  - Prior fitness/suitability determination based on equivalent criteria
  - No break in service
- **When reciprocity does not apply**
  - New investigation is required
  - New information calls fitness into question
  - Conduct incompatible with core duties of position
- **Favorable decisions on cases with issues should be reviewed and re-adjudicated if warranted**





# Reciprocity Related to National Security Clearances

- E.O. 12968 requires agencies to mutually and reciprocally accept existing access background investigations and eligibility determinations
- Exceptions
  - Substantial information that employee may not satisfy the standards
  - Existing security clearance was discretionary - did not meet adjudicative or investigative standards (conditions, deviations, and waivers)
  - In exceptional circumstances for special access programs where additional, but not duplicative, procedures are required to protect the national security (polygraph, non-U.S. immediate family members, requirement for investigation within seven years regardless of classification level)