



PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY

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Submitted via <https://www.regulations.gov>

Timothy Curry  
Deputy Associate Director  
Accountability and Workforce Relations  
U.S. Office of Personnel Management  
1900 E Street, NW  
Washington, DC 20415

**Re: Probation on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade and Removal Actions and Adverse Actions; Document ID OPM-2022-0001-0001**

Dear Mr. Curry,

Public Employees for Environmental Responsibility (PEER) is a nonprofit organization that assists federal, state, and local public employees in fighting for the ethical management of natural resources, strong environmental laws and policies, and accountability and transparency in government actions. As a part of this work PEER frequently represents whistleblowing public employees who have been retaliated against by their employers, and who are in need of mutually acceptable settlement options to avoid lengthy litigation to resolve their employment disputes. PEER respectfully submits these comments on the U.S. Office of Personnel Management's (OPM) above-captioned comment period on its proposed rule (rulemaking).

PEER supports OPM's rulemaking proposal to rescind § 432.108, Settlement Agreements, and to make conforming amendments to rescind that language where it may appear in other parts of the Code of Federal Regulations.<sup>1</sup> The policy this section furthered, to eliminate "clean record" agreements for employees who have lodged complaints or administrative challenges against their employer, is harmful to employees and employers because it removes a valid and useful tool that promotes productive settlement of employment disputes. PEER has experience with several settlements that it reached on behalf of clients that were possible only because of the availability of clean record terms.

Public employees who engage in protected whistleblower activity often are retaliated against with unfounded or exaggerated claims of poor performance or misconduct and unwarranted disciplinary actions. The existing rule prevents agencies from correcting personnel records that

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<sup>1</sup> Including, as the rulemaking notes, §§ 752.104, 752.203(h), 752.407 and 752.607.

employees allege contain false and retaliatory material. In order to avoid lengthy and costly litigation over the accuracy and validity of matters reflected in the personnel record, the employee and the agency often wish to adopt a “clean record” as part of a settlement. It is often the only way that an employee can reach a settlement that will salvage their future career, which could be fatally undermined by negative material in their personnel file.

The rulemaking would reestablish a workable standard where agencies and employees can negotiate in good faith to provide employees with clean record settlements that do not obstruct future employment within or outside the federal government. While each dispute will have its own facts and parties, it is helpful to make available clean record settlements for situations where agencies and employees agree to settle without the need to fully litigate each matter placed in an employee’s personnel file. By returning to the earlier status quo, this rulemaking would conserve agency resources that otherwise will be used in protracted litigation, and will make it more possible for employees who engaged in protected activity to move on after retaliation by former supervisors.

As an organization that often also exposes and decries misconduct by public employees who are not acting in accordance with the law or ethics, it is of course important to PEER that misconduct not be routinely swept under the rug. We agree with OPM’s balance when it states:

The removal of the prohibition on clean record agreements will allow agencies discretion to resolve informal and formal complaints and settle administrative challenges in a manner that balances the needs of the agency and fairness to the employee. In doing so, agencies should still adhere to the principles of promoting high standards of integrity and accountability within the Federal workforce.

Thank you for the opportunity to comment on this matter. PEER is not stating a position on any other part of the instant rulemaking.

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