

Keys to Suitability Appeals for Federal Employees and Applicants

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We represent federal employees and federal applicants in suitability appeals. There are some important points to consider when a federal employee or applicant is faced with a suitability appeal. Typically, notice of suitability concerns will come in the form of a notice of potential suitability or through a request for additional information or interrogatories from a federal agency. These suitability notices require a full and serious response, otherwise the federal agency involved or the Office of Personnel Management (OPM) is likely to deem the individual unsuitable for the position and potentially debar them from future federal employment for a period of time. This article focuses on keys to mitigating these types of security concerns.

Suitability Appeals are Based on Specific Security Issues

Generally, suitability concerns are those listed in [5 C.F.R. § 731.202](#), but they can include other items. Those listed in 5 C.F.R. § 731.202 are the following:

- (1) Misconduct / negligence in employment;
- (2) Criminal / dishonest conduct;
- (3) Intentional false statements, deception, fraud;
- (4) Refusal to furnish testimony;
- (5) Alcohol abuse, without evidence of rehabilitation;
- (6) Illegal use of narcotics, drugs or other controlled substances, without evidence of rehabilitation;
- (7) Knowing and willful engaged in acts designed to over the U.S. Government by force; and
- (8) Any statutory or regulatory bar that prevents the lawful employment of the person at issue.

Most Common Types of Suitability Appeal Issues

The most common types of suitability cases, in our experience, can involve financial issues (even though not listed as a specific suitability concern). Other common suitability concerns involve truthfulness (often in connection to former employment) and former employer references about misconduct. Other grounds also occasionally arise, such as a past alleged criminal, alcohol or controlled substance issues. If background or suitability concerns are not resolved during the investigation, a federal agency and/or the Office of Personnel Management (OPM) can take what is known as a suitability action. The individual's response usually takes the form of a written submission where the federal

employee or applicant is given between 15 and 30 days to respond in writing to the Agency.

Focus on Mitigating Circumstances in Suitability Appeals

The focus of a written suitability response is to show that the allegations are not true (or not as portrayed) or as significant as has been noted. It is just as important to show that there is sufficient mitigation to resolve the security concerns noted in a suitability case. Under [5 C.F.R. § 731.202 \(c\)](#), federal agencies and OPM should consider the following in mitigating potential suitability concerns:

- (1) The nature of the position that the individual is applying for or is employed;
- (2) The nature and seriousness of the conduct;
- (3) The circumstances surrounding the conduct;
- (4) The recency of the conduct;
- (5) The age and maturity of the person involved at the time of the conduct;
- (6) Contributing societal conditions; and
- (7) The absence or presence of rehabilitation or efforts towards rehabilitation.

Key Factors in Written Response to Suitability

Perhaps the most important of these mitigating circumstances typically involves the recency of the conduct, the age/maturity of the person when the issues arose, and the presence of rehabilitation. There are also mitigating concerns which are not discussed, but which definitely can assist with mitigation. These include records of good work performance, which can be shown through letters of reference from supervisors and coworkers, awards at work, good performance ratings, etc. In addition, it is important to show any documentation which can demonstrate that the person at issue is respected or honorable. Evidence of charitable work, or positive contributions can help to mitigate suitability concerns. Basically, the key to mitigating suitability issues is to show the entire picture of the person under review in the most favorable manner possible.

Conclusion

Berry & Berry, PLLC is a law firm which handles federal suitability issues and appeals throughout the United States. Our experienced attorneys have assisted numerous federal government employees and applicants in the suitability process by providing legal advice or representation during the investigation, response and appeals process. In addition, our firm belongs to the [Security Clearance Lawyers Association](#). Please [contact Berry & Berry, PLLC](#) to schedule a consultation with a suitability attorney.

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Practice Areas

Suitability