



Upholding Civil Service Protections and Merit System Principles

Agency: Office of Personal Management

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Landmark Legal Foundation (“Landmark”) submits this comment on the Office of Personal Management’s (“OPM” or “the Office”) proposal, **Upholding Civil Service Protections and Merit System Principles** (“Proposal”). For the reasons set forth in this comment, OPM should immediately revoke and revise the current proposal.

The Proposal:

1. Will make it harder for agencies to fire underperforming employees.
2. Goes beyond the scope of OPM’s regulatory authority.
3. Establishes civil service protections in a novel way.

Introduction

Federal employment protections prevent career civil servants from politically motivated firings. Even so, the current administrative process makes it nearly impossible to punish misconduct or terminate employment for underperforming employees.

Federal workers are protected through an extensive network of regulations that are nonexistent in any other field. And if an agency fails to follow every protocol throughout the termination process, an employee can seek damages or even reinstatement. For example, in 2015, the Air Force fired Michelle Kaszowski, a civilian worker. Her federal employee union

refused to pursue a grievance against the Air Force for wrongful termination. She challenged her firing to the Merit Systems Protection Board (“MSPB”). This challenge was dismissed because regulations limit workers to one form of appeal. In April 2023, the MSPB reversed its decision, eight years after their original decision. They claimed that the Air Force had not explicitly told Kaszowski she must choose one form of appeal.

Kaszowski’s case exemplifies the nature of worker protection in the federal bureaucracy: elevating procedure above competence when determining whether to terminate employees. Based on a procedural misstep, Kaszowski’s case was remanded to the regional office to repeat the burdensome process of termination completed eight years ago.

Retaining poor-performing workers affects government productivity and morale. According to a 2021 report from this Office, only 36 percent of federal employees reported that in their agency “steps are taken to deal with a poor performer who cannot or will not improve.” OPM “Federal Employee Viewpoint Survey Results,” 2022, <https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2022/2022-governmentwide-management-report.pdf> (Accessed November 8, 2023). Half of federal employees state that they have poor performers in their agency who remain on the job, continuing to underperform. *Id.* These underperforming employees threaten agencies’ ability to write and execute regulations and complete their necessary tasks. According to a September 2023 poll from the Pew Research Center, a historic low 16% of Americans trust the federal government to do what is right. Pew Research Center, *Public Trust in Government*, September 19, 2023, <https://www.pewresearch.org/politics/2023/09/19/public-trust-in-government-1958-2023/> (Accessed November 8, 2023). This dismal view of the bureaucracy is unsurprising given the inability to dismiss underperforming employees.

This is not the Executive Branch the Founders envisioned. Alexander Hamilton, writing in Federalist 70, argues that “energy in the executive is a leading character in the definition of good government. It is essential to... the steady administration of the laws.” The federal bureaucracy not only lacks energy, its employees contribute to inefficiency. In 2022, one out of every six immigration cases brought by the Department of Homeland Security was dismissed because Customs and Border Protection officials failed to file a “Notice to Appear” with the Immigration Court. TRAC Immigration, *DHS Fails to File Paperwork Leading to Large*

Numbers of Dismissals, July 29, 2022, <https://trac.syr.edu/immigration/reports/691/> (Accessed November 13, 2023). This failure of federal employees to complete a basic task exposes the incompetence and inefficiency of the federal bureaucracy.

This ineffectiveness can be traced to several causes. First, the bureaucracy lacks the same competition that makes the private sector efficient. Once an employee accrues worker protections (typically after a year), they have little incentive to improve their work. Should an agency allege poor performance, the federal worker has ample time to improve their performance and challenge the claims of the agency. These protections protect the independence and effectiveness of the bureaucracy. Yet they have “facilitated the rise of federal employees as a third party, with a specific agenda for further structuring the civil service system. Despite the complaints of politicians about the functioning of the bureaucracy, much of the current arrangement is as they have wanted it and, indeed, as they have designed it.” Ronald N. Johnson and Gary D. Libecap, National Bureau of Economic Research, *The "Problem of Bureaucracy,"* 1994, <https://www.nber.org/system/files/chapters/c8632/c8632.pdf> (Accessed November 8, 2023).

Bureaucrats exert immense influence in executing and shaping policy but are protected from justified termination and Congressional oversight. These protections, unique to the public sector, damage the effectiveness of the government. And there is no incentive for the system to change because it protects its employees.

The inability of agencies to terminate underperforming employees contributes to a failing bureaucracy. To terminate employment for a federal employee, an agency must navigate a maze of regulatory hurdles. First, if an employee is underperforming, the agency must provide the employee with an opportunity to improve his or her work through a Performance Improvement Plan (“PIP”). Next, if the employee does not meet the standards for improvement, the agency can choose to fire them. The employee then has a right to appeal the termination to the MSPB or through the agency’s grievance procedure. Appeals are a burdensome and time-consuming task and can take years to resolve. Agencies must maintain detailed records at every step of this process. As was the case for Kaszowski, an overlooked detail will allow the employee to rejoin the bureaucracy despite the merits of her termination going unchallenged.

This Proposal promulgated by OPM responds to President Trump’s Executive Order 13957 (“EO 13957”): Creating Schedule F in the Excepted Service. Under EO 13957, agencies were directed to shift a portion of their employees into the newly created Schedule F, which

would revoke their previously accrued worker protections (“Property Rights”). EO 13957 explained that agency heads need “additional flexibility to assess prospective appointees without the limitations imposed by competitive service selection procedures.” Exec. Order No. 13957, 5 C.F.R 6 (2020). Placing low-performing employees into Schedule F would afford agencies the ability to terminate these employees without the burdensome appeal process.

President Biden nullified EO 13957, and this Proposal clarifies that when employees move from the Competitive Service to the Excepted Service, they will retain their Property Rights. OPM also proposes new requirements for managers when moving an employee from the Competitive Service to the Excepted Service. Competitive Service employees face a competitive hiring process and must complete a probationary period before earning worker protections. Each agency has its own Excepted Service positions that are filled based on appointment or merit. The Competitive Service comprises the majority of the federal workforce.

1. The Proposal will make it more difficult for agencies to terminate employment for underperforming federal workers.

Under the Civil Service Reform Act of 1973, “employees should be separated who cannot or will not improve their performance to meet required standards.” 5 U.S.C. 2301(b)(6). Agencies are also charged to terminate employees “for such cause as will promote the efficiency of the service.” 5 U.S.C. 7513(a). The Proposal makes such terminations harder for agencies by strengthening civil service protections. Again, under the Proposal, moving a federal employee from Competitive Service to Excepted Service will not mean a revocation of previously accrued protections. This means any effort to terminate a designated Excepted Service employee must follow a burdensome and time-consuming process that contributes to an ineffective and inefficient federal government.

When employees move from the Competitive Service to the Excepted Service, it is not logical that their accrued worker protections should follow them. They will report to new supervisors, have new work, and different responsibilities. Should federal workers underperform in their new role, agencies must have tools available to promote the efficiency of the workforce. Michelle Kaszowski’s case shows how worker protection already makes it difficult to terminate employees. For agencies to be efficient and effective, they must retain the authority to fire

underperforming employees, especially those that cannot or will not adapt to the requirements of a new position.

2. The Proposal goes beyond the scope of OPM’s regulatory authority.

OPM does have regulatory authority to execute, administer, and enforce civil service rules and regulations. 5 U.S.C. 1103(a)(5)(A). Still, they are also bound under 5 U.S.C. 1302(d) to “prescribe **reasonable** procedure and regulations for the administration of its functions.” The Proposal creates burdensome and **unreasonable** requirements for agencies in managing their personnel.

The Proposal prescribes that if agencies move employees or positions into or within the Excepted Service they must:

- (1) Identify the types, numbers, and locations of positions that the agency proposes to move into the excepted service.
- (2) Document the basis for its determination that movement of the position or positions is consistent with the standards set forth by the President, Congress, OPM, or their designees as applicable.
- (3) Obtain certification from the agency's Chief Human Capital Officer (CHCO) that the documentation is sufficient and movement of the position or positions is both consistent with the standards set forth by the directive, as applicable, and with merit system principles.
- (4) Submit the CHCO certification and supporting documentation to OPM (to include the types, numbers, and locations of positions) in advance of using the excepted service authority, which OPM will then review. Proposed Rule, September 18, 2023, <https://www.federalregister.gov/documents/2023/09/18/2023-19806/upholding-civil-service-protections-and-merit-system-principles#h-20> (Accessed November 8, 2023).

These requirements are unreasonable and burdensome for agencies. Agencies should be able to manage their staff without submitting documentation to the OPM. No such requirements exist for agencies when they reorganize their employees, and OPM failed to explain how this will improve the efficiency of the federal bureaucracy.

3. The Proposal establishes civil service protections in a novel way.

In Section II (A) of the Proposal, OPM explains their Proposal will “reflect OPM's longstanding interpretation of 5 U.S.C. 7501 and 5 U.S.C 7511 and the congressional intent underlying the statutes, including exceptions to civil service protections outlined in 5 U.S.C. 7511(b).” Proposed Rule, September 18, 2023, <https://www.federalregister.gov/documents/2023/09/18/2023-19806/upholding-civil-service-protections-and-merit-system-principles#h-20> (Accessed November 8, 2023). But the specific instance they seek to affect has no basis in “longstanding interpretation.”

These sections of the U.S. Code define an employee who has civil service protections. In the Excepted Service, an employee has these protections if they are “a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions.” 5 U.S.C. 7511(B). There is no reference to the situation where an employee moves from the Competitive Service to the Excepted Service. Instead, an employee must have worked in the “same or similar position.”

Furthermore, OPM offers no case law relevant to this specific instance. Because Executive Order 13957 was rescinded before any agency placed employees in Schedule F, the constitutionality of it was not challenged. Because the current regulations do not address this particular situation and there is no case law, Landmark believes Rulemaking is not the proper way for OPM to address this concern. Instead, Congress ought to clarify worker protection here.

Conclusion

For these reasons, the Office of Personal Management should rescind and revise the Proposal immediately.

Respectfully submitted,

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