

THE WHITE HOUSE  
Office of the Press Secretary

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EXECUTIVE ORDER

PROMOTING ACCOUNTABILITY AND STREAMLINING REMOVAL PROCEDURES  
CONSISTENT WITH MERIT SYSTEM PRINCIPLES

*(Comments in Italics)*

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 1104(a)(1), 3301, and 7301 of title 5, United States Code, and section 301 of title 3, United States Code, and to ensure the effective functioning of the executive branch, it is hereby ordered as follows:

*Section 7301 authorizes the President to issue regulations governing the conduct of federal employees.*

*Section 3301 authorizes the President to issue regulations concerning the hiring of employees into the civil service, including assessing their fitness and qualifications for the position Shaughnessy.*

*Section 1104(a)(1) authorizes the President to delegate personnel management authority to the Director of OPM.*

Section 1. Purpose. Merit system principles call for holding Federal employees accountable for performance and conduct. They state that employees should maintain high standards of integrity, conduct, and concern for the public interest, and that the Federal workforce should be used efficiently and effectively. They further state that employees should be retained based on the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards. Unfortunately, implementation of America's civil service laws has fallen far short of these ideals. The Federal Employee Viewpoint Survey has consistently found that less than one-third of Federal employees believe that the Government deals with poor performers effectively. Failure to address unacceptable performance and misconduct undermines morale, burdens good performers with subpar colleagues, and

inhibits the ability of executive agencies (as defined in section 105 of title 5, United States Code, but excluding the Government Accountability Office) (agencies) to accomplish their missions. This order advances the ability of supervisors in agencies to promote civil servant accountability consistent with merit system principles while simultaneously recognizing employees' procedural rights and protections.

*In fact, the Order seeks to erode employees' statutory procedural rights and protections under the law, including Chapters 43 and 75 of Title V of the U.S. Code, OPM's current regulations, and NTEU's collective bargaining agreements. Although FEVs survey results reflect employees' views that poor performers are not dealt with effectively, survey results do not reflect widespread views that employees' procedural rights and protections from unfair and unwarranted personnel actions should be cut back. Agency managers are not held accountable for effectively dealing with unacceptable performance and misconduct using the tools they have now. This EO does nothing to change that. Far from improving morale, the EO will undermine it by increasing the chances that employees are treated unfairly, for non-merit reasons.*

Sec. 2. Principles for Accountability in the Federal Workforce. (a) Removing unacceptable performers should be a straightforward process that minimizes the burden on supervisors. Agencies should limit opportunity periods to demonstrate acceptable performance under section 4302(c)(6) of title 5, United States Code, to the amount of time that provides sufficient opportunity to demonstrate acceptable performance.

*The law, 5 USC Section 4302(c)(6), requires that agencies adopt appraisal systems that employees with an opportunity to improve before they are reducing in grade or removed for unacceptable performance. This right to an opportunity to improve has long been interpreted as substantive; if an agency fails to provide a reasonable, meaningful opportunity to improve, the performance action is unlawful. A factor in assessing the reasonableness of the opportunity to improve is the length of the opportunity period, a.k.a., performance improvement period or PIP. Our contracts typically specify minimum time periods for a PIP. Whether the opportunity period is long enough to afford a reasonable opportunity to improve is tied to the type of job and the nature of the alleged poor performance involved.*

(b) Supervisors and deciding officials should not be required to use progressive discipline. The penalty for an

instance of misconduct should be tailored to the facts and circumstances.

*The law and our contracts require that discipline and adverse actions promote the efficiency of the service. To promote the efficiency of the service, the penalty for proven misconduct may not exceed the bounds of reasonableness. An illustrative list of aggravating and mitigating factors for assessing the reasonableness of a penalty under a particular set of circumstances were first articulated in Douglas v. Veterans Administration, and are included in NTEU's contracts. These factors are often included in agencies' rules of conduct and tables of penalties.*

*Although some offenses are so severe that discharge is an appropriate penalty for the first offense, the failure to follow a course of progressive discipline implicates several so-called Douglas factors: whether the offense was frequently repeated; the employee's past disciplinary record; the consistency of the penalty with those imposed on others and with the agency's table of penalties; the employee's potential for rehabilitation; the clarity with which the employee was on notice of the rules violated or had been warned about it; and, the adequacy and effectiveness of alternative sanctions. In short, a failure to follow a course of progressive discipline could result in the penalty being found unreasonable and, therefore, contrary to the statutory requirement that actions promote the efficiency of the service.*

(c) Each employee's work performance and disciplinary history is unique, and disciplinary action should be calibrated to the specific facts and circumstances of each individual employee's situation. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time -- particularly where the employees are in different work units or chains of supervision -- and agencies are not prohibited from removing an employee simply because they did not remove a different employee for comparable conduct. Nonetheless, employees should be treated equitably, so agencies should consider appropriate comparators as they evaluate potential disciplinary actions.

*As noted, the consistency of a penalty imposed on others in an agency for the same or similar offenses is a factor bearing on the reasonableness of a penalty. Under case law, if an employee facing an adverse action raises a claim of disparate treatment*

*by pointing to others treated less severely for engaging in the same or similar misconduct, the agency must establish why it was reasonable to treat the situations differently. Different chains of command may provide such an explanation, but this factor is not controlling when agencies have tables of penalties that apply nationwide or bargaining unit wide, or have a centralized penalty determination processes, like a national disciplinary review board.*

(d) Suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require suspension of an employee before proposing to remove that employee, except as may be appropriate under applicable facts.

*See discussion above under subsection (b). To the extent agencies pursue removal when a suspension is appropriate, they may run afoul of the Douglas factor requiring the consideration of the adequacy and effectiveness of alternative sanctions.*

(e) When taking disciplinary action, agencies should have discretion to take into account an employee's disciplinary record and past work record, including all past misconduct -- not only similar past misconduct. Agencies should provide an employee with appropriate notice when taking a disciplinary action.

*Agencies generally have this discretion under the law, including the ability to consider all past misconduct. But the similarity of past misconduct bears on the appropriateness of the penalty, implicating the employee's potential for rehabilitation, the clarity with which the employee was on notice that the conduct was wrong, and the effectiveness of alternative sanctions to deter the conduct by the employee and others.*

(f) To the extent practicable, agencies should issue decisions on proposed removals taken under chapter 75 of title 5, United States Code, within 15 business days of the end of the employee reply period following a notice of proposed removal.

(g) To the extent practicable, agencies should limit the written notice of adverse action to the 30 days prescribed in section 7513(b)(1) of title 5, United States Code.

*By law, 5 USC Section 7513, employees must receive "at least" 30 days advance notice of an adverse action, including removals, and a "reasonable time", "not less than 7 days", to answer a*

proposed action "orally and in writing". OPMs regulations, at 5 CFR Part 752, and our contracts incorporate these standards. Our contracts generally require that a request for a reply must be submitted with 7 days of receiving a proposal letter and that the reply be held within a specified or reasonable time. Specified time frames should be extended when requested information relevant to the proposed action has yet to be provided. To the extent agencies seek to change these explicitly minimum time frames to maximum time frames, as encouraged by the EO, there is an increased likelihood of final decision that does not fairly considers all relevant information. This is particularly true in cases involving factually complex allegations of misconduct. In sum, if agencies take shortcuts to issue decisions within 30 days, they run the risk of implementing actions that do not promote the efficiency of the service or committing harmful procedural error, a basis for overturning adverse actions. 5 USC Section 7701(c)(2).

(h) The removal procedures set forth in chapter 75 of title 5, United States Code (Chapter 75 procedures), should be used in appropriate cases to address instances of unacceptable performance.

Chapter 75 procedures are generally used to take adverse actions against employees for misconduct whereas Chapter 43 procedures are used to remove employees or reduce them in grade for unacceptable performance. But agencies have the discretion to use Chapter 75 procedures to take actions based on unacceptable performance. Lovshin v. Navy, 767 F2d 826 (Fed. Cir. 1985). There are advantages and disadvantages to agencies and employees under each Chapter. Under Chapter 75, there is no requirement that an employee receive an opportunity to improve their performance and, for that reason, an action may be taken quicker, from a procedural standpoint. But the burden of proof is higher, preponderance of the evidence vs. substantial evidence, and, since the action must promote service efficiency, mitigation of the penalty is a possibility. Indeed, the failure to help an employee improve their performance could be a significant mitigating factor in a removal action based on performance.

(i) A probationary period should be used as the final step in the hiring process of a new employee. Supervisors should use that period to assess how well an employee can perform the duties of a job. A probationary period can be a highly effective tool to evaluate a candidate's potential to be

an asset to an agency before the candidate's appointment becomes final.

*To the extent this section encourages agencies to be more aggressive in terminating employees, it brings nothing new but is unfortunate. Many agencies we deal with don't hesitate to terminate employees based on the slightest, and at times unfounded, concerns about their abilities to do the job, thereby wasting the resources invested in hiring and training them up to that point.*

(j) Following issuance of regulations under section 7 of this order, agencies should prioritize performance over length of service when determining which employees will be retained following a reduction in force.

*OPM's RIF regulations require that employees' retention standing, in the event of a RIF, be based on tenure of employment, veteran preference, length of service and performance. 5 CFR 351.501(a). OPM's regulations were amended in the late '90s to provide employees with additional service credit based on their 3 most recent ratings of records received within previous 4 years. Part 351.504. This section apparently directs OPM to amend its regulations to give performance appraisal more weight than length of service in determining retention standing in a RIF.*

Sec. 3. Standard for Negotiating Grievance Procedures. Whenever reasonable in view of the particular circumstances, agency heads shall endeavor to exclude from the application of any grievance procedures negotiated under section 7121 of title 5, United States Code, any dispute concerning decisions to remove any employee from Federal service for misconduct or unacceptable performance. Each agency shall commit the time and resources necessary to achieve this goal and to fulfill its obligation to bargain in good faith. If an agreement cannot be reached, the agency shall, to the extent permitted by law, promptly request the assistance of the Federal Mediation and Conciliation Service and, as necessary, the Federal Service Impasses Panel in the resolution of the disagreement. Within 30 days after the adoption of any collective bargaining agreement that fails to achieve this goal, the agency head shall provide an explanation to the President, through the Director of the Office of Personnel Management (OPM Director).

*By law, collective bargaining agreements (CBAs) must have a negotiated grievance procedure (NGP). The parties may agree to*

*exclude "any matter" from the procedure. 5 USC 7121(a). The EO instructs agency to seek to exclude removal actions from the NBP when bargaining term agreements, including taking the issue to the FSIP if necessary to achieve that objective. If removals are excluded from the NGP, appeals to the Merit Systems Protection Board or complaints under the statutory EEO procedure would be the only option for challenging unfair removals.*

*No rationale is provided for excluding removals from the NGP. All our agreements currently provide the option of taking adverse and performance actions through the negotiated grievance procedure, and have always done so. Many of our collective bargaining relationships with agencies have existed for decades. In bargaining, the burden would be upon the agency to justify eliminating a procedure that has served the parties for years. Coupled with the fact that Chapter 71 establishes the collective bargaining relationship between the agency and the exclusive representative, not the White House and the exclusive representative, take it or leave it demands for excluding removals from the NGP at the direction of the WH may be inconsistent with agency's statutory good faith bargaining obligations under Section 7114(b). In any event, negotiating all future agreements, NTEU will vigorously fight to retain the NGP option for challenging removals.*

Sec. 4. Managing the Federal Workforce. To promote good morale in the Federal workforce, employee accountability, and high performance, and to ensure the effective and efficient accomplishment of agency missions and the efficiency of the Federal service, to the extent consistent with law, no agency shall:

(a) subject to grievance procedures or binding arbitration disputes concerning:

(i) the assignment of ratings of record; or

(ii) the award of any form of incentive pay, including cash awards; quality step increases; or recruitment, retention, or relocation payments;

*Excluding appraisals, awards and incentive payments from the NGP will hardly promote good morale, accountability, and high performance. To the contrary, it will result in more decisions that are inconsistent with merit systems principles and more prohibited personnel practices by making these decisions*

*unchallengeable. As with removals, agencies must negotiate to exclude such matters from the NGP, either through mid-term reopeners or in term bargaining.*

(b) make any agreement, including a collective bargaining agreement:

(i) that limits the agency's discretion to employ Chapter 75 procedures to address unacceptable performance of an employee;

(ii) that requires the use of procedures under chapter 43 of title 5, United States Code (including any performance assistance period or similar informal period to demonstrate improved performance prior to the initiation of an opportunity period under section 4302(c)(6) of title 5, United States Code), before removing an employee for unacceptable performance; or

*See the discussion above, under Section 2(h). In addition, the law and OPM's current regulations require agencies to establish appraisal systems that provide for assisting employees in improving unacceptable performance. 5 CFR 340.204(b)(1). If agencies are to bargain to eliminate requirements that employees be given an opportunity to improve their performance, OPM would need to amend these agency appraisal system requirements.*

(iii) that limits the agency's discretion to remove an employee from Federal service without first engaging in progressive discipline; or

*See the discussion above, under Section 2.*

(c) generally afford an employee more than a 30-day period to demonstrate acceptable performance under section 4302(c)(6) of title 5, United States Code, except when the agency determines in its sole and exclusive discretion that a longer period is necessary to provide sufficient time to evaluate an employee's performance.

*Many of our current contracts provide for minimum opportunity periods longer than 30 days. Agencies would need to bargain to change these minimum time frames. And as discussed above, opportunity periods of less than 30 days may not satisfy the statutory requirement of a meaningful opportunity to improve, regardless of contractually specified time frames.*

Sec. 5. Ensuring Integrity of Personnel Files. Agencies shall not agree to erase, remove, alter, or withhold from

another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action.

*The 2017 National Defense Authorization Act (NDAA) added a new section 3322 to Title V, that requires a permanent official personnel file notation if the employee subject to a personnel investigation (which includes an action under Chapter 43 or 75) resigns and there is an adverse determination against the employee based on the investigation. Certain due process protections must be afforded before the notation is made permanent and the employee may appeal the adverse determination to the MSPB. If the employee prevails, the notation must be removed. This Section goes one step further and precludes settlement agreements from providing for expungement of adverse notations from a personnel file. As a practical matter, this would make it more difficult to settle removal actions for resignations, as the incentive of a clean record would be eliminated.*

Sec. 6. Data Collection of Adverse Actions. (a) For fiscal year 2018, and for each fiscal year thereafter, each agency shall provide a report to the OPM Director containing the following information:

(i) the number of civilian employees in a probationary period or otherwise employed for a specific term who were removed by the agency;

(ii) the number of civilian employees reprimanded in writing by the agency;

(iii) the number of civilian employees afforded an opportunity period by the agency under section 4302(c)(6) of title 5, United States Code, breaking out the number of such employees receiving an opportunity period longer than 30 days;

(iv) the number of adverse personnel actions taken against civilian employees by the agency, broken down by type of adverse personnel action, including reduction in grade or pay (or equivalent), suspension, and removal;

(v) the number of decisions on proposed removals by the agency taken under chapter 75 of title 5, United States Code, not issued within 15 business days of the end of the employee reply period;

(vi) the number of adverse personnel actions by the agency for which employees received written notice in excess of the 30 days prescribed in section 7513(b)(1) of title 5, United States Code;

(vii) the number and key terms of settlements reached by the agency with civilian employees in cases arising out of adverse personnel actions; and

(viii) the resolutions of litigation about adverse personnel actions involving civilian employees reached by the agency.

(b) Compilation and submission of the data required by subsection (a) of this section shall be conducted in accordance with all applicable laws, including those governing privacy and data security.

(c) To enhance public accountability of agencies for their management of the Federal workforce, the OPM Director shall, consistent with applicable law, publish the information received under subsection (a) of this section, at the minimum level of aggregation necessary to protect personal privacy. The OPM Director may withhold particular information if publication would unduly risk disclosing information protected by law, including personally identifiable information.

(d) Within 60 days of the date of this order, the OPM Director shall issue guidance regarding the implementation of this section, including with respect to any exemptions necessary for compliance with applicable law and the reporting format for submissions required by subsection (a) of this section.

*Like the other two EOs, this Order imposes costly additional reporting requirements upon agencies in the name of promoting more efficient and effective government.*

Sec. 7. Implementation. (a) Within 45 days of the date of this order, the OPM Director shall examine whether existing regulations effectuate the principles set forth in section 2 of this order and the requirements of sections 3, 4, 5, and 6 of this order. To the extent necessary or appropriate, the OPM Director shall, as soon as practicable, propose for notice and

public comment appropriate regulations to effectuate the principles set forth in section 2 of this order and the requirements of sections 3, 4, 5, and 6 of this order.

(b) The head of each agency shall take steps to conform internal agency discipline and unacceptable performance policies to the principles and requirements of this order. To the extent consistent with law, each agency head shall:

(i) within 45 days of this order, revise its discipline and unacceptable performance policies to conform to the principles and requirements of this order, in areas where new final Office of Personnel Management (OPM) regulations are not required, and shall further revise such policies as necessary to conform to any new final OPM regulations, within 45 days of the issuance of such regulations; and

(ii) renegotiate, as applicable, any collective bargaining agreement provisions that are inconsistent with any part of this order or any final OPM regulations promulgated pursuant to this order. Each agency shall give any contractually required notice of its intent to alter the terms of such agreement and reopen negotiations. Each agency shall, to the extent consistent with law, subsequently conform such terms to the requirements of this order, and to any final OPM regulations issued pursuant to this order, on the earliest practicable date permitted by law.

*As noted, OPM will need to amend certain regulations before agencies can pursue contract changes consistent with this EO. In addition, agencies cannot legally implement changes to procedures for taking discipline and unacceptable performance actions against BU employees without bargaining over those proposed changes. When the provisions are the subject of term agreements, agencies must wait until a mid-term reopener clause provides the opportunity to renegotiate articles containing those provisions or until the entire term agreement may be renegotiated.*

(c) Within 15 months of the adoption of any final rules issued pursuant to subsection (a) of this section, the OPM Director shall submit to the President a report, through the Director of the Office of Management and Budget, evaluating the effect of those rules, including their effect on the ability of Federal supervisors to hold employees accountable for their performance.

(d) Within a reasonable amount of time following the adoption of any final rules issued pursuant to subsection (a) of this section, the OPM Director and the Chief Human Capital Officers Council shall undertake a Government-wide initiative to educate Federal supervisors about holding employees accountable for unacceptable performance or misconduct under those rules.

Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) Agencies shall consult with employee labor representatives about the implementation of this order. Nothing in this order shall abrogate any collective bargaining agreement in effect on the date of this order.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(e) If any provision of this order, including any of its applications, is held to be invalid, the remainder of this order and all of its other applications shall not be affected thereby.

DONALD J. TRUMP

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