NFFE Annotated Executive Order
Annotations in Red.

THE WHITE HOUSE
Office of the Press Secretary

FOR IMMEDIATE RELEASE
May 25, 2018

EXECUTIVE ORDER

PROMOTING ACCOUNTABILITY AND STREAMLINING REMOVAL PROCEDURES CONSISTENT WITH MERIT SYSTEM PRINCIPLES

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 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.

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.

- **Statute Controls**: This appears to be an attempt by the White House to inch agencies towards standards found in the VA Accountability Act. However, the White House has no power to overturn the existing statute.
  - 5 USC § 4302(c)(6), requires that agencies adopt appraisal systems that give employees an opportunity to improve before they are reduced in grade or removed for unacceptable performance.
  - The right to an opportunity period has 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.
  - CBAs usually 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 White House does not have the power to change the legal standards found in CBAs, case law, and statutes.**
  - 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 is articulated in Douglas v. Veterans Administration, 5 MSPR 280(1981).

(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.

- **This is another impermissible attempt to restate/change legal standards which already exist.**
  - The consistency of a penalty imposed on others in an agency for the same or similar offenses is already 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.

(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.

- No such requirement currently exists.

(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 already have this discretion under the law, but the similarity of past misconduct bears on the appropriateness of the penalty and the Douglas factors analysis.

(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.

- **The timelines in a CBA control.** This is, again, the White House attempting to mandate what an agency bargains in its CBAs. It is unlikely that agencies will be keen on having to work under a compressed timeline, as evidenced by the changes to the VA under the VA Accountability Act.

(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 Removals**: Agencies already have the discretion to use Chapter 75 procedures to take actions based on unacceptable performance, as opposed to Chapter 43, which contains the standards that are usually used.
  - 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.

(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.

(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.

- **New RIF Regulations Expected**: OPM's RIF regulations currently 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).

- **Negotiating Grievance Procedures**: By law, collective bargaining agreements (CBAs) must have a negotiated grievance procedure, and parties may agree to exclude "any matter" from it.5 USC 7121(a).
    - 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.

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;

(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

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

(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.

- **PIP Periods in CBAs Control**: Agencies must to bargain to change minimum time frames, this EO cannot do it alone.
  - 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.

- **Settlement Terms**: If an agency bargained/implemented this rule, it would eliminate the potential for a "clean slate" in an employee's personnel record, making it less desirable to settle removal and other disciplinary actions.

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.

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.

- **New OPM Regulations Expected**: Agencies cannot pursue contract changes consistent with this EO until OPM amends certain regulations.
- **Agencies Must Bargain**: Agencies cannot legally implement changes to procedures for taking discipline and unacceptable performance actions against BUEs without bargaining over those proposed changes.

(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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