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*Congressional Testimony*

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# **IRS Abuses: Ensuring that Targeting Never Happens Again**

**Testimony before  
Oversight and Government Reform  
Committee  
U.S. House of Representatives**

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Chairman Issa, Ranking Member Cummings, and Members of the Oversight and Government Reform Committee, thank you for inviting me to testify this morning. My name is James Sherk. I am a Senior Policy Analyst in Labor Economics at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

Federal law makes it very difficult to separate federal employees from their jobs. Managers who wish to fire problematic employees, whether because of misconduct or poor performance, must go through draining and time-consuming procedures that take about a year and a half. Consequently the federal government very rarely fires its employees, even when their performance or conduct justifies it. In fiscal year (FY) 2013 the federal government terminated the employment of just 0.26 percent of its tenured workforce for performance or misconduct—a rate one-fifth that of *monthly* private-sector layoffs.

This system shelters employees who engage in misconduct. IRS officials who wanted to fire employees engaging in misconduct would have had great difficulty doing so. Most federal managers find letting all but the most egregious misconduct slide the path of least resistance. Congress should streamline the firing process in the federal government. The system should serve the interests of the public, not the civil service itself.

### **Hard to Remove Federal Employees**

The law makes firing problematic federal employees extremely difficult. Consider that General Services Administration (GSA) regional commissioner Paul Prouty helped plan the infamous \$800,000 lavish employee conference in Las Vegas. The GSA fired him when this came to light. Nonetheless he remains on the federal payroll to this day. The Merit Systems Protection Board (MSPB) overruled the GSA's decision and ordered Prouty reinstated.<sup>1</sup> The MSPB concluded his involvement in the conference did not justify firing him and ordered the GSA to give him 11 months of back pay. Federal managers at the IRS and elsewhere have great difficulty removing problem employees.

This system evolved from well-intentioned civil service reforms in the 19th century. Congress passed the Pendleton Act in 1883 to replace the spoils system with a merit system in federal hiring. The Pendleton Act only regulated the hiring process; it left government officials free to remove federal employees at will. However, subsequent legislation, Executive Orders, and Supreme Court decisions also made terminating federal employment very difficult. The Civil Service Reform Act of 1978 codified the currently required procedures.

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<sup>1</sup>Lisa Rein, "GSA Ordered to Give Job Back to Executive Fired after Las Vegas Conference Scandal," *The Washington Post*, March 13, 2013, [http://www.washingtonpost.com/politics/gsa-executive-fired-after-las-vegas-scandal-ordered-to-get-his-job-back/2013/03/13/279ad318-8b5b-11e2-b63f-f53fb9f2fcb4\\_story.html](http://www.washingtonpost.com/politics/gsa-executive-fired-after-las-vegas-scandal-ordered-to-get-his-job-back/2013/03/13/279ad318-8b5b-11e2-b63f-f53fb9f2fcb4_story.html) (accessed July 28, 2014).

The Supreme Court's decision in *Cleveland Board of Education v. Loudermill* (1985) further reinforced these protections.<sup>2</sup> The Supreme Court found that civil service laws give government employees a property interest in their jobs. As such the Court ruled the Due Process clause of the U.S. Constitution prevents the government from firing tenured civil servants without first "some kind of hearing" and an administrative process afterwards.

Once the government has extended civil service protections the Court ruled it must maintain them in some fashion. If federal managers want to fire a federal employee today they can use one of two forms of due process: Chapter 43 or Chapter 75 of Title 5 of U.S. Code. Both avenues involve significant time and expense.

### **Chapter 75**

Federal managers can penalize employees for misconduct or bad performance using Chapter 75. However, even in cases of misconduct—as occurred at the IRS—managers cannot simply fire someone. Instead they must analyze infractions using the 12 *Douglas* factors.<sup>3</sup> These factors include the relationship of the infraction to the employee's responsibilities, the workers' disciplinary and work records, how clearly the manager informed the employee they were violating the rules, the possibility of rehabilitation, mitigating circumstances such as personality clashes, and the efficacy of alternative punishments in deterring future misconduct. Managers must show they carefully evaluated all 12 *Douglas* factors before proposing to fire an employee. If they do not the MSPB may reduce the penalty from firing to something less serious on appeal.

If an agency concludes the *Douglas* factors merit firing it must also gather enough evidence to support this conclusion. To successfully fire an employee the agency must show that "a preponderance of evidence" justifies doing so. In other words they must show that a reasonable person would be more likely than not to conclude the evidence justifies a firing. The manager must also prove that firing the employee will improve the efficiency of their agency.<sup>4</sup> The process of gathering sufficient evidence can take several months. If the agency believes it has enough evidence to overcome this burden of proof it can begin the firing process.

To fire someone the agency must first give the employee 30 days advanced notice. They agency must explain why it intends to fire the employee and give the employee a chance to respond. If the agency wants the employee gone during this time it must put him (or her) on paid leave—the law does not permit faster removals or unpaid leave except in extreme cases.<sup>5</sup> During this time the agency cannot hire a replacement; legally the employee still fills that job and no vacancy exists.

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<sup>2</sup>470 U.S. Code § 532.

<sup>3</sup>*Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06

<sup>4</sup>U.S. Merit Systems Protection Board, "Addressing Poor Performers and the Law," Report to the President and the Congress of the United States, September 2009, page 33, <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=445841&version=446988&> (accessed July 28, 2014).

<sup>5</sup>An agency may terminate an employee in less than 30 days if it has good reason to believe the employee has committed a crime for which he (or she) could get sent to jail. See 5 U.S. Code § 7513(b)(1)-(2).

If during this time the employee alleges his supervisor fired him for blowing the whistle on misconduct they can ask the Office of Special Counsel (OSC) to investigate. During an OSC whistleblower investigation the agency cannot terminate him.

After this 30-day period, and after any OSC investigation, the agency can fire the employee and stop paying him. However, the employee has 30 days to appeal this decision to his regional Merit Systems Protection Board or to file a grievance with his union (the worker can pick one or the other but not both). The regional MSPB will conduct an investigation and issue a ruling. In 2013 this took an average of 93 days—three months.<sup>6</sup> The MSPB has the authority to downgrade the firing to a less serious punishment, such as a demotion. If the employee loses this appeal, he can file a second appeal to the MSPB headquarters in Washington, D.C. The MSPB headquarters will review and possibly overturn the regional board's decision. In 2013 this process took an average of 281 days—over nine months.<sup>7</sup> If the employee uses all his appeal rights within the MSPB, the firing process takes an average of about one and a half years from start to finish.<sup>8</sup>

Having exhausted appeals to the MSPB the employee can then file appeals in alternative forums. They have the option of appealing to the federal courts. If the employee alleges they were fired for discriminatory reasons, the employee can also file charges with the Equal Employment Opportunity Commission (EEOC)—instigating an investigation that can take years. The EEOC has the authority to order the employee reinstated even if the MSPB rejected the employees' allegations of discrimination. In total it can take several years to fire employees for even flagrant misconduct.

For example, Lester Erickson, a police officer at the Bureau of Engraving and Printing, lied to investigators during an internal misconduct investigation. The Bureau fired him for lying. Erickson appealed to the MSPB, the Court of Appeals, and ultimately the Supreme Court.<sup>9</sup> From start to finish it took the Bureau five years to finish the process of terminating his employment.

In another case the U.S. Postal Service (USPS) required an employee, Winford Sullivan, to undergo a medical evaluation to support his claim to need five to 10 days of medical leave a month. In February 2009 Sullivan refused to appear at the medical evaluation but continued taking medical leave. He proceeded to rack up 44 unscheduled absences in the coming months. After clear warnings he had violated agency procedures the USPS

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<sup>6</sup>U.S. Merit Systems Protection Board, *Annual Performance Report for FY 2013 and Annual Performance Plans for FY 2014 – 2015*, March 10, 2014, p. 11, <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=996058&version=999982&application=ACRQBAT> (accessed July 28, 2014).

<sup>7</sup>Ibid.

<sup>8</sup>Three months to gather evidence supporting the firing, the 30-day advance notice requirement, 30-day waiting period for appeals to the MSPB, three months for the first MSPB appeal, nine months for the second MSPB appeal totals 17 months, in addition to any investigation by the OSC, the EEOC, or appeals to the federal courts.

<sup>9</sup>*LaChance v. Erickson*, 522 U.S. Code 262 (1998).

terminated Sullivan's employment in March 2010. Sullivan appealed his firing to the MSPB which rejected his claims in July 2011. Sullivan then appealed his firing to the U.S. Court of Appeals for the Federal Circuit, which ruled against him in February 2012—three years after his misconduct started.<sup>10</sup>

### **Chapter 43**

Federal managers seeking to remove poorly performing employees can also use Chapter 43. These procedures only apply to performance issues—managers cannot use them for misconduct.<sup>11</sup> The IRS could only use Chapter 43 to punish misconduct if that misconduct also affected the employee's job performance.

Chapter 43 offers some benefits over Chapter 75. First it has a lower burden of proof. Managers need only prove that "substantial evidence" supports removing or demoting the employee. That means that a reasonable person might find the evidence justifies the action—even though another reasonable person might disagree. Managers do not have to show that a reasonable person would probably agree with their actions. Second, the MSPB cannot reduce penalty. If a manager proposes firing an employee the MSPB cannot instead order them suspended or demoted. A manager who proves his case knows he can remove the employee from the federal service.<sup>12</sup> Third, managers do not have to prove that firing the employee will improve the efficiency of the federal service. Fourth, the agency does not have to use the *Douglas* factors when proposing a penalty.

These benefits come at a cost. In order to take action under Chapter 43 the agency must first show the employee has fallen short in a critical area of his work. Before proposing removal the employee's manager must (1) clearly inform the employee of his particular shortcoming; (2) work with him to help improve his performance; and (3) expressly warn the employee that continued poor performance could lead to his removal. Federal employees call this a PIP—short for both a Performance Improvement Plan and Performance Improvement Period.

If the employee's performance improves during the PIP and remains at tolerable levels for a year, his agency cannot fire him using Chapter 43. If his performance reverts to unacceptable levels after that period, the agency must give him a new PIP.

If the employee's performance does not improve during the PIP the agency can then propose firing him. As with Chapter 75 the agency must give the employee 30 days advance notice. Unlike Chapter 75 that notice must include not only specific instances that lead to the firing but also the critical performance element where the employee fell short.

After getting fired the employee then has the same appeal rights to the MSPB and other forums that he would under Chapter 75.<sup>13</sup> Consequently, disciplinary actions often take

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<sup>10</sup>*Sullivan v. U.S. Postal Service*, 464 F. App'x 895 (Fed. Cir. 2012).

<sup>11</sup>Managers must use Chapter 75 to remove employees for misconduct.

<sup>12</sup>U.S. Merit Systems Protection Board, "Addressing Poor Performers and the Law," pp 33–34.

<sup>13</sup>*Ibid.*

longer under Chapter 43 than under Chapter 75. A manager must work with a problematic employee on a PIP, give him time to improve, and document his failure to do so before beginning the termination process.

The structure of Chapter 43 also allows employees to fail repeatedly without getting fired. If an employee does poorly in one element of his job, improves during the PIP, but reverts to old habits after the year has passed his manager cannot fire him. Such a yo-yo pattern of unacceptable–acceptable–unacceptable performance can recur for years without a firing under Chapter 43.

Similarly, managers need a separate PIP for each separate performance shortcoming. A PIP dealing with one performance issue does not permit firing an employee for a different failure. For example, an employee might submit his reports chronically late. His supervisor could work with that employee on a PIP. If the employee subsequently got his reports in on time, but the quality of those reports deteriorated, the manager could not fire him. They would have to start a new PIP to deal with quality issues. If the employee then improved the timeliness and quality of those reports, but began neglecting another element of his job, the manager could not fire him without another PIP dealing with the new issue. This can make Chapter 43 very difficult and frustrating for federal managers to use.

### **No Action the Path of Least Resistance**

Federal managers typically find navigating these procedures time-consuming and difficult. For many successfully removing a problematic employee becomes a full-time job in its own right. Daniel Michaels, former Director of the Food and Drug Administration’s Office of Enforcement explains, “The most difficult thing [about firing someone] is the time it takes away from managing the organization in order to document the case.”<sup>14</sup> A MSPB survey found that one-third of federal managers with a problematic employee cited a lack of time as their greatest obstacle to dealing with the problem.<sup>15</sup> One representative complaint from an Office of Personnel Management (OPM) survey of federal managers states: “Because of the amount of time I had to spend on the [disciplinary] action, my performance suffered and I received a rating of ‘needs improvement.’”<sup>16</sup>

Employees can also avoid getting fired if they can convince the MSPB or EEOC that their manager is firing them for racially or sexually discriminatory reasons, or if they can convince the Office of Special Counsel they blew the whistle on wrongdoing. This gives employees facing termination a strong incentive to accuse their supervisor of bigotry or

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<sup>14</sup>Denise Kersten Willis, “You’re Fired,” *Government Executive*, March 1, 2006, <http://www.govexec.com/magazine/features/2006/03/youre-fired/21285/> (accessed July 28, 2014).

<sup>15</sup>U.S. Merit Systems Protection Board, Office of Policy and Evaluation, “Removing Poor Performers in the Federal Service,” Issue Paper, September 1995, pp. 6–7, <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253662&version=253949&application=ACR OBAT> (accessed July 28, 2014).

<sup>16</sup>U.S. Office of Personnel Management, Office of Merit Systems Oversight and Effectiveness, “Poor Performers in Government: A Quest for the True Story,” January 1999, p. 11, <http://archive.opm.gov/studies/perform.pdf> (accessed July 28, 2014).

misconduct. OPM has found this discourages managers from disciplining employees.<sup>17</sup> As Timothy Dirks, a former director of human resources for the Department of Energy puts it this way: “In effect, the manager is being put on trial.”<sup>18</sup>

For most federal managers doing nothing becomes the path of least resistance. The MSPB reports that “many supervisors believe it is simply not worth the effort to attempt to remove Federal employees who cannot or will not perform adequately.”<sup>19</sup> An OPM study found that it takes “heroic” efforts for federal managers to remove problematic employees.<sup>20</sup>

### **Exceptionally Low Firing Rates**

Most federal managers are not heroes. They are managers trying to run a federal agency. Faced with these incentives they rarely attempt to remove employees with conduct or performance issues. A MSPB survey found that almost four-fifths of federal managers have managed a poorly performing employee. Fewer than one-quarter of these managers attempted to demote or fire that worker.<sup>21</sup> Another OPM survey found even bleaker results. OPM reported that only 8 percent of managers with problem employees attempted to demote or fire those workers. Fully 78 percent of these managers said these efforts had no effect.<sup>22</sup>

This inaction translates into exceptionally low firing rates for federal employees. OPM data shows that in FY 2013 the federal government fired only 9,603 employees for discipline or performance reasons out of its entire 2.1 million person workforce.<sup>23</sup> That translates into an annual firing rate of 0.46 percent—less than a third that of the 1.5 percent *monthly* layoff and discharge rate in the private sector.<sup>24,25</sup>

Even these rates are artificially inflated. Federal employees go through a one-year—or at some agencies two-year—probationary period. During this period they have almost no

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<sup>17</sup>Ibid., p. 11.

<sup>18</sup>Willis, “You’re Fired.”

<sup>19</sup>U.S. Merit Systems Protection Board, Office of Policy and Evaluation, “Removing Poor Performers in the Federal Service,” p. 2.

<sup>20</sup>U.S. Office of Personnel Management, Office of Merit Systems Oversight and Effectiveness, “Poor Performers in Government: A Quest for the True Story,” January 1999, p. 1, <http://archive.opm.gov/studies/perform.pdf> (accessed July 28, 2014).

<sup>21</sup>U.S. Merit Systems Protection Board, Office of Policy and Evaluation, “Removing Poor Performers in the Federal Service,” p. 5.

<sup>22</sup>U.S. Office of Personnel Management, Office of Merit Systems Oversight and Effectiveness, “Poor Performers in Government: A Quest for the True Story,” p. 11.

<sup>23</sup>Heritage Foundation calculations using data from the U.S. Office of Personnel Management, FedScope – Federal Human Resource Data. The rate divides FY 2013 terminations for discipline/performance by June 2013 total federal employment. Available online at [www.fedscope.opm.gov](http://www.fedscope.opm.gov) (accessed July 28, 2014).

<sup>24</sup>Department of Labor, Bureau of Labor Statistics, “Job Openings and Labor Turnover – May 2014,” Table 5, July 8, 2014.

<sup>25</sup>Unfortunately, the Bureau of Labor Statistics does not estimate discharges separately from layoffs, so this is the best available estimate of the firing rate in the federal government. These figures are not strictly comparable because the layoff and discharge rate includes both firing/terminations and job losses due to contracting (or bankrupt) enterprises laying off employees. The federal government did not go bankrupt in 2013 and despite sequestration under 600 federal employees lost their jobs to a reduction in force.

appeal rights and their managers can fire them with little difficulty. Many managers use this probationary period to weed out employees with conduct or performance issues. Almost half of the FY 2013 firings occurred among employees with fewer than two years of federal service.<sup>26</sup> The firing rate stood at just 0.26 percent among tenured federal workers with two or more years of experience.<sup>27</sup> The system that makes it hard to fire federal employees for political reasons makes it hard to fire them for any reason.

### **Sheltering Misconduct**

This system shelters government employees who engage in misconduct. It takes extreme effort for federal managers to fire subordinates who abuse their position. Even if they put in the effort to do so the MSPB may overrule their decision, as Paul Prouty's case demonstrates. So federal managers let conduct slide that private-sector employers would never tolerate.

For example a Housing and Urban Development (HUD) employee spent over a third of his working time for over five years conducting private business deals with his official e-mail account. This included arrangements to provide a lap-dancer to a private party. Another HUD employee operated a private trucking business during work hours from her worksite. HUD officials did not try to fire either worker.<sup>28</sup> The OPM reports managers said that "the unwritten policy [in their agencies] was to avoid any situation that could lead to an appeal or law suit."<sup>29</sup>

This system protects IRS employees who targeted conservative groups for their political views. Section 1203 of the IRS code allows IRS supervisors to immediately fire an employee who violates the constitutional rights of any citizen. However, IRS employees still go through the same notice and appeals process as government employees do for any other violation. It would take incredible time and effort for IRS managers to discipline their subordinates from engaging in this behavior.

Consequently, IRS managers have strong incentives to let misconduct like targeting Americans for their political beliefs slide. Unless IRS managers undertook heroic efforts their employees will remain on the job, conducting their work as they see fit, without repercussions for selectively targeting Americans for their beliefs.

### **Solutions**

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<sup>26</sup>Heritage Foundation calculations using data from the U.S. Office of Personnel Management, FedScope – Federal Human Resource Data. The federal government terminated the employment of 4,419 federal employees with fewer than two years of service in FY 2013.

<sup>27</sup>Heritage Foundation calculations using data from the U.S. Office of Personnel Management, FedScope – Federal Human Resource Data. The rate divides FY 2013 terminations for discipline/performance for employees with two or more years of service by June 2013 total federal employment of employees with two or more years of federal service.

<sup>28</sup>Jim McElhatton "Nice Work If You Can Get It: Federal Workers Keep Jobs Despite Misconduct," *The Washington Times*, May 13, 2014, <http://www.washingtontimes.com/news/2014/may/13/federal-workers-hold-on-to-jobs-despite-blattant-mi/?page=all#pagebreak> (accessed July 28, 2014).

<sup>29</sup>U.S. Office of Personnel Management, Office of Merit Systems Oversight and Effectiveness, "Poor Performers in Government: A Quest for the True Story," p. 11.

Congress should reform civil service laws to better serve the American public. The law now makes government employees largely unaccountable to the American people or their elected representatives. It protects poor performers and those who abuse the public trust.

Ideally, Congress should eliminate all restrictions on firing federal employees. The original Pendleton Act regulated the hiring of federal employees without making it difficult to fire them. Congress can prevent patronage appointments by returning to such a system. If Congress does not want to take this step it can take several incremental measures to bring greater accountability to federal employees. These include:

- **Allowing federal managers to immediately suspend employees** without pay for misconduct or poor performance, providing due process after the suspension. Federal managers should not have to wait 30 days before removing an employee from their job.
- **Permitting federal managers to immediately fill vacancies** created by suspending an employee instead of waiting until the end of the 30-day period.
- **Eliminating the ability of federal employees to appeal their dismissal through multiple forums.** Currently, employees can appeal their termination through either their union grievance system or the MSPB, and then potentially file charges with the Equal Employment Opportunities Commission or the Office of Special Counsel. They should have to pick one agency to review their case without getting to re-litigate their removal through multiple agencies.
- **Extending the probationary period from one to three years.** This would give managers more time to vet employees and remove those likely to cause problems later.
- **Transforming the current seniority-based “step increases” in pay into performance-based raises and reward good behavior.** Congress can do this by restricting these raises to employees rated four or five on the federal performance scale. Currently, employees rated three or higher receive step increases. However managers must develop a Performance Improvement Plan for employees rated a one or two on this scale and work with them intensively to improve their performance. Consequently, the overwhelming majority of federal employees earn a rating of three or higher and step increases effectively function as seniority-based raises. Restricting them to employees rated 4 or higher would turn them into truly performance-based raises that would enable managers to encourage good behavior—not just penalize misconduct.

America's civil service laws do more to serve the interests of poorly performing federal employees than the public. Even many government employees object to the excessive job protections given to them and their colleagues—they force diligent and hard-working federal employees to pick up the slack left by those who do not pull their own weight. The hard work of honest federal workers gets impugned by those who abuse their position and abuse the public trust. A recent MSPB survey found that less than a quarter of federal employees believe their agency deals with poor performers effectively—the lowest rating of every measure of organizational stewardship the MSPB surveyed.<sup>30</sup> The American public and conscientious federal workers deserve better.

## **Conclusion**

Congress intended civil service laws to prevent administrations from using federal employment to reward their supports. It has turned into a system that makes it very challenging to remove a federal employee for any reason—even serious misconduct. IRS employees who targeted Americans based on their political beliefs knew that removing them could easily take their managers over a year and a half. This system ensured they would face little accountability for their actions. Such a system serves the interests of the federal bureaucracy, not the general public. Congress should streamline firing procedures to enable managers to swiftly remove problem employees.

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<sup>30</sup>U.S. Merit Systems Protection Board, “Managing Public Employees in the Public Interest: Employee Perspectives on Merit Principles in Federal Workplaces,” A Report to Congress and the President, Figure 1, p. 11, January 2013, <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=790793&version=793798&application=ACR OBAT> (accessed July 28, 2014).

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