

STATEMENT FOR THE HEARING RECORD

SUBMITTED BY

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TO THE

U. S. SENATE COMMITTEE ON VETERANS' AFFAIRS

COMMITTEE HEARING TO CONSIDER

PENDING HEALTH CARE AND BENEFITS LEGISLATION

WEDNESDAY, JUNE 24, 2015

Chairman Isakson, Ranking Member Blumenthal and distinguished Members of the United States Senate Veterans' Affairs Committee ("Committee"). Thank you for the opportunity to present written testimony for the hearing record on behalf of the United States Merit Systems Protection Board ("MSPB"), an independent, quasi-judicial agency in the executive branch of the federal government. As the Chairman of MSPB, I am pleased to present written testimony for the record for this hearing on health care and benefits legislation pending before the Committee. You have asked that MSPB present written testimony for the hearing record on each agenda item for which MSPB has a position or an interest. I have identified two bills on the agenda in which MSPB has an interest:

- **S. 1082, The "Department of Veterans Affairs Accountability Act of 2015,"** introduced by Senator Rubio and cosponsored by Senators Vitter and Barrasso; and
- **S. 1117, The "Ensuring Veterans Safety Through Accountability Act of 2015,"** introduced by Senator Johnson and cosponsored by Senators Perdue, Lee, Inhofe, Daines, Flake, Crapo, Cassidy, Cruz, Toomey, Collins, Vitter, McCain, Risch, Hatch, Cochran, and Ayotte.

As an initial matter, I would like to note that under statute, MSPB is prohibited from providing advisory opinions on any hypothetical or future personnel action in the executive branch of the federal government. 5 U.S.C. § 1204(h) ("The Board shall not issue advisory opinions."). Accordingly, this testimony should not be construed as an indication of how I, any other presidentially appointed, Senate-confirmed Member of the three-Member Board at MSPB Headquarters in Washington, D.C. ("Board"), or an MSPB administrative judge would rule in any pending or future matter before MSPB. Moreover, during my time as Chairman, MSPB has not taken policy positions on legislation pending before Congress. Generally, I view MSPB's role in the federal civil service as an

independent adjudicator of appeals in accordance with legislation passed by Congress and signed into law by the president. Accordingly, I would respectfully request that the Committee consider my testimony technical in nature.

A. MSPB's Interest in the Committee Agenda Items

MSPB's interest in S. 1082 and S. 1117 derives primarily from its statutory responsibility to adjudicate appeals filed by federal employees in connection with certain adverse employment actions. Generally, after a federal agency imposes an adverse personnel action upon a federal employee, such as removal or demotion, and the federal employee chooses to exercise his or her statutory right to file an appeal with MSPB, MSPB will begin the adjudication process. In the case of a federal employee who is removed from his or her position, that individual is no longer employed by the federal government, and is not receiving pay, at the time he or she files an appeal with MSPB or at any point during the subsequent MSPB adjudication process.

Once an appeal is filed, an MSPB administrative judge¹ in one of MSPB's regional or field offices will first determine whether MSPB jurisdiction exists over the appeal. If jurisdiction does exist, the MSPB administrative judge may conduct a hearing on the merits and then issue an initial decision addressing the federal agency's case and the appellant's defenses and claims. Thereafter, either the appellant or the named federal agency may file a petition for review of the MSPB administrative judge's initial decision with the Board, which will review the initial decision and then issue a final decision of the MSPB. Both the Board and MSPB administrative judges adjudicate appeals in accordance with statutory law, federal

¹MSPB administrative judges are federal employees under the General Schedule System employed by MSPB. MSPB administrative judges are not "administrative law judges" appointed under 5 U.S.C. § 3105 nor Article III federal judges. MSPB currently employs 67 administrative judges nationwide.

regulations, precedent from United States federal courts, including the Supreme Court of the United States and the United States Court of Appeals for the Federal Circuit, and MSPB precedent.

B. S. 1082 – The “Department of Veterans Affairs Accountability Act of 2015”

1. Authority of the Secretary of the Department of Veterans Affairs to Remove or Demote Employees Under S. 1082

In pertinent part, S. 1082 would allow the Secretary of the Department of Veterans Affairs (“Secretary” and “Department”) to remove or demote an individual who is an employee of the Department if the Secretary determines the performance or misconduct of the employee warrants such removal or demotion. If the Secretary removes or demotes such an employee, the Secretary may:

- Remove the employee from the civil service (as defined in section 2101 of title 5); or
- Demote the employee by means of:
 - A reduction in grade for which the employee is qualified and that the Secretary determines is appropriate; or
 - A reduction in annual rate of pay that the Secretary determines is appropriate.

Section 2(a) of the bill provides that the procedures listed in 5 U.S.C. § 7513(b) (“Cause and Procedure”) and chapter 43 of title 5 (“Performance Appraisal”) “shall not apply” to a removal or demotion referred to in that section.

Under 5 U.S.C. § 7513(b)(1)-(4) and (d), a federal employee against whom certain adverse actions are proposed (including removal and demotion) is generally entitled to: 1) at least 30 days advance written notice stating the specific reasons for the federal agency’s proposed action; 2) not less than 7 days to respond to the proposed adverse action; 3) be represented by an attorney or other representative before the federal agency; 4) a written decision and the specific

reasons therefor by the federal agency; and 5) file an appeal to MSPB under 5 U.S.C. § 7701.

Under 5 U.S.C. § 4303(b)(1), a federal employee who is subject to removal or a reduction in grade for unacceptable performance is generally entitled to: 1) at least 30 days advance written notice of the federal agency's proposed action identifying certain information; 2) be represented by an attorney or other representative before the federal agency; 3) a reasonable time to answer orally and in writing to the proposed adverse action; 4) a written decision by the federal agency specifying the instances of unacceptable performance which has been concurred in by an employee who is in a higher position that proposes the removal or reduction in grade; and 5) appeal to MSPB under 5 U.S.C. § 7701.

2. Expedited MSPB Appeal Rights Under S. 1082

Section 2(a) of S. 1082 permits employees who are either removed or demoted by the Secretary to appeal that personnel action to MSPB “under section 7701 of title 5.” Any such appeal must be filed with MSPB “not later than seven days after the date of such removal or demotion”² and the MSPB will be required to refer the appeal to an MSPB administrative judge for adjudication. An MSPB administrative judge would be required to issue a decision “not later than 45 days after the date of the appeal,” and that decision “shall be final” and not subject to further review, either by the Board or a United States federal court. In the event that an MSPB administrative judge does not issue a final decision within 45 days, the decision of the Secretary to remove or demote the employee becomes final and the employee has no further right to appeal.

² Generally, under current law, an appeal must be filed at MSPB no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision, whichever is later. 5 C.F.R. §1201.22(b).

C. S. 1117 – The “Ensuring Veteran Safety Through Accountability Act of 2015”

S. 1117 would expand the existing authority of the Secretary to remove or demote senior executive employees at the Department – granted in Section 707 of the Veterans Access, Choice, and Accountability Act of 2014 ("2014 Act") - to positions at the Department listed in 38 U.S.C. § 7401 "that [are] not ... senior executive position[s]." Thus, in order to provide technical views on S. 1117, a brief discussion of Section 707 of the 2014 Act is first necessary.

The pertinent provisions of Section 707 of the 2014 Act are similar, however not identical, to the provisions of S. 1082 addressed above. Under Section 707 of the 2014 Act:

- The Secretary may remove an individual employed in a senior executive position at the Department of Veterans Affairs from the senior executive position if the Secretary determines the performance or misconduct of the individual warrants removal; and
- If the Secretary so removes such an individual, the Secretary may:
A) remove the individual from the civil service (as defined in section 2101 of title 5); or B) ... transfer the individual from the senior executive position to a General Schedule position at any grade of the General Schedule for which the individual is qualified and that the Secretary determines is appropriate.

38 U.S.C. § 713(a)(1)(A)-(B).

Section 707 of the 2014 Act also provides that “the procedures under section 7543 of title 5 shall not apply” to removals and transfers under that section. 38 U.S.C. § (c)(1). Under 5 U.S.C. § 7543(b), senior executive service employees employed by agencies other than the Department who are subject to a charge of misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of a function are generally entitled to the following rights: 1) at least 30 days advance written notice stating the specific reasons for the federal agency’s proposed action; 2) not less than 7

days to respond to the proposed adverse action; 3) to be represented by an attorney or other representative before the federal agency; 4) a written decision and the specific reasons therefor by the federal agency; and 5) to file an appeal to MSPB under 5 U.S.C. § 7701.

Similar to S. 1082, upon either removal or transfer, a senior executive service employee of the Department may appeal to the MSPB “under section 7701 of title 5” not later than seven days after the date of such removal or transfer. Also similar to S. 1082, an MSPB administrative judge must “expedite” these appeals and issue a decision “not later than 21 days after the date of the appeal.” If an MSPB administrative judge fails to issue a decision within 21 days, the Secretary’s decision to either remove or transfer the senior executive service employee becomes final. Finally, a senior executive service employee of the Department has no right to appeal the MSPB administrative judge’s decision to the Board or a United States federal court.

D. Views on S. 1082 and S. 1117

1. Possible Constitutional Defects With S. 1082 and S. 1117

As stated above, both S. 1082 and S. 1117 would eliminate a covered employee’s right to notice and any opportunity to respond prior to the imposition of an adverse personnel action. In May 2015, MSPB released a study³ entitled

³ In addition to adjudicating appeals filed by federal employees, MSPB is required under statute to:

Conduct, from time to time, special studies relating to the civil service and to the other merit systems in the executive branch, and report to the President and to Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected. 5 U.S.C. § 1204(a)(3).

What is Due Process in Federal Civil Service Employment? The report provides an overview of current civil service laws for adverse actions and, perhaps more importantly, the history and considerations behind the formation of those laws. It also explains why, according to the Supreme Court of the United States, the Constitution requires that any system which provides that a public employee may only be removed for specified causes must also include an opportunity for the employee – prior to his or her termination – to be made aware of the charges the employer will make, present a defense to those charges, and appeal the removal decision to an impartial adjudicator. We encourage Members of the Committee and their staffs who have interest in these issues to read this report⁴.

In the landmark decision *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Supreme Court held that while Congress (through statutes) or the president (through executive orders) may decide *whether to grant protections* to employees, they lack the authority to decide whether they will grant due process rights *once those protections are granted*. Stated differently, when Congress establishes the circumstances under which employees may be removed from positions (such as for misconduct or poor performance), employees have a property interest in those positions. *Loudermill*, 470 U.S. at 538-39⁵.

Specifically, the *Loudermill* Court stated:

Property cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due

⁴ This report can be found at:
<http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1166935&version=1171499&application=ACROBAT>

⁵ The *Loudermill* case involved a state employee, not a federal employee. Nevertheless, while the Federal Government is covered by the Fifth Amendment and the states by the Fourteenth Amendment, the effect is the same. See *Lachance v. Erickson*, 522 U.S. 262, 266 (1998); *Stone v. Federal Deposit Insurance Corp.*, 179 F.3d 1368, 1375-76 (Fed. Cir. 1999).

process is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without the appropriate procedural safeguards.

Id. at 541.

The Court explained that the “root requirement” of the Due Process Clause is that “an individual be given an opportunity for a hearing before he is deprived of any significant property interest,” and that “this principle requires some kind of a hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment.” *Id.* at 542.

According to the Court, one reason for this due process right is the possibility that “[e]ven where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect.” *Id.* at 542. The Court further held that “the right to a hearing does not depend on a demonstration of certain success.” *Id.* at 544.

I further note that the requirements of the Constitution have shaped the rules under which federal agencies may take adverse actions against federal employees, as explained by the Supreme Court of the United States, United States Courts of Appeal, and United States District Courts. Accordingly, should Congress consider modifications to federal civil service laws, many of which have been in place for more than one hundred years, MSPB respectfully submits that the discussion be an informed one, and that all constitutional requirements be considered.

Finally, I note that the constitutionality of Section 707 of the 2014 Act is currently the subject of litigation at the United States Court of Appeals for the Federal Circuit. *Helman v. Dep't. of Veterans Affairs*, Case No. 15-3086 (Fed. Cir. 2015). The plaintiff in that litigation is alleging that Section 707 is unconstitutional primarily on two grounds:

- By permitting the Department to remove a tenured federal employee without any pre-removal notice or an opportunity to respond, and by severely limiting post-removal appeal rights, Section 707 violates an employee's right to constitutional due process as articulated by the Supreme Court; and
- By removing the Board from the MSPB appellate review process and permitting MSPB administrative judges (General Schedule employees) to make a final decision binding an executive branch agency which is not reviewable by a presidential appointee, Section 707 violates the Appointments Clause contained in Article II, Section 2 of the United States Constitution.

As noted above, similar to Section 707 of the 2014 Act, Section 2(a) of S. 1082 would allow the Secretary to eliminate the requirement that the Department provide the pre-adverse action rights found in 5 U.S.C. § 7513(b) and 5 U.S.C. § 4303(b)(1). Section 1(a) of S. 1117 would also allow the Secretary to eliminate the requirement that the Department provide those rights, along with the rights provided in 5 U.S.C. § 7503 (pre-adverse action rights for employees in connection with suspensions of 14 days or less), 38 U.S.C. § 7461(b) (pre-adverse action rights for Department employees in positions listed in 5 U.S.C. § 7401 in connection with adverse actions), and 38 U.S.C. § 7462 (pre-adverse action rights for Department employees in positions listed in 5 U.S.C. § 7401 in connection with professional conduct or competence). It is my understanding the Federal Circuit is currently considering whether it has jurisdiction over the lawsuit concerning Section 707 of the 2014 Act. If it determines that jurisdiction exists, a panel of federal appellate judges will proceed to consider the merits of the claims alleged.

2. S. 1117 Could Provide MSPB Appeal Rights to Department Employees Who Currently Do Not Possess Such Rights

S. 1117 covers positions listed in 38 U.S.C. § 7401 that are “not a senior executive position.” Generally, these positions involve employees who provide health care services at the Department. It is my understanding that the Department employs nearly 190,000 health care professionals. Under existing law, these employees do not possess the right to appeal adverse personnel actions to MSPB. Instead, they are subject to a separate internal disciplinary procedure provided for at 38 U.S.C. § 7461, *et seq.* Under that procedure, Department health care professionals may appeal adverse personnel actions to internal disciplinary appeal boards at the Department and thereafter to a United States federal court. Thus, if S. 1117 were enacted into law, it would provide the Secretary with the discretion to invoke a disciplinary process that would provide MSPB appeal rights to nearly 190,000 federal employees who currently do not possess that right.

3. Permitting Appeals to MSPB “Under 5 U.S.C. § 7701”

S. 1082 and S. 1117 would allow covered employees to appeal to MSPB “under 5 U.S.C. § 7701.” Section 7701 of title 5, United States Code, provides in pertinent part that “the decision of an agency shall be sustained ... only if the agency’s decision ... is supported by a preponderance of the evidence.” 5 U.S.C. § 7701(c)(1)(B). The term “preponderance of the evidence” is defined as “the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.” 5 C.F.R. § 1201.4(q).

Additionally, 5 U.S.C. § 7701(c)(2)(B) provides that “an agency’s decision may not be sustained ... if the employee or applicant for employment shows that the decision was based on any prohibited personnel practice described in section

2302(b) [of title 5, United States Code].” Among the “prohibited personnel practices” described in section 2302(b) are illegal discrimination, 5 U.S.C. § 2302(b)(1)(A)-(E), coercion of political activity or reprisal for refusal to engage in political activity, 5 U.S.C. § 2302(b)(3), and reprisal for lawful “whistleblowing,” 5 U.S.C. § 2302(b)(8). Thus, if such issues are raised by appellants as defenses in appeals filed pursuant to the language contained in S. 1082 or S. 1117, MSPB administrative judges would be required under law to consider those defenses prior to issuing a final decision within either 21 days or 45 days.

4. S. 1082’s and S. 1117’s Impact on MSPB’s Workload

Finally, if enacted into law, S. 1082 and/or S. 1117 could have a dramatic impact on MSPB’s workload and in particular, the workload of MSPB administrative judges. As stated above, under both bills, the Board is prohibited from playing any role in the appellate process. Thus, under the current language, all adjudicatory responsibility resulting from enactment of both pieces of legislation would necessarily fall on MSPB’s administrative judges.

MSPB understands that, for some time now, *all* federal agencies have been asked to do more with less as a result of the fiscal climate. As the independent federal agency that receives appeals filed by federal employees, MSPB is in a unique position to observe how agencies, managers, and employees have been, and continue to be, impacted by decreasing federal budgets.

While practically all federal agencies have been negatively impacted by budget decreases, I believe MSPB has been especially hard hit. During Fiscal Year 2013, MSPB administrative judges adjudicated 6,340 appeals, with an average case processing time of 93 days per appeal. During Fiscal Year 2014, MSPB administrative judges adjudicated 16,354 appeals, with an average case processing time of 262 days per appeal. These increases between Fiscal Years 2013 and 2014 were due directly to the massive influx of appeals filed at MSPB as

a result of federal agency-imposed employee furloughs, resulting from government-wide “sequestration” during Fiscal Year 2013, as mandated by the Budget Control Act of 2011. A “furlough of 30 days or less” is an adverse action which a federal employee has a statutory right to appeal to MSPB. 5 U.S.C. § 7512(5). Additionally, MSPB is required under statute to process and adjudicate every appeal filed by a federal employee. During a three-month period in Fiscal Year 2013, federal employees filed more than 32,000 appeals as a result of sequestration-related furloughs. MSPB continues to process and adjudicate these appeals.

As stated above, if S. 1117 were enacted into law, nearly 190,000 federal employees who currently do not possess MSPB appeal rights could be provided with right such rights. If the Secretary were to remove or demote even 2% covered employees under the expanded authority, MSPB could be required to adjudicate nearly 4,000 additional appeals⁶ within an expedited time frame of 21 days. With existing resources and staffing, it is difficult to imagine how MSPB administrative judges could process and adjudicate these appeals in the time frame provided without placing most other appeals filed by non-Department employees on hold.

Moreover, the time frames provided in S. 1117 (21 days) and S. 1082 (45 days) to adjudicate appeals will make proper adjudication extremely difficult for MSPB administrative judges. In our limited experience adjudicating appeals filed under Section 707 of the 2014 Act, MSPB has observed that these appeals tend to be high profile in nature, involve complicated issues, and generally include a variety of disciplinary charges by the federal agency and defenses by the employee. An MSPB administrative judge could be required to address numerous discovery issues, hold a hearing, and issue a written decision, all within 21 days.

⁶ 4,000 appeals would represent more than half of the total appeals filed by appellants government-wide in most fiscal years prior to Fiscal Year 2013.

Because there is no review by either the Board or a United States federal court, and because the Secretary's decision becomes final in the absence of an MSPB decision, MSPB administrative judges understandably will feel pressured to address each and every aspect of the appeal in as thorough a manner as possible, especially given that these appeals involve federal employees who have been removed from the civil service. For instance, in a recent appeal involving a Department senior executive service employee in Phoenix, Arizona, the MSPB administrative judge's written decision totaled 61 pages. Application of this degree of effort in a large number of cases would be extremely difficult given MSPB's current staffing and resources.

Accordingly, I would respectfully request that this Committee give serious consideration to providing MSPB administrative judges more time to adjudicate appeals filed pursuant to the current language of either S. 1082 or S. 1117. As noted above, individuals who have been removed from their positions are not employed by the federal government – and thus receive no pay – during the entirety of the MSPB adjudication process. Thus, federal taxpayers are in no way burdened by the length of time it takes MSPB to adjudicate appeals involving removals.

This concludes my written testimony for the hearing record. I am happy to address any questions for the record that Members of the Committee may have.