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BACKGROUNDER

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Strengthening the Federal Workforce Through Increased Accountability

John W. York, PhD

Abstract

Both anecdotal evidence and government studies demonstrate that poor performance and misconduct regularly go unaddressed in the federal workforce. This leads to worse government services at a higher price for the American taxpayer. Not only does the American public deserve better from the bureaucracy, good civil servants deserve better also. These workers are often unfairly maligned due to the actions of a few exceptionally bad employees. Further, because managers are often unable to remove poor performers, good civil servants are often asked to pick up the slack for those who are not doing their share and are denied opportunities for advancement.

In the federal government, layoffs and terminations are so infrequent that employees are often more likely to leave their office with a toe tag than a pink slip.[1] In fact, federal employees have the highest job security of any sector of the economy except, not surprisingly, for state and local education employees.[2] Out of a federal non-military workforce of 2.1 million, only 11,046 persons—or 0.5 percent—were fired in fiscal year 2017.[3]

The cost of unaddressed misconduct and poor performance is hard to calculate. No one knows how many wasted hours federal employees spend at their desks or how many unmotivated employees populate the civil service. As a rough estimate, McKinsey Company suggests that improving government performance could benefit the U.S. economy on the scale of between $300 billion and $450 billion annually.[4]

Not only does the American public deserve better from the bureaucracy, good civil servants deserve better also. While there

Key Points

- Complex regulations and convoluted procedures force federal managers to focus first on regulatory compliance—and only secondarily on job performance, discipline, and morale.
- Federal employees have the highest job security of any sector of the economy except, not surprisingly, for state and local education employees.
- The inability to hold employees accountable for misconduct and poor performance not only makes government services worse and wastes taxpayer dollars, it also demoralizes good civil servants who are asked to pick up the slack for underperforming colleagues.
- Congress should consider the following solutions: double the length of probationary periods for new employees from one year to two; eliminate performance improvement plans; create a single forum for appeals or, at the least, eliminate jurisdictional overlap between the current appeals forums.

This paper, in its entirety, can be found at **http://report.heritage.org/bg3325**

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

are certainly federal employees who take advantage of their insulation from accountability to shirk their responsibilities, customer satisfaction among those who received some federal service was at 70 percent in 2017.[5] This is a testament to the hard work and dedication of the majority of civil servants. These diligent workers are often unfairly maligned due to the actions of a few exceptionally bad employees. Further, because managers are often unable to remove poor performers, good civil servants are often asked to pick up the slack for those who are not doing their share and are denied opportunities for advancement by dead weight above them.

In order to improve the efficiency, quality, and morale of the federal career civil service, Congress must enact common-sense reforms to the federal removal and appeals process. Congress should expedite the removal of low-performing federal employees by removing onerous and unnecessary administrative hurdles that bog federal managers down. Congress should also simplify the appeals process for fired federal employees. Prior to 1978, one agency processed all appeals. The federal government should return to that streamlined system. Last, lawmakers should expand the probationary period for new hires—during which it is far easier to remove federal employees—from one year to two years.

The Scope of the Problem

When confronted by the low number of employees removed from the federal civil service, the Merit Systems Protection Board (MSPB) responded that:

> If the agency is successful in preventing poor performance and addressing it when it does occur, removals would become unnecessary. In that way, a small number of performance-based removals could actually be a positive sign.[6]

While a low number of terminations could theoretically indicate a federal workforce that has little chaff to cut, as the MSPB suggests, anecdotal evidence and survey data suggest otherwise. In fact, managers in the federal civil service often let poor performance and malfeasance go unaddressed.

An Environmental Protection Agency employee retained her job despite the fact that she stole a video camera from work and attempted to pawn it.[7] When 41 Secret Service employees conspired to illegally release information from Representative Jason Chaffetz's (R–UT) personnel file to the press as payback after a critical congressional hearing, no one was fired—or even demoted.[8] Unsurprisingly, a recent poll conducted by the MSPB found that only half of federal managers believed they would be able to fire an employee for "serious misconduct."[9] It is even more difficult to fire a poorly performing federal employee. A 2017 Federal Employee Viewpoint Survey found that only 31 percent of federal employees agree with the statement, "[I]n my work unit, steps are taken to deal with a poor performer who cannot or will not improve."[10]

One reason misconduct and poor performance often go unaddressed in the federal bureaucracy is the cumbersome process managers must endure to fire a single employee. The Office of Personnel Management (OPM) estimates that meeting all the requirements to fire a federal employee for poor performance takes between 170 to 370 days—though after President Donald Trump's May 25, 2018, executive order, that time frame will be 90 days shorter in most cases.[11]

The timeline for firing a federal employee for misconduct is shorter. However, no matter the reason why a federal employee is fired, he is entitled to a lengthy appeals process. After an agency fires a career civil servant, he can often appeal his removal to one of three separate agencies and, in most cases, more than one, in the hopes of being reinstated with back pay. Fired employees can also enlist the aid of a fourth agency under certain conditions. After exhausting these options, an employee can take his case to the federal court system. From start to finish, this process can take half a decade—even in cases of flagrant misconduct.[12]

The Process for Firing Federal Employees

For the vast majority of the 2.1 million career civil servants who are not exempted from the merit system protections and procedures laid out in Title 5 of the United States Code, removal is the last step at the end of a labyrinthine maze starting in their immediate supervisor's office and terminating, in many cases, in federal court.[13] Though always onerous, the precise procedures a manager must follow to fire an employee from the civil service vary depending on the reason for that individual's removal. Different statutory and regulatory procedures apply to removals based on poor performance versus misconduct.[14]

FIGURE 1

Steps for Firing a Federal Worker

Progressive Discipline
80–200 DAYS

1) Observe poor performance through normal, day-to-day supervisory activities.
2) Respond to poor performance with progressive discipline steps including: verbal warnings, written reprimands, suspensions, etc.
3) Document instances of poor performance and work with Human Resources, General Cousel, and higher level supervisor to determine next steps.

Does employee improve? **NO** **YES** → **END OF FIRING PROCESS**

Performance Improvement Period
30 DAYS

1) If necessary, agree to a Performance Improvement Plan (PIP) with employee.
2) Monitor, document performance, and provide frequent feedback to employee during formal performance improvement period.

Does employee improve? **NO** **YES** → **END OF FIRING PROCESS**

Notice of Removal
40–60 DAYS

1) Work with HR and GC to prepare notice of proposed removal. Meet with employee and his or her representation, if any, to deliver and discuss notice of removal.
2) Review employee response to the notice of proposed removal with HR, GC, and a higher level official.

Did the deciding official uphold the proposal notice? **YES** **NO** → **END OF FIRING PROCESS**

TOTAL ESTIMATED TIME: 150–290 DAYS

Inform the employee of his or her dismissal and rights to appeal to Merit Systems Protection Board (MSPB) and any applicable appeal and/or grievance rights.

NOTE: During the dismissal process, the employee may make a request for reasonable accommodation, file a grievance, or file an EEO complaint. These actions may add time to the process.
SOURCE: Office of Personnel Management, "Performance-Based Discipline," p. 5, April, 30, 2015, https://www.opm.gov/policy-data-oversight/employee-relations/training/Performance-Based-Discipline.pdf (accessed April 16, 2018).

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Poor Performance. The procedure for removing an employee from the civil service for poor performance is the most difficult and time-consuming for managers. According to Chris Burton and Geraldine Rowe, Associate Directors of the MSPB's Office of Appeals Counsel, this process normally takes between 170 and 370 days.[15] Over the course of that period, managers must follow a complicated set of procedures, knowing that if they do not run the paperwork gauntlet perfectly, an employee can successfully appeal his removal and get his job back.

Once a manager notices subpar performance, he must begin carefully documenting each instance of that employee falling short regarding a *critical element* of his job. Deficiency in anything but a critical element is not sufficient grounds for removal.[16] Only after extensive counselling, monitoring, feedback, and progressive disciplinary steps can a manager give an employee a formal notice of unsatisfactory performance, which effectively indicates a manager's intent to remove an employee from the civil service.[17] Along with this notice, the manager must develop a Performance Improvement Plan (PIP) for the underperforming employee, often with the help of the agency's Human Resources office and General Counsel.[18]

Once this plan is presented to the employee, he must be given a formal opportunity to improve.[19] Prior to President Trump's May 25 executive order, the duration of this period varied from 60 to 120 days, depending on the department.[20] Agencies had significant leeway to establish the length of this appraisal period for their employees since the Code of Federal Regulations only requires that they provide a "reasonable opportunity to demonstrate acceptable performance."[21] However, the President's executive order specified that "agencies shall not afford an employee more than a 30-day period to demonstrate acceptable performance...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."[22] Time will tell whether agencies abuse the latitude granted them by the concluding proviso in this clause.

If an employee does not improve during this period, or if he improves for a time but regresses inside of one year, a manager or Proposing Officer can recommend his removal from the civil service to a designated Deciding Official, who is ordinarily someone one or two levels higher in the chain of command.[23] If the Deciding Official agrees with the decision to remove the employee, a written notice must be delivered to that employee detailing all specific instances of unacceptable performance at least 30 days in advance of that employee's removal.[24]

This final step is often a high hurdle. Deciding Officials do not simply rubber stamp the decisions of the Deciding Officials underneath them. In fact, their incentives tilt *against* approving a removal. Since several layers of bureaucracy may separate them from the employee whose termination is in question, Deciding Officials are not directly affected by that individual's poor performance or bad attitude. Deciding Officials will, however, be directly affected by the administrative and legal appeals that often follow the firing of a federal employee.

Misconduct. If an employee is guilty of misconduct, the process for removal is somewhat abbreviated compared to removal for poor performance. Agencies must still rigorously document all cases of misconduct. Managers, with the assistance of their agency's Inspector General's office, must keep an extensive written record of the nature of the misconduct, when it occurred, and how the agency discovered it. It is also important for an agency to establish that an employee was aware of the rule he broke when he broke it.[25] Simply having a rule included in an employee handbook is not always sufficient. Thus, managers are sometimes advised to e-mail an employee a reminder of a workplace policy for documentation purposes.[26]

Despite this procedural hurdle, several factors make it somewhat easier to dismiss a federal employee for misconduct. Once misconduct has been properly documented, an agency does not need to provide an employee with a PIP or give him a formal opportunity to improve. Once a Deciding Official has signed off on a removal for misconduct, an employee can be dismissed, though he is entitled to a 30-day notice unless there is a reasonable basis to believe that the employee engaged in a crime.[27] Also, managers do not need to show that an employee's misconduct pertained to a critical element of his job description. If, for instance, an employee demonstrated a "lack of candor"—a federal management euphemism for lying—he can be removed regardless of whether he was lying about a critical or lesser element of his job.

While firing an employee for misconduct can be slightly expedited compared to removal based on poor performance, not all misconduct is grounds for

removal from the civil service. In most cases, federal managers must demonstrate that firing an employee for misconduct would "promote the efficiency of the service."[28] This is not always easy to demonstrate, especially if the misconduct occurred outside the workplace. In such cases, an agency must demonstrate a nexus between the employee's off-duty conduct and his on-the-job performance. The agency must show by a preponderance of the evidence that the misconduct in question adversely affected its work or interfered with its mission.[29]

The Appeals Process

As tedious as the process of firing federal employees is, the process of keeping them off the payroll permanently is much more onerous. Once an agency has gone through all the steps described above and fired an employee, the employee has four options:

1. Appeal to the MSPB, which can hear almost any appeal;
2. Appeal to the Equal Employment Opportunity Commission (EEOC), which handles discrimination cases;
3. File a union grievance if the employee is covered by a Collective Bargaining Agreement (CBA); or
4. Make a disclosure to the Office of Special Counsel (OSC), which investigates reprisals against whistleblowers.

These avenues are not exclusive. Fired employees can often gain a hearing before more than one agency, either by appealing the decision of one agency to another or by filing concurrent appeals based on different types of allegations against their employers.

The Merit Systems Protection Board

The MSPB has the widest jurisdiction of the four agencies listed above. It can hear all appeals of agency decisions to fire, demote, or suspend someone for 14 days or more—no matter what accusations a fired federal employee brings against a former agency or manager. Most appeals brought before the MSPB involve a dispute between a fired employee and the agency worked for over whether the agency in question exaggerated allegations of misconduct or poor performance, gave fair warning of the potential consequences of actions, provided an adequate chance to improve, or inflicted too harsh a penalty. Some appellants claim that there were ulterior motives behind their removal. For instance, they may claim that they were discriminated against because of their race, color, religion, sex, sexual orientation, national origin, age, disability, or genetic information. They may also claim that their firings were retaliation for a previous disclosure of fraud or misconduct in their agency or an earlier complaint against a manager.[30]

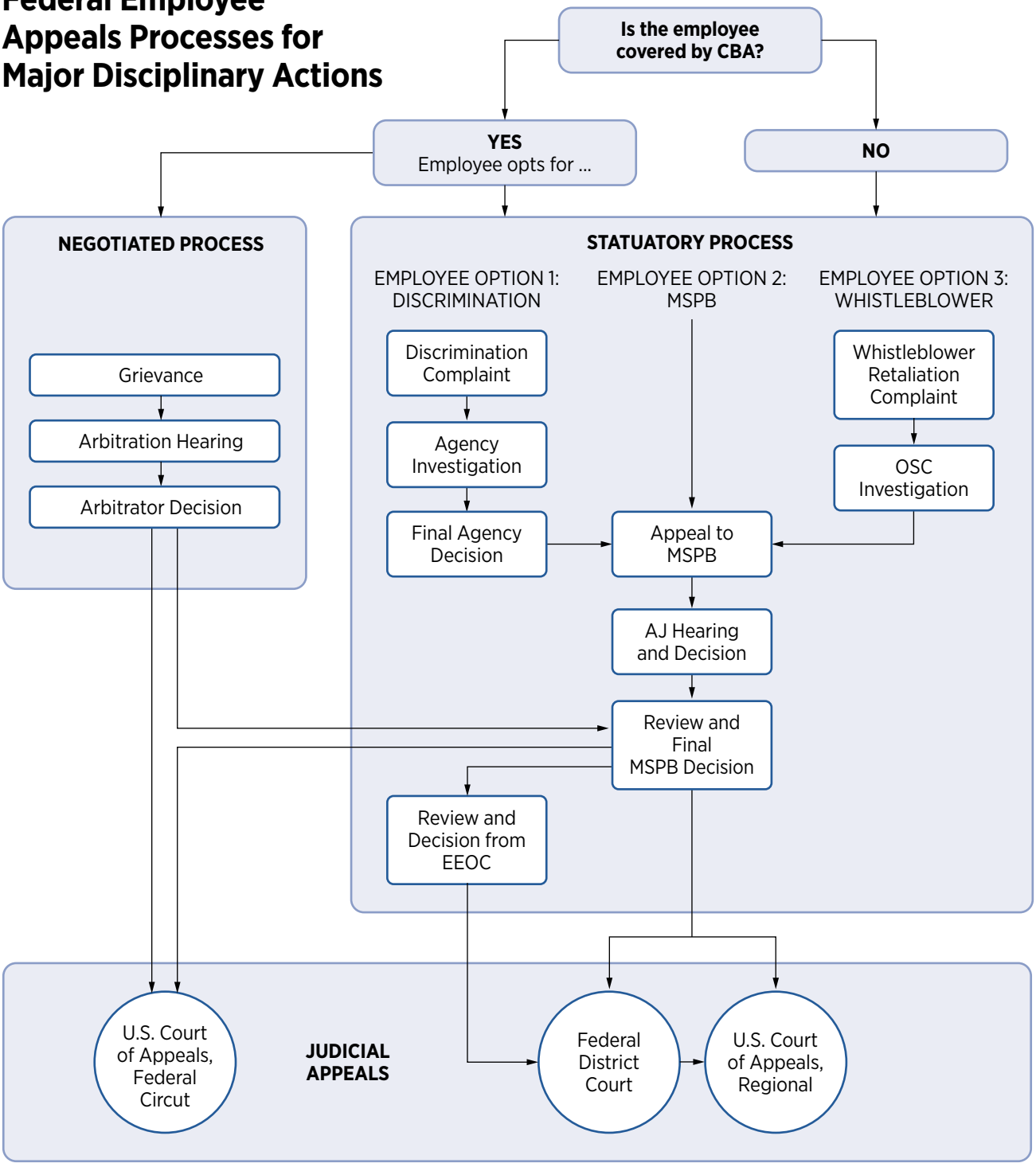
In the case of employees fired for misconduct, the agency must also demonstrate that it took into account 12 potentially mitigating considerations known as the "Douglas Factors."[31] These factors include potential for rehabilitation, past disciplinary record, potentially mitigating circumstances like unusual job tensions or personality problems, and consistency of the penalty when compared with other cases.[32] The MSPB can overturn a removal and propose a lesser punishment if it determines that the agency did not properly weigh any one of these factors.[33]

Though the procedural pitfalls are many and the burden of proof is often high, most serious adverse actions are affirmed by the MSPB.[34] This is all the more surprising given the multiple levels of review an MSPB appeal faces. A formal MSPB appeal is first heard by an Administrative Judge (AJ) at a regional or field office. Of the 2,267 adverse actions appealed in 2016, 46 percent were dismissed at this initial stage.[35] Of the 54 percent of cases that were not dismissed, about 65 percent were settled by the agency and appellant before an initial decision by the AJ.[36] When AJs actually issue initial decisions in MSPB appeals, they uphold the agencies' decision 84 percent of the time and overturn a corrective action 11 percent of the time. Another 3 percent of the time an AJ mitigates the agency's disciplinary action.[37]

After a fired federal employee receives an initial decision on his appeal from an AJ, he can request a review and final decision from the MSPB's main adjudicative body, which consists of three board members appointed by the President and confirmed by the Senate for seven-year terms. Getting a hearing before the Board is very difficult; it denied or dismissed 83 percent of the 359 petitions for review submitted to it in 2016. If, however, an agency or—more often—an employee is granted a review by the three-member board, it is very likely that the appeal will at least be remanded to the regional AJ for reconsideration. In 2016, 89 percent of cases were remanded,

FIGURE 2

Federal Employee Appeals Processes for Major Disciplinary Actions



NOTES: CBA stands for Collective Bargaining Agreement; MSPB stands for Merit Systems Protection Board; AJ stands for Administrative Judge; EEOC stands for Equal Employment Opportunity Commission; OSC stands for Office of Special Counsel.
SOURCE: U.S. Merit Systems Protection Board, "Federal Employee Review Processes for Major Disciplinary Actions [Removal; Suspension 14 > Days; Reduction in Grade or Pay]," https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1392675&version=1398085&application=ACROBAT (accessed April 20, 2018).

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The Douglas Factors

1) The nature and seriousness of the offense;

2) The employee's job level and type of employment;

3) The employee's past disciplinary record;

4) The employee's past work record;

5) The effect of the offense upon the employee's ability to perform at a satisfactory level;

6) Consistency of the penalty with those imposed upon other employees;

7) Consistency of the penalty with any applicable agency table of penalties;

8) Impact upon the reputation of the agency;

9) Clarity with which the employee was on notice of any rules that were violated;

10) The potential for the employee's rehabilitation;

11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future.

while only 4 percent of the AJ's initial decisions were affirmed. Another 4 percent of initial decisions were reversed.[38] Unfortunately, there is no publicly available data on how the decisions of MSPB AJs differed, if at all, upon remand. If the odds of success are no different for a fired federal employee the second time around, this additional opportunity to prove his case greatly improves his overall odds of a favorable settlement.

The fact that employees typically lose their appeals in the MSPB does not mean these venues necessarily skew toward the federal employer. More likely, the daunting appeals process leads employers and agencies to remove an employee only when their case is completely airtight. In all but the most egregious cases of misconduct and poor performance, managers likely resign themselves to the impossibility of firing a bad employee and hiring someone better.

The Equal Employment Opportunity Commission

While nearly all fired federal employees can appeal their removal directly to the MSPB, depending on why they believe they were removed, an employee may choose to start the appeals process in another venue. Employees who believe they were the victims of discrimination on the basis of race, religion, sex, age, disability, or national origin may choose to appeal their removal to their workplace's Equal Employment Opportunity (EEO) Counselor within 45 days of removal.[39] Employees who believe they have been fired for complaining about discrimination or filing a discrimination charge in the past can also appeal their removal to their EEO Office.[40]

When an EEO Counselor receives a complaint, he informs the former employee of his rights and the process that will follow if the employee chooses to file a formal complaint.[41] After being informed about the process that lies ahead, the fired employee can either file a formal complaint or attempt to reach a settlement with his former employer via an alternative dispute resolution (ADR) program, such as mediation.[42] This route is meant to be a non-adversarial way of reaching an agreement that allays the arduous and time-intensive formal appeals process.

If the former employee chooses not to proceed with the ADR procedure or if this process fails, the fired employee can file a formal complaint with the agency for which he used to work.[43] Once an agency receives a formal complaint, it will launch an inves-

tigation unless it finds there is no merit to the charge and dismisses it.[44] Once an agency completes its investigation, an employee is given two options: ask the agency to issue a final decision or request a hearing before an EEOC Administrative Judge (AJ).[45]

Once an AJ has come to a decision and delivered his findings to the agency and employee, either party can appeal to the EEOC's top adjudicative body, a five-member presidentially appointed commission. If this commission does not rule in favor of the fired employee, the employee can ask the commission to reconsider its decision if, but only if, the original decision turned on a clearly erroneous interpretation of the material facts of the case or the law or if the decision will have a substantial impact on the policies, practices, or operations of an agency.[46]

Like the MSPB, the EEOC typically upholds agencies' adverse actions—although this may indicate that managers address only the most glaring poor performance and misconduct rather than a pro-agency bias at the EEOC. According to the EEOC's latest report on the federal workforce, the EEOC found discrimination contributed to an adverse action only 2.6 percent of the time.[47] However, in 15 percent of EEOC appeals, the agency settled. The average award paid to an appellant in settlements was $5,000 in 2014. But the greatest cost of EEOC appeals to federal managers and agencies is time. In 2014, appeals that made it to the EEOC took 196 days to conclude on average.[48]

Retaliation Claims and the Office of Special Counsel

For federal employees who argue that their removal was an act of retaliation against whistleblowers, the Office of Special Counsel may aid their appeal.[49] The OSC is an independent agency that has authority to investigate and prosecute Prohibited Personnel Practices (PPP)—a broad category of illegal practices spanning from nepotism to coercing political activity.[50] The OSC's primary focus is whistleblower retaliation, which makes up one-third of its caseload.[51] While most PPPs deal with preferential hiring and promotions, whistleblower retaliation bears on an agency's decision to fire an employee. Unlike the MSPB and EEOC, the OSC is not an adjudicative body. It does not resolve appeals; rather, it investigates allegations and advocates on behalf of appellants if their cases are plausible.

In fiscal year 2016 alone, the OSC received 4,111 new complaints.[52] Each complaint is subject to a close, multi-tier review. Claims are first reviewed by a Complaints Examining Unit that determines if an agency's actions constitute one of the 14 PPPs. If there is not sufficient evidence to warrant an investigation, the Complaints Examining Unit will give former employees an opportunity to provide more evidence to bolster their cases. If there is evidence to suggest a PPP occurred, the next step is often the Alternative Dispute Resolution process, which resulted in a settlement 67 percent of the time in fiscal year 2016.

If an agency or former employer does not want to engage in the ADR process or there is no settlement, one of the OSC Investigation and Prosecution Division's four field offices will take over the investigation. If there are reasonable grounds to believe that an individual was fired due to a whistleblower reprisal or another PPP, the Investigation and Prosecution Division will attempt to settle the dispute with the agency. This may mean reinstating the fired employee with back pay or awarding him a financial settlement.

If an agency does not agree with the OSC's determination and declines to take corrective action, the OSC will file a complaint with the MSPB. This rarely happens, as agencies almost always agree to the corrective action proposed by the OSC. In fact, in the past six years, the OSC has only filed five corrective action petitions or disciplinary action complaints with the MSPB.[53]

Like the MSPB and EEOC, the OSC is apparently asked to investigate many meritless cases. Of the 4,111 new cases filed with the OSC in fiscal year 2016, only 275 resulted in some favorable action such as reinstatement of a fired employee or a settlement. This means the OSC either did not seek or did not receive a favorable result from either the agency or the MSPB approximately 96 percent of the time.

The Negotiated Process and the Federal Labor Relations Authority

According to the Federal Labor Relations Authority, 56 percent of federal employees are represented by a labor union. When these federal employees are fired, they have an alternative to the administrative processes described above to fight their agency's decision. They can elect to engage in what is referred to as the negotiated grievance procedure. In electing this path, a federal employee must claim that his firing violates the terms of the collective-bargaining agreement (CBA) negotiated by the union and the agency.

While every CBA is required by law to establish a grievance procedure that includes binding arbitration before a neutral arbiter, the causes for which an employee can be fired, the process an agency must follow to remove him, the steps of the appeals process, and the burdens of proof at each stage vary from agency to agency depending on the terms of the CBA.[54] However, CBAs cannot supersede a statute, an executive order, government-wide regulations, or agency rules for which there is a "compelling need."[55] This means that, in reality, federal labor unions are considerably less free to press their demands during the negotiation of a CBA compared to private-sector unions.

While federal employee unions may be at a disadvantage when negotiating the terms of a CBA, they have legal advantages when filing a grievance.[56] The law guarantees public-sector employees paid time away from their regular duties to represent themselves in arbitration.[57] This is referred to as "official time." Public-sector employees are also authorized to use official time to represent other employees in their bargaining unit while being paid taxpayer dollars. Based on the average salary of unionized federal workers, the amount of official time taken by federal employees costs taxpayers around $500 million a year.[58] In addition to paid time off to work on their case, unionized federal employees are generally provided a union representative—paid for by union dues—to represent them in arbitration.[59]

Union grievance cases are typically settled by arbitration. The arbitrators who run these proceedings are independent practitioners referred to the two parties by the Federal Mediation and Conciliation Service (FMCS). Though they are independent practitioners, arbitrators in the negotiated process have the same authority as MSPB and EEOC AJs.[60]

If a fired employee or agency is unhappy with the result of arbitration, that party can request that the Federal Labor Relations Authority (FLRA) review the arbitration decision.[61] The FLRA is an independent agency that governs labor relations between the federal government and the over 1.2 million federal employees represented by public-sector labor unions.[62] The adjudicative component of the FLRA is comprised of three members appointed for five-year terms by the President with the advice and consent of the Senate. Some arbitration appeals are heard by the FLRA's Collaboration and Alternative Dispute Office, which offers agencies and appellants an "informal, voluntary, and confidential way" to resolve a dispute over an arbitration decision.[63]

Hearing arbitration appeals from fired or disciplined federal employees represents a relatively small part of the FLRA's workload, and it has only limited discretion to overturn an arbitrator's decision. The FLRA is allowed to overturn an arbitration decision only if it is "contrary to any law, rule, or regulation" or "on other grounds similar to those applied by Federal courts in private sector labor-management relations."[64]

Sequential Venue Shopping

For fired federal employees, the decision to pursue one avenue of appeal does not rule out the possibility of pursuing other avenues later. Whatever venue a former federal employee starts in, he can try his hand in several other venues if he fails.

For example, if a unionized federal employee is not able to get his job back or win a settlement via the negotiated process or from the FLRA, he has several options for further appeal. In theory, once a unionized employee has decided to appeal his removal via the negotiated process, he waives his right to an appeal before the MSPB, EEOC, or OSC.[65] Nonetheless, in practice, after the negotiated process concludes, an employee can still appeal the final decision to either the MSPB or the EEOC, or enlist the aid of the OSC if he believes his removal not only violated the terms of the CBA but the law as well.[66]

For non-unionized employees who start the appeals process at the MSPB, OSC, or EEOC, it is significantly easier to file an appeal before another body. Because the MSPB's jurisdiction overlaps with both that of the OSC and the EEOC, there are often two or more agencies to which an employee can appeal—no matter why he believes he was fired. For instance, if an employee believes he was fired in retribution for a whistleblower complaint but the OSC does not pursue the case, a fired federal employee can appeal directly to the MSPB.[67] Similarly, if an employee believes he was fired due to discrimination but the MSPB did not reinstate him or offer him a suitable settlement, he can turn to the EEOC.[68] If the MSPB and EEOC come to different conclusions, a Special Panel (consisting of a Chairman appointed by the President, and one board member from both the EEOC and MSPB) must be assembled to resolve that single dispute.[69]

If an employee is not able to get his job back or reach an attractive settlement via the MSPB, EEOC, OSC, or through the negotiated union grievance process, he can still take his case to court. Depend-

ing on the nature of the case, different courts will have jurisdiction. Employees who claim that they were discriminated against can file their cases in federal district court.[70] These cases can be subsequently appealed to the U.S. Court of Appeals for the appropriate regional circuit.[71] Whistleblower retaliation claims are heard directly by the U.S. Courts of Appeal.[72] Appeals of FLRA decisions are heard by the U.S. Court of Appeals for the Federal Circuit,[73] as are appeals from other decisions by the MSPB.[74]

The Consequences of the Removal and Appeals Process

The last section provides just a sketch of the cumbersome and confusing process involved in firing a federal employee or taking any other serious adverse action. Statutes, regulations, case law, and administrative adjudications have created a nettlesome and Gordian procedure that is difficult for all but highly specialized lawyers and arbitrators to navigate.

Faced with the myriad of procedural hurdles that they must clear before they can remove a federal employee, federal managers are likely to look the other way when poor performance and misconduct occur. The data bear this out. Out of a federal workforce of 2.1 million (excluding postal workers and military service members), only 11,046 were removed for poor performance or misconduct in 2017. Of those, 4,352 were in their first year of employment and, thus, were still within the federal government's probationary period. As such, they could be removed without the ordinary procedural hurdles and with far fewer appeal rights.[75] All in all, then, only 6,694 employees—representing 0.3 percent of the non-probationary federal workforce—were successfully removed in a year.[76]

When federal managers do consider taking on the herculean task of firing an employee, they often find little support from their agency's leadership. A recent poll conducted by the MSPB found that only half of federal managers believed they would be able to fire an employee for "serious misconduct." Among those who expressed this view, most blamed their managers and agency culture.[77]

The evidentiary burden required to uphold a removal or any other serious disciplinary action is also a major challenge to managers' ability to remove poor performers with discipline problems. Seventy-four percent of managers reported that the "level of proof required by law" was a factor preventing them from holding employees accountable.[78] This suggests that the high rate of agency success at the MSPB and EEOC is the result of managers pursuing only the most egregious cases, not any built-in procedural advantage for agencies.

When little is done to address poor performance and misconduct, employees notice—and it can have a demoralizing impact. According to the latest Federal Employee Viewpoint Survey, 69 percent of respondents disagree that "steps are taken to deal with employees who cannot or will not improve their performance."[79] Failure to address poor performance and misconduct not only teaches employees that their actions do not have consequences, it indirectly punishes diligent civil servants. When bad employees do not do their share of an agency's work, hardworking employees are required to pick up the slack. Further, essentially irremovable poor performers, especially those who are in the later stages of their career, create insurmountable barriers to upward mobility.

Improving the Removal and Appeals Process

In 2017, during the oral argument in *Perry v. Merit Systems Protection Board*, Supreme Court Justice Samuel Alito said of this body of law: "[N]obody who is not a lawyer, and no ordinary lawyer could read these statutes and figure out what they are supposed to do." He then asked, "Who wrote this statute? Somebody who takes pleasure out of pulling the wings off flies?"[80] While regulations have added degrees of complexity, at its heart, this dysfunctional system is a creation of Congress, and legislation will be necessary to fix it. Congress should consider the following solutions:

Eliminate Performance Improvement Plans. The process of documentation, notification, review, and response that managers are required by law to complete before they can fire an employee for poor performance is excessive. Congress should revise 5 U.S. Code § 4302(c)(6), which requires agencies to provide employees with an opportunity to demonstrate acceptable performance before they are reassigned, reduced in grade, or removed, and 5 U.S. Code § 4303, which establishes the other procedural requirements for removal of a federal employee for unacceptable performance. The current process makes an already stressful process of dealing with a problem employee much worse for federal managers.

More specifically, the requirement that managers draft and present employees with a Performance

Improvement Plan months before their removal is unnecessary. Statute dictates that "each agency shall develop one or more performance appraisal systems."[81] This performance appraisal system, the statute elaborates, should be used to "provide for periodic appraisals of job performance of employees" and "[in] assisting employees in improving unacceptable performance."[82] If a performance appraisal system does what the law dictates, there is no need for a PIP listing all of an employee's deficits. The regularly administered performance appraisal tool should fulfill both of these functions throughout an employee's career—not just at the bitter end.

The formal opportunity to improve that employees are given after they are presented with a PIP is also unnecessary. Title 5 of the U.S. Code provides the statutory basis for this cumbersome practice. It specifies that an agency's ordinary performance appraisal system should be used for "reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance."[83] If an ordinary performance appraisal system, performed regularly by managers, meets the statutory guidelines it is supposed to, an agency should not need to provide an additional period to improve performance. If employees are given regular feedback on job performance and assistance in improving areas where they are weak, as the law dictates, then every day on the job should be considered a performance improvement period—just as it is in the private sector.

Not only is the PIP onerous and time-consuming, it does not fulfill its stated purposes. According to a recent MSPB poll, only 35 percent of federal managers thought "poor performers make a serious effort to use the performance improvement period to improve their performance."[84] The PIP has become a *pro forma* notice of intent to fire. It is *not* an improvement plan as its name indicates. Instead, it has effectively become an advanced notice of removal. This procedural hurdle not only burdens managers unnecessarily, it hurts workplace morale by requiring that disgruntled, soon-to-be fired employees stay on the job for months.

Create a Single Forum for Appeals. As with most features of the American bureaucracy, the system we now have for removing career civil servants from their jobs was not designed by any one individual. It is the result of an accretion of layers, each added with good intentions, in response to several crises over the past 100 years. President James Garfield's assassination by a disappointed party regular hoping for a federal job brought to a head concerns about the adequacy of the spoils system and gave birth to the Civil Service Commission (CSC). The civil rights movement focused attention on racial prejudice and led to the creation of the Equal Employment Opportunity Commission and to Equal Opportunity offices in every bureau and agency. The Watergate crisis led some to favor a decentralized executive branch. Thus, the Civil Service Reform Act of 1978 ended the CSC and split its functions up between the newly created MSPB, the FLRA, and the Office of Personnel Management.

Each layer of insulation surrounding the federal workforce was intended to address a clear problem. Stripping these protections away completely would be unwise, even if doing so would result in a more efficient civil service. Some procedural barriers to serious disciplinary action are necessary to protect the merit system even if they make misconduct and poor performance harder to address. However, the appeals system we have now does not strike the right balance between the competing goals of a non-partisan administration of the law on the one hand and promoting professional competence on the other.

Congress should draft legislation to create a single forum for appeals of adverse agency actions. This system existed prior to 1978 and the dissolution of the CSC—and it worked well. A modern iteration of the CSC could more expeditiously settle appeals and deliver justice for the appellant and the agency because its decisions would be reviewable only by the courts. Further, creating a single forum for appeals would not change the substantive protections that employees deserve.

Creating a single forum for appeals like what existed prior to the Civil Service Reform Act would be a difficult undertaking for Congress. Like all bureaucracies, the agencies that currently hear appeals would fight for their lives. Also, federal employee unions would fiercely oppose any effort to make their members easier to fire. It may take time to build public pressure and brace Members of Congress for the inevitable blowback. In the meantime, however, there are smaller remedies that should be considered.

Eliminate Jurisdictional Overlap Between the MSPB, EEOC, and FLRA. Congress should amend Titles 5 and 29 of the U.S. Code to eliminate jurisdictional overlap between the MSPB, the FLRA, and the EEOC, such that each branch has exclusive authority over one set of appeals. All discrimination cases should be heard by the EEOC. The MSPB should have

sole jurisdiction over all other appeals. The negotiated process for union grievances should be used only when an otherwise lawful adverse action violates the terms of a CBA. Any adverse action that violates a statute should be heard before either the MSPB or EEOC, not dealt with via the union grievance process. By eliminating jurisdictional overlap and, thus, sequential appeals to multiple agencies, Congress can greatly simplify and expedite the process for removing poor performers and discipline problems.

Double the Probationary Period for New Hires. Federal employees in their first year of federal employment are not afforded all the administrative protections and avenues of appeal that other employees are. The first year of a federal employee's career is spent in a probationary period during which it is significantly easier to remove him. No PIP has to be filled out to fire him. There is no need to show that he demonstrated poor performance in a critical component of his work or was guilty of misconduct. He is not accorded an opportunity to improve either. If a manager does not judge him to be a good addition to the team, that employee can be fired.

Employees in this probationary period still have limited appeal rights. Essentially, probationary employees are still considered applicants for employment, and they have only those rights of appeal other applicants for employment have. For instance, if they believe they were discriminated against on the basis of a protected status like race or nationality, they can appeal to the MSPB or EEOC. They cannot, however, claim that their employer did not take into consideration their time in service, disciplinary record, or typical penalties for similar errors or misdeeds.

Lower procedural hurdles and limited rights to appeal will most likely make employers significantly more willing to remove problem employees. In 2017, an employee in his probationary first year in the federal government had a 2 percent chance of being fired. After his first year, the odds dropped to 0.4 percent.[85]

The problem with the current probationary period is its short length. One year is not long enough to accurately appraise the suitability of a new employee. This does not give a new employee time to complete any significant long-term tasks, administer any annual inventories, inspections, audits, and reports, or—for supervisors—handle a performance-rating cycle. Especially given the difficulty of firing non-probationary federal employees, it is critical that upper-level managers have a larger sample of an employee's work to evaluate before making an employee a permanent part of the federal workforce.

Congress should double the current probationary period for federal employees from one year to two years by amending relevant sections of Title 5. The Ensuring a Qualified Civil Service Act of 2017 does just this.[86] The bill, introduced by Representative James Comer (R–KY), passed the House of Representatives in November 2017 but has not yet been taken up by the Senate.

Time for Change

While no one wants to abandon the merit system and return to the spoils system of the 19th century, lawmakers have radically overcorrected for the vices of that era. We now have a human resources regime that is ambivalent toward the merit of civil servants. Instead, complex regulations and convoluted procedures force managers to focus first on compliance and only secondarily on performance, discipline, and morale.

The American taxpayer deserves a more accountable civil service. Problem employees collect paychecks and generous benefits packages and, in return, make government services worse. And while private-sector employees know that their jobs are closely linked to their own performance, the performance of their company, and the performance of the economy overall, public-sector employees seem to have a job for life.

By simplifying the removal process, streamlining the appeals process, and doubling the length of the probationary period for new employees from one year to two, Congress can significantly improve the quality of the civil service. These changes would strip away unneeded procedural hurdles that guard underperforming and misconduct-prone employees from the consequences of their actions. In so doing, these changes would strike a better balance between twin goals of the merit system: guarding employees against arbitrary or politically motivated removal and assuring good governance.

*—**John W. York, PhD,** is a Policy Analyst in the B. Kenneth Simon Center for Principles and Politics, of the Institute for Constitutional Government, at The Heritage Foundation.*

Endnotes

1. In 2017, for example, the Environmental Protection Agency, which has roughly 15,000 employees, lost 20 employees to untimely death, while terminating only 10 for poor performance or misconduct. Last year, the Federal Communications Commission (FCC) fired only two employees, while three passed away. Like the FCC, the Department of Transportation's Maritime Administration also saw three employees pass away during 2017, but it fired no one during the same year. U.S. Office of Personnel Management, "About Our Data (EHRI-SDM)," https://www.fedscope.opm.gov/datadefn/aehri_sdm.asp (accessed June 13, 2018).
2. Bureau of Labor Statistics, "Table 5: Layoffs and Discharges Levels and Rates by Industry and Region, Seasonally Adjusted," March 2018, USDL–18–0742, March 2018, https://www.bls.gov/news.release/jolts.t05.htm (accessed June 13, 2018).
3. U.S. Office of Personnel Management, "Separation Trend Cubes," https://www.fedscope.opm.gov/separations.asp (accessed June 13, 2018).
4. McKinsey and Company, "Better for Less: Improving Public Sector Performance on a Tight Budget," July 2011, https://www.mckinsey.com/~/media/mckinsey/dotcom/client_service/public%20sector/pdfs/better_for_less_improving_public_sector_performance_on_a_tight_budget.ashx (accessed June 13, 2018).
5. American Customer Satisfaction Index, "ASCI Federal Government Report," January 30, 2018, http://www.theacsi.org/images/stories/images/govsatscores/18jan_gov-report-2017.pdf (accessed June 13, 2018).
6. U.S. Merit Systems Protection Board, Office of Policy and Evaluation, "Building Blocks of Effective Performance Management," October 2017, https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1453471&version=1458980&application=ACROBAT (accessed June 13, 2018).
7. Patrick Sullivan, "OIG Investigations of Employee Misconduct at the U.S. Environmental Protection Agency," testimony before the Committee on Oversight and Government Reform, U.S. House of Representatives, May 18, 2016, https://www.epa.gov/sites/production/files/2016-05/documents/_epaoig_statement_of_sullivan_hogr_hearing_5-18-16.pdf (accessed June 13, 2018).
8. Lisa Rein, "41 Secret Service Agents Disciplined After Leaking GOP Congressman's Personnel File," *The Washington Post*, May 27, 2016, https://www.washingtonpost.com/news/powerpost/wp/2016/05/27/41-secret-service-agents-disciplined-after-leaking-gop-congressmans-personnel-file/?utm_term=.262beae042ba (accessed June 13, 2018).
9. Eighty percent said their "agency's culture" made it significantly more difficult to remove employees for serious misconduct, while 77 percent said the "degree of support given by managers and leaders above [them]" contributed to the problem. An additional 75 percent faulted, in part, the "quality of service provided by [their] human resources office." U.S. Merit Systems Protection Board, Office of Policy and Evaluation, "Addressing Misconduct in the Federal Civil Service: Management Perspectives," https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1363799&version=1369157&application=ACROBAT (accessed June 13, 2018).
10. U.S. Office of Personnel Management, "Federal Employee Viewpoint Survey," 2016, https://www.opm.gov/fevs/ (accessed June 13, 2018).
11. President Trump's executive order, entitled "Executive Order Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles," put a 30-day cap on the period of time supervisors must appraise the performance of an employee after an official warning. Prior to this order, agencies could require up to a 120-day appraisal period, though some agencies established shorter timelines. See Donald Trump, "Executive Order Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles," Executive Order No. 13839, § 4(a)(ii), May 25, 2018, https://www.whitehouse.gov/presidential-actions/executive-order-promoting-accountability-streamlining-removal-procedures-consistent-merit-system-principles/ (accessed June 13, 2018), and Government Accountability Office, *Federal Workforce: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance*, GAO–15–191, February 2015, p. 15, https://www.gao.gov/products/GAO-15-191 (accessed June 13, 2018).
12. James Sherk, "IRS Abuses: Ensuring That Targeting Never Happens Again," testimony before the Oversight and Government Reform Committee, U.S. House of Representatives, July 30, 2014, https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Sherk%20Statement%20IRS%20Abuses%207-30.pdf (accessed June 13, 2018).
13. As alluded to above, not all federal employees are equally difficult to fire. Political appointees can be removed immediately and cannot appeal their termination. Intelligence agencies like the Central Intelligence Agency, the National Security Agency, and the Defense Intelligence Agency have been exempted from many of the provisions of the law relevant to adverse actions. Civil servants at those agencies are not entitled to the same advanced notice, representation, and appeals as other federal employees. High-level managers in the Senior Executive Service (SES) are also easier to remove. But SES employees and employees of exempted agencies total fewer than 100,000. This represents only a small fraction of the federal workforce of 2.1 million. See U.S. General Accounting Office, "Intelligence Agencies: Personnel Practices at CIA, NSA, and DIA Compared with Those of Other Agencies," March 1996, https://www.gao.gov/assets/160/155413.pdf (accessed June 13, 2018), and U.S. Office of Personnel Management, "About Our Data (EHRI-SDM)."
14. Removals for poor performance fall under 5 U.S. Code, Ch. 43, while Ch. 75 of the same Title covers misconduct.
15. Chris Burton and Geraldine Rowe, "Performance-Based Discipline," April 30, 2015, https://www.opm.gov/policy-data-oversight/employee-relations/training/Performance-Based-Discipline.pdf (accessed May 31, 2018).
16. The term "critical element" is defined in 5 Code of Federal Regulations § 430.203 (1997) as "a work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable." This may not be much of a barrier to removal, however. Agencies often define critical elements very loosely. For instance, one critical element in the U.S. Department of the Interior Supervisory Employee Performance Appraisal Plan reads, "Improve protection of lives,

property and assets, advance the use of scientific knowledge, and improve the quality of life for communities we serve." One critical element for the assessment of Department of the Interior engineers reads simply, "leadership." See U.S. Department of the Interior, "Supervisory Employee Performance Appraisal Plan: Employee Appraisal Handbook," DI–3100S, September 2010, and U.S. Department of the Interior, "Employee Performance Appraisal Plan: Employee Appraisal Handbook," DI–3100, November 2004. See also Robbie Kunreuther, "How HR Should View 'Critical Elements,'" FedSmith, April 19, 2012, https://www.fedsmith.com/2012/04/19/how-hr-should-view-critical-elements/ (accessed June 13, 2018).

17. Removal is typically the last in a long series of steps, starting with informal disciplinary actions such as oral admonishment, counseling letters, and written warnings—and moving to formal disciplinary steps like written reprimands, suspensions, and reductions in grade or pay. If a manager does not move through these steps, in so doing building a record of continued poor performance and misconduct, the MSBP or the courts may overturn an employee's removal. For more on these and other disciplinary and adverse actions, see Office of the Deputy Chief Management Officer of the Department of Defense, "Administrative Instruction 8: Disciplinary and Adverse Actions," December 16, 2016, https://fas.org/irp/doddir/dod/ai-8.pdf (accessed May 31, 2018).
18. 5 Code of Federal Regulations § 432.104 (1993).
19. Ibid.
20. U.S. Office of Personnel Management, "Providing an Opportunity to Improve," https://www.opm.gov/policy-data-oversight/employee-relations/reference-materials/the-performance-improvement-period.pdf (accessed June 13, 2018), and "Legal Reference: Chapter 43 Actions," FEDweek, May 10, 2018, http://www.fedweek.com/legal-reference/chapter-43-actions/ (accessed June 13, 2018).
21. 5 Code of Federal Regulations § 432.105(a)(1) (1993).
22. Donald Trump, "Executive Order Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles."
23. 5 Code of Federal Regulations § 432.105(b) (1993). The Proposing and Deciding Officials are not allowed to privately communicate about the nature of the employee's conduct or performance. According to several court decisions, such interchanges bias the Deciding Official while not allowing the employee an opportunity to respond. Prohibition of these so-called ex parte communications between two managers in the same agency or office is a legal tripwire that can ultimately trigger a fired employee's reinstatement into the civil service. See *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011), and *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999). For more on these and similar cases, see U.S. Merit Systems Protection Board, "What is Due Process in Federal Civil Service Employment?: A Report to the President and the Congress of the United States," May 2015, https://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1166935&version=1171499&application=ACROBAT (accessed May 31, 2018).
24. 5 U.S. Code § 4303(b)(1)(A).
25. *Lehnerd v. OPM*, 55 MSPR 170 (1992).
26. For examples, see National Oceanic and Atmospheric Administration, "Workforce Management Office: 'How Do I Deal with an Employee's Misconduct?'" http://www.wfm.noaa.gov/ELRD/employee_misconduct.html (accessed May 30, 2018); Deborah Hopkins, "How Should You Document Misconduct?" Federal Employment Law Training Group, May 15, 2017, https://feltg.com/how-should-you-document-misconduct/ (accessed May 30, 2018); and U.S. Department of Commerce, Office of Human Resources Management, "How Do I Deal with an Employee's Misconduct," http://hr.commerce.gov/Practitioners/ClassificationAndPositionManagement/PDLibrary/prod01_000954 (accessed May 30, 2018).
27. 5 U.S. Code § 7513(b)(1).
28. 5 U.S. Code § 7513(a). See also Lee J. Lofthus, "Off-Duty Conduct," U.S. Department of Justice, January 29, 2016, https://www.justice.gov/civil/file/820381/download (accessed June 13, 2018).
29. In the most egregious cases, the nexus between the off-duty conduct and the agency's mission "speaks for itself." *Graham v. U.S. Postal Service*, 49 MSPR 364, 367 (1991). Violent crimes and sexual misconduct with minors constitute two clear examples of egregious offenses. See *Hayes v. Department of the Navy*, 727 F.2d 1535, 1539 (Fed. Cir. 1984); *Graham v. U.S. Postal Service*, 49 MSPR 364 (1991); and *Scheffler v. Department of the Army*, 117 MSPR 499, (2012). Often, nexus is significantly more difficult to demonstrate. For instance, when the Department of Justice determined that one of its employees was videotaping sexual encounters without his partners' knowledge, his subsequent termination was overturned. The U.S. Court of Appeals for the Federal Circuit held that the employee's misconduct was "private in nature" and did not "implicate job performance in any obvious way." *Doe v. Department of Justice*, 565 F.3d 1375, 1380 (Fed. Cir. 2009). In other cases, however, convictions for drug offenses, larceny, and aggravated assault have been successfully used as pretext for removal even though there was no direct nexus between misconduct and job performance. Cases of criminal misconduct like these, the Federal Circuit has determined, lead to "an agency's reasonable loss of trust and confidence" in an employee that will interfere with the efficiency of the service. *Beasley v. Department of Defense*, 52 MSPR 272, 275 (1992), and *Brook v. Corrado*, 999 F.2d 523, 527 (Fed. Cir. 1993). For more, see U.S. Merit Systems Protection Board, "Connecting the Job and the Offense ('Nexus')," https://www.mspb.gov/studies/adverse_action_report/8_Connectingthejob.htm (accessed June 13, 2018).
30. In both of these cases, an employee can choose to bring his appeal before another agency first—the EEOC in the case of discrimination and the OSC in the case of whistleblower retaliation—but he may also appeal directly to the MSPB.
31. *Douglas v. Veterans Administration*, 91 FMSR 7037, 5 MSPR 280 (MSPB 1981).
32. U.S. Office of Personnel Management, "Basic Employee Relations: Your Accountability as a Supervisor or Manager; A Supervisor's Guide to Applying the Douglas Factors," http://hru.gov/Courses/OPM_Basic_Employee_Relations/PDFs/A_Supervisors_Guide_to_Applying_the_Douglas_Factors.pdf (accessed June 13, 2018).

33. For instance, the MSPB overturned the Small Business Administration's (SBA's) decision to fire a Public Affairs Specialist when it was discovered he was sending sexually explicit pictures and videos from his work computer because the SBA had not taken into consideration his lack of disciplinary history, tenure with the agency, rehabilitative potential, and the fact that the employee "had been working in an environment for several years in which his immediate supervisor...and other agency managers condoned the emailing of sexually oriented materials by employees." *Chavez v. Small Business Administration* 121 MSPR 168 (MSPB 2014). For a summary of this case, see Conor D. Dirks, "MSPB Reverses Removal After Agency Withheld Requested Information," FedManager, June 3, 2014, https://www.fedmanager.com/case-law-updates/1736-mspb-reverses-removal-after-agency-withheld-requested-information (accessed June 13, 2018).
34. Depending on the nature of the appeal, different burdens of proof are applied by the MSPB:
    - In cases where an employee was fired for poor performance, the MSPB upholds an agency's action if there is "substantial evidence" supporting the agency's decision. In legal terms, substantial evidence means the amount of evidence that "a reasonable mind might accept as adequate to support a particular conclusion." See "Evidentiary Standards and Burdens of Proof," *Justia*, https://www.justia.com/trials-litigation/evidentiary-standards-burdens-proof (accessed June 13, 2018).
    - In the case of removal for misconduct, the agency must meet the higher evidentiary standard of "preponderance of the evidence." This means over half the evidence must point toward the agency's conclusion that the misconduct occurred and that the action was warranted.
    - When a former employee alleges that discrimination or whistleblower retaliation was the cause of his removal, the burden of proof is initially with the terminated employee. If he can demonstrate that, in fact, either one of these was a motivating factor behind his removal, the burden of proof shifts to the agency.
    - In the case of alleged whistleblower retaliation, an agency must show by "clear and convincing" evidence that it would have taken the challenged actions in the absence of a protected disclosure. When discrimination is alleged, the agency must demonstrate by a preponderance of the evidence that it would have removed an employee in the absence of a discriminatory motive. See *Savage v. Department of the Army*, 2015 MSPB 51 (MSPB 2015).

    The MSPB can hear appeals of not only removals, but also reductions in grade and suspensions over 14 days; the MSPB's annual reports do not specify the sort of adverse personnel actions that are being appealed. While one cannot differentiate between the MSPB's disposition of these very different adverse actions, there is not a clear reason to expect the MSPB would tend to uphold an agency's decision more or less depending on the severity of the adverse action.
35. This does not include the rash of furlough appeals in 2016. A furlough is a cost-saving measure many departments undertook in 2016 to stay within their operating budgets. Essentially, employees are placed in a temporary status without duties and pay. See 5 U.S. Code § 7511(a)(5) for the definition of the term. These appeals are not included in this report because furloughs are not issued for disciplinary reasons. Research note: This report relies on 2016 MSPB data instead of the 2017 MSPB data because throughout 2017, the MSPB has been down to just one member. Since it takes at least two members to decide a case, the 2017 statistics do not give a full picture of the MSPB's ordinary adjudication patterns.
36. Merit Systems Protection Board, "Annual Report for FY 2016," January 18, 2017, https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1374269&version=1379643&application=ACROBAT (accessed June 13, 2018).
37. Ibid.
38. Ibid. The MSPB categorizes the disposition of the remaining 3 percent of petitions for review simply as "other."
39. 29 Code of Federal Regulations § 1614 (1992).
40. For more on the EEO Complaint Process, see U.S. Equal Employment Opportunity Commission, "Overview of Federal Sector EEO Complaint Process," https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm (accessed June 13, 2018).
41. 29 Code of Federal Regulations § 1614.105(b)(1) (1992).
42. 29 Code of Federal Regulations § 1614.105(b)(2) (1992).
43. This formal complaint must be made within 15 days of an employee's receipt of instruction from his EEO Counselor as to how to file. See 29 Code of Federal Regulations §§ 1614.105 and 1614.106(b).
44. An agency's decision to dismiss an EEO complaint is reviewable by an EEOC Administrative Judge. To be upheld, a dismissal must be based on one of the following 10 factors outlined in 29 Code of Federal Regulations § 1614.107 (2012):

    (1) failure to state a claim, or stating the same claim that is pending or has been decided by the agency or the EEOC;

    (2) failure to comply with the time limits;

    (3) filing a complaint on a matter that has not been brought to the attention of an EEO counselor and which is not like or related to the matters counseled;

    (4) filing a complaint which is the basis of a pending civil action, or which was the basis of a civil action already decided by a court;

    (5) where the complainant has already elected to pursue the matter through either the negotiated grievance procedure or in an appeal to the Merit Systems Protection Board;

    (6) where the matter is moot or merely alleges a proposal to take a personnel action;

    (7) where the complainant cannot be located;

    (8) where the complainant fails to respond to a request to provide relevant information;

(9) where the complaint alleges dissatisfaction with the processing of a previously filed complaint; [or]

(10) where the complaint is part of a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination.

If an agency concludes that a claim has enough merit to warrant an investigation, it is required to conduct that investigation within 180 days. See 29 Code of Federal Regulations § 1614.106(e)(2) (1992).

45. 29 Code of Federal Regulations § 1614.106(e) (1992), and 29 Code of Federal Regulations § 1614.108 (2012).
46. 29 Code of Federal Regulations § 1614.405(b) (1992).
47. U.S. Equal Employment Opportunity Commission, "Annual Report on the Federal Work Force Part 1: EEO Complaints Processing; Fiscal Year 2014," 2014, https://www.eeoc.gov/federal/reports/fsp2014/index.cfm#I (accessed June 13, 2018). This low success rate may be due to the fact that the burden of proof in discrimination cases shifts from employee to agency and back to employee over the course of an appeal. First, the employee must establish a *prima facie* case of discrimination. At that point, the agency has the burden of articulating a legitimate nondiscriminatory reason why an action was taken. Only then does the employee have to demonstrate by preponderant evidence that an agency's actions were actually the result of discrimination. This burden of proof used by the EEOC is identical to that used by the courts and the MSPB.
48. 29 Code of Federal Regulations § 1614.106(e)(2) (1999) requires agencies to issue a report to the complainant within 180 days of the filing of a complaint unless: (1) the parties agree to an extension of no more than 90 days (may not exceed 270 days); or (2) the complaint was amended or consolidated. This can add 180 days to the period. The total time of the appeal may not exceed 360 days in any event.
49. 5 U.S. Code § 1212, and 5 Code of Federal Regulations § 1800.1 (2003).
50. The statutory basis for these 14 PPPs are found in the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment and Reemployment Rights Act.
51. U.S. Office of the Special Counsel, "The Role of the U.S. Office of the Special Counsel," https://osc.gov/Resources/oscrole.pdf (accessed June 13, 2018).
52. U.S. Office of the Special Counsel, "Annual Report to Congress for Fiscal Year 2016," July 31, 2017, https://osc.gov/Resources/OSC%20FY%202016%20Annual%20Report%20-31July2017.pdf (accessed June 13, 2108).
53. Ibid., p. 17.
54. U.S. Office of Personnel Management, "Labor-Management Relations in the Executive Branch," October 2014, https://www.opm.gov/policy-data-oversight/labor-management-relations/reports/labor-management-relations-in-the-executive-branch-2014.pdf (accessed June 13, 2018).
55. For more on negotiability, i.e., what can be negotiated for in a collective-bargaining agreement, see U.S. Federal Labor Relations Authority, "Guide to Negotiability Under the Federal Service Labor-Management Relations Statute," July 17, 2013, https://www.flra.gov/system/files/webfm/Authority/NG%20Forms%2C%20Guide%2C%20Other/Negotiability%20Guide%206-17-13.pdf (accessed June 13, 2018).
56. For more on the arbitration process, see U.S. Federal Labor Relations Authority, "Guide to Arbitration under the Federal Service Labor-Management Relations Statute," September 30, 2016, https://www.flra.gov/system/files/webfm/Authority/AR%20Forms,%20Guide,%20Other/Arbitration%20Guide%209.30.16.pdf (accessed June 13, 2018).
57. 5 U.S. Code § 7131.
58. This figure is based on OPM estimates that are admittedly inaccurate. Some estimate the true cost of official time to be closer to $1 billion. See Bob Gilson, "OPM's Official Time Report: Some Wonderfully Amazing Numbers," FedSmith, April 2, 2017, https://www.fedsmith.com/2017/04/02/opms-official-time-report-wonderfully-amazing-numbers/ (accessed June 13, 2018).
59. 29 U.S. Code § 172. See also Federal Mediation and Conciliation Service, "Arbitration and the Arbitrator Roster," https://www.fmcs.gov/services/arbitration/ (accessed June 13, 2018).
60. Ibid.
61. This must be done within 30 days of receipt of the decision. See 5 U.S. Code § 7122.
62. U.S. Federal Labor Relations Authority, "About the FLRA," https://www.flra.gov/about (accessed June 13, 2018).
63. U.S. Federal Labor Relations Authority, "Collaboration and Alternative Dispute Resolution Office (CADRO): What We Do," https://www.flra.gov/components-offices/offices/collaboration-and-alternative-dispute-resolution-office-cadro (accessed June 13, 2018).
64. 5 U.S. Code § 7122(a).
65. According to 5 U.S. Code § 7121(d), "[A]n aggrieved employee affected by a prohibited personnel practice…which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both."
66. 5 U.S. Code § 7121(d) reads: "Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission."

67. 5 U.S. Code § 1214(a)(3)(B).
68. Regarding appeals of MSPB decisions to the EEOC, see 5 U.S. Code § 7702(b), and 29 Code of Federal Regulations § 1614.305 (2010). On appeals of agency EEO office decisions to the MSPB, see 5 U.S. Code § 7702(a)(2)5, and 29 Code of Federal Regulations § 1614.302(b) (2012).
69. 5 U.S. Code § 7702(d), and 29 Code of Federal Regulations 1614.303 (2012).
70. 5 U.S. Code §§ 7702(a) and (b)(5)(A); 29 Code of Federal Regulations § 1614.407 (1999); and 29 Code of Federal Regulations § 1614.408 (1999).
71. 5 U.S. Code § 1219.
72. 5 U.S. Code § 7703(b)(1)(B).
73. 5 U.S. Code §§ 7121(f) and 7703.
74. 5 U.S. Code § 7703(b)(1)(A) and (B).
75. Individuals in probationary status are considered applicants for employment, and they have the same appeal rights of other applicants. If they believe they were discriminated against or if a prohibited consideration like partisanship contributed to their dismissal, they can appeal in the same way as a first-time applicant for a federal job.
76. U.S. Office of Personnel Management, "About Our Data (EHRI-SDM)."
77. See note 9.
78. Ibid.
79. U.S. Office of Personnel Management, "Federal Employee Viewpoint Survey: Governmentwide Management Report," 2017, p. 20, https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-management-report/governmentwide-report/2017/2017-governmentwide-management-report.pdf (accessed June 13, 2018).
80. *Perry v. Merit Systems Protection Board*, No. 14–1155 (D.C. Cir. 2016).
81. 5 U.S. Code § 4302(a).
82. Ibid.
83. 5 U.S. Code § 4302(c)(6) (emphasis added). 5 Code of Federal Regulations § 432.104 (1993) adds to this protection, specifying that an agency must provide a "reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and abilities of the employee's position." The Code of Federal Regulations also specifies that "as part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance."
84. U.S. Merit Systems Protection Board, Office of Policy and Evaluation, "Building Blocks of Effective Performance Management."
85. U.S. Office of Personnel Management, "About Our Data (EHRI-SDM)."
86. Ensuring a Qualified Civil Service Act of 2017, H.R. 4182, 114th Cong., 2nd Sess., https://rules.house.gov/bill/115/hr-4182 (accessed June 13, 2018).