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## “You’re Fired”: Executive Order 13839 and Civil Service Protections

by [Bernard Bell](#) – Friday, July 13, 2018

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Posts to this blog have justifiably focused on *Lucia v. SEC*, 138 S.Ct. 2044 (June 21, 2018), the recent Executive Order entitled “Excepting Administrative Law Judges from the Competitive Service,” and the resultant implications for the administrative judiciary’s independence. But in the meantime, President Trump has issued three executive orders addressing job protections and related matters for the far greater number of government employees who serve outside the administrative judiciary. These orders are described by OPM as “the President’s Management Agenda.” Memorandum of Jeff T. H. Pon to regarding Guidance for Implementation of Executive Order 13839 (July 5, 2018) (hereinafter “Pon July 5, 2018 Memorandum re Executive Order 13839”).

Executive Order 13839, 83 Fed. Reg. 25343 (June 1, 2018) entitled “**Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles**,” seeks to enhance managerial efforts to correct civil servants’ “inadequate performance” and dismiss employees “who cannot or will not improve their performance to meet required standards.” *Id.*, §1.

Exec. Order No. 13837, 83 Fed. Reg. 25335 (May 25, 2018), entitled “**Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use**,” directs agencies to (1) require employees to obtain specific authorization before engaging in union business on government time (thereby “eliminate unrestricted grants of taxpayer-funded union time”), (2) monitor use of official time for union business to ensure it is used only for authorized purposes, and (3) make information regarding civil servants’ use of time on union business readily available to the public. *Id.*, §1. (OPM had issued a report regarding practices with respect to employee use of official time on union business and the increased time employees devoted to union business on May 17, 2018, [OFFICE OF PERSONNEL MANAGEMENT, OFFICIAL TIME USAGE IN THE FEDERAL GOVERNMENT: FISCAL YEAR 2016 \(May 2018\)](#)). However, in comparing FY 2016 to FY 2014, it is not clear

whether OPM has considered the effect on the change in Presidential administrations on the number of employment disputes that might require union involvement.)

Executive Order 13836, 83 Fed. Reg. 25329 (May 25, 2018), entitled "**Developing Efficient, Effective, and Cost-Reducing Approaches To Federal Sector Collective Bargaining**," instructs agencies to negotiate collective bargaining agreements that: (1) promote effective and efficient means of accomplishing the agency's missions, (2) encourage the highest levels of employee performance and ethical conduct; (3) ensure employees' accountability for their conduct and job performance; (4) and preserve management rights under 5 U.S.C. § 7106(a). *Id.* at §1(b). The executive orders appear to be designed to work in tandem.

The orders have not been well-received. Letters urging the President to rescind the orders have been sent by various groups of legislators – [21 Republican Representatives](#), [23 Democratic Representatives](#), and [45 Democratic Senators](#). The American Federation of Government Employees has challenged all three executive orders, *American Federation of Government Employees v. Trump*, Dkt 18 Civ. 1261 (D.D.C.)[[view the complaint here](#)]; *American Federation of Government Employees v. Trump*, Dkt 18 Civ. 1475 (D.D.C.)[[view the complaint here](#)], and the National Treasury Employees' Union challenged Executive Order 13836 and 13839, *National Treasury Employees' Union v. Trump*, Dkt 18 Civ. 1261 (D.D.C.) [[view the complaint here](#)]. The cases have been consolidated and set for a hearing on July 25, 2018. Though [Ballotpedia's Administrative State Project](#) reports that a flash poll conducted by the Government Business Council on June 5-6 indicates that "51 percent of federal workers support or strongly support making it easier to remove poorly performing or malfeasant employees."

This blogpost will focus on [Executive Order 13839](#). The Executive Order sets forth ten principles of accountability "within the federal workforce." Executive Order 13839, §2. The principles are as follows.

- Agencies should limit the amount of time employees have to demonstrate acceptable performance before being reassigned, demoted, or removed for failure to meet applicable performance criteria. (Section 4302 of Title 5 provides that every performance appraisal system shall accord employees an opportunity to demonstrate acceptable performance, but does not specify the length of time to be provided.)
- Supervisors should not be required to use progressive discipline. Progressive discipline is a widely accepted approach in managing employees. STEPHEN P. PEPE AND SCOTT H. DUNHAM, AVOIDING AND DEFENDING WRONGFUL DISCHARGE CLAIMS §5.1 (available on westlaw) ("[t]he concept of progressive discipline is generally accepted in contemporary industrial society.")
- While agencies should consider their response to comparable misconduct in evaluating appropriate discipline, agencies are not prohibited from removing an employee simply because they did not remove a different employee for comparable conduct – each employee's work performance and disciplinary history are unique.
- When removal is warranted, suspension is not an appropriate alternative.
- Agencies should have discretion to consider the employee's disciplinary record and past work record when selecting the appropriate discipline; they should not be limited to considering the employee's similar past misconduct. See AVOIDING AND DEFENDING WRONGFUL DISCHARGE CLAIMS §5.1 for a discussion of such issues.
- Once the employee's reply period following issuance of a notice of proposed removal has ended, the agency should issue a decision within 15 days.
- Agencies should generally limit written notice of adverse action to 5 U.S.C. §7513(b)(1)'s statutorily prescribed 30 day period.
- Removal procedures should be used in appropriate cases to address a civil servant's unacceptable performance, rather than, presumably, limiting removals to cases of misconduct.
- The probationary period (one might say the apprenticeship) should be conceived of as a part of the hiring process, and supervisors should use the period to assess how well the employee can perform the duties required by the job.

- When engaging in “reductions in force,” agencies should not adhere to seniority, but rather prioritize performance over length of service in determine which employees will be retained.

In pursuing these principles agencies are directed to seek to make grievance procedures inapplicable to any disputes regarding removal of employees for misconduct or unacceptable performance. *Id.* §3. If any agency fails to obtain such a provision in its collective bargaining agreement with its employees’ union, it must provide an explanation to the President via the Director of the Office of Personnel Management. *Id.* And, to the extent allowed by law, an agency shall not subject its assignments of ratings of record or its award of any form of incentive pay to grievance proceedings or binding arbitration. *Id.*, §4(a). Nor shall an agency agree to limits on its discretion to remove employees for unacceptable performance, including agreements that require the agency to employ progressive discipline before proposing an employee’s removal. *Id.*, §4(b).

Often, employment disputes are resolved by agreeing to give a terminated employee “clean paper,” *i.e.*, limiting the negative information the employer will reveal about the employee or the reasons for his or her departure. The Executive Order, in a provision entitled “Ensuring the Integrity of Personnel Files” provides that agencies “shall not agree to erase, remove, alter, or withhold from another agency” any information in the employee’s personnel records regarding his or her performance or conduct. *Id.* §5. The Executive Order also includes various reporting requirements, *id.*, §6(a), and the Director of OPM is to publish such information received from agencies “at the minimum level of aggregation necessary to protect personal privacy,” *id.*, §6(c). The Director of OPM is to issue guidance with regard to agency reporting requirements within 60 days. *Id.*, §6(d).

Within 45 days, the OPM is to assess whether existing regulations effectuate the principles set forth in section 2 and the requirements of sections 3 through 6. *Id.*, §7.

Jeff Neal, former the chief human resources officer at the Department of Homeland Security and the Defense Logistics Agency, has provided an insightful analysis of Executive Order 13839, Jeff Neal, *What’s Really in those New Executive Orders* (May 30, 2018), which has been reprinted by Federal News Radio [here](#).

On July 5, 2018, the Director of OPM issued general guidance to agencies regarding compliance with Executive Order 13839, and transmitted the “data collection form” agencies were to use to satisfy the reporting obligations imposed by section 6(a) of the Executive Order. [Pon July 5, 2018 Memorandum re Executive Order 13839](#).

Will the Executive Order have much effect on agency practices regarding termination of employees? To say the least, unions do not appear receptive to the changes in collective bargaining agreements that the President contemplates. And, as Jeff Neal notes, “[a]gencies do not fire large groups of people and are unlikely to start doing so now.” Nevertheless the fate of Executive Order 13839 (and the companion executive orders) and the shape of its implementation remains to be seen.

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### About Bernard Bell

Professor of Law and Herbert Hanooh Scholar Rutgers Law School

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