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, SEPTEMBER 16, 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 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. Chairman Isakson has asked that MSPB present written testimony on each agenda item for which MSPB has a position or an interest and that "of particular interest to the Committee is MSPB's views on S. 1856 and any constitutional concerns."

As an initial matter, as I have stated in previous written testimony for the record to this Committee, 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. Instead, I would respectfully request that the Committee consider this testimony technical in nature.

Also, I note that as a quasi-judicial agency, MSPB does not have the legal authority to determine the constitutionality of federal statutes. The Civil Service Reform Act grants both MSPB and federal courts with authority to review certain adverse personnel actions taken against employees in the federal government. However, with respect to the question of whether a statute itself is constitutional, MSPB's primary responsibility is to develop a record, take evidence, and find

facts that could assist a federal court in determining that question. *Elgin v. Treasury*, 132 S.Ct. 2126, 2138 (2012). Thus, consistent with the Committee's request, I am happy to provide my personal views and/or concerns regarding the constitutionality of one of the bills pending before the Committee, though I stress that the ultimate determination of any such question would need to be made by a federal court and would likely depend on the facts and circumstances of a particular case.

A. MSPB's Interest in S. 1856, The "Department of Veterans Affairs Equitable Employee Accountability Act of 2015"

MSPB's interest in S. 1856, the "Department of Veterans Affairs Equitable Employee Accountability Act of 2015," introduced by Ranking Member Blumenthal, derives from its statutory responsibility to adjudicate appeals filed by federal employees in connection with certain adverse employment actions. As I have previously explained to the Committee, 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 judge[1] 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

[1]MSPB administrative judges are federal employees under the General Schedule System employed by MSPB. They are not "administrative law judges" appointed under 5 U.S.C. § 3105 nor federal judges.

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 to the Board, which will review that 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 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. 1856 – The "Department of Veterans Affairs Equitable Employee Accountability Act of 2015"

In pertinent part, S. 1856 would provide the Secretary of the Department of Veterans Affairs ("Secretary" and "Department") with the authority[2] to:

1. Suspend without pay an employee[3] of the Department if the Secretary determines the performance or misconduct of the employee is a clear and direct threat to public health or safety; and

2. Remove an employee suspended in the manner referenced above if the Secretary determines that removal is necessary in the interests of public health or safety.

After suspension, but prior to removal, a covered employee is entitled to the following rights under S. 1856:

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[2] The authority provided to the Secretary in S. 1856 is "in addition to the authority provided under section 713 and subchapter V of chapter 74 of [title 38 of the United States Code] and with title 5 [of the United States Code] with respect to disciplinary actions for performance or misconduct." Thus, if S. 1856 were enacted into law, it would provide the Secretary with an alternative procedure with which to take disciplinary action, but that procedure would not be mandated.

[3] S. 1856 defines an employee as "any individual occupying a position within the Department under a permanent or indefinite appointment and who is not serving a probationary or trial period."

1. Not later than 30 days after the date of the suspension, a written statement of the charges against the employee;

2. A reasonable opportunity, but not less than 7 business days, to answer the charges orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

3. At the request of the employee, not later than 15 business days after such request, a formal review by a Department authority where the employee may be represented by an attorney or other representative;

4. A review of the case by the Secretary before a final adverse decision against the employee is made;

5. As soon as practical, a decision of the Secretary with respect to the charges against the employee; and

6. A written statement of the decision of the Secretary that includes the specific reasons for the removal.

S. 1856 further provides that in the event that the Secretary determines that the suspension or removal is either not warranted or constitutes a prohibited personnel practice, the employee shall receive back pay "equal to the total amount of pay" that the employee would have received during the period that the suspension or removal was in effect, minus any compensation earned by the employee through other employment.

Finally, S. 1856 would allow an employee suspended or removed to appeal the final decision of the Secretary to the Merit Systems Protection Board, "under section 7701 of title 5" and to "obtain judicial review of a final order or decision of the Merit Systems Protection Board under [5 U.S.C. § 7703]. " S. 1856 provides no limitation on the manner in which MSPB may review an appeal[4].

[4] S. 1082 and S. 1117, legislation similar to S. 1856, would prohibit the three-member Board, which consists of presidentially-appointed, Senate confirmed political appointees, from reviewing appeals filed at MSPB by covered employees. Specifically, MSPB administrative judges (career federal employees), and not Senate confirmed political appointees, would be in a position to make a final determination on behalf of an executive branch agency. As I noted in my previous

C. MSPB's Views on The "Department of Veterans Affairs Equitable Employee Accountability Act of 2015"

1. Due Process Considerations

On June 23, 2015, MSPB submitted written testimony to this Committee presenting views on S. 1117, The "Ensuring Veterans Safety Through Accountability Act of 2015," which Senator Johnson introduced, and S. 1082, The "Department of Veterans Affairs Accountability Act of 2015," which Senator Rubio introduced. Both bills generally provide the Secretary with expanded authority to remove or demote employees at the Department and also provide limited MSPB appeal rights to those employees and no right to judicial review.

In my view, the primary difference between S. 1856 and the two bills referenced above is that S. 1856 would *require* the Department to provide an employee who is suspended with the right to notice and an opportunity to respond *prior to his or her ultimate removal*. I note that S. 1856 does not require that a covered employed be provided with these rights *prior to his or her suspension without pay*[5]. The language of S. 1856 tracks the language of 5 U.S.C. § 7532, the statutory provision that allows the head of an agency to suspend employees

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testimony, an identical provision of law enacted in 2014 is currently being challenged at the United States Court of Appeals for the Federal Circuit on the grounds that, by prohibiting the Board members from participating in the MSPB adjudicatory process, the law violates the Appointments Clause contained in Article II, Section 2 of the United States Constitution.

[5] In *Gilbert v. Homar*, 520 U.S. 924, 933-34 (1997), the Supreme Court concluded that, under the circumstances of that case, a public employee's right to due process was not violated when he was suspended without advance notice. It noted, however, that "[o]nce the [suspension] charges were dropped, the risk of erroneous deprivation [of due process rights] increased substantially." *Id*. at 935. Accordingly, it remanded the case to the court of appeals to determine whether, under the facts of the case, the hearing was sufficiently prompt to satisfy the requirements of due process. In other words, the lesson of *Homar* is that basic due process is situationally dependent on the facts of each case.

without pay when it is determined that such action is necessary *in the interests of national security.* (This is different from the standard set forth in S. 1856: a threat to, or in the interest of, "the public health or safety.") After the employee is afforded similar post-suspension rights as required under S. 1856, he or she may be removed. 5 U.S.C. § 7532(b) and (c). In *Dep't of Navy v. Egan*, 484 U.S. 518, 532-33 (1988), the Supreme Court stated that the procedure established under 5 U.S.C. § 7532 is "harsh and drastic for both the employee and the agency head." I am not aware, however, of any decision by a federal court concluding that the procedure provided for in 5 U.S.C. § 7532 is unconstitutional on its face.

As I noted in my previous written testimony to the Committee, in May 2015, MSPB released a study[6] entitled *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

[6] 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).

adjudicator. We encourage Members of the Committee and their staff who have interest in these issues to read this report[7].

In the landmark decision of *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 malfeasance), employees have a property interest in those positions. *Loudermill*, 470 U.S. at 538-39[8]. 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 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 Supreme 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

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

[8] 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).

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 Supreme 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 Supreme Court further held that "the right to a hearing does not depend on a demonstration of certain success." *Id*. at 544.

I also noted in my previous testimony 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, U.S. Courts of Appeal, and U.S. District Courts. I suggested that should Congress consider modifications to these rules, many of which have been in place for more than one hundred years, it should ensure that the discussion surrounding those changes be an informed one, and that all Constitutional requirements be considered. By considering S. 1856 as an alternative to S. 1082 or S. 1117, I believe the Committee is ensuring that an informed discussion take place.

2. Additional Considerations

Moreover, as stated above, S. 1856 defines an employee as "any individual occupying a position within the Department under a permanent or indefinite appointment and who is not serving a probationary or trial period." I believe this definition would include Department employees with positions listed in 38 U.S.C. § 7401. Generally, these positions involve employees who provide health care services at the Department. It is my understanding that the Department currently employs nearly 190,000 health care professionals. Under existing law, a significant number of 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, health care professionals at the Department may appeal adverse personnel actions to internal disciplinary appeal boards at the Department and thereafter to a United States federal court. Thus, if S. 1856 were enacted into law, similar to S. 1082 and S. 1117, it would provide the Secretary with the discretion to invoke a disciplinary process that would provide MSPB appeal rights to a significant number of employees who currently do not possess those rights.

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