October 17, 2019

***VIA* Electronic Submission on regulations.gov**

Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Re: Proposed Rule, RIN 3206-AN60
84 Fed.Reg. 48,794-48,806 (September 17, 2019)

To Whom It May Concern:

The National Employment Lawyers Association (NELA) respectfully submits the following comments concerning the Office of Personnel Management's (OPM) Proposed Rule, as published in the Federal Register at 84 Fed.Reg. 48,794-48,806 (September 17, 2019).

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. Our mission is to advance employee rights and serve lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have faced illegal treatment in the workplace. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws and comments on relevant Notices of Proposed Rulemaking (NPRMs). NELA also engages in legislative advocacy on behalf of workers throughout the United States. A substantial number of NELA members' clients are federal employees. Thus, NELA has both an interest in any potential modifications to federal sector personnel regulations issued by OPM and extensive expertise regarding the practical impact of any proposed modifications.

The Proposed Rules Will Impede Settlement And Increase Litigation

Overall, NELA opposes the changes wrought on federal civil service law by Executive Order 13,839 (May 25, 2018). We oppose OPM's attempt to enshrine those provisions into the Code of Federal Regulations. These changes are not well thought out and will have a deleterious effect on federal agencies, the adjudicative bodies responsible for enforcing federal civil service law, and federal employees.

NELA strongly opposes proposed 5 C.F.R. §§ 432.108, 752.104, 752.203(h), 752.407, 752.607. These provisions serve to move E.O. 13,839 § 5 (Section 5) into the C.F.R. NELA members' experience demonstrates that Section 5 has eliminated the possibility of settlement agreement in cases involving disciplinary or performance actions, especially once the personnel action occurs. The limiting effect of Section 5 does not operate in isolation. In theory, Section 5 leaves open the possibility of other settlements that do not involve modification of personnel records (such as purely monetary settlements), but this policy has followed on the heels of agencies' implementing new stringent limits on non-record modification settlements. *See, e.g.*, "VA Employee Settlements", *available at* https://www.va.gov/settlements/ (limiting settlements at the Department of Veterans Affairs to $5,000 without the "personal approval of the under secretary, assistant secretary or equivalent senior-level official within the organization in which the settlement occurs").

OPM's October 10, 2018, *Interpretive Guidance on Section 5 Ensuring Integrity of Personnel Files Contained in Executive Order 13839* appears to provide some discretion to agencies to continue to settle cases; however, NELA members' experience is that this rarely occurs for post-personnel action settlements. It appears clear that agencies have been highly deterred from agreeing to post-personnel action settlements involving record modification because, in order to do so, they must acknowledge that the agency issued a personnel action that was illegal, inaccurate or the product of Agency error—which , obviously, agencies are highly loathe to do. The net result of these modifications is to force far more cases into litigation. In practice, merits litigation is left as the sole means to relief for aggrieved employees.

Forcing cases that would have settled pre-Section 5 into merits litigations risks additional burdens, not only for employees, but for the civil service enforcement/adjudication agencies and employing agencies as well. Published MSPB[1], EEOC[2] and OSC[3] policy all strongly support settlement. Prior to Section 5, a substantial portion of the cases at the Equal Employment Opportunity Commission (EEOC), the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC) were settled. According to the latest publicly available data covering time periods prior to E.O. 13,839, roughly 28% of EEO complaints,[4] 23% of MSPB appeals (33% of adverse actions and whistleblower reprisal complaints)[5], and 7.5% of OSC whistleblower complaints[6] settled. Indeed, all of OSC's non-stay favorable actions in whistleblower reprisal complaints in FY 2015, FY 2016 and FY 2017 were by settlement.[7] Many of these settlements (if not the majority) involved personnel record modification terms that are now impaired by Section 5, which

---

1 *See, e.g.*, MSPB *Judges' Handbook,* Ch. 11, § I.

2 *See, e.g.*, EEOC Management Directive 110 *(*MD-110), Ch.3, § I.

3 *See, e.g.*, "Alternative Dispute Resolution Overview", *available at* https://osc.gov/Services/Pages/ADR.aspx.

4 *See* https://www.eeoc.gov/federal/reports/fsp2015/index.cfm#_bookmark8.

5 *See* https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1481375&version=1486936&application=ACROBAT

6 *See* https://osc.gov/Documents/Resources/Congressional%20Matters/Annual%20Reports%20to%20Congress/FY%202018%20Annual%20Report%20to%20Congress.pdf.

7 *See supra* at fn.6.

means that many cases which could have otherwise settled based on mutually-agreeable record modification, now continue in merits litigation. This outcome is both burdensome and extremely costly for all participants (agencies, adjudication and enforcement agencies, and employees). The MSPB has already publicly stated that it anticipates that Section 5 to impact its case adjudication.[8] NELA members have further received anecdotal evidence that many agencies and pro-agency commentators have also objected to Section 5, albeit in some instances on different grounds than those which raise concern for NELA.[9]

The Proposed Rules Give Too Much Independent Discretion To Low Level Supervisors

The proposed rules which move Section 5 into the C.F.R. also give too much discretion to low-level supervisors, by rendering their decisions in personnel actions far harder to reverse later through settlement. In most agencies, authority to take Chapter 43 or Chapter 75 adverse actions, rests with first line and second line supervisors. In the case of reprimands, the first line supervisor has sole discretion to unilaterally impose discipline. In more serious adverse actions, the first line supervisor is often the proposing official and the second line supervisor is often the deciding official. In a few agencies, the first line supervisor is permitted to serve as both proposing official *and* deciding official for the same action.

Performance evaluations are also typically issued by the first line supervisor as rater, with varying degrees of oversight by the second line supervisor as reviewer. According to anecdotal evidence, higher-level management often does not get involved in disciplinary or performance matters until after the issuance of discipline or performance evaluations and the commencement of litigation. Prior to E.O. 13,839, settlement mechanisms provided an avenue for higher-level management to review the actions of lower-level subordinates (often for the first time), and to make changes in their discretion through settlement agreements—benefiting the agency by closing out litigation, benefiting the higher level supervisor by providing the excuse of a settlement as political cover for overruling their subordinate's decision without having to openly denounce the lower-level supervisor. As discussed above, Section 5 has greatly reduced the use of settlement as a 'safety valve' for agencies. Consequently, lower level supervisors are left with a high degree of unilateral and unchecked discretion with respect to disciplinary and performance actions. This approach subjects the agency to far greater risk of litigation. The MSPB has published research criticizing the quality of lower level federal managers.[10] This study further supports the importance of higher level review of such decisions/actions. Non-federal employers—who are concerned about litigation risk (especially as many such employers, unlike federal agencies, do not have taxpayer-funded in-house employment law counsel on salary)—often have pre-personnel action safeguard mechanisms in place requiring higher-level review of personnel actions likely to lead to litigation,

---

[8] *See* HTTPS://WWW.MSPB.GOV/MSPBSEARCH/VIEWDOCS.ASPX?DOCNUMBER=1592474&VERSION=1598254&APPLICATION=ACROBAT

[9] *See, e.g.,* William Wiley, "OPM Clarifies the No-Clean-Record Executive Order Provision", *available at* https://feltg.com/opm-clarifies-the-no-clean-record-executive-order-provision/.

[10] *See, e.g.,* MSPB, *A Call to Action: Improving First-Level Supervision of Federal Employees, available at* https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=516534&version=517986&application=ACROBAT.

in order to protect against individual rogue managers unilaterally placing their employer at litigation risk. Anecdotally, such pre-issuance review mechanisms often do not exist in federal agencies. Without such mechanisms, and without the availability of settlement options to allow for after-action review, higher-level management and their employing agencies will be bound by the judgement of line supervisors to potentially open-ended litigation risks.

As recent problems with loosening adverse action standards under 38 U.S.C. §§ 713-714 have demonstrated, simply making it procedurally easier to fire employees does not in practice improve the overall efficiency of the federal service. Instead, NELA members have seen, such changes simply make it easier for lower level managers to engage in abuse of their disciplinary authorities in a fashion that is not only injurious to the affected employees, but also to the efficiency of the federal service.

The Proposed Rules Would Result In Disparate Penalty Determinations

NELA supports the proposed modification of 5 C.F.R. §§ 752.202(c), 752.403(c) to the extent that it finally explicitly incorporates the *Douglas* factor analysis[11] into the C.F.R. standards for adverse actions.

The Proposed Rule, however, is self-contradictory, stating the importance of the *Douglas* factors on one hand, while undercutting the application of *Douglas* factor 7, "consistency of the penalty with any applicable agency table of penalties." While the comment period for this Proposed Rule has been open, OPM has issued new guidance expressing hostility to the continued use of tables of penalties. *See* OPM, "Guidance on Progressive Discipline and Tables of Penalties" and "Progressive Discipline And Tables Of Penalties In Penalty Determination For Federal Employees" (October 10, 2019). NELA strongly disagrees with OPM's approach to tables of penalties. Tables of penalties are valuable tools for ensuring acceptance of overall disciplinary strictures in the federal workforce. By providing a measure of uniformity, tables of penalties help avoid favoritism, disparate treatment, and discrimination in disciplinary matters, as well as the appearance of the foregoing. Tables of penalties also help guide and inform lower level managers who must make individual judgements in disciplinary matters. Such guidance is important given the issues with the quality of line supervisors which were discussed *supra*. Doing away with tables of penalties will not facilitate the issuance of adverse actions because, in fact, the process of checking a proposed adverse action against a table of penalties requires little time or effort. Eliminating this resource and practicewill cause an increase in disparate treatment complaints before both the EEOC and the MSPB and expose agencies to greater liability in discipline cases. Tables of penalties help reduce the risks of such litigation for agencies.

Further, tables of penalties do not prohibit managers from tailoring discipline as needed in specific circumstances. To the contrary, NELA members have observed that most penalty tables make clear that, in certain situations, a supervisor can deviate from the guidelines, provided there is a reasoned explanation for doing so.

---

[11] *See Douglas v. Veterans Administration*, 5 M.S.P.B. 313, 331-32 (1981).

For similar reasons, NELA opposes the Proposed Rule to the extent that it undercuts longstanding progressive discipline procedures. Decades of application have shown the basic wisdom of the progressive discipline approach. The assertion that progressive discipline necessarily constrains an agency from handling severe disciplinary infractions does not comport with empirical disciplinary practices; just as with tables of penalties, in certain situations, a supervisor can deviate from the guidelines of progressive discipline provided they have a reasoned explanation for doing so in the given case.

Equitably applied and carefully considered discipline is a hallmark of a fair disciplinary process. The federal government should be cautious about moving away from a fair disciplinary process for the federal civil service.

The Proposed Rules Turn Chapter 43 Actions Into Formalities Rather Than Opportunity To Improve Performance

As the MSPB observed, 5 U.S.C. Chapter 43 is not meant to be an empty formality solely intended to give agencies a more favorable standard of review on appeal:

> Regardless of the employee's occupational category, or any additional uses for the PIP, the purpose of the PIP is to provide the employee with the tools for success (where practical) and an opportunity to demonstrate that success. It should represent a genuine effort on management's part to assist an employee based on that employee's deficiencies, and not be a half-hearted exercise designed solely to demonstrate that a PIP occurred.

MSPB, *Addressing Poor Performers and the Law*, at 18.[12] This requirement presumably is based in part on the practicality that it is less onerous for a federal agency to try to maximize performance out of its pre-existing workforce than to repeatedly hire and train replacement employees due to perfunctory discharge of its existing workforce. Consistent with these policies, NELA supports a robust Performance Improvement Period process. NELA opposes E.O. 13,839 §§ 2, 6(iii), which pressures agencies to limit Performance Improvement Periods under 5 U.S.C. Chapter 43, to 30 calendar days by requiring agencies to report to OPM when any employee's PIP period exceeds 30 calendar days. Thirty calendar days is an insufficient time period to demonstrate improvement in performance for many occupations in the federal workforce given the fact that many employees' work projects play out over a time period longer than 30 calendar days. For similar reasons, NELA opposes proposed 5 C.F.R. §§ 432.104, 432.105 to the extent that they excuse agencies from routine procedures that support the PIP period such as regular supervisor meetings and guidance. This assistance is an essential aspect of the statutory requirement of 5 U.S.C. § 4302(c)(5), which says that agencies shall "assist[] employees in improving unacceptable performance." This approach cannot be readily evaded by proposed 5 C.F.R. § 432.104. The MSPB has held that the requirement for an opportunity to improve is not merely procedural but is instead a substantive condition precedent for a Chapter 43 adverse action, and that counseling the subject employee is

[12] *Available at* https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=445841&version=446988&application=ACROBAT.

a part of that "opportunity to improve" period. *See, e.g., Pine v. Dept. of the Air Force,* 28 M.S.P.R 453 (1985); *Sandland v. General Services Admin.,* 23 M.S.P.R. 583 (1984). As the "opportunity to improve," requirement is statutory, it cannot be avoided by OPM regulation. Allowing supervisors to declare that an employee's performance is unsatisfactory without explaining the specific ways that an employee needs to substantively improve performance in a contextualized fashion further sets employees up for failure and renders the PIP period an empty formality, especially in circumstances where the performance standards are inherently subjective or vague (as is often the case for higher-graded employees subject to performance standards on such amorphous topics as communication skills, teamwork and leadership).

The Proposed Rules Err In Limiting Response Periods To Proposed Discipline

NELA opposes proposed 5 C.F.R. § 752.103(b) as contrary to statute. NELA supports strong protection of whistleblowers and sure punishment for those who retaliate against whistleblowers or engage in other Prohibited Personnel Practice violations. However, OPM cannot waive the statutory requirements for advance notice of proposed adverse actions by regulation, and so cannot set up a scheme where the effective date of an adverse action is less than the absolute statutory minimum.

NELA more generally opposes E.O. 13,839 § 2(g), 6(vi) and Proposed Rule 5 C.F.R. § 752.404. Part of the basic statutory framework for response to adverse actions under 5 U.S.C. §§ 7503(b)(2-3), 7513(b)(2-3) are the right to counsel and the right to furnish witness affidavits and other evidence as part of the response to the proposed discipline. Tasks such as securing counsel, interviewing witnesses and drafting affidavits take time, practically speaking, especially in a federal workforce where many federal employees work far from urban centers where counsel knowledgeable about federal sector employment law are located, and where witnesses may be scattered across the globe geographically. Truncating employees' response period limits the opportunity for identification of evidence that the proposing official may have ignored or not considered, and further rushes management in its deliberations on proposed discipline. The end result will often be hasty decisions based on incomplete deliberations and, ultimately, litigation that could possibly have been avoided. For these reasons, NELA opposes any attempts to cap the response period for proposed discipline or to limit agencies' discretion to extend the time for notice and response or for implementing the adverse action. NELA believes that the pre-existing system (in which agencies retain discretion to go beyond 30 days for a decision when requested by the employee and when the employee has stated a good reason for doing so) works satisfactorily, and agencies are not prejudiced given that they are in control of the length of the extension they ultimately agree to grant.

Conclusion

NELA draws OPM's history in support of these comments. As OPM notes itself on its website,

> OPM's history begins with the Civil Service Act, signed in 1883, ending the spoils system and establishing the Civil Service Commission. The Commission, led by the energetic Teddy Roosevelt, laid the foundations of an impartial, professional civil service based on the merit principle – that employees should be judged only on how well they can do the job.
>
> In 1978, the Civil Service Commission was reorganized into three new organizations: the Office of Personnel Management, the Merit Systems Protection Board, and the Federal Labor Relations Authority. Each of these new organizations took over a portion of the Civil Service Commission's responsibilities, with OPM responsible for personnel management of the civil service of the Government.

See OPM, "Our Mission, Role & History: Our History," *available at* https://www.opm.gov/about-us/our-mission-role-history/. That statute—the Pendleton Act—was metaphorically sealed in the blood of President Garfield, as it took no less than his assassination to finally impel Congress to abolish the spoils system and take steps to help ensure the professionalism of the civil service. The civil service protections which OPM is now charged to enforce are designed not to create sinecures for federal employees or to otherwise protect them from being at-will employees, but instead to benefit the public by ensuring the integrity of the civil service as a whole through protecting it down to its individual element, the individual federal employee, without exceptions.

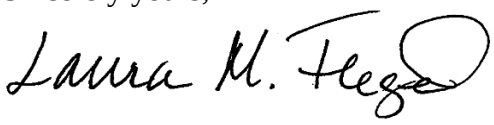
In the years since the Civil Service Reform Act of 1978, OPM has delegated or lost much of its authority as the executive branch's nonpolitical central personnel office, with the Federal Personnel Manual now gone, much personnel policy-setting authority now delegated to individual agencies and background investigation authority now transferred out of OPM. For the sake of the professional civil service and the public good, and to fight off the evils of the spoils system, it is important that OPM retain its independent role in setting *actual standards* for federal agencies and for the federal disciplinary mechanisms, rather than simply giving *carte blanche* to line federal managers to do as they please to their subordinates—undercutting the authority of the MSPB and others to oversee merit systems principles and discrimination law in civil service. Further self-abnegation by OPM is very risky for the civil service, and also organizationally risky for OPM itself at a time when some advocate OPM's dismemberment and the transfer of civil service policy-setting authority to the more political Office of Management and Budget within the Executive Office of the President.

These revisions are based on the erroneous stereotype that it is difficult to fire federal employees. It is not. As the Government Accountability Office reports (based on OPM's own statistics), almost 1% of the federal workforce is subject to adverse actions every year. *See* OPM Report No. GAO-18-48, *FEDERAL EMPLOYEE MISCONDUCT: Actions Needed to Ensure Agencies Have Tools to Effectively Address Misconduct, available at* https://www.gao.gov/assets/700/693133.pdf. Present statutes and regulations, if knowledgably applied by agencies, provide more than adequate

means to regulate the civil service in meritorious cases where disciplinary or performance action is warranted. Removing protections that ensure that such actions are actually warranted does not promote an efficient, professional and productive federal workforce. It instead takes the federal civil service steps closer back to the spoils system, and thus is a big step in the wrong direction.

Thank you for your consideration. If you have questions or wish to discuss these matters please contact Laura Flegel at lflegel@nelahq.org or (202) 898-2880 ext. 115.

Sincerely yours,



Laura M. Flegel
National Employment Lawyers Association
Director of Legislative & Public Policy