

# PROLOGUE

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Do not skip this section. Yes, we know; most prologues are meaningless dribble about the authors or unnecessary ruminations about the meaning of life. However, this prologue is different because you need to keep some very timely matters in mind as you read this text.

First, if you work at the Veterans Affairs (VA), you need to be aware that in June of 2017, Congress changed the accountability laws that apply to your employees by approving the “Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017.” Unlike most other agencies, VA now has regular civil service employees whose rights are defined by this legislation, Title 38 employees, “hybrid” employees that fall into more than one category, and goodness knows how many other categories of employment. Each of these groups has different procedural and appeal rights, deceptively similar, but ultimately different in application and possible outcome.

This text does NOT go into the details of these differences and does NOT claim to accurately describe the changes that were promulgated by the 2017 act. The main reason we chose not to go into details relative to these changes is that they have not yet been litigated in court and there are currently pending significant legal challenges to their Constitutionality and their application. If we were to claim to know what they mean now before the courts have had a chance to consider them, we might be misleading those readers who do not have the most recent edition of this text. However, in broadly stated language, here are some of the major changes:

- The minimum time period required for firing a bad employee has been reduced by about 25%.
- The amount of proof necessary for a supervisor on appeal to prove that removal is warranted has been reduced from “removal is *probably* warranted” to “removal *might be* warranted” (more on the burdens of proof in civil service law in later chapters).
- Supervisors no longer have to defend their decisions to remove an employee rather than impose a lesser level of discipline (e.g., a suspension). Judges reviewing these cases on appeal can no longer rule that a removal is too severe and should be mitigated to a lower penalty.

Hopefully, by the time we produce the next edition of *UnCivil Servant*, we’ll be able to flesh out the newly-developed procedures at VA.

Of course, most readers are not VA supervisors. Most of you work at other agencies. Why should you care what has happened with this new legislation? Well, for one big fat reason: President Trump said in his 2018 State of the Union address that he believes that the VA changes should be applied throughout government. And in his 2019 budget proposal for the Executive Branch, he proposed that changes similar to those made for the VA be incorporated by law for all other federal agencies.

Things don't get into a State of the Union address or budget proposal by accident. There has to be an intent to make them happen and sponsors working to put changes into law and regulation. Even with a divided government or even with a different President, there is an enduring amount of bipartisan support for changing the law to make it easier for federal supervisors to fire unproductive and misbehaving federal workers. Like it or not, we have to accept that there is a good possibility of legislative action intended to incorporate all or parts of the statutory changes implemented at the VA in 2017 into the rest of the government.

Separately, in May of 2018, the President exercised his authority to direct his secretaries and department heads via Executive Order (EO) to tighten up their utilization of existing law to make it easier to fire bad federal employees (EO 13839). We will highlight and detail those EO directives for you. Again, in broad summary, they are:

- Restrict the time for making a decision on a proposed removal from unlimited to 30 days. The law since 1978 has required a *minimum* of 30 days. Unfortunately, some agencies have been taking months (and even YEARS!) to issue a final decision on a proposed removal.
- Clarify that progressive discipline is not required prior to firing a bad employee.
- Clarify that a prior act of discipline (e.g. a reprimand for insubordination) can be considered a prior act of discipline for the purpose of applying the principle of progressive discipline even if the subsequent act of misconduct is of another type (e.g. the second act of misconduct is disrespectful conduct).
- Clarify that supervisors are not limited to initiating a level of discipline no higher than that ever taken anywhere else within the agency for the same misconduct.
- Clarify that when an employee is performing unacceptably, the supervisor can institute immediately a 30-day period for the employee to demonstrate whether he can actually perform at an acceptable level, then propose to remove the employee at the end of the period if he fails. This Presidential directive does away with the concept of allowing an employee a period to "improve" performance prior to termination. It also restricts the demonstration period generally to 30 days. Some agencies had been allowing several months for "improvement" prior to initiating a proposed removal.

Separately, as of this writing we have endured over two years without a quorum of members at the U.S. Merit Systems Protection Board. Normally, MSPB would be issuing four or five decisions every business day, most involving appeals of terminations from federal employment, as it has for nearly 40 years. Each of those decisions adds to the body of caselaw that provides guidance to federal supervisors and employment law practitioners when dealing with a problem employee. The Board being effectively shut down has deprived us all of precedential decisions that would help both agencies and employees understand and operate within the civil service system.

These are the most tumultuous times we have had in civil service employment law in over 40 years. We are seeing permanent changes to employee rights and management obligations in some agencies via legislation, perhaps temporary emphasis and instruction via EO, and an ongoing active dialogue as to just what our civil service should look like. Should federal employees have significant rights that hinder the ability

of their agency to hold them accountable? Or, should federal supervisors be provided procedures that allow for the prompt low-effort removal of misbehaving or non-productive civil servants?

Answers to these questions will be made in the future by officials at higher pay grades than those held by the authors of this textbook. As will always be our advice in challenging times like these, find advisors you can trust and rely on them to keep you current on the law.

***A Note on Personal Pronouns***

The English language lacks a third person singular pronoun universally interpreted to be sex neutral. Although we are not comfortable with the convention, this text will default to using “he” and related pronouns as other options are often distracting, and because that is the convention currently used by many courts and administrative bodies. We welcome suggestions regarding pronoun use for future editions.

And, no, we will not use an unmarked plural pronoun with a singular antecedent. Some things just are not right.



# QUICK START

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Firing a government employee can be very complicated and time-consuming if you do not know what you are doing. Much of this text is devoted to helping you understand those complexities and dealing with them in a straightforward efficient manner. However, with the many permutations and options aside, there is a single direct way that any government employee can be fired.

In some ways, we hesitate to present this section to you because a supervisor really needs to know the theory of discipline and the various tools that are available for dealing with a problem employee that make up the bulk of this text. At the same time, we realize that many of you will benefit from knowing a guaranteed simplified approach for dealing with a problem employee that will withstand review in any forum (as long as your motives are above reproach and your heart is pure). You may have grievances and complaints filed against you, but just consider them as the slings and arrows you must endure to clear the hurdles that lie before you. Although we highly recommend you study and understand the substantive chapters of this book before embarking on a course to remove a government employee, here is the most direct path to dealing with a problem employee that will always result in a successful termination. Some might call this the chapter the “Keys to the Kingdom,” but we steal a concept from the computer world and just call it Quick Start:

**Step One:** Give the employee an order. Put it in writing, be specific, and set a time for performance.

**Step Two:** If the employee obeys the order in the time specified, you don’t have a problem employee, at least not as far as this order is concerned. Go find something else to do with your leadership skills. Assuming that this guy really is a loser, he will not comply within the time frame you established, so Step Two is: Issue a Letter of Reprimand for “failing to comply with an order.”

**Step Three:** Give the employee another order with a time frame for compliance. When the employee does not obey, propose a one to five work day suspension for “failure to comply with an order—second offense.” The length of the suspension will be determined by the harm the agency suffered because of the failure to comply. Consult your management advisers and utilize the *Douglas* Factors you will find discussed in [Chapter Two](#) to select an appropriate suspension length.

[In earlier editions of this text, we recommended a second suspension if the employee engages in subsequent misconduct. However, the Government Accountability Office recently has criticized the use of more than one suspension. The theory appears to be a good one: if a first suspension does not motivate an employee to correct his behavior, there’s no science that says that a second suspension is any more likely to motivate him to obey the rules. Although this principle has not yet been articulated by the judges who rule in these matters, until someone in authority rules otherwise, we believe that it’s safe to use a single suspension prior to a termination.]

**Step Four:** Give the employee a third order. When the employee does not comply, propose his removal. His pattern of disrespect for authority coupled with your patience and your pattern of progressive discipline will be viewed with respect and admiration by most any arbitrator or administrative judge who hears the appeal of the termination, and the removal will be sustained.

My gosh, this is a lot of steps isn't it? Can't a government employee be fired without having to go through all these reprimands and suspensions? Oh yes...yes he can. To make it stick on appeal, however, you will have to convince an arbitrator or other impartial adjudicator that the harm caused by just one or two incidents of misconduct warrants removal from government service. Removals based on only one or two incidents are affirmed all the time. However, they also are occasionally mitigated to a lower level of discipline because the reviewing judge decides that removal just isn't warranted based on the misconduct.

Take that risk if you must and the chances are decent that you will be sustained if the single incident of misconduct is serious. If you have the patience and perseverance, following the four-step Quick Start will avoid you having to convince some third party that the misconduct is serious enough to warrant a first-offense-termination because the very pattern of misconduct itself warrants removal regardless of what the actual harm to the agency might be.

See the [Appendix](#) for a collection of sample documents to implement a misconduct termination.

As for employees who engage in unacceptable performance rather than misconduct, a Quick Start guide would look just like a full service guide as performance actions are extremely expedient and efficient, if you know what you are doing. You will know what you are doing by the time you finish that chapter later in this book.

Now that you know the basic approach to misconduct, the next chapters will give you the procedural and philosophical details and some recommended strategies for dealing with a variety of complicated situations.

# CHAPTER ONE

## GETTING STARTED

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If just showing up is half the battle, the other half is getting started. In this chapter, we will take you through the steps you should consider, in the order in which you should consider them, when first coming to realize that you have a problem civil servant on your hands.

### I. TRY EVERYTHING ELSE FIRST

Although this is a book on how to fire employees who do bad things, we hope that you will never have to fire anyone. That is because the removal of a career government employee takes time, resources, and emotional involvement that would be better spent on other endeavors. When you fire someone, you adversely affect his employability perhaps for the rest of his life, plus you have to go through the trouble and expense of hiring a replacement. That's why we say we hope you never have to fire anybody. So before you start the disciplinary process in earnest, we suggest that you try everything else first. It is easier on you and perhaps you will be able to convert an unacceptable employee into an employee who is at least doing a minimally adequate job. Of course, some misconduct or poor performance is so bad that a single incident warrants immediate termination. The guy who leaves the door open to the safe with all the secret documents and highly explosive materials probably warrants a quick goodbye. For most situations, once you realize that you have a problem employee, you will want to consider one or more of the following options:

- *Coaching.* Periodic informal instruction and feedback given by you or a seasoned coworker (a mentor) may help a minimal performer improve without having to resort to formal procedures.
- *Counseling.* While coaching can work with poor performers, misconduct warrants a little more direct discussion between you and the miscreant. Tell him what he did wrong and that you want him to do it right.
- *Training.* Sometimes, low performance can be improved through formal classroom or online training. Although the government usually does not have an obligation to train its employees, a three-day course in computer maintenance that helps your information resources technician improve to a point where he is being productive is a trivial expense compared to having to fire him for poor performance. Sometimes just asking the employee what training would be helpful gives valuable insight.
- *Reassignment.* Every job is made up of three components: the employee, the supervisor, and the work itself. If the employee is not working satisfactorily on a particular assignment, perhaps reassigning him to a new supervisor and/or a new position description will allow him the opportunity to become productive.

Although we could spend many pages devoted to discussing these techniques, doing

so would be beyond the purpose of this book. Our objective is to help you to know what to do when all of your best leadership skills are unsuccessful, and you have reached the point of asking yourself, "What do I do next?"

## II. ASK YOURSELF: QUESTION ONE

The answer as to what to do next requires that you ask yourself a series of questions:

*Question One:* What is the employment status of the problem employee (e.g., has the employee just barely begun working for the government or is he in for the long haul)?

Most government agencies have more than one category of worker. When confronted with a problem employee, the first thing to do is to determine the employee's status in order to establish what procedures and rights apply.

### A. TYPICAL CATEGORIES OF EMPLOYEE STATUS

Here are some typical categories of employment and how to handle a problem employee who falls into each category:

*Probationer*—Most organizations, both government and non-government, have a probationary period for new employees to observe the employee in the work setting and to make a final determination as to employability. During probation, it is easier to summarily terminate an employee for poor performance or misconduct without a lot of procedures and without a lot of proof.

In the private sector, probationary periods usually are measured in weeks or months. In the federal government, by comparison, the standard probationary period is one year from the first day of employment (two years in the Department of Defense). If your problem employee is a probationer, the most you will need to do is to give the employee a letter stating that you have decided to terminate him and give the effective date (usually at the close of business the day of the letter). Local policy will determine the exact wording and timing of the letter, but the bottom line is that this is a very simple process, at least compared to what you will encounter with a career employee.

There are three traps to avoid when terminating a probationary employee.

1. A federal probationary period is over at the end of the last scheduled work shift that precedes the one-year anniversary of initial employment. Removals are effective at midnight on the day stated in the notification letter. If today is the last day before the one-year anniversary of initial employment, and the employee's shift is over at 4:30 this afternoon, your probationary termination letter dated today will be effective at midnight, several hours after the employee's probationary period is over. A probationary termination letter under these circumstances would be defective and set aside because the employee is entitled to the full notice and appeal rights of a career employee as of 4:31 P.M. Either make the termination effective on a date prior to the last day of the probationary period, or set a specific time for the removal to be effective on the last day, a time that is earlier than the end of the shift.

2. As a general rule, an employee who occupies a position identified as “probationary” may still have rights to file an appeal with the Merit Systems Protection Board if that employee has completed more than a year of current continuous employment with the government in any positions other than temporary positions limited to one year or less. Be careful of the “probationary” employee who has come to work for you directly from employment with another component of the government without any break in service. That person might well be entitled to the full protections of a non-probationary employee.
3. Employees in the federal civil service have a variety of ways that they can challenge a management action, that they can “push back” against their supervisor. For example, an employee can file a claim of civil rights discrimination regarding just about anything that a supervisor might do to him. When that happens, you will want to be ready to defend yourself, to prove that you have valid reasons for doing what you have done.

The law does not demand any proof for you to terminate an employee during probation. Because a terminated probationer can challenge you through the discrimination complaint process (or in some other manner), always have a legitimate, *bona fide*, business-related reason for the removal. At a minimum, write down, date, and sign your rationale for the termination, and store that piece of paper somewhere you can retrieve it if needed. Be as specific as possible about your reasons, with dates and witnesses, if relevant. A statement that says, “I terminated John Doe because he turned in the Smith report a week late on September 9, 20XX” is much better than a statement that says, “Doe was always late with reports.” Always have a *bona fide* reason for doing what you do.

As a side note, although it is permissible to reprimand or suspend a probationary employee (and a temporary employee) few agencies do. That’s because if a probationary employee has engaged in misconduct that warrants any discipline, most managers would agree that it is better simply to remove and replace the employee rather than get involved in the complaints, grievances, and appeals that might result if you were to impose lesser discipline.

*Supervisory probationer*—In the federal government, first-time supervisors have to undergo a supervisory probationary period during which they are evaluated on their ability to supervise. If your problem employee is a supervisor within the first year of appointment to a supervisory position, you can demote the supervisor back to the last nonsupervisory position held prior to promotion without having to use a lot of procedures or giving formal appeal rights. If the problem with the employee is misconduct or if it is not convenient for you to demote the employee to a nonsupervisory position, then you can still use the full procedures for disciplining career employees that we will discuss later.

*Temporary employee*—Temporary employees can be terminated in much the same manner as probationers. It just takes a letter from the supervisor that says that the temporary appointment is being terminated effective on such-and-such date. But remember to have a *bona fide* reason articulated in your file so you can defend yourself if that becomes necessary.

*Contractor*—More and more people who work for the government work as contractors rather than as true civil servants. The termination of a contract employee is controlled by the provisions of the master contract between the government and the private sector company that is providing services through contract. Usually, it takes no more than a phone call from you to your contract manager in the procurement office to have that particular worker replaced. The exact process is individual for every contract, so check with your contracts office to find out the most expedient manner to get rid of the problem employee.

*Political appointee*—At the state and local government level, in some locations employees at all levels are considered “political” and serve at the will of the elected officials who are in charge of their organization. Such positions are often called “patronage” and are a holdover from the days when government jobs were handed out as favors to political supporters. The concept of a non-patronage civil service, invented, by the way, in China over 2,000 years ago, has replaced these political jobs in most larger jurisdictions, except for the top management positions in an administration.

Individuals who serve at the will of the President of the United States as political appointees may be summarily dismissed without notice, an opportunity to respond, or appeal rights. They can be told to leave, have their appointment terminated, and the only right they have is to retrieve their personal belongings from the worksite before you slam the door behind them as they exit the building. In fact, you can even mail their belongings to them if you cannot stand them in your sight anymore. You would not be reading this book if all federal employees were political.

*Special appointment authorities*—Most federal civil servants are appointed under the hiring authorities established by Congress under Title 5 of the United States Code. The rights and procedures for that group are the subject of this book. However, some federal employees are appointed using specialized unique appointment authorities; e.g., Title 38 health care professionals employed in the Department of Veterans Administration and a few other agencies, and Administrative Law Judges serving in a number of agencies throughout government. The procedures and options for dealing with those individuals are beyond the scope of this text, although their processes are often very similar to those described here for Title 5 employees.

*Career employee*—An individual who was hired as a federal employee from a competitive source (e.g., a regular government applicant) and who has completed a one-year probationary period (or the equivalent) is considered to be a career employee for the purpose of disciplinary rights. If you have ruled out each of the above employment categories and have determined that your problem employee is a career Title 5 employee, you must use the formal discipline and appeals procedures that make up the rest of this text.

### **III. ASK YOURSELF: QUESTION TWO**

Once you have determined that the status of your problem employee is career, then you will need to answer the next question:

*Question Two:* Is the employee’s problem misconduct or poor performance (e.g., did the employee steal widgets or was he just really slow when he made them)?