AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
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October 17, 2019

Timothy Curry
Deputy Associate Director
Accountability & Workforce Relations
U.S. Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415-8200

Re: RIN 3206-AN60, Comments by AFGE Concerning Probation on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade and Removal Actions and Adverse Actions, 84 Fed. Reg. 48794

Dear Mr. Curry:

The American Federation of Government Employees, AFL-CIO, ("AFGE") hereby submits its comments to the changes proposed by the U.S. Office of Personnel Management ("OPM") to the regulations governing probation on initial appointment to a competitive position, performance-based reductions in grade, and removal and adverse actions. AFGE opposes the proposed regulations. They should be withdrawn. They are unsupported by the facts and are likely to have an overall negative effect on government operations by reducing due process for federal employees and increasing arbitrary and capricious agency conduct.

The so-called "**Case for Action**" that OPM sets forth at the beginning of the proposed regulations is not grounded in fact. OPM looks to the Federal Employee Viewpoint Survey, which is a subjective survey of employee perceptions, and claims that "a majority of both employees and managers agree that the performance management system fails to reward the best and address unacceptable performance." But far from failing to adequately address poor performance, the evidence shows that federal agencies routinely take actions against employees based on allegations of misconduct or poor performance and that those actions are almost always upheld. For example, of the approximately thirty (30) performance-based actions taken by agencies pursuant to 5 U.S.C., Chapter 43 that were adjudicated on the merits by the U.S. Merit Systems Protection Board ("Board") over the twelve-month period beginning October 2018, the Board affirmed twenty-four (24). *See Moore v. Dep't of the Treasury*, 2018 WL 4914126 (Oct. 5, 2018) (removal affirmed); *Aguirre v. Dep't of Homeland Security*, 2018 WL

5115932 (Oct. 17, 2018) (removal affirmed); *Perry v. Dep't of Veterans Affairs*, 2018 WL 5389405 (Oct. 22, 2018) (removal affirmed); *Deskins v. Dep't of Agriculture*, 2018 WL 5785768 (Oct. 29, 2018) (removal affirmed); *Brookins v. Dep't of the Interior*, 2018 WL 6171489 (Nov. 23, 2018) (removal affirmed); *Acty v. Dep't of Housing and Urban Development*, 2018 WL 6308855 (Nov. 26, 2018) (removal affirmed); *Smith v. Social Security Administration*, 2018 WL 6381071 (Nov. 27, 2018) (removal affirmed); *Forman v. Dep't of the Navy*, 2018 WL 6308894 (Nov. 29, 2018) (removal affirmed); *Silver v. Dep't of Justice*, 2018 6682361 (Dec. 10, 2018) (removal affirmed); *Harris v. Securities and Exchange Commission*, 2018 WL 6682317 (Dec. 13, 2018) (removal affirmed); *Berry v. Dep't of the Navy*, 2019 WL 690567 (Feb. 15, 2019) (removal affirmed); *Crawford v. Dep't of Defense*, 2019 WL 1242566 (Mar. 15, 2019) (removal affirmed); *Birkenruth v. Dep't of Agriculture*, 2019 WL 1315747 (Mar. 18, 2019) (removal affirmed); *Green-Doyle v. Dep't of Homeland Security*, 2019 WL 1780468 (Apr. 18, 2019) (removal affirmed); *Flugstad v. Nat'l Aeronautics and Space Admin.*, 2019 WL 1904336 (Apr. 23, 2019) (removal affirmed); *Reynolds v. Dep't of Agriculture*, 2019 WL 2121464 (May 6, 2019) (removal affirmed); *Santos v. Nat'l Aeronautics and Space Admin.*, 2019 WL 2176543 (May 21, 2019) (removal affirmed); *Cordaro v. Dep't of Defense*, 2019 WL 2273048 (May 21, 2019) (removal affirmed); *Brown v. Social Security Administration*, 2019 WL 2912790 (July 3, 2019) (removal affirmed); *Dphrepaulezz v. Social Security Administration*, 2019 WL 3083194 (July 12, 2019) (demotion affirmed); *Laggah v. Dep't of Housing and Urban Development*, 2019 WL 3550418 (Aug. 2, 2019) (removal affirmed); *Mauro v. Social Security Administration*, 2019 WL 4015335 (Aug. 23, 2019) (demotion affirmed); *Baisden v. Dep't of Defense*, 2019 WL 4575156 (Sept. 16, 2019) (removal affirmed).

Of the small number of adjudicated cases in which an agency's performance-based action was not upheld, moreover, each one was reversed for reasons that demonstrate the importance of due process and impartial review. *See Waldron v. Dep't of Defense*, 2018 WL 7138838 (Dec. 20, 2018) (removal reversed based on whistleblower retaliation); *Lastra v. Dep't of Commerce*, 2019 WL 1242595 (Mar. 15, 2019) (removal reversed based on constitutional due process violation arising from improper *ex parte* communications of deciding official); *Westling v. Dep't of Defense*, 2019 WL 2176561 (May 14, 2019) (removal reversed because performance standard failed to inform appellant of what was required to achieve fully successful rating); *Thompson v. Dep't of Commerce*, 2019 WL 2912790 (July 10, 2019) (removal reversed because appellant was not given statutorily-required 30 days to demonstrate acceptable performance or promised supervisory assistance); *Johnson v. Dep't of Agriculture*, 2019 WL 4252307 (Sept. 4, 2019) (removal reversed where agency failed to prove unacceptable performance in a critical element); *Combs v. Dep't of Homeland Security*, 2019 WL 4575170 (Sept. 17, 2019) (removal reversed where agency retaliated against appellant based on disability and underlying PIP was expunged by decision of the Equal Employment Opportunity Commission). This small number of cases is not, in other words, a failure of the system but rather an example of the system working effectively in a manner that fosters merit system principles. *See* 5 U.S.C. § 2301. Just as importantly, given the reasons on which each reversal above was based, the proposed regulations will not avoid or eliminate similar outcomes in the future. OPM's contention that

“interpretations of chapter 43 have made it difficult for agencies to take actions against unacceptable performers and to have those actions upheld” is thus demonstrably untrue. 84 Fed. Reg. 48796, **5 CFR part 432 – Performance-Based Reduction in Grade and Removal Actions**. The changes proposed by OPM to 5 C.F.R. part 432 are unwarranted.

Nor are the above case outcomes anomalous or confined to performance-based actions. The Board adjudicated just under one thousand initial appeals on the merits in fiscal year 2018. It reversed an agency decision or ordered corrective action in just 14% of those appeals. And it mitigated an agency-selected penalty in just 2% of those appeals. *See* MSPB Annual Report for Fiscal Year 2018, page 14, available at: https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1592474&version=1598254&application=ACROBAT (last accessed October 16, 2019). The Board similarly adjudicated just over one thousand initial appeals on the merits for fiscal year 2017. Of these, only 13% of Board decisions resulted in reversal of an agency decision or corrective action. Again, a mere 2% of adjudicated appeals resulted in mitigation of an agency selected penalty. *See* MSPB Annual Report for Fiscal Year 2017, page 16, available at: https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1481375&version=1486936&application=ACROBAT (last accessed October 16, 2019).

Going back to fiscal year 2016, the statistics continue to demonstrate that agencies are, in fact, overwhelmingly successful in taking actions based on misconduct or performance. During the 2016 fiscal year, the Board adjudicated a large number of appeals arising from furloughs in addition to its usual number of adverse action cases. So, out of over three thousand initial appeals adjudicated on the merits, only 6% resulted in reversal of an agency decision or corrective action. A bare 1% resulted in mitigation of an agency-selected penalty. *See* MSPB Annual Report for Fiscal Year 2016, page 20, available at: https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1374269&version=1379643&application=ACROBAT (last accessed October 16, 2019). Consequently, the case for action that OPM purports to make is illusory.

The proposed regulations’ attack on progressive discipline is similarly deficient and should be withdrawn. Progressive discipline should be retained. OPM’s attack on progressive discipline reflects a fundamental misunderstanding of its purpose. The proposed regulations, for example, purport for the first time to formally apply *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), (“*Douglas*”), to non-adverse actions for the proposition that agencies must “impose and propose a penalty that is within the bounds of reasonableness. 84 Fed. Reg. 48799. But OPM relies on a deliberately twisted and facile reading of *Douglas*. Progressive discipline is not nor has it ever been an impediment to justified agency action. It is instead an important tool that agencies should use in order to avoid arbitrary and capricious penalty determinations.

The Board thus crafted the *Douglas* factors, including consideration of whether the penalty administered was progressive, whether the penalty was consistent with other penalties imposed for the same or similar offenses, and whether the penalty was

consistent with an agency's table of penalties, to guide agencies in administering proportionate and fair penalties. *Douglas*, 5 M.S.P.R. at 303 ("Before it can properly be concluded that a particular penalty will promote the efficiency of the service, it must appear that the penalty takes reasonable account of the factors relevant to promotion of service efficiency in the individual case."). By eliminating progressive discipline, OPM would take away a critical safeguard against arbitrary and capricious agency action in favor of inconsistent and ad-hoc decision-making.

OPM's treatment of comparator evidence is also wrong-headed. The fact that each case may stand "on its own factual and contextual footing[,]" 84 Fed. Reg. 48798, does not justify any regulatory change nor does it warrant any change in how comparator evidence should be treated. Nor is it the gravamen of the court's decision in *Miskill v. Social Security Administration*, 863 F.3d 1379 (Fed. Cir. 2017) ("*Miskill*"). The *Miskill* court merely applied existing law that "similarly situated employees must be subject to the same criteria, and differences in penalties must depend on specific factual differences between those employees." *Id*. at 1384. The court thus held that "a categorical rule of exclusion [as a comparator] based on an employee's investigatory status is improper." *Id*. at 1385. The court did not make any material change to the evaluation of agency penalties nor did it adopt any manner of new test or bright line rule. *Id*. So, OPM's statement that "conduct that justifies discipline of one employee at one time by a particular deciding official does not necessarily justify the same or similar disciplinary decision for a different employee at a different time" is not responsive to the issue if disparate penalties. OPM's muddying of the water will only lead to confusion and an increase in arbitrary and capricious agency conduct.

The same is true with respect to the proposed regulations' hostility to tables of penalties. Contrary to OPM's contention that tables of penalties "may create significant drawbacks to the viability of a particular action and to effective management," 84 Fed. Reg. at 48798, the U.S. Government Accountability Office ("GAO") has found that tables of penalties assist agencies in making consistent and reasoned penalty determinations. Specifically, GAO has found "that tables of penalties—a list of recommended disciplinary actions for various types of misconduct—though not required by statute, case law, or OPM regulations, nor used by all agencies, can help ensure the appropriateness and consistency of a penalty in relation to an infraction." *GAO July 2018 Report on Federal Employee Misconduct*, pg. 31, available at: https://www.gao.gov/assets/700/693133.pdf (last accessed October 17, 2019). GAO has also explained that, "tables of penalties can help ensure the disciplinary process is aligned with merit principles because they make the process more transparent, reduce arbitrary or capricious penalties, and provide guidance to supervisors." *Id*. OPM's desire to cabin tables of penalties is thus ill-advised.

And OPM's citation to *Nazelrod v. Department of Justice*, 43 F.3d 663 (Fed. Cir. 1994) is nonsensical. Eliminating tables of penalties or urging agencies, with a nod and a wink, to avoid their use will not change the requirement that an "agency must prove all of the elements of the substantive offense with which an individual is charged." *Id*. at 666. This is, in part, because requiring an agency to prove the elements of the offense charged

(something already in the agency's power to determine) is part and parcel of the core constitutional requirement that an employee against whom an action has been proposed is entitled to notice and an opportunity to be heard before the action may become final. *See*, *e.g.*, *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985). An agency may not charge an employee with one offense and then set out to prove another. And no amount of fanciful rationalizations will relieve OPM or other federal agencies of this constitutional obligation.

Put simply, jettisoning progressive discipline, confusing the use of comparator evidence, and discouraging tables of penalties, creates an improper bias toward the most drastic penalty an agency thinks it can get away with. Such a "rule of severity" is not only foolish, because it is counterproductive and likely to lead to a greater number of penalty reversals, it is also contrary to the text, structure, and purpose of the Civil Service Reform Act ("CSRA"). It was certainly not the purpose of the CSRA that agencies be able to act without meaningful review or that federal employees receive only lip-service to due process. The heart of the CSRA was the desire to balance the needs of an efficient government with due process and fundamental fairness for federal employees. *See*, *e.g.*, 5 U.S.C. § 2301(b)(8)(A) ("Employees should be – protected against arbitrary action, personal favoritism, or coercion for political purposes[.]"). The proposed regulations upset this balance. Indeed, OPM's claim that "[p]rogressive discipline and table [sic] of penalties are inimical to good management principles" is nothing more than a cheap soundbite. 84 Fed. Reg. at 48799, **Subpart B Regulatory Requirements for Suspension for 14 Days or Less**. It is not based on sound analysis or solid evidence. The proposed regulations should therefore be abandoned.

Additional specific comments by AFGE are provided below.

SPECIFIC COMMENTS

5 C.F.R. § 315.803(a)

The probationary period for federal civilian employees is controlled by statute. 5 U.S.C. § 7511; *see also Van Wersch v. HHS*, 197 F.3d 1144 (Fed. Cir. 1999); *McCormick v. Dep't of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002). By establishing a requirement that supervisors make an affirmative decision to retain an employee beyond the probationary period, this proposed change creates the incorrect impression that an employee must receive an affirmative supervisory determination in order to complete the probationary period. OPM should clarify that the affirmative supervisory decision contemplated by this section has no effect on whether an employee's probationary period has been completed.

The proposed regulations should also clarify that an employee is under no obligation to seek or obtain such an affirmative supervisory decision. A probationary employee who meets the statutory requirements needed to become non-probationary does

not remain probationary in the absence of any affirmative supervisory decision. Further, if the rule is going to require notification of supervisors in advance of the expiration of an employee's probationary period, it should also require an agency to provide the commensurate notice to the employee.

5 C.F.R. § 432.104
5 C.F.R. § 432.105

The changes proposed by these sections are, again, ill-advised and should be withdrawn. An agency must meet all the requirements set forth by 5 U.S.C. Chapter 43 before it may it may take an action based on unacceptable performance. *Lovshin v. Dep't of the Navy*, 767 F.2d 826 (Fed. Cir. 1985). The procedural requirements of Chapter 43, including the provision of a reasonable opportunity to improve, are substantive guarantees and may not be diminished by regulation. *See*, *e.g.*, *Sandland v. General Services Administration*, 23 M.S.P.R. 583, 589 (1984). Yet, in the name of "streamlining" removal procedures (a goal with no statutory foundation), this is precisely what OPM seeks to do. OPM should desist in this effort.

Moreover, consistent with AFGE's discussion of Chapter 43 cases above, leading agencies away from providing employees who face performance issues with genuine opportunities to improve, which is what these regulations will do in practice, is contrary to the language and intent of the CSRA. In order for agencies to effectively utilize the federal workforce, OPM should instead encourage the use of meaningful opportunities to improve.

5 C.F.R. § 432.108
5 C.F.R. § 752.203(h)
5 C.F.R. § 752.407

Amicable settlements are in the government's interest. By preventing agencies from entering into "clean record" settlements, OPM stymies the efficient and effective resolution of employment disputes. Further, by giving agencies essentially unfettered power to unilaterally modify an employee's personnel record, the proposed regulations open the door to arbitrary and capricious agency action and to potential violations of the Privacy Act. These regulations should be withdrawn.

5 C.F.R. § 752.202
5 C.F.R. § 752.403

For the reasons discussed above, these proposed sections should be abandoned. OPM should rescind its invitation to arbitrary and capricious agency decision-making. In particular, nothing in the CSRA supports OPM's admonition to agencies that suspension

should not be a substitute for removal. Such a bias toward removal is inconsistent with due process and unjustified.

5 C.F.R. § 752.404

OPM's creation of a rule limiting written notice of an adverse action to 30 days, or requiring agencies to report their "failure" to provide the bare minimum notice OPM, is again unsupported by the facts. It is also counterproductive. Like OPM's regulations prohibiting clean record settlements, a hard 30-day notice rule will hinder the efficient resolution of cases prior to litigation by curtailing the time in which an agency and an employee might reach an alternative resolution. This limitation serves no valid purpose and should be withdrawn.

CONCLUSION

AFGE thanks OPM for allowing it the opportunity to submit these comments. AFGE notes that by submitting these comments, AFGE does not waive any arguments, claims, challenges, or rights, that it may have, now or in the future, concerning any aspect of the changes proposed by OPM in Probation on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade and Removal Actions and Adverse Actions, 84 Fed. Reg. 48794 (Sept. 17, 2019).

Sincerely,

/s/ Andres M. Grajales
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