



CONGRESSIONAL TESTIMONY

STATEMENT BY

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BEFORE

**SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT
SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS**

ON

EMPOWERING MANAGERS: IDEAS FOR A MORE EFFECTIVE FEDERAL WORKFORCE

February 9, 2017

Mr. Chairman, Ranking Member Heitkamp, and Members of this Subcommittee. My name is J. David Cox, and I am the National President of the American Federation of Government Employees, AFL-CIO (AFGE). On behalf of the 700,000 federal and District of Columbia employees across the nation and around the world represented by our union, I thank the Subcommittee for the opportunity to present AFGE's views on the subject of this hearing: "Empowering Managers: Ideas for a More Effective Federal Workforce."

One of the most useful ways to frame policy questions that aim to address a real or perceived problem is to ask what is needed: New laws or more effective enforcement of existing laws? In the context of this hearing, the question is whether the laws on the books give federal managers adequate authority to manage the federal workforce, or whether they need new authorities granted by new, more expansive laws.

I can tell you unequivocally that no new laws are needed. America has the best civil service in the world. No expanded authorities for government managers are needed. What may be needed is more effective enforcement of existing law and better training for federal managers so that they know how to use their substantial authorities. In addition, because we believe that managers' failures to utilize their authorities derives from more than just ignorance, what is needed are federal managers with the courage, organizational skill, and confidence to take actions that may at times feel uncomfortable. The public and the vast majority of federal workers who do an excellent job every day deserve no less.

There are two sides to the managerial dilemma. First and foremost is the responsibility for hiring, developing, cultivating, training, motivating and providing the tools for the 99% of the workforce who are productive employees. Hiring good employees, giving them good direction and the tools to do their jobs, including a union voice to deal with concerns and provide input, empowers employees to do their job. Good managers also need to provide positive motivation and recognition of employees for their contributions. These are the basic premises of success. Virtually all studies of federal employee performance management call for engagement of front line employees as the key to creating highly successful organizations. Managers need to focus on the 99% of the workforce who are doing good work, and they must be supported by agency heads and Congress. Unfortunately, this is not where the public focus and debate rests, although this is where managers really need to spend their time.

Instead Congress is focusing on how to get rid of the tiny percentage of the workforce that fails to perform or engages in misconduct. AFGE's view is that if one were to quantify the group of poorly performing employees who are left after taking out those who failed probation, quit before being fired, and those that got fired and were later found to be without fault, that this number would be even smaller than 1%. So AFGE's concern is that we are spending too much time and energy focused on less than 1% of the workforce instead of leading and managing the other 99% for success. AFGE believes that managers and systems for managing need to be focused on the

99% of successful employees while taking into account the need to deal with the very small number of poor performers.

As you are aware, the modern civil service was created by the Pendleton Act, signed into law in 1883. Prior to that time, all Executive Branch employees were considered to be “at will” and were largely appointed based on patronage principles (“to the victor go the spoils”). This resulted in a highly partisan civil service, which changed when a new Presidential administration took office. Unqualified people were appointed to offices that required more and more technical expertise in an emerging modern state, and the inevitable corruption that ensued became a threat to the nation and to our democracy.

The assassination of President Garfield in 1881 by a disappointed office seeker (Charles Guiteau) finally provided the impetus for passage of the Pendleton Act. There was broad recognition that partisanship needed to be removed from day-to-day government administration, and that merit and skill, not politics, should dictate government employment. The apolitical civil service, hired based solely on merit, and removable only for legitimate “good cause” became institutionalized with broad public support. It was the “good government” program of its time. Today, both “competitive service” and most “excepted service” positions are covered by laws protecting the civil service from politics and corruption.

A “merit-based” civil service system forms the cornerstone of all modern Western democracies. It ensures that technical expertise is brought to bear on performing agency missions, without the threat of overt partisan agendas driving day-to-day operations.

Agency career employees remain accountable to politically-appointed officials, but those appointees, and supervisors who serve under them, may not take actions against career employees for misconduct or poor performance without at least providing some evidence to back up the allegations and a level of due process to the employee, including third-party review by neutral decision-makers.

The Civil Service Reform Act (CSRA) of 1978 provides the modern-day basis for both selection of most career civil servants, and their protection from unwarranted personnel actions, including removals (unwarranted = motivated by politics, bias, etc.). This law protects the public from having their tax dollars used for hiring political partisans for non-political jobs, and helps ensure the efficient and effective provision of services to citizens.

The CSRA provides that employees may be removed for either misconduct or poor performance. The employee merely needs to be informed of his or her alleged deficiency and the reason that management proposes to take an action against him or her (removal, demotion, suspension, etc.).

Unlike prior law, the CSRA provided more bases for managers to take action against federal employees. Under the CSRA, employees may be removed for either misconduct or poor performance if:

- 1) the employee has been informed of the problem and the reason that management proposes to take an adverse action (e.g., removal, demotion, or suspension) against him or her; and
- 2) the employee has been given a reasonable opportunity to respond, both in writing and orally, if requested; and
- 3) the agency's final decision is adverse to the employee, (e.g., removal, demotion, suspension for more than 14 days).

An employee is subject to a final adverse action by an agency 30 days after receiving an adverse proposal. An employee may file an appeal to an adverse action to the Merit System Protection Board (MSPB), a third-party agency that hears and adjudicates civil service appeals. MSPB administrative judges (AJs) hear the matter in an adversarial setting and decide the case in accordance with established legal precedents. If dissatisfied with the AJ's decision, either the agency or the employee may appeal the decision to the full three Member MSPB.

The CSRA does not give unfair advantages to federal employees. Agencies generally prevail in 80% - 90% of all cases at the AJ level, and only about 18% of all AJ decisions are appealed to the full Board. AJs are upheld by the full MSPB in about 90% of all appealed cases.

It is very important to note that following an agency's adverse decision against an employee, the agency's decision is automatically put into effect (e.g., the employee is removed from the agency's rolls the day of issuance of the decision or within several days following the decision). An employee removed by an agency receives **no pay** during the appeal process. The MSPB appeal process is highly efficient and expeditious. Most AJ decisions are rendered within 70 days of the filing of an appeal. An appeal to the full MSPB from an AJ decision takes about 210 days. Meanwhile, the agency's decision remains in effect during the entire appeals process.

The importance of maintaining a nonpartisan, apolitical civil service in an increasingly partisan environment cannot be overstated. First, most federal jobs require technical skills that agencies simply would not obtain through non-merit based appointment. Second, career employees must be free to perform their work in accordance with objective professional standards. Those standards must remain the only basis for evaluating employee performance or misconduct.

Calls to make it easier to fire a federal employee by decreasing due process rights are "dog whistles" for making the career service subject to the partisan or personal whims of a few supervisors or political appointees. Whatever lack of public confidence in government exists today (usually because of political partisanship) will be

magnified a hundredfold if all civil servants become *de facto* political appointees, serving at the whim of supervisors.

It may be politically unpopular to admit this, but federal managers are already fully empowered under existing law to take appropriate action when employees are underperforming or engaged in misconduct. There is no group of people who object more to the continuing presence in the workplace of those who are not performing well or who may engage in misconduct than fellow federal employees. When someone doesn't perform up to speed, it simply means more work for the rest of the people who do perform well. Similarly, an individual's misconduct hurts all employees in the workplace, and it is usually fellow employees who are the first to shine light on misconduct, as they did at the Phoenix VA Medical Center in 2014. Without the protection of civil service laws, I can guarantee you that no employee will be foolish enough to come forward with evidence of mismanagement. Although whistleblower laws offer protection from retaliation for those who reveal certain types of mismanagement, the kind of routine mismanagement that was revealed by AFGE members at the Phoenix VA would not have occurred if the front line employees like scheduling clerk Pauline DeWenter were "at will."

Whistleblowers typically have to hire lawyers at great expense and litigate over extended periods of time during the course of which managers can retaliate. It took seven years for a civilian in the Marine Corps to successfully litigate his whistleblower complaint based on his internal report that showed how the Corps could have saved hundreds of lives by fulfilling a 2005 request for Mine Resistant Ambush Protected vehicles in Iraq. The idea that simply invoking whistleblower laws will somehow protect or encourage whistleblowing when an "at will" employment relationship exists is a fiction given the immense litigation hurdles, and financial and emotional stresses that whistleblowers have to incur.

In all my years with AFGE, I have yet to encounter a federal employee who supports those who do not pull their weight, performs poorly, or otherwise engages in misconduct.

The notion that federal managers lack adequate authority and tools to discipline those who engage in misconduct or who are poor performers is false. Despite the various protestations of some managers and management-associated think tanks, the Government Accountability Office (GAO), the Merit Systems Protection Board (MSPB) and the Office of Personnel Management (OPM) have all issued reports and analyses that have come to pretty much the same conclusion: When poor performers are not dealt with it is **never** because the civil service laws or procedures are too difficult to navigate, but rather because some managers (or their managers) either do not want to take the time and effort to properly document poor performance and remove or demote poor performers, or because they lack the knowledge, skills, and ability to do this.

A recent GAO report, "Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance," (GAO-151-191),

February 6, 2015, found four principal reasons why agencies do not use the already substantial tools they have available to them to remove the relatively few poor performers. All four reasons related to management failures and/or unwillingness to properly identify and document poor performance. AFGE would urge this Subcommittee to review GAO's well thought-out recommendations and its careful analysis of relevant statutes and regulations.

We are well aware that the campaign to reduce civil service protections is promoted through the suggestion that civil service due process procedures are just too difficult for some managers to follow. The goal seems to be to remove the employee immediately, and deal with due process in the future, if ever. This is a dangerous precedent if we want to maintain an apolitical and highly qualified civil service, especially in the current political environment.

The premise that the procedural hurdles for removing poorly performing employees are too high is simply not borne out by the facts. When an employee invokes his/her rights to a formal adjudicatory hearing before the MSPB, the agency almost always prevails. For example, in 2013, only 3% of employees appealing their dismissal to the MSPB prevailed on the merits. In contrast, agencies were favored at a rate five times that of employees when formal appeals were pursued. The charge that the MSPB makes it impossible to fire a federal employee is simply not true. Perhaps we should call it an "alternative fact."

GAO reviews and reports (e.g., GAO-15-191) have consistently found that the underlying reasons for permitting a small number of poor performers to remain in federal service are: (1) some managers' failure or (2) unwillingness to document poor performance in accordance with due process procedures available to them under the Civil Service Reform Act. The bottom line of the GAO report is that lack of performance management by some supervisors is the reason why poor performers are not dealt with expeditiously.

There are well-established and fully adequate processes and procedures for removing problem federal employees. This is true for performance or conduct reasons. In fact, the standards for removing underperformers were specifically developed so that poorly performing employees may be more easily dismissed than employees committing conduct-related offenses. Even more important, the burden of proof is lower for removing a poor performer -- it is only the "substantial evidence" test, so that reasonable supervisors are given leeway to determine what constitutes unacceptable or poor performance.

The real issue is some managers' reluctance to document employee performance in accordance with due process procedures. In 1978, Congress enacted the CSRA, which is the modern day statute governing civil service protections. In considering the law, Congress was specifically concerned about balancing the maintenance of a non-partisan civil service with the need for management to deal with poor performers, or unacceptable conduct. In fact, to facilitate agency managers' ability

to deal with poor performers, the CSRA added chapter 43 to title 5, which addresses performance issues.

The GAO report previously mentioned (GAO-15-191) suggests many reasons why a few managers are sometimes reluctant to address performance issues. It also explores the many myths surrounding removal of poor performers. GAO's report echoed findings of the MSPB in its reported entitled, "Addressing Poor Performers and the Law" (September 2009). The fact is that the laws governing the removal of poor performers, primarily Chapters 43 and 75 of title 5, are straightforward and not unduly burdensome to agencies in any practical sense. The due process procedures inherent in these laws simply require documentation of communication that has occurred between the supervisor and the employee that addresses the performance or conduct issues. This seems to be very difficult for some supervisors, and is one area where both technical and assertiveness training may be in order. But the law is clear: agency supervisors have many tools available to them to address performance issues, and to remove poor performers.

WHY DOES THE MYTH CONTINUE?

Maintaining due process rights and avoiding arbitrary or politicized personnel decisions requires that decisions be properly documented, presented to the employee, and appropriately defended before any reviewing authority. While not an inherently complex or technically difficult process, it can cause discomfort, and diverts supervisors from work they may find more rewarding, or at least less stressful.

To address these issues, and to deal more effectively with poor performers, agency supervisors need to be properly-trained ***and willing*** to effect all of the performance management tools the law provides to them in the workplace. In addition, agencies must provide adequate support to supervisors, whether through human resources offices or through legal counsel, to address and steer a clear path to dealing with problem employees. Until this occurs, the myth will continue, and some workplace issues will go unaddressed by supervisors, and worst of all, the political campaign to eliminate the legal provisions that protect our nation from a politicized civil service will be in danger.

DENIGRATION OF FEDERAL WORKERS

As members of this Subcommittee are undoubtedly aware, continuing partisan attacks on the work of federal employees fuels a self-reinforcing feedback loop. Federal employees know they are punching bags. Morale plummets as a continuous stream of anti-federal worker proclamations, almost all false or highly exaggerated, emanate from elected or appointed leaders who inevitably complain that the penalty for alleged wrongdoing had not been severe enough.

Recently, the majority leader in the House of Representatives wrote an op-ed in the *Wall Street Journal* describing the "federal bureaucracy" as the entity that "poses the

greatest threat to America's people, economy and Constitution." Such rhetoric misleads people into thinking that career civil servants create statutes and regulations wholly apart from supervision by elected leaders and political appointees. In addition, it is absolutely false. Anyone who has worked in federal service will tell you that employees follow direction, whether that direction comes from Congress, the President or other politically-appointed officials. Career federal workers respond to and implement duly enacted laws and policies. They do not create laws or policies.

In all my years as an elected official of AFGE, I have never seen fit to denigrate my own staff. No leader should do that. There, of course, have been situations where employees have been disciplined or dismissed. But taking a battle axe to all employees and describing them in broad terms as "threats" to the American people heralds a new low in misinformation and outright dishonesty. As I told several news outlets: to call civil servants – one-third of whom are veterans – a 'threat to America's people, economy and Constitution' is a horrible insult to the men and women who dedicate their lives to the programs and services that benefit all Americans. I cannot fathom what motivated such a statement, but I think that we can all agree that such rhetoric is irresponsible and can have horrible consequences. Recall Timothy McVeigh and the bombing of the federal building in Oklahoma City in 1995 that killed 168 people and injured almost 700 others. McVeigh stated his motivation was to liberate America from the tyranny of its government. Any attempt to feed this kind of paranoia should be repudiated.

Rather than attempt to vilify the people entrusted with carrying out the laws and programs that Congress establishes, leaders should praise, or at least recognize, the hard and sometimes thankless work performed by federal employees. These are the people who deliver taxpayers' Social Security checks, inspect for safety the food we eat and the water we drink. They care for our veterans and maintain equipment for our troops. These proud and patriotic civil servants patrol our borders and ensure the safety of our skies and seas. Unjustified criticism and political rhetoric aimed at career federal workers only serves to hurt and undermine the work of those who are doing a good job, day in and day out.

I have often heard it said that the government should be run "more like a business." Without debating that notion, I will tell you that very few business leaders make it a point to publicly criticize and denigrate their own workforce. Just the opposite is true.

If Congress is serious about improving government agency performance, it will consider federal workers as an asset to be developed and fostered, not as a "whipping post" for the various policy differences that may exist among the political leadership of this country. Already federal workers have contributed over \$182 billion to deficit reduction during the past 8 years. Employee pay adjustments during this period have been very small (and in quite a few years there were no adjustments at all), and inflation-adjusted federal employee compensation has actually decreased. Rather than continuing to punish and vilify federal workers, we ask that Congress consider giving

agencies and supervisors appropriate tools to reward high performers. Freezes in pay, promotions and awards, and decreases in benefits whether directly or through more employee cost-sharing, do nothing to improve quality.

A BETTER WAY FORWARD

History is replete with examples of public service corrupted by unfettered, politically-based employment decisions. That's why we continue to support a merit-based civil service system with appropriate due process, and checks and balances to ensure that both hiring and firing decisions be merit-based, and subject to meaningful review.

AFGE strongly supports improvements in agency performance management systems, such as the Defense Department's New Beginnings approach. We look forward to working with lawmakers and others to see this carried-out. AFGE also supports better training of both supervisors and employees so that clear expectations are established, performance is measurable, and appropriate steps are taken to either remedy performance problems, or to remove the small number of poor performers from the workplace. AFGE also recommends that Congress focus more on empowering and improving the quality of the workplace for the 99% of all federal employees who perform well. While we understand the need to deal with the 1% who may be problem performers, we must not allow the other 99% to be tarred and feathered with the same brush. Improving the lot of the 99% will further reduce the influence and tolerance for the 1% to remain employees. This starts with more proactive management.

AFGE will vigorously oppose the various iterations of "at will" employment being offered by some in the House. Such a system and its corrupting influences will destroy the professional apolitical civil service and return the country to the days of the "spoils system" of government employment.

CONCLUSION

Attacks on government employees and the civil service in general may make for good politics, but they make for bad government. AFGE agrees that dealing with the very small number of problem employees is essential to sound public administration. At the same time, we must remember, and acknowledge, that the vast majority of federal employees perform well, and that agency systems and the laws and regulations governing employee performance are well-thought-out.

The issue is not whether the laws or regulations governing the civil service are adequate, but whether agencies, including managers and supervisors (and the political supervisors of career supervisors) have the training and will to implement current rules effectively. On this issue, and the important issue of recognizing the good work of the vast majority of federal employees, we are eager to work with you. Due process for civil servants provides accountability for both managers and political appointees and is a cornerstone of our system of democracy and public administration.

Thank you for your time and consideration and I will be happy to answer any questions you may have.



AFGE National President J. David Cox Sr.



Jeffrey David Cox Sr. is National President of the American Federation of Government Employees, which is the largest union representing federal and D.C. government employees. Cox was elected president in August 2012, at AFGE's 39th National Convention in Las Vegas. He was re-elected to another three-year term in August 2015, at AFGE's 40th National Convention in Orlando.

As National President, Cox has invested heavily in growing union membership both within AFGE and among the labor movement as a whole. AFGE has boosted its membership by more than 90,000 employees since Cox first was elected to national office in 2006.

In October 2015, AFGE topped 300,000 active members for the first time in modern history – a remarkable feat in the face of hiring freezes, budget cuts, and continual attacks on the pay and benefits of government workers.

Under Cox's leadership, AFGE has developed a strategic plan to chart the union's direction for the next decade. The plan, called Big Enough to Win, is organized around four key strategies: Organizing and Growth, Legislative Mobilization, Political Strength, and Creating Strong Effective Locals.

As a nationally recognized labor leader, Cox was appointed by President Obama to serve on the Federal Salary Council and the Federal Prevailing Wage Council. He is a member of the AFL-CIO Executive Council and Vice President of the North Carolina State AFL-CIO, serving in the latter position since 1993. Cox was unanimously elected chairman of the Executive Committee of the Department for Professional Employees (DPE), AFL-CIO. He also chairs the AFL-CIO's Union Veterans Council, which seeks to help veterans with employment opportunities through the VA and in the building trades.

Cox is the proud recipient of numerous awards honoring his commitment to the labor movement:

- The Yitzhak Rabin Public Service Award, American Friends of the Yitzhak Rabin Center, 2012;
- At the River I Stand Award, AFL-CIO, 2013;
- Martin Luther King Jr./the Rev. Jesse L. Jackson Labor Leader Award, Rainbow/PUSH Coalition, 2013;
- Labor Award, National Action Network, 2014;
- Peggy Browning Award for Social Justice Advocacy, Peggy Browning Foundation, 2014.

Cox began his career in healthcare in 1970. In 1983, he became a registered nurse and started a public-sector career with the VA that lasted until September 2006 when he became AFGE National Secretary-Treasurer.

A native of North Carolina, Cox is a graduate of North Carolina's Rowan-Cabarrus Community College and a former member of its board of trustees. He also attended Gardner Webb University in Boiling Springs, N.C.