U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

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The Honorable John Hoeven
Chairman
Committee on Indian Affairs
United States Senate
Washington, DC 20510

The Honorable Tom Udall
Vice Chairman
Committee on Indian Affairs
United States Senate
Washington, DC 20510

Dear Chairman Hoeven and Senator Udall:

We write to provide our views on S. 1250, the "Restoring Accountability in the Indian Health Service Act of 2017." The Department of Justice wishes to notify Congress of certain constitutional concerns raised by the bill and recommend ways to address those concerns.

1. Appeal of Removal of IHS Employees to the MSPB (Section 106, adding 25 U.S.C. § 606)

Recommended change: Permit employees of the Indian Health Service ("IHS") to appeal removals to the full Merit Systems Protection Board ("MSPB"), not just to an MSPB administrative law judge ("ALJ").

Explanation: Section 106 would add a new 25 U.S.C. § 606, authorizing expedited removal of IHS employees. The Secretary of Health and Human Services ("HHS"), acting through the Director of IHS, would be authorized to "remove an employee of the [IHS] if the Secretary determines that the performance or misconduct of the employee warrants removal." S. 1250, sec. 106, § 606(b)(1). Upon such a determination, the Secretary could remove the employee entirely from the civil service, transfer the employee (if he or she is a member of the Senior Executive Service) to a General Schedule position at any grade, or (if he or she is a manager or supervisor) reduce the employee in grade. *Id.* § 606(b)(2). An IHS employee could appeal any of these personnel actions to the MSPB within seven days, *id.* § 606(e), but the MSPB would be required to refer the appeal to an ALJ, *id.* § 606(f)(1)(A), and the decision of the ALJ on the appeal would be "final" and "not subject . . . to any further administrative appeal," *id.* § 606(f)(2).

These provisions are unconstitutional for the same reason that led the Department recently to decline to defend 38 U.S.C. § 713 against constitutional challenge. *See* Letter for Paul Ryan, Speaker, U.S. House of Representatives, from Loretta E. Lynch, Attorney General, *Re:* Helman v. Department of Veterans Affairs, *No. 15-3086 (Fed. Cir.)* (May 31, 2016), https://www.justice.gov/oip/foia-library/osg-530d-letters/5-31-2016/download. Section 713 authorized MSPB administrative judges to exercise final authority to review certain personnel decisions by the Secretary of Veterans Affairs. The Federal Circuit agreed with the United States that the administrative judges could not exercise that kind of power without being properly appointed as Officers of the United States within the meaning of the Appointments Clause. *See Helman v. Dep't of Veterans Affairs*, 856 F.3d 920, 929–30 (Fed. Cir. 2017).

Only properly appointed officers of the United States may exercise "significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). The authority granted to ALJs by this bill is of that magnitude because it affords them final, unreviewable authority to remove, transfer, or demote tenure-protected federal employees. If those ALJs were "inferior officers," Congress could provide for their proper appointment by vesting the appointment authority in the President, a court of law, or a head of a department, U.S. Const. art. II, § 2, cl. 2, which could include the MSPB. We understand, however, that the MSPB does not directly employ or appoint any ALJs of its own but instead uses ALJs from other agencies, some of which are not appointed via any of those means. *See* MSPB, *Organization Functions & Delegations of Authority* 5 (Apr. 2011); *see also* OPM, *Administrative Law Judges: ALJs by Agency* (Dec. 2016), https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency (reporting that MSPB employs zero ALJs). ALJs who are not officers could may not constitutionally exercise the review authority in proposed 25 U.S.C. § 606.

Compounding the constitutional problem is that these ALJs may well be not simply acting as de facto inferior officers, but rather as de facto principal officers, who under the Appointments Clause may constitutionally be appointed only by the President with the advice and consent of the Senate. The ALJs would be tenure-protected and would have unreviewable and final authority to overturn a decision by the HHS Secretary, a principal officer. *See Secretary of Education Review of Administrative Law Judge Decisions*, 15 Op. O.L.C. 8, 14 (1991) ("An ALJ whose decision could not be reviewed by the Secretary . . . would appear to be acting as a principal officer of the United States."); *cf. Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1339 (D.C. Cir. 2012) (holding that copyright royalty judges who had the authority to enter final, unreviewable royalty decisions and who could be removed only for cause were functioning as principal officers in violation of the Appointments Clause). Any MSPB ALJ who exercised the review function in proposed 25 U.S.C. § 606 would thus likely have to be considered a principal officer and would need to be appointed by the President with the advice and consent of the Senate.

A final constitutional problem is that the bill would unduly interfere with the President's constitutional authority to supervise the execution of the laws because the ALJs would be insulated by two layers of removal protection. Members of the MSPB "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. § 1202(d),

and ALJs can generally be removed only "for good cause," *id.* § 7521(a). As the Supreme Court has made clear, this kind of "multilevel protection from removal" by the President impairs the President's authority under the Take Care Clause to "oversee the faithfulness of the officers who execute" federal laws. *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 484 (2010). In *Free Enterprise Fund*, the Supreme Court invalidated "for cause" removal limitations on members of the Public Company Accounting Oversight Board appointed by the Securities and Exchange Commission, whose members could be removed only for cause. Here, MSPB ALJs would be in the same position.

For all these reasons, we recommend that an IHS employee removed by the Secretary be permitted to appeal an MSPB ALJ's decision to the full MSPB. This change would parallel the remedy adopted by the court of appeals in *Helman*.

2. Finality of Decision to Remove IHS Employee if MSPB ALJ Does Not Rule on Appeal Within 21 Days (Section 106, adding 25 U.S.C. § 606(f)(3)(A))

Recommended change: Consider eliminating proposed 25 U.S.C. § 606(f)(3)(A) or change it so that the employee has the right to waive judicial review by an ALJ and proceed immediately to district-court review.

Explanation: If an IHS employee were to appeal a removal decision under proposed 25 U.S.C. § 606(e), the MSPB ALJ would be required to reach a decision on the appeal within 21 days. S. 1250, sec. 106, § 606(f)(1)(B)(ii). If the ALJ did not issue a decision within 21 days, "the personnel action" of the HHS Secretary "shall be treated as final," *id.* § 606(f)(3)(A), and the MSPB would be required to issue a report to Congress explaining why a decision was not issued in accordance with the expedited appeal requirement, *id.* § 606(f)(3). Proposed section 606(f)(3)(A) might be challenged on equal protection grounds.

In concurring opinions in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), six justices agreed that a state commission had violated equal protection principles by applying a 120-day deadline for the commission to act on pending employment discrimination claims, on pain of forfeiture of the claims—effectively creating an arbitrary and unjustified distinction between those employees whose claims were timely processed and those employees whose claims were not (and who therefore forfeited their claims). *See id.* at 442 (separate opinion of Blackmun, J., joined by Brennan, Marshall, and O'Connor, JJ.); *id.* at 442–44 (Powell, J., concurring in the judgment, joined by Rehnquist, J.). The Supreme Court has also held that, even when a right of judicial appeal is not constitutionally compelled, the right to appeal "cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsay v. Normet*, 405 U.S. 56, 77 (1972); *see also Griffin v. Illinois*, 351 U.S. 12, 18 (1956). The statute here, though distinguishable from the one at issue in *Logan*, might be subject to challenge on similar equal protection grounds.

To be sure, the 21-day deadline at issue here, unlike in *Logan*, does not extinguish the employee's claim entirely. It merely renders the Secretary's decision final and therefore suitable for immediate judicial review. The rationality of the 21-day deadline thus might be defended on the ground that it is designed to expedite the employee's opportunity to seek judicial review of

the adverse employment action. That rationale, however, would appear equally to be advanced by granting the employee an option to seek judicial review after 21 days of inaction by an ALJ, rather than simply terminating the ALJ review process after 21 days.

We therefore recommend that section 606(f)(3)(A) be eliminated or revised to permit the employee the option of waiving ALJ review and proceeding immediately to MSPB or district-court review if the ALJ does not issue a decision within 21 days.

3. Rights of IHS Employees to Contact Congress with Information About Job Responsibilities (Section 201(b)(2))

Recommended change: Delete section 201(b)(2).

Explanation: Section 201 would require the HHS Secretary, acting through the Director of the IHS, to provide each IHS employee with a memorandum of notice of the employee's right to petition Congress under 5 U.S.C. § 7211. S. 1250, sec. 201(b). The memorandum would be required to include the following statement:

> It is a violation of section 7211 of title 5, United States Code, for any Federal agency or employee to require a Federal employee to seek approval, guidance, or any other form of input prior to contacting Congress with information, even if that information is in relation to the job responsibilities of the employee. A Federal employee found to have interfered with or denied the right of another Federal employee under such section shall be subject to an adverse action described in paragraphs (1) through (5) of section 7512 of title 5, United States Code, including a suspension for more than 14 days without pay.

Id. sec. 201(b)(2). Section 7211 is a codification of the Lloyd-LaFollette Act, Pub. L. No. 62-336, § 6, 37 Stat. 539, 555 (1912), which was recodified at 5 U.S.C. § 7211 as part of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, sec. 703(a)(3). It states: "The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." 5 U.S.C. § 7211.

It is the longstanding position of the Executive Branch, however, that the Lloyd-LaFollette Act and similar appropriations riders do not prevent agencies from supervising their employees and, where necessary, preventing them from disclosing information protected by executive privilege. *See Authority of Agency Officials to Prohibit Employees From Providing Information to Congress*, 28 Op. O.L.C. 79, 80–82 (2004) (recounting history of this position). "[U]nder separation of powers principles, Congress may not bypass the procedures the President establishes to authorize the disclosure to Congress of classified and other privileged information by vesting lower-level employees with a right to disclose such information to Congress without authorization." *Id.* at 80. Because the statement of employees' right to petition Congress that section 201 would require the HHS Secretary to provide to each IHS employee does not recognize the authority of agency officials to supervise and approve their employees' disclosure of information, it misstates the law and would mislead IHS employees about their legal rights.

We therefore recommend that section 201(b)(2) be deleted.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that, from the standpoint of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

Samuel R. Ramer

Samuel R. Ramer
Acting Assistant Attorney General