



Public Employees for Environmental Responsibility

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August 2, 2017

U.S. Office of Personnel Management [OPM]
Theodore Roosevelt Federal Building
1900 E Street, NW
Washington, DC 20415-0001

RE: PEER Comments on OPM proposed Administrative Leave, Investigative Leave, Notice Leave, and Weather and Safety Leave Proposed Rule [Docket ID: OPM-2017-0005-0001]

On behalf of Public Employees for Environmental Responsibility (PEER), I am submitting the below comments on OPM's Administrative Leave, Investigative Leave, Notice Leave, and Weather and Safety Leave Proposed Rule.

These proposed regulations are supposed to implement Section 1138 of the 2017 National Defense Authorization Act which enacted the Administrative Leave Act of 2016. By its terms, this law was designed to curb federal agency abuse of administrative leave, which Congress deemed "has exceeded reasonable amounts." The Act declares –

“data show that there are too many examples of employees placed in administrative leave for [six] months or longer, leaving the employees without any available recourse...”

The thrust of our comments is that OPM's proposed regulations do not curb these ongoing abuses because they contain loopholes, lack recourse for victimized employees, and rely upon agency self-policing.

Specific Comments:

1. Unlimited “Notice Leave” Is a Gaping Loophole

Following its statutory direction, the regulations would supplement administrative leave with two other types of leave: investigative and notice leave. The latter covers what the proposed regulations call the “notice period” defined as –

“...a period beginning on the date on which an employee is provided notice, as required under law, of a proposed adverse action against the employee and ending –

- (1) On the effective date of the adverse action; or
- (2) On the date on which the agency notifies the employee that no adverse action will be taken.”

This open-ended period could be weeks, months, years, even decades. PEER has represented clients who were noticed with proposed terminations, but the agency did not act on those proposals for years. In one case, the employee had languished on administrative leave for nearly three years. In that case, the agency acted only after an article in *The Washington Post* described the excessive leave. Had there not have been publicity, this employee may well still have been on administrative leave for several more years, until his retirement.

In PEER’s experience, employees are left in lengthy leave-limbos because agency management finds the employee inconvenient, an irritant, or a political threat but lacks grounds to justify removing him or her. Making an unjustifiable removal proposal followed by imposing indefinite leave allows the agency to “disappear” the targeted employee without an ounce of due process or procedural protection.

If these regulations are adopted as written, agencies can, and most likely will, take abusive cases of excessive administrative leave and instead place that employee on open-ended notice leave.

2. No Recourse for Employee Subjected to Excessive Leave

While in the cases of administrative and investigative leave the proposed regulations posit relatively concrete limits, they contain no means for enforcing those limits.

In the case of investigative leave, the proposed regulations provide:

“...placement on investigative leave under this subpart for a period of 70 workdays or more shall be considered a personnel action for purposes of the Office of Special Counsel in applying the prohibited personnel practices provisions at 5 U.S.C. 2302 (b)(8) or (9) [the Whistleblower Protection Act].”

This provision is both puzzling and largely ineffectual.

It is puzzling in that it only applies to investigative leave but does not cover excessive administrative leave.

It is ineffectual in that, absent an independent whistleblower claim, the Office of Special Counsel (OSC) would not have jurisdiction to act. Thus, for an employee subjected to excessive investigative leave because he or she was politically inconvenient or doing legitimate work that is potentially embarrassing to agency management, this provision conveys no protection whatsoever.

Conversely, if the person had a whistleblower claim, retaliatory investigations are already prohibited as part of the current prohibited personnel action of “any other significant change in duties, responsibilities, or working conditions.” If the person can already make an OSC

complaint against the investigation itself, it adds little meaningful protection to throw in excessive investigative leave.

3. Reporting Requirement Is Toothless

The proposed regulations require agencies only to report on their use of administrative leave, and not investigative or notice leave.

In addition, even these limited reports are to be submitted every five years. Instead, agencies should be required to maintain real time, current tallies of all types of paid leave available on its website for all to see, rather than buried in obscure, long, after-the-fact reports.

4. No Punishment for Managers Who Violate Leave Limits

In our experience, agency managers abuse administrative leave, in part, because there is no “down side” for them, as there are no adverse career consequences. That incentive for impunity remains intact under these proposed regulations.

These managers are cheating both the taxpayer and their own agency by directing that human resources are wasted. Further, excessive leave damages the targeted employee’s professional prospects and reputation. Yet under OPM’s proposal, miscreant managers are not even identified, let alone subject to discipline.

In short, OPM’s approach relies upon the agencies to self-police against a practice that Congress felt compelled to legislate against because of continued widespread abuse. If OPM adopts its proposed feckless approach, it will invite further Congressional action to ensure that its intent is finally carried out.

5. OPM Irresponsibly Washes Its Hands

These proposed regulations merely direct agencies to adopt their own rules. OPM makes no provision for ensuring that agencies adopt their own rules or that their rules are consistent with the OPM regulations.

And, OPM seeks no role for itself in policing against abuse of paid leave. In response to a PEER complaint filed on behalf of an employee placed on open-ended administrative leave for unspecified reasons, OPM replied in a letter dated December 1, 2015 signed by Timothy Curry, Deputy Associate Director for Partnership and Labor Relations in which he stated:

“OPM guidance advises agencies to limit the approval of administrative leave...[but] OPM has no oversight authority concerning how and when agencies grant excused absence or administrative leave for their employees.”

Mr. Curry referred us to OSC and the Inspector general – neither of which have oversight authority to end unjustified or excessive administrative leave.

PEER suggests that the Office of Personnel Management assert some management responsibilities for redressing abuse of public servants and the taxpayer as it is so directed by Congress.