

SENIOR EXECUTIVE SERVICE ACCOUNTABILITY ACT

SEPTEMBER 16, 2014.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. ISSA, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 5169]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 5169) to amend title 5, United States Code, to enhance accountability within the Senior Executive Service, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

The Senior Executive Service Accountability Act, H.R. 5169, brings needed accountability to the federal government's executive leadership corps by providing employing agencies additional tools to address instances where senior government officials are engaging in behavior contrary to the principles of public service.

BACKGROUND AND NEED FOR LEGISLATION

The Oversight and Government Reform Committee has discovered high-ranking government leaders engaged in gross mismanagement and misconduct.

In February 2012, the Committee began investigating allegations that the Internal Revenue Service inappropriately scrutinized certain applicants seeking tax-exempt status. On May 12, 2013, the Treasury Inspector General for Tax Administration released a report that found that the Exempt Organizations (EO) division of the IRS inappropriately targeted "Tea Party" and other conservative applicants for tax-exempt status and subjected them to heightened scrutiny.¹ This additional scrutiny resulted in extended delays that, in most cases, sidelined applicants during the 2012 election cycle, in spite of their Constitutional right to participate. Meanwhile, the majority of liberal and left-leaning applicants won approval.² Documents and information obtained by the Committee show that Lois G. Lerner, the now-retired Director of IRS Exempt Organizations, was extensively involved in targeting conservative-oriented tax-exempt applicants for inappropriate scrutiny. The Committee's investigation of Ms. Lerner found that she led efforts to scrutinize conservative groups while working to maintain a veneer of objective enforcement.³

In April 2012, the General Services Administration (GSA) Office of Inspector General (OIG) released a report on the GSA 2010 Western Regions Conference held at a Las Vegas resort.⁴ The OIG found GSA spending on conference planning excessive, wasteful, and in some cases impermissible; GSA wasted taxpayer dollars and failed to follow contracting regulations in many of the procurements associated with the Western Regional Conference (WRC), GSA incurred impermissible and questionable miscellaneous expenses; and GSA's approach to the conference indicates that minimizing expenses was not a goal.⁵ A Senior Executive Service employee, Jeff Neely, directed those planning the conference to make it "over the top."⁶ Mr. Neely engaged in an indefensible pattern of misconduct, including repeatedly violating federal travel and procurement rules, held lavish parties in luxury hotel suites, and allowed his wife and other nongovernment officials to partici-

¹Treasury Inspector Gen. for Tax Admin., *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 24, 2013).

²Gregory Korte, *IRS Approved Liberal Groups while Tea Party in Limbo*, USA Today, May 15, 2013.

³H. Comm. on Oversight and Gov't Reform, Staff Report, *Lois Lerner's Involvement in the IRS Targeting of Tax-Exempt Organizations*, (March 11, 2014).

⁴General Services Admin. Inspector Gen., *General Services Administration Public Buildings Service 2010 Western Regions Conference* (Apr. 2, 2012).

⁵*Id.* at 1–2.

⁶*Id.* at 13.

pate in some of these events at taxpayers' expense. Mr. Neely was aware that his actions were inappropriate.⁷

In response, H.R. 5169 helps ensure Senior Executive Service employees are held accountable for their work on behalf of the American people. The bill eliminates the provision under current law that allows Senior Executive Service employees demoted for underperformance to retain their executive salary. As a result, executives downgraded based upon performance will be paid the salary of the position to which they are assigned. H.R. 5169 extends the probationary period of executive leaders by an additional year, providing agencies additional time to ensure newly appointed officials are qualified for their assigned role. The type of work expected of Senior Executive Service employees is arguably more complex and warrants a longer probationary period. H.R. 5169 makes executive leaders subject to suspensions of two weeks or less, under the same conditions as front line workers, and also makes clear executives are held accountable for conduct contrary to the efficiency of federal service. Both changes provide additional tools for agencies to use when addressing issues of executive misconduct and bring needed equity to the disciplinary system for the federal workforce.

SECTION-BY-SECTION

Section 1. Short title

The short title of the bill is the "Senior Executive Service Accountability Act."

Section 2. Biennial justification of positions

Requires agencies to provide written justification to the Office of Personnel Management (OPM) for each requested SES position, including existing positions.

Section 3. Extension of probationary period

Extends the probationary period for individuals appointed to the Senior Executive Service from one year to two years.

Section 4. Modification of pay retention for senior executive service members removed for underperformance

Eliminates the provision in current law which allows an individual removed from the Senior Executive Service for performance to retain his or her SES pay if appointed to a civil service position.

Section 5. Requirement that performance requirements be established in advance

Senior Executive Service employees must receive performance requirements in writing no less than 30 days before the start of an appraisal period.

Section 6. Amendments to adverse action provisions with respect to career appointees in the senior executive service

Makes Senior Executive Service employees subject to suspensions (without pay) of less than two weeks, in the same manner as other

⁷H. Comm. on Oversight & Gov't Reform, Addressing GSA's Culture of Wasteful Spending (April 16, 2012).

civil service workers. Gives agencies authority to remove Senior Executive Service employees for “such cause as would promote the efficiency of the service”—the standard that currently applies to other civil service workers. Reduces the requirement for agencies to give senior executives advance notice of termination from a minimum of 30 days to not less than 15 days.

Section 7. Mandatory leave for career appointees in the senior executive service

Gives agency heads authority to place on mandatory annual leave Senior Executive Service employees facing removal for misconduct, and prohibits the accumulation of additional annual leave during this period. Annual leave would be restored to the Senior Executive Service employee if the agency, Merit Systems Protection Board, or court found in the employee’s favor during the appeals process.

EXPLANATION OF AMENDMENTS

No amendments were adopted to H.R. 5169.

COMMITTEE CONSIDERATION

On July 24, 2014, the Committee met in open session and ordered reported favorably the bill, H.R. 5169, by voice vote, a quorum being present.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill eliminates the provision under current law that allows Senior Executive Service employees demoted for underperformance to retain their executive salary. Legislative branch employees and their families, to the extent that they are otherwise eligible for the benefits provided by this legislation, have equal access to its benefits.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee’s oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee’s performance goals and objectives are reflected in the descriptive portions of this report.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 5169 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section

21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

H.R. 5169 requires the Office of Personnel Management to promulgate regulations for agencies to use when exercising the discretionary authority in section 7 to place a Senior Executive Service employee on mandatory leave for misconduct, neglect of duty, malfeasance, or such cause as would promote the efficiency of the service. The bill requires the regulations to be issued not later than 6 months after the date of enactment of H.R. 5169.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

H.R. 5169 does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 5169. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 5169 from the Director of Congressional Budget Office:

SEPTEMBER 8, 2014.

Hon. DARRELL ISSA,
Chairman, Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5169, the Senior Executive Service Accountability Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Dan Ready.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 5169—Senior Executive Service Accountability Act

CBO estimates that implementing H.R. 5169 would not have a significant impact on federal spending. Enacting the bill could affect revenues; therefore, pay-as-you-go procedures apply. However, CBO estimates that any such effects would be insignificant over the next ten years.

H.R. 5169 would make several changes to the conditions of employment for members of the Senior Executive Service (SES). In particular, the bill would change the procedures for removing SES employees for misconduct or underperformance, and modify the rules for providing salary and paid time off for those removed. For example, H.R. 5169 would eliminate the ability of former SES members removed for underperformance to keep their SES pay if demoted to a civil service position (under current law, they are allowed to continue being paid at the SES level).

Implementing this bill would lead to lower discretionary spending for salaries and expenses for those removed from the SES for misconduct or underperformance. CBO estimates that the spending decrease would be small because so few employees would likely be affected. According to the Office of Personnel Management, only 5 SES employees over the past five years would have met the criteria for salary adjustments set forth in this bill. Because some affected employees would receive a reduced salary, their retirement contributions would also be slightly reduced, resulting in a reduction in revenues. CBO estimates that those reductions also would not be significant.

H.R. 5169 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Dan Ready. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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PART III—EMPLOYEES

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SUBPART B—EMPLOYMENT AND RETENTION

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CHAPTER 31—AUTHORITY FOR EMPLOYMENT

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SUBCHAPTER II—THE SENIOR EXECUTIVE SERVICE

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§ 3133. Authorization of positions; authority for appointment

(a) During each even-numbered calendar year, each agency shall—

(1) * * *

(2) submit to the Office of Personnel Management a written request for a specific number of Senior Executive Service positions, *with a justification for each position (by title and organizational location) and the specific result expected from each position, including the impact of such result on the agency mission*, for each of such fiscal years.

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CHAPTER 33—EXAMINATION, SELECTION, AND PLACEMENT

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SUBCHAPTER VIII—APPOINTMENT, REASSIGNMENT, TRANSFER, AND DEVELOPMENT IN THE SENIOR EXECUTIVE SERVICE

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§ 3393. Career appointments

(a) * * *

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(d) An individual's initial appointment as a career appointee shall become final only after the individual has served a **[1-year]** 2-year probationary period as a career appointee.

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CHAPTER 35—RETENTION PREFERENCE, VOLUNTARY SEPARATION INCENTIVE PAYMENTS, RESTORATION, AND REEMPLOYMENT

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SUBCHAPTER V—REMOVAL, REINSTATEMENT, AND GUARANTEED PLACEMENT IN THE SENIOR EXECUTIVE SERVICE

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§ 3592. Removal from the Senior Executive Service

(a) Except as provided in subsection (b) of this section, a career appointee may be removed from the Senior Executive Service to a civil service position outside of the Senior Executive Service—

(1) during the ~~1-year~~ 2-year period of probation under section 3393(d) of this title, or

* * * * *

§ 3593. Reinstatement in the Senior Executive Service

(a) A former career appointee may be reinstated, without regard to section 3393(b) and (c) of this title, to any Senior Executive Service position for which the appointee is qualified if—

(1) * * *

(2) the appointee left the Senior Executive Service for reasons other than ~~misconduct,~~ *such cause as would promote the efficiency of the service, misconduct*, neglect of duty, malfeasance, or less than fully successful executive performance as determined under subchapter II of chapter 43.

(b) A career appointee who is appointed by the President to any civil service position outside the Senior Executive Service and who leaves the position for reasons other than ~~misconduct,~~ *such cause as would promote the efficiency of the service, misconduct*, neglect of duty, or malfeasance shall be entitled to be placed in the Senior Executive Service if the appointee applies to the Office of Personnel Management within 90 days after separation from the Presidential appointment.

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§ 3594. Guaranteed placement in other personnel systems

(a) A career appointee who was appointed from a civil service position held under a career or career-conditional appointment (or an appointment of equivalent tenure, as determined by the Office of Personnel Management) and who, for reasons other than ~~misconduct,~~ *such cause as would promote the efficiency of the service, misconduct*, neglect of duty, or malfeasance, is removed from the Senior Executive Service during the probationary period under section 3393(d) of this title, shall be entitled to be placed in a civil service position (other than a Senior Executive Service position) in any agency.

* * * * *

(c)(1) For purposes of subsections (a) and (b) of this section—

(A) * * *

(B) any career appointee placed under subsection (a) or (b) of this section shall be entitled to receive basic pay at the highest of—

(i) the rate of basic pay in effect for the position in which placed;

【(ii) the rate of basic pay in effect at the time of the placement for the position the career appointee held in the civil service immediately before being appointed to the Senior Executive Service; or

【(iii) the rate of basic pay in effect for the career appointee immediately before being placed under subsection (a) or (b) of this section; and】

(B)(i) any career appointee placed under subsection (a) or (b)(2) of this section shall be entitled to receive basic pay at the highest of—

(I) the rate of basic pay in effect for the position in which placed;

(II) the rate of basic pay in effect at the time of the placement for the position the career appointee held in the civil service immediately before being appointed to the Senior Executive Service; or

(III) the rate of basic pay in effect for the career appointee immediately before being placed under subsection (a) or (b) of this section; and

(ii) any career appointee placed under subsection (b)(1) of this section shall be entitled to receive basic pay at the rate of basic pay in effect for the position in which placed; and

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SUBPART C—EMPLOYEE PERFORMANCE

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CHAPTER 43—PERFORMANCE APPRAISAL

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SUBCHAPTER II—PERFORMANCE APPRAISAL IN THE SENIOR EXECUTIVE SERVICE

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§ 4312. Senior Executive Service performance appraisal systems

(a) * * *

(b) Each performance appraisal system established by an agency under subsection (a) of this section shall provide—

(1) that, 【on or】 *not later than 30 calendar days* before the beginning of each rating period, performance requirements for each senior executive in the agency are established in consultation with the senior executive and communicated *in writing* to the senior executive;

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SUBPART E—ATTENDANCE AND LEAVE

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CHAPTER 63—LEAVE

SUBCHAPTER I—ANNUAL AND SICK LEAVE

Sec.
6301. Definitions.

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SUBCHAPTER II—OTHER PAID LEAVE

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6329. *Mandatory leave for Senior Executive Service career appointees.*

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SUBCHAPTER II—OTHER PAID LEAVE

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§6329. *Mandatory leave for Senior Executive Service career appointees*

(a) *In this section—*

(1) *the term “employee” means—*

(A) *a career appointee in the Senior Executive Service who—*

(i) *has completed the probationary period prescribed under section 3393(d) of this title; or*

(ii) *was covered by the provisions of subchapter II of chapter 75 of this title immediately before appointment to the Senior Executive Service; and*

(B) *who has received written notice of removal from the civil service under subchapter V of chapter 75 of this title; and*

(2) *the term “mandatory leave” means, with respect to an employee, an absence with pay but without duty during which such employee—*

(A) *shall be charged accrued annual leave for the period of such absence; and*

(B) *may not accrue any annual leave under section 6303 for the period of such absence.*

(b) *Under regulations prescribed by the Office of Personnel Management, an agency may place an employee on mandatory leave for misconduct, neglect of duty, malfeasance, or such cause as would promote the efficiency of the service.*

(c) *If an agency determines that an employee should be placed on mandatory leave under subsection (b), such leave shall begin no earlier than the date on which the employee received written notice of a removal under subchapter V of chapter 75.*

(d) *If a final order or decision is issued in favor of such employee with respect to removal under subchapter V of chapter 75 by the agency, the Merit Systems Protection Board, or the United States Court of Appeals for the Federal Circuit, any annual leave that is charged to an employee by operation of this section shall be restored to the applicable leave account of such employee.*

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SUBPART F—LABOR-MANAGEMENT AND EMPLOYEE RELATIONS

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CHAPTER 75—ADVERSE ACTIONS

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SUBCHAPTER I—SUSPENSION FOR 14 DAYS OR LESS

§ 7501. Definitions

For the purpose of this subchapter—

[(1) “employee” means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less; and]

(1) “employee” means—

(A) *an individual in the competitive service who is not serving a probationary period or trial period under an initial appointment or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less; or*

(B) *a career appointee in the Senior Executive Service who—*

(i) has completed the probationary period prescribed under section 3393(d); or

(ii) was covered by the provisions of subchapter II of this chapter immediately before appointment to the Senior Executive Service; and

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SUBCHAPTER V—SENIOR EXECUTIVE SERVICE

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§ 7543. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for [misconduct,] *such cause as would promote the efficiency of the service, misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.*

(b) An employee against whom an action covered by this subchapter is proposed is entitled to—

(1) at least [30] *15 days’ advance written notice, unless there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment can be imposed, stating specific reasons for the proposed action;*

* * * * *

MINORITY VIEWS

Committee Democrats oppose H.R. 5169, the Senior Executive Service Accountability Act, which would make it easier for agencies to suspend or remove members of the Senior Executive Service (SES) at the expense of due process and at the risk of politicizing the federal government's senior executive corps.

This legislation was intended to address recent allegations of misconduct and management failures by senior executives at various agencies by bringing the federal government's career senior executives closer to becoming "at will" employees. H.R. 5169 would: extend the current probationary period from one year to two years; authorize agencies to suspend senior executives for less than 14 days without third-party review; shorten the timeframe for agencies to give advanced written notice to SES employees of adverse actions from 30 days to 15 days; and allow agencies to place SES employees on mandatory leave for misconduct, neglect of duty, malfeasance, or such cause as would promote the efficiency of the service.

The bill's provisions regarding the extension of the probationary period and the authorization of suspensions for less than 14 days would allow agency heads and political appointees to terminate or suspend SES members for politically-motivated reasons and without third-party review. This could result in the politicization of career senior executives, which would undermine the protections against political patronage and corruption provided under the Pendleton Civil Service Reform Act of 1883.¹

The legislation also raises due process concerns. The provision that would shorten the advance notice period given to SES employees of adverse actions may negatively impact the ability of employees to respond to agency charges and proposed actions.

In addition, "mandatory leave" as defined in the legislation may be interpreted by the courts and the Merit Systems Protections Board (MSPB) as involuntary or enforced leave requiring procedural due process. The Federal Circuit Court of Appeals and MSPB have held that the imposition of involuntary or enforced sick or annual leave constitutes a constructive suspension requiring agencies to provide employees with procedural rights such as notice, an opportunity to respond to agency decisions, and appeal rights prior to placement on leave status.²

During the Committee's consideration of H.R. 5169, Representative Norton offered an amendment that would have struck the provision shortening the notice period for adverse actions from 30 days to 15 days. Representative Lynch offered an amendment that

¹Ch. 27, 22 Stat. 403 (1883).

²*Pittman v. Merit Systems Protection Board*, 832 F.2d 598 (Fed. Cir. 1987); *Abbott v. United States Postal Service*, 2014 MSPB 47(2014); *Zygas v. United States Postal Service*, 2011 MSPB 55 (2011).

would have struck the provision giving agencies authority to place senior executives on mandatory leave.

Representatives Norton and Lynch withdrew their amendments based on assurances from the Chairman that he would work to address their concerns prior to House consideration of the bill.

ELIJAH E. CUMMINGS.

