

OFFICIAL PERSONNEL FILE ENHANCEMENT ACT

MARCH 16, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

[To accompany H.R. 4360]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 4360) to amend title 5, United States Code, to provide that a Federal employee who leaves Government service while under personnel investigation shall have a notation of any adverse findings under such investigation placed in such employee's official personnel file, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

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The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 2, line 4, strike “31” and insert “33”.

Page 2, line 9, strike “individual” and insert “employee”.

Page 2, strike lines 15 through 20 and insert the following: “with respect to such employee pursuant to such investigation, make a permanent notation in the employee’s official personnel record file. The head shall make such notation not later than 40 days after the date of the resolution of such investigation.”.

Page 2, strike lines 21 through 23 and insert the following (and redesignate the subsequent subsection accordingly):

“(b) Prior to making a permanent notation in an employee’s official personnel record file under subsection (a), the head of the agency shall—

“(1) notify the employee in writing within 5 days of the resolution of the investigation and provide such employee a copy of the adverse finding and any supporting documentation;

“(2) provide the employee with a reasonable time, but not less than 30 days, to respond in writing and to furnish affidavits and other documentary evidence to show why the adverse finding was unfounded (a summary of which shall be included in any notation made to the employee’s personnel file under subsection (d)); and

“(3) provide a written decision and the specific reasons therefore to the employee at the earliest practicable date.

“(c) An employee is entitled to appeal the decision of the head of the agency to make a permanent notation under subsection (a) to the Merit Systems Protection Board under section 7701.

“(d)(1) If an employee files an appeal with the Merit Systems Protection Board pursuant to subsection (c), the agency head shall make a notation in the employee’s official personnel record file indicating that an appeal disputing the notation is pending not later than 2 weeks after the date on which such appeal was filed.

“(2) If the head of the agency is the prevailing party on appeal, not later than 2 weeks after the date that the Board issues the appeal decision, the head of the agency shall remove the notation made under paragraph (1) from the employee’s official personnel record file.

“(3) If the employee is the prevailing party on appeal, not later than 2 weeks after the date that the Board issues the appeal decision, the head of the agency shall remove the notation made under paragraph (1) and the notation of an adverse finding made under subsection (a) from the employee’s official personnel record file.”.

Page 2, line 26, insert “and” at the end.

Page 3, line 4, strike “; and” and insert a period.

Page 3, strike lines 5 through 8.

Page 3, line 20, strike “31” and insert “33”.

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 4360, the Official Personnel File Enhancement Act, requires federal agencies to make a notation in a separated employee’s offi-

cial personnel file if that employee resigns in the midst of an investigation that ultimately makes an adverse finding against that employee.

No later than 40 days after the resolution of a personnel investigation regarding a former employee resulting in an adverse finding, an agency head must make a notation in the former employee's personnel file. Prior to making such notation, and within 5 days after the resolution of the investigation, the agency head must give the former employee written notice of the finding and an opportunity to respond. The former employee may appeal the agency head's written decision to the Merit Systems Protection Board (MSPB). If the former employee prevails at the MSPB, the notation is removed. If the former employee loses the appeal, the notation remains and becomes a permanent part of the former employee's personnel file.

BACKGROUND AND NEED FOR LEGISLATION

Currently, a federal employee who is under investigation for misconduct or performance issues may resign from employment in the midst of an investigation and may largely escape formal discipline or accountability (including any notation of such issues in his or her official personnel file), should the investigation result in an adverse finding against the separated employee. Individuals who resign in such circumstances could then seek employment with another federal agency, which would not necessarily have knowledge of the adverse finding.

For example, an August 2015 Investigative Report by the Office of the Inspector General (OIG) for the Department of Commerce concerning the United States Patent and Trademark Office (USPTO) detailed how employees are able to take advantage of the current disciplinary process.¹ In this case, the OIG determined that a USPTO patent examiner (Examiner A) had committed at least 730 hours of time and attendance abuse in fiscal year 2014, about 43 percent of the hours the individual certified that year.² This resulted in roughly \$25,500 in payments for unworked time.³ As part of its investigation, the OIG scheduled an interview with this patent examiner.⁴ However, Examiner A resigned "immediately prior to a scheduled interview," and the Inspector General report explains that, "[i]n an IM to a co-worker on the day of his resignation, Examiner A stated that the Patent Office Professional Association (POPA), the union representing patent examiners, advised him that he could keep his official personnel file free of any derogatory information if he resigned before the OIG interview."⁵

In another instance, an employee was found to have lied about his education credentials, falsifying university transcripts as well as official records that he submitted to the Department of the Interior.⁶ After receiving a complaint that the employee may have falsified his educational history, the OIG began investigating the alle-

¹ U.S. Dep't of Commerce Office of Inspector General, *Investigative Report, U.S. Patent and Trademark Office, Time and Attendance Abuse by Patent Examiner A* (Aug. 2015) (15-0076).

² *Id.*, at 2.

³ *Id.*

⁴ *Id.*, at 3.

⁵ *Id.*

⁶ U.S. Dep't of the Interior Office of Inspector General, *Report of Investigation*, at 1 (Nov. 26, 2013) (PI-PI-13-0457-I).

gation.⁷ The individual subsequently admitted to falsifying the information and resigned before the conclusion of the investigation.⁸ After his resignation, the individual applied to and was hired by the Census Bureau.⁹

While circumstances such as these are rare, it is important to close loopholes that allow individuals to take advantage of the federal government’s highly structured investigatory and disciplinary process to escape responsibility for their actions. To correct this problem, H.R. 4360 requires that a notation be made in an employee’s official personnel file if the employee resigns while under investigation and the investigation subsequently results in an adverse finding against the employee. This will help ensure that other agencies will be aware of the finding should the employee apply for federal employment at a later time. Importantly, H.R. 4360 provides separated employees the opportunity to respond to an investigation’s findings before the agency head makes a final determination on the adverse finding. Further, the bill also affords appeal rights to a separated employee to guard against any unfair or inaccurate notation in the former employee’s personnel file.

LEGISLATIVE HISTORY

H.R. 4360, the Official Personnel File Enhancement Act, was introduced by Rep. Jason Chaffetz (R-UT) on January 11, 2016, and referred to the Committee on Oversight and Government Reform.

On January 12, 2016, the Committee on Oversight and Government Reform ordered H.R. 4360 favorably reported, as amended by an amendment offered by Congressman Gerald Connolly (D-VA).

SECTION-BY-SECTION

Section 1. Short title

Designates the short title of the bill as the “Official Personnel File Enhancement Act”.

Section 2. Record of Investigation of Personnel Action in Separated Employee’s Personnel File

Amends title 5, United States Code, to require the head of an agency to make a permanent notation in an individual’s personnel file if that individual, as a member of the competitive or excepted service, resigns from government employment while the subject of a personnel investigation, and an adverse finding against the individual is ultimately made as a result of the investigation. The notation must be made within 14 days of the finding.

A personnel investigation includes an Inspector General investigation, an adverse personnel action, and any other type of investigation relating to poor performance or misconduct.

This amendment will apply to all members of the competitive service and excepted service who leave the service after the date of enactment of this Act.

⁷*Id.*, at 2.

⁸*Id.*

⁹Letter from John H. Thompson, Director, U.S. Census Bureau, to Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov’t Reform (July 14, 2015).

Section 3. Review of Official Personnel File of Former Federal Employees before Rehiring

Further amends title 5 to require agencies to review and consider the information within the official personnel record file of any former federal government employee who is a candidate for a position with that agency within the competitive or excepted service.

Defines “former Government employee” as an individual whose most recent government position was within the competitive or excepted service, prior to becoming a candidate.

This amendment will apply to any former government employee appointed or reinstated on or after the date that is 180 days after enactment of this Act.

EXPLANATION OF AMENDMENTS

During Full Committee consideration of the bill, Congressman Gerald Connolly (D–VA) offered an amendment to give a separated employee an opportunity to respond to adverse findings as a result of an investigation.

Under the amendment, the agency head is provided 40 days to make a determination to include a notation within the separated employee’s personnel file. During this time, the agency head must provide the former employee written notice of the finding and 30 days to respond. If the agency upholds an adverse finding, the separated employee may appeal the decision to the MSPB and a notation is made of the finding in the employee’s official personnel file. Should the individual choose to appeal to MSPB, a notation of the appeal will be made in his/her file. If the individual wins the appeal, the notation regarding the adverse finding and subsequent appeal will be removed from the file. If the individual loses the appeal, only the notation regarding the appeal will be removed from the file.

The amendment offered by Rep. Connolly was adopted by voice vote.

COMMITTEE CONSIDERATION

On January 12, 2016, the Committee met in open session and ordered reported favorably the bill, H.R. 4360, as amended, by voice vote, a quorum being present.

ROLL CALL VOTES

No roll call votes were requested or conducted during Full Committee consideration of H.R. 4360.

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 amends title 5, United States Code, to provide that a Federal employee who leaves Government service while under personnel investigation shall have a notation of any adverse findings under such investigation placed in such employee’s official personnel file. As such, it does not relate to employment or access to public services and accommodations.

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 goal or objective of the bill is to provide that a Federal employee who leaves Government service while under personnel investigation shall have a notation of any adverse findings under such investigation placed in such employee's official personnel file.

DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill 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

The Committee estimates that enacting this bill does not direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

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

This bill 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)(1) 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 this bill. However, clause 3(d)(2)(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 of 1974.

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 this bill from the Director of Congressional Budget Office:

H.R. 4360—Official Personnel File Enhancement Act

H.R. 4360 would require federal agencies to include any findings of a government investigation of misconduct in an employee's personnel file. The legislation specifically applies to employees who leave government service before such an investigation is completed.

Under current law, such investigations end once an employee leaves federal service. Based on information from the Merit System Protection Board and human resource professionals, CBO expects that completing all misconduct investigations and updating personnel files as required under H.R. 4360 would lead to a small increase in administrative costs at federal agencies. Based on information from federal agencies, CBO expects that most costs to conduct investigations of employee misconduct are usually incurred before such employees leave federal service. Based on prior experience and information from federal agencies, CBO also expects that very few former employees would appeal the findings of their completed investigations under H.R. 4360. Thus, CBO estimates that any additional administrative costs to the federal government to implement H.R. 4360 would not be significant.

Enacting H.R. 4360 could affect direct spending by some agencies (such as the Tennessee Valley Authority) because they are authorized to use receipts from the sale of goods, fees, and other collections to cover their operating costs; therefore, pay-as-you-go procedures apply. Because most of those agencies can cover additional costs by making adjustments to the amounts collected, CBO estimates that any net changes in direct spending by those agencies would be negligible. Enacting the bill would not affect revenues.

CBO estimates that enacting H.R. 4360 would not increase direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 4360 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by H. Samuel Papenfuss, 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 (new matter is printed in italics and 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 33—EXAMINATION, SELECTION, AND
PLACEMENT**

SUBCHAPTER I—EXAMINATION, CERTIFICATION, AND APPOINTMENT

Sec.

3301. Civil service; generally.

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3322. *Voluntary separation before resolution of personnel investigation.*

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3330e. *Review of official personnel file of former Federal employees before rehiring.*

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SUBCHAPTER I—EXAMINATION, CERTIFICATION, AND
APPOINTMENT

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**§ 3322. *Voluntary separation before resolution of personnel
investigation***

(a) *With respect to any employee occupying a position in the competitive service or the excepted service who is the subject of a personnel investigation and resigns from Government employment prior to the resolution of such investigation, the head of the agency from which such employee so resigns shall, if an adverse finding was made with respect to such employee pursuant to such investigation, make a permanent notation in the employee's official personnel record file. The head shall make such notation not later than 40 days after the date of the resolution of such investigation.*

(b) *Prior to making a permanent notation in an employee's official personnel record file under subsection (a), the head of the agency shall—*

(1) *notify the employee in writing within 5 days of the resolution of the investigation and provide such employee a copy of the adverse finding and any supporting documentation;*

(2) *provide the employee with a reasonable time, but not less than 30 days, to respond in writing and to furnish affidavits and other documentary evidence to show why the adverse finding was unfounded (a summary of which shall be included in any notation made to the employee's personnel file under subsection (d)); and*

(3) provide a written decision and the specific reasons therefore to the employee at the earliest practicable date.

(c) An employee is entitled to appeal the decision of the head of the agency to make a permanent notation under subsection (a) to the Merit Systems Protection Board under section 7701.

(d)(1) If an employee files an appeal with the Merit Systems Protection Board pursuant to subsection (c), the agency head shall make a notation in the employee's official personnel record file indicating that an appeal disputing the notation is pending not later than 2 weeks after the date on which such appeal was filed.

(2) If the head of the agency is the prevailing party on appeal, not later than 2 weeks after the date that the Board issues the appeal decision, the head of the agency shall remove the notation made under paragraph (1) from the employee's official personnel record file.

(3) If the employee is the prevailing party on appeal, not later than 2 weeks after the date that the Board issues the appeal decision, the head of the agency shall remove the notation made under paragraph (1) and the notation of an adverse finding made under subsection (a) from the employee's official personnel record file.

(e) In this section, the term "personnel investigation" includes—

(1) an investigation by an Inspector General; and

(2) an adverse personnel action as a result of performance, misconduct, or for such cause as will promote the efficiency of the service under chapter 43 or chapter 75.

* * * * *

§3330e. Review of official personnel file of former Federal employees before rehiring

(a) If a former Government employee is a candidate for a position within the competitive service or the excepted service, prior to making any determination with respect to the appointment or reinstatement of such employee to such position, the appointing authority shall review and consider the information relating to such employee's former period or periods of service in such employee's official personnel record file.

(b) In subsection (a), the term "former Government employee" means an individual whose most recent position with the Government prior to becoming a candidate as described under subsection (a) was within the competitive service or the excepted service.

(c) The Office of Personnel Management shall prescribe regulations to carry out the purpose of this section.

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