Senior Executives Association

the voice of career federal executives since 1980

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January 11, 2016

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Elijah Cummings
Ranking Member
Committee on Oversight and Government Reform
2471 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Chaffetz, Ranking Member Cummings, and Members of the Committee,

As you know, the Senior Executives Association (SEA) represents the interests of career federal executives in the Senior Executive Service (SES), and those in Senior Level (SL), Scientific and Professional (ST), and equivalent positions. I am writing today to convey SEA's perspective regarding legislation that will be marked up by the committee on January 12.

H.R. 4358, the Senior Executive Service Accountability Act

SEA has long supported efforts to hold employees accountable at all levels of government and believes there are ways to strengthen the application of existing tools and authorities. However, the policies and tools are oftentimes already in place – it is ensuring they are understood and used appropriately that should be the focus of oversight and reform efforts. While SEA is amenable to some of the provisions in this legislation, we have moderate to severe concerns with certain portions of the bill. For these reasons, SEA asks you to oppose this legislation.

The following is a listing of SEA's concerns and perspective, section by section.

Sec. 2 – Biennial Justification of Positions

Currently by statute (5 U.S.C. §3133) agencies must examine their needs for the number of SES positions and submit the request to the Office of Personnel Management (OPM). OPM, in consultation with the Office of Management and Budget (OMB), allocates the number of SES positions that each agency may fill. This position allocation is not based on specific jobs and titles, but rather on predicted needs of the agency. Agencies sometimes have more slots than they fill to allow for flexibility in managing their SES corps based off of current as well as unforeseeable needs. Requiring agencies to link slot requests to specific titles would reduce an agencies' ability to manage their workforce, especially since slotting is done on a two year cycle.

Furthermore, adding a requirement for results and impact of jobs seems out of place in this section and should be part of an agency's performance and organizational management systems. It is unclear what OPM would do with this information since the agency is not in a position to assess the results justification nor do they have the capacity to deal with this requirement. Workforce assessment and planning should be a routine function of agencies and be part of their overall workforce management and the request for slots should then be informed by that assessment. It is unclear that this provision

would achieve that goal; it would, instead, create a huge paperwork burden on agencies – which would be required to document over 7,000 career SES slots – and on OPM, which would be required to review same.

Sec. 3 – Extension of Probationary Period

SEA has heard nothing from agencies or from Senior Executives to suggest that an extension of the SES probationary period is necessary or useful, given the high barrier to entry into the SES corps. To the extent that the existing probationary period is not being fully utilized, which research by the Merit Systems Protection Board (MPSB) indicates it is not, that is an issue of training leadership to use the authority, as is the case for workforce accountability authorities for performance and misconduct.

That said, SEA is supportive of extending the probationary period for new executives to two years. While we believe one year is sufficient, if the period is extended to two years, it should provide flexibility to certify at one year, at a year and a half or at 2 years. This would enable certifying a good performer after one year but also provide additional time for those who might need further development and assessment.

The comments provided here relative to extension of the SES probationary period should also be considered in reference to **H.R.3023 - To amend title 5, United States Code, to modify probationary periods with respect to positions within the competitive service and the Senior Executive Service, and for other purposes.** A more expansive perspective on H.R. 3023 of SEA, along with our colleagues in the Government Managers Coalition (GMC), is being transmitted separately to the committee.

Sec. 4 – Modification of Pay Retention

When Senior Executives are removed for performance, the agency may terminate them except that some executives "fall-back" to a GS-15 position if the Senior Executive came into the SES from the civil service.

The current statute is very similar to this provision, except that this provision removes the ability of an agency to decide whether to set the base pay for the Senior Executive at the rate of basic pay for the GS job to which the SES is moving or the pay the Senior Executive was receiving just prior to entering the SES.

It appears that this provision is a response to the belief that Senior Executives are retaining their SES level salary when they return to a GS position. Senior Executives usually do not retain their full prior pay. This process is governed by OPM regulations. Therefore, it is unclear to SEA what issue this provision is intending to rectify.

Sec. 5 – Advanced Establishment of Performance Requirements

SEA applauds this provision to ensure that performance requirements for senior executives are timely communicated, in writing, to begin performance appraisal cycles. As documented in a research report released in May 2014 by SEA entitled "Deteriorating Pay for Performance Adversely Impacting Morale and Retention Within the Federal Career Senior Executive and Professionals Corps," this is a real and legitimate issue facing many executives, particularly those overseen by political appointees who often do not take their role in the performance management system seriously.

Sec. 6 – Amendments to Adverse Action Provisions

Currently, when agencies take an adverse action against a Senior Executive they may suspend them for more than 14 days or terminate them. Senior Executives have not been subject to less than fourteen day suspensions, unlike their GS counterparts, due to the opportunity such suspensions would provide for politically motivated actions. Many Senior Executives report directly to political appointees. There has often been tension between the career SES and political appointees, especially after a Presidential transition when some career executives are seen as having been too helpful to or supportive of the prior Administration even though they are expected to do their very best for every Administration.

Allowing political appointees the ability to pressure career Senior Executives with the threat of a one to 14 day suspension – which has no third party review – opens the door to allow politically motivated adverse actions regardless of whether they are reasonable or not. Also, it is not in the government's best interests to have career executives occupying extraordinarily important managerial positions to be summarily removed for short periods of time from their jobs – with adverse impacts on day to day operations. Furthermore, adding the broad category of "efficiency of the service" is unnecessary.

Senior Executives are routinely held accountable under current statutes which provide for major disciplinary actions from longer term suspensions up to removal. To the extent that they are not, it is not because tools do not exist to hold employees accountable; rather, it appears that they are not being used either because the Senior Executive isn't engaging in misconduct or because political leadership isn't willing to use the tools. It does not make a difference how many tools you add if leadership is not trained and willing to use them.

Sec. 7 – Mandatory Leave

SEA has serious concerns about the creation of this new leave category. It appears to be intended to allow agencies to force an employee to use his or her annual leave rather than using the current practice of placing an employee on administrative leave, which is problematic in and of itself. Not only does SEA question the constitutionality of this prevision, we question its necessity.

Unless there is a good reason to remove an employee from the workplace during adverse action proceedings, SEA believes that employees should remain in a duty status, either in their jobs or in comparable positions, and should only be removed from duty status in the case that the employees' presence poses a threat to themselves or others or jeopardizes a legitimate government interest.

Although this provision does allow for a restoration of annual leave if an employee is found not to have engaged in conduct necessitating removal, this provision appears to be yet another attempt to punish employees before they have been given a chance to state their case or ultimately found guilty.

Sec. 8 – Expedited Removal for Performance or Misconduct

SEA's strongest concerns with this legislation pertain to this section.

The legislative language employed in this section has been lifted from Section 707 of the Veterans Access, Choice, and Accountability Act of 2014 (P.L. 113-146) and applied to the entire career SES corps covered by Title 5. The VA SES provision included in the Choice Act is currently subject to a constitutional

challenge at the United States Court of Appeals for the Federal Circuit in *Helman v. Dept. of Veterans Affairs*, Case No. 15-3086 (Fed. Cir. 2015), and SEA cautions the committee in pursuing legislation that is most likely unconstitutional.

Senior Executives are already the easiest type of career federal employees to terminate or discipline, and failure of agencies to do so once again reflects a failure on behalf of agency leadership to understand and employ tools already established in law and which have been determined to be fair and constitutional.

Sec. 9 – Mandatory Reassignment

SEA is not aware of any major company that simply rotates its top level employees every five years, just because. Therefore, it is unclear why this legislation contains this provision.

While it is true that developmental assignments and rotations can bolster an executive's skill set, worldview, and interpersonal connections, and the President acknowledged this fact with provisions included in his recent Executive Order on the SES, agencies are ultimately in the best position to allocate their personnel resources and determine when reassignments would benefit their operations and the executive's professional development. Given that agencies are already largely failing to adhere to the requirements Congress set in the Federal Workforce Flexibility Act of 2004 (P.L. 108-411) to conduct comprehensive personnel management and succession planning activities, which would logically include rotation and reassignment of personnel as necessary, it is unclear why this provision is necessary. Additionally, rotating and reassigning executives is not an activity without costs to the agency or to the executive, and it is unclear if that fact has been considered in the drafting of this section.

Concluding Thoughts on the SES Accountability Act

This legislation appears on its face to reform the SES. However, it does absolutely nothing to address the growing risk-reward imbalance to serving in the SES, and several of the provisions are troubling and appear to be a solution in search of a problem. Rather than adding and changing the current laws, SEA encourages the committee to work with stakeholders to ensure that existing laws are being used and applied appropriately. This could be accomplished through mandatory supervisor training, onboarding for political appointees, and the creation of a straightforward guide to holding employees accountable.

SEA has documented many of the challenges facing the SES in reports produced in recent years (Taking the Helm: Attracting the Next Generation of Federal Leaders; Recruiting Qualified Career Senior Leadership: How Are We Doing?; At Will Employment in the Career Senior Executive Service, as has the Merit Systems Protection Board (MSPB) in its December 2015 report on training and development for the SES, and other organizations, such as the Partnership for Public Service. SEA is eager to work with members of the committee on real, and much needed, comprehensive SES reform, and in the meantime looks forward to working with members of the committee to address the concerns we have with the legislation as currently drafted.

H.R. ____, the Administrative Leave Reform Act

Abuse of administrative leave, especially in the case of investigations related to misconduct and poor performance, is a real problem in the government and SEA commends the committee for attempting to address this issue. The Government Accountability Office (GAO) last year with their report (GAO-15-79),

and Senator Grassley this year in a report prepared by his Senate Judiciary Committee staff, have documented this issue well. For well over a year SEA has engaged with the staff of Senators Grassley and Tester to craft meaningful administrative leave reform legislation, and encourages the committee to examine that legislation rather than pursuing the bill considered at markup, which is far less comprehensive and likely an insufficient remedy to the issue, in part because administrative leave currently does not exist in statute and this bill does not address that fact.

H.R.____, the Official Personnel File Enhancement Act

While SEA understands the genesis of this legislation – frustration over federal employees who resign pending an investigation – we have strong concerns about this bill from a due process and fundamental fairness standpoint. Existing procedure already provides that if an employee resigns prior to their agency taking an action against them, their resignation or retirement in their official personnel file will be notated with ILIA (In Lieu of Impending Action). Additionally, there may be other avenues to accomplish a presumed goal of this legislation – that being ensuring agencies are not rehiring employees with a problem past without their knowledge. Last May, SEA proposed to then-OPM Director Katherine Archuleta that the Declaration for Federal Employment (OPM Optional Form 306) be made mandatory. We also suggested enhancements to the form and for its application in the hiring process. A copy of that proposal has been included for the committee's reference.

The construction of this legislation also raises many questions – Will the investigation be completed, and how-so; What are the employee's and agency's rights and obligations regarding an investigation that takes place once an employee leaves federal service; What happens to the notation if no adverse finding is determined – that we would like the committee to address.

Conclusion

I appreciate the opportunity to provide the Association's perspective on the legislative proposals that will be discussed on January 12. Please reach out to SEA Legislative Director Jason Briefel (jbriefel@shawbransford.com; 202-463-8400) if we can be of further assistance.

Sincerely,

Timothy M. Dirks

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