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Concerns have been expressed that many Government employees are not productive and that nothing can be done about it. Federal agencies are empowered to fire, suspend, or demote employees in accordance with established laws, regulations, and procedures. Findings/Conclusions: The Civil Service Commissioners, top agency officials, leaders of Federal employee unions, and Federal employees hold widely divergent views on the difficulty of removing nonproductive personnel. Most agree that a Federal job is not assured for a lifetime and that discharging an employee should occur only if the person does not respond to counseling, has skill deficiencies which are not correctable, and cannot be suitably reassigned. Shortcomings in the Federal personnel system which contribute to difficulty in firing unsuitable employees are: a rating system that gives about 95% of employees the same satisfactory rating in spite of wide variations in performance, inadequate or nonexistent performance standards and measurement systems, lack of incentives for managers and supervisors to deal with problem employees, lack of probationary periods for tenured employees promoted to supervisory positions, and eligibility for within-grade pay increases based on longevity. Also, agencies are deterred from removing employees because of perceptions of difficulties, fear of reprisals, and the complexity of removal procedures. The Civil Service Reform Act of 1978 recommends changes which should simplify the identification and, if necessary, the removal of nonproductive employees while adequately protecting their

rights. Recommendations: The Congress should: abolish present requirements for summary adjective ratings; establish the requirement that job-related performance appraisals be used as a basis for personnel action, including separating employees; require a probationary period for employees in initial managerial or supervisory assignments; and establish simplified procedures for taking actions based on unacceptable performance. It should also act to develop a method for granting within-grade salary increases based on merit. (H75)

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BY THE COMPTROLLER GENERAL

# Report To The Congress

## OF THE UNITED STATES

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### **A Management Concern: How To Deal With The Nonproductive Federal Employee**

Unsatisfactory performance is both a private and public sector concern.

In the Federal Government, an agency should be able to discharge nonproductive personnel if repeated efforts to improve their performance fail. Managers and supervisors, however, perceive firing as a difficult, costly, cumbersome task, filled with legalisms and intricate procedures.

GAO found that there is a basis for this perception, and recommends that the removal process be improved.



FPCD-78-71  
AUGUST 10, 1978



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

B-150411

To the President of the Senate and the  
Speaker of the House of Representatives

This report is one of several responses to a request by the Chairwoman, Subcommittee on Manpower and Housing, House Committee on Government Operations, that we review aspects of the Federal personnel system. It discusses the difficulty of removing nonproductive employees and recommends improving the process.

As requested by the Chairwoman's office, we did not obtain formal comments from the Civil Service Commission or other Federal departments and agencies mentioned in the report. However, we discussed our results with agency officials, including the Chairman of the Civil Service Commission, and we considered their comments in preparing the report.

A handwritten signature in black ink, reading "Luther B. Stacks". The signature is written in a cursive, flowing style.

Comptroller General  
of the United States

COMPTROLLER GENERAL'S  
REPORT TO THE CONGRESS

A MANAGEMENT CONCERN: HOW TO  
DEAL WITH THE NONPRODUCTIVE  
FEDERAL EMPLOYEE

D I G E S T

Although the great majority of public servants are conscientious, nonproductive employees give the entire Federal work force a negative image. Newspaper, radio, and television report stories of loafing, red tape, and cavalier treatment of the public. The many employees who routinely do a competent job are seldom heard about. There is no consensus or accurate data on the severity of the problem; an impression, however, both in and out of Government, is that Federal employees have an inordinate amount of job security.

Unsatisfactory performance is not solely a concern of the Government; frequent consumer complaints indicate that inefficient employees are a concern in the private sector, with managers and unions giving protection to employees who might otherwise be dismissed.

The Civil Service Commissioners, top agency officials, leaders of Federal employee unions, and Federal employees hold widely divergent views on the difficulty of removing nonproductive personnel. Most agree, however, that a Federal job is not a lifetime sinecure; that discharging an employee should only occur after the agency decides that the person does not respond to counseling; skill deficiencies are not correctable; and no suitable reassignments are available.

While Federal employees can be fired, it is both perceived as and actually is a difficult process. Major shortcomings in the Federal personnel system which contribute to the problems are:

--A rating system that gives about 95 percent of the employees the same satisfactory

rating for not only fully satisfactory and superior performance, but also for marginal performance. This neither lets employees know the true quality of their work nor gives management information on which to base personnel actions.

--Performance standards and measurement systems are generally inadequate or nonexistent. Measure of quantity, quality, and timing and the level of achievement as well as honest appraisals are needed to identify marginal or unsatisfactory performance, to serve as a basis for assistance, and then, if necessary, to take removal action.

--Incentives are lacking for managers and supervisors to deal with problem employees.

--Tenured employees promoted to supervisory positions do not serve new probationary or temporary trial periods. Although they may be unsuited for the added responsibilities, they cannot be returned to their previous jobs or be demoted without following adverse action procedures.

--Eligibility for within-grade pay increases are based on longevity rather than merit.

Agencies are often deterred from removing chronically nonproductive employees because:

--Supervisors and managers perceive firing as a difficult chore which often lacks top-level management support. People at all levels fear reprisals from employees who may file adverse action appeals, discrimination complaints, and lawsuits.

--Removal procedures are complex, especially the detail and specificity required in stating reasons for removal; the process is also lengthy and time consuming.

Supervisors and managers instead tend to use an informal system of working around, isolating, reassigning, sending to long-term training, or even promoting unsatisfactory employees.

The President's Personnel Management Project, after a comprehensive study of the Federal personnel systems, reported many of the above problems and suggested changes in the way Federal employees are hired, fired, rewarded, and evaluated.

The resulting Civil Service Reform Act of 1978 (H.R. 11280 and S. 2640) recommends changes which should simplify the identification and, if necessary, the removal of nonproductive employees while affording them adequate protection of their rights.

New laws and regulations will not automatically insure that tough personnel decisions will be properly made or that the work force will be more productive. Changes, however, particularly in areas where impetus has been lacking and support is needed, should encourage managers and improve personnel actions.

#### RECOMMENDATION TO THE CONGRESS

GAO recommends that the Congress:

- Abolish present requirements for summary adjective ratings of "outstanding," "satisfactory," and "unsatisfactory."
- Establish the requirement that job-related performance appraisals be used as a basis for developing, rewarding, assigning, demoting, promoting, retaining, or separating employees.
- Require a probationary period for employees serving in their initial managerial or supervisory assignment.
- Establish new and simplified procedures for taking actions based on unacceptable performance.

These provisions are found in the Civil Service Reform Act of 1978.

GAO also recommends that the Congress act to develop a method for granting within-grade salary increases based on merit.

#### AGENCY COMMENTS

As requested by the Subcommittee, GAO did not obtain written agency comments. GAO did, however, informally discuss its findings with the Civil Service Commissioners and has included their comments where appropriate.



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## ABBREVIATIONS

ARB	Appeals Review Board
CSC	Civil Service Commission
FEAA	Federal Employees Appeals Authority
GAO	General Accounting Office
GS	general schedule
ESC	Executive Seminar Center

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## CHAPTER 1

### INTRODUCTION

In investigations of Federal agencies, the Subcommittee on Manpower and Housing, House Committee on Government Operations, consistently heard complaints that a large percentage of Government employees were not performing satisfactorily, yet nothing could be done about it. On the other hand, according to the Subcommittee, some Civil Service Commission (CSC) and other agency personnel specialists contended that removing nonproductive employees is possible but that many managers and supervisors do not know or follow the regulations or do not have the "guts" to honestly face employees' performance problems. The Chairwoman of the Subcommittee requested that we review the procedures and examine both managerial perceptions and the actual difficulty of firing nonproductive employees.

The Congress, the administration, the public, and Federal managers are concerned that nonproductive employees limit Government responsiveness and effectiveness. President Carter, in introducing the Civil Service Reform Act of 1978 (H.R. 11280 and S. 2640), 1/ said:

"The sad fact is that it is easier to promote and transfer incompetent employees than to get rid of them. It may take as long as three years merely to fire someone for just cause, and at the same time the protection of legitimate rights is a costly and time-consuming process for the employee.

"You cannot run a farm that way, you cannot run a factory that way, and you certainly cannot run a government that way."

In a recent speech, the Chairman, CSC, said:

"\* \* \* the present system imposes on \* \* \* hard-working bureaucrats an array of rules and restrictions that minimize rather than maximize their contributions. You cannot maintain high morale where effort is insufficiently supported; you cannot achieve high productivity where accountability is unaccompanied by management

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1/Throughout this report, the bill will be referred to as the reform bill.

tools; you cannot pay enough attention to innovation and service if you are preoccupied with chinking every crack in the system of employee protection.

"We want to make it possible for the vast majority of employees who are productive to be even more productive, unencumbered by the rigidities of the personnel system which now impedes efficiency.

"And, we want to make it possible to improve the work--or discipline those who are not fully capable."

### BASIC LAWS

Since the Federal courts determined that the Government could dismiss employees, various laws have been passed setting the conditions.

--Lloyd-LaFollette Act of 1912 (now enacted with modifications as 5 U.S.C. 7501) stated "That no person in the classified service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service \* \* \*" and the employee must be given a written notice of reasons for the action and then allowed time to answer.

--Veterans Preference Act of 1944 (now enacted in pertinent part as 5 U.S.C. 7512 and 7701) required agencies to provide veteran preference eligible employees 30 days advance written removal notice, stating the reasons, specifically and in detail, and their right to appeal the firings to CSC. Executive Order 10988 in 1962 extended these rights to all competitive service employees and they have been continued under Executive Order 11491 (since amended).

--In 1974 Executive Order 11787 abolished within-agency appeal systems, and the same year CSC Commissioners established the Federal Employee Appeals Authority (FEAA) and the Appeals Review Board (ARB) to replace the CSC Board of Appeals and Review.

### APPEAL PROCESSES

Federal agencies are empowered to fire, suspend, or demote employees. Once an agency notifies an employee of

the proposed removal, the employee is permitted to review the material on which the notice is based and is allowed time in which to reply. The employee may appear before an agency representative but, with a few exceptions, is not entitled to a formal hearing. The dismissal proposal must be reviewed, in the agency, at a higher level than that at which the charges originated. The employee is then entitled to appeal the decision to FEAA, where he is entitled to a hearing if he desires one.

CSC established FEAA and ARB to quickly resolve appeals of adverse actions against employees. The appeal organizations are quasi-independent CSC components, reporting directly to CSC Commissioners.

FEAA has 11 field offices staffed with appeals officers and assistants throughout the United States. Under most circumstances, Federal employees within the competitive service and others covered by veterans preference can appeal their dismissals to FEAA.

Fewer than 5 percent of adverse action appeals decided by FEAA are accepted for review on appeal to ARB in Washington, D.C. ARB is an organizational entity separate from FEAA. ARB may reopen and reconsider an appeal only after FEAA makes a decision and if the agency or the employee can demonstrate

--new and material evidence not previously available,

--that FEAA's decision contained an erroneous interpretation of the law or a misapplication of established policy, or

--that new or unsettled policy questions are involved.

CSC Commissioners, at their discretion, may reopen or reconsider any ARB decision which involves new or unsettled policy questions of an exceptional nature whose significance merits their attention.

#### APPEALS TO FEDERAL COURTS

After exhausting administrative remedies, Federal employees may appeal removals to the Federal courts where review is generally limited to a determination (1) of whether there has been substantial compliance with statutory and regulatory requirements and (2) upon review of the administrative record, of whether the challenged action was supported by substantial evidence in the record and was not arbitrary, capricious, or unreasonable.

## SCOPE OF REVIEW

We reviewed laws, regulations, and procedures for firing Federal civilian employees, focusing primarily on white-collar employees. We interviewed central and field office officials of CSC, ARB, and FEAA and we reviewed FEAA's files.

We discussed firing policies and practices with executives, managers, and personnel officials at the following agencies:

- Railroad Retirement Board
- Veterans Administration.
- Department of Labor.
- Department of Housing and Urban Development.
- Department of Health, Education, and Welfare.
- Internal Revenue Service, Department of the Treasury.

By using a questionnaire and a discussion period, we asked about 400 Federal managers, supervisors, and employees who were attending management courses at the Federal Executive Institute, Executive Seminar Centers (ESCs), and CSC regional training centers for their perceptions of removing unproductive employees and rewarding outstanding employees. 1/ We also interviewed directors and staff members 2/ at ESCs.

We interviewed leaders of the American Federation of Government Employees, National Treasury Employees Union, National Federation of Federal Employees, and the National Association of Supervisors, and reviewed their testimony on the reform bill proposals.

We reviewed President Carter's Federal Personnel Management Project option papers, recommendations, and the resulting reorganization plan and legislative proposal.

This report also uses data and observations from other GAO reports on personnel management problems.

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1/Throughout this report we refer to these Federal managers, supervisors, and employees as "questionnaire respondents." Information from questionnaires on rewarding outstanding employees will be in another GAO report.

2/Throughout this report we refer to directors and staff-members as ESC instructors.

## CHAPTER 2

### ARE NONPRODUCTIVE EMPLOYEES A PROBLEM?

Concern about nonproductive Federal employees is not a new problem, as the following quotation from Congressman Burton French attests:

"\* \* \* assembling many thousands of clerks and other employees, as must be done in the departments, we must have civil service, with all its faults, to prevent still greater wrongs. Under it the large majority of employees are thoroughly high class, but not all. Inefficient employees, like clinkers in a furnace, hamper the work. They are in all departments, killing time, disturbing public business, writing answers to letters that do not answer, stupidly pretending to do work that live employees must do over again or waste their good time coaching the dullards. To get rid of the worthless when once installed is the bane of department heads. We all know of clerks who are shunted from division to division, department to department, because they cannot make good, and chiefs very kindly help them to a transfer rather than make a fight to dismiss them entirely. "Let George do it" is the motto as these Government failures are passed on for another chief to dispose of. I am told that it is almost impossible to get rid of worthless help when once installed."

--Congressional Record, 1919

Unsatisfactory performance is not solely a concern of the Government; frequent consumer complaints indicate that inefficient employees are also a concern in the private sector.

### NUMBER OF POOR PERFORMERS

Few people agree on the number of inefficient Federal employees; department and agency managers estimated percentages from less than 1 to at least 10 percent. One agency personnel director said that the number of inefficient employees never exceeds 1 percent, while another agency personnel officer estimated that such employees make up 5 percent of the work force. Some officials would not guess. Questionnaire

respondents' estimates also varied widely, with a few saying up to half of the employees they supervised were poor performers.

Union officials said there are not enough inefficient Federal employees to cause serious problems—that the widespread notion that Federal workers are nonproductive is a creation of politicians and the media with little basis in fact. They suggested a distinction be made between employees and their supervisors and managers who, employees believe, are often the problem. This view is supported by a recent survey published by the National Center for Productivity and Quality of Working Life which reported that most Government workers think their bosses are incompetent. In our interviews on unsatisfactory performance, "horror stories" about Federal employees ranged from tales about people in the lowest to the highest grades.

Because the exact standards and definitions of inefficient or nonproductive performers vary, some managers and supervisors use those words to describe what others might consider a marginal performer. Many questionnaire respondents suggested that the large number of marginal performers created a more serious problem than the fewer completely nonproductive employees. (See p. 13.)

#### FREQUENCY OF FIRING

CSC officials said that the personnel action codes and standard terms which agencies use to designate the nature of agency removal actions are not exact enough to insure accurate reports. Agencies, according to their choice of codes, may record a firing as a separation for inefficiency, a removal action for misconduct, a termination action for inefficiency, a resignation in lieu of adverse action, or in many other terms. Some employees choose retirement or resignation when they realize they truly are to be fired. CSC is revising codes and instructions for recording personnel actions.

The Bureau of Labor Statistics does not have data on private sector firings. They could not suggest nor could we find a source for comparable statistics. Existing private sector data, as in the Federal personnel information system, combines firings, layoffs, resignations, and retirements.



## PERFORMANCE RATINGS

The performance summary rating, required by law (5 U.S.C. 4304(a)), is intended to identify outstanding and unsatisfactory employees. About 95 percent of employees, however, receive a satisfactory rating which ranges from fully satisfactory and superior to marginal performance.

A recent GAO review <sup>1/</sup> reported that using this single rating does not let employees know the quality of their performance in specific terms or give management enough information on which to base personnel decisions. The review also concluded that the performance rating system is burdened with warning and appeal provisions that defeat timely identification of inefficiency.

The system's lack of credibility was reflected in questionnaires and in discussion with questionnaire respondents when we asked, "If you could accept or reject an employee of your agency, how would past performance ratings affect your decisions?" Very few people said they would rely on them. The most often heard comment was, "Are you kidding?" Typical responses were:

- Satisfactory is meaningless.
- Unsatisfactory would influence me, but these are few and far between and would certainly not be on a form for an employee who was being helped to move.
- Outstanding is so unusual that it would not induce me to hire the person.
- Why would an employee leave a supervisor who would go through all the trouble it takes to give an outstanding rating?

According to Federal officials at various management levels, supervisors are reluctant to subject themselves to the cumbersome paperwork and possible appeals resulting from an unsatisfactory performance rating. The law

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<sup>1/</sup>"Federal Employees Performance Rating Systems Need Fundamental Changes," Mar. 3, 1978 (FPCD-77-80).

(5 U.S.C. 4304(b)) provides that a performance rating of unsatisfactory is a basis for removal from the position in which the performance is unsatisfactory. However, an employee may be rated unsatisfactory only after a 90-day advance warning period and after a reasonable opportunity to demonstrate satisfactory performance. The employee then has the right to appeal the rating to a review board and a right to a hearing before such board. The courts have also held that, in addition to the above actions, an employee may be removed from the service only after adverse action procedures have been followed. Because of these difficult and time-consuming procedures, officials in several major agencies said they openly discourage using the unsatisfactory rating, and they tend to move directly to adverse action proceedings basing the actions on "such cause as will promote the efficiency of the service." However, the officials said this means when the employee has been given satisfactory ratings all along, the required record to support such cause is extremely difficult. Many questionnaire respondents made comments similar to one who wrote:

"In my agency it is very difficult to get people (managers) to 'write up' bad performers. There is a reluctance to give marginal and unsatisfactory ratings. As a result, there has been a build up of 'dead wood' which are now difficult to get rid of. Their seniority and bumping rights also aggravate the problem. It is easier to do nothing than do what is right."

About one-fourth of our questionnaire respondents said they did not give unsatisfactory ratings to employees who should get them. During discussions, some people said they thought the question was self-incriminating so they would not admit improperly rating their employees.

We also asked respondents what would happen if employees in their units got the performance ratings they deserved. Respondents were asked to check as many as were applicable.

--36 percent said nothing would happen since workers in their unit already got the type of performance appraisals they deserved.

--22 percent said a greater percentage would receive special achievement awards.

--22 percent said the amount of paperwork required to justify accurate ratings would adversely affect productivity.

--25 percent said the number of adverse actions appeals would increase considerably.

--13 percent said a number of people in their unit would leave either because they were dismissed or because they chose to work elsewhere.

--23 percent said morale in their unit would increase.

Again, many people told us during a discussion period after the questionnaire had been completed that because they had signed their names, they were reluctant to admit their evaluations were not honest and this fact somewhat affected their responses.

Questionnaire respondents said some civilian offices in the Department of Defense were requiring a bell curve for performance ratings (usually 5 percent unsatisfactory, 5 percent outstanding, and 90 percent satisfactory); for example, the Air Force's "forced distribution system," which is designed to overcome leniency errors. Questions were raised as to whether a required number or percent in each category might be a quota and contrary to CSC regulations.

Both our recommendations and the reform bill propose eliminating summary adjective ratings and requiring agencies to develop performance appraisal systems that would encourage quality performance and enhance productivity. Among others supporting these recommendations are the International Personnel Management Association, the National Civil Service League, and the Program Committee of the Committee for Economic Development.

#### PERFORMANCE STANDARDS

The law (5 U.S.C. 4303) provides that performance requirements or standards be made known to employees and that supervisors measure performance against the standards. The quality, quantity, and timing and the level of achievement that management expects in an individual's work provide information on specific performance areas that need improvement and serve as a basis for remedial action. Personnel specialists say such standards would help employees avoid misunderstanding on what needs to be done, how well, how much, and how fast. And as several managers stressed, "This is not to be confused with being at work on time or always at your desk."

Despite the law and regulations, we found a lack of written performance standards or requirements for Federal

white-collar jobs. The Federal Personnel Management Project also found that performance standards are virtually nonexistent in Government but agreed that they are needed to motivate employees toward high productivity and responsiveness. The reform bill requires agencies to use personnel evaluation systems, based on performance standards, to assign, develop, reward, demote, promote, and separate employees.

About one-fourth of our questionnaire respondents use work standards in assessing performance. More often they use a graphic rating scale in which employees are assigned adjective ratings on a variety of work and personal traits.

Agencies have not developed performance standards for a variety of reasons. A recent GAO review 1/ found that supervisors had not done so because they felt the standards were not required, unnecessary, too difficult, or too time consuming to formulate. In five agencies, we found that every third employee did not clearly understand what acceptable job performance was, and half were never told of their jobs' performance requirements. The difficulty with setting standards in many Federal jobs where the results cannot be counted or accurately measured and where judgment and subjective factors are important was often mentioned as a deterrent.

#### POSITION CLASSIFICATION PROBLEMS

According to the Federal Personnel Management Project report, "the Federal Government is at the end of a quarter century of liberal organization design, exploitive position management and liberal classification interpretations."

A 1975 GAO report 2/ commented on the significant evidence of overgrading and undergrading in CSC's review of classification practices and controls. A recent CSC review found 13 percent of all white-collar positions are misgraded, and the Subcommittee on Investigations, House Committee on Post Office and Civil Service, in its June 1977 report, 3/ estimated that between 50,000 and 100,000 positions are overgraded.

Our 1975 review and the Personnel Management Project also focused on trends toward using higher grade levels to

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1/See footnote, p. 7.

2/"Classification of Federal White-Collar Jobs Should Be Better Controlled," Dec. 4, 1975 (FPCD-75-173).

3/"Downgrading in the Federal Civil Service."

serve as rewards for good performance, to assist in recruiting, and to remain competitive in local job markets. Annual promotion to a certain level is expected without regard to the quality of the employee's work. When performance does not keep up to grade level standards, some employees are assigned less complex duties rather than being subjected to formal removal or demotion process.

### DISINCENTIVES

Individual managers agree that they have a responsibility for the efficient and effective conduct of public business. They are expected to require satisfactory performance and to take responsibility for unpopular actions if employees continue to be unproductive despite efforts to assist them. Executive Seminar Center instructors said management courses stress strong decisionmaking, but managers report feeling victimized by personnel systems which do not provide them with objective performance standards or which deny them support.

The Federal Personnel Management Project report concluded:

"\* \* \* managers lack the tools to effectively manage their organizations. Sensing the weakness of the managers, some employees simply do not produce; others see that there are no penalties for nonproduction and few rewards for high performance. Some employees lose heart and do only what their own pride requires, a level of performance often far below their potential."

Over half of the 400 questionnaire respondents said it was much more likely that chronically poor performers would be transferred to an unsuspecting organization, instead of being dismissed.

A recent GAO study shows that accountability for efficient use of people is obscured under present Federal management practices. Managers generally perceive penalties rather than rewards for efficient performance; for example, a poor manager may get additional and higher graded staff to accomplish his work and then may have his own position upgraded, while a more efficient manager may not be able to justify either additional staff or an upgraded position. Some ESC instructors also said that the longer managers were in grade

or in the same job, the less likely they were to be firm--"One gets tired."

Managers also suggested that step increases which are supposed to be given for "an acceptable level of competence" are seldom based on performance appraisal and are rarely withheld. GAO and other groups have recommended alternatives to the present method of granting within-grade salary increases. In an October 1975 report 1/ we recommended developing a method of granting within-grade salary increases which adequately reflect an individual's contribution to the job and which is integrated with a performance appraisal system. The 1975 report of the President's Panel on Federal Compensation said that historically 98 percent of general schedule employees have received step increases at the time of eligibility and fewer than 2 percent have had the increase withheld for failure to meet the minimum standard. GAO has again recently recommended that eligibility for within grade pay increases be based on merit rather than longevity. 2/

The reform bill would establish an incentive pay system for middle managers and supervisors in the GS-13 through 15 levels with compensation based on performance rather than length of service. The bill would also create a senior executive service for some managers in the GS-16 through executive level IV. Those who opt for inclusion would earn bonuses based on performance. These changes in staffing and pay are expected to increase both managerial accountability and performance.

#### TENURE AFTER INITIAL PROBATIONARY PERIOD

Because supervisory skills are difficult to predict, technical ability and knowledge are often the main criteria for moving a person into a managerial position. A study of 1,200 professional persons in top positions in the Federal service revealed that the professional in a top administrative position is first of all a professional, and only secondarily, if at all, acts as a manager. In spite of this, two-thirds of the professionals were in jobs which required them to supervise other persons.

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1/"Federal White-Collar Pay Systems Need Fundamental Changes," FPCD-76-9, Oct. 30, 1975.

2/"Federal Pay Comparability: Need For Congressional Action," FPCD-78-60 (July 21, 1978).

Under present law, Federal employees who complete a probationary period after initial appointment have tenure in both that job and future Federal positions. People who are promoted or moved to jobs with supervisory duties have, at times, been unsuited for the new responsibilities. Managers have documented cases where skilled individual performers, who moved to new positions lacked both interest and potential as supervisors. To remove a person after such an appointment is difficult and the stigma attached to a removal can jeopardize individual careers.

The proposed reform bill would require a probationary period for initial managerial or supervisory assignments. Those who are not successful or who do not want to stay in the new position can return to their former position or an equivalent position. During the new on-the-job evaluation period, formal appeal protections from removal based on performance are eliminated.

#### MARGINAL PERFORMERS

Agency officials said that marginal performers--those who usually, but not always, fail to meet acceptable standards--present serious problems. A discussion of separations in a recent publication on revitalizing the Federal personnel systems said:

"Even more frustrating is the problem with personnel of marginal adequacy who are advanced by a glacial process permitting those who merely survive to move steadily, if slowly, upward."<sup>1/</sup>

We asked respondents how marginal performers are treated in their agencies.

--77 percent said they are tolerated.

--15 percent said they are neglected.

--15 percent said they are transferred.

--8 percent said they are promoted and moved to new units.

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<sup>1/</sup>"Revitalizing the Federal Personnel System," a statement by the program committee of the Committee for Economic Development.

--7 percent said they are fired.

--46 percent said they are compensated for by other employees.

Comments which reflected opinions expressed during discussion periods were:

--He's just about retired on the job.

--They know just how far to go to keep from being unsatisfactory.

--The marginal employee presents a much greater problem to the manager than extreme cases; we end up living with them rather than fighting a losing battle.

--A major problem in terms of my personal frustration.

ESC instructors said they found managers from small units less tolerant of marginal employees than those from large offices where problems were easier to hide.



### CHAPTER 3

#### IS IT TOO DIFFICULT TO FIRE

#### NONPRODUCTIVE FEDERAL EMPLOYEES?

Dismissal, although often distasteful is an important option in dealing with nonproductive employees. Supreme Court Justice Powell said: "Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." 1/

A recent article in a university law review stated:

"\* \* \* Too great an emphasis on the protection of public employees against government dismissals may reduce the caliber of government employees and thus weaken the ability of government to function intelligently. A bureaucracy so constituted may create a serious threat to the rights of the public at large. The more entrenched the government work force, the less likely it becomes that the public can receive fair and effective treatment from its government." 2/

#### FIRING FEDERAL EMPLOYEES

Federal managers are often reluctant to attempt firing nonproductive employees because of both real and perceived difficulties. They perceive firing as a cumbersome and costly task frequently lacking management support and leading to employee reprisals, such as adverse action appeals and discrimination complaints and lawsuits. The actual procedures are complex and time consuming, especially if the employee appeals the decision.

Not everyone agrees that firing nonproductive employees is difficult. Federal employee union leaders oppose moves to ease removal procedures contending that the current process favors management. They cite what they label as the small percentage (33 percent) of FEAA decisions favoring employees.

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1/Arnett v. Kennedy, 416 U.S. 134 (1974) p. 68.

2/Frug, Gerald E., "Does the Constitution Prevent the Discharge of Civil Service Employees?", University of Pennsylvania Law Review, vol. 124:942, 1976.

A Defense Manpower Commission staff study concluded that managers are not properly using the tools they have to deal with nonproductive employees. Some personnel officers and FEAA and ARB officials say the removal process is not difficult, but the problem is managers inability to document a case and their lack of honesty in facing employees. They stress that the latter will be difficult under any regulations--that it is a human rather than a systemic failure.

#### FIRING PRIVATE SECTOR EMPLOYEES

Some people believe firing is easier in parts of the private sector, yet several large corporations' guidelines for dealing with problem employees state that unsatisfactory performance has always been a difficult problem for industry. At a university seminar on unproductive employees, private sector supervisors also complained of ineffective employees and the difficulty of firing them.

Strong unions also strive to assure job security for members. Although flexibility in removing employees is said to increase as one moves up the corporate scale, some corporations are said to have "gentlemen's agreements," under which executives are never dismissed. The possibility of discrimination appeals to the Equal Employment Opportunity Commission also deter private sector firms from firing employees. Some help comes from the increased use of "outplacement services." An often used forced separation technique--retirement--was retained to allow industry executives to be exempt, under certain conditions, from the removal of mandatory retirement provisions of the Age Discrimination in Employment Act Amendments of 1978.

#### SUPERVISORY PERCEPTIONS

Whether or not firing Federal employees is difficult, many perceive it to be so. More than half of almost 400 questionnaire respondents said that employment protection is too strong; only 10 respondents believed protection was not strong enough.

The Federal Personnel Management Project reported that managers think they are unable to remove employees for poor performance and that they are often reluctant to make even qualitative distinctions among employees. Agency officials, managers, and supervisors expressed the same perceptions and said that when employees recognize these perceptions, they may have lowered incentives, secure in the knowledge that supervisors would rather endure their poor performance than try to dismiss them.

### Fear of reprisal

Many managers and supervisors cited, often in hushed tones, the fear of an equal employment opportunity complaint or lawsuit against them as a deterrent to firing. They expressed reluctance to withhold periodic salary increases, give unsatisfactory performance ratings, or initiate firings because of the career, financial, and legal costs they might incur. Several supervisors in one large agency said:

"Management just doesn't want to take the chance of having any more cases filed against them, so they just ignore discipline or performance problems. They've gone from one extreme to another."

Top agency officials acknowledged that complaints to counter firing are common. In one recent case, an employee, over a 6-year period, consistently used grievances, threats, EEO complaints, and the EEO process to harass supervisors and to coerce them into at least two grade promotions. A U.S. district court judge, in reviewing the case, spoke of this as a vendetta, comprised of intentionally vindictive and abusive actions taken to harass supervisors and the organization, but the knowledge of this 6-year case and similar ones about which both fact and rumors abound, gives rise to managerial and supervisory fears.

### Lack of support

Many supervisors and employees perceive their agencies as nonsupportive should they want to fire someone. The Executive Director of the National Association of Supervisors agreed, saying that middle and top management "lack the guts" to support first-line supervisors in firing actions.

Agency personnel departments are also sometimes reluctant to become involved in removal actions. One agency personnel officer said he was extremely hesitant to ever again involve himself in a removal proceeding because of the amount of time it took and the malicious abuse from the to-be-fired employees. Personnel officers said they often have to bear the brunt of the burden when an action is taken. Supervisors, on the other hand, also reported that they often felt left alone to initiate, document, and carry through the entire process by themselves.

### Intricate procedures

According to CSC regulations, an agency initiating a firing is required to provide the employee

- 30 days advance written notice of proposed removal,
- any and all reasons specifically and in detail,
- all material relied on to support the firing,
- official time to secure affidavits and prepare an answer,
- consideration of the employee's answer,
- a written decision before removal is effected, and
- explicit appeal rights in the decision.

CSC removal procedures are a base on which agencies can add more restrictive procedures to protect employees, either on their own or through collective bargaining agreements. For example, in addition to CSC procedures, supervisors at one agency are allowed to initiate a firing for unsatisfactory work performance only after giving an employee a warning and at least 90 days in which to demonstrate improvement.

#### Specificity

The Veterans Preference Act (5 U.S.C. 7512) requires that reasons for removal be stated specifically and in detail. Officials say charges of misconduct, such as tardiness, fighting, and theft, are not difficult to document in detail, but without performance standards, known and understood by employer and employee, documenting specific acts of inefficiency and keeping a record of warnings, advice, assistance, and opportunities to improve are considered difficult or at times impossible. FEAA reversed the firing of an office manager, for example, partly because the agency did not specifically write instructions on the assignments the manager failed to do.

In another case, FEAA reversed the firing of a typist even though the agency had specific examples of the person's work that failed to meet a detailed standard; the agency had not specifically stated, however, whether the eight examples of substandard work attached to the dismissal notice were the examples relied on in the charges.

A personnel director said his agency dismissed a GS-14 engineer and FEAA sustained the dismissal. According to the director, ARB reversed the action on the grounds that the case file was so thick and the agency had amassed so much data, it must have been "out to get" the employee. This

discouraged other agency managers from attempting to document their experiences with other nonproductive employees as specifically and in detail as is usually required.

Agency officials said that the unrepentive or loosely controlled jobs in the Federal work force are not amenable to exact measurement of quantity, quality, and timing and often have nebulous products. Performance measurements in these jobs tend to be subjective, and are hard to document according to the strict interpretation given to "specifically and in detail" by courts and appeal authorities.

CSC guides couch examples in simple terms of gross misconduct and do not address employee nonproductivity in detail. CSC officials said they are unaware of any regulation, procedure, or instruction which explicitly defines "inefficient" or "nonproductive."

Federal courts generally refuse to review the merits of an action if the dismissal was according to prescribed procedures. The courts do, however, require strict adherence to those procedures. Because of this and other procedural difficulties, an agency may attempt removal of an inefficient employee for something other and easier to document than inefficiency. One supervisor told us that for 3 years his agency tried without success to remove an employee for unsatisfactory work. The employee was finally removed for misuse of funds, not performance problems. Our review of a sample of firings upheld on appeal showed that elements of negligence and insubordination were involved in many cases.

The reform bill clearly distinguishes between removal for unsatisfactory performance and removal for misconduct. The latter will still have to be stated specifically and in detail, while the former will not.

#### Procedural reversals

The possibility of reversal on procedural grounds causes concern among supervisors who fear resulting humiliation and depressed employee morale. One official compared the present removal system to walking on a minefield.

In discussions with our questionnaire respondents, we heard over and over again that the employment protection process was too complicated. Among anecdotes related to us about removals reversed on minor technicalities were:

- A supervisor said FEAA reversed a firing because the agency gave the employee 29 days rather than the required 30 days advance notice.
- An agency fired an employee for beating his supervisor with a baseball bat. FEAA overturned the removal, contending the agency had not given the employee adequate notice of the firing. The agency had to reinstate the employee in the same position, under the same supervisor, and reimburse the employee 8 months' back pay.
- One agency's internal procedures require it to decide on a removal within 10 days of getting the employee's response to the charges. This requirement led FEAA to overturn a removal when the agency took 12 rather than 10 days.

Many officials said that immense benefit with little cost would result if the present appeals authority were given the power to correct minor or harmless errors.

Using independent arbitrators, instead of CSC appeal authorities, also reduces procedural reversals according to officials of two major agencies--the U.S. Postal Service and the Tennessee Valley Authority--who have used both processes but prefer arbitration. They say arbitrators are more familiar with the work place and less concerned with procedural fine points.

#### LENGTHY, TIME-CONSUMING PROCESS

Managers and supervisors often complain about the inordinate time it takes to fire an employee.

The following analysis of 129 firings for inefficiency, which were appealed to FEAA, shows that appeals can stretch out for more than 4 years.

	Months from agency firing decision to final appeal decision	
	<u>Average</u>	<u>Range</u>
FEAA sustained	10	4 to 53
FEAA reversed	8	3 to 38
Appealed further to ARB	19	7 to 58

According to FEAA and ARB officials, almost all appeal delays are due to backlogs, each case having to wait its turn. Actual

time spent in proceedings, according to these officials, has become shorter--now averaging 35 hours an appeal.

The 1978 Committee on Economic Development statement on "Revitalizing the Federal Personnel Systems" summarizes views we heard in discussions with agency officials and ESC instructors.

"Many able and conscientious administrators in government have long since abandoned the effort to discipline nonperforming civil servants. They claim that it is less costly and less destructive of program administration simply to continue incompetent personnel on the payroll rather than spend time in a process that may well end in reversal. They assert, with considerable justice, that it is they rather than the offending employee who must undergo trial, and that life is too short and their time too valuable to undergo the harassment incident to an adverse action. This is a deplorable attitude, since it is not uncommon for disciplinary or separation actions, kept alive by successive appeals, to go on for three or four years."

#### PROPOSED APPROACHES TO IMPROVING THE REMOVAL PROCESS

In interviews, meetings with the Personnel Management Task Force, and recent congressional hearings on the proposed Civil Service reform, several approaches have been suggested for improving the removal process.

#### The reform bill proposals

Under the reform bill proposed simplified procedures for removing nonproductive employees, an employee would be entitled to

- a written notice, at least 30 days before the proposed action, which identifies areas of unsatisfactory performance and the expected level of performance;
- reply in writing;
- be represented;
- a reasonable opportunity to demonstrate fully satisfactory performance; and

--a written decision from a higher level official than the official who proposed the action which states the reason for the decision.

Employees demoted or separated for unacceptable performance would be able to appeal to the Merit Systems Protection Board, which would overturn the action only if there had been a substantial failure to follow correct procedures, there was not reasonable evidence of unacceptable performance, or there was discrimination.

If during the notice period, an employee's performance improves and continues to be satisfactory for 1 year, the proposed procedures call for the record of unacceptable performance to be removed from the employee's official personnel folder.

#### Testimony on reform bill proposals

The National Civil Service League, in testimony on the reform bill, noted:

"\* \* \* with approval the streamlining of procedures for disciplining or separating employees found misbehaving or incompetent, and for protecting their rights while appropriate action is being taken."

The American Civil Liberties Union testimony did not accept the reorganization project's view that the presence of incompetents in Government service is due primarily to the current "overelaborate" due process protections in the removal procedures, but said they understood that these procedures may play a role in discouraging initiation of adverse actions against incompetents. They suggested:

- The legislation include a short time limit before which the agency would be required to present its case and the proposed Merit Systems Protection Board would be required to review the record, with mandatory reinstatement of the employee if the time limit were exceeded.
- Prompt and thorough review of the record should automatic evidentiary hearings on appeal be eliminated.
- The agency be required to document fully its charges of incompetence, a burden which they say in all fairness cannot be shifted to the employee.



--The employee be able to secure a reversal on the more reasonable grounds of inadequacy of the evidence rather than under the "arbitrary and capricious" standards.

The International Personnel Management Association supports the reform bill improvements to the adverse action appeals process and the limitation on the holding of hearings. Their testimony said:

"\* \* \* It is difficult to draw a perfect line between simplified streamlined appeals and adequate review. We believed that more simplified procedures are needed and will lead to prompt and fair decisions unlike the cumbersome and drawn out methods of the current system."

Federal employees' union leaders, in testifying before the Congress, have voiced objections to specific provisions in the legislation. Generally, they have suggested the following provisions on appeals from actions taken against employees because of unacceptable performance:

- Performance standards should be established in advance and furnished to employees before beginning their respective performance appraisal periods.
- Management should be required to include all charges upon which an action to fire an employee for unacceptable performance are based.
- An employee should have the right to a hearing, unless waived, on an adverse action appeal.
- It should be clear that the burden of proof is on the agency to show that adverse action taken against an employee for unacceptable performance was justified on the merit and properly executed from a procedural standpoint.

## CHAPTER 4

### ALTERNATIVES TO FIRING

Firing an employee is a harsh measure which most managers agree should only occur after the agency decides that

- the employee does not respond to counseling;
- skill deficiencies, if there are any, are not correctable; and
- no suitable reassignments are available.

Because of both the actual and perceived difficulties in firing unproductive employees, informal systems "to take care of the problems" are often used. These include:

- Placing the employee in a position where little or no work is done.
- Tolerating the person.
- "Passing the buck" to another supervisor.
- Reassigning the person to an unsuspecting organization.
- Reassigning the employee, often with promotion, to another geographic location.
- Reorganizing the office, eliminating the unsatisfactory employee's job.
- Encouraging the employee to resign or retire early using either solicitude or harassment.
- Assigning the employee duties of a lower graded position without reducing the employee's grade.
- Sending the person on a special assignment, such as on an Intergovernmental Personnel Act Mobility job or to long-term training away from the office.

## CORRECTIVE ACTIONS

### Counseling

Personnel manuals recommend counseling for problem employees. Surveys have found that on-the-job difficulties are usually attributable to emotional disturbances (personal problems requiring help from persons outside the work unit) rather than technical incompetence.

We asked our respondents if their agencies had counselors for employees whose performance was marginal or unsatisfactory. Forty-one percent said no or they did not know. Of those who knew their agencies had counseling services, 45 percent said it was seldom used, and in response to whether it made any difference, close to 40 percent said seldom and an equal number didn't know.

Because counseling may reveal that problems stem from "bad chemistry" between an employee and a manager rather than from the work itself, some agency officials say their offered counseling services are not as widely used as may be desirable.

### Skill deficiencies

Rarely are skill deficiencies given as reasons for continuing problems of unproductive employees. Both industry and Government report that training is a first step in attempting to improve performance. Opportunities for alleviating skill deficiencies are not only available but also are usually successful.

Managers' comments were less positive on the ability of some employees who are promoted to supervisory positions without previous supervisory experience. Specialists who are unsuccessful and unhappy in managerial positions have seldom found management training helpful nor have they been able to return to a preferred solo performer role without difficulty. Under the proposed reform bill, a probationary period is required for new supervisors. (See p. 12.)

### Suitable transfers

In discussions with managers, reassignment was mentioned as both a positive and a negative step in dealing with

unsatisfactory employees. Personnel directors report that moves for developmental purposes usually benefit both the employee and the agency. When the employee is capable but the "chemistry" is wrong in that particular office or between the person and the supervisor, a suitable transfer, agreed upon by both parties, is a positive step. Because, however, both voluntary and involuntary reassignments in the Federal Government are not widespread, they are often viewed negatively. Managers in several agencies said that if reassignments were used more often, the belief that changes are made solely because an employee is incompetent may gradually disappear.

One successful move involved a professional employee who "burned out" after many years, yet had outstanding experience and the ability to articulate it; he was moved to an instructor's position where he serves the same agency well.

#### INFORMAL SYSTEMS

Many people suggested that, while the ratings and appeals systems were often at fault, an equally serious problem in firing unsatisfactory employees was that managers themselves were unwilling to honestly face the employee whose work was unsatisfactory. Because of all of these difficulties, an informal system of "taking care of" problem Federal employees has developed. The same alternatives to firing were brought up in almost all interviews with CSC and agency officials, ESC instructors, and the almost 400 supervisors and managers who completed our questionnaires. These people recognized that by avoiding firing, neither the agency's nor the employee's problems were solved.

#### Reassignment and relocation

While personnel officials agree that reassignments are valuable in certain situations--to more effectively use staff members' capabilities, for on-the-job training, or for easing personality clashes--they have frequently been used by Federal managers as a disciplinary action. According to the Federal Personnel Manual, reassigning an employee to a position of like grade and rank in a different location is not considered an adverse action, at least on the face of it, and an employee who fails to report to work at the new location may be removed for cause for unauthorized absence.

Courts have, however, ruled that geographic transfer cannot be used to circumvent the procedures required for adverse actions. 1/

Employees at all levels said they considered reassignments and relocations were most used to "pawn off" incompetents. Fifty-three percent of our respondents said that in dealing with people who are continuing to perform unsatisfactorily despite repeated efforts to improve their performance, it was likely their agencies would transfer those employees to a different geographic location. A move from a headquarters job to a regional assignment, even with a promotion, was reported to be or to give the appearance of being to "get rid of" the person. Moves within a large office were also considered "suspect." One manager said an analogy might be passing kids to a higher grade and letting the next teacher take care of the problem.

### Reorganization

If unable to reassign an unacceptable or marginal employee, officials told us they are likely to reorganize their offices to eliminate certain positions. Although this is often an expensive and not satisfactory means of solving a problem, several examples were reported to us. Thirty-nine percent of our respondents said it was likely that their units would be reorganized to compensate for the weaknesses of unsatisfactory employees. Courts have ruled that

"Reorganization (including the creation and abolition of jobs) as a means of improving the public's business is peculiarly within the authority and discretion of agency heads and supervisory officials \* \* \* Such rearrangements, as everyone who has lived in Washington knows, are a common remedy for the endemic ailments of federal agencies." 2/

Some agencies used reductions in force; some offices created new titles for previous duties; still others made elaborate changes on an organization chart. Results of these efforts led to early somewhat involuntary retirements, placing the employees at desks with no work or giving the employee duties of a lower graded position without a reduction in grade. Only occasionally were the results reported as beneficial to both the employee and the Government.

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1/Motto v. GSA, 335 F. Supp. 694 (1971).

2/Keener v. United States, 165 Ct. Cl. 334, 341 (1964).

### Other informal alternatives in firing

Almost everyone in our survey and interviews gave us examples of Federal employees who were urged to resign or retire, were shunted aside or improperly placed, or were sent on special assignments, or long-term training. Most agencies were reported to have "dumping grounds" or "turkey farms."

A GAO study (FPCD-76-32, Feb. 23, 1976) of the Intergovernmental Personnel Mobility Program found that many employees were sent or chose to go on assignments to get out of their jobs. These people were often extremely successful on their mobility tours, but were seldom given suitable positions on return. Employees in one agency recently told us of an informal club--a group of people back from mobility assignments or from being "farmed out" to task forces or other agencies--who walked their agency halls with nothing to do.

At a recent conference of assistant secretaries, a participant, talking about his experiences, said, " \* \* \* and as everybody who has been in government a while knows, in offices which are set up by detail, you end up with employees that offices would like to get rid of \* \* \*."

Some managers said they tried to urge unproductive employees to resign or retire early. One Cabinet Secretary said he simply could not get rid of a high salaried incompetent worker and had ordered that no task of any kind be assigned to the worker in the hope of shaming him into retirement. Courts have ruled that a resignation must be voluntary to be binding, that employees cannot be tricked or deceived about their rights. The same principles apply to retirement. 1/

One manager recounted his experience to a class saying

"If you think I am going to do anything about Mr. X's poor work, you're mistaken. He's only two years from retirement and I can't have on my conscience that I kept him from getting benefits. Besides, no one else wants to talk to him, so we'll let him alone until he leaves."

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1/e.g. Gratehouse v. United States 512 F 2d 1104 (1975).  
Perlman v. United States, 490 F 2d 928 (1974).

Other class participants agreed this was not an uncommon situation.

A former Government official discussing training and career development programs said: "We can't let the good guys go, but its a great way to rid yourself of the duds for a while." Another said, "If the Civil Service sends me a jacket for top-level career consideration and I see several extensive training tours, I tend to look for someone else. He's being shuffled." Thirty percent of our respondents said it was likely their agencies would place unsatisfactory employees in an extended training program.

#### SURVEY AND INTERVIEW SUMMARY

Of the almost 400 questionnaire respondents, 44 percent said they had to deal with unsatisfactory performance at some point during their career with the Government. Many of these respondents recounted details of their efforts--rarely successful--to properly resolve the situation.

Despite the sensitivity of the questions and the fact that honest answers often showed they or their offices were not squarely facing disciplinary or removal issues, 43 percent found the subject of great enough concern to give us their names and telephone numbers so that we could get more information on their problem cases; and 35 percent agreed they would discuss the subject with congressional staff. Twenty-three percent also said they would testify should congressional hearings be held on the subject.