February 9, 2016

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. SEA is pleased to offer the committee its perspective on several of the bills being considered at the committee’s February 10 legislative markup.

Nomination of the Honorable Beth Cobert to be Director, Office of Personnel Management

As indicated in the letter shared with the committee last week ahead of her nomination hearing, SEA fully supports the nomination of Acting Director Cobert to serve as the Director of OPM. At this critical juncture for OPM, it is essential that the agency has a Senate-confirmed leader.

S. 2450, Administrative Leave Act of 2016

Having collaborated with Senators Grassley and Tester for over a year in crafting this legislation, SEA is proud to endorse this bill. The manner in which administrative leave has sometimes been abused by federal agencies has been unfair to employees, agencies, and American taxpayers. SEA looks forward to working with members of the committee, the Senate, and the Congress to improve and advance this common sense, good government proposal forward and onto the President’s desk for his signature.

Abuse of administrative leave by federal agencies, in which employees are prohibited by their agency to report to work while continuing to receive their taxpayer-funded salaries during the course of agency investigations or while awaiting effectuation of a personnel action, has grown over the years into a substantial problem. Many Senior Executives and other federal employees have found themselves on administrative leave lasting for periods of months and even years in some cases, especially in high-profile incidents with public or congressional interest.

Congress wisely requested that the Government Accountability Office (GAO) conduct an inquiry into agency use of administrative leave to better understand how administrative leave, in all of its applications, is being used across the government. The GAO report\(^1\) found that agency policies and guidance on administrative leave varied, and inaccuracies and erroneous accounting of leave was

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common. GAO also found that between FY 2011 – FY 2013, 263 employees were on administrative leave for a period of one to three years, costing taxpayers approximately $31 million in salary costs for employees prevented by their agencies from working.

Following the issuance of the GAO report, in May 2015 the Office of Personnel Management (OPM) issued a memo and fact sheet on administrative leave to agencies. The memo notes that OPM would implement GAO’s recommendations to agencies and payroll providers to more accurately collect leave data, and the fact sheet reminded agencies of appropriate use of administrative leave authority. The memo notes that administrative leave is not codified in Title 5, and this legislation appropriately rectifies the lack of clear statutory authority regarding use of administrative leave by codifying it and putting bounds around its use, both as a general authority and for cases of investigations and notice periods. It is in the latter category that this legislation is especially important, as that area has been where a great deal of agency abuse has been witnessed.

As demonstrated by a recently released report by Senator Grassley’s Judiciary Committee staff, agencies frequently had little to no stated justification for why employees remained on administrative leave for such extended periods of times. Further, agencies often did not communicate to the employee on administrative leave why they were being prevented from working and kept out of the office. The Senator’s report found that seventeen agencies spent over $80 million on employees kept on paid administrative leave for one month or more in FY 2014, and the figure could realistically be higher due to imprecise calculations and possible underreporting of some agencies.

Regarding the specifics of the legislation, the bill appropriately maintains agency flexibility to grant administrative leave for periods of up to five consecutive days unless additional leave is required due to an act of God, a terrorist attack, or another condition preventing employees from reporting to work.

The bill also creates categories of “investigative leave,” “notice leave,” and “corrective action leave,” and timelines and procedures for each category to ensure agencies are not leaving employees in the limbo status of administrative leave, where they have no recourse or due process because no official action has been taken by the agency. The necessity of providing agencies with specific timeframes to conduct investigations and make personnel decisions is evident by the manner in which administrative leave has previously been abused in those instances.

It is unfair to employees, agencies, and most importantly, taxpayers, for agencies to keep employees on administrative leave for extended periods of time. If an employee is not deemed to be a threat to themselves, their colleagues, or the agency, they should remain in a duty status, working in some capacity to earn their paycheck. Alternatively, if the agency believes the employee is a threat, it can invoke the crime provision to remove the employee from the office, or take a personnel action such as a

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2 Memo from OPM Director Katherine Archuleta, Administrative Leave, CPM 2015-04 [https://www.chcoc.gov/content/administrative-leave](https://www.chcoc.gov/content/administrative-leave), May 29, 2015.
suspension. The crux of the issue is forcing the agency to make a decision about what to do with an employee, and this bill effectively accomplishes that goal.

SEA applauds that this legislation does not contain “guilty until proven innocent” provisions that have been included in other administrative leave alternatives, such as the Government Employee Accountability Act (S. 362; H.R. 722) that stipulate an employee cannot receive pay or benefits during disposition of agency personnel actions against an employee. Notwithstanding that such a structure may be unconstitutional, this legislation recognizes the importance of due process, fairness, and employee rights while balancing those factors against the imperative that agencies make timely and prudent decisions about personnel matters.

SEA encourages all members of the committee to support this legislation, and is eager to continue working with members to advance this legislation.

Please contact SEA Sr. Legislative and Media Coordinator Nikki Cannon (ncannon@shawbransford.com; 202-463-8400) if SEA can be of further assistance to any of you on these matters.

Sincerely,

JASON BRIEFEL
Interim President
Senior Executives Association