

21 JUN 1977

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DRAFT
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Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

This is in response to your request for the views of the Central Intelligence Agency on the Civil Service Commission's views letter on H.R. 3793, a bill to provide Federal employees under investigation for misconduct the right to representation during questioning regarding such misconduct.

We concur with the Civil Service Commission's opposition to the bill. There is adequate protection of Federal employees from arbitrary and capricious action in already existing statutory law, and the imposition of further procedural protections would merely hinder effective personnel management.

We also agree with the Commission that the procedures proposed in H.R. 3793 could introduce an adversary character into the circumstances where otherwise there might be none.

Due to the unique character of the Agency, we have additional reasons for opposing H.R. 3793, which we would like to express to the Committee. We will submit a views letter for clearance in the near future.

Sincerely,

OGC HAS REVIEWED

George L. Cary
Legislative Counsel

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CHAIRMAN

WASHINGTON, D.C. 20415

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Honorable Robert N.C. Nix
Chairman, Committee on Post
Office and Civil Service
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for the Civil Service Commission's views on H.R. 3793, a bill "To amend title 5, United States Code, to provide Federal employees under investigation for misconduct the right to representation during questioning regarding such misconduct."

H.R. 3793 would provide that Federal civilian employees who were under investigation for misconduct which could lead to suspension, removal, or reduction in rank or pay would not be required to answer questions relating to the misconduct unless they were first advised in writing that they were under investigation for misconduct, the specific nature of the misconduct, and of their right to have a representative present during the questioning. The employees would have to be given a reasonable amount of time, not to exceed five working days, before questioning in order to obtain a representative. H.R. 3793 would prohibit the use of any employee admissions in subsequent actions for suspension, removal, or reduction in rank or pay unless the employees had been advised of their right to representation.

The second portion of the bill provides for an appeal to the Commission by employees disciplined on the basis of their admissions when they were not informed of the rights provided by the first portion of the bill.

The procedures provided in the bill are substantially the same as those required of the police in criminal investigations. The Civil Service Commission believes that ample protections are presently provided by statute, Executive order, and Commission regulations for employees formally charged with serious misconduct. The provisions of the Veterans Preference Act (now codified in section 7512 of title 5, United States Code) require 30 days' advance written notice of proposed adverse action against a Federal employee who is a veteran, with opportunity to respond personally and in writing, to the charges. These protections were extended to all employees in the competitive service by Executive Order 10988, the predecessor of Executive Order 11491, which now governs the Federal Labor Relations Program. In addition, The Commission's regulations (Part

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772 of title 5, Code of Federal Regulations) insure such employee protections as advance written notice of adverse action, reasonable time to reply, written decision by a higher level agency official than the proposing officer, appeal of the agency decision to the Commission, full hearing by the Commission, and written decision.

The Commission is deeply concerned about the effect that passage of this bill would have on personnel management in the Federal service. H.R. 3793 would provide protections to Federal employees similar to, but in some ways more extensive than, those provided to private sector employees under the National Labor Relations Act as interpreted by the Supreme Court in the decision of N.L.R.B. v. Weingarten Inc., 43 U.S.L.W. 4275 (February 19, 1975). In that decision, the Court recognized the right of an employee in private industry to have a representative present during investigatory interviews when the employee reasonably believes that the interview might lead to disciplinary action and when the employee asserts his right to representation. H.R. 3793 goes further in requiring that specific notice be given to the employee of his right to representation. Extension of "Weingarten" type protections to the Federal sector is inappropriate because Federal employees already enjoy statutory and regulatory rights and protections against arbitrary and capricious disciplinary actions whereas private sector employees do not have such rights and protections. The bill also ignores the Supreme Court's suggestion in the Weingarten case that employees may find positive benefits in cooperative discussions with managers.

The bill does not define "under investigation" or establish any meaningful criteria for determining the circumstances under which the procedural protections of proposed section 7171 would apply. While we question whether the bill is really intended to provide formal procedures for all instances when employees are to be questioned on potentially disciplinary matters (however minor), the general language of the bill could well lead to this kind of interpretation and/or application. The Commission feels strongly that informal counseling of employees by supervisors concerning their work should never be subjected to adversary procedures. One of the most effective management tools is appropriate and timely informal counseling of employees concerning the less favorable aspects of their work performance or conduct. (Counseling obviously assists the employee as well.) Part 735 of the Commission's regulations (title 5 of the Code of Federal Regulations), issued pursuant to Executive Order 11222, requires agencies to provide employee counseling concerning employee responsibilities and conduct. We believe that the broad provisions of this bill could make it difficult for superiors to counsel employees informally. Allegations of "fruit of the poisoned tree" would become commonplace. The very existence of this legislation would have a "chilling" effect on the willingness of supervisors to employ informal preventive measures which primarily benefit the employee whose performance or conduct needs improvement.

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It has been argued that because the provisions of this bill would give an employee the opportunity to secure representation at a pre-disciplinary stage, the employee would be able to avoid the stigma of a proposed adverse action. We believe the contrary--if the supervisor-employee relationship becomes an adversary one at an earlier stage more rather than fewer adverse actions are likely to be proposed. This is so because agency officials might well decide to omit preliminary informal questioning (which in many cases results in an understanding which makes an adverse action unnecessary) because the procedural requirements are substantially the same as those now required for a proposed adverse action.

H.R. 3793 would also provide that any civilian employee of an executive agency against whom an action is taken in violation of proposed section 7171, could appeal the violation to the Commission. We interpret the bill as extending appeal rights to cover probationary employees in the competitive service, all excepted service employees and temporary employees in both the competitive and excepted service. (The Commission currently has appellate jurisdiction over suspensions, removals, or reductions in rank or pay for competitive service employees who have completed their probationary periods and preference eligible employees in the excepted service with one year of continuous service.) Obviously, an extension of appeal rights like the one contemplated by H.R. 3793 would impose a burden on the Commission's appeals system which would seriously affect expeditious resolution of the cases that affect employees most adversely. More importantly, H.R. 3793 would grant many employees who have been excluded from past extensions of appeal rights what would amount to a right to appeal adverse actions. This is so because failure of an agency to advise employees of their right to obtain representation before questioning would most likely result in reversal of any action to suspend, remove, or reduce an employee in rank or pay whenever the employee exercised the appeal right granted by the bill. The Commission believes that extension of appeal rights to probationers, excepted service employees, and all temporary employees must be carefully considered.

In summary, the bill is modeled on the Miranda rule which applies to sharply adversary situations where police have in custody individuals who have become "accused" persons. Such a process could well be applied to nonadversarial situations in which a manager who lacks sufficient information to decide whether it is worth charging anyone, is precluded from engaging in cooperative discussion to develop an informal judgment and must instead freeze the situation into adversarial form at high procedural cost and at the risk of being unable ever to solve what may prove to be a simple matter which merits no charges. We also feel that Federal employees already have ample protections against arbitrary and capricious agency actions. Accordingly, the Commission believes that the provisions of H.R. 3793 are extremely undesirable, unnecessary, and unwarranted, and strongly urges that the Committee not approve the bill.

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The Office of Management and Budget advises that enactment of H.R. 3793 would not be in accord with the program of the President.

By direction of the Commission:

Sincerely yours,

Chairman

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ROUTING AND RECORD SHEET

SUBJECT: (Optional)

FROM: Legislative Counsel
6C19 HQ

EXTENSION
6126

NO.
DATE

21 June 1977

TO: (Officer designation, room number, and building)

DATE

RECEIVED

FORWARDED

OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

1. OP
5E13 HQ

2.

3.

4.

STATINTL

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7. OLC
6C19 Hqs.

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STATINTL

14.

F. W. M. Janney
Director of Personnel

15.

We have been asked by OMB to comment on the proposed report of the Civil Service Commission on H.R. 3793, the right to representation bill. Please review the draft response and provide any comments you may have by Monday, 27 June. Thank you.

Office of Legislative Counsel

7. We do not have a copy of subject Bill and cannot, therefore, either cite specific problems or determine the impact of the applicable provisions, but on basis of the CSC letter, we strongly concur with the OLC proposed response to OMB endorsing the CSC opposition to HR 3793. It would appear to seriously hinder effective personnel management and, if, as indicated in the CSC letter, the appeals system would be extended to all employees, regardless of status, would appear to jeopardize the Agency's new three year trial period policy.

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