TULLY RINCKEY PLLC
YOUR LAWYERS FOR LIFE - 1888LAW4LIFE.COM

VA Accountability and Whistleblower Protection Act Tackles the Issue of Firing Insufficient Workers Without Pitfalls

Congress has taken up the mantle of holding Department of Veterans Affairs' employees accountable again.The Senate and the House of Representatives have passed the VA Accountability and Whistleblower Protection Act of 2017, which focuses on placing a higher standard of accountability upon executives, rather than rank-and-file workers. President Donald Trump has already indicated that he will sign the bill.The VA Accountability and Whistleblower Protection Act (S. 1094) was a response to the Federal Circuit's declaration as unconstitutional a provision in the Veterans Access, Choice and Accountability Act in an appeal of the case of former Phoenix VA Health Care System Director Sharon Helman. The Court held that the prior bill didn't allow for review of VA disciplinary proceedings by the full Presidentially Appointed, Senate Confirmed Merit Systems Protection Board (MSPB), and that this violated the Constitution.

Grievance Procedures

The VA Accountability and Whistleblower Protection Act also does not allow for full MSPB review of SES disciplinary decisions by the Secretary of the VA. If a senior executive wants to challenge a disciplinary action or removal from service, he or she can grieve the Secretary's decision using a yet-to-be-determined internal VA procedure – to be developed by the Secretary and a new Assistant Secretary, who will be a presidential appointee.The grievance procedure will be swift as it will be limited to a decision within 21 days from when the grievance is filed. If the executive is still not satisfied following the grievance procedure, senior executives can seek judicial review of the appeal decision. Here, the law is vague as it does not say in which Court such a review may be sought – a problem that may have to be litigated in the future.Though it is risky on a constitutional level to eliminate the MSPB from the review process, the creation of an internal grievance procedure does grant executives the right to appeal a decision before taking the matter to a court. Without that step, the VA Accountability and Whistleblower Protection Act could easily fall into the same trap that ultimately doomed the Veterans Access, Choice and Accountability Act. Judicial review, however, may save it from the same fate.Rank-and-file VA employees who are disciplined, demoted or removed from service can appeal their decisions to the MSPB, but must do so within 10 business days following the effective date of the action. Any review of a rank-and-file employee's case by a MSPB administrative judge must be concluded within 180 days from the date when the appeal was filed. All other traditional rules for appealing a decision apply, including the ability to appeal to the full MSPB if it is first denied by an administrative judge, and the ability to appeal a judge's decision to the full MSPB or Federal Circuit Court of Appeals as desired is left intact.

A Lower Standard of Proof

There is another aspect in the VA Accountability and Whistleblower Act which all employees need to consider. Instead of needing to meet "a prenderance of evidence" standard to discipline, demote or remove an employee, the Secretary of the VA now would only need

“substantial evidence” to take action. This is a lower standard of proof that is now only used in performance based actions under chapter 43 of title V. This lowered standard of proof may lead to more employees facing disciplinary actions, as it makes proving the infractions far more readily attainable.Once the VA Accountability and Whistleblower Act becomes law, VA employees, especially executives, should strongly consider retaining legal counsel the moment they receive notification of possible investigation and/or disciplinary actions. Between the proposed streamlined procedures, reduced timetables and the reduced proof needed to take action, it will become more difficult for employees to retain their jobs unless they have someone who can guide them through the process with efficiency and knowledge.Two things are clear: Congress wants to make it easier for the Secretary of the VA to discipline or remove employees for cause, and it wants to ensure that there can be no further constitutional challenges to the process. It remains to be seen whether the bill succeeds in holding VA workers more accountable, especially senior executives.Mathew B. Tully is a founding partner of Tully Rinckey PLLC. He concentrates his practice on representing federal government employees and military personnel and can be reached at mtully@fedattorney.com

. To schedule a meeting with one of the firm’s federal employment law attorneys call 202-787-1900. The information in this column is not intended as legal advice.

Tully Rinckey PLLC welcomes I. Charles “Chuck” McCullough III, Esq. as the firm’s newest partner

WASHINGTON, DC –

Tully Rinckey PLLC is pleased to announce that

I. Charles “Chuck” McCullough III, Esq.

has joined the firm’s Washington, DC office as Partner.

In his most recent position as Inspector General (IG) for the Intelligence Community, Chuck was responsible for ensuring the highest levels of diplomacy, discretion and judgement across the Intelligence Community through his leadership and oversight. Chuck was nominated for this position by President Barack Obama and unanimously confirmed by the United States Senate in 2011. Reporting directly to the former Director of National Intelligence, Hon. General James R. Clapper, it was Chuck’s responsibility to oversee professionals responsible for audits, inspections, investigations and special reviews within the Office of the Director of National Intelligence (ODNI) and throughout the Intelligence Community. Among his accomplishments were issuing reports involving cyber threat information sharing and information sharing within the Intelligence Community related to the Boston Marathon bombing, as well as overseeing a government-wide implementation of a Presidential Directive protecting whistleblowers from retaliation.

As a Partner in the firm’s Washington, D.C. office, Chuck will be the primary attorney to handle security clearance representation matters for federal employees nationwide; including high-ranking government officials and Department of Defense contractors. He will guide clients applying for and renewing confidential, secret and top secret clearance in addition to representing clients facing security clearance denials, revocations and suspensions.

More specifically, Chuck has the ability to assist defense contractors with obtaining facility clearances and consult with corporations on national security legal matters through pre-clearance counseling, preparation for interrogatories and investigative interviews. Chuck

represents clients at post-denial hearings before government entities such as the Defense Office of Hearing and Appeals (DOHA), the Department of Defense, the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), the Department of Homeland Security (DHS) and all other federal courts and government agencies.

Prior to his appointment as IG, Chuck dedicated the past two decades to public service in the Federal Government; serving in multiple leadership positions in law enforcement, legal and intelligence capacities. Chuck is a former Deputy Inspector General for the Office of the Director of National Intelligence and spent eight years as the Assistant Inspector General for Investigations at the National Security Agency/Central Security Service. He was also formerly the Senior Counsel for Law Enforcement and Intelligence at the U.S. Treasury Department. When Chuck worked as a Special Agent of the FBI, where he handled foreign counterintelligence, counterterrorism, narcotics, violent and white-collar crime, he also served as a legal instructor and as a member of FBI Pittsburgh's Special Weapons and Tactics team (SWAT). As a member of a SWAT team, Chuck received specialized weapons and tactical training and participated in high-risk law enforcement operations.

Chuck earned his bachelor's degree in political science from the University of Kentucky and obtained his juris doctorate from the Dickinson School of Law at Pennsylvania State University.

To find out more information about Tully Rinckey PLLC's Manhattan Ribbon Cutting event, please contact our Chief Marketing Officer Kelsey Knutsen at (518) 903-1559 or via email at kknutsen@tullylegal.com

Follow the Rules Act Broadens Whistleblower Protections

With the addition of three words to an existing law, the recently-signed Follow the Rules Act (FTRA) (H.R. 657) provides federal employees protection from adverse actions if they don't agree with what they're being asked to do for their agencies if the disagreement is about violation of a rule or regulation.Originally, Title 5 of U.S. Code 2032 (prohibited personnel practices) stipulated only that federal employees were protected from adverse actions from their superiors when they refused "to obey an order that would require the individual to violate a law." That left room, though, for a superior to punish an employee who refused to obey an order that would have required the employee to violate a rule or a regulation.The Follow the Rules Act closes up that loophole by adding "rule or regulation" to the end of that provision of Title 5. Now, a federal employee can refuse to obey an order that would require violating a law, rule or regulation and be protected from reprisal from his or her superior under the Act.This opens up a new line of defense for federal employees who find themselves at the receiving end of an adverse action because they refused to follow their superiors' improper orders.Traditionally, the difference between disobedience on account of unlawfulness and insubordination had been a case of the employee's word against the boss' word. Unless a federal law was being violated, a superior could expect an employee to follow the order and grieve about it later, or the supervisor could punish the employee as an act of insubordination when the employee didn't follow the order. The employee could try appealing to a review board such as the Merit Systems Protection Board (MSPB) if the adverse action caused a

suspension greater than 14 days, but without clear evidence that the order disobeyed would have caused the employee to violate a law, the employee didn't have much of a legal leg to stand on.The FTRA gives employees more legal leverage to disobey orders they feel are unlawful. If it can be proven that a boss' order violates any statute, federal rule or federal regulation, then employees are granted whistleblower protection, and when their bosses retaliate by taking some action against them, the employee can seek assistance from the Office of Special Counsel (OSC) for reprisal.This doesn't mean employees are free to disobey every order given by their bosses and are free from all punishment. As long as the request is reasonable, employees must perform their duties. Only when orders are in direct conflict with the law, a rule or a regulation can an employee refuse to obey his or her boss. This does not require that the employee be asked to commit a criminal offense – only that they are being asked to violate an existing federal law, rule or regulation.The FTRA also doesn't mean employees can expect their bosses to act in a supportive way if they disobey their orders. Some bosses will still take adverse actions against employees for their disobedience, regardless of what the law says about retaliation. All the statute means is employees can claim they were refusing to follow a non-legal order as now more broadly defined when they refused to follow the order, which allows for a complaint for reprisal to go forward to OSC. This should carry weight at a review by OSC or the MSPB, if it were to go that far.The FTRA may not eliminate retaliation from the federal workplace for employees who disobey their bosses' orders, but it does expand the scope of who is protected under whistleblower statutes. If you are a federal employee who feels that you've been unjustly punished for following the law by refusing to follow an improper order, be sure to speak with a labor and employment attorney to gain the most leverage you can before fighting any adverse action or other act of retaliation.Mathew B. Tully is a founding partner of Tully Rinckey PLLC. He concentrates his practice on representing federal government employees and military personnel and can be reached at mtully@fedattorney.com

. To schedule a meeting with one of the firm's federal employment law attorneys call 202-787-1900. The information in this column is not intended as legal advice.

Too Early to 'Freak Out' Over Federal Agency Funding Cuts?

By Louis C. LaBrecqueFederal employees "shouldn't be freaking out yet" over the large funding cuts that President Donald Trump wants for federal agencies—but there is cause for concern.That's from Jeff Neal, senior vice president at ICF and former chief human capital officer at the Department of Homeland Security. ICF is a management consulting company with more than 65 locations worldwide."There are some pretty significant reductions" for federal agencies in the "skinny budget" that the administration submitted to Congress in March, Neal told Bloomberg BNA in a recent interview. "But I don't think it's very likely that a large number" of federal workers will be forced out of their jobs, he said.Daily Labor Report® is the objective resource the nation's foremost labor and employment professionals read and rely on, providing reliable, analytical coverage of top labor and employment developments.

 Attrition Viewed as `Harmless'

A far more likely scenario, according to Neal, is that federal agencies will use attrition to reduce the size of their workforces.Republicans in Congress for many years have floated attrition proposals, such as one that would call on federal agencies to hire only one new employee for every three who leave the agency."That's generally viewed as a harmless way to downsize," Neal said. But attrition "isn't necessarily" harmless from the point of view of the

agency, he said.The problem with attrition, Neal said, is that federal agencies that use this tactic to cut their workforces don't have any control over who leaves."If the agency has 10,000 employees and there are 500 [specific] employees I'd like to get rid of, they aren't going anywhere" unless they happen to want to leave, he said.Buyouts and "early outs"—early retirement offers for those who are eligible—give federal agencies more control over who leaves, provided that the offers are targeted to the divisions that the agency is seeking to downsize or eliminate, Neal said. However, agencies with large numbers of unionized employees will likely find that the unions are pushing to make buyouts and early outs available to as many people as possible rather than confining them to agency subcomponents, he said.Time to Think About the Future

Cheri Cannon, a managing partner at Tully Rinckey PLLC in Washington who handles federal sector legal matters for the firm, told Bloomberg BNA that some agencies are preparing for steep budget cuts in fiscal year 2018.The Environmental Protection Agency, which is offering buyouts and early outs to some employees, is among the most prominent of these, Cannon said.At the EPA, eligible employees are being told to decide whether they want to accept a buyout or early out by no later than the Sept. 30 end of FY 2017.It's unusual for a federal agency to offer buyouts and early outs near the end of the fiscal year, Cannon noted, because it's far more effective from the point of view of budget savings to offer incentives to employees early in the fiscal year."It's most cost-effective to separate someone on Oct. 1," which allows the agency to count the employee's entire salary for the fiscal year as a cost saving, Cannon said.The EPA apparently determined it would be worthwhile to use FY 2017 funds to reduce its future costs ahead of the budget cuts expected in FY 2018, she said. "They're trying to go into the next budget cycle with a lower payroll," Cannon said.EPA employees would be foolish to ignore Trump's budget blueprint, which called on the 15,000-person agency to cut 3,200 positions, Cannon said. That's true even though Congress isn't likely to go along with the full extent of the cuts sought by the administration, she said."People absolutely should be thinking about their futures," Cannon said. "You never want to say that this is never going to pass," she said of the possible EPA cuts.`Brain Drain,' Talent Stampede or Both?

Congress when it considers the FY 2018 budget may decide to eliminate specific federal programs at the EPA and other vulnerable agencies, Cannon said."If you don't have a program, what do you do with the people?" she asked. Agencies in this situation generally seek to move employees to other programs that still have funding, she said.If there are still too many employees, the next step for the agency likely would be to offer buyouts and early outs, Cannon said.But buyouts and early outs can negatively affect agencies in different ways, she said.Early outs are only available to federal employees with the required years of service, Cannon said. For this reason, the big risk of using early outs is that a large number of senior employees may retire at the same time."It's a brain drain," she said.Buyouts can result in younger employees leaving agencies, which also isn't ideal, Cannon said.Buyouts—which are capped at $25,000 for federal agencies other than the Department of Defense, which can offer up to $40,000—may have appeal for some retirement-eligible employees who were ready to leave anyway. But the largest group of takers in some agencies may be younger employees with sought-after skills who have the best opportunities to find jobs outside of government, Cannon said. This is because those who accept buyouts have to pay back the money if they return to work for the government within five years.Agencies that offer both incentives can lose both types of employees at the same time, she added. "You lose your young talent and your older, more seasoned veterans," with negative results for short- and long-term agency productivity.Problems With RIFs

If buyouts and early outs don't take care of the excess employees, Cannon and Neal said, the next step may be reductions in force.There are a number of problems with using RIFs, including that agencies are bound by four RIF factors for determining who stays and who

goes, according to John Palguta, an adjunct professor at Georgetown University's McCourt School of Public Policy and former vice president for policy at the Washington-based Partnership for Public Service.The four factors are type of appointment (i.e., permanent appointments take precedence over temporary appointments), veterans' preference, years of service and performance, Palguta said.Performance essentially acts as a tie-breaker and therefore is the last factor considered in RIFs, making them less than ideal for an agency that wants to reshape its workforce in a positive way, he said."If you're tied on the other factors and you're both non-veterans, the person with the higher performance will stay," Palguta said. Otherwise, the first three factors will determine who stays and who goes, he said. The exception is the DOD, which gives more weight to performance than other federal agencies, Palguta said.Bump-and-retreat rights and pay and grade retention rules make RIFs even more hazardous, Neal said."You don't save top earners' salaries," even if the agency cuts positions held by employees with higher salaries, he said. This is because grade and pay retention rules governing RIFs in the federal government mean that higher-graded employees who "bump" lower-graded employees with less seniority keep the same pay, at least initially, Neal said.In the event of a RIF, he said, the higher-graded employee retains his or her grade for two years—and if the lower-graded employee has more seniority than someone at an even lower grade, that person can then bump or "retreat" to a lower-graded position.Bumping is displacing an employee in a lower "retention subgroup," Neal explained. For example, a career employee with veterans' preference would bump a career employee without veterans' preference. Retreating is displacing another employee in the same subgroup, he said.After the two years are up for grade retention, pay retention rules kick in, Neal said. Although those moved to lower-graded positions in RIFs are now officially at their new position's grade, they are entitled to keep their salaries. However, they get only half the annual pay raise offered to federal employees each January until their pay matches their grade, he said.It can take "decades" for this to happen, Neal said. As a practical matter, it usually never happens—especially because employees moved to a lower grade are still eligible for promotions, he said.`Agencies Have a Lot of Uncertainty'

Max Stier, president of the Partnership for Public Service, told Bloomberg BNA that workforce reductions may be the consequence, but should never be the goal, of federal budget cuts.Federal agencies responding to budget cuts should be clear about their missions and make decisions based on continuing to meet mission goals, he said."Agencies have a lot of uncertainty" in the current environment, but they won't face the very steep funding cuts specified in Trump's budget, Stier said.Congress has to approve agency funding cuts, Stier said. "The reality is that they will end up with more money," he said.

The Intersection of Social Media and the Security Clearance Process

If you will be applying for a security clearance, it is advisable that you are cautious of what you post publicly on social media sites, such as Twitter, Facebook, and Instagram. Security Executive Agent Directive 5 allows investigators to analyze information posted publicly on social media sites as part of security clearance background checks.

Directive 5 allows investigators to collect and use publicly available social media information to aid them in deciding whether to issue an initial security clearance or grant continued eligibility for security clearance. Directive 5 does not allow investigators to request or require applicants torelinquish passwords to private social media accounts or access an applicant's private accounts through a third party that has access to them.The decision whether to grant, deny or revoke a security clearance is determined by the "whole person concept." This means

that investigators will make a decision about an applicant's conduct, behavior and trustworthiness based on various factors after considering numerous sources of information.Although not the only determining factor, public social media accounts can reveal if an applicant lied when answering the questions on the SF86. If an investigator comes across information on an applicant's public social media account that is "discrepant or potentially disqualifying" relating to one of the adjudicative guidelines, Directive 5 requires agencies to make "reasonably exhaustive efforts" to fully investigate that issue.For example, if an applicant answers 'none' when asked about marijuana use on the SF86 but that applicant's public social media accounts have pictures of that applicant smoking, investigators will be probed to look into that issue further and a security clearance may be denied or revoked because of that discrepancy. In Defense Office of Hearings and Appeals (DOHA) Case No. 14-02975 an Applicant admitted in a sworn response to DOHA interrogatories in 2014 that he used marijuana on a daily basis in college and thereafter twice per month, while holding a security clearance, but when asked about his marijuana use on his 2003 SF86 application he stated that he only used marijuana 'occasionally.' The Judge denied this Applicant's continued eligibility for security clearance arguing that this intentional concealment of his marijuana use on his SF86 called into question his reliability, trustworthiness and judgment.Similarly, contradictory evidence found on public social media accounts can raise a red flag for investigators. For example, a red flag would be raised if an applicant denies drug use on their SF86 but investigators simultaneously find pictures of that applicant smoking marijuana on their public social media accounts.Mathew B. Tully is a founding partner of Tully Rinckey PLLC. He concentrates his practice on representing military personnel and federal government employees and can be reached at

mtully@fedattorney.com

. To schedule a meeting with one of the firm's federal employment law attorneys call 202-787-1900

. The information in this column is not intended as legal advice

.

Financial Considerations in the Security Clearance Process

Based on currently published security clearance decisions, security clearances are denied or revoked most readily under Guideline F, which relates to financial considerations.

Financial issues usually arise when an applicant fails to live within one's financial means, demonstrates an "inability or unwillingness" to satisfy debts, or fails to satisfy delinquent debts in a responsible and timely manner.Financial concerns have the potential to be mitigated if the cause of the financial hardship was outside the applicant's control, the person obtains counseling for the problem, the individual has made a good-faith effort to resolve delinquent debts, and/or the debt occurred so long ago or under such circumstances that it is "unlikely to recur."For example, in Defense Office of Hearings and Appels (DOHA) Case No. 15-01354 (2016) a Department of Defense (DOD) contractor was able to mitigate the financial concerns outlined in the Statement of Reasons (SOR) by demonstrating that he made a good-faith effort to resolve his debts by seeking counseling, that is financial situation was stable, and that his most major debt arose over eight years ago when he was only 18 years-old.The decision whether to grant, deny or revoke a security clearance is determined by the

“whole-person concept.” This means that investigators will make a decision about an applicant’s conduct, behavior and trustworthiness based on various factors after considering numerous sources of information.It is important for an individual to take affirmative action and devise a plan to resolve delinquent debts in order to mitigate a financial concern under Guideline F. If an individual does not take this affirmative action, other mitigating factors will likely hold little to no weight in the overall security clearance analysis.For example, in The Appeal Board Decision Case No. 14-06131 (2016), an Applicant, who engaged in credit counseling, was nonetheless denied a security clearance because there was “little evidence” that the Applicant could “maintain a budget or resolve his debts.” In making its decision, the Court noted that the Applicant’s communication with his creditors was “few and far between,” and he had not set up a payment plan to eliminate his debts even though he had sufficient funds to do so.

When is an Indefinite Suspension Appropriate?

In the federal sector, indefinite suspensions are generally only used in three situations. First, when the agency reasonably believes an employee committed a crime that could be punished by imprisonment. Second, when the agency has genuine concerns that an employee’s medical condition makes that employee’s continued presence in the workplace either dangerous or inappropriate. Third, when an employee’s access to classified information has been suspended and such access is necessary for the employee to perform job duties.

Therefore, an indefinite suspension is inappropriate when the employee’s case does not fall under one of the three aforementioned categories. For example, in Gonzales v. Department of Homeland Security (2010), the employee was issued an indefinite suspension pending the agency’s investigation into claims regarding the employee’s off-duty conduct. The Merit Systems Protection Board (MSPB) reversed the indefinite suspension; however, because the agency did not profess to have “reasonable cause to believe” that Gonzalez had “committed a crime for which a sentence of imprisonment could be imposed.”Similarly, an agency cannot indefinitely suspend an employee based on the second aforementioned category “pending inquiry, for psychological or other medical reasons if the agency” does not have a “sufficient objective basis for doing so.” For example, in Moe v. Department of Navy (2013), the Department of Navy indefinitely suspended an employee, a Rigger Apprentice at a Navy Shipyard, who was found to be unfit for duty by a Naval Health Clinic doctor after he suffered an episode where he was crying and talking to himself.The MSPB reversed the employee’s indefinite suspension, however, ruling that the agency lacked an “objective basis” for the action because the employee had been given an unrestricted medical release to return to work froman emergency room doctor and his personal psychiatrist, and no further psychological or medical issues regarding the employee were reported by his supervisor or by anyone else.In order for an employee to be indefinitely suspended based on revocation of a security clearance, that employee’s access to classified information must be necessary for that employee to perform his or her job duties.For example, in Hall v. Department of Defense (2012), an employee was indefinitely suspended from her position as a financial accounting assistant with the Defense of Finance and Accounting Service after the agency ruled she was unfit to have access to sensitive information. The MSPB reversed her suspension, however, because Hall’s job only required access to sensitive information and not classified information. As such, her case did not fall under any of the aforementioned categories above.

Attorney Spotlight: Rachelle S. Young, Esq.

You have extensive experience with Federal Employment Law. What drew you to this practice area in particular?

I am fascinated by the interactions between employers and employees and the dynamic of the employment relationship. My interest started when I was still in high school working a summer job at a small company that was bought out by another large, major company. It was interesting to see how this changed the dynamic of the employment relationship. I watched as the new management made bad decisions that negatively affected the employees and decreased morale among the workforce. This experience drew me to study Management in college, which then drew me to law school and the practice of labor and employment law. What type of cases do you handle in your practice?

I handle a wide-array of cases in my practice, all with the common goal of protecting employee rights. I am sometimes involved in the employment relationship in its initial stages and help employees negotiate contracts and employment terms. I also represent and give employees advice and assistance on a variety of issues throughout their career, which includes handling discrimination claims, filing complaints, and whistleblower cases. I also represent employees in disciplinary matters, which include either performance based discipline or misconduct based discipline. I also litigate on behalf of employees in front of the MSPB.What sort of cases are you most passionate about?

I am most passionate about helping people in vulnerable situations. I do not like seeing people getting taken advantage of, so I am particularly passionate about cases that involve employers refusing to make accommodations for employees who have medical conditions and cases that involve older employees being treated disrespectfully, even though they are very talented. I am also extremely passionate about non-selection cases, which involve a qualified employee being passed up for a job in favor of someone who was pre-chosen or is less qualified.Rachelle provides representation to federal employees in a wide range of employment and labor matters, including claims of age, gender, race, national origin, sexual harassment, wrongful discharge, and retaliation.

Rachelle’s vast experience makes her a zealous representative for her clients. In her practice, Rachelle strives to protect the labor rights of her employee clients in court, at administrative hearings, and in settlement negotiations.

Rachelle is also actively involved in the legal community, including being a member of the National Employment Lawyers Association, the Metropolitan Washington Employment Lawyers Association, and the American Bar Association.

Secret Service vague on action taken against agent who suggested she wouldn't take 'a bullet' for Trump

The Secret Service is weighing how far to take its disciplinary action against a senior special

agent who suggested she would rather do jail time than take "a bullet" for President Trump.The agency on Tuesday said it has taken "appropriate action" against Kerry O'Grady, who is the special agent in charge of the Denver office, but has not indicated whether she has been placed on administrative leave, which would be forced leave with pay, a common first disciplinary step when the Secret Service is taking a behavioral incident seriously."The U.S. Secret Service is aware of the postings and the agency is taking quick and appropriate action," a spokesman said in a statement. "As a matter of practice, we do not comment on personnel matters.""All Secret Service agents and employees are held to the highest standards of professional and ethical conduct. Any allegations of misconduct are taken seriously and swiftly investigated," the spokesperson added.The Washington Examiner

reported Tuesday that O'Grady made several derogatory Facebook posts about Trump over the past seven months, including one in which she endorsed Hillary Clinton and said she would endure "jail time" rather than "taking a bullet" for what she regarded as a "disaster" for America and women and minorities.The Secret Service initially told the Washington Examiner

that they were looking into the matter but then didn't respond to questions about whether she would be disciplined.One person familiar with the matter told CNN Tuesday night that the Secret Service is trying to find out if she posted the information while she was working, which would be a clear violation of the Hatch Act. The Hatch Act bars federal employees from engaging in some forms of political activity, especially while at work on when using any form of their professional role.Secret Service employees are part of a group of federal employees that face more severe Hatch Act restrictions, including these two rules:May not post a comment to a blog or a social media site that advocates for or against a partisan political party, candidate for partisan political office, or partisan political group.

May not use any email account or social media to distribute, send or forward content that advocates for or against a partisan political party, candidate for partisan political office, or partisan political group.

O'Grady, in the post in question, said she knew she was on shaky ground when it comes to violating the Hatch Act but said her desire to express her personal political feelings was more important to her at the time. "Hatch Act, be damned," she said in the Facebook post in question.Upon greater reflection, she decided the post wasn't appropriate and took it down within two to three days, she told the Examiner. She has repeatedly stressed that she would continue to perform her duties and that her political views would not impact her ability to protect the president."As a public servant for nearly 23 years, I struggle not to violate the Hatch Act. So I keep quiet and skirt the median," she wrote in one Facebook post, as reported by the Examiner. "To do otherwise can be a criminal offense for those in my position. Despite the fact that I am expected to take a bullet for both sides."But this world has changed and I have changed. And I would take jail time over a bullet or an endorsement for what I believe to be disaster to this country and the strong and amazing women and minorities who reside here. Hatch Act be damned. I am with Her."   O'Grady cannot face "jail time" for Hatch Act violations, because the law doesn't carry criminal penalties. But she could face serious disciplinary action, including a reassignment in which she is not directly involved in protecting the president and other administration officials.Cheri Cannon, an employment lawyer and managing partner at Tully Rinckey who represents federal law enforcement clients, said O'Grady's statements in her Facebook post are "clearly a violation of the Hatch Act" because Secret Service employees face greater restrictions.But Cannon said, "she's in bigger trouble than the Hatch Act. She needs to resign. She's refusing to do the job she was given to do."The Hatch Act is a limit on your First Amendment rights, which the Supreme Court

has upheld as reasonable for some federal employees, she said.Senior employees like O'Grady, she said, are further restricted in their freedom of speech and political activities.   "My advice to people at that level is not to use Facebook," she said.O'Grady, in the post in question, said she knew she was on shaky ground when it comes to violating the Hatch Act but said her desire to express her personal political feelings was more important to her at the time. "Hatch Act, be damned," she said in the Facebook post in question.Upon greater reflection, she decided the post wasn't appropriate and took it down within two to three days, she told the Examiner. She has repeatedly stressed that she would continue to perform her duties and that her political views would not impact her ability to protect the president."As a public servant for nearly 23 years, I struggle not to violate the Hatch Act. So I keep quiet and skirt the median," she wrote in one Facebook post, as reported by the Examiner. "To do otherwise can be a criminal offense for those in my position. Despite the fact that I am expected to take a bullet for both sides."But this world has changed and I have changed. And I would take jail time over a bullet or an endorsement for what I believe to be disaster to this country and the strong and amazing women and minorities who reside here. Hatch Act be damned. I am with Her."O'Grady cannot face "jail time" for Hatch Act violations, because the law doesn't carry criminal penalties. But she could face serious disciplinary action, including a reassignment in which she is not directly involved in protecting the president and other administration officials.

As campaign season reaches crescendo, feds warned to stay clear of politics

Hatch Act and Political Activity in the Workplace

AS THE ELECTION DRAWS NEARER dur-ing this year’s contentious campaign season, experts are warning feds to redouble their efforts to keep their political views and activities well clear of the federal workplace.

Restrictions to those activities are laid out in the Hatch Act, a 1939 law named for Sen. Carl Hatch (R-N.M.).“The Hatch Act, and its amendments, is intended to keep partisan political activity out of the federal workplace,” said Cheri L. Cannon, an attorney and managing partner with the federal labor and employment practice group of the D.C. office of Tully Rinckey PLLC. “It is a complicated system, really, but for the average employee the restric-tions in effect basically demand that employees remain politically neutral in the office, at any kind of federal work, and to not use their influence to act in any partisan way.”“So, for example, the regular restric-tions include if you are engaging in political, partisan activity from home— say, writing something on behalf of a candidate or something—you cannot use your title or position, at all, in any kind of correspondence or writing,” Cannon told FEND

.Cannon added that no federal employee—except for the president, vice president and certain Senate-confirmed political appointees—can solicit or accept a donation, or any kind of political contribution, on behalf of a political candidate or group—or even sell tickets to political fundraisers.“Now, you can attend political fun-draisers, on your own personal time— you can go to a house or rally, and cam-paign for candidates or constitutional amendments or whatever you’d like,” Cannon clarified. “But you cannot host anything like that at your home.”Cannon said that, under the Hatch Act, all covered feds cannot run for any political office—and if they are holding one when they get a federal job, they have to give it up immediately or face prosecution.“You cannot do anything political while on duty—and you cannot do anything in a federal building or—and not everyone remembers this—a federal vehicle,” Cannon said.“You might think this is obvious— but in my years on this work I have

seen feds running for political office, and they really should have known better," Cannon told FEND

. "I have also seen people sending out political information, cartoons and the like to their subordinates, at all times, and all kinds of mistakes like this."SPECIAL PROBLEMS IN 2016

Endless newspaper, magazine and television news stories also have acted to reinforce the partisan nature of this year's political campaigns."One or the other of the candidates is easier to make fun of, with lots of jokes being generated," Richard Painter, an expert on the Hatch Act and law professor at the University of Minnesota told FEND

. "When these jokes are brought into the office—like posters, papers, cartoons—it can cause a problem, and it will lead to accusations of a Hatch Act violation.""With this year's election, you're going to have a one or two people in many offices who will make these mistakes, and a few who will be upset and will report it," he said."People are getting emotional about this election—getting worked up," Painter said. "You just have to keep it out of the office—and that goes for every single federal employee, other than those who are Senate-confirmed and some in the White House," Painter said."This election is one of heavy pas-sions—and not just about issues, but about personalities. We've never seen this in recent times—well, there was the 1998 [Bill Clinton] scandal, but all that happened after that president had been re-elected, so it didn't get into the campaign.""You just cannot have a situation where there are people bringing it into the office," Painter pointed out. "This election season is also seeing emails and other political messages. People really must keep all this off of govern-ment email and out of the office."Painter noted there also are some things feds can

do. "You can have a non-political photo of yourself next to Mrs. Clinton in her role as secretary of state, for instance—but you just cannot have any political aspect to it," he said.AVOIDING ONLINE PERILS

Online, there are many, and in some cases complicated, restrictions on what federal employees can and cannot do, as Tully's Cannon explained to FEND

."You don't check your First Amendment rights at the door when you take a federal job, but there are certain things every fed should be aware of," Cannon said. "You cannot use a social media account that notes your official capacity for anything political—and you cannot tweet, retweet, share or solicit political con-tributions, and you cannot fundraise through your social media."Do not use your government com-puters and devices for anything politi-cal—and you can't 'like' candidates or partisan groups while you are on duty or on your social media—even using your own personal Facebook page," Cannon said. "Now, if you are at home, and on your personal Facebook page, you can 'like.'""You do meet feds who have official capacity social media pages, and they also create private pages for off-duty, off-campus use—and even then you must be cautious about how you use social media," Cannon said."This is the future of the Hatch Act and its enforcement," Cannon said. "As different platforms and programs develop and change, I see the law will have to develop and change too."