

Part III. Administrative, Procedural, and Miscellaneous

Termination of Employment for Misconduct

Notice 99-27

SECTION I. PURPOSE

Section 1203 of the Internal Revenue Service Restructuring and Reform Act of 1998 (the “RRA”) provides generally that IRS employees must be terminated from Federal employment if they violate certain rules in connection with the performance of their official duties. The statute also allows the Commissioner to mitigate the sanction of termination. This Notice requests public comments on the proper interpretation of section 1203.

SECTION II. BACKGROUND

The basic rules governing disciplinary actions against federal civilian employees are set forth in Chapter 75 of Title 5 of the United States Code. In general, these rules permit discipline, up to and including termination of employment, to be imposed for such cause as will promote the efficiency of the federal service. Agencies generally have discretion as to whether to impose disciplinary action and as to the form and severity of the action to be imposed, based upon the facts and circumstances of the situation. Most agency decisions concerning the imposition of discipline are subject to review by parties outside the agency, *e.g.*, in arbitration or by an appeal to the Merit Systems Protection Board.

RRA section 1203 made significant changes in these general rules as applied to IRS employees. Specifically, section 1203 provides that an IRS employee must be terminated from employment if there is a final administrative or judicial determination that the employee violated any of the rules set forth in sections 1203(b)(1)-(10) in the performance of official duties. In addition, section 1203(c) of the statute provides that the Commissioner may decide to take a personnel action other than removal if certain mitigating factors are present; however, this decision may only be made by the Commissioner personally and is not subject to review in any administrative or judicial proceeding. The full text of section 1203 is attached at Appendix A.

SECTION III. INTERPRETATION OF SECTION 1203

The Internal Revenue Service requests comment with respect to the following matters under RRA section 1203:

- A.** Existing personnel law and procedures will be applied in interpreting section 1203, unless explicitly provided otherwise. For example, current procedural requirements of personnel law, including advance written notice, an opportunity for an oral and written

reply, and a right to appeal the substance of the charges, will be provided employees who are subject to discipline under section 1203.

B. The current personnel law definition of “employee” will be applied in interpreting section 1203. Section 1203 is triggered with respect to “any employee” of the IRS. In implementing section 1203, the IRS will apply the definition of “employee” in 5 U.S.C. 2105, that is, an individual who is appointed in the civil service, engaged in the performance of a Federal function under authority of law, and subject to the supervision of an individual already appointed in the civil service while engaged in the performance of the duties of the position. As a consequence of this definition, and since section 1203 applies only to acts or omissions of an employee of the IRS, any acts or omissions that occurred prior to the individual becoming an “employee” of the IRS would not be within the scope of section 1203.

C. Acts or omissions of IRS employees committed “in the performance of the employee’s official duties” include only those acts or omissions listed under section 1203(b) that have a nexus to an employee’s position in the IRS. To establish nexus, a clear and direct relationship must be demonstrated between the act or omission of the employee that constitutes the grounds for the employee’s removal and either the employee’s ability to accomplish his or her duties satisfactorily or some other legitimate governmental interest promoting the “efficiency of the service,” as required by 5 U.S.C. 7513(a). *See, Doe v. Hampton*, 566 F.2d 265, 272 (D.C. Cir. 1977).

Example 1. While at home after duty hours, an IRS employee becomes involved in a physical argument with his neighbor. The neighbor sues the employee for assault and battery and a court finds the employee liable for civil assault and battery. Is the agency mandated to terminate the employment of the employee pursuant to section 1203?

Answer. No. Section 1203 is triggered only with respect to acts or omissions committed in the performance of the employee’s official duties. Under the facts presented here, the IRS employee’s conduct was off-duty conduct having no connection to the IRS. Therefore, the civil judgment finding the employee liable for assault and battery on his neighbor would not fall under section 1203(b)(5). Additionally, the assault and battery was not “on a taxpayer, taxpayer representative, or other employee of the IRS,” as is required by section 1203(b)(5). See **F.** for a discussion of the meaning of taxpayer and taxpayer representative.

Example 2. A taxpayer tells the Internal Revenue Agent who is auditing the taxpayer that the Agent is incompetent. While off duty, the Agent sees the taxpayer at a restaurant and tells him that he did not appreciate the comment. The Agent pushes the taxpayer. A court finds the Agent liable for civil assault and battery. Is the agency

required to terminate the employment of the employee pursuant to section 1203?

Answer. Yes. Under the facts presented, the physical altercation, while occurring off-duty, resulted from the Agent's interaction as an IRS employee with the taxpayer. Thus, the Agent's off duty conduct has a nexus, or a clear and direct relationship, to the efficiency of the service. Therefore, the civil judgment finding the employee liable for civil assault and battery would fall within the scope of section 1203(b)(5).

D. Acts or omissions of Internal Revenue Service employees will be subject to the discipline prescribed by section 1203 only if those acts are taken, or those omissions are made, with some degree of intent.

Some of the acts or omissions specified in section 1203 that are subject to the discipline prescribed by that section appear to be based upon standards that are found in the Internal Revenue Code (IRC). Thus, section 1203 (b)(8) mandates removal of an IRS employee whose "failure to file any return of tax required under the Internal Revenue Code ... on or before the date prescribed therefor" was "willful." This language mirrors that found in IRC section 7203. Similarly, section 1203 (b)(9) mandates removal of an employee whose "understatement of Federal tax liability" was "willful." This language implicates concepts found in IRC section 7201. The IRS will employ standards similar to those applicable to these IRC provisions in implementing sections 1203(b)(8) and 1203(b)(9). To support an action under either of these sections, the IRS must prove by a preponderance of the evidence that the IRS employee's act or omission was a voluntary, intentional violation of a known legal duty.

Section 1203(b)(1) requires removal of an IRS employee who willfully fails to obtain signatures on documents authorizing the seizure of certain types of property. Section 1203(b)(7) requires removal of employees who engage in "willful" misuse of IRC section 6103 "for the purpose of concealing information from a congressional inquiry." In order to support an action under either of these provisions, the IRS must prove by a preponderance of the evidence that the employee's act or omission was made with actual knowledge of the failure to comply with, or with a reckless disregard of, the requirements for obtaining approval signatures or for disclosing information in response to a congressional inquiry, as the case might be.

E. A final administrative or judicial determination pursuant to section 1203(a) is a determination concerning an individual in a proceeding in which the individual is granted full rights to participate as a party to the action or proceeding. Such a determination becomes final when:

- (1) if a judicial proceeding, all appeals have been exhausted or, if no

appeals are taken, the time for all appeals has expired; or

(2) if an administrative proceeding:

(i) all appeals have been exhausted, or if no appeals are taken, the time for all appeals has expired, or

(ii) a disciplinary decision is made by the deciding official at the conclusion of a process that included an advance written notice to the individual of the proposed action to be taken.

Example 1. A finding is made in an EEO case that an IRS employee has been discriminated against in violation of Title VII of the Civil Rights Act of 1964. Is the finding of discrimination a final administrative determination such that section 1203(a) would require the removal of all IRS employees whose conduct may have contributed to the finding of discrimination?

Answer. No. Equal Employment Opportunity cases are filed against the agency, and not against specific individual employees. Therefore, IRS employees, other than the complainant, are not parties to the proceeding, and consequently are not afforded the opportunity to submit evidence or to call or cross-examine witnesses. The finding in the EEOC decision concerning discrimination is not a final administrative determination within the meaning of section 1203 with respect to IRS employees whose conduct may have contributed to the finding.

However, in every case in which there is a finding of discrimination, the finding will be reviewed by the Office of the National Director, EEO and Diversity, pursuant to specific procedures established by the IRS. These procedures will require that the Office of the National Director, EEO and Diversity, determine whether to refer the matter to the appropriate office for further action. If management makes a determination that any employee committed an act or omission within the coverage of section 1203(b), the employee will be issued advance written notice of the proposal to remove the employee from the IRS. The statutory and regulatory requirements of Title 5, United States Code, and Title 5, Part 752, Code of Federal Regulations (CFR), must be followed in terminating the employment of the employee under section 1203. Moreover, the final decision to remove the employee from the IRS is subject to appeal, such as to the Merit Systems Protection Board (MSPB). While the employee may challenge the charges, a reviewing body may not mitigate the adverse action of removal if the facts establish a violation of section 1203.

Example 2. An IRS employee files a formal complaint of discrimination, alleging that his manager has retaliated against him by giving him a low performance evaluation because of the employee's prior EEO activity. The case is settled, and a settlement agreement is signed. Is this a final administrative determination that the manager has violated section 1203(b)?

Answer. No. A settlement agreement is not a determination that discrimination has occurred. Further, the manager was not a party to the discrimination complaint process or to the settlement agreement. The parties are the agency and the employee alleging discrimination. Therefore, the analysis set forth in Example 1 is also applicable to this situation.

In addition, cases in which an allegation of discrimination is raised, but there is no finding or settlement, will be referred to an appropriate office to determine whether there should be further action.

F. “Taxpayer,” “taxpayer representative,” and “person” will have the following meanings:

A “taxpayer” means any person subject to any internal revenue law, and with respect to whom an act or omission is undertaken because of that person’s status as a taxpayer.

A “taxpayer representative” means any person who acts in a representative capacity to a taxpayer, and with respect to whom an act or omission is undertaken because of that person’s status as a representative of a taxpayer.

A “person” includes an individual, trust, estate, partnership, association, company or corporation.

Example 1. An IRS employee is stopped by a police officer for speeding. The employee tells the police officer that he will be audited if the employee receives a ticket. The police officer does not have an open, ongoing dispute with the IRS. Does the employee’s conduct come within the scope of section 1203(b)(10)?

Answer. Yes. The definition of taxpayer does not require that the person have an ongoing dispute with the IRS. The police officer fits the definition of a taxpayer since the employee’s conduct is directed toward the police officer because that officer is subject to the internal revenue laws. Additionally, the purpose of the IRS employee’s conduct was to extract personal gain or benefit. Based on these facts, a nexus would also exist (see **C.** above).

Example 2. A taxpayer service representative is driving her car and sees an empty parking spot. Before the taxpayer service representative can pull into that parking space, another driver parks her car there. Unknown to the employee, the other person represents taxpayers. The employee, unable to control her anger, shoves the taxpayer representative and is eventually criminally convicted of assault and battery. Does the employee’s conduct come within the ambit of section 1203(b)(5)?

Answer. No. The employee's conduct, although directed against someone who represents a taxpayer, was not directed against that individual because she represents a taxpayer. The employee did not know the individual represented taxpayers, and even if she had known, her conduct toward the representative was unrelated to that individual's capacity as a representative. Therefore, the employee's conduct does not constitute an assault and battery upon a taxpayer representative.

G. The false statement referred to in subsection 1203(b)(2) must be with respect to a material matter involving a taxpayer or taxpayer representative, as those terms are defined in **F**. To be material, the false statement must be one that would have a natural tendency to influence, or be capable of influencing, a decision on the matter involving a taxpayer or taxpayer representative.

Example 1. A Revenue Agent intentionally falsely states under oath that a taxpayer had shown him receipts to document a particular deduction when he had not seen any such receipts. Is this false statement within the coverage of section 1203(b)(2)?

Answer. Yes. The Revenue Agent's false sworn statement that the taxpayer had shown him receipts to document a particular deduction would have a natural tendency to influence, or the capacity to influence, a decision on the matter involving the taxpayer or taxpayer representative. Thus, it is within the coverage of section 1203(b)(2).

Example 2. A Revenue Officer is being questioned about his use of annual leave. The Revenue Officer provides a statement to the Treasury Inspector General for Tax Administration, under oath, in which he intentionally falsely states that he was at the office all day each of the prior six Fridays. Is this false statement within the coverage of section 1203(b)(2)?

Answer. No. The Revenue Officer's false statement to the Treasury Inspector General for Tax Administration does not have a natural tendency to influence, or the capacity to influence, a decision on a matter involving a taxpayer or taxpayer representative. Therefore, it would not be within the coverage of section 1203(b)(2). However, even though the IRS would not be required to terminate the employment of the Revenue Officer pursuant to section 1203(b)(2), the IRS may discipline the Revenue Officer up to and including termination from Federal service.

H. Section 1203 applies only to acts or omissions occurring on or after July 22, 1998. This position is based on existing law regarding the retroactivity of civil statutes. See, *Taylor v. Rubin*, No. 97-2398 (W.D. LA Sept. 21, 1998). In general, where statutory provisions are substantive, in that they create new rights or impair vested rights, impose new duties, or attach new disabilities regarding past transactions, as opposed

to merely procedural provisions, the rule is that the provision will not apply retroactively absent a clear congressional intent otherwise. *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994) (holding that punitive and compensatory damages provision of the 1991 Civil Rights Act amending Title VII did not apply retroactively to a case that was pending when the statute was enacted, since there was not clear congressional intent concerning retroactivity). See also *Hughes Aircraft Co. v. U.S. Ex Rel. Schumer*, 117 S.Ct. 1871, 1876 (1997) (The Court affirmed the “time-honored” presumption against giving retroactive effect to legislation unless Congress had clearly manifested its intent to the contrary, holding that a 1986 amendment to the *qui tam* statute which would deprive defendant of a defense, did not apply retroactively).

SECTION V. COMMENTS

Comments are requested on the matters discussed in this notice and on any other provisions of section 1203. Comments should be submitted by June 30, 1999. Written comments may be submitted to the Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attention: CC:DOM:CORP:R (Notice 99-27), Room 5226, Washington, DC 20044. Submissions may be hand-delivered between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (Notice 99-27), Courier’s Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the “Tax Regs” option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at:

http://www.irs.ustreas.gov/prod/tax_regs/comments.html

Comments will be available for public inspection and copying.

For further information regarding this notice, contact Lee Patton of the Office of Associate Chief Counsel (Finance & Management), General Legal Services Division, at 202-283-7900 (not a toll-free call).

APPENDIX A

SEC. 1203. TERMINATION OF EMPLOYMENT FOR MISCONDUCT

(a) IN GENERAL.— Subject to subsection (c), the Commissioner of Internal Revenue shall terminate the employment of any employee of the Internal Revenue Service if there is a final administrative or judicial determination that such employee committed any act or omission described under subsection (b) in the performance of the employee's official duties. Such termination shall be a removal for cause on charges of misconduct.

(b) ACTS OR OMISSIONS.— The acts or omissions referred to under subsection (a) are—

(1) willful failure to obtain the required approval signatures on documents authorizing the seizure of a taxpayer's home, personal belongings, or business assets;

(2) providing a false statement under oath with respect to a material matter involving a taxpayer or taxpayer's representative;

(3) with respect to a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, the violation of—

(A) any right under the Constitution of the United States; or

(B) any civil right established under—

(i) title VI or VII of the Civil Rights Act of 1964;

(ii) title IX of the Education Amendments of 1972;

(iii) the Age Discrimination in Employment Act of 1967;

(iv) the Age Discrimination Act of 1975;

(v) section 501 or 504 of the Rehabilitation Act of 1973; or

(vi) title I of the Americans with Disabilities Act of 1990;

(4) falsifying or destroying documents to conceal mistakes made by any employee with respect to a matter involving a taxpayer or taxpayer representative;

(5) assault or battery on a taxpayer, taxpayer representative, or other

employee of the Internal Revenue Service, but only if there is a criminal conviction, or a final judgment by a court in a civil case, with respect to the assault or battery;

(6) violations of the Internal Revenue Code of 1986, Department of Treasury regulations, or policies of the Internal Revenue Service (including the Internal Revenue Manual) for the purpose of retaliating against, or harassing, a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service;

(7) willful misuse of the provisions of section 6103 of the Internal Revenue Code of 1986 for the purpose of concealing information from a congressional inquiry,

(8) willful failure to file any return of tax required under the Internal Revenue Code of 1986 on or before the date prescribed therefor (including any extensions), unless such failure is due to reasonable cause and not to willful neglect,

(9) willful understatement of Federal tax liability, unless such understatement is due to reasonable cause and not to willful neglect, and

(10) threatening to audit a taxpayer for the purpose of extracting personal gain or benefit.

(c) DETERMINATION OF COMMISSIONER.--

(1) IN GENERAL.— The Commissioner of Internal Revenue may take a personnel action other than termination for an act or omission under subsection (a).

(2) DISCRETION.— The exercise of authority under paragraph (1) shall be at the sole discretion of the Commissioner of Internal Revenue and may not be delegated to any other officer. The Commissioner of Internal Revenue, in his sole discretion, may establish a procedure which will be used to determine whether an individual should be referred to the Commissioner of Internal Revenue for a determination by the Commissioner under paragraph (1).

(3) NO APPEAL.— Any determination of the Commissioner of Internal Revenue under this subsection may not be appealed in any administrative or judicial proceeding.

(d) DEFINITION.— For purposes of the provisions described in clauses (i), (ii), and (iv) of subsection (b)(3)(B), references to a program or activity receiving Federal financial assistance or an educational program or activity receiving Federal financial assistance shall include any program or activity conducted by the Internal Revenue Service for a taxpayer.