

AMENDMENT TO H.R. 5620
OFFERED BY M . _____

Strike section 3 and insert the following:

1 **SEC. 3. REMOVAL OF EMPLOYEES OF DEPARTMENT OF**
 2 **VETERANS AFFAIRS BASED ON PERFORM-**
 3 **ANCE OR MISCONDUCT.**

4 (a) IN GENERAL.—Chapter 7 of title 38, United
 5 States Code, as amended by subtitles A and B, is further
 6 amended by inserting after section 714, as added by sec-
 7 tion 114, the following new section:

8 **“§ 715. Employees: removal based on performance or**
 9 **misconduct**

10 “(a) IN GENERAL.—(1) The Secretary may remove
 11 a covered individual who is an employee of the Department
 12 if the Secretary determines that—

13 “(A) the performance or misconduct of the cov-
 14 ered individual warrants such removal; and

15 “(B) in the case of removal for performance, a
 16 portion of such performance occurred during the
 17 two-year period ending on the date of the determina-
 18 tion.

19 “(2) If the Secretary removes a covered individual
 20 under paragraph (1), the Secretary may remove the cov-

1 ered individual from the civil service (as defined in section
2 2101 of title 5).

3 “(3) Nothing in this section may be construed to au-
4 thorize a finalized performance appraisal of an employee
5 to be retroactively amended.

6 “(b) NOTICE TO CONGRESS.—Not later than 30 days
7 after removing a covered individual under subsection (a),
8 the Secretary shall submit to the Committees on Veterans’
9 Affairs of the Senate and House of Representatives notice
10 in writing of such removal and the reason for such re-
11 moval.

12 “(c) PROCEDURE.—(1) An employee removed under
13 subsection (a) is entitled, before removal, to—

14 “(A) at least 10 business days written notice
15 (which, in the case of removal for performance, shall
16 identify specific instances as described in clause (i)
17 of section 4303(b)(1)(A) of title 5 and critical ele-
18 ments as described in clause (ii) of such section),
19 unless there is reasonable cause to believe that the
20 employee committed a crime for which a sentence of
21 imprisonment can be imposed—

22 “(i) stating the specific reasons for the
23 proposed action; and

24 “(ii) including a file containing all evidence
25 in support of the proposed action;

1 “(B) 10 business days to answer the charges
2 orally and in writing and to furnish affidavits and
3 other documentary evidence in support of the an-
4 swer;

5 “(C) be represented by an attorney or other
6 representative;

7 “(D) a review of the case by the Secretary be-
8 fore a decision adverse to the employee is made
9 final;

10 “(E) as soon as practicable, a decision of the
11 Secretary with respect to the charges of the em-
12 ployee; and

13 “(F) a written statement of the decision of the
14 Secretary that—

15 “(i) includes the specific reasons of the de-
16 cision; and

17 “(ii) in the case of a removal based on per-
18 formance, complies with section 4303(b)(1)(D)
19 of title 5.

20 “(2)(A) Subject to subparagraph (B) and subsection
21 (e), any final decision of the Secretary regarding removal
22 under subsection (a) may be appealed to the Merit Sys-
23 tems Protection Board.

1 “(B) An appeal under subparagraph (A) of a removal
2 may only be made if such appeal is made not later than
3 10 business days after the date of such removal.

4 “(C)(i) Subject to clause (ii), the decision of the Sec-
5 retary shall be sustained under subparagraph (A) only if
6 the Secretary’s decision—

7 “(I) in the case of an action based on perform-
8 ance, is supported by substantial evidence; or

9 “(II) in any other case, is supported by a pre-
10 ponderance of the evidence.

11 “(ii) Notwithstanding clause (i), the Secretary’s deci-
12 sion may not be sustained under subparagraph (A) if the
13 covered individual—

14 “(I) shows harmful error in the application of
15 the Secretary’s procedures in arriving at such deci-
16 sion;

17 “(II) shows that the decision was based on any
18 prohibited personnel practice described in section
19 2302(b) of title 5; or

20 “(III) shows that the decision was not in ac-
21 cordance with law.

22 “(3) The procedures under section 7513(b) of title
23 5 and chapter 43 of such title shall not apply to a removal
24 under this section.

1 “(d) EXPEDITED REVIEW.—(1) The Merit Systems
2 Protection Board shall promulgate such rules as the
3 Board considers appropriate to expedite appeals under
4 subsection (c)(2).

5 “(2) The Board shall ensure that a final decision on
6 an appeal described in paragraph (1) is issued not later
7 than 90 days after the appeal is made.

8 “(3) During the period beginning on the date on
9 which a covered individual appeals a removal from the civil
10 service under subsection (c)(2) and ending on the date
11 that the Board issues a final decision on such appeal, such
12 covered individual may not receive any pay, awards, bo-
13 nuses, incentives, allowances, differentials, student loan
14 repayments, special payments, or benefits.

15 “(4) To the maximum extent practicable, the Sec-
16 retary shall provide to the Merit Systems Protection
17 Board such information and assistance as may be nec-
18 essary to ensure an appeal under subsection (c)(2) is expe-
19 dited.

20 “(e) RELATION TO TITLE 5.—The authority provided
21 by this section is in addition to the authority provided by
22 subchapter V of chapter 75 of title 5 and chapter 43 of
23 such title.

24 “(f) DEFINITIONS.—In this section:

1 “(1) The term ‘covered individual’ means an in-
2 dividual occupying a position at the Department but
3 does not include—

4 “(A) an individual, as that term is defined
5 in section 713(d); or

6 “(B) a political appointee.

7 “(2) The term ‘misconduct’ includes a violation
8 of paragraph (8) or (9) of section 2302(b) of title
9 5, neglect of duty, malfeasance, or failure to accept
10 a directed reassignment or to accompany a position
11 in a transfer of function.

12 “(3) The term ‘political appointee’ means an in-
13 dividual who is—

14 “(A) employed in a position described
15 under sections 5312 through 5316 of title 5
16 (relating to the Executive Schedule);

17 “(B) a limited term appointee, limited
18 emergency appointee, or noncareer appointee in
19 the Senior Executive Service, as defined under
20 paragraphs (5), (6), and (7), respectively, of
21 section 3132(a) of title 5; or

22 “(C) employed in a position of a confiden-
23 tial or policy-determining character under
24 schedule C of subpart C of part 213 of title 5
25 of the Code of Federal Regulations.”.

1 (b) CLERICAL AND CONFORMING AMENDMENTS.—

2 (1) CLERICAL.—The table of sections at the be-
3 ginning of such chapter is amended by inserting
4 after the item relating to section 714, as added by
5 section 114, the following new item:

“715. Employees: removal based on performance or misconduct.”.

6 (2) CONFORMING.—

7 (A) TITLE 5.—Section 4303(f) of title 5,
8 United States Code, is amended—

9 (i) in paragraph (2), by striking “or”
10 at the end;

11 (ii) in paragraph (3), by striking the
12 period at the end and inserting “, or”; and

13 (iii) by adding at the end the fol-
14 lowing:

15 “(4) any removal under section 715 of title
16 38.”.

17 (B) TITLE 38.—Subchapter V of chapter
18 74 of title 38, United States Code, is amend-
19 ed—

20 (i) in section 7461(b)(1), by striking
21 “If the” and inserting “Except as provided
22 in section 715 of this title, if the”; and

23 (ii) in section 7462—

24 (I) in subsection (a)(1), by strik-
25 ing “Disciplinary” and inserting “Ex-

1 cept as provided in section 715 of this
2 title, the Disciplinary’; and

3 (II) in subsection (b)(1), by
4 striking “In any case” and inserting
5 “Except as provided in section 715 of
6 this title, in any case”.

