NATIONAL REVIEW ONLINE

Firing Lois Lerner

Not impossible, but almost.

By: Daniel Foster – May 23, 2013

How do you solve a problem like Lois Lerner? Former IRS commissioner Douglas Shulman, under whose foggy watch the targeting of conservative groups occurred, was easy to fire — he had already quit. And acting director Steven Miller was no sweat to dispatch, either. He merely "resigned" a month before he was going to leave anyway — effective in 30 days. But Lerner, director of the office that actually did the discriminating, and precisely the kind of middle manager the White House has been keen to blame this unfortunateness on throughout, is a different matter. Even as she pleads the Fifth Amendment at a congressional hearing, she holds onto her job.

That's not to say there isn't a desire, all the way up to the top, to see Lerner go. Exhibit A is the administration's gathering of friendly bloggers, for the kind of White House meeting they don't want to do over the phone, and those bloggers' turning around and calling for Lerner's removal within a half hour of each other. But as a civil servant, she is protected by both the full weight of federal law and the advocacy of a powerful union, making her tricky to get rid of.

Statistically speaking, the firing of a federal employee is a rare event. A Cato Institute study showed that in one year, just 1 in 5,000 non-defense, civilian federal employees was fired for cause. A widely cited analysis by *USA Today* found that in FY 2011, the federal government fired just 11,668 out of 2.1 million employees (excluding military and postal workers). That's a "separation for cause" rate of 0.55 percent, roughly a fifth the rate in the private sector.

And the firing of employees who fit Lerner's profile is rarer still. Lerner is very much a "white-collar" employee, and the same analysis found that blue-collar employees (such as food-service workers) were twice as likely to be fired. Lerner is a twelve-year vet at IRS, and before that was associate counsel at the Federal Elections Commission for many years. But fully 60 percent of federal employees fired were in their first two years on the job. Lerner has averaged $185,000 in salary from 2009 to 2012, but only 0.18 percent of federal employees making more than $100,000 were let go for cause. Most relevant of all, Lerner is a lawyer, and just 27 of the government's 35,000 lawyers lost their jobs in 2011 — six fewer than left federal employment via the Big Sleep.

Part of the reason so few federal workers are let go is surely the, shall we say, culture of lowered expectations synonymous with government bureaucracy. But the greater part of it is that firings are complex and time-consuming. Forty-nine states have "at-will" employment laws, meaning that, specific contracts and covenants aside, a private-sector employer can let an employee go for any reason at all, with a few exceptions for things like discrimination and (ironically enough) the intimidation of whistleblowers. But in Washington, the process can take 18 months or more.

"It's much more difficult to fire government workers, because it requires much more evidence of wrongdoing, and it is a longer process for creating the paperwork, for documenting it, and so forth," Donald Kettl, dean of the University of Maryland's School of Public Policy and a nonresident senior fellow at Brookings, tells me. "There are lots of cases where supervisors give up, and either decide it's easier to transfer [a poor employee] or, in the time-honored tradition, to promote them."

"It worked in *Seinfeld*," Kettl adds.

Moreover, once an employee is fired, there is no guarantee he will *stay* fired. Each has the right to appeal to the Merit Systems Protection Board (MSPB), a Carter-era body created as part of an update to the civil-service reforms in the century-old Pendleton Act (a.k.a. the only reason you remember Chester A. Arthur's name). As a board spokesman told *Politico*, the initial appeal, before a regional administrative-law judge, takes an average of three months to process. A second appeal, to the D.C. board, could take another nine months or more. In the meantime, the terminated will usually have the full-throated advocacy of a union lawyer to go along with a set of MSPB guidelines that set a high bar for the terminators.

IRS brass have presumably done little or none of the paper-trail building required to off Lerner, and they can't skip steps in the process simply because the offender is a political inconvenience to the president of the United States.

Should Lerner ever actually be fired, and should she decide to appeal, she will no doubt point to her lack of a disciplinary history, and indeed to the praises sung of her by the likes of Miller, who was then commissioner of the Tax Exempt and Government Entities Division. In announcing her promotion to her current position in 2005, Miller lauded Lerner as "an integral part of the EO team [who] has successfully increased the IRS presence in the exempt community." (And how!) He went on, specifically praising Lerner's "integrity, skills, and judgment" as "exceptional."

I asked Kettl if such praise was likely to complicate the case for firing her.

"*Oh yeah*," Kettl said. "If in the past your judgment had been applauded by your superiors, and then something happens that embarrasses them . . . then you've got that paper in the file that you can pull out and say: 'Look at this. This isn't on me, this is on everyone else who put me in this position.'"

Indeed, both Kettl and Chris Edwards, director of tax-policy studies at Cato and author of the institute's study on federal firing practices, emphasized that the key in Lerner's case would be whether her role in the targeting rose to the level of illegality.

"Federal workers almost never get fired for poor performance, but they do occasionally get fired for misconduct. So if IRS workers routinely and willfully ignored laws and regulations, that is certainly grounds for firing," Edwards told me.

According to a 22-year veteran of the IRS's investigatory division, who is now retired and asked not to be named, the clearest source both for criminal charges and grounds for termination against Lerner and others at the IRS is probably section 1203 of the IRS code, amended in 1998 as part of the congressional GOP's Taxpayers Bill of Rights.

Known as the “10 Deadly Sins” inside IRS circles, section 1203 spells out the kinds of misconduct that, if proved, result in automatic termination.

Among them? “Providing a false statement under oath with respect to a material matter involving a taxpayer or taxpayer representative”; “concealing information from a congressional inquiry”; and “the violation of any right under the Constitution” of a taxpayer.

Sure, all of this sounds painfully familiar. But the question is whether the new management at the IRS will be willing and able to put the rap on Lerner, as opposed to either “rogue” subordinates or crusading superiors. If they can’t get the “administrative or judicial determination” that Lerner is guilty of any of the 10 Deadly Sins, all they’ll have to fall back on is poor judgment or incompetence. And in Washington, those sins are merely venial.

Kettl agreed. “Did she break the law or did she simply exercise poor judgment? And is it clear that it was her poor judgment, or her superiors’? I’m not sure that under these circumstances I’d want to be the one making that the procedural case.”

And if you think that the publicity of the IRS scandal will make it easier to fire Lerner, or for her firing to stick, think again. Jeff Neely, the GSA administrator who was infamously photographed last year in a hot tub enjoying a glass of wine at a taxpayer-funded conference in Las Vegas, and who became the focus of a congressional investigation into wasteful spending, retired with benefits. His colleague Paul Prouty was fired for his role in the conference, but was reinstated on appeal to the MSPB — with eleven months’ back pay.

Given all these hurdles, it would certainly be understandable for the White House to resort to asking its allies in the blogosphere to create public pressure on Lerner. Maybe she’ll quit — or be struck by lightning. Either seems likelier, at this point, than a pink slip.

— Daniel Foster is news editor of National Review Online.