

# A Biden appointee sues to keep her job under Trump

"This is pretty straightforward. There are regulations, there are laws. These were violated in her termination," said attorney Mary Kuntz.



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One highly visible appointee of former president Joe Biden has filed suit to keep her job. Bureau of Prisons Director Collette Peters filed her appeal of what she calls a wrongful dismissal to the Merit Systems Protection Board. Peter has retained federal employment attorney Mary Kuntz, who joined [\*the Federal Drive with Tom Temin\*](#).

*Interview transcript:*

**Tom Temin** Let's begin with why she is even looking to get back her job. I thought the Bureau of Prisons director was a Presidential appointee and they all serve at the pleasure of the President.

**Mary Kuntz** Collette Peters is, in fact, career civil service, and so career SES. And so she has all the rights that are attached to career SES.

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**Tom Temin** But she did come in with the Biden administration and well, okay, but if she's career SS, then she is career SES, subject to Title V rights and protections.

**Mary Kuntz** That's absolutely right. And that's what we're appealing on to the [Merit Systems Protection Board].

**Tom Temin** Golly. And what is the process for MSPB in terms of what you expect for time? I mean, can they issue a stay, like a judge can? And she's in the job and this has happened with a lot of appointees, but MSPB could take years, right?

**Mary Kuntz** MSPB is a very quick procedure in general. Yeah. So we don't expect it to take a great deal of time. We're not sure. We're waiting for the judge's order right now to get proceedings started. We submitted the appeal. We submitted the termination document. We submitted proof that she's career SES. And the agency has entered appearance of counsel now; we're still awaiting an order from the judge, but it should move pretty quickly. Generally, what happens with the MSPB is that after an initial conference or just an initial order, the agency will be required to file its agency file and then discovery will commence. We're not sure if we need discovery. We need to see what the agency has to say first and then we'll move forward.

**Tom Temin** So you will be having your appeal then to an administrative law judge, not to the board itself, initially.

**Mary Kuntz** An administrative judge. That's right.

**Tom Temin** And the grounds then. So what you'll be seeking then is grounds for dismissal, or at least asking the agency to state why. In this case, if it is career SES, there has to be cause for the dismissal.

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**Mary Kuntz** So there has to be cause. And under federal law of 5 USC 3393G, a career appointee to the SES can only be fired for five reasons, and none of those reasons were given. I won't bore you with all of them. But fundamentally, a misconduct allegation. Any of these reasons allow her to give a response. She's entitled. She has a property interest in her position. She is entitled to notice of why she's being removed and the opportunity to respond to it. The only time that an SES doesn't have this opportunity to appeal to the MSPB is in a performance based action. But a performance based action has to be based upon a whole careful process in which she is allowed to address the performance based charges and respond to them. That hasn't happened. There hasn't been a misconduct allegation; that hasn't happened. The document terminating her simply cited Article II [of the] Constitution. That is not one of the ways that a career appointee to the SES can be removed under federal law. So it's both that she appears to have been removed for something that is extra statutory. So we're asking the MSPB to review that. And she wasn't accorded any of the due process right. She wasn't even given notice. There are requirements for notice that she's supposed to be given and she wasn't given that. So we're seeking all of that. And it appears to us that the government can respond by simply asserting a constitutional claim or by saying, yes, we messed up, we messed up the way we removed her. And what they have to do to reform that is restore her to her position.

**Tom Temin** We're speaking with Attorney Mary Kuntz. She's a partner at Kalijarvi, Chuzi, Newman and Fitch. And getting back to the reasons for removal of an SES. Go ahead and bore us, and just give us the quick version of the five grounds that you can remove someone in the SES.

**Mary Kuntz** I'm not sure I can remember all of them, but OSC can, if OSC makes a finding.

**Tom Temin** Office of Special Counsel.

**Mary Kuntz** Office of Special Counsel. They can make a proposal. There are misconduct claims that can be used. National security. Performance is a basis for removal. And it's essentially non-appealable; there's a hearing that's available, but it doesn't really do anything but advise. Fundamentally, there are very specific reasons that you can remove somebody who is a part of the career SES. None of those were relied upon. Under 5 USC 7543, I think it is, there are procedural requirements and none of that was followed. And she simply received a notice the afternoon after the inauguration that she was removed, effective immediately.

**Tom Temin** And this came via email.

**Mary Kuntz** Yes.

**Tom Temin** From presidential personnel.

**Mary Kuntz** No from the acting attorney general, signed by the then-acting attorney general.

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**Tom Temin** Right. So BOP, of course, is part of the Justice Department and the country child there. Well, you're speaking for Collette Peters then, who is now out of office. What's she doing at the moment? Is she at home waiting for the disposition of this case?

**Mary Kuntz** I don't know exactly what she's doing. She's being a mom. She's, I think, at a swim meet right now for one of her children.

**Tom Temin** Well, I meant in general. She staying in Washington hoping for this restoration of her position.

**Mary Kuntz** Well, she's staying in Washington because she wants to prosecute this case, Right. I'm not sure that she's just waiting on that. I think she's probably out talking to folks about the work she's done for decades, which is prison.

**Tom Temin** Right. She was the prison director, I think, in Oregon before coming to Washington to take over BOP. And if you file this appeal to the MSPB, when one does on behalf of a senior executive, and one of the grounds for dismissal is performance and that is not appealable, isn't that just an invitation to the agency to gin up things and say, Yeah, well, okay, here we go. This is why she did not perform. I have no idea what they would come up with. Do you ever win these types of things? I guess is what I'm asking.

**Mary Kuntz** We do. But it's also true that if an agency simply messed up the procedure, right, they didn't give the proper notice or whatever, the MSPB will reverse. The person is restored to their position and yes, an action can be taken. But the thing about performance is that there is a huge paper trail that has to go on. There is an initial performance evaluation and an opportunity for her to respond. It goes to a board that looks over this for SES and they make a recommendation. It goes back to the agency. None of that has happened here. And in fact, her record of performance is good. So that would have to happen. Same thing for misconduct. If there's a misconduct allegation, we've certainly not been put on notice. The reason for terminating her was simply given as a constitutional claim asserted by the acting attorney general that the President has these powers.

**Tom Temin** Right. And they've also instituted that "career/policy" schedule position, which they used to call Schedule F. Did that come up in the dismissal or we don't know yet?

**Mary Kuntz** Not at all. Not at all. No mention of that. But of course, this was early days for the Trump administration. It was hours after the inauguration.

**Tom Temin** And to your knowledge, the MSPB has two basic kinds of cases: routine and what they call precedential, and there doesn't seem to be much precedential here. It sounds like a routine filing then.

**Mary Kuntz** I think it's a very straightforward case. I laugh because obviously there may be more public interest in it than often in the cases that I litigate. But it's also true that this is pretty straightforward. There are regulations, there are laws. These were violated in her termination. The Merit Systems Protection Board is where we have to bring those claims, and that's what we're doing. We are eager to see what the agency has to say about this termination.

**Tom Temin** Sure.

**Mary Kuntz** Because right now, all we can do is hypothesize.

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**Tom Temin**

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