



**MAY 6, 2014**  
**TOP NEWS STORIES**

## **SURVEY OF SENIOR EXECUTIVES FINDS LOW MORALE, DISATISFACTION WITH PERFORMANCE APPRAISAL AND PAY-FOR-PERFORMANCE SYSTEM**

The results of a survey of federal Senior Executives and Senior Professionals conducted by the [Senior Executives Association](#) (SEA) were [released](#) last week, and they are not pretty.

The survey paints a picture of a demoralized executive corps that is dissatisfied with how pay-for-performance is working and their agencies handling their performance and appraisal processes.

The survey found that 51% of respondents rated the morale of the senior executives and professionals at their organization with "low or very low" morale, with only 13% reporting "high or very high" morale.

Over a third (34%) reported being "not satisfied" with the FY2013 performance appraisal and rating process at their agency, with a greater percentage saying the process became worse from FY2012 to FY2013.

Also evident is a concern of the executives surveyed about the future of government management, with many comments suggesting that capable GS-14s and 15s are opting not to enter the executive corps due to an unbalanced risk/reward ratio.

One survey respondent said the current pay-for-performance system for Senior Executives "is broken," with others saying they are considering falling back to General Schedule positions or leaving the government for the private sector altogether.

In addition to the survey data, the report contains written comments provided by respondents.

"There is not a company in the world that would institute pay freezes, deny or limit performance bonuses, continually criticize senior executives, politicize mistakes by agencies and blow them all out of proportion and at the same time expect us to work long hours, recruit top talent and continue to be positive about the future of government," said one survey respondent.

To read the full report, [click here](#).

## **OPM ISSUES UPDATED HATCH ACT FINAL RULE**

This week the Office of Personnel Management (OPM) issued a [final rule](#) on political activity regulations in the Federal Register.

The rule incorporates new political activity regulations stemming from the Hatch Act Modernization Act of 2012.

The 2012 Hatch Act modernization modified the penalties under the [Hatch Act](#) to allow for disciplinary actions in addition to removal for federal employees. It also clarified the application of the Hatch Act for residents of the District of Columbia and limited the prohibition on state and local government employees running for elective office to those whose salary is paid completely by federal grants or loans.

Recently the Office of Special Counsel, which is responsible for investigating Hatch Act violations, [took action against](#) two federal employees for violation of the Act for political activity in support of either President Obama or Republican candidate Mitt Romney around the 2012 elections.

“These two cases are examples of how government agencies can work together to ensure partisan politics stay out of the federal workplace,” [said](#) Special Counsel Carolyn Lerner.

The new Hatch Act rules go into effect on June 4, 2014.

## **GAO SAYS OPM NEEDS TO DEMONSTRATE THE VALUE OF ITS INNOVATION LAB**

A Government Accountability Office (GAO) [report](#) released last week found that the Office of Personnel Management (OPM) needs to do more to demonstrate the [return on investment](#) for their Innovation Lab.

In particular, GAO said OPM needs to do more to ensure the lab has a real impact on agency culture and performance.

The OPM Innovation Lab, was opened in March 2012 and is staffed by 6 FTEs. The lab is used in a similar fashion as other agency innovation laboratories – it provides employees with a distinct physical place to engage in discussions about difficult to solve problems and explore technologies which could be used for innovation or problem solving.

Despite the use of the lab for trainings and workshops, GAO said the agency has “not developed performance targets or measures related to project outcomes, and without a rigorous evaluation framework that can help OPM track the lab's performance, it will be hard to demonstrate that the lab is operating as originally envisioned.”

To access the GAO report, GAO-14-306, [click here](#).

## **FROM THE HILL**

### **PRESSURE ON VETERANS AFFAIRS INCREASES AS AMERICAN LEGION CALLS FOR RESIGNATION OF SECRETARY SHINSEKI AMIDST AGENCY PROBES INTO EMPLOYEE CONDUCT**

As FEDmanager has [reported](#) in recent months, there has been much bipartisan attention directed towards the management of the Department of Veterans Affairs (VA).

That attention and the pressure for legislative action will likely significantly increase following a Monday press conference during which American Legion National Commander Daniel M. Dellinger [called for the resignation](#) of VA Secretary Eric Shinseki, Under Secretary of Health Robert Petzel and Under Secretary of Benefits Allison Hickey.

“Gen. Eric Shinseki has served his country well,” Dellinger said. “His patriotism and sacrifice for this nation are above reproach. However, his record as the head of the Department of Veterans Affairs tells a different story.

The existing leadership has exhibited a pattern of bureaucratic incompetence and failed leadership that has been amplified in recent weeks.”

The call for the resignation of the top political leadership at the VA comes on top of congressional efforts to pass legislation ([H.R. 4031](#); [S. 2013](#)) which would allow for the [removal of career Senior Executives](#) without due process, and separate efforts to [ban performance awards](#) for all VA executives.

## CASE LAW UPDATE

### **MSPB REVERSES SUSPENSION OF POSTAL SERVICE SUPERVISOR IN LEAVE WITHOUT PAY STATUS**

On June 18, 2013, a Postal Service supervisor requested sick leave under the Family and Medical Leave Act (“FMLA”) of 1993. Four days later, on June 22, 2013, the Postmaster contacted the employee and told him that if he intended to come to work on his next scheduled work day (June 24, 2013), he should not do so. The Postmaster informed the employee he was being placed on emergency leave pending an ongoing investigation into alleged misconduct, and retroactively changed the employee’s sick leave to Leave Without Pay (“LWOP”). On August 12, 2013, the employee’s doctor cleared him to return to work. The agency responded by placing the employee in an emergency LWOP status from August 12, 2013, until August 20, 2013, when he was finally returned to a paid status. In an appeal to the MSPB, the employee argued that he had been constructively suspended because he was in an approved sick leave status when the agency placed him in a LWOP status. An MSPB administrative judge dismissed the appeal for lack of jurisdiction because the employee initiated the absence and was not able to return until August 12, 2013, and also because there were only eight days between his ability to return and his actual return to paid status, putting the total days of his “constructive suspension” below the amount necessary for an MSPB appeal right. On April 25, 2014, the Board reversed the administrative judge’s decision and did not sustain the employee’s suspension.

The Board opened their analysis of the case by citing *5 U.S.C. §§ 7511(a)(2), 7501(2)*, which defines a suspension as “the placing of an employee, for disciplinary reasons, in a temporary status without duties or pay.” The Board then turned to the employee’s argument on review that the agency suspended him when it retroactively changed his sick leave to LWOP, and that the agency’s decision was not because it was waiting for “proper documentation,” as the agency claimed, because his request for leave under the FMLA was eventually approved based on the information he originally submitted, rather than subsequent submissions. The Board noted that the employee contended he had sent medical documentation to the agency on three separate occasions. On June 18, 2013, the documentation was allegedly signed for by an agency official. On June 25, 2013, the agency allegedly refused to accept delivery. On July 11, 2013, the Postmaster allegedly signed for additional medical documentation.

This position contrasted sharply with the agency’s contention that they changed the employee’s leave status from sick leave to LWOP because he failed to provide adequate medical documentation. The Board stated, however, that they found no evidence in the record that the agency “ever requested medical documentation from the [employee] that he failed to provide.” The Board also concluded that the agency’s answers to the employee’s discovery requests indicated that the agency’s investigation into alleged misconduct by the employee was likely the motivating factor for the denial of the employee’s sick leave and the agency’s decision to retroactively switch the employee from sick leave to LWOP. Also, the Board noted, the fact that the employee was immediately put in an emergency LWOP status “due to the ongoing investigation” after his doctor cleared him to return to work supported their conclusion.

The Board cited *Lefavor v. Department of the Navy*, 115 M.S.P.R. 120 (2010) in support of their position that because the agency “completely and retroactively rescinded the [employee’s] sick leave and changed the nature of his leave status to LWOP before he filed [his MSPB appeal], the employee was never in a sick leave status for the purpose of the Board’s jurisdictional analysis. In other words, the Board found that the employee’s self-initiated sick leave status, having been overwritten by the retroactive status change, did not

prevent the employee from falling under MSPB jurisdiction because the Board's jurisdiction is determined by the nature of the agency's action at the time the appeal is filed.

The Board further found that there was no "constructive" suspension because a constructive suspension arises when an agency places an employee on "enforced leave pending an inquiry into her ability to perform her job, or when an employee absent from work for medical reasons requests to return to work with altered duties and the agency denies the request."

Instead, the Board found that an actual suspension had occurred when the agency retroactively rescinded the employee's sick leave, directed him *not* to return to work, and placed him in a LWOP status for more than 14 days. Additionally, the Board found that the period of "emergency placement" in LWOP status following the employee being cleared by his doctor to return to work was a continuation of his suspension.

Because the employee did not receive minimum due process, the Board reversed the suspension, and ordered the agency to pay the employee back pay, interest on back pay, and other benefits.

[You can read the full case, \*McHenry v. United States Postal Service\*, here.](#)

*This case law update was written by [Conor D. Dirks](#), associate attorney, [Shaw Bransford & Roth, PC](#).*

*For thirty years, Shaw Bransford & Roth P.C. has provided superior representation on a wide range of federal employment law issues, from representing federal employees nationwide in administrative investigations, disciplinary and performance actions, and Bivens lawsuits, to handling security clearance adjudications and employment discrimination cases.*

## **PERFORMANCE PICK UP BLOG**

### **IGNORING OUR DATA: COMPROMISE OF A DISTASTEFUL VARIETY**

The longtime opinion writer, Ruth Marcus recently coined a great phrase to describe a growing and particularly disturbing issue, our policymakers willingness to ignore data for their own purposes. [Ms. Marcus called it legislative "compromise of a peculiarly distasteful variety — bipartisanship in the form of can-kicking, budgetary obfuscation and unaffordable generosity."](#) These comments have stayed with me as I prepare for the 15th [Annual Government Performance Summit](#), where a variety of Federal and State Performance and Budget leaders will discuss the structural and behavioral obstacles that have prevented us from fully realizing the promise of better, more rational decision making in government.

It's become increasingly apparent that Congressional can-kicking has unfortunately made its way into the psyche and mindset of all of us working for improved Government-results. Evidence mounts almost daily, including [this recent snapshot from the Federal Viewpoint Survey](#) which paints a sobering picture of employees walking away from innovation and new ideas. Other signals are coming through as well, including the [DoD CFO](#), Bob Hale's recent comment at a National Academy of Public Administration conference that he, "Can't measure outcomes in a way that's meaningful to management."

Need more evidence? How about the ["temporary" tax breaks](#) that never end, and this year were extended once again for a whopping \$47 billion, without a performance measure or evaluation in sight. We could dismiss this massive lack of oversight and accountability as typical Washington behavior if it wasn't having devastating results. Not just the lack of resources available for needed programs, but the siphoning of dollars away from the US middle class, [as recently reported in \*The New York Times\*](#). If that's not an outcome based measure, I'm not sure what is.

As we're seeing at events, forums and research from groups that span the spectrum, from the [American Enterprise Institute](#), the [Partnership for Public Service](#) and [AGA](#), attitudinal and behavioral changes, and leadership-driven focus is essential for performance improvement, something sorely lacking when Congress

seems to be the last institution in America ignoring quantitative data. [Long interruptions in political leadership](#) have also been very disruptive to innovation and strategy execution, along with the massive budget disruptions. While Federal employees, managers and public policy students have all experienced an increase in knowledge on performance and evaluation, some of their political leadership and congressional appropriators unfortunately have not. But the future may be brighter, [Beth Cobert, the OMB Deputy Director for Management](#), is bringing a fresh focus from her years consulting with the private sector and for the next two years budgets appear to be stabilized. Now is the time to demonstrate a needed new management focus.

*This article was written by Jon Desenberg of [The Performance Institute](#).*

## MANAGER MATTERS

### IN THE NEWS: GAO & TIGTA ISSUE WORRYING REPORTS WHILE LERNER MAY FACE CONTEMPT CHARGES

*FEDS Professional Liability Insurance gives you the freedom to manage. For more articles like this one, read "Yesterday's Headlines, Today's Coverage" in the bottom left corner on the FEDS homepage.*

Here at FEDS we are consistently asked how federal employee professional liability insurance actually works and in what scenarios it is applicable and would provide coverage. In our column here at FEDmanager we will aim to give you concrete examples of instances in which a PLI policy would be of great benefit. Given the nature of today's federal government finding these scenarios is no more difficult than looking at the front page of your newspaper. Today's column focuses on the Internal Revenue Service (IRS), an agency still dealing with the fallout of the tax-exemption "scandal" from last year, and currently facing new difficulties.

- On April 10, the House Oversight and Government Reform Committee voted to approve a resolution holding Lois Lerner, ex-head of an IRS division that reviews applications for tax exemptions, in contempt of Congress due to her refusal to testify at two of the committee's hearings. The party-line 21-12 vote, with Republicans voting for and Democrats against, sends the bill to the House floor, where the full body of representatives will decide whether or not to ask the Justice Department to pursue criminal prosecution of Lerner. The Oversight and Government Reform Committee's vote comes on the heels of an earlier vote by the House Ways and Means Committee requesting that the Justice Department consider prosecuting Lerner for crimes including exposing confidential taxpayer information and misleading investigators.
- The Government Accountability Office (GAO) recently released a report that reflects how a large decrease in the budget of the Internal Revenue Service (IRS) has led to a substantial decline in the agency's ability to effectively collect owed tax revenue as well as the agency's customer service capabilities. The IRS' budget has declined approximately \$900 million since fiscal 2010 in the shape of personnel reductions, some efficiency improvements, and a sharp decline in employee training. The GAO reported that IRS per-employee spending has dropped from \$1,450 in 2009 to \$250 in 2013.

Consequently, the IRS' abilities have been compromised. In an interview, IRS Commissioner John A. Koskinen stated that the \$500 million budget cut that the IRS absorbed as part of the sequester last year led to a drop in tax revenue of more than \$2 billion, with more than \$4 in revenue being lost for every \$1 that was "saved" due to the sequester. IRS collections from enforcement actions are also down about \$4.3 billion from 2010.

- A late-April report by the Treasury Inspector General for Tax Administration revealed that between October 2010 and December 2012 the Internal Revenue Service (IRS) paid out approximately \$2.8 million in bonuses to employees with serious conduct issues, including more than \$1 million in cash awards to about 1,100 employees with federal tax-compliance issues. IRS officials revealed that, due to

their interpretation of the agency's contract with the National Treasury Employees Union (NTEU), they generally do not consider conduct issues when issuing employees' performance awards. TIGTA Inspector General Russell George acknowledged in the report that the government does not prohibit bonuses for those employees who are tax-delinquent, but added that these awards create "a conflict with the IRS' charge of ensuring the integrity of the system of tax administration."

As the GAO report suggests, this is already an agency dealing with the harmful effects of severe budget cuts. The large presence of the IRS in the public's eye means that more and more scrutiny, both by the media and by Congress, is being heaped upon the agency. This in turn can lead to an increased chance of disciplinary, criminal, and civil actions being taken against managers in the IRS. In the three news stories mentioned above, we see one manager hauled in front of Congress and now potentially facing criminal charges, while the TIGTA report may lead to discipline for managers who gave bonuses to employees behind on their taxes.

It is apparent from these scenarios that outside scrutiny could affect ANY manager. Adverse actions can and do get brought against quality government workers. If you have a disciplinary matter being brought against you the FEDS policy will provide you with up to \$200,000 in legal defense costs to protect your career and your reputation. Being the subject of an investigation, whether by OIG, OSC, or another organization within the government, is also covered under this part of the policy. The administrative portion of the FEDS policy also would provide legal counsel if you are forced to testify before Congress, as IRS officials did after the Cincinnati office scandal. The policy also allows for up to \$100,000 in legal defense in the unfortunate event that you face a criminal charge brought against you as a result of doing your job in the federal government. Having a FEDS professional liability insurance policy assures that you will have top-notch legal representation and coverage in the event of any job-related adverse action being taken against you. You will also have the peace of mind, knowing that the FEDS policy will defend and indemnify you up to \$1 or \$2 million in the event of a civil lawsuit. Given the prevalence of all types of these instances in today's government, you can't afford not to have FEDS PLI.

*For more information on your specific exposures now, how professional liability insurance protects, or how the FEDS program differs from other insurance programs, please visit the [FEDS website](#) and choose the Executive and Managers tab. For more articles like this one, read "Yesterday's Headlines, Today's Coverage" in the bottom left corner on the [FEDS homepage](#).*

## EDUCATE YOURSELF

### **FEIAA EXECUTIVE FORUM TRAINING – MAY 20 AT GWU, WASHINGTON, DC**

"Leadership Readiness for New Realities" is a one-day training program that will be held Tuesday, May 20, 2014, at The George Washington University in the Marvin Center's Grand Ballroom. Sponsored by the Federal Executive Institute Alumni Association ([FEIAA](#)) and the Federal Executive Institute (FEI), the program offers an outstanding lineup of FEI faculty and adjunct faculty. It is also designed to provide a sampling of the experience of attending FEI's four-week Leadership for a Democratic Society program and is an excellent opportunity for cross-agency networking.

Our speakers include Katherine Archuleta, Director of the Office of Personnel Management (invited); Dr. Suzanne Logan, Director of FEI; Dr. Matthew Stafford, Dean of Faculty, FEI; Dr. Warren Blank, FEI adjunct faculty member; and John Kamensky, Senior Fellow, IBM Center for the Business of Government.

As an added bonus, each participant will receive copies of the book [The Nine Natural Laws of Leadership](#) by Dr. Warren Blank and the report [Six Trends Driving Change in Government](#) coauthored by John Kamensky. Continental breakfast, lunch and break refreshments are also included in the registration fee.

Please circulate this announcement to executives, managers, and aspiring leaders in your organization. This very affordable program—\$450 per person (\$375 per person for [members of FEIAA](#)) or \$350 per person for groups of 5 or more—is open to members of the Senior Executive Service, managers and supervisors.

For [complete information](#) about each training segment and what participants can expect to learn, the speakers, and Forum program updates, please visit the FEIAA website at [www.feiaa.org](http://www.feiaa.org); call the FEIAA office at 703-725-2863; or contact Marc Flaster at [Marc.Flaster@opm.gov](mailto:Marc.Flaster@opm.gov). To register, use the [attached form](#) or register securely online.

## **GEICO'S GOOD STUFF PUBLIC SERVICE RECOGNITION WEEK CELEBRATED AROUND THE NATION**

*GEICO's Good Stuff is a column series highlighting great stuff happening in the federal community.*

In the midst of Public Service Recognition Week ([PSRW](#)), GEICO would again like to salute FEDmanager subscribers for their service to our nation. We appreciate the hard and often thankless work you do each day on behalf of your fellow citizens.

While there are many [events](#) in the Washington, D.C. area, many PSRW celebration events take place around the nation led by local Federal Executive Boards, regional and local agency offices, governors and state and local government offices.

Visit [www.psrw.org](http://www.psrw.org) and check out the Twitter stream on the front page tracking use of the #PSRW hashtag to see who from around the country is celebrating public service.

PSRW [celebration guides](#) are available online, and the Public Employees Roundtable (PER) [has asked](#) public employees to share why they are proud to serve and why they [love public service](#) (by following the link to download a 1 < 3 Public Service whiteboard) on their [Facebook](#), [Twitter](#), and [Instagram](#) pages using tags #PSRW and #Proud2ServeUSA.

Did your agency participate in PSRW or did you see or hear about local celebrations in the news or newspaper? If so, contact [publisher@shawbransford.com](mailto:publisher@shawbransford.com) to let us know, and we can share stories we receive next week.

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## **HEARD INSIDE THE BELTWAY**

When confronted by an agency investigator regarding your conduct, the natural tendency... is to deflect, divert, downplay or deny. But doing so, almost always, will result in a more severe penalty than if you simply admitted to the conduct — in its truest and most complete form.

*Debra Roth, attorney, Shaw Bransford & Roth, in the Federal Times Ask the Lawyer column entitled "[Admit the Misconduct](#)"*

## **WEEKLY LEADERSHIP REFLECTION**

First rule of leadership: everything is your fault.

*A Bug's Life*