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TOP NEWS STORIES

OPM HAS INADEQUATE CONTROLS OVER BACKGROUND INVESTIGATION CONTRACTORS, AUDIT FINDS

A newly released audit by the Office of Personnel Management (OPM) Office of the Inspector General (OIG) found that "OPM needs to strengthen its controls over its contractors and the background investigation review process."

The audit of OPM's Federal Investigative Services' (FIS) case review process over background investigations was conducted between August and December of 2013.

OPM's FIS is responsible for conducting background investigations on federal job applicants, employees, and contractor personnel, including making security clearance level determinations. It performs background investigation services on a reimbursable basis for agencies, and also contracts with three companies, U.S. Investigations Services (USIS), CACI International Inc. (CACI), and KeyPoint Governmental Solutions, Inc. (KGS) to assist with completing background investigations.

FIS is responsible for quality control of the contractor reviewed background investigations. The OPM IG found that FIS could improve their oversight over two areas of the background review process: Personnel Investigation Processing System (PIPS) events, and auto-released Reports of Investigations (ROI).

The audit found that PIPS event indicators are "weak controls to ensure all investigative items have been reviewed," and for ROIs, that "FIS does not have a control in place to verify that the Contractors are conducting a review on auto-released ROIs."

Contractors responsible for background reviews are required to have a process in place to conduct a full, 100 percent pre-submission quality review of all investigative work. The audit determined that such reviews do not always occur, as required, and that FIS needed to improve their oversight of reviews. FIS concurred or partially concurred with many of the recommendations, saying process improvements are underway.

To access the full OPM OIG report (4A-IS-00-13-062) including recommendations and OPM's response to the IG, Audit of the Federal Investigative Services' Case Review Process Over Background Investigations, click here.

OMB SHOULD STRENGTHEN REVIEWS OF CROSS-AGENCY GOALS, GAO REPORTS

Since the passage of the GPRA Modernization Act of 2010 (GPRAMA), the Office of Management and Budget (OMB) has been required to coordinate with agencies to establish outcome-oriented priority goals, known as cross-agency priority (CAP) goals, with quarterly and annual performance targets and milestones, and to report that information on Performance.gov.

A new Government Accountability Office (GAO) report found that OMB's assessment of CAP goals could use improvement.

OMB had identified fourteen (14) interim CAP goals in early 2012 and has since released five quarterly updates on the status of those goals on Performance.gov. GAO found that of those 14 goals, eight included data that indicated performance towards an overall planned level of performance, and only three contained annual or quarterly targets to allow for assessment of interim progress. The six other goals did not report progress towards the goal due to lack of a quantitative target or data necessary to track progress. GAO also found the updates on Performance.gov to not include some relevant information.

Overall, GAO said that "the incomplete information in the updates provided a limited basis for ensuring accountability for the achievement of targets and milestones," as they relate to CAP goals.

GAO also reviewed OMB's quarterly progress reviews, a component required by GPRAMA, that OMB carries out with the support of the Performance Improvement Council (PIC). OMB has instituted a process for reviewing progress on goals each quarter, including data collection from goal leaders and the development of memorandum for the OMB Director.

GAO found the information included in OMB's memos were not consistent with GPRAMA requirements. "For example, GPRAMA requires OMB to identify strategies for improving the performance of goals at risk of not being met, but this was not consistently done. Without this information, OMB leadership and others may not be able to adequately track whether corrective actions are being taken, thereby limiting their ability to hold officials accountable for addressing identified risks and improving performance," GAO noted.

GAO also examined whether leading practices were being utilized in CAP-goal reviews. GAO found some variation in how CAP-goal leaders instituted their progress reviews.

"Effective review processes consistently engage leaders and agency officials in efforts to identify and address performance deficiencies, and to ensure accountability for commitments. Thus, not using them may result in missed opportunities to hold meaningful performance discussions, ensure accountability and oversight, and drive performance improvement," GAO stated.

GAO made seven recommendations to OMB to improve the reporting of performance information for CAP goals and to ensure that CAP goal progress reviews meet GPRAMA requirements and reflect leading practices. OMB generally agreed to consider GAO's recommendations.

To access the full GAO report, GAO-14-526, Managing for Results: OMB Should Strengthen Reviews of Cross-Agency Goals, click here.

CIO SURVEY PROVIDES INSIGHTS FOR FEDERAL IT WORKFORCE, CHALLENGES AND OPPORTUNITIES

A new survey of government information technology (IT) leaders offers a view into the top challenges and focus areas of federal chief information officers (CIOs) and chief information security officers (CISOs).

The survey, produced by TechAmerica and Grant Thornton and now in its 24th iteration, is based on interviews with 59 CIOs and CISOs.

The survey found that top challenges for CIOs include workforce, cyber security, and budget. "While CIOs have a dedicated workforce, they still continually face the need to navigate through the impacts of budget cuts on hiring, skills gaps and workload imbalances on performance," the report states.

Survey respondents said they expected a departure of 20-70% of their IT workforce within the next five years, and that they were worried their IT departments were not positioned to meet the pending recruitment challenge. “The long waits for hires, the cumbersome processes, and the lack of modern technology only make the other challenges of filling vacancies and planning for turnover more difficult. Reform is necessary if CIOs are going to meet their goals,” asserts the report.

“CIO’s have a long road ahead to solve their workforce challenges. They need new ways of understanding the skills they have and the workload of their staff. They also need to improve how they recruit and retain staff and provide education and training to teach staff the skills they need. CIO’s desperately need to develop the next generation of IT leaders to create a succession plan for CIO’s and IT leaders of the future. OPM has a significant role in this process and must provide CIO’s and all federal executives with better tools and processes to recruit and reward great staff,” the report’s conclusion states when discussing the workforce component.

The survey identified top priorities of CIOs to include: improving cyber security, modernizing/transforming IT operations, migrating to the cloud and maturing mobility. “While there is much work to do in these areas, CIOs are making headway moving to continuous monitoring for cyber, using agile techniques to simplify IT modernization and “walking not running” toward cloud and mobile,” says the report.

CIOs also reported feeling that too much of their limited IT dollars go to fund operations, maintenance, and IT infrastructure, as opposed to development, modernization, and enhancement.

To access the full report, CIO/CISO Insights: Achieving Results and Confronting Obstacles, click here.

FROM THE HILL

HOUSE MAJORITY LEADER FALLS IN PRIMARY

Last week the House Majority Leader Eric Cantor (R-VA-7) lost his Republican primary election to David Brat, a university economics professor. Rep. Cantor will serve out the rest of his term, but will not run a write-in campaign for his seat, he has said.

The surprise election result, the first time a sitting Majority Leader has lost a primary election, has sparked a leadership battle while creating uncertainty for the rest of the legislative year in the House.

The Majority Leader is the number two leadership post in the House, and several members are running in a Republican caucus race to take Cantor’s spot and that of Majority Whip, the number three leadership post in the caucus.

The loss of Cantor, an establishment Republican, to Brat, a tea-party backed candidate, has many congressional watchers predicting the House will be done with most of its serious legislative business for the remainder of the year, fearful for taking on controversial issues such as immigration prior to the elections this fall which could cause problems internally for the party.

There are still several important pieces of legislation to complete, including final passage of the defense authorization bill and annual appropriations bills. FEDmanager will continue tracking those legislative developments, looking in particular for aspects which may affect the workforce.

MANAGER MATTERS

WHAT 2014 HAS BROUGHT FOR MANAGERS SO FAR

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As we move into the second half of 2014, we look back at the last six months and evaluate how the year has gone so far. For federal managers, a half-year internal review can be helpful in determining whether you are on your way to accomplishing workplace goals for 2014. While the beginning of each new year can bring enthusiasm about innovation, change, and efficiency improvement, oftentimes that enthusiasm dulls as the year goes on. Here at *Manager Matters* we have altered the format of the column in 2014. Our new structure offers greater flexibility in providing federal managers with more up-to-date issue updates and case studies. Today's column will look at the rights of contractors in the federal EEO process, as well as a discussion about whistleblower retaliation.

- In today's "blended" federal workforce, it is becoming increasingly common for federal managers to supervise both federal employees and contractors for the government. It can be tempting to think of the contractors as at-will employees, with little recourse against managers if they are dismissed. Although they do not have all of the due process protections that federal employees have, federal contractors do have the ability to make life difficult for the managers above them, if terminated. A spring decision by the EEOC's Office of Federal Operations (OFO) found that the complainant, an employee of a contracting company that was doing work at an Army facility in Minnesota, was able to file a formal EEO complaint against the agency regarding her dismissal. The OFO decision noted that the federal EEO system is NOT limited only to direct federal employees, but can be extended to include any employee under a certain amount of supervision by agency managers. If they are, the contractors are deemed to be in a "joint-employer" situation and can thus sue the agency as their employer.

  If you are a federal manager with contractors under your supervision, it is important to be aware of the rights that these employees have. The ability to press discrimination lawsuits against both the agency and the responsible management officials gives contractors many of the same avenues for fighting termination of discipline that federal employees have. One of the best protections against an EEO complaint or suit is FEDS professional liability insurance. Having a FEDS PLI policy will provide you with expert legal representation in the event of a discrimination allegation, and defend you through that process.

- Recently, federal investigators are looking into claims that the Department of Veterans Affairs has improperly retaliated against 37 whistleblowers at 28 VA locations. The complaints contain allegations that managers demoted, suspended, and negatively influenced performance grades of employees who attempted to expose problems in the agency's record-keeping practices at VA hospitals. The investigation into this matter is now with the Office of Special Counsel (OSC), whose statement on the issue said that about half of the retaliation complaints were filed before the scandal started breaking into mainstream news.

  All managers in the federal government should understand how damaging it can be to be involved in a whistleblower retaliation situation. With problem employees, seemingly minor issues can quickly escalate into investigations and potentially large consequences for the manager. One of the most

effective ways for managers to cut their vulnerability to accusations of retaliation from problem employees is to get into the habit of documenting minor to major decisions and actions affecting your personnel. If you have a paper trail that can show an employee's history of poor performance, allegations of retaliation after discipline has been proposed will be much less likely to stick. If you do find yourself being accused of retaliation against an employee, it is equally as important to have FEDS liability insurance in place. As a FEDS policyholder, you will have access to top-quality attorneys with years of experience in federal employment law. The policy provides for defense in the event of any adverse administrative action or investigation, as well as protections against civil and criminal liability. When dealing with problem employees, FEDS is the best protection you can have.

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.

CASE LAW UPDATE

MSPB CLARIFIES STANDARD FOR REASONABLE BELIEF IN WHISTLEBLOWER DISCLOSURES

On September 21, 2012, the Department of Veterans Affairs effected the removal of a Medical Administrative Assistant at the Veteran's Administration's Southern Oregon Rehabilitation Center and Clinics ("SORCC") based on charges of an inappropriate relationship with a veteran and failure to follow policy. The agency stated that the employee's relationship with a veteran, which was evidenced through a series of Facebook messages from February 20, 2012 to April 3, 2012, violated SORCC's Medical Center Memorandum ("MCM") 05-002, Patient/Employee Relationships, which prohibits relationships outside the boundaries of either assigned duties or professional standards that "result in or give the appearance of personal, emotional, romantic, sexual, and/or financial relationships that could influence or affect professional patient care goals or outcomes." The employee appealed her removal to the Merit Systems Protection Board and requested a hearing. Before an MSPB administrative judge, the employee raised affirmative defenses of harmful procedural error and whistleblower reprisal. The administrative judge sustained the charge (after the two charges were merged), found that the penalty of removal was reasonable, and also found that the employee failed to prove her affirmative defenses. The employee petitioned the full Board for review, and on June 5, 2014, the Board vacated the portion of the administrative judge's decision finding that the employee failed to prove her whistleblower reprisal claims, and remanded the case for further adjudication.

Finding that the administrative judge had correctly found that the agency proved the charge by preponderant evidence and that the agency had established a nexus between the sustained charge and both the employee's ability to accomplish her duties satisfactorily and SORCC's ability to treat veterans, the Board turned to the employee's whistleblower reprisal claims.

The Board observed that in adverse action appeals, an employee's claim of whistleblower reprisal is treated as an affirmative defense. Because whistleblower reprisal is an affirmative defense, "once the agency proves its adverse action case by preponderance of the evidence, the appellant must show by preponderant evidence that she engaged in whistleblowing activity by making a protected disclosure … and that the disclosure was a contributing factor in the agency's personnel action." The Board cited *Chambers v. Department of the Interior*, 515 F.3d 1362, 1367 (Fed. Cir. 2008) to define a protected disclosure as "a disclosure of information that the

appellant reasonably believes evidences a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

The Board began its analysis of whether the employee's five disclosures were contributing factors in her removal through use of the "knowledge/timing" test, under which an employee can prove that her protected disclosures are a contributing factor to an adverse action taken against her through evidence that the official taking the action knew of the whistleblowing disclosure and took the action "within a period of time such that a reasonable person could conclude" that the disclosure had contributed to the taking of the action. The employee alleged that between November 7, 2011, and March 9, 2012, she made five protected disclosures: first, that the lead Administrative Officer of the Day ("AOD") brought a laptop to work to watch movies; second, that the lead AOD and another employee manipulated payroll records to allow each other to take off work on alternating Fridays; third, that the lead AOD was conducting personal business during work time; fourth, that the lead AOD had slapped another employee on the rear end; and fifth, that another employee would wrap herself in a blanket and sleep during her shift.

Noting the administrative judge's findings that only the first disclosure had any merit to it and that the agency showed by clear and convincing evidence that it would have removed the employee absent this disclosure, the Board discussed the administrative judge's reasoning when he found that, regarding disclosures two through five, the employee could not have reasonably believed that a violation of a law, rule, or regulation had occurred because she had not supported her allegations of wrongdoing with preponderant evidence that the conduct had actually occurred.

The Board disagreed with the legal standard used by the administrative judge, and stated that the administrative judge had improperly required the employee "to prove that the alleged misconduct had actually occurred." Per the Board, the test for protected status "is not the truth of the matter disclosed but whether it was reasonably believed." The Board articulated that test as the need to show only "that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by her could reasonably conclude" that the alleged misconduct occurred, and "that the alleged misconduct evidences one of the categories of wrongdoing identified in *5 U.S.C. § 2302(b)(8)(A).*

In a footnote, the Board cited the Senate report accompanying the Whistleblower Protection Enhancement Act ("WPEA"), which "expressly disapproves of requiring appellants asserting whistleblower reprisal claims to prove that the alleged misconduct occurred." The Board held that regarding the applicable evidentiary standard for proving that disclosures are protected under section 103 of the WPEA, any presumption of good faith performance of duties in accordance with the law regarding an employee whose conduct is the subject of a whistleblower disclosure can be rebutted by the disclosing employee by use of "substantial" evidence, rather than the preponderant evidence standard used by the administrative judge, proving that the employee could reasonably conclude that the alleged misconduct occurred. Substantial evidence differs from a preponderance of the evidence significantly, and was described by the United States Supreme Court in *Richardson v. Perales*, 402 U.S. 389, 401 (1971) as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The Board also stated that the administrative judge had failed to make specific findings regarding the contributing factor element of the whistleblower reprisal claim.

For the above stated reasons, the Board remanded the appeal and ordered the administrative judge to issue a new initial decision that addresses the affirmative defense of whistleblower reprisal and its effect on the

outcome of the appeal, while giving appropriate consideration to any additional relevant evidence developed on remand.

You can read the full case, *Shannon v. Department of Veterans Affairs*, 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.

GEICO'S GOOD STUFF
IRS ADOPTS "TAXPAYER BILL OF RIGHTS"

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

Last week the Internal Revenue Service (IRS) announced the adoption of a "Taxpayer Bill of Rights."

The Taxpayer Bill of Rights "will become a cornerstone document to provide the nation's taxpayers with a better understanding of their rights," the IRS press release announcing the development states.

The Taxpayer Bill of Rights is not creating new rights, rather it takes existing rights embedded in the tax code and organizes them into ten broad categories, making it easier for taxpayers to find and understand that information.

The Taxpayer Bill of Rights contains 10 provisions. They are:

1. The Right to Be Informed
2. The Right to Quality Service
3. The Right to Pay No More than the Correct Amount of Tax
4. The Right to Challenge the IRS's Position and Be Heard
5. The Right to Appeal an IRS Decision in an Independent Forum
6. The Right to Finality
7. The Right to Privacy
8. The Right to Confidentiality
9. The Right to Retain Representation
10. The Right to a Fair and Just Tax System

"The Taxpayer Bill of Rights contains fundamental information to help taxpayers," said IRS Commissioner John A. Koskinen. "These are core concepts about which taxpayers should be aware. Respecting taxpayer rights continues to be a top priority for IRS employees, and the new Taxpayer Bill of Rights summarizes these important protections in a clearer, more understandable format than ever before."

"I also want to emphasize that the concept of taxpayer rights is not a new one for IRS employees; they embrace it in their work every day," Koskinen added.

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HEARD INSIDE THE BELTWAY

Starting on June 15, 2014, up to approximately 275 U.S. Armed Forces personnel are deploying to Iraq to provide support and security for U.S. personnel and the U.S. Embassy in Baghdad. This force is deploying for the purpose of protecting U.S. citizens and property, if necessary, and is equipped for combat. This force will remain in Iraq until the security situation becomes such that it is no longer needed.

President Obama notifying Congress that U.S. troops were being sent back into Iraq to help protect the U.S. Embassy, personnel and property.

WEEKLY LEADERSHIP REFLECTION

Good, better, best. Never let it rest. Until your good is better and your better is best.

Tim Duncan