



AUGUST 27, 2014
TOP NEWS STORIES

MSPB REPORTS ON PRACTICES AND PERCEPTIONS OF VETERAN HIRING

A [new report](#) by the Merit Systems Protection Board (MSPB) explains federal laws and regulations pertaining to hiring of veterans and certain family members.

The report also examines practices and perceptions of veteran hiring by the federal government, informed by a survey on the views of the use of veteran hiring authorities.

“Between their training, experience, and commitment to public service, veterans have much to offer potential employers, especially the Federal Government,” [said](#) MSPB Chairman Susan Tsui Grundmann.

“The laws and regulations regarding the preferences in hiring that can or must be given to veterans and certain family members are extremely complicated. For example, the preferences vary by the specific circumstances of the veterans—or their family members—and the hiring authorities being used. These laws and regulations invite misunderstandings, confusion, perceptions of wrongdoing, and possibly actual wrongdoing—whether intentional or inadvertent,” Grundmann stated in a letter to the President and the House and Senate leaders accompanying the report.

MSPB reported on a survey conducted in 2010 that found 6.5 percent of respondents indicating they had observed inappropriate favoritism towards veterans. The same survey found 4.5 percent of respondents reported observing a knowing violation of veterans’ preference rights. The employees who reported these two issues were found to be less likely to be engaged and more likely to want to leave their agencies.

Perceptions of inappropriate favoritism towards veterans was particularly acute at the Defense Department (DOD), where 8 percent of Defense employees reported seeing such behavior.

The MSPB also found that the Office of Personnel Management (OPM) had not been conducting proper oversight of Title 5, section 3326, which applies to the Defense Department and requires certain steps to be taken before hiring a veteran within 180 days of their retirement from the military. MSPB found that OPM did not conduct oversight of this provision since or prior to a declaration of a national emergency in 2001.

Since 2001, 41,000 appointments have been made to retired service members for whom a waiver would have been required if the 180-day rule was in effect. MSPB recommended that Congress revisit 5 U.S.C. § 3326. It also recommended that OPM and DOD examine the national emergency exemption now in place for over a decade, and to determine who should have oversight over the military retiree waiver process.

The MSPB report states that “some of the perceptions of inappropriate favoritism may have been a result of the complex hiring process and a proliferation of hiring authorities, which can invite misunderstandings and provide opportunities for suspicion.”

In the recommendations section, the MSPB says that “the extent to which the law should give a preference based on military service is a public policy question that remains solely with Congress and the President.”

Yet the MSPB does recommend “that agencies make every effort to explain to employees at all levels, whether veterans or non-veterans, what the rules are and why certain decisions were made.” It suggests education and training of supervisors and human resources staff.

To access the full MSPB report, *Veteran Hiring in the Civil Service: Practices and Perceptions*, [click here](#).

REPORT DETAILS STATE OF EEO COMPLAINTS IN FEDERAL GOVERNMENT

In fiscal year 2012, 15,026 individuals filed 15,837 complaints alleging employment discrimination against the federal government.

The EEO complaint figures were among those included in [one of two reports issued last week](#) by the Equal Employment Opportunity Commission (EEOC).

A second report issued last week by the EEOC, on [federal workforce demographics and statistics](#), is [discussed on our blog](#).

The EEOC report found that in fiscal year 2012, the number of complaints decreased 6.7% and there was a 4.9% decrease in the number of individuals filing complaints, as compared to the previous year. Pre-complaint EEO counselling and alternative dispute resolution (ADR) programs were found to address many concerns, with 54.2% of the 34,521 instances of counselling not resulting in a formal complaint.

For those complaints that were fully investigated (10,226 investigations were completed in FY 2012), the EEOC found that investigations took an average of 187 days. About three in four complaints (74.9%) were processed within that timeframe, slightly better than the FY 2011 rate of 74.7% timely completion rate.

The report also found that between final agency decisions, settlement agreements, and final agency actions fully implementing EEOC Administrative Judge decisions, agencies paid \$51.4 million in monetary benefits to EEO complainants, up 18.2% from the \$43.5 million paid in FY 2011.

The report also provided details on [training](#) provided to federal agencies by EEOC staff members. EEOC staff members conducted 95 training sessions reaching 2,440 federal employees, including 154 new EEO counselors, 150 new EEO investigators, and 249 EEO professionals in affirmative employment programs. EEOC OFO staff members also responded to more than 8,168 calls concerning the federal sector EEO complaint process.

The Commission's training and outreach information for federal agencies can be found by [clicking here](#).

To access the full EEOC report, *Annual Report on the Federal Work Force Part I EEO Complaints Processing Fiscal Year 2012*, [click here](#).

OPM SENDS AGENCIES MEMO ON ENHANCING WORKPLACE FLEXIBILITIES, WORK-LIFE PROGRAMS

Agencies should begin laying the groundwork to enable reporting to the Office of Personnel Management (OPM) on the status of their workplace flexibilities and work-life programs.

OPM Director Katherine Archuleta, in a [memo](#) to agency heads, chief human capital officers (CHCOs), and human resources directors, said “agencies are encouraged to begin the process of identifying appropriate contacts who will communicate with OPM on these various deliverables.”

Director Archuleta says in the memo that the President has directed OPM to work with agencies on eight areas, and agencies will need to be ready to provide information to OPM on the following:

- Agency efforts to educate and train the federal workforce on various workplace flexibilities and work-life programs available
- Agency efforts to promote workplace environments that incorporate workplace flexibilities and work-life programs into organizational cultures
- Ensuring employees are aware of the right to request work schedule flexibilities without fear of retaliation
- Conducting a review the Federal Employee Viewpoint Survey (FEVS) data related to supervisor and senior leadership support for work-life, as well as use and satisfaction with alternative work schedules, telework, and work-life programs
- Status of implementing the President’s Management Agenda efforts in a manner that improves Senior Executive Service (SES) focus on creating inclusive work environments where workplace flexibilities and work-life programs are used effectively
- Efforts to establish a Workplace Flexibility Index using data from the FEVS, reporting required by the Telework Enhancement Act of 2010, and other appropriate measures of agencies’ effective use of workplace flexibilities
- Agency report to the White House on agency best practices, potential barriers or limitations, and recommendations for improvements
- Review of the relevant trends related to workplace flexibility issues in the annual reports that agencies provide to OPM under the No FEAR Act

To access the memo from Director Archuleta on workplace flexibilities and work-life programs, [click here](#).

FROM THE HILL

HOUSE OVERSIGHT REPUBLICANS PROPOSE IRS REFORMS

Prior to the August recess, the House Oversight and Government Reform Committee held a [hearing into IRS “targeting”](#) of groups for scrutiny, and unveiled a set of proposals to reform the Internal Revenue Service (IRS).

The committee, led by Chairman Darrell Issa (R-CA), also released a report entitled “[Making Sure Targeting Never Happens: Getting Politics Out of the IRS and Other Solutions.](#)”

“As the Committee continues its comprehensive investigation into IRS targeting of Americans for their political beliefs, both immediate and long-term reforms are needed to prevent such targeting from ever happening again. We must make structural changes to improve internal oversight and get politics out of the IRS. The current imbalance of IRS power over taxpayers must cede to a system that recognizes and protects the rights of taxpayers,” Chairman Issa [stated on the release of the report](#).

The report includes 15 proposals to address so-called politicization of the IRS, including:

- Replacing the IRS Commissioner with a multi-member, bipartisan commission
- Removing the IRS as a regulator of political speech for social-welfare groups
- Allowing taxpayers, and not the IRS, to control access to their confidential taxpayer information

- Creating a private right of action for victims of willful and injurious leaks by IRS officials of confidential taxpayer information
- Establishing transparent and objective criteria for scrutiny of applicants
- Establishing clear and transparent rules for information-collecting purposes
- Prohibiting political and policy communications between the IRS and Executive Office of the President
- Removing the IRS from implementation of the Affordable Care Act

The full report can be [accessed here](#).

DOLLARS & SENSE

PHASED RETIREMENT: A TOOL FOR SUPERVISORS

It's my opinion that Phased Retirement makes for a wonderful HR (Human Resources) tool. Agency leadership could use phased retirement to help manage the huge "brain drain" that they are facing as more and more experienced Federal employees leave the work place for retirement. If you are a supervisor who is facing the possibility of losing some of your most valued employees to retirement, you would certainly want to talk with your agency HR in regards to this tool. Keep in mind, however, that the earliest that Phased Retirement will be available for agency use will be November 6th of this year.

Since each agency will have to determine various parameters as to how this tool will be managed within the agency, it's possible that the tool may not be available to everyone as early as November. Each agency will have to decide whether they will even allow this tool to be used at all, whether certain positions will be exempt, and what level of leadership will be required to approve phased retirement. The agency must also decide on whether they want to establish a time limit on Phased Retirement.

If the agency wants to allow Phased Retirements, the agency should focus on publishing clear guidance for the appropriate supervisors to follow. This can help avoid any potential discrimination issues or complaints from applicants. In other words, the criteria within the agency for approval or denial of one's application for Phased Retirement and duration should be very clear.

Phased retirement is not something that can be forced onto an employee... nor is it an employee entitlement. Rather, it's an agreement between the agency and the employee—either party can reject the option if it's not favorable to them. An employee does not have to enter into a Phased Retirement agreement if they don't like the terms.

Also, a supervisor cannot prevent an employee from separating, especially if the employee meets the age & service requirements for a voluntary retirement. But a supervisor could discuss the Phased Retirement option with the employee and could potentially benefit from keeping this employee on the team a little longer than he/she originally planned.

If I were a supervisor and I were about to lose a valuable employee to retirement, I'd want to discuss the Phased Retirement option with this individual—especially if I can't easily replace this employee with another. Keeping this experienced employee around a little longer on a part-time basis is better than losing them altogether. If I were in this situation as a supervisor, I'd be learning more about this tool from my agency HR once it becomes available.

Stay tuned for more on employee considerations with regards to phased retirement in my upcoming columns.

James Marshall is a federal retirement benefits specialist and the owner of Federal Retirement Planning LLC. For more information, please visit the [Federal Retirement Planning LLC website](#).

CAREER TIP OF THE WEEK

LEANING INTO YOUR JOURNEY TO THE SENIOR EXECUTIVE SERVICE

Not surprisingly, while working with thousands of SES applicants, the team at CareerPro Global has noticed certain best (and worst) practices.

Chief among them is that clients wait until the last minute to prepare their SES application materials. While we realize that everyone is busy in this sometimes-dizzying modern workplace, rushing through resume and ECQ development is never going to be ideal. Further, the end products may not be as strong as they could be.

So, rather than wait until you find that perfect position, or until your SES boss gives you the wink and says “you should apply,” we encourage you to take a more proactive stance.

After all, if you have made that internal decision to pursue a position/career in the SES, then you might as well “lean into it,” instead of standing on the sidelines and biting your fingernails with nervous excitement.

Use some or all of the tips below to position yourself for success when you’re ready to start applying:

- Consider a Candidate Development Program. This gives you the chance to think about the SES as part of your daily professional life, to complete developmental opportunities, and to work on your ECQs in advance. Very wise.
- Develop a five-page resume that’s focused mostly on your last decade of experience. Once you have the 90% solution, you can easily tweak the remaining 10% to tailor your resume for a specific vacancy announcement.
- Do some strategic planning on the ECQs. That’s right—use those planning sensibilities and skills to truly analyze the five ECQ categories, and then develop two potential career stories for each one.
- Get some peer support, or even ask a senior official, mentor, or current/former member of the SES to take a look at your materials and give you honest feedback.
- Finally, you may want to pick up a copy of our book, *Roadmap to the Senior Executive Service*, for step-by-step instructions and builders that will guide you through the resume development and ECQ process. Along these lines, you always have the option of getting some executive coaching and writing support to help present your career stories and professional experience in the most effective way possible. As of late summer 2014, more than 5,000 potential SESers like you have used our services to do exactly that.

Lee Kelley is an Iraq war veteran, former Army Captain, and author who now serves as the senior writer on CareerPro Global’s writing team. Leveraging the company’s vast expertise in assisting thousands of SES and federal job seekers, Lee has personally developed hundreds of resumes and more than a thousand ECQs. He is also the Director of Training and Veteran Transitions, and has provided USAJOBS resume-writing workshops to hundreds of federal employees and military personnel. In addition, Lee co-authored the book Roadmap to the Senior Executive Service: How to Find SES Jobs, Determine Your Qualifications, and Develop Your SES Application. His latest book is titled Inside Marine One: Four U.S. Presidents, One Proud Marine, and the World’s Most Amazing Helicopter.

[Visit CareerProGlobal’s website for more information.](#)

HEAR IT FROM FMA

FEDERAL MANAGERS WORK WITH CONGRESS TO PROVIDE WELL-EARNED SICK LEAVE CREDIT FOR DISABLED VETERANS

By The Federal Managers Association

The federal government is proud to be the largest employer of veterans in the country. These brave men and women are returning from military service with skills and talents that federal managers find invaluable. This population of workers, however, includes many with significant service-related disabilities. Those classified by the Department of Veterans Affairs (VA) with a disability rating need to keep VA medical appointments not only for treatment, but also to ensure their disability benefits. Disabled veterans who are serving their first year of federal employment often struggle with allotted sick leave. These men and women, like all feds, begin their first year of service with no sick leave, accruing four hours of leave every pay period. However, with chronic disabilities that require numerous medical appointments, disabled veterans run the risk of exhausting both sick and annual leave available in their first year of service.

The Federal Managers Association (FMA) chapter at Cherry Point Marine Corp Air Station Depot in North Carolina first brought this issue to the Association's attention. The Air Station employs numerous veterans as they have first-hand experience working with military vehicles in combat zones. Disabled veterans working here have to travel three to four hours to the nearest VA medical facility. This, on top of a medical appointment, means these employees face taking an entire day off of work, burning through leave. One first year federal employee who qualified as disabled under the VA used thirty hours of sick leave in three months. Because of this, FMA began to work with members of Congress to provide first year federal employees who have a service-related disability of thirty percent or more with the necessary amount of sick leave for VA medical appointments.

Shortly before the summer recess, Representative Stephen Lynch (D-MA) introduced the Wounded Warriors Federal Leave Act, H.R. 5229. The legislation provides 104 hours upon hiring to first-year federal employees with at least a thirty percent disability rating from the VA. This extra leave can only be used to seek medical attention for service related injuries and cannot be carried over after twelve months of employment. Upon introduction, Rep. Lynch commented, "Our wounded warrior federal employees who are just starting out in the federal workforce are often faced with the difficult choice of having to take unpaid leave to attend their VA appointments or miss their medical visits. This provides vital federal leave for our heroic and dedicated wounded warriors so that they are able to take the time they need to address their disabilities, while continuing their much appreciated service to our country."

FMA National President Patricia Niehaus commented on the bill, stating, "H.R. 5229 recognizes that newly hired federal employees who are disabled veterans should not have to choose between seeking medical attention and exhausting any leave available." She added, "FMA members have seen first-hand the stress this creates in the work environment, as both managers and employees try to meet congressionally-mandated missions and goals. As these disabled veterans served their country on and off the battlefield, it is only right that the federal government provide this much needed leave."

H.R. 5229 received bipartisan support in the House, as it is cosponsored by Representatives Blake Farenthold (R-TX), Elijah Cummings (D-MD), G.K. Butterfield (D-NC), and Walter Jones (R-NC). The bill has been referred to the House Oversight and Government Reform Committee and FMA is working to get similar language introduced in the Senate. Although there are few legislative days left in the 113th Congress, we are hopeful this common-sense legislation will be passed and signed into law, and we can give back to the disabled veterans who have already sacrificed so much on behalf of the country and continue to serve.

[For more on this topic, read FEDmanager's recent article, *Bill Would Give New Veterans Feds Sick Leave*.](#)

Celebrating its 100th year, the Federal Managers Association (FMA) is proud of its long tradition of Advocating Excellence in Public Service. For more information on how FMA works to protect your interests and to join our team, please visit www.fedmanagers.org.

CASE LAW UPDATE

MSPB DENIES ACCESS TO VOLUNTARY EARLY RETIREMENT TO EMPLOYEE GUILTY OF EMBEZZLING FUNDS

On November 6, 2012, the Department of Agriculture proposed to indefinitely suspend an Area Director with the agency's Rural Housing Service in Camden, Alabama in contemplation of an ongoing criminal investigation and the purported confession of the employee to the conduct at issue. On November 20, 2012, the employee pled guilty to a felony criminal charge related to embezzling \$6,225,920.76 in government funds. On December 5, 2012, an email memorandum issued announcing the agency's approval of an early buyout under the Voluntary Early Retirement Authority ("VERA"). But because the employee's suspension had been effected on November 24, 2012, he did not have access to his agency email account and was unaware of the December 5th email memorandum about VERA. On December 18, 2012, the agency issued a proposed removal letter to the employee, and on December 21, 2012, the "window" for employees to apply for early retirement ended.

A coworker of the employee, who has a service computation date in 1982 (compared to the employee's date in 1972) was granted a VERA based on seniority. On January 26, 2013, the employee's removal was effected, and on January 31, 2013, the coworker retired early. On March 8, 2013, the employee applied for early retirement, requesting a VERA. Shortly thereafter, on March 12, 2013, the employee was sentenced to 60 months in prison and ordered to report to prison on May 31, 2013. The agency denied the employee's VERA request. An MSPB administrative judge adjudicated three appeals of the agency's decisions to indefinitely suspend, remove, and deny the employee's VERA request. The administrative judge's three initial decisions: (1) reversed the indefinite suspension for violating due process and because the suspension improperly occurred simultaneously with the notice of proposed removal; (2) sustained the removal action; and (3) ordered the agency to grant the employee's application for early retirement under VERA. The agency petitioned the full Board for review of the first and third decisions, and the employee petitioned for review of the second decision. On August 21, 2014, the Board joined the three appeals, and reversed the first and third decisions (while sustaining the second), thereby sustaining the employee's indefinite suspension, his removal, and the agency's decision to deny the employee's VERA benefit.

As a preliminary matter, the Board determined that the administrative judge had correctly sustained the employee's removal because the employee pled guilty to a charge of fraud by wire, radio, or television in federal court and was sentenced to 60 months in prison.

The Board then addressed the administrative judge's finding that because the agency imposed an indefinite suspension that coincided with the notice period of the proposed removal, the indefinite suspension was improper. The Board questioned the precedent relied upon by the administrative judge as not being universally applied by the Board or its reviewing court. Citing several cases, including *Jones v. Department of the Army*, 68 M.S.P.R. 398, 402 (1995), in which an appellant was indefinitely suspended through the end of the criminal proceedings against him and through any proposal period for any additional action to be taken against him, the Board found that the administrative judge's reason for reversing the indefinite suspension was erroneous, and further found that the employee was not entitled to back pay for the period of more than three weeks after the suspension went into effect and before the proposed removal was issued.

Turning to whether the agency provided the employee sufficient notice of the reasons for the indefinite suspension, the Board disagreed with the administrative judge's finding of a due process violation. Citing the foundational U.S. Supreme Court case of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985), the Board noted that due process requirements entail only "written notice of the charges against the employee, with an explanation of the evidence; and an opportunity for the employee to present his account of events. The proposal letter and subsequent opportunity to reply, according to the Board, met the requirements of *Loudermill*. The proposal letter specifically explained the reason for the proposed action was that: "On June 20, 2012, Special Agent Philip Maxey, Office of Inspector General (OIG), notified [the proposing official] that: 1) you were under investigation for alleged embezzlement of government funds; and 2) a criminal investigation

was underway and would likely result in criminal conviction...Moreover, on October 5, 2012, Special Agent Maxey informed [the proposing official] that you had confessed to the misconduct..." The Board also stated that the notice letter provided very specific details otherwise in describing "significant financial discrepancies" regarding rural water and utilities accounts from which the employee embezzled a great deal of government funds.

According to the Board, then, the agency provided the employee adequate prior notice of the specific reasons for the indefinite suspension (most importantly, the agency's reasonable belief that he committed a criminal offense for which a term of imprisonment could be imposed). Before sustaining the indefinite suspension, the Board also noted that the employee had admitted to the crime on November 20, 2012, four days before the suspension began, which, according to the Board, made it unnecessary to complete the investigation and wait for a criminal indictment.

While the administrative judge determined that the employee demonstrated good cause for his untimely filed application to retire with a VERA benefit, the Board disagreed. Although the Board did not dispute that the employee had no way to access and receive the agency's VERA memorandum during the "window" for applications, the Board cited OPM regulations (5 C.F.R. § 831.114(h)(1) and 5 C.F.R. § 831.114(m)) which provide that an agency may limit voluntary early retirement offers based on established windows that are announced to employees at the time of the offer and state that the agency may not offer or process voluntary early retirements beyond the stated expiration date of the VERA, subject to several exceptions, none of which were applicable in this case.

However, according to the Board, it has recognized that agency misconduct can sometimes preclude the enforcement of a filing deadline under an equitable estoppel theory, if the out-of-deadline processing of an early retirement application would not result in the expenditure of otherwise appropriated funds. But the Board found that in this case, in contrast with the administrative judge's finding that the agency effectively and unfairly denied the employee the opportunity to apply for early retirement via being locked out of his agency email, there was no agency misconduct. According to the Board, because of the above-cited regulations and because the indefinite suspension was not attributable to agency misconduct, the lack of access to email could not be due to agency misconduct either.

The Board also found that the doctrine of "unclean hands" weighed against waiving the filing deadline. Citing *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1369 (Fed. Cir. 2005) and others, the Board stated that the doctrine of unclean hands "is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." Admitting that this doctrine is invoked rarely, the Board found that it was appropriate where, in this case, there is an element of bad faith shown by one of the parties to the litigation. The Board stated that it was clear from the facts in this case that "it was the appellant's misconduct, rather than any misconduct on the part of the agency, that precluded him from accessing the agency's [email memorandum opening the window to apply for early retirement under VERA]." Therefore, the Board held that the principles of equity precluded waiving the filing deadline.

For the above stated reasons, the Board sustained the employee's removal and reversed the administrative judge's decisions which reversed the employee's indefinite suspension and granted the employee a VERA benefit.

[You can read the full case, *Dawson v. Department of Agriculture*, 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

ARMY LEADERS REVAMPING CIVILIAN CAREER MANAGEMENT

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

The Army is working to improve civilian career development, including hiring, training, development and retention, [according to a recent press report](#).

Army Under Secretary Brad R. Carson recently hosted a two-day session at the Pentagon with approximately thirty members of the Senior Executive Service (SES) to discuss thoughts and strategies for improving civilian career development.

The Army has developed a Civilian Workforce Transformation (CWT) program, which was created to help develop an enterprise approach to how Army manages its civilian cadre. The CWT is modeled from the effective, centrally managed and resourced professional development scheme used for military members.

"The primary goal of CWT is to produce a more flexible and adaptable Capabilities-based civilian workforce to better support Army goals and missions," Scott Rowell, CWT integrator, said. "The Army faces significant challenges in the future. As the number of active duty Soldiers decreases, the Army is calling on its civilian corps to assume greater levels of responsibility and accountability."

"Under Secretary Carson understands that Army civilians are a vital part of the workforce, and provide technical expertise and continuity to the military. His challenge to senior civilian leaders was to define what success is in regards to civilian professional development, what it will take to get there, and the metrics senior leaders will use to know they are successful," said Rowell.

For more information on the CWT program, [click here](#).

[Army.mil](#) will be highlighting additional key programs for Army civilians in the near future, as well.

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HEARD INSIDE THE BELTWAY

As we head toward Labor Day and the end of summer, I hope all Federal employees will take a few minutes to bring in one last donation for [Feds Feed Families](#), our annual food drive. August 31 is the final day of this important campaign.

OPM Director Katherine Archuleta in a [blog post](#) "Still Time to Knock Out Hunger" reminding feds that this is the last week to donate Feds Feed Families contributions

WEEKLY LEADERSHIP REFLECTION

I start with the premise that the function of leadership is to produce more leaders, not more followers.

Ralph Nader