



SEPTEMBER 23, 2014
TOP NEWS STORIES

CONGRESS APPROVES CONTINUING RESOLUTION, AVOIDING SHUTDOWN UNTIL AFTER ELECTIONS

Last week both the House and Senate approved a continuing resolution (CR; [H.J.Res. 124](#)) to fund the government at fiscal year 2014 levels through December 11, and to authorize aid to Syrian rebel groups combating the terrorist group the Islamic State.

The continuing resolution does not prevent a one percent pay raise for federal employees from going into effect.

Lawmakers are waiting until after the elections, where control of the Senate is at play, to inform the length and scope of the next CR, which will be needed after December 11.

The CR passed by lawmakers only makes a handful of adjustments to agency funding levels.

Funding was provided to support border security operations and claims processing at the Department of Veterans Affairs (VA). The CR also funded the Export-Import Bank of the U.S., the continuation of which had been a political issue, through the end of June 2015. Funding was also provided to address the Ebola outbreak in Africa.

Bruce Moyer, chair of the Federal-Postal Coalition, a group of over thirty employee organizations and management associations for federal and postal workers, lamented lawmakers' use of another CR.

"The Federal-Postal Coalition supports efforts in Congress to keep the government running through December under a short-term continuing resolution (CR). As the events of last year highlighted, a government shutdown is disastrous for the fiscal health of the country as well as to the millions of Americans who rely on government services daily. However, as we have seen over the past several years, a series of short-term, patchwork funding solutions are becoming the norm rather than the exception. Continuing resolutions tie the hands of managers and employees alike by limiting strategic planning and restricting resources to get the job done," Moyer stated.

"As GAO found in a [recent report](#), the effects of budget uncertainty on agency operations are harmful to both fiscal stability as well as to the levels of services required by American citizens. Until we return to a thoughtful, deliberate, long-term budgeting process, the American people will continue to pay the price of Congressional inaction. FPC urges Congress to use this short window of time provided by a CR to work on a long-term funding solution for the next fiscal year," Moyer concluded.

OPM NEEDS TO IMPROVE DESIGN, MANAGEMENT, AND OVERSIGHT OF FEDERAL CLASSIFICATION SYSTEM, GAO SAYS

A [report released earlier this month](#) by the Government Accountability Office (GAO) outlines eight attributes of a modern, effective classification system.

The report also provides recommendations for the Office of Personnel Management (OPM) to improve the design, management, and oversight of the federal classification system that has been in place since 1949.

“GAO’s analysis shows that in concept the current General Schedule (GS) classification system’s design incorporates several key attributes including internal and external equity, transparency, simplicity, and rank in position,” GAO wrote in the report summary. The eight attributes of a modern, effective classification identified by GAO are:

- **Internal equity:** All employees with comparable qualifications and responsibilities for their respective occupations are assigned the same grade level.
- **External equity:** All employees with comparable qualifications and responsibilities are assigned grade levels and corresponding pay ranges comparable to the non-federal sector.
- **Transparency:** A comprehensible and predictable system that employees, management, and taxpayers can understand.
- **Flexibility:** The ease and ability to modify the system to meet agency-specific needs and mission requirements, including modifying rates of pay for certain occupations to attract a qualified workforce, within the framework of a uniform government-wide system.
- **Adaptability:** The ease and ability to conduct a periodic, fundamental review of the entire classification system that enables the system to evolve as the workforce and workplace changes.
- **Simplicity:** A system that enables interagency mobility and comparisons, with a rational number of occupations and clear career ladders with meaningful differences in skills and performance, as well as a system that can be cost-effectively maintained and managed.
- **Rank-in-position:** A classification of positions based on mission needs and then hiring individuals with those qualifications.
- **Rank-in person:** A classification of employees based on their unique skills and abilities.

“As OPM implemented the system, the attributes of transparency, internal equity, simplicity, flexibility, and adaptability are reduced. This occurs, in part, because some attributes are at odds with one another so fully achieving one attribute comes at the expense of another. Thus, OPM, working with its stakeholders, is challenged to determine how best to optimize each attribute,” GAO also wrote in its summary.

To access the full GAO report (GAO-14-677), [click here](#).

WHITE HOUSE OUTLINES PROGRESS ON SECURITY AND SUITABILITY CLEARANCES

Last week marked the one year anniversary of the [Washington Navy Yard shooting](#).

Since that time, agencies and the administration have been working to review and update the security and suitability clearance process.

In February a report containing an [initial thirteen recommendations](#) was issued.

Beth Cobert, Deputy Director for Management at the Office of Management and Budget (OMB) and Chair of the Suitability and Security Clearance Performance Accountability Council, highlighted key features of work on security and suitability processes in a [blog post](#).

“We’ve made progress, but there is more work to be done. We will continue to work aggressively to ensure rigorous oversight and accountability mechanisms are in place throughout government, thereby ensuring the safety of Federal workers and the protection of our nation’s most sensitive information,” Cobert said.

FROM THE HILL

STATUS OF CONSOLIDATED DHS HEADQUARTERS DISCUSSED AT HOUSE HEARING

The project to consolidate the various components of the Department of Homeland Security (DHS) into a unified headquarters campus at the St. Elizabeths hospital in southeast Washington, D.C. has greatly exceeded time and cost estimates.

Members of the House Homeland Security Committee expressed their [frustrations](#) and [concerns](#) about the management of the project, now \$1 billion more costly and ten years behind schedule, at a [subcommittee hearing](#) last week.

The hearing featured the testimony of Chris Cumiskey, acting under secretary for DHS’ Management Directorate, Commissioner Norman Dong of the General Services Administration’s Public Building Service (GSA PBS), and David Maurer, Director of the Government Accountability Office’s (GAO) homeland security and justice section.

DHS and GSA have been leading the headquarters consolidation project since 2006, which Oversight and Management Efficiency subcommittee chairman Jeff Duncan (R-SC) [called](#) “a monument to mismanagement,” with the features of the monument laid out in a [GAO report](#) released for the hearing and in [testimony](#) from David Maurer.

Testimony at the hearing identified the confluence of multiple factors contributing to the delays on the project.

Congress has not fully funded the consolidation, delaying work on the project at various intervals. GAO identified a \$1.6 billion funding gap between what was requested for the project and what was provided between 2009 and 2014.

GAO also found that DHS and GSA were relying on outdated assessments and plans for the project, that an assessment of current needs and capability gaps wasn’t conducted, and that the agencies failed to look at alternative designs to address rising costs and shifting needs.

GSA and DHS agreed with many of the recommendations in the GAO report, and indicated that the DHS fiscal 2016 budget will include an updated project plan for moving forward.

Sen. Tom Carper (D-DE), chairman of the Senate Homeland Security and Governmental Affairs Committee, released a [report](#) on the day of the hearing saying that continuing the consolidation project was warranted, as it could save the government nearly \$1 billion in leases over time while also improving security.

MANAGER MATTERS

AGENCIES FOUND TO FREQUENTLY DISMISS EEO COMPLAINTS IMPROPERLY

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For federal managers, defending against EEO complaints is increasingly becoming a commonplace part of the job. It also appears as though more and more EEO complaints are being dismissed improperly. The report by the US Equal Employment Opportunity Commission titled [Common Errors by Federal Agencies in Dismissing](#)

[Complaints of Discrimination on Procedural Grounds](#) was released September 15th. The report details how federal agencies have increasingly dismissed EEO complaints without proper adjudication.

As a refresher on the process, when a federal employee believes he/she has been discriminated against, the next step is to notify the agency's EEO office. At this point, there is counseling, and if this does not resolve the issue a formal EEO complaint ensues. The agency then has the choice to initiate an investigation into the complaint or to dismiss the complaint outright. Reasons for dismissal include lack of filing on time, the complaint addressing a previously settled matter, or a lack of necessary information. If the complainant feels the complaint was dismissed unfairly, there is the option to appeal to the Equal Employment Opportunity Commission (EEOC).

The EEOC revealed in the report that it had reversed 33% of all agency dismissals between the years of 2008 and 2012, with the reversal rate hitting a high of 45% in 2012. This figure was a full 15% higher than the rate in 2008, and in raw terms means that of the 1,548 dismissal appeals the EEOC heard, almost 700 were remanded back to the agency. The report listed many reasons why agencies had improperly dismissed claims: they ranged from wrongly dismissing complaints as minor instead of looking for a pattern of discrimination to failing to account for valid excuses when complainants were unable to submit their formal complaints in time. Carlton Hadden, the director of the EEOC's Office of Federal Operations, said that the report was issued with hope to "reduce the number of incorrect procedural dismissals by federal agencies."

If the report does indeed have that desired impact, there could be a noticeable increase in formal EEO complaints in the coming years. More agencies taking heed of the EEOC's findings would naturally lead to less complaints being dismissed and more progressing to the formal stage. This development would likely make the jobs of federal managers even more difficult. For many managers, especially those dealing with "problem" employees, it can already seem as though the EEO system is too accommodating to frivolous complaints and often keeps these complaints in the works for years at a time. Less agency dismissals could portend even more fringe complaints becoming formal.

An increase in EEO complaints across the government would only reinforce what many federal managers already know: in today's federal environment, having a professional liability insurance policy is one of the most important career protections a member of management can have. The PLI policy administered by FEDS provides for up to \$200,000 in legal defense costs for administrative actions, which include defending against formal EEO complaints. While it may seem as though your interests and the agency's interests are aligned when defending against an EEO complaint, many managers can attest to that not always being the case. When that divergence of interests occurs it is invaluable to have top-notch legal representation at your side, looking out only for you.

A FEDS PLI policy starts at only \$290 a year, and all federal employees in management are eligible for a reimbursement up to 50% of the premium cost from their agency. Before you find yourself dealing with a complaint on your own, make the decision to protect your career and your peace of mind. Visit www.fedsprotection.com or call 866.955.FEDS today.

CASE LAW UPDATE

FEDERAL CIRCUIT COURT OF APPEALS DENIES BEDB TO ESTATE OF FEDERAL EMPLOYEE'S SPOUSE

A FERS-covered employee of the Department of Defense, with almost six years of civilian service to his credit, died on January 26, 2010. His wife, after the employee's death, began an Application for Death Benefits, but died before signing and filing the application, on February 12, 2010. When she died, the employee's wife was eligible for Basic Employee Death Benefits ("BEDB") should she have submitted the application. Her son, the co-administrator of her estate, completed, signed, and filed an application for BEDB on her behalf. OPM concluded

that the employee's wife was not entitled to BEDB because of her failure to submit an application before her death. Her son sought reconsideration, arguing that his status as the co-administrator of her estate allowed him to act on her behalf, even after her death. Both the MSPB administrative judge and full Board disagreed with his position, and affirmed OPM's decision to deny BEDB because, according to the Board, even if a spouse of a federal employee is entitled to BEDB upon the employee's death, that spouse's estate may not apply for those benefits on his or her behalf if the spouse has died before filing the application. The employee's son appealed the decision. On September 12, 2014, the United States Court of Appeals for the Federal Circuit affirmed OPM's denial of BEDB.

The appeals court took jurisdiction pursuant to 28 U.S.C. § 1295(a) and stated that it must affirm the Board's holding unless it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if it was obtained without procedures required by law, rule, or regulation having been followed, or if it was unsupported by substantial evidence.

Finding that the statute which governs BEDB does not clearly answer the question of whether a surviving spouse's estate may apply for BEDB on his or her behalf, the appeals court looked to the interpretation provided by OPM. OPM's regulations which implement 5 U.S.C. § 8442 provide that a "current spouse" may file an application for benefits at any time within 30 years after the death of the employee. Those regulations define a "current spouse" as a "living person who is married to the employee ... at the time of the employee's ... death." The appeals court rejected the son's argument that this definition only requires the current spouse to be living at the time of the employee's death, and stated that the "plain language of the regulation requires the current spouse to be living at the time of his or her application for BEDB."

The employee's son argued that OPM's interpretation was inconsistent with the appeals court's decision in *Cushman v. Shinseki*, 576 F.3d 1290 (Fed.Cir.2009), where the appeals court had held that a veteran was entitled to disability benefits upon a showing that he meets the eligibility requirements, and that "such entitlement to benefits is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution."

But in this case, the appeals court concluded, the employee's spouse never made a showing that she was eligible for BEDB, even though she was eligible. She failed to make a showing, the appeals court stated, because "she failed to file an application that would have established her eligibility." Because filing that application for BEDB was a necessary prerequisite for entitlement, the employee's spouse had not gained a protected property interest in those benefits. Therefore, the appeals court concluded, her estate could have no protected property interest in the BEDB on her behalf.

For the above stated reasons, the United States Court of Appeals for the Federal Circuit concluded that OPM's interpretation of 5 U.S.C. § 8442(b)(1)(A) was reasonable, and affirmed OPM's decision to deny Basic Employee Death Benefits to the employee's spouse's estate.

[You can read the full case, *Devlin v. Office of Personnel Management*, 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

WHITE HOUSE LAUNCHES "IT'S ON US" CAMPAIGN TO COMBAT SEXUAL ASSAULT ON CAMPUSES

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

Last week, The White House launched the "It's On Us" campaign. The campaign's goal is to end sexual assault on college campuses. The campaign asks everyone—men and women across America—to make a personal commitment to be part of the solution to this problem.

"An estimated one in five women has been sexually assaulted during her college years -- one in five," the President noted. "Of those assaults, only 12 percent are reported, and of those reported assaults, only a fraction of the offenders are punished."

The campaign urges people to go to www.itsonus.org to take a personal pledge to keep individuals safe from sexual assault. Individuals can share this pledge with friends and family on social media by using the hashtag #ItsOnUs.

The Obama administration has also taken additional steps to help bring an end to campus sexual assault. The administration sent guidance to every school district, college, and university that receives federal funding on their legal obligations to prevent and respond to sexual assault. [The White House Task Force to Protect Students from Sexual Assault](#) was also created to work with colleges and universities on developing best practices on how to respond and prevent sexual assault.

[Read more about the campaign on The White House Blog.](#)

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HEARD INSIDE THE BELTWAY

Today's story in *The Washington Post*, "[Turnover at the top has DHS unsettled](#)," is about the past and disregards the present. The story's portrayal of the Department of Homeland Security is unrecognizable to anyone acquainted with the remarkable reconstruction of this agency over the last nine months.

[Statement](#) by Department of Homeland Security (DHS) Secretary Jeh Johnson [reacting](#) to a September 22 article in *The Washington Post*

WEEKLY LEADERSHIP REFLECTION

Leadership is the challenge to be something more than average.

Jim Rohn