



OCTOBER 21, 2014
TOP NEWS STORIES

HELP FEDS IN NEED—SUPPORT FEEA’S BILL BRANSFORD HELPING HANDS FUND

During this year’s Combined Federal Campaign (CFC) – join the effort of feds helping feds!

Consider contributing to the [Bill Bransford Helping Hands Fund](#), which provides grants to federal employees in need for whom repayment of even a no-interest [FEEA](#) (Federal Employee Education & Assistance Fund) loan would create an undue hardship.

[Bill Bransford](#), of the law firm Shaw Bransford & Roth P.C. and the publisher of the FEDmanager and FEDagent newsletters, passed away in September 2013.

"Bill was known as a champion of the federal workforce and dedicated his profession to advocating on their behalf. This fund recognizes that dedication and ensures that his legacy continues to truly help those in need. He'd approve, and ask you to join him in support," [said](#) Debra Roth, longtime law partner at Shaw Bransford & Roth, upon creation of the Fund.

"Bill's greatest concern was always ensuring those who most needed help would receive it and I can think of no more fitting tribute than to provide that assistance in his name. Bill will live on in our hearts and his legacy will be in continued service to federal employees," [said](#) FEEA Executive Director, Steve Bauer.

Please join the staff at FEDmanager and FEDagent in honoring Bill’s memory with your contribution to the [Bill Bransford Helping Hands Fund](#).

Donations to the Fund are tax deductible to the full extent of the law and may be made online at [www.feea.org/GiveBBfund](#) or by mailing a check to FEEA/Bill Bransford Fund, 3333 S. Wadsworth Blvd, Suite 300, Lakewood, CO 80227.

FEDERAL SALARY COUNCIL FINDS 35 PERCENT PUBLIC-PRIVATE PAY GAP

On Friday the [Federal Salary Council reported](#) that white-collar federal employees earn on average 35.2 percent less than private-sector employees in comparable jobs.

The figure is similar to the 35.4 percent public-private pay difference reported last year, which is determined by analyzing data collected by the Bureau of Labor Statistics (BLS).

The Federal Salary Council is made up of compensation experts and federal labor representatives. The Council reports to the President’s Pay Agent, which makes recommendations to the president about federal pay.

The methodology for determining the public-private pay gap has been [debated for several years](#), with different groups using different data sets and measurement techniques.

A common thread among the various studies on federal pay is a finding that federal employees at the higher end of the pay scale are generally under-compensated relative to their private sector counterparts, whereas federal employees on the low end of the pay scale are generally over-compensated relative to their private sector counterparts.

The Federal Salary Council also makes recommendations regarding [locality pay](#).

Despite the council recommending boosts in the locality pay in several areas, including Albany, NY, Albuquerque, NM, Austin, TX, Charlotte, NC, Colorado Springs, CO, Davenport, IA, Harrisburg, PA, Kansas City, MO, Laredo, TX, Las Vegas, NV, Palm Bay, FL, St. Louis, MO, and Tucson, AZ, President Obama has frozen locality pay rates through 2016.

GAO REPORT OUTLINES USES, AND ABUSES, OF PAID ADMINISTRATIVE LEAVE

A new Government Accountability Office (GAO) [report on paid administrative leave \(GAO-15-79\)](#) found that a majority of such leave (97%) is granted for periods of less than twenty days.

Yet some employees are kept on paid administrative leave for more than a month, and 263 feds were on paid administrative leave for a period of one to three years, GAO found.

Employees on long term administrative leave were often in that situation due to personnel matters, such as investigations into alleged misconduct.

Paid administrative leave is difficult to compare across agencies, since there is no uniform data categorization for reporting nor for agency policy.

GAO recommended that the Office of Personnel Management (OPM) develop agency and payroll provider guidance regarding the recording and reporting of paid administrative leave. OPM agreed to clarify guidance to agencies and payroll providers, but said it lacked authority to direct agencies on how to collect such data.

The GAO report was requested was requested by Rep. Darrell Issa (R-CA), and Sens. Charles Grassley (R-IA) and Tom Coburn (R-OK).

Sen. Grassley [told *The Washington Post*](#) that extended paid administrative leave is “not authorized by any law,” and that “bureaucrats are abusing it.”

The Washington Post also reported that Sen. Grassley is working on legislation to narrowly define the circumstances in which employees can be kept home on paid administrative leave.

TALENT, IT, BUDGET UNCERTAINTY, RISK MANAGEMENT AMONG TOP CONCERNS FOR CFOS, SURVEY FINDS

Chief Financial Officers (CFOs) from across the federal government face many of the same challenges as their management colleagues across the C-suite.

Those challenges, as well as common themes, were discussed last week by Office of Management and Budget (OMB) Controller Dave Mader and Grant Thornton LLP managing director and former Labor Department CFO, Jim Taylor, at a breakfast panel discussion of the [CFO survey results](#).

Talent, budget uncertainty, and information technology (IT) were top areas of concern for federal financial managers who took part in the annual survey, conducted by the [Association of Government Accountants](#) (AGA) and Grant Thornton LLP.

Five major themes also emerged from the survey: risk management, analytics, transparency, shared services, and workforce.

Citing recent high profile government failures, including Healthcare.gov, the Internal Revenue Service (IRS) “targeting” of political groups for scrutiny, and the Veterans Affairs (VA) wait list scandal, U.S. Controller Dave Mader [said](#) the government needed a “broader enterprise risk management program.”

Mader said that [OMB would be issuing recommendations to agencies](#), likely in the second quarter next year, to enhance the use of [enterprise risk management](#). Mader said agencies wouldn’t necessarily have to designate a Chief Risk Officer (CRO), but that a suggestion might be for the creation of a risk committee to help agency leaders, especially at large and diffuse agencies such as the Department of Health and Human Services (HHS) or the Department of Homeland Security (DHS).

In terms of the use of analytics, Mader stated that agencies are beginning to utilize analytics to better understand their operational and mission costs, and that the recently passed DATA Act will push agencies to use this information more in the coming years.

On transparency, Mader commented that the preparation of financial statements by government agencies is important internally, but even more-so externally. He described his time as an IRS executive – a time when the agency itself couldn’t produce a clean audit – and the contradiction he and other agency leaders saw for an agency to ask American taxpayers to have clean books when the agency could not.

“We’re accountable” to taxpayers, Mader said while discussing the link between financial statements and transparency. “We are stewards and they [taxpayers] need to know we’re following the right controls and spending it [their tax money] wisely.”

In discussing shared services, concerns by agency leaders about the cost and quality of such services was discussed. Yet Taylor and Mader stressed that shifting to shared services, which some agencies may avoid due to fear of loss of control, can allow agencies to invest their budget in mission, instead of back office functions that can achieve savings and efficiency through scale.

Financial managers also are concerned about their workforce. Impending retirements, coupled with tight budgets and tight hiring, make succession planning difficult.

To download the full report, *Driving Collaboration and Innovation: Achieving the CFO Mission in Uncertain Times*, [click here](#).

FROM THE HILL

PRESIDENT TAPS EBOLA CZAR TO GUIDE MULTI-AGENCY RESPONSE

In response to public and congressional pressure, and to serve as a quarterback for the government’s response to Ebola, [President Obama has named an “Ebola czar.”](#)

The congressional push for a single Ebola coordinator, [as well as for a travel ban](#), came during [last week’s hearing](#) by the House Energy and Commerce Committee examining the public health response to the Ebola outbreak, which former DHS Secretary Janet Napolitano called “[shameful](#).”

Ron Klain, a former chief of staff to both Vice President Joe Biden and former Vice President Al Gore, has been tapped by the administration to coordinate the government's Ebola response.

Klain will be responsible for ensuring coordination between disparate federal agencies involved in the Ebola response, including the [Department of Homeland Security](#) (DHS) and subcomponent agencies including the Transportation Safety Administration (TSA) and Customs and Border Protection (CBP), and the Department of Health and Human Services (HHS) and subcomponent agencies including the [Centers for Disease Control and Prevention](#) (CDC), the National Institutes of Health (NIH), the Food and Drug Administration (FDA), among others.

"Klain comes to the job with extensive experience in overseeing complex governmental operations and has good working relationships with leading Members of Congress as well as senior Administration officials," the White House said in a [blog post announcing Klain's selection](#).

The administration's selection of Klain received criticism because he does not have a public health background.

"What we were looking for is not an Ebola expert, but rather an implementation expert. And that's exactly what Ron Klain is," White House press secretary Josh Earnest [told reporters Friday](#) during a briefing. Earnest cited Klain's work helping implement the 2009 stimulus package, the American Recovery and Reinvestment Act, as a management credential qualifying Klain for the Ebola response coordinator position.

This weekend the President delivered his [weekly address](#) on Ebola and [provided an update](#) on [the government's Ebola response](#).

On Friday this week the House Oversight and Government Reform Committee will [hold a hearing](#) into the multi-agency Ebola response. The Senate Appropriations Committee will [hold a hearing](#) on the government's response to Ebola on November 6.

CASE LAW UPDATE

MSPB REVERSES DISMISSAL OF VA WHISTLEBLOWER CASE

A Veterans Affairs nurse filed a complaint with OSC on December 30, 2011, and disclosed to OSC that he believed medications were being improperly distributed to veterans, and that some patients had been granted access to off-limits areas. He filed an OSC complaint on July 24, 2012, claiming that in reprisal for his original disclosure his car was vandalized, he received patient complaints, was issued a "minimally satisfactory" evaluation, that he received a "double bind" proficiency review and summary review notice, and was subjected to a hostile work environment. On July 26, 2012, the employee informed the agency he planned to resign, and on August 12, 2012, that resignation became effective. After his resignation, the employee filed another OSC reprisal complaint, but was informed on March 7, 2013, that OSC was closing its investigation. At that time, the employee filed a Board appeal and requested a hearing. The MSPB administrative judge agreed with the employee that he had exhausted his administrative remedies with OSC, but ultimately found that he had failed to make a nonfrivolous allegation that the agency retaliated against him by creating intolerable working conditions that caused his involuntary resignation. The employee appealed to the full Board. On October 16, 2014, the Merit Systems Protection Board reversed the administrative judge's finding, and remanded the case for an analysis of his involuntary resignation claim.

The Board began by affirming the administrative judge's decision regarding the employee's exhaustion of his OSC remedies. According to the Board, OSC's closure letter served as sufficient evidence that the employee's administrative remedies with OSC had been fully exhausted.

While the administrative judge analyzed this case under the provisions of the Whistleblower Protection Enhancement Act (“WPEA”) authorizing an Individual Rights Action appeal based on an allegation that a personnel action was taken as a result of a prohibited personnel practice, the Board disagreed with the application of those provisions. According to the Board, the administrative judge did not have the benefit of the Board’s recent decision in *Hooker v. Department of Veterans Affairs*, 120 M.S.P.R. 629 (2014), wherein the Board refused to give retroactive effect to the provisions of the WPEA cited by the administrative judge. The Board concluded that the expanded IRA appeal rights under the WPEA did not apply to this case.

Because the administrative judge’s analysis was vacated, the Board considered the employee’s appeal under 5 U.S.C. § 2302(b)(8)(B)(i), a section which states that it is a prohibited personnel practice to take or fail to take, or threaten to take or fail to take, a personnel action concerning any employee “because of...any disclosure to the Special Counsel” of information that the employee reasonably believes evidences “a violation of any law, rule, or regulation.” The Board found that the employee’s statement in his affidavit, which described his belief that medication administration was being improperly conducted and that veterans were gaining access improperly to parts of the facility which should have been off-limits, did constitute a nonfrivolous allegation of a protected disclosure to OSC in December of 2011.

Next, the Board addressed whether the employee made a nonfrivolous allegation that his December 2011 OSC complaint was a contributing factor in the agency’s decision to take a personnel action against him. The Board applied the knowledge-timing test, which measures the time between the official taking the personnel action knowing about the disclosure and the personnel action taking place. The Board cited *Mudd v. Department of Veterans Affairs*, 120 M.S.P.R. 365 (2013) to show that personnel actions alleged to have begun within one year of a disclosure satisfy the “timing” component of the knowledge-timing test.

As for the “knowledge” component of the knowledge-timing test, the employee claimed that he notified “management,” including his supervisor and manager, and another nursing supervisor, about his OSC disclosure. He also claimed that his supervisor then requested a summary review board. The Board found that these assertions satisfied the “knowledge” component. Thus, combined with the several identified retaliatory personnel actions under 5 U.S.C. § 2302(a)(2)(A), the employee’s fulfillment of the standards of the knowledge-timing test led the Board to conclude that he had made a nonfrivolous allegation that his December 2011 OSC complaint was a contributing factor in the agency’s decision to take a personnel action against him.

Because the administrative judge’s decision that the employee had failed to make a nonfrivolous allegation that he was subjected to a personnel action in the form of a forced resignation in reprisal for protected whistleblowing activity was based on the incorrect (according to the Board) finding that the employee failed to make a nonfrivolous allegation of a protected disclosure, the Board vacated the administrative judge’s analysis of the employee’s involuntary resignation claim.

For the above stated reasons, the Board remanded the involuntary resignation claim to the administrative judge for further adjudication, and ordered the administrative judge to reconsider her findings concerning the involuntary resignation claim in light of any further evidence and argument introduced on remand.

[You can read the full case, *Colbert 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.

Last month, the federal community came together to recognize the efforts of outstanding government employees at the annual ceremony for the [Samuel J. Heyman Service to America Medals](#), commonly known as the Sammies. The awards, sometimes called the “Oscars of the government workforce,” were given out at a black-tie gala that attracted government luminaries such as Attorney General Eric Holder, Veterans Affairs Secretary Robert McDonald, and NASA Administrator Charles Bolden to the Andrew W. Mellon Auditorium in Washington, D.C. This year was the 13th edition of the awards ceremony.

The highest honor, Federal Employee of the Year, went to Rana Hajjeh of the Centers for Disease Control and Prevention. Along with her colleagues, Ms. Hajjeh was celebrated for her work in improving vaccination rates through a global campaign. She was scheduled to depart for Africa shortly after the Sammies to aid in the fight against the Ebola outbreak. FEDS would like to take the opportunity to congratulate Ms. Hajjeh and her fellow award winners, listed below, and thank them for the outstanding public service they provide each and every day.

The other award winners:

- Career Achievement Medal: Edwin Kneeder, for his career as a deputy in the solicitor general’s office, has argued 125 cases before the Supreme Court.
- Science and Environment Medal: William Bauman and Ann Spungen of the Department of Veterans Affairs for developing “innovative medical advances and novel drug therapies” to help paralyzed veterans.
- Homeland Security and Law Enforcement Award: Omar Perez Aybar, Reginald France, Joseph Randy Culp, Joseph Jeziorski and colleagues at the Department of homeland Security for their work in exposing hundreds of Medicare fraud schemes.
- National Security and International Affairs Medal: Sean Young and Benjamin Tran, engineers in the Air Force, for spearheading the development of an aerial sensor system to identify and destroy IEDs.
- Management Excellence Award: Alan Lindenmoyer, manager at NASA, for helping start a new era of private-sector orbital transportation while “dramatically reducing the costs to taxpayers of building and deploying rockets and spacecraft.”
- Call To Service Medal: Sara Meyers of the Department of Housing and Urban Development for installing systems that evaluate the performance of programs regarding homelessness, public housing and rental subsidies using data analysis.
- Citizen Service Medal: Michael Byrne, former geographic information officer with the Federal Communications Commission, for creating searchable online maps that display information about broadband availability.

Again, FEDS would like to congratulate and thank all of the award winners for their public service, and we hope that by sharing their names we can provide yet another rebuke to those that question the commitment and dedication of federal employees.

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](#).

GEICO’S GOOD STUFF

HEALTH BENEFITS FOR TEMPORARY AND SEASONAL FEDS

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

Temporary and seasonal federal employees will soon be eligible for enrollment into the Federal Employees Health Benefits (FEHB) Program.

The newly eligible employees will be able to apply for federal health benefits no later than January 2015, pursuant to a [final rule](#) by the Office of Personnel Management (OPM) recently published in the Federal Register.

OPM had [proposed the rule in late July](#), and finalized it after receiving public comment and feedback.

Under the new rule, employees who are scheduled to work at least 90 days and at least 130 hours in a calendar month will be eligible for FEHBP in January 2015.

Currently 1 to 2 percent of the federal workforce is ineligible for FEHBP, and the new rule would benefit those employees.

Some agencies submitted comments that the added healthcare costs might affect their staffing plans. OPM acknowledged but disregarded those concerns, citing the federal government's role as a model employer.

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HEARD INSIDE THE BELTWAY

A desire for accountability does not have to preclude a certain generosity of spirit, or some empathy for those who are performing public service. We seem to have forgotten that.

Fred Hiatt, in an October 19 editorial in The Washington Post, [America: Now the Unforgiving Land of Gotcha](#)

WEEKLY LEADERSHIP REFLECTION

The leadership instinct you were born with is the backbone. You develop the funny bone and the wishbone that go with it.

Elaine Agather