

ISSUES OF MERIT

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WHAT'S INSIDE

Director's Perspective
Page 2

Supervisors
and Favoritism
Page 4

Whistleblowing
Cultures
Page 5

Acquiring Key
Competencies
Page 6

Trait-Based
Abilities
Page 7

Sexual Orientation and the Federal Workplace

Prior to 1975, Federal Government policy considered an individual's sexual orientation when determining suitability for Federal employment. That policy effectively precluded hiring openly gay or lesbian individuals into the civil service. According to the recently released MSPB report, *Sexual Orientation and the Federal Workplace: Policy and Perception*, there are encouraging signs that the history of sexual orientation discrimination in Federal employment is being overcome.

For example, lesbian, gay, bisexual, and transgender (LGBT) employees appear to be represented in the supervisory, managerial, and executive ranks at the same proportion as they are in the overall Federal workforce. In addition, according to MSPB's Merit Principles Survey (MPS) 2010, relatively few Federal employees believe sexual orientation discrimination occurs in the workplace. About 3 percent of Federal employee respondents to the MPS 2010 said they believed sexual orientation discrimination had occurred in the workplace—but they were not the direct targets of the discrimination. This was a similar percentage of employees who believed that discrimination had occurred based on national origin and marital status,

as well as based on violations of veterans' preference laws.

The Office of Personnel Management (OPM) previously reported that, according to its 2012 Federal Employee Viewpoint Survey (FEVS) results, LGBT Federal employee perceptions of the workplace are generally less positive than those of other employees. However, further MSPB analysis of 2012 FEVS data revealed that, in some agencies for at least some workplace issues (including agency leadership, work environment, and training), LGBT employees' perceptions were as positive about the workplace as those of their heterosexual colleagues. This suggests that agencies may be able to create more inclusive workplace cultures.

Amid these encouraging signs, however there may be need for clarity in the policy that prohibits sexual orientation discrimination in Federal employment. In 1980, OPM first interpreted the tenth Prohibited Personnel Practice (PPP), which prohibits discrimination based on conduct that does not adversely affect job performance, to also prohibit sexual orientation discrimination. This means that Federal employees (or applicants for Federal employment) who believe they

continued, page 3

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The MSPB Office of Policy and Evaluation conducts studies to assess the health of Federal merit systems and to ensure they are free from prohibited personnel practices.

Issues of Merit

We offer insights and analyses on topics related to Federal human capital management, particularly findings and recommendations from our independent research.

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DIRECTOR'S PERSPECTIVE

Looking for Guidance

By a process of accretion, over the last two decades the Federal Personnel Manual has been recreated in a diffuse, web-based form.

We recently marked the 20-year anniversary of the demise of the 7,000-page Federal Personnel Manual (FPM), a publication of the Office of Personnel Management (OPM) that was the authoritative source for Federal personnel rules. The FPM had become “burdensome” and instilled rigidity into Federal HR operations.¹ Although not everyone was happy to lose the FPM, OPM’s leadership wanted to free Federal HR offices from “excessive guidance” and foster more flexible personnel management.² The wisdom of abolishing the FPM is not my focus, however. Instead, I would like to survey the current landscape of OPM guidance.

OPM has authority to regulate the conduct of Federal HR offices and managers both generally, 5 U.S.C. § 1103, and with regard to many specific areas, e.g., 5 U.S.C. §§ 3304 (exceptions to competitive examination requirement); 4304 (performance management); 5338 (pay administration); 6311 (attendance and leave); 7514 (adverse actions). Under these and other authorities, OPM has issued Governmentwide rules after public notice and comment that are collected in two volumes of Title 5 C.F.R. In 2013, these rules totaled 1,496 pages. Similar rules co-existed with the FPM, and the FPM’s abolition did not negate OPM’s statutory responsibility to promulgate personnel regulations.

Something else happened about

1. Merit Systems Protection Board, *The U.S. Office of Personnel Management in Retrospect* (December 2001), at 5.
2. *Id.*

20 years ago: Federal agencies began disseminating information to the public and to other agencies via the internet. This powerful communication tool has allowed OPM to develop a broad, deep website rich with guidance. Click on the “Policy” link on OPM’s homepage and you will be directed to a menu of 20 topics ranging from “Assessment and Selection” to “Classification and Qualifications” to “Pay and Leave.” Clicking on one of those topics will bring you to a menu of sub-topics; for example, “Hiring Authorities” contains 11 sub-topics. Clicking on a sub-topic will bring you to substantive guidance that itself includes links to statutes, OPM rules, handbooks, executive orders, other OPM publications, and other websites.

Another area of OPM’s website lists approximately 250 “Reports & Publications” with titles such as *Human Resources Flexibilities and Authorities in the Federal Government* (75 pages), *Guide for Implementing Child Care Legislation* (39 pages), and *Handbook of Occupational Groups and Families* (194 pages). The foregoing publications are directed to Federal managers and HR specialists, while other publications, such as *Information for Survivor Annuity* (21 pages) and *Military Service Credit Under the Civil Service Retirement System* (11 pages), are geared to employees or the public. Whereas a regulation appearing in Title 5 C.F.R. has all the hallmarks of a binding rule, many OPM publications mix legal principles, best practices, and

continued, page 3

Director's Perspective

(continued from page 2)

explanations of options.³

Another area on OPM's website is "Memos to Agencies," which, when clicked, will bring you to the website of the Chief Human Capital Officers Council. The latter website lists issuances such as "Memoranda for Heads of Executive Departments and Agencies" and "Memoranda for Human Resources Directors." In the first three months of 2014, there were 12 such issuances, including five "Compensation Policy Memoranda" that contain detailed rules for implementing pay-setting laws and links to relevant authorities.

One might say that, by a process of accretion over the last two decades the FPM has been recreated in a diffuse, web-based form. Such a development may have

been inevitable, given OPM's responsibilities as the administrator of a decentralized personnel system that continues to be covered by complex laws. Organizing and maintaining for currency all of this guidance is likely to be an ongoing challenge for OPM, as illustrated by some "File Not Found" messages I encountered when clicking on links. Users of OPM's website also face challenges, the most basic of which may be determining which materials represent binding dictates and which materials represent non-binding advice. ❖

James Read

Director, Policy and Evaluation

3. See, e.g., *Guide to Telework in the Federal Government* (41 pages); *Settlement Guidelines* (4 unpaginated online chapters).

Sexual Orientation and the Workforce...

(continued from page 1)

have been discriminated against based on their sexual orientation can file a complaint with the Office of Special Counsel. As the prohibition against sexual orientation discrimination has never been expressly stated in statute nor affirmed in judicial decision, the view that the tenth PPP prohibits sexual orientation discrimination, although generally accepted, has been subject to interpretation. For example, in 2004, the then-Special Counsel determined

that the tenth PPP *did not* extend to sexual orientation discrimination.

See the MSPB report at www.mspb.gov/studies for recommendations to further the inclusion of LGBT employees in the Federal workplace and provide clarity to the prohibition against sexual orientation discrimination in Federal employment. ❖

What should MSPB study next?

MSPB wants to know what research studies *Issues of Merit* readers think we should conduct in the near future. MSPB is soliciting research ideas from Federal employees, supervisors, and other stakeholders during the next several weeks. Anyone can contribute suggestions for future studies and reports.

Examples of past studies and our last research agenda are available at www.mspb.gov/studies. Looking through them is a good way to learn about the kind of research we do.

Those interested in contributing ideas to this effort are invited to email their suggestions to research.agenda@mspb.gov. We look forward to hearing from you!

Keep your calendars free on **September 16th**. MSPB will hold a public Sunshine Act Meeting to discuss our research agenda at the U.S. Court of Appeals for the Federal Circuit. (See www.cafc.uscourts.gov/the-court/faqs.html for directions to their location.)

Supervisors and Favoritism: Guilty, Innocent, or Something in Between?

According to results from MSPB's 2011 Federal Merit Systems Survey, employees frequently suspect that supervisors "play favorites" and base their decisions on factors other than work-related criteria.¹ So why does this happen? Do supervisors disregard their responsibilities under the Merit System Principles (MSPs) and provide unfair advantages for favored employees? Or do employees sometimes make incorrect assumptions?

Our research indicates that several factors frequently contribute to employee perceptions of favoritism:

1. **Intentional favoritism.** A supervisor knowingly provides an advantage to an applicant or employee based on inappropriate non-merit factors;
2. **Unintentional favoritism.** A supervisor takes an ill-advised action or makes a flawed decision absent intentional wrongdoing; and
3. **Misinterpretation or misinformation.** Employees or other observers may perceive favoritism even when a decision is truly merit-based, perhaps due to a lack of transparency or when the presence of a legitimate professional relationship leads to suspicion that a supervisor was influenced by non-merit factors.

Most Federal employees (59 percent) believe favoritism involves an intentional decision, motivated by the supervisor's desire to value friendship or loyalty over competence. Intentional favoritism can occur when a supervisor rewards employees based on close, personal relationships or similarity to the supervisor or an employee's ingratiation efforts.

Although cited less frequently than intentional favoritism, employees also noted the existence of factors that could lead to unintentional favoritism. Specifically, employees thought unintentional favoritism could be caused by a supervisor's lack of knowledge or understanding (38 percent) or lack of good decision-making tools (32 percent). Unintentional favoritism can

1. Fifty-three percent of employees suspected supervisors in their organization demonstrated favoritism, while 28 percent thought their own supervisor was guilty of this.

also occur through a mechanism similar to intentional bias but without the supervisor's awareness. For example, a supervisor may demonstrate unconscious bias by unintentionally favoring employees with whom the supervisor feels a higher comfort level due to similarity in terms of factors such as culture, class, background, and experiences.

On other occasions, there may be a misperception by employees. Professional relationships may exist that do not conflict with the merit systems or a supervisor may justly provide more opportunities to those who demonstrate the ability and motivation to take on new roles. When asked to identify critical factors in their career advancement,² 85 percent of Federal employees identified "A supportive supervisor to encourage my development and advancement" and a "Senior person/mentor (other than my supervisor) looking out for my interests" as the two factors with the most positive impact on their career advancement. The fifth most popular response, which was expressed by 78 percent of the respondents, involved "Contacts who knew the selecting official and recommended me." As a result, three of the top five reported influences on career advancement involved professional relationships between employees and another party who provided individualized attention and assistance. While the presence of supportive professional relationships does not necessarily indicate favoritism, supervisors should be aware of possible misperceptions regarding the fairness of their decisions after dealing with applicants who are known to them through personal or professional networks or when distributing scarce resources among employees.

A supervisor's actions can be perceived as: 1) intentional favoritism; 2) unintentional favoritism; 3) reflecting both merit and favoritism, particularly when there is an existing professional or personal connection; or 4) simply merit-based. It is critical, therefore, for supervisors and observers to strive for a shared perspective that conforms to the high expectations of the merit system principles. ❖

2. U.S. Merit Systems Protection Board, *Fair and Equitable Treatment: Progress Made and Challenges Remaining*, 2009, pp. 47-50.

Variations in Agency Whistleblowing Cultures: Look at the Trees, Not Just the Forest

As we noted in our 2012 report, *Blowing the Whistle: Barriers to Federal Employees Making Disclosures*, one of the most important things that an agency can do to learn about internal wrongdoing is to establish a culture that encourages employees to report perceived problems. Agencies should know where their culture stands so that they can determine the extent of their need for improvement and measure whether improvement is occurring. However, survey data from our 2010 Merit Principles Survey show that Federal agencies are not all starting from the same place and that there can be large cultural differences within a single agency.

We asked survey respondents whether their agency actively encourages employees to report wrongdoing. The responses cannot tell us precisely what agency leaders say to their employees or their motivation for asking employees to come forward. However, the data shows important differences in employee perceptions across agencies, as well as differences in perceptions within a single agency.

For example, the agencies with the highest level of agreement were the National Aeronautics & Space Administration (82 percent) and the Department of the Treasury (72 percent). In contrast, only 49 percent of respondents from the Environmental Protection Agency and 43 percent of respondents from the Department of Housing & Urban Development agreed with the statement.

However, agency-level survey results can paint an incomplete picture of what is happening throughout the agency. For example, although 75 percent of Internal Revenue Service respondents agreed that their agency encourages reports of wrongdoing, for the rest of the Department of the Treasury, there was only 59 percent agreement. In the Department of Homeland Security, Customs and Border Protection, 69 percent of respondents agreed that they are encouraged to make reports of

wrongdoing. At the same time, in the Transportation Safety Administration, only 58 percent of respondents agreed. Within the Department of Justice, 71 percent of respondents from the Drug Enforcement Administration agreed with the statement, while only 58 percent from the U.S. Marshals Service agreed. In the Department of Veterans Affairs, 69 percent of respondents within the Veterans Health Administration agreed, while in the Veterans Benefits Administration, 61 percent agreed.

As the above examples illustrate, agency-level responses cannot truly tell leaders in individual bureaus what they need to know about the perceptions of their own workforces. We encourage agency leaders to learn more about their employees' perceptions regarding whistleblowing and to instruct subordinate leaders and managers to explore the perceptions that exist within their own organizations. Wrongdoing will often be seen and reported on the local level. For this reason, whistleblowing culture is like real estate—location matters. ❖

“Wrongdoing will often be seen and reported on the local level. For this reason, whistleblowing culture is like real estate—location matters.”

Did you know about MSPB’s “Studies Flash” web page?

It’s where we post articles that are too long for *Issues of Merit*—or that we think you would like to know about right away.

Our latest Flash discusses a recent case, *Calixto v. Department of Defense*, in which the Board needed to determine whether an individual appointed under a “direct hire authority” was a probationer whose employment could be terminated summarily without the right to appeal to the Board.

For a discussion of this case and its implications, visit our Flash page at <http://www.mspb.gov/studies/latestnews.htm> .

Agency Success Acquiring Key Competencies

Each Federal agency is home to a variety of occupations and work environments that support its mission. This means that the competencies needed by each agency’s workforce require a different combination of hiring, training, and employee development. Managing the workforce effectively includes understanding key competencies and how to best acquire them.

MSPB’s Merit Principles Survey 2010 explored what competencies Federal employees considered essential to their jobs and how successful agencies were at acquiring the necessary level of proficiency in the workforce. Survey participants classified their most important competency into one of the six general categories, listed in the table below, that have emerged from MSPB’s research. As discussed in MSPB’s report, *Making the Right Connections: Targeting the Best Competencies for Training*, some competencies are more difficult to develop through training than others. The third column in the table below summarizes information from MSPB’s research about the relative effectiveness of training in developing each type of competency.

Survey participants also evaluated their agency’s success in ensuring the workforce has the key competencies it needs. The last column in the table contains the percentage of survey respondents who believe their agency does this well.¹ There is a clear relationship between the trainability of a competency

and an agency’s success in acquiring it in the workforce. When a competency is highly trainable, agencies are perceived as more successful; when it is less trainable, there is less perception of success. The least success occurs with competencies similar to traits and personal characteristics that respond slowly to training.

What explains these different perceptions, especially with regard to the less trainable competencies? We believe that part of the answer involves resources (such as a lack of funds or time for training) and execution (such as poorly designed or delivered training). However, we suspect that the answer also involves ineffective strategy: a misguided reliance on developmental activities to confer proficiency in less-trainable competencies, grounded in an incorrect belief that less-trainable competencies can be readily acquired on the job. More resources or “better” training modules will not help in such situations and well-meaning efforts may only serve to squander resources and increase employee frustration.

The good news is that this problem has a solution: a different strategy. It is more effective to use assessments to hire job applicants who already have these less-trainable competencies and to reserve training resources for more trainable competencies. Agencies can examine their hiring processes and refocus on key competencies that are difficult to develop after employees are hired. MSPB survey data also indicate large agency differences in successful workforce competency development. This suggests that some agencies have effective workforce development strategies in place from which we all can learn. ❖

1. These survey participants responded with “Agree” or “Strongly Agree” to the statement, “My agency does a good job ensuring that people with my kind of job possess this most important knowledge, skill or ability.”

Competency Category		Can Be Trained	Agency Does a Good Job
Knowledge	Facts and other information, including job knowledge, academic subjects, laws, policies, and regulations.	High	65%
Language	Reading, writing, learning other languages, editing, preparing lengthy documents, and preparing and giving speeches or presentations.	Medium	57%
Reasoning	Abilities based on logic and mathematics, including such practical abilities as analysis, troubleshooting, and computer programming.	Medium	56%
Social	Abilities that help us get along with other people, ranging from basic interpersonal skills and teamwork to more specialized abilities to negotiate, manage conflict, and foster diversity.	Medium	55%
Motivation	Personal characteristics that affect employee willingness to perform work, including resilience in the face of difficulty, integrity, and public spiritedness.	Low	51%
Mental Style	Long-term “mental habits” such as flexibility, creativity, ability to deal with complexity, rapid learning ability, and decisiveness.	Low	47%

Assessing Entry-Level Candidates: The Importance of Trait-Based Abilities

As explained in our recent report, *Evaluating Job Applicants: The Role of Training and Experience in Hiring*, there are many assessment tools available to measure a candidate’s knowledge and skill levels. However, what should agencies do when hiring for entry-level positions where the candidates have not yet developed a solid base of job-related knowledge or have not had the opportunity to demonstrate skills by performing the duties common to the occupation in question? What should be done when all the candidates have a similar college degree and lack of experience so that none stand out with respect to those criteria?¹ What might be done when high performance requires something other than formal education or technical training?

The answer may rest in job-related personal traits that influence the competencies necessary for success in the job. Many Federal positions need specific abilities that are trait-based, whether it is a scientist being creative, a nurse or doctor expressing caring and empathy, or a customer service representative demonstrating patience and a desire to help. For example, NASA’s Mars Curiosity rover would not have been possible without a lot of scientific knowledge, but one or more people had to have the ability to think very creatively in order to deliver it safely to the surface to perform its tasks. (It is also rather revealing that NASA named its multi-billion dollar rover after a human trait.)

Some agencies have openly recognized the importance of traits through discussions about qualification requirements for their positions. For example, in a recent vacancy announcement for a position as a corrections officer, the Department of Justice:

1. Grade point average (GPA) is not a recommended way of distinguishing among degree holders, as GPA is not a good predictor of long-term job success. See U.S. Merit Systems Protection Board, *Evaluating Job Applicants: The Role of Training and Experience in Hiring*, at 21-22 (2014), available at www.mspb.gov/studies.

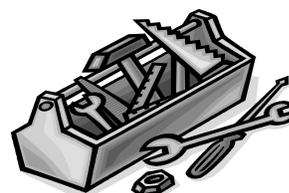
- Identified trait-based abilities such as the “ability to remain calm during emergency situations” and the “ability to act quickly, particularly under stress”;
- Stated that applicants, with no previous corrections officer experience, could be qualified if they had the “personal attributes important to the effectiveness of correctional officers,” such as a “sympathetic attitude towards the welfare of others,” as well as “poise and self-confidence”; and
- Offered examples of other jobs in which such attributes and abilities may have been demonstrated, such as in the clergy or as a firefighter.

“MSPB’s Office of Policy and Evaluation has begun a study of how agencies are assessing trait-based abilities and what more can be done to ensure that the Government selects candidates with the right job-related traits.”

Some traits appear to be popular across the Government, regardless of occupation or grade level. For example, a review of positions in USAJOBS shows that agencies want “enthusiasm” in their attorneys, secretaries, nurses, physicians, and

student trainees, in grades ranging from GS-05 to the Senior Executive Service. “Creativity” is a desired trait mentioned in vacancy announcements from the Departments of the Air Force, Army, Housing & Urban Development, Justice, Labor, Homeland Security, Veterans Affairs, and other agencies. “Compassion” is also sought in vacancy announcements from multiple agencies, as is being “helpful.”

MSPB’s Office of Policy and Evaluation has begun a study of how agencies are assessing trait-based abilities and the extent to which such assessments are consistent with merit-based hiring. ❖





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IN THIS ISSUE * IN THIS ISSUE * IN THIS ISSUE

Sexual Orientation. *Discrimination based on sexual orientation is prohibited in the Federal government. (Page 1)*



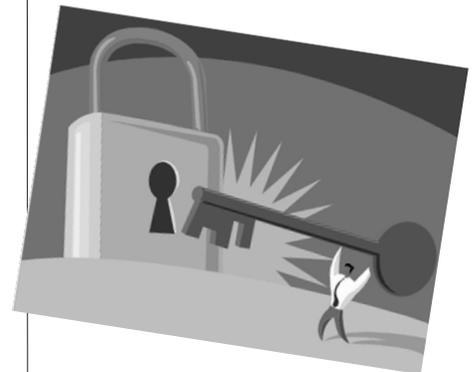
Director's Perspective. *The Federal Personnel Manual has been recreated in a diffuse, web-based form. (Page 2)*

Supervisors and Favoritism. *Is a supervisor guilty of favoritism or is there a misunderstanding? (Page 4)*



Whistleblowing Cultures. *What do your agency's employees think about reporting wrongdoing? (Page 5)*

Acquiring Key Competencies. *Agencies are more successful acquiring highly trainable workforce competencies. (Page 6)*



Trait-Based Abilities. *Many Federal jobs require abilities that are trait-based. (Page 7)*