insights & analyses for Federal human capital management

Issues of Merit

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Transition Time at the Merit Systems Protection Board

A look at the last 7 years under Chairman Grundmann.

For the last few months the Nation has been anticipating the inauguration of a new President. The Merit Systems Protection Board (MSPB) is also going through its own transition. Now is a good time to look back at the tenure of MSPB's former leader and peek at what may lie ahead for the agency.

Following nomination by President Obama and confirmation by the Senate, Susan Tsui Grundmann became a Member and the ninth Chairman of MSPB on November 5, 2009. She served through January 7, 2017.

One of Chairman Grundmann's first initiatives was to create a new form of decision at the Board level. Traditionally, a decision from the full Board has consisted of either a short, standardized, non-substantive denial of a petition for review or a full explanation of the Board's action on the petition that contains findings of fact and conclusions of law and that represents citable precedent. Chairman Grundmann persuaded her colleagues that there should be a third type of decision, one that would inform the parties and any reviewing body of the Board's reasoning but that would not constitute citable precedent. This third kind of decision, which has come to be known as a Non-Precedential Final Order, promotes transparency and clarity for parties.

In addition to bringing more of the Board's reasoning into the public light, Chairman Grundmann created opportunities for greater stakeholder input into Board decision making. For example, Chairman Grundmann selected three complex cases of Governmentwide significance for oral argument before the three Board members that was open to the public. These were the first oral arguments at MSPB in decades. Further, in developing research agendas for MSPB's studies program, Chairman Grundmann solicited input from all interested parties and convened public meetings at which selected stakeholders presented ideas to the Board members.

In 2013, MSPB was hit with over 33,000 appeals from furlough actions related to the budgetary sequester. The furlough appeals amounted to over five times the number of cases that MSPB receives in a typical year. Providing fair adjudication of this massive group of

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ISSUES OF MERIT

U.S. Merit Systems Protection Board

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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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Similar Misconduct Need Not Mean Identical Penalties

Agencies may impose different penalties for similar offenses, but they must be ready to explain why.

The Board recently released a report comprised of a series of articles explaining the adverse action system in order to address misperceptions and confusion about how the system works. One area that has seemed to particularly confuse people is a concept known as "similarly situated" employees—the question of whether seemingly similar offenses by different employees must result in similar penalties or if the penalty can differ.

When an agency official selects a penalty for an employee's misconduct, it does not happen in a vacuum. The Board has long held that in order to ensure that penalties are reasonable, same or similar offenses should be treated in a similar manner. To establish that an agency has enacted an unreasonable penalty, an appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar to those of another employee who received a lesser penalty.

This goes beyond the question of what misconduct occurred. Proof that the employee who received the lesser penalty was in the same work unit, with the same supervisor, and was subjected to the same standards governing discipline can help an appellant to make an initial showing that the charges and the circumstances surrounding the charged behavior are substantially similar. However, these are factors to be considered, not hard-and-fast mathematical calculations. Board case law demonstrates how important it is for the agency to be prepared to articulate the reasons why the case at issue is different from cases that appear similar. Every case will be considered on its own merits.

For example, in *Chavez v. Small Business Administration*, 121 M.S.P.R. 168 (2014), the appellant claimed that his penalty was too harsh because another employee in a supposedly similar situation was not as severely disciplined. However, the Board found that differing penalties were justified because: (1) a 2-year lapse in time between the impositions of penalties weakened the comparison; (2) the employees were disciplined by different agency officials and worked in separate chains of command within the agency; (3) the employees had different responsibilities; and (4) the appellant had committed additional offenses not committed by the other employee.

In 1981, the Board identified 12 factors to be considered when determining a penalty. They are known as the *Douglas* Factors, and the more these factors differ, the less similar the situations actually are, regardless of initial appearances. Decades of case law show that just because two cases have some commonalities does not mean that the agency cannot enact different penalties if it is able to explain why they are different. It just means that if an action is appealed to MSPB, agencies may be required to make those explanations and submit a record showing that when penalties differ it is because the situations were not similar after all.

For more on similarly situated employees (including a discussion of additional cases) and for information about other aspects of the adverse action process, please see our recent report, *Adverse Actions: A Compilation of Articles.* ❖

Director's Perspective

(continued from page 1)

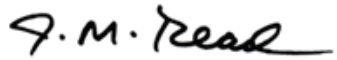
cases along with the rest of the agency's docket was a top-to-bottom effort, with all hands at all levels of MSPB contributing.

Congress enacted significant legislation affecting MSPB during Chairman Grundmann's term. The Whistleblower Protection Enhancement Act of 2012 expanded the substantive scope of protections for Federal employees who disclose waste, fraud, and abuse, and also augmented the remedies for individuals who claim retaliation before MSPB. The Veterans Access, Choice, and Accountability Act (VACA) of 2014 modified the procedural rights of senior executives removed from the Department of Veterans Affairs for cause. Joined by her fellow Board members, Chairman Grundmann led MSPB in adjusting to these new laws and expressing concerns about the constitutionality of a portion of VACA.

Under Chairman Grundmann's leadership, MSPB issued informative reports on topics such as employee engagement, fair and equitable treatment, veterans' rights, discrimination based on sexual orientation, women in the Federal Government, and workplace violence. Moreover, both personally and through MSPB publications, Chairman Grundmann has emphasized to policy makers and other stakeholders that providing constitutional protections to tenured Federal employees is a price worth paying for an objective, non-partisan Federal civil service.

All of us at MSPB will miss Chairman Grundmann for her intelligence, wit, energy, and above all, her advocacy for the preservation of the Government's merit-based personnel system. We wish her well in her next endeavor.

Unfortunately for MSPB, Chairman Grundmann's departure has left the agency without the quorum needed to issue decisions at the Board level and release reports to Congress and the President. Member Mark A. Robbins will perform the other functions vested in the Board while we await the arrival of new members and the establishment of a quorum. ❖



Director, Policy and Evaluation

ANNOUNCEMENTS

Thank You!

MSPB would like to thank all Federal employees, supervisors, and managers who contributed to the success of our Merit Principles Survey (MPS) 2016. The MPS is a tool that measures the "health" of Federal merit systems over time. The MPS contained core questions about merit in the Federal workforce that allows us to study how well the Federal Government is managing its workforce. We administered the survey to almost 110,000 Federal employees and supervisors across 24 Government agencies from July 25 through September 14, achieving an overall response rate of 39 percent. We are processing the data now and can't wait to share the results with you, the President, and Congress!

MSPB Noteworthy Page

MSPB recently rebranded its Flash page as the Noteworthy page. It can be found at:

www.mspb.gov/studies/noteworthy.htm

The page features research findings and new information about the Federal workforce. If you have not already joined our listserv to receive alerts of newly released publications, including new content for the Noteworthy page, go to the address above and click on the link to the Studies listserv.

Helpful Hints for Managing in a Merit System

Have you ever wished for help in making the decisions needed to lead and manage employees in a merit-based system? That help is available in MSPB's recent report, *The Merit System Principles: Guiding the Fair and Effective Management of the Federal Workforce.* It discusses the nine merit system principles (MSPs, available at 5 U.S.C. § 2301(b)), their role in creating and maintaining a workforce that serves and promotes the public interest, and provides practical advice on applying them. This article presents three themes—Fairness, Protection, and Stewardship—underlying the MSPs and examples of actions that agencies and agency leaders can take to support the MSPs. Although too brief to cover every situation, we highlight some critical actions needed to manage Federal employees fairly and effectively. More information can be found at *www.mspb.gov/studies/*.

Fairness. The first three MSPs focus on fair treatment of applicants and employees, from recruitment and hiring through management and retention.

Selected Actions to Support Fairness	
Recruitment	• Use workforce analysis to identify current and future talent needs. • Be active: announce vacancies through a variety of media.
Competition	• Use an appropriate mix of hiring authorities. • Establish job-related and measurable selection criteria. • Use assessments that are structured, valid, and reliable. • Identify and address barriers to open competition and equal opportunity.
Management	• Seek and act on employee opinions about work and work conditions. • Evaluate workforce trends and demographics. • Monitor trends in complaints and dispute resolution.

Protection. The last two MSPs emphasize avoiding misuse of authority and protecting employees from political coercion, mistreatment, and reprisal for whistleblowing.

Selected Actions to Support Protection	
Standards	• Establish zero tolerance for favoritism, political coercion, and retaliation. • Educate employees about their obligations and rights.
Prevention	• Select and train supervisors with care. • Consult with HR staff.
Culture	• Hold supervisors accountable for proper use of authority. • Strive for transparency in personnel decisions. • Respond constructively to disclosures of possible wrongdoing.

Stewardship. The remaining four MSPs address management of the Federal workforce, including establishing high standards of conduct, managing resources wisely, providing necessary training, and addressing deficient performance.

Selected Actions to Support Stewardship	
Managing Supervisors	• Emphasize supervisory competencies when selecting supervisors. • Train supervisors on how to lead people and manage resources.
Development	• Identify important skills and competencies needed now and in the future. • Discuss training needs and career interests with employees. • Decide when to train for competencies and when to hire for them.
Managing Performance	• Communicate priorities, goals, and standards clearly and frequently. • Review and discuss progress regularly. • Recognize good work. • Promptly address problems, during probation if possible. • Use established processes to address unsatisfactory performance and conduct.

Believing You Can Make a Difference Makes a Difference at Work

Locus of Control most often comes into play when we face novel, difficult, or stressful situations.

Medical researchers made an interesting discovery about recovery from serious injury or illness that is relevant to the world of work. Consider two people, Irv and Ed, who are diagnosed with the same illness, prescribed the same medication, and given the same recovery instructions. Irv recovers several days sooner than Ed, even though they are close in age and other physical characteristics. Why?

A key factor is how Irv and Ed think about their health. Irv believes that his choices and actions have a real effect on his physical well-being and therefore follows all of his doctor's orders. Ed, on the other hand, believes that most things happen either by chance or because of what is going on around him. He therefore mostly waits to see what will happen—he will either get well or he won't.

This personal characteristic, which most often comes into play when we face novel, difficult, or stressful situations, is called Locus of Control (LoC).[1] People like Irv, who believe their actions can make a difference, are said to have an ***Internal*** LoC. People like Ed, who see their lives as determined by chance and their environment, have an ***External*** LoC. Medical professionals have found that patients with an Internal LoC have better health outcomes and live longer, healthier lives.[2]

Not surprisingly, LoC also makes a difference at work. Research has shown that Internals like Irv are generally more successful in office settings, cope better with change and adversity, lead more effectively, and are more satisfied with their work than their External LoC coworkers. Internals prefer more loosely structured work that allows them to set and achieve their own goals. Conversely, Externals benefit from more structured environments with strong, directive leadership. Recognizing the benefits of employees who adopt a more internal perspective, managers have successfully used developmental activities that emphasize connections between actions and consequences, realistic goal setting, and environments where learners can explore different approaches to problem solving.[3]

LoC is also one factor to consider when teams are assembled. Research shows that both Internals and Externals perform better on teams where most members have similar LoC scores. Although this can differ by task, generally Internals prefer and perform better on leaderless teams where members choose their own courses of action. Externals do well with a strong team lead and particularly well when that lead has a more Internal LoC than the rest of the group.[4] Furthermore, employees may find it useful to consider their preferred LoC when pursuing their next assignments or development opportunities.

Are you like Internal Irv or External Ed—or somewhere in between? Find out by following the first link in the blue box to take an established LoC test. Your score will place you on a dimension ranging from strong internal to strong external LoC. As you consider your score, remember that LoC can vary over time and across different areas of your life. ❖

Learn More About Locus of Control

Measure Your LoC

http://www.psych.uncc.edu/pagoolka/LocusofControl-intro.html

http://teachinternalcontrol.com/uploads/LOC_Measures__1_.pdf

LoC in the Workplace

http://ijbssnet.com/journals/Vol_2_No_18_October_2011/28.pdf

http://c.ymcdn.com/sites/www.incentivemarketing.org/resource/resmgr/imported/Locus%20%20of%20Control%20%20final.pdf

https://www.ijsr.net/archive/v2i12/MDIwMTM1OTk=.pdf

[1] Nowicki, Stephen (2016). *Choice or Chance: Understanding Your Locus of Control and Why It Matters*. Prometheus: Amherst, NY.

[2] Deborah Cobb-Clark, Sonja Kassenboehmer, and Stefanie Schurer, "The Connection between Diet, Exercise, and Locus of Control," *Journal of Economic Behavior and Organization* 98(2) (February 2014): 1–28.

[3] Russ Hill (2011). *How to Teach Internal Locus of Control*. Will to Power: Beach Haven, NJ.

[4] Christophe Boone, Woody van Olfen, and Arjen van Witteloostuijn, "Team Locus-of-Control, Composition, Leadership Structure, Information, Acquisition, and Financial Performance: A Business Simulation Study," *Academy of Management Journal* 48(5) (October 2005): 889–909.

Agency Corner:
DHS Hires Cyber Experts Fast

The news is filled with stories about how agencies are unable to fill critical positions because the hiring rules keep them from reaching high-quality applicants. The civil service rules help ensure that hiring decisions are based on merit, but they can also result in a long, complicated hiring process that many top applicants are not willing to endure. Is there anything agencies can do to alleviate this problem? The Department of Homeland Security (DHS) thinks so.

At the recent *Fedstival*—a Washington, D.C. event hosted by Government Executive and Nextgov—DHS's Chief Human Capital Officer (CHCO), Angela Bailey, said that she believed agencies have the tools at their disposal to hire high-quality applicants. She pointed out that with all of the flexibilities available, agencies just need to think creatively about how to best use them. She then discussed how DHS used the direct hire authority to hire for a mission-critical occupation—cybersecurity.

DHS's Chief Human Capital Officer, Angela Bailey, said that she believed agencies have the tools at their disposal to hire high-quality applicants.

Direct hire is an authority the Office of Personnel Management (OPM) can grant to agencies when a critical hiring need or severe shortage of candidates exists. The authority is subject to qualification requirements, public notice, and career transition program provisions, but not to rating and ranking and veterans' preference. OPM currently has approved the use of direct hire for several Governmentwide positions, including cybersecurity and technology specialists.

These positions are in high demand and are difficult to fill, but MSPB research shows that direct hire is still not widely used to fill them. Over the past 5 years, the Federal Government hired, on average, only about 650 IT specialists per year using direct hire.

Cybersecurity is an important mission for DHS, so CHCO Bailey met with DHS's leadership and decided to host an event to hire cyber professionals. DHS held its first ever Cyber and Tech Job Fair in Washington, D.C., in July 2016. It was a 2-day hiring event at which applicants could apply for a position, interview for the position, receive a tentative job offer, and initiate the security process, all in one place at one time, making wide use of the Governmentwide direct hire authority.

DHS had approximately 350 openings at the time of the fair. It posted Department-wide job opportunity announcements that all of the hiring organizations could share. All of the key players were represented at the fair, including Human Resources (HR), security, the Chief Information Officer, and hiring managers.

During the event, HR accepted applications, reviewed the qualifications on the spot, and brought the resumes to hiring managers to see if they wanted to conduct interviews. Once interviews were completed, hiring managers could make tentative job offers. At that point, the candidates were fingerprinted and started filling out the security paperwork (i.e., e-QIP). CHCO Bailey pointed out that they were able to complete a process that typically takes 4-6 weeks in 2 days.

DHS also used the event to highlight its missions. Agency representatives recognized that many candidates would have to wait for different phases of the process to occur, so they set up a showcase to demonstrate what the agency does and how it does it. They even brought in as many of the agency "toys" as possible, including a Coast Guard Cutter and a Presidential limousine. The purpose was to demonstrate the interesting, important things the Department does while helping fill time between phases of the process, thereby leaving the candidate with a good overall experience.

The numbers indicate that this event was quite a success. CHCO Bailey stated that approximately 15,000 people applied for jobs featured at the fair; about 2,000 people showed up for the fair; almost 1,000 interviews were conducted; and approximately 200 tentative job offers were made during the 2-day event.

According to CHCO Bailey, the job fair opened at 8 a.m., the first job offer was made around 8:15 a.m., and the first new hire was in place in 2 weeks. The announcements were left open for 6 months, and as of

early October, DHS had hired almost 400 people—180 of which were brought on board within 6 weeks.

The direct hire authority is not a cure-all for the Federal hiring process. The flexibility should be used with caution because it does not require assessment beyond minimum qualifications. But if combined with a strong recruitment strategy to target high-quality applicants and a probationary period process that weeds out poor performers, it can provide for a more efficient process for hard to fill positions. What the DHS example more pertinently shows is that if agencies think critically and creatively, they can use current processes and flexibilities to meet many of their workforce challenges. ❖

To listen to CHCO Bailey's remarks at Fedstival, go to *http://fedstival.com/* and forward to about 3:53:00 on *The Next Workforce* webcast.

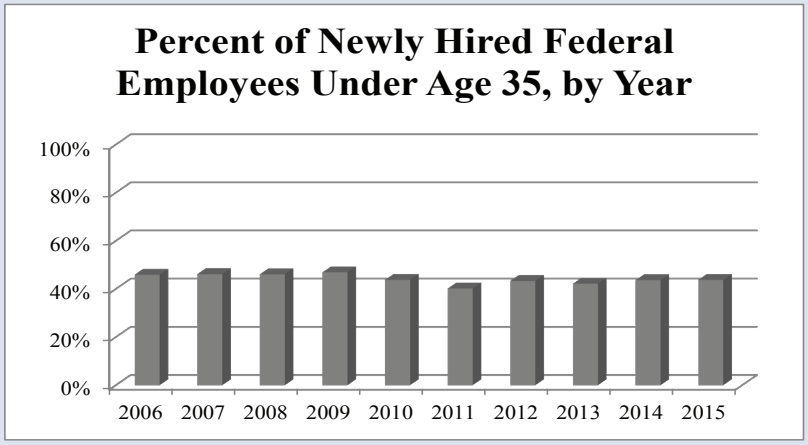
Focus on the Facts

Myth: The Federal Government does not hire Millennials.

Fact: Millennials made up almost 45 percent of new hires and represented 17 percent of the permanent Federal workforce in 2015.

Focus: Millennials are the first generation to come of age in the new millennium and are currently 22–34 years old. There have been numerous discussions in the media and on Capitol Hill regarding why the Federal Government is unable to attract Millennials into public service.

According to OPM's Central Personnel Data File (CPDF), 44 percent of newly hired permanent full-time Federal employees in 2015 were under age 35. As the figure below shows, the Federal Government's new hires under 35 have consistently been in the 40–45 percent range over the past 10 years.



Source: CPDF

In addition to being a significant portion of newly hired employees, Millennials represented 17 percent of the permanent full-time Federal workforce in 2015. This is a 4 percent increase from 2010, when only 13 percent of Federal employees were under 35.

This does not mean that younger applicants don't face hurdles in the hiring process or that agencies are able to retain the best and brightest Millennials. But it does suggest that "How many Millennials does the Federal Government hire?" might be the wrong question.

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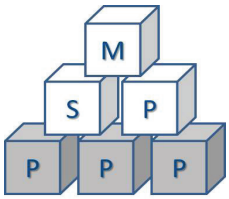
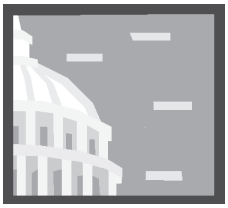


Locus of Control. *It's all about whether you believe you can make a difference. (Page 5)*

Agency Corner. *DHS demonstrates how to make the most of available hiring flexibilities. (Page 6)*



Focus on the Facts. *Is the Federal Government really not hiring Millennials? (Page 7)*