The Merit System Principles: Guiding the Fair and Effective Management of the Federal Workforce

1	Select employees on the basis of ability, through fair and open competition, to attain a representative workforce.
2	Treat employees and applicants fairly and equitably, with proper regard for their privacy and constitutional rights.
3	Provide equal pay for work of equal value and recognize excellence in performance.
4	Maintain high standards of conduct and concern for the public interest.
5	Use the Federal workforce efficiently and effectively.
6	Retain employees on the basis of performance and address inadequate performance fairly and decisively.
7	Train and educate employees to improve individual and organizational performance.
8	Protect employees against favoritism, political coercion and arbitrary action and prohibit abuse of authority.
9	Protect employees against reprisal for whistleblowing

A Report to the President and the Congress of the United States
by the U.S. Merit Systems Protection Board
September 2016

THE CHAIRMAN

U.S. Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419-0001

September 26, 2016

The President
President of the Senate
Speaker of the House of Representatives

Dear Sirs:

In accordance with the requirements of 5 U.S.C. § 1204(a)(3), it is my honor to submit this U.S. Merit Systems Protection Board (MSPB) report, *The Merit System Principles: Guiding the Fair and Effective Management of the Federal Workforce*. With the Civil Service Reform Act of 1978, Congress codified the Merit System Principles (MSPs) and the Prohibited Personnel Practices (PPPs). Together, the MSPs and PPPs guide agency leaders in managing the Federal workforce and inform Federal officials and employees of their responsibilities and rights.

Our research shows that Federal employees believe their agencies have varying success—and substantial room for improvement—in achieving the vision of the MSPs. Notably, surveys revealed a belief among both Chief Human Capital Officers and human resources staff that employees at all levels lack knowledge about how to fully adhere to the MSPs and avoid PPPs.

MSPB recommends that agencies take steps to educate employees on the MSPs and PPPs. Specifically, agencies should ensure that all employees receive training that is timely, tailored to their level of responsibility, provided by experts, and delivered effectively. To that end, this report includes a resource guide that explains each MSP and summarizes findings and recommendations from recent MSPB reports.

Because the MSPs are the foundation for an effective, merit-based civil service, it is essential that Federal agencies understand and fully support them. I believe that you will find this report useful as you consider how to sustain and strengthen the Federal civil service.

Respectfully,

Susan Tsui Grundmann

Enclosure

The Merit System Principles: Guiding the Fair and Effective Management of the Federal Workforce

A Report to the President and
the Congress of the United States
by the U.S. Merit Systems Protection Board

U.S. Merit Systems Protection Board

Susan Tsui Grundmann, *Chairman*

Mark A. Robbins, *Member*

Office of Policy and Evaluation

Director
James M. Read

Deputy Director
James J. Tsugawa

Project Manager
Cynthia H. Ferentinos, Ph.D.

Contributing Offices
Office of Appeals Counsel
Office of Clerk of the Board
Office of Regional Operations

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The Merit System Principles

Federal personnel management should be implemented consistent with the following Merit System Principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be—

> (A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and
>
> (B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—

> (A) a violation of any law, rule, or regulation, or
>
> (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

The Prohibited Personnel Practices

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

> (A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e–16);
>
> (B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. §§ 631, 633a);
>
> (C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 206 (d));
>
> (D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. § 791); or
>
> (E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

> (A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or
>
> (B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110 (a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110 (a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(11)

(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; or

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title; or

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."

Executive Summary

The Civil Service Reform Act of 1978 (CSRA) established a concise set of expectations for the fair, effective and efficient management of the Federal workforce. Known as the Merit System Principles (MSPs), and supported by the complementary Prohibited Personnel Practices (PPPs), these guidelines specify actions that should (or should not) be taken to produce the desired outcomes of treating employees and applicants fairly in all aspects of their careers, protecting the rights of employees, and promoting the effective and efficient use of Federal resources. The CSRA established several agencies with specific responsibility for protecting MSPs or preventing PPPs, including the U.S. Merit Systems Protection Board (MSPB), which initially included the U.S. Office of Special Counsel (OSC), and the U.S. Office of Personnel Management (OPM). However, the CSRA also provides that personnel authority would be exercised by individual agencies, rather than any central agency. Therefore, the primary responsibility for avoiding PPPs—and attaining the ideals described in the MSPs—lies with the employing agencies.

The mission of the MSPB is to protect the MSPs and promote an effective workforce free of PPPs. This mission is achieved through dual functions: adjudication of cases and studies of workforce management practices. This report combines expertise from both the adjudicatory and studies functions to achieve the following purposes: (1) assess how well Federal employees believe their agencies adhere to the MSPs; (2) evaluate current agency training practices regarding the MSPs and PPPs; (3) help readers better understand the meaning and intent of each MSP, by providing resources where they can learn more. To achieve these goals, we analyzed data from surveys, agency questionnaires, and interviews and summarized research from cases and studies that are related to each MSP.

Our research finds a disparity between the widespread professed knowledge of the MSPs by Federal employees and the perceived implementation of those principles within the Federal Government. Observations by members of the human resources management (HRM) community suggest that this may be due, at least in part, to variations in the quality and quantity of training on the MSPs (and avoidance of PPPs) that is provided within agencies.

For example, results from MSPB surveys indicate that most nonsupervisory employees (74 percent) and supervisors (89 percent) claim familiarity with the MSPs.[1] However, Chief Human Capital Officers (CHCOs) and HRM staff were somewhat less likely to view employees and supervisors as adequately knowledgeable of the MSPs.[2] Given their organizational role as objective advisors regarding workforce management decisions, HRM employees may offer a more accurate perspective to assess the familiarity of employees and supervisors with practices that are consistent with the MSPs. The existence of a discrepancy between the self-ratings of employees and supervisors and the evaluations provided by HRM staff suggests a need for improving education regarding MSPs and PPPs since it is critical for all Federal employees to understand the rights and responsibilities inherent in the merit systems.

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[1] U.S. Merit Systems Protection Board, *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism*, December 2013, p. 34.

[2] U.S. Merit Systems Protection Board, 2014 Merit System Principles (MSP) Education Agency Questionnaire, Question 9 a–d.

We assessed the current level of agency training on the MSPs and PPPs through a 2011 survey of HRM staff and an agency questionnaire that was distributed to CHCOs in 2014. Their responses revealed a wide range in the information provided to employees at various levels. Less than half of managers and supervisors were thought to receive extensive training on the MSPs and PPPs, while slightly under 15 percent received little or no training on the MSPs or PPPs.[3] A disappointingly large number of HRM staff also responded that they had received little or no training on the MSPs (17 percent) or PPPs (12 percent).[4]

Therefore, some agencies are currently failing to provide employees with the training that they need to successfully fulfill their responsibilities to uphold the merit system principles. Agencies should ensure that all employees (though particularly supervisors, managers and executives, including political appointees) understand how the MSPs should impact all workforce management decisions. Agencies can accomplish this by providing employees with appropriate training at critical junctures in their careers. At a minimum, employees should receive training upon joining the organization, whether at the entry level or as a high-ranking executive. Employees should also receive more detailed training that is tailored to their responsibilities each time they move into a new role with broader decision-making authority, such as a supervisor or manager. Further, in these critical roles, one-time training is insufficient. Refresher training should be provided at regular intervals to ensure supervisors remain up-to-date regarding the application of the MSPs, as well as understand that their leadership views this expertise as a priority. Given that agencies are legally bound to provide supervisors with refresher training on a number of topics related to workforce management at a minimum of every three years, this represents an opportunity for agencies to incorporate the MSPs into this training, thereby meeting the existing requirement, while enhancing the organization's ability to function effectively within the Federal merit systems.

In terms of outcomes, many employees lack confidence that organizations successfully achieve the ideals espoused in the MSPs.[5] In particular, employees remain skeptical that managers effectively and efficiently manage the workforce, such as by selecting and retaining the best qualified (rather than those with whom they have personal relationships) and by appropriately dealing with employees whose performance is lacking. These employee perceptions may be inaccurate due to other requirements, such as the test security requirements which may obscure the assessment criteria, as well as the mandatory confidentiality of disciplinary actions, which may prevent other employees from knowing which steps the supervisor has taken. However, educating employees about these requirements may help them to be better informed about what information to which they may or may not be privy.

When employees believe that they are knowledgeable about the requirements of the MSPs and the PPPs and yet believe that supervisors do not adhere to those requirements, there are several possible explanations. First of all, this discrepancy may suggest a need for additional education—of employees (including supervisors) as it may indicate an inadequate understanding of the MSPs and PPPs. The MSP education process must go beyond superficial knowledge of the MSPs to provide an in-depth understanding of their meaning and intent to improve the application of these principles within the complexities of their organizations.

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[3] U.S. Merit Systems Protection Board, 2011 Fair and Open Competition Survey, Question 15 a–b.

[4] *Id.*, Question 16 a–b.

[5] U.S. Merit Systems Protection Board, *Managing Pu)blic Employees in the Public Interest: Employee Perspectives on Merit Principles in Federal Workplaces*, January 2013, pp. 10–11.

Additionally, employees and particularly supervisors would benefit from gaining a greater understanding of the expectations and implementation of the MSPs. In some organizations, this may include paying more attention to holding employees (at all levels) accountable for adhering to the MSPs. To facilitate this goal, agency leaders need to hold their employees—as well as themselves—responsible for embodying the full range of the MSPs.

This report is designed to provide information on the MSPs and related practices by summarizing the meaning and intent of each MSP. By referencing illustrative cases of what not to do, these explanations go beyond the content of the MSPs to provide additional context to aid Federal supervisors (and other employees) in making merit-based decisions. Furthermore, we summarize findings and recommendations from related MSPB research and point readers to additional references for more details.

Recommendations

Promote merit-based management of the Federal workforce through education and action.

Management of the Federal workforce should be guided by the MSPs. However, the realities of what this looks like can vary depending on the circumstances. The MSPs require examining individual circumstances and exercising judgment regarding what could and should be done to support the merit systems. HRM staff and other sources can provide advice on a case-by-case basis. However, a more concerted approach to educate different components of the workforce should complement these individual consultations.

The mandatory training required for new supervisors (within one year of their initial appointment and refresher training at least every three years)[6] should include comprehensive training on the MSPs and PPPs. Topics currently required by the mandatory refresher training include components of the MSPs, such as managing poor performers and providing training and developmental opportunities. Although these represent essential areas of supervisory responsibility, agencies should think more broadly and include the broader range of management practices covered by the MSPs and PPPs.

Training on the MSPs and PPPs should also be tailored for political appointees who may have supervisory and managerial experience, but lack familiarity with the requirements of the Federal merit systems. These executives need to be introduced to the concepts inherent in the Federal merit systems because these may differ in some fundamental ways from the management practices to which they are accustomed.

In addition to training supervisors, managers, and executives, agencies also need to ensure that all employees possess a basic understanding of the MSPs and PPPs. This knowledge can serve to decrease the potential for misunderstandings of how employees should be managed within the Federal merit systems.

However, while increased education on the MSPs for executives, managers, supervisors and other employees is critical, it is not sufficient. Supervisors at all levels must also be held accountable for their decisions, to ensure that they are supporting the intent of the MSPs.

[6] As required by the Federal Workforce Flexibility Act of 2004 (P.L. 108–411) which was incorporated into 5 C.F.R. § 412.202.

Key Recommendations for Agencies

To ensure a merit-based culture that promotes the MSPs and protects against PPPs, it is essential that agencies:

- Select supervisors who have demonstrated their commitment to upholding the high expectations of the Federal merit systems.
- Provide in-depth training regarding the content and applications of the MSPs and PPPs (as well as the potential costs for not adhering to these expectations) to all supervisors at the time of hire and on a regularly recurring basis.
- Ensure that supervisors receive the required training at the time of selection and as needed in subsequent years (at a minimum frequency of every three years as legally mandated). Although the requirements do not specifically mention the MSPs and PPPs, to adequately perform their duties, this training should cover not only the content of the MSPs and PPPs, but also how they impact their workforce management decisions.
- Ensure that political appointees are well-informed about the practical implications of the MSPs and PPPs and understand the criticality of demonstrating their full support of the Federal merit systems given their influential leadership role.
- Hold all supervisors, managers and executives accountable for adhering to the MSPs and avoiding PPPs.
- Ensure HRM employees have the expertise to correctly advise regarding the impact of the MSPs on all workforce management decisions.
- Educate employees regarding their rights and responsibilities according to the MSPs and PPPs and ensure that they are aware of the procedures for redress in the event they feel their rights have been violated.
- Understand the dual responsibility to employees and the public to manage the Federal workforce fairly and effectively.

Key Recommendations for Supervisors

Supervisors directly manage the Federal workforce, therefore, each supervisor must:

- Fully appreciate the implications of each MSP and PPP to understand how their actions impact their agency's embodiment of the merit systems.
- Ask for assistance from HRM staff or others with relevant expertise prior to taking an action that could be inconsistent with the MSPs or constitute a PPP.
- Work with HRM to understand the options available to achieve the desired merit-based goals, and not request that HRM take actions that violate MSPs or result in PPPs.

Key Recommendations for Human Resources Management Staff

HRM employees play a critical role in helping agencies and managers promote the MSPs and avoid the commission of PPPs. To that end, they should:

- Provide expert advice on merit-based workforce management, including best practices for recruiting, hiring (including promoting), evaluating performance, determining awards, distributing work assignments and training and development opportunities, and administering discipline.
- Take appropriate action upon observing a violation of a MSP or the commission of a PPP.
- HRM supervisors, managers and executives need to support HRM staff when they raise concerns regarding MSPs or PPPs.

Key Recommendations for Employees

Employees should take the following steps to manage their performance and careers:

- Learn more about the MSPs and the PPPs.
- Work with supervisors and colleagues to support the MSPs.
- When it appears that a MSP has been violated or a PPP committed, consider the options, such as discussing the act with HRM or the Equal Employment Opportunity (EEO) office or by filing a grievance, appeal or complaint.

The MSPs should be supported (and the PPPs avoided) through several means: (1) proactive education of all employees; (2) holding employees accountable through internal agency mechanisms, and (3) enforcing accountability through external agencies (when necessary). These processes provide multiple layers of support for sustaining the Federal merit systems as envisioned by the architects of the Civil Service Reform Act of 1978.

Introduction

Purpose

Given MSPB's role as a guardian of the Federal merit systems, we have created this report to assist with educating Federal employees regarding the meaning and intent of the Merit System Principles (MSPs)[7] and why they are important. This report will serve the following purposes:

1. To assess how well Federal employees believe they are protected by the MSPs;
2. To evaluate and summarize current agency training practices regarding the MSPs and the Prohibited Personnel Practices (PPPs),[8] and
3. To summarize information regarding the MSPs to serve as a reference guide for supervisors and employees.[9]

Method

To prepare this report, we examined:

- A review of the relevant legislative history (e.g., the Civil Service Reform Act of 1978 (CSRA)), which codified the MSPs and the PPPs, and more recent efforts to improve supervisory and managerial training.
- A review of selected cases involving alleged violations of the MSPs and related PPPs.
- Results from the 2014 Merit System Principles Education Agency Questionnaire ("MSP Education Agency Questionnaire"), a questionnaire directed to agency Chief Human Capital Officers (CHCOs) regarding MSP and PPP training provided to employees.[10]
- Results from the Merit Principles Survey (MPS)[11] which MSPB periodically administers to Federal Government employees to assess their perceptions of the Federal merit systems, monitor trends over time, as well as to provide insights into current topics of research. Specifically, on the 2010 Merit Principles Survey, the MSPs were broken out into discrete questions to obtain employee perceptions of different aspects of each MSP. This provides a more detailed perspective on how well Federal employees believe their agencies uphold the various aspects of the MSPs.

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[7] See Appendix A.

[8] See Appendix B.

[9] The full reports of cited MSPB studies are available at www.mspb.gov/studies/viewallstudies.htm..

[10] Appendix C contains an overview of the questionnaire method and a copy of the questionnaire.

[11] The results from this survey were most recently discussed in the 2013 MSPB report, *Managing Public Employees in the Public Interest: Employee Perspectives on Merit Principles in Federal Workplaces.*

- Results from the 2011 Federal Merit Systems Survey,[12] a Governmentwide survey administered by MSPB which included questions regarding when, how and why Federal employees perceive that some applicants or employees receive an unfair advantage, their opinions regarding their supervisor's effectiveness, and what supervisors should do to improve their adherence to the MSPs.
- Results from the 2011 Fair and Open Competition Survey,[13] administered to HRM employees because of their role in advising managers regarding personnel decisions.
- Results from interviews with the Office of Special Counsel (OSC), the Office of Personnel Management (OPM), and the Partnership for Public Service (PPS).

Taken together, these sources provide insights into what the CSRA intended in codifying the MSPs and the degree to which employees believe Federal agencies are adhering to these principles. Examples of cases relating to each MSP illustrate how these principles may have been overlooked or misinterpreted. Therefore, we also propose remedies, such as to the deficits in training that Federal employees have received, and offer additional information and resources regarding how Federal agencies can better operate within the merit systems.

[12] For an overview of the Federal Merit Systems Survey method, the text of the email invitation accompanying the Federal Merit Systems Survey, and a copy of the Federal Merit Systems Survey, please see the 2013 MSPB report, *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism.*

[13] For an overview of the Fair and Open Competition Survey, please see the 2014 MSPB report, *The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs.*

Maintaining the Merit System Principles

Background

The Civil Service Reform Act of 1978 (CSRA)

The CSRA sought to "promote a more efficient civil service while preserving the merit principle in Federal employment."[14] This reflected a movement to ensure the Federal Government serves the public efficiently and effectively, while also preserving employees' rights to be treated fairly. Although the Pendleton Act of 1883 had been enacted to end the practice of awarding Federal jobs on the basis of political affiliation or personal relationships (known as the "spoils system"), concerns were increasing in the late 1970's that the merit system was being undermined. In part, this was attributed to frustration expressed by some regarding the plethora of personnel rules and regulations that were intended to preserve merit, but were seen as impeding supervisors' rights to appropriately manage their staff, including the removal of poor performers.

To address these concerns, the CSRA and the related Reorganization Plans accomplished a number of goals. To clarify expectations for the management of the Federal workforce, the CSRA established as law the Merit System Principles and the Prohibited Personnel Practices.

What are the Merit System Principles?

The Merit System Principles are nine basic standards governing the management of the executive branch workforce. They operate as aspirational goals for how the Federal workforce should be managed since they are not "self-actuating"—which means that they are not sufficient to serve as the basis for an enforceable action. The principles are part of the Civil Service Reform Act of 1978, and can be found at 5 U.S.C. § 2301(b).

What are the Prohibited Personnel Practices?

The Prohibited Personnel Practices are thirteen actions that are forbidden for employees who have the authority to make personnel decisions. Unlike the Merit System Principles, Congress made the prohibition of these personnel practices enforceable so employees could (1) be disciplined for committing a PPP and (2) obtain corrective action if a PPP was committed against them. The Civil Service Reform Act of 1978 established a list of eleven PPPs, which has been expanded to thirteen, and these can be found at 5 U.S.C. § 2302(b).

[14] S. Rep. 95-969, at 2, *reprinted in* U.S.C.C.A.N. 2723, 2724.

As mentioned above, the MSPs are not self-actuating, which means they cannot serve as the basis for a corrective action.[15] However, violations of MSPs may also involve the commission of PPPs. As a result, there exists a close correspondence between the MSPs and the PPPs as the PPPs clearly define actions that would undermine a merit system.[16] Together, these MSPs and PPPs establish the vision for how the Federal workforce should be fairly and effectively managed and how Federal employees should view their rights and responsibilities. The general themes across the MSPs and PPPs relate to treating employees fairly in all aspects of their employment; protecting employees from harm, such as when they exercise legally protected rights; as well as encouraging the efficiency of the Federal workforce.[17] Although the MSPs and PPPs clearly stipulate certain behaviors that should not be done, the MSPs also provide aspirational guidance for the ideal functioning of the Federal workforce.

The primary responsibility for upholding the MSPs and avoiding PPPs rests in the day to day management of the workforce within each agency. Agency leaders serve as role models for demonstrating a commitment to the values distilled into the MSPs and PPPs.

As reinforced by the MSPs and PPPs, great latitude exists within the range of flexibility granted to supervisors and managers to enable them to decide how to best manage their employees as long as their actions are driven by merit. Perhaps one way to envision the complementary roles of the MSPs and PPPs is to think of them as metaphorical "guard rails" for the management of the Federal workforce. Given the evolution in regulations governing workforce management policies and practices, those with decision-making authority in agencies should consider (and as needed, seek counsel from HRM experts regarding) the multitude of options for recruitment, hiring, providing training and development, managing performance, providing recognition and awards, and administering disciplinary action. While keeping in mind their organizational goals to facilitate efficiency and effectiveness, agencies also maintain a responsibility to treat employees fairly.

Roles of Federal Agencies Responsible for Supporting the MSPs

While Federal agencies possess significant authority over managing within the MSPs, Congress also intended for Federal employees to be able to have a fair hearing if they felt that a PPP had been committed against them. Although agencies typically offer mechanisms for resolving these complaints internally, the authors of the CSRA recognized the need to continue to provide an external, more objective means for investigating and adjudicating employees' allegations of unfair treatment. Therefore, the CSRA also reorganized the appeal functions of the Civil Service Commission into several newly established organizations. The U.S. Merit Systems Protection Board (MSPB) was created to safeguard the "effective operation of the merit principles in practice."[18] MSPB assumed the employee appeals function of the Civil

[15] *Pollard v. Office of Personnel Management*, 52 M.S.P.R. 566, 569–570 (1992).

[16] Appendix D provides a fuller discussion of the relationship between the MSPs and PPPs.

[17] A factor analysis of MPS 2010 results was discussed on p. 7 of the 2013 MSPB report, *Managing Public Employees in the Public Interest: Employee Perspectives on Merit Principles in Federal Workplaces*. The resulting factors were labeled "fairness," "protection," and "stewardship."

[18] S. Rep. 95-969, at 6, *reprinted* in U.S.C.C.A.N. 2723, 2728.

Service Commission[19] and was given new responsibilities to perform merit systems studies[20] and to review the significant actions of the U.S. Office of Personnel Management (OPM).

What is the U.S. Merit Systems Protection Board?

The Merit Systems Protection Board (MSPB) is an independent, quasi-judicial agency in the Executive branch that serves to protect the Merit System Principles (MSPs) and to promote an effective Federal workforce free of Prohibited Personnel Practices (PPPs). To support this mission, MSPB adjudicates appeals of covered actions and conducts studies to assess how fairly and effectively Federal agencies are managing their employees and to make recommendations for improvements.

As part of the adjudicatory function, MSPB is empowered to hear and decide requests for corrective or disciplinary action when an agency is alleged to have committed a PPP.[21] Specifically, MSPB assumed responsibility for hearing appeals of certain agency personnel actions (e.g., removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less) by Federal employees who are eligible to bring their cases to MSPB.[22] MSPB also hears appeals of certain OPM actions, such as determinations in retirement cases, suitability determinations, and employment practices (e.g., the development and use of examinations, qualification standards, tests and other measurement instruments). After an administrative judge (AJ) issues an initial decision, this decision can typically be appealed to the Board[23] through the petition for review process.

The CSRA requires OPM to hold "managers and human resources officials accountable for efficient and effective human resources management in support of agency missions in accordance with Merit System Principles."[24] In part, OPM addresses this responsibility through its Merit System Accountability and Compliance division, which evaluates Federal agency human resources programs to ensure that they provide "high quality and merit system-based services."[25]

When dividing the responsibilities of the Civil Service Commission among new agencies, the CSRA originally created the Office of Special Counsel (OSC) as an office within the MSPB to investigate allegations of PPPs, prosecute violators of civil service rules and regulations, and enforce the Hatch Act.[26]

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[19] The CSRA, which became effective January 11, 1979, replaced the Civil Service Commission with three new independent agencies: the Office of Personnel Management (OPM), which manages the Federal workforce; the Federal Labor Relations Authority (FLRA), which oversees Federal labor-management relations; and the MSPB.

[20] These reports are provided to the President and the Congress and are available at www.mspb.gov/studies/viewallstudies.htm.

[21] 5 U.S.C. §§ 1214–1215.

[22] For more details regarding MSPB's appellate jurisdiction, see www.mspb.gov/About/jurisdiction.htm.

[23] The Board is bi-partisan and composed of the Chairman, Vice Chairman and Member, who are appointed by the President and confirmed by the Senate to serve seven-year terms.

[24] 5 U.S.C. § 1103(c)(2)(F).

[25] For more information, see www.opm.gov/about-us/our-people-organization/program-divisions/merit-system-accountability-and-compliance/.

[26] The Hatch Act, 5 U.S.C. §§ 7321–7326, places restrictions on the political activities of Federal employees. For information on enforcement of the Hatch Act, see https://osc.gov/Pages/HatchAct.aspx.

However, the OSC became an independent agency in July 1989, with authority to prosecute cases before the MSPB and seek disciplinary and/or corrective action.

The U.S. Equal Employment Opportunity Commission (EEOC) may also become involved in cases where an employee alleges discrimination as part of a personnel action that is appealable to the MSPB (which is termed a "mixed case"). The employee may raise their concerns through the EEO process, and ultimately, the EEOC or the MSPB can hear these appeals, but the employee has the option to request that EEOC review the decision of the MSPB, if the employee is dissatisfied with the outcome. If the EEOC and the MSPB cannot agree, the case is referred to the Special Panel for final resolution.[27]

How Might a PPP or Violation of an MSP Be Redressed?

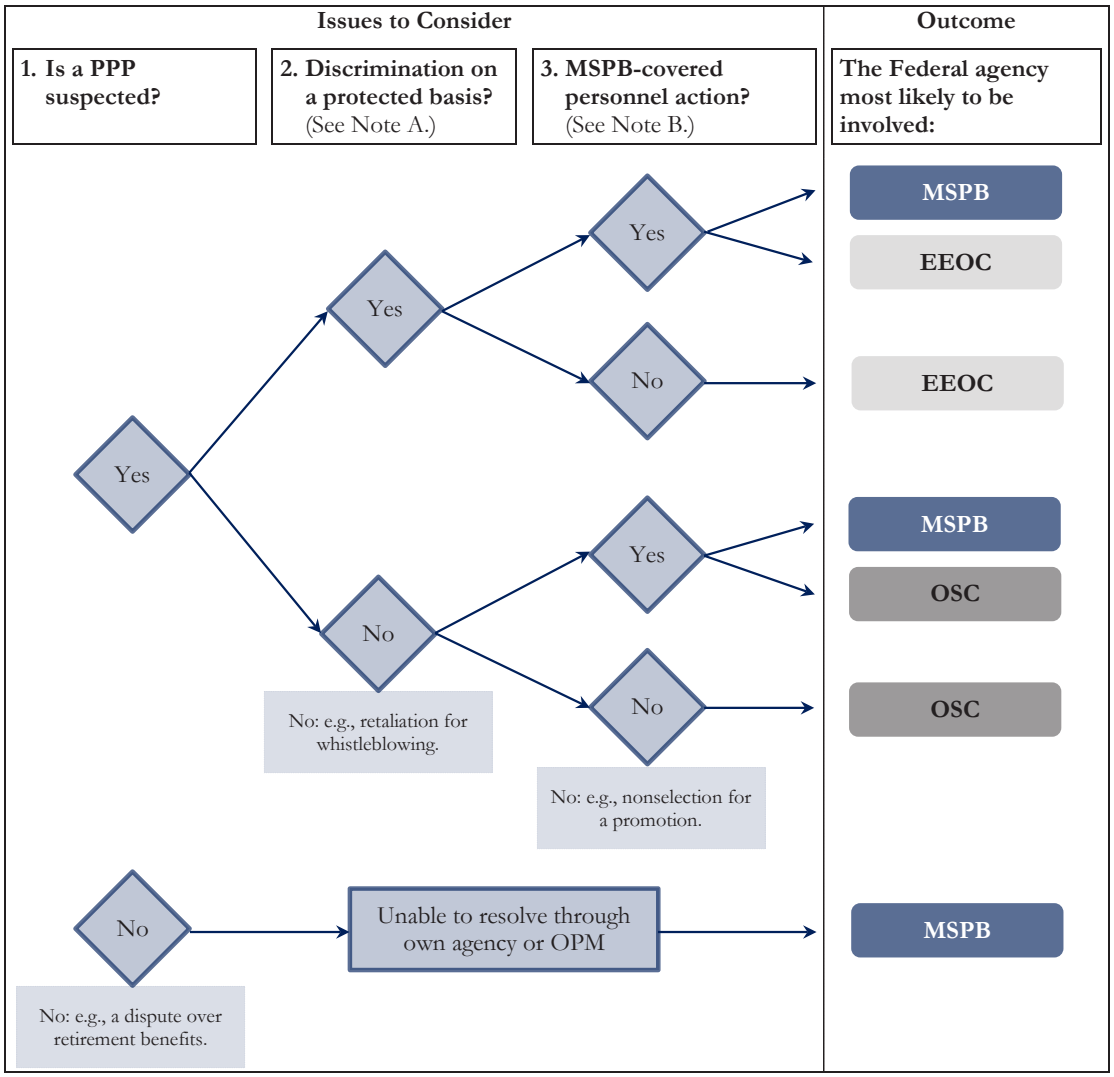
As mentioned earlier, after an employee has exhausted the internal agency complaint, appeal or grievance process and/or decided to turn to external sources for assistance, the process varies widely depending upon the nature of the allegation, who is making the allegation, and the conditions which may restrict the venue to which the employee may direct the claim. These factors determine which agency will investigate the complaint or hear the appeal. For example, MSPB's jurisdiction generally applies only to certain personnel actions that were conducted by a covered agency (e.g., coverage excludes certain agencies, such as in the intelligence community) and against an eligible employee (e.g., a non-probationary employee in the competitive service). Other conditions, such as the presence of an agency grievance process, may also impact how claims will be handled.

Given the complexity of jurisdictional issues, Federal employees with potential appeals or complaints should promptly seek advice from the appropriate experts within or outside of their agencies or consult relevant agency websites. For example, information on MSPB's jurisdiction is available at www.mspb.gov/About/jurisdiction.htm. Additionally, **Figure 1** below provides a simplified view of some issues to consider and possible outcomes for which agency would handle an appeal or complaint.

The following paragraphs expand upon the flow chart depicted in **Figure 1** and present a general overview of the typical routing of employee claims regarding violations of the MSPs or commission of PPPs based on the unique circumstances of each case. For more specific advice tailored to personal circumstances, employees need to seek advice within their own agency or directly from the agencies identified in **Figure 1**.

[27] 5 U.S.C. § 7702.

Figure 1. Issues to Consider When Filing a Complaint or Appeal: An Employee Perspective



Notes:

A. Protected bases include: political affiliation, race, color, religion, national origin, sex, marital status, age, disability, genetic information, and sexual orientation.

B. MSPB-covered personnel actions include: removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less.

For more information:

MSPB	www.mspb.gov (202) 653-7200
EEOC	www.eeoc.gov (202) 663-4900
OSC	www.osc.gov (202) 254-3600

When an employee believes that legally prohibited discrimination has occurred and it involves a personnel action under MSPB's jurisdiction, the individual may either file with MSPB or elect to go through the EEO complaint process, which may ultimately lead to involvement by the EEOC.[28] (Although OSC's jurisdiction includes discrimination as covered by 5 U.S.C. § 2302(b)(1), OSC typically refers these complaints to the EEO process, with a few exceptions.)[29] As mentioned earlier, "mixed cases" that involve personnel actions that are within MSPB's jurisdiction may be appealed to the MSPB, but trigger different procedures in the event the employee wishes to appeal an unfavorable decision. An employee who believes that a discrimination-based PPP has occurred, but did not result in an MSPB-covered personnel action may contact the agency EEO office for further guidance.

However, when an employee feels that a PPP has occurred that does not relate to illegal discrimination (such as retaliation for whistleblowing) or does relate to discrimination based on conduct as described in 5 U.S.C. § 2302(b)(10), the employee may have several options, as described in 5 U.S.C. § 7121(g). For example, the employee may file through the MSPB appeal process (if the action was covered by MSPB jurisdiction), pursue a grievance through a negotiated grievance process (if applicable), or file a complaint with OSC (if the issue falls under their jurisdiction).[30] As noted earlier, this discussion presents a highly simplified overview so the employee should keep in mind that additional review rights may be triggered depending on the circumstances and the initial election made by the employee.

If OSC believes corrective action is warranted, they will investigate and prosecute the case before the MSPB. It is important to note that OSC has the authority to pursue both corrective action (to right a wrong against an employee or applicant) and disciplinary action against the Federal official who committed the PPP.[31] OSC also investigates allegations of wrongdoing (e.g., waste, fraud, and abuse of authority), the Hatch Act (restrictions on political activity), and violations of the Uniformed Services Employment and Reemployment Rights Act (USERRA). For more information regarding OSC's investigative and prosecutorial roles, see OSC's website at https://osc.gov/Pages/WhatWeDo.aspx.

Enforcing Accountability

When Federal employee complaints have been substantiated, agencies such as the MSPB and the EEOC have the authority to "make the employee whole." That is, they can grant the employee what had been denied by the commission of the PPP. They can also grant monetary compensation to reimburse the employee for attorney's fees or damages. In addition, these Federal agencies can take action against the person who committed the PPP, including penalties such as levying fines and recommending suspension or removal from Federal employment.

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[28] Federal employees who believe they have been discriminated against should contact an equal employment opportunity (EEO) counselor within their own agency within 45 days for initial guidance regarding their options. For an overview of the EEOC's role in protecting Federal employees and applicants against discrimination and the process for filing an EEO complaint, see EEOC's website at www.eeoc.gov/federal/fed_employees/index.cfm.

[29] For more information, see https://osc.gov/Pages/PPP.aspx. OSC does investigate allegations of discrimination based on marital status or political affiliation which are not covered by the EEO process, as well as allegations of discrimination based on sexual orientation or gender identity, which are covered by the EEO process.

[30] OSC's complaint process for PPPs is discussed in detail at https://osc.gov/Pages/ppp-ourprocess.aspx.

[31] For more information, see https://osc.gov/Pages/ppp-ourprocess.aspx.

However, to avoid getting to the point where employees consider filing complaints with the appropriate entities, agencies should maintain vigilance over their work environments to reinforce that supervisors' decisions should embody the spirit of the MSPs and refrain from any actions that might appear to be PPPs. Agency leaders should also communicate with all employees to reinforce a culture that adheres to the meaning and intent of the MSPs and provide the necessary information and training to ensure that everyone understands what is required within a merit-based system. Without this base level of knowledge, there exists a greater likelihood that employees will perceive challenges to the merit systems and that supervisors may also lack critical information to guide their actions. Adhering to the MSPs requires both the knowledge of these principles and willingness to hold everyone accountable for actions that are not in accord with the principles.

Frequently Alleged Violations

As seen in the brief descriptions above, MSPB, OSC, and EEOC serve complementary roles in processing Federal employee allegations that the MSPs have been violated and/or that PPPs have been committed. Although the annual volume of complaints is modest relative to the size of the Federal workforce, each complaint filed with OSC or EEOC (and some of the appeals filed with MSPB) represents an employee who believes that their agencies have failed to adhere to the MSPs and have committed a PPP (and importantly, that the employee is actually willing to risk negative consequences (i.e., retaliation) by filing a complaint or appeal). Each of these complaints can be expensive and time-consuming to resolve, and often have negative effects on others in the agency who observe these intra-agency battles. Although some of these complaints are dismissed as unfounded, others may indicate—regardless of the outcome—that agencies need to put more effort into (1) decreasing the actions that may be perceived as violating the MSPs or constituting PPPs, as well as (2) improving Federal employee understanding of what constitutes a violation of an MSP or the commission of a PPP.

In the most recent years for which data is available, each of these agencies received thousands of appeals, with the composition of the appeals reflecting the unique focus of each agency. During FY 2014, OSC received 3,371 new PPP complaints.[32] Those relating to retaliation for reporting allegations of wrongdoing (i.e., "whistleblowing") were the most prevalent among complaints that were resolved during FY 2014.[33] At EEOC in FY 2014, 14,343 individuals filed 15,013 complaints alleging employment discrimination by the Federal Government.[34] Reprisal and retaliation for engaging in protected activity (such as filing a discrimination complaint) was the most common basis, noted 7,018 times, followed by discrimination based on age (4,697) and physical disability (3,817).[35] These alleged discriminatory acts were reported as occurring as harassment (due to a legally protected basis other than sex), impacting terms and conditions of employment, and non-selection, such as for a promotion. Similarly, in FY 2015, the MSPB decided 5,418 employee appeals in the regional and field offices.[36] Of this total number, 2,043 (38 percent) related

[32] U.S. Office of Special Counsel, *Annual Report for the Fiscal Year 2014*, p. 16.

[33] *Id.*

[34] U.S. Equal Employment Opportunity Commission, *FY 2014 Annual Report on the Federal Work Force, Part 1*, available at www.eeoc.gov/federal/reports/fsp2014/upload/Final-FY-2014-Annual-Report-Part-I.pdf.

[35] *Id.* at p. I-12.

[36] U.S. Merit Systems Protection Board, *Annual Report for FY 2015*, February 29, 2015, p. 18. This number does not include furlough appeals.

to adverse action appeals.[37] As part of their affirmative defense,[38] appellants frequently cited discrimination by the agency based on their disability or reprisal for participating in the complaint, grievance, or appeal process.[39]

These results suggest that a gap still exists between the ideal envisioned by the authors of the Merit System Principles and the experiences of many Federal employees. By filing appeals or complaints with OSC or EEOC or MSPB, Federal employees are typically raising allegations of violations of the MSPs and/or the commission of PPPs. As evidenced by the large numbers of reprisal and retaliation claims, Federal employees often fear for the future of their careers once they file. To remedy this problem, Federal employees need to understand and have confidence in the integrity of the procedures established to provide fairness, protect employees who voice concerns, and ensure that the Federal workforce is effectively and efficiently managed.

Federal Employee Perceptions of Adherence to Merit System Principles

Given the number of appeals and complaints filed with MSPB, OSC and EEOC, it should come as no surprise that many Federal employees feel that their agencies are not yet fully achieving the ideals of the MSPs.[40] Further, as shown in **Figure 2**, Federal agencies are perceived by employees to have been more successful at some Merit System Principles than others.[41](Although there are nine MSPs, each of these MSPs can be further divided into components or practices that were addressed separately in the survey questions.) The results showed that most employees agreed that their organization effectively deals with issues such as appropriately avoiding and handling prohibited discrimination, maintaining high standards of conduct, paying employees fairly, and recruiting diverse pools of applicants. However, we note that fewer than 70 percent of employees expressed confidence in their agencies upholding any MSP, even the MSP viewed as most frequently upheld by their agencies.

In contrast, employees tended to be skeptical about the organization's ability (or willingness) to address poor performers, refrain from practicing favoritism or eliminate unnecessary functions to operate more efficiently, as fewer than 30 percent of employees felt their agencies were successful at fulfilling these MSPs. The reasons behind these deficits in trust are likely to vary widely: from a lack of resources, knowledge (on the part of the supervisor or by the employee who is unaware of information that must be kept confidential), or appropriate skills to an organizational culture that may not fully embrace the MSPs.

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[37] *Id.* at p. 18.

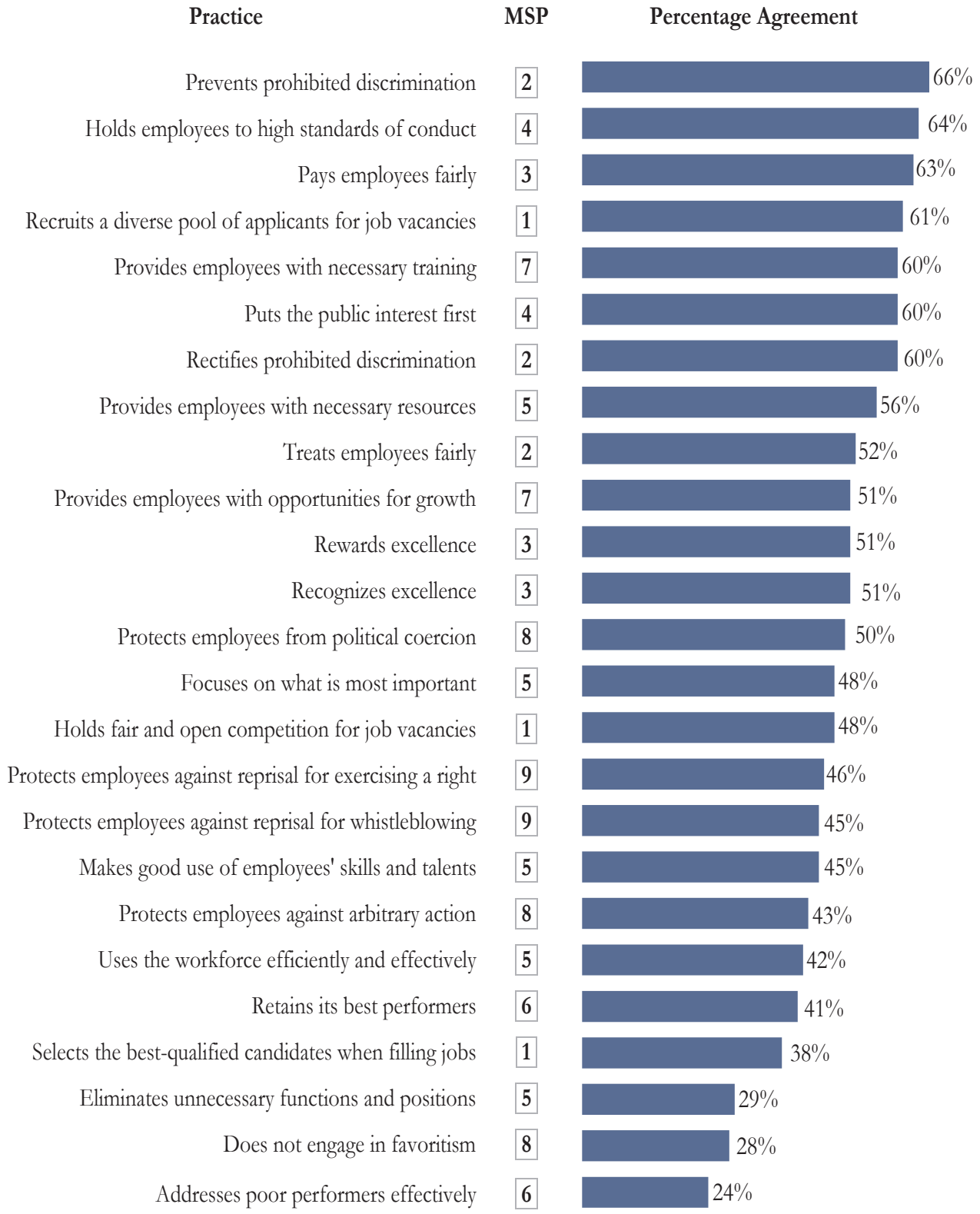
[38] Appellants before the MSPB may seek to prove that the agency action was taken for one of the reasons prohibited by 5 U.S.C. § 2302(b) which may lead to the agency's decision not being sustained. For more information on affirmative defenses, see www.mspb.gov/ppp/ppp.htm.

[39] U.S. Merit Systems Protection Board, Law Manager information system (data retrieved on September 21, 2015).

[40] For further information on Federal employee perceptions of the prevalence of PPPs, see the 2011 MSPB report, *Prohibited Personnel Practices: Federal Employee Perceptions* at www.mspb.gov/netsearch/viewdocs.aspx?docnumber=634680&version=636592&application=ACROBAT.

[41] U.S. Merit Systems Protection Board, *Managing Public Employees in the Public Interest: Employee Perspectives on Merit Principles in Federal Workplaces*, January 2013.

Figure 2. Employee Agreement That Their Organization Adheres to the MSPs



Regardless of the reasons underlying the failure of organizations to win employees' confidence in their ability to support these MSPs, it is essential for all Federal employees—at all levels—to gain a better understanding of the MSPs and how to incorporate them into their organizations. Beyond understanding the meaning of each MSP, the greater challenge likely lies in applying them under varying circumstances. Ambiguous situations and subjective judgment calls may also result in decision makers and onlookers who have different perspectives on situations.

By delving into the history, meaning and intent of each of these MSPs, findings and recommendations from MSPB studies, and relevant legal decisions, this report strives to clarify for readers how each MSP applies to their work lives.[42] Each MSP sets expectations for the optimal functioning of the Federal Government in service to the taxpaying public, while fairly and effectively managing the Federal workforce. These dual goals need not conflict—in fact, they should complement each other. While supervising within the Federal merit systems remains challenging, dedicated effort and a greater understanding of how the MSPs impact every aspect of a supervisor's authority can greatly facilitate the achievement of the ideals envisioned by the Merit System Principles.

[42] Full MSPB decisions and study reports are available at http://mspb.gov/decisions/searchdec.htm and www.mspb.gov/studies/viewallstudies.htm.

Educating Employees Regarding the Merit System Principles

Current Levels of Employee Awareness of the MSPs and PPPs

Federal employee perceptions that agencies fail to fully support all of the MSPs and that PPPs occur (albeit rarely) within the Federal workforce[43] might suggest one of two likely causes: (1) employees (including front line employees, supervisors and higher level decision makers) lack knowledge regarding what should (and should not) be done and/or (2) the supervisors and other decision makers are aware of the MSPs and PPPs and choose not to adhere to these guidelines.

It is also important to note—although ignorance of the MSPs and PPPs does not excuse transgressions against the merit systems—intent (which implies knowledge of "right" vs. "wrong") remains a key element for whether or not a prosecutable PPP has occurred. From a practical standpoint in terms of identifying remedies for violations of the merit systems, it is also essential to understand why an undesired behavior is occurring. Therefore, to try to discern the frequency of each scenario (intentional vs. unintentional based on lack of understanding), we conducted several surveys to obtain employee opinions regarding their perceived level of knowledge, as well as the level of knowledge of those with whom they interact.

In response to one set of survey questions, Federal employees report their "familiarity" with the MSPs and the PPPs. The majority of nonsupervisory employees indicated that they were familiar with the MSPs (74 percent) and PPPs (77 percent), with supervisors being somewhat more likely to report familiarity with the MSPs (89 percent) and the PPPs (92 percent).[44] While these results represent fairly widespread confidence in knowledge of the MSPs and PPPs, given the criticality of these principles, all employees, particularly supervisors, should be thoroughly cognizant of the content and implications of all of the MSPs and PPPs.

To obtain guidance when making personnel decisions, agency executives, managers and supervisors often interact with the Chief Human Capital Officer (CHCO) or other Federal HRM employees—although these interactions may vary greatly in terms of trust and collaboration. Ideally, supervisors will view HRM as a competent business partner to help them make sound decisions. In other cases, supervisors may prefer to manage their workforce with as little outside input as possible. Either way, HRM employees may offer a valuable perspective on supervisors' ability and willingness to support the MSPs and avoid PPPs.

Therefore, we asked Chief Human Capital Officers or their designees to assess how well employees at various levels understood the MSPs. In contrast with employees' more positive evaluations of their awareness of the MSPs, only about half (52 percent) of the questionnaire respondents viewed nonsupervisory employees as having good to excellent knowledge of the MSPs.[45] Their confidence in the

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[43] As noted in the prior section regarding complaints received by the EEOC and the OSC. Results from the 2010 Merit Principles Survey are included in the 2011 MSPB report, *Prohibited Personnel Practices: Employee Perceptions.*

[44] U.S. Merit Systems Protection Board, 2011 Federal Merit Systems Survey, Question 20 a–b.

[45] U.S. Merit Systems Protection Board, 2014 MSP Education Agency Questionnaire, Question 9 a–d.

knowledge of supervisors ranged from 72 percent for new supervisors to nearly 90 percent for experienced managers. By comparison, about two-thirds (63 percent) had confidence that political appointees possessed good to excellent knowledge of the MSPs.

A separate survey of HRM employees also revealed some concerns about the amount of training that managers and supervisors receive on the MSPs and PPPs. Less than 40 percent of HRM employees responded that managers and supervisors in their organizations had received training to a "very great extent" (12 percent) or to a "considerable extent" (27 percent) on the MSPs, with nearly 15 percent saying these officials received little or no training on the MSPs. Regarding the PPPs, just over 40 percent said supervisors and managers received training to a "very great extent" (14 percent) or to a "considerable extent" (29 percent), and approximately 14 percent said these officials had received little or no training on the PPPs.[46]

Given their critical role as advisors regarding workforce management decisions, it is also troubling that 17 percent of HR employees indicated that they had personally received little or no training on the MSPs and 12 percent responded that they lacked training on the PPPs.[47] Obviously, it would be difficult for HR to provide needed advice when they themselves lack the knowledge and resources regarding how to adhere to the MSPs and steer clear of PPPs.

Agency-Specific Training

In their responses to the 2014 MSP Education Agency Questionnaire, agency representatives also offered insights into how knowledgeable employees in their agency are regarding a variety of topics, including the MSPs and PPPs in general, as well as specific components of the MSPs. Further, the questionnaire requested that they estimate the level of familiarity with the MSPs by type of employee, to distinguish between employee, new supervisor, refresher training for experienced supervisors, and political appointees.

Supervisors

As shown in **Figure 3**, agency representatives responded that new supervisors (81 percent) and experienced supervisors (60 percent) are more likely than other employees to receive training on an overview of the MSPs.[48] Results for the PPPs were nearly identical. Although these results suggest that the majority of supervisors receive an introduction to the MSPs and PPPs, they also indicate that there is substantial room for improvement. All new supervisors should be aware of these guidelines before being granted the authority to make decisions impacting others' careers and the ability of the agency to function efficiently and effectively. However, 11 percent of respondents said that new supervisors received **no** training on the MSPs. Further, given that circumstances may evolve over time necessitating updated training and supervisors may benefit from reminders regarding how the MSPs and PPPs related to their actions, experienced supervisors should also be more frequently included in refresher training on the MSPs and PPPs.

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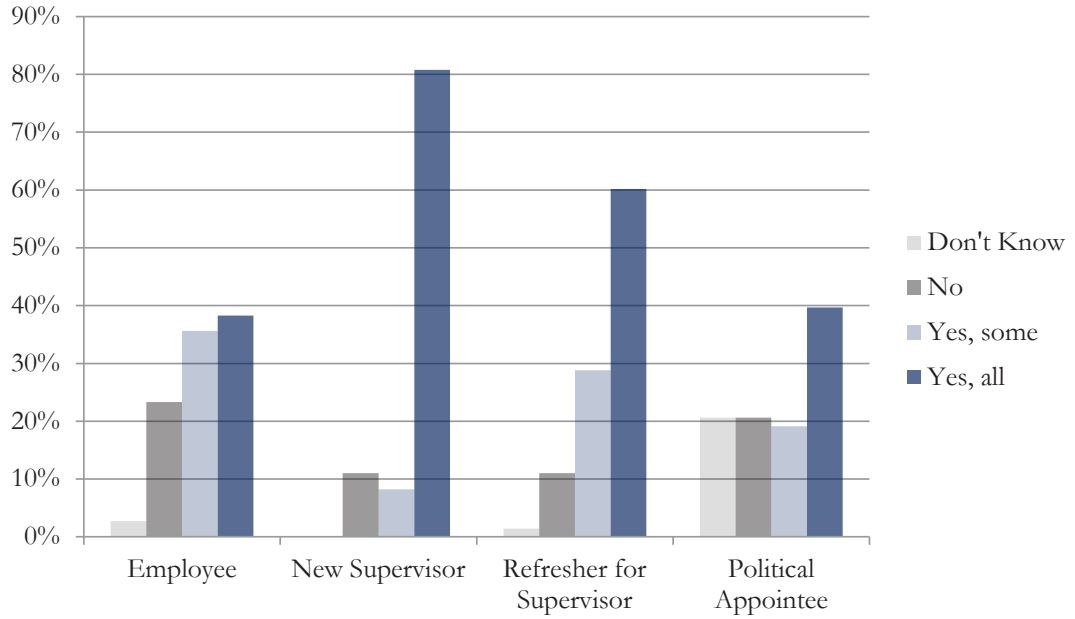
[46] U.S. Merit Systems Protection Board, 2011 Fair and Open Competition Survey, Question 15 a–b.

[47] *Id.*, Question 16 a–b.

[48] U.S. Merit Systems Protection Board, 2014 MSP Education Agency Questionnaire, Question 1 a–b.

Figure 3. Provision of MSP Training, by Type of Employee



Political appointees

Agencies indicated that political appointees were less likely than career supervisors to receive training on the MSPs and PPPs as only 40 percent responded that political appointees received this training.[49] Approximately, one of five of those who responded to the agency questionnaire said political appointees received no training on the MSPs/PPPs and an additional 20 percent did not know what training political appointees received regarding the MSPs or PPPs. This lack of training may partly explain the results of a 2010 MPS item, which compared political and career senior executives in terms of respecting the merit process when making hiring decisions. While 53 percent of respondents agreed that career senior executives respect the merit process when making hiring decisions, only 41 percent agreed that political appointee executives do so.[50]

Although the overall number of political appointees is small relative to the entire Federal workforce,[51] these individuals tend to occupy extremely powerful and highly visible positions, and often have the authority to make decisions that broadly impact the agency and its workforce, and at times, to significantly change long-standing agency policies that have become customary to career Federal employees. Therefore, agencies need to ensure that political appointees are familiar with the requirements of the Federal merit systems so the likelihood of committing PPPs is reduced to the fullest extent possible. For example, because political

[49] U.S. Merit Systems Protection Board, 2014 MSP Education Agency Questionnaire, Question 1 a–b.

[50] U.S. Merit Systems Protection Board, 2010 Merit Principles Survey, Questions Lead 2f and 3f.

[51] The *Sourcebook of United States Executive Agencies*, published by the Administrative Conference of the United States, estimates the percentage of Federal Government political appointees at less than 0.12 percent, based on a comparison of positions listed in the 2008 *Plum Book* to the total Federal civilian workforce in 2008.

appointees may be experienced executives from the private sector, which is typically an at-will employment environment, it is crucial that they understand that the Federal sector has its own legal requirements and unique expectations for the management of the workforce, including the requirement to base workforce management decisions on merit rather than political, familial or other personal connections. They also need to shift strategies to focus on providing services to citizens, rather than generating profits.

This recommendation hearkens back to the 1989 Report of the National Commission on the Public Service, chaired by Paul A. Volcker. In that report, *Leadership for America: Rebuilding the Public Service*, the Commission recommended that all presidential appointees receive "adequate orientation" at the point in time between nomination and confirmation so the appointee would be fully versed on not only the agency-specific knowledge required by the leadership role, but also regarding "the ethical conduct expected of a public official" and "the positive role that career officers can play."[52] Achieving these goals was envisioned as leading to a more successful collaboration between political and career executives, and thus improving the management of the Federal workforce.

Employees

Finally, given that employees need to understand their rights and responsibilities, as well as expectations for the operation of the Federal merit systems, agencies should consider providing more training to all employees regarding the MSPs and PPPs. Although this training need not be as detailed as that provided to supervisors, employees would likely benefit from an introduction to the MSPs and PPPs, as well as guidance regarding where to find more information. Additionally, since supervisors are frequently selected from the pool of career employees and benefit from having long-term education on the MSPs and PPPs prior to assuming the supervisory role, MSP and PPP education for all employees can be viewed as an investment in the future supervisory corps.

Components of MSP Training

As discussed earlier, the MSPs encompass broad recommendations (e.g., manage employees efficiently and effectively), guidance regarding discrete aspects of workforce management (i.e., recruitment, selection, pay, training, retention), as well as proscriptions against arbitrary action, personal favoritism, political influence, and reprisal for exercising legal rights. Consequently, it is appropriate to make available to employees information at various levels of specificity. In global terms, employees may be informed about the general concepts of the MSPs and PPPs. The reasons for achieving broad goals may also be communicated with the support of the agency's leaders. However, connecting these more general aspirations to specific behaviors is essential to helping employees understand what the MSPs mean in practical terms.

To ascertain the breadth and depth of training provided to the various levels of employees, the MSPB requested that agency CHCO representatives identify which components of the MSPs were covered in training and to whom such training was provided.[53] Responses are shown in **Table 1**. Percentages shown reflect the percent of the respondents who replied that all persons in the listed category were provided with training on the MSPs, PPPs, or MSP component.

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[52] The National Commission on the Public Service, *Leadership for America: Rebuilding the Public Service*, 1989, pp. 21–22.

[53] U.S. Merit Systems Protection Board, 2014 MSP Education Agency Questionnaire, Question 1 a–m.

Table 1. Prevalence of Training Related to the MSPs by Type of Employee

Yes to all within each employee category	Employee	New Supervisor	Refresher Supervisor	Political Appointee	Average
Merit System Principles	38%	81%	60%	40%	55%
Prohibited Personnel Practices	41%	82%	59%	40%	56%
Recruitment	14%	71%	52%	25%	41%
Hiring	18%	78%	60%	29%	46%
Preventing or Remedying Discrimination	69%	86%	74%	49%	70%
Setting Pay	10%	36%	25%	13%	21%
Awards and Recognition	38%	71%	52%	31%	48%
Maintaining Standards of Conduct	66%	88%	66%	52%	68%
Efficient and Effective Workforce Management	12%	51%	49%	31%	36%
Managing Poor Performers	8%	84%	66%	28%	47%
Training and Development	52%	80%	63%	37%	58%
Avoiding Arbitrary Action, Favoritism, Political Coercion	59%	75%	64%	53%	63%
Protecting Employees Against Reprisal	75%	85%	74%	53%	72%
Average	38%	74%	59%	37%	

As noted previously, new supervisors are the group that most frequently receives training on a wide range of specific topics that are related to the MSPs. As might be expected from the survey results (shown earlier in **Figure 2**) which reflect employees' reports of their agencies' success at adhering to various aspects of the MSPs, the questionnaire data reveals that new supervisors most frequently receive training on topics such as: maintaining standards of conduct and preventing discrimination. However, these results also suggest that most new supervisors receive training on protecting employees against reprisal and managing poor performers, which were not rated so highly by employees in terms of agency success at these aspects of the MSPs.

Interestingly, very few responding agencies (only 8 percent) reported providing nonsupervisory employees with any training on the topic of managing poor performers. This may represent a missed opportunity for agencies to educate employees regarding what options supervisors have for improving performance (or removing employees who cannot or will not improve), as well as to inform employees of confidentiality policies which prohibit supervisors from making known the actions that they are taking in these cases. However, greater percentages of agencies reported providing employees with training on protecting employees against reprisal (75 percent) and preventing or remedying discrimination (69 percent). These numbers likely reflect the success of the requirements of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), which requires annual training for all employees on laws to prevent and remedy discrimination and reprisal for whistleblowing.[54] Agencies are also required to communicate their equal employment opportunity policies on an annual basis to all employees.[55]

As discussed earlier, unfavorable employee perceptions of agency success at adhering to the MSPs could be due to many causes: (1) lack of awareness by employees regarding (a) what should be done by their agencies (if their expectations exceed what is required by the MSPs) or (b) what actually is being done by their agencies (in the event of actions that must be kept confidential, such as taking action regarding poor performers); (2) the strong influence of political appointees, who tended to receive much less training on any of the aspects of MSPs or PPPs and might be missing the mark, or (3) the need for additional refresher training for supervisors who might also be failing to meet the aspirational goals of the MSPs or to refrain from committing PPPs. In other words, these employee perceptions could be due to employees' misunderstanding of what is required by the MSPs and to avoid PPPs or it could reflect the failure of agency decision makers at the top and middle levels to actually achieve these goals.

Supervisory Refresher Training on the MSPs

Regarding this third possible explanation, agency refresher training seems to have been underutilized. Particularly after they have had some experience in the role, supervisors will likely benefit from follow up training to reinforce or expand upon what they learned earlier. Agencies should continue to invest in the education of their supervisory workforce by providing refresher training at least every three years to supervisors as required by the Federal Workforce Flexibility Act of 2004 (P.L. 108-411) which was incorporated into 5 C.F.R. § 412.202. This regulation requires initial supervisory training as well as refresher training every three years (at a minimum). Although the requirements do not specifically mention the MSPs or PPPs, they do address some related subjects, such as improving performance and productivity, addressing poor performers, providing mentoring and coaching, and conducting performance appraisals.[56]

In light of the requirement for periodic supervisor refresher training, perhaps it is somewhat surprising that the percentage of agencies reporting refresher supervisor training is not higher, particularly regarding topics such as managing poor performers (66 percent) and training and development (63 percent) which closely

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[54] For details on the No FEAR Act training requirements, see 5 C.F.R. § 724.203. For more information, see www.eeoc.gov/eeoc/statistics/nofear/qanda.cfm.

[55] 29 C.F.R. § 1614.102(a)(4).

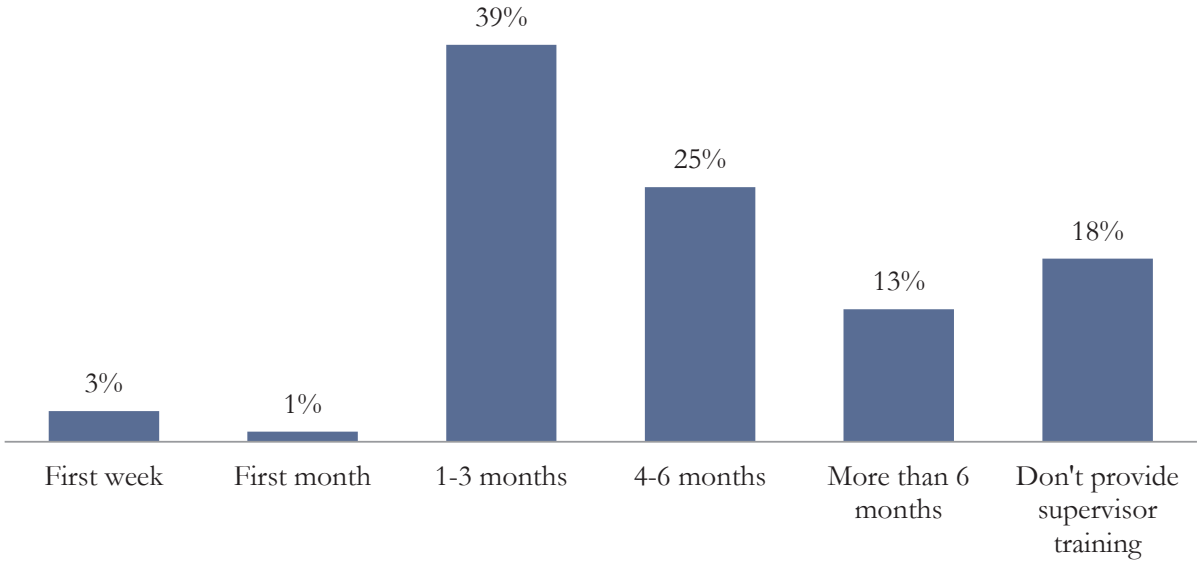
[56] In 2010 and 2011, both the Senate and the House of Representatives drafted legislation known as the Federal Supervisor Training Act of 2011, which would have modified Section 4121 of title 5, United States Code, to better align supervisory training requirements with the MSPs and PPPs and require annual reporting to the U.S. Office of Personnel Management. However, this proposed legislation was not enacted.

fit the requirements of the regulations.[57] Therefore, it appears that many agencies may be overlooking a supervisory training requirement, one that would also likely prove beneficial to improving their ability to more fairly and effectively manage their workforce. Further, given that only 60 percent of questionnaire respondents stated that they provided refresher training on the broader topics of the MSPs,[58] expanding the refresher training for supervisors to include the MSPs and PPPs would help ensure that supervisors gain greater expertise in making merit-based decisions and avoiding PPPs.

New Supervisor Training on the MSPs

Given the criticality for supervisors to perform their role effectively, training should be provided to new supervisors as promptly as possible, ideally before the supervisor moves into the new role. However, as shown in **Figure 4**, only 3 percent of agency respondents indicated their agencies provide training to new supervisors by the end of their first week in this role, while 40 percent provided training within 3 months of their hire. In contrast, substantial percentages said their agencies offered training later, while 18 percent stated they did not provide new supervisor training.[59]

Figure 4. Timing of MSP/PPP Training for New Supervisors



In terms of the length of new supervisor training regarding the MSPs and PPPs, **Figure 5** shows that the majority offer very brief training of one to three hours (54 percent) or even less than one hour (23 percent).[60] Given the importance of the MSPs and PPPs to effective supervisory performance, agencies should consider providing more in-depth training to include applications of the MSPs to supervisory responsibilities. Overly

[57] U.S. Merit Systems Protection Board, 2014 MSP Education Agency Questionnaire, Question 1 a–m.

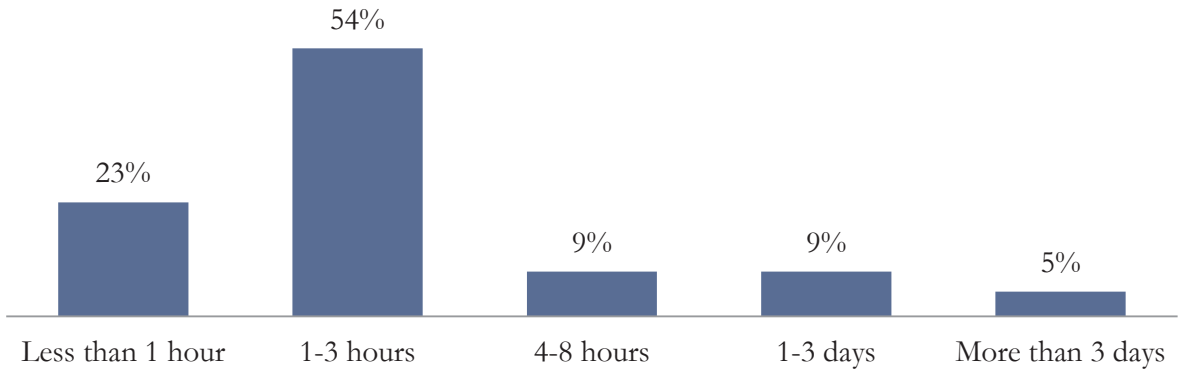
[58] *Id.*

[59] *Id.*, Question 2.

[60] *Id.*, Question 3.

brief training can do little beyond introducing the text of the MSPs and PPPs as if they were phrases to be memorized. In contrast, the MSPs and PPPs should serve as guiding principles to influence how supervisors handle every workforce management decision on a daily basis, while taking into consideration the unique circumstances of each situation.

Figure 5. Length of MSP/PPP Training for New Supervisors



To achieve this economically, agencies may need to explore alternatives to their current training strategies, such as by using different methods of sharing information. For example, although in-person training may provide an opportunity for in-depth two-way conversations or to facilitate group discussions, agencies may need to supplement traditional classroom training, (which was the most frequently mentioned option, by 52 percent of respondents) or one-on-one training (provided by 21 percent of the respondents).[61] Given budget and time constraints, agencies may benefit from expanding technology-based training. For example, some agency representatives also mentioned offering self-paced computer modules (38 percent) and webinars (22 percent). Although self-paced computer modules and videos have upfront development costs, they become more economical over time. These types of technology-based training can also be more flexible, such as allowing the training to be delivered at the time most convenient and appropriate for each new supervisor, rather than waiting to get a group together or to coordinate between the trainer and trainee's schedules. Agency representatives also mentioned more static forms of learning such as written materials (e.g., wallet cards, memos). Although written materials often serve as useful reference materials, they should not be relied upon to educate new supervisors regarding their complex responsibilities.

As might be expected given the content area, the majority of agencies relied heavily on HRM staff (58 percent) to provide new supervisor training.[62] Twenty-seven percent included Equal Employment Opportunity staff in the training for new supervisors. Training staff and legal counsel were also frequently

[61] *Id.*, Question 5.

[62] *Id.*, Question 6.

mentioned as participating in this training. Some agencies hired professional trainers or invited speakers from other agencies to assist with new supervisor training.

Together these results suggest that there are likely a variety of ways that information on the MSPs and PPPs can be shared in terms of the breadth and depth of the subject matter, who receives the training, the timing and length of the training, who delivers the training and through what delivery mechanisms. However, it seems that many agencies could greatly enhance the training and education that they offer to their employees at all levels. Although time and money represent scarce resources in many organizations, the return on investment is great from having a workforce that is knowledgeable regarding the MSPs and how to effectively implement them in today's complex work environments.

Training Provided by Other Organizations

In this section, we will provide an overview of resources available to Federal employees from MSPB, EEOC, OSC and OPM. These sources of information can serve as reference materials and guide the reader to additional materials. This listing will be followed by the largest section of this report, which is devoted to providing an overview of the MSPs. In this section, we provide a reference guide on the MSPs and their practical applications as we delve more deeply into each MSP and provide recommendations for improving management in accord with the MSPs by citing findings and recommendations from studies conducted by MSPB's Office of Policy and Evaluation (OPE). We also note relevant cases that touch on aspects of the MSPs to illustrate where questions have emerged regarding whether agency leadership or employee actions were fully supporting the MSPs.

The MSPB offers a variety of additional resources on its website, www.mspb.gov. This includes an overview of the MSPs[63] and PPPs,[64] a summary of the appeal process,[65] a searchable listing of MSPB decisions,[66] a listing of MSPB training[67] that is available online, and other information regarding the MSPB. OPE's Studies web page[68] provides free access to OPE's published reports,[69] as well as the newsletter, *Issues of Merit*.[70] Anyone who is interested can also subscribe to the MSPB Studies Listserv[71] to be notified whenever a decision or an OPE publication (e.g., report, newsletter) is released.

Similarly, Federal agencies that investigate and enforce PPPs, such as the OSC (www.osc.gov) and the EEOC (www.eeoc.gov) offer extensive information on their websites, as well as speakers who may be available to address topics relevant to the MSPs and PPPs. For example, to help agencies complete the 2302(c) Certification Program, OSC provides extensive resources in support of each of five program

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[63] www.mspb.gov/meritsystemsprinciples.htm.

[64] www.mspb.gov/ppp/ppp.htm.

[65] www.mspb.gov/appeals/appeals.htm.

[66] www.mspb.gov/decisions/decisions.htm.

[67] www.mspb.gov/training.htm.

[68] www.mspb.gov/studies/index.htm.

[69] Recent reports are shown at www.mspb.gov/studies/browsestudies.htm. A comprehensive archive of reports dating back to 1981 is located at www.mspb.gov/studies/viewallstudies.htm.

[70] www.mspb.gov/studies/newsletters.htm.

[71] To sign up for the MSPB Studies Listserv, follow the links from the main MSPB Studies page at www.mspb.gov/studies/index.htm or go directly to LISTSERV 16.0 - MSPB-STUDIESLIST-L List at listserv.mspb.gov.

requirements: (1) post information on the thirteen PPPs and how to contact OSC; (2) include information on the PPPs and OSC's jurisdiction in new employee orientation; (3) provide information annually to all employees about PPPs (including whistleblower retaliation) and OSC's role; (4) provide training, in consultation with OSC, to managers and supervisors every three years, and (5) display a link to OSC's website on the agency's website or intranet.[72] Additionally, EEOC offers training on EEO-related topics, such as discrimination, through webinars, on-site training and the annual EXCEL conference.[73]

OPM makes information available on its organizational website (www.opm.gov), and has developed HR University (HRU)[74] as a web-based training resource center dedicated to improving knowledge within the Federal HRM community.[75] The HRU website consolidates a variety of free and fee-based course offerings on topics such as staffing, performance management, and labor relations, in a searchable course catalog.[76] In addition to resources specifically for HRM employees, HRU is also designed to serve a valuable function to educate Federal supervisors, managers and executives regarding "critical leadership competencies and HR technical knowledge needed to succeed." The "Manager's Corner" includes a subset of the HR course catalog, as well as leadership self-development tools and resources, such as a video library.

Included among the HRU course offerings is a free webinar, Merit System Principles and Prohibited Personnel Practices. As of April 2015, approximately 4,200 Federal employees at various Federal agencies had completed this course.[77] Since web-based webinars may provide Federal agencies with a cost-effective way to share information on the MSPs and PPPs, HRU's course offerings may benefit a broader audience than is currently being reached—to include all employees and supervisors. Given that OPM has already invested in the architecture for making training available via the internet, it could efficiently continue to expand this resource as other agencies contribute their training modules on HRU.gov. Additionally, OPM could further assist the development of quality training modules by using its capability to gain efficiencies of scale and contractually facilitate the development of these training modules, rather than having each agency start the process from scratch.

Also featured in the HRU course catalog are the more traditional training courses that OPM provides to Federal supervisors, managers and executives through a variety of courses targeting each of these levels. Similarly, OPM's Center for Leadership Development offers courses that tap aspects of managing in accord with the MSPs.[78]

Finally, given their critical role and the unique challenges they may face by being new to the Federal service, political appointees should receive training on the MSPs and PPPs that is uniquely tailored to their level of responsibility. Since political appointees set the tone for the agency, they need to know (and buy into) the MSPs so they can act in accord with them. As a supplement to the orientation that some agencies provide, each Administration may provide an overview of the essentials of Federal service. On its own initiative, the

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[72] See https://osc.gov/Pages/Outreach-2302Cert.aspx, accessed February 10, 2016.

[73] See www.eeotraining.eeoc.gov/index.html, accessed February 10, 2016.

[74] The HRU website is www.hru.gov/.

[75] Information on HRU's mission can be found at https://hru.gov/about_us.aspx.

[76] The HRU course catalog is available at https://hru.gov/Course_Catalog.aspx?mgr=false. Taking a course requires registering with a Federal email address. As of March 12, 2015, there were 134 courses listed for HR professionals and 65 of these were available at no cost.

[77] Data on *Merit System Principles and Prohibited Personnel Practices* course completion shared by OPM.

[78] For more information, see https://leadership.opm.gov/index.aspx.

Partnership for Public Service, a nonprofit, nonpartisan organization that works to promote a more effective and efficient Federal Government,[79] offers training for newly appointed members of the senior executive service regarding a variety of topics including the MSPs and the PPPs through a program titled *Ready to Govern*.[80] Led by current or former Federal executives, the ninety minute discussion sessions cover topics such as *Federal Hiring: Dos and Don'ts* and *Ethics and Optics* (ethical factors to take into account when making decisions in the Federal Government).[81]

Taken together, these resources from Federal Government agencies and other providers offer a wealth of educational information regarding the MSPs and how to apply them. To better prepare Federal employees at all levels to adequately support the merit systems and avoid PPPs, agencies would be well served to take advantage of the knowledge and expertise that is readily available.

[79] For more information about the Partnership for Public Service, see http://ourpublicservice.org/about-us/index.php.

[80] Details of the Ready to Govern program are located at http://ourpublicservice.org/issues/develop-leaders/ready-to-govern.php.

[81] Information received from Ms. Tina Sung, Vice President for Government Transformation and Agency Partnerships, Partnership for Public Service, on October 19, 2014.

Overview of the Merit System Principles

By codifying the nine MSPs to provide aspirational guidance and offering additional tools to help supervisors more efficiently and effectively manage the Federal workforce, the CSRA was intended to facilitate "a civil service that is worthy of the public and its confidence: One in which hiring, promotion, and pay are truly based on merit and one in which those who cannot or will not perform their jobs well will not perform at all for the Federal Government."[82] This section reviews each MSP to briefly explain the intent of the MSP, summarize Federal employee opinions regarding achievement of these goals, present highlights of findings and recommendations from MSPB studies related to these MSPs,[83] and identify cases where potential violations of MSPs were examined. For every MSP, there appears to be substantial room for improvement to gain employees' confidence that the Federal Government has achieved these goals. Therefore, we encourage agency leaders to consider ways to improve their organization's success in implementing these ideals for the optimal functioning of the Federal Government.

MSP 1: Recruitment, Selection and Advancement

> "Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity."

Explanation and Intent of MSP 1[84]

MSP 1 sets the expectation that recruitment within the Federal merit systems should build a workforce that will effectively carry out the missions of the Federal Government while also being representative of the broad diversity within the population of the United States. To achieve these goals, agencies need to consider how to reach out to prospective applicants to ensure that they are attracting qualified candidates from a variety of backgrounds.

MSP 1 also emphasizes fairness by mandating selection based on merit following "fair and open competition" for both initial hires and promotions of current employees. This requirement represents the core value of hiring based on qualifications—rather than political or personal connections. As mentioned earlier, the Pendleton Act of 1883 replaced the patronage system with a merit system under which civil service appointments are based on knowledge, skills and ability, rather than political affiliation. The Civil

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[82] House Committee on Post Office and Civil Service, *Legislative History of the Civil Service Reform Act of 1978*, at 1606 (1979) (Remarks of Senator Abraham A. Ribicoff).

[83] Recent reports are shown at www.mspb.gov/studies/browsestudies.htm. A more comprehensive archive of reports dating back to 1981 is located at www.mspb.gov/studies/viewallstudies.htm.

[84] These "Explanation and Intent" sections are adapted from MSPB's summary of the MSPs, available at www.mspb.gov/meritsystemsprinciples.htm.

Service Reform Act of 1978 sought to buttress and expand upon the original intent of the Pendleton Act as evidenced by MSP 1's emphasis on merit-based hiring and advancement.

The assurance of equal opportunity during the selection process reinforces the relevance of Title VII of the Civil Rights Act of 1964 and related laws barring discrimination in employment. Although the focus on merit should eliminate the influence of extraneous factors, inclusion of the reference to equal opportunity in MSP 1 emphasizes the importance of equal opportunity throughout the process of recruitment, selection and advancement.

Federal Employee Perspective

As shown earlier in the 2010 MPS results displayed in **Figure 2**, a majority of Federal employees (61 percent) believe their agencies are succeeding at recruiting a diverse pool of applicants for job vacancies. However, only about half (48 percent) believe their agencies hold "fair and open competition" for job vacancies and only 38 percent expressed confidence that the best-qualified candidates are selected.

Findings and Recommendations Related to MSP 1

As mentioned previously, MSPs serve as aspirational goals. As a result, they provide an ideal which agencies should strive to achieve. However, they leave significant discretion to agencies as to how to achieve these objectives. MSP 1 focuses on the steps needed to build a representative workforce, starting with recruitment and selection, and leading to later advancement as employees progress through their careers.

Recruitment/Fair and Open Competition

To build a qualified and representative workforce, agency managers need to start with an effective recruitment plan.[85] Selecting officials should draw on expertise within their organization (e.g., Human Resources Management, Equal Employment Opportunity) to develop and implement a strategic recruitment plan that is aligned with the agency strategic and workforce plans.[86] While developing the recruitment plan, they should consider:[87]

1. Current and future workforce needs in terms of occupations and underlying competencies, considering work team and agency priorities;
2. Current workforce and occupational representation (e.g., sex, ethnicity, race) compared to the Civilian Labor Force (for jobs without specialized education or training requirements) or the Relevant Civilian Labor Force (for jobs that require specialized education or training);
3. Where and how to communicate with prospective applicants (thinking broadly to facilitate quality and diversity of the applicant pool, rather than relying on the most readily available applicants); and

[85] U.S. Merit Systems Protection Board, *Managing Federal Recruitment: Issues, Insights, and Illustrations*, September 2004, p. 9.

[86] *Id.* at pp. 7–9.

[87] *Id.* and U.S. Merit Systems Protection Board, *Attracting the Next Generation: A Look at Federal Entry-Level New Hires,* January 2008.

4. Who should serve as recruiters to reach out to the prospective applicants.

Effective recruitment requires understanding what competencies are required, describing them accurately in a vacancy announcement, and knowing where to reach out to find a qualified and diverse applicant pool. Although agency leaders need to carefully consider the advantages and disadvantages of targeted recruitment, aiming recruitment efforts at some of the most likely sources of strong candidates may quickly yield optimal numbers of highly qualified applicants.[88] Further, the extent of outreach will likely depend upon how difficult it is to find the needed competencies among a representative population.[89] Although an agency need not conduct extensive outreach and recruitment for every occupation and position, agency leaders should consider the return on investment—in terms of quality and diversity of the candidate pool, as well as the credibility of the hiring process. Even small-scale efforts to expand the applicant pool—such as disseminating information about job openings and encouraging employees to "market" job opportunities—can yield more positive results than passive recruitment, such as simply posting vacancy announcements on USAJOBS.

MSPB reports that are most relevant to the topic of recruitment include:

- *Managing Federal Recruitment: Issues, Insights, and Illustrations* (2004)
- *Attracting the Next Generation: A Look at Federal Entry-Level New Hires* (2008)
- *In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees from Outside the Federal Government* (2008)
- *Reforming Federal Hiring: Beyond Faster and Cheaper* (2006)
- *The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs* (2015)

Basic principles of fair and open competition require:

1. Announcing vacancies through appropriate means;
2. Clearly articulating the attributes of qualified and ideal candidates; and
3. Using appropriate hiring authorities (or a combination of them to achieve balance) to bring on board a qualified and representative pool of new hires.

Statute envisions that Federal agencies will use open competitive examinations to appoint an individual who is not a current or previous Federal employee to a competitive service position and prescribes procedures to promote openness.[90] The standard requirements of competitive examining, such as public notice[91]

[88] U.S. Merit Systems Protection Board, *Attracting the Next Generation: A Look at Federal Entry-Level New Hires*, January 2008, pp. 21–22 and U.S. Merit Systems Protection Board, *Managing Federal Recruitment: Issues, Insights, and Illustrations*, September 2004, pp. 5–13.

[89] U.S. Merit Systems Protection Board, *Reforming Federal Hiring: Beyond Faster and Cheaper*, September 2006, p. 15.

[90] 5 U.S.C. § 3302.

[91] The public notice requirement is met through posting on USAJOBS.

and minimum open periods, are intended to allow members of the public to learn of job openings and application procedures.

However, agencies must design and communicate job requirements with care. Although agencies have delegated authority to define job requirements, they should ensure that such stated requirements do not unduly restrict competition or place an inappropriate amount of weight on organization-specific knowledge. Also, they should avoid practices (e.g., creating selective factors that are more narrow than the actual job requirements, shortening the vacancy announcement open period, restricting the area of consideration) that may give the appearance of rigging the vacancy announcement for a preselected candidate.[92]

Further, agencies need to thoughtfully consider the choice of hiring authorities because this can greatly impact the breadth of the candidate pool, as well as the ability to reach certain candidate pools. Limiting the scope may be appropriate and need not conflict with the goals of a representative workforce, while soliciting applications too broadly may produce a large number of unqualified applicants and contribute to the perception that job competitions are shams—exercises conducted solely for the sake of appearances. Previous MSPB research confirms that such perceptions are widespread.[93] And in some cases, these perceptions have been found to be grounded in practices that attempted to subvert MSP 1 and the concept of fair and open competition.

For more information on fair and open competition, please see the following MSPB reports:

- *The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs* (2015)
- *In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees from Outside the Federal Government* (2008)
- *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism* (2013)
- *Fair and Equitable Treatment: Progress Made and Challenges Remaining* (2009)

Assessment

To convince employees and other observers that selection decisions are being made appropriately, Federal agencies should strive for greater rigor and transparency in the assessment process. Accordingly, we suggest that hiring officials, HR staff, and others involved in making or influencing hiring decisions should take a number of steps to ensure the integrity of the hiring process and be as transparent about the process as possible. Most fundamentally, selection criteria must be job-related, carefully assessed, and the impacts of their usage evaluated for adverse impact. These are discussed in more detail below and in the related reports from MSPB.

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[92] U.S. Merit Systems Protection Board, *In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees from Outside the Federal Government*, Washington, DC, February 2008, pp. 38–39.

[93] U.S. Merit System Protection Board, *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism*, Washington, DC, December 2013, pp. 7–11, pp. 18–20, and pp. 23–25 and U.S. Merit Systems Protection Board, *Fair and Equitable Treatment: Progress Made and Challenges Remaining*, Washington, DC, December 2009, p. 72.

1. The selection criteria should be essential to the job and not chosen for their ability to unfairly provide an advantage to preferred applicants.

2. Critical skills should be directly assessed through valid and reliable assessment techniques that can directly assess the skills, rather than drawing inferences based on indirect measures, such as education or training that the applicant has completed.

3. Assessments should be structured and administered in a uniform manner rather than relying upon more haphazard approaches. This will improve the quality of the assessment process and the resulting decisions, by helping focus the assessors on the job-related criteria and decrease the potential influence of unconscious biases or assumptions.

4. Evaluate the diversity of the applicant pool and the new hires to identify if any potential barriers exist that are undermining representation.

The first step in the assessment process is to identify job-related criteria. To achieve this, agencies must conduct a job analysis to identify: "(1) The basic duties and responsibilities; (2) The knowledge, skills, and abilities required to perform the duties and responsibilities; and (3) The factors that are important in evaluating candidates."[94] Also, to promote job-relatedness and consistency in competitive service hiring and promotion, OPM develops and publishes qualification standards that agencies must apply (and an applicant or employee must meet) before placement.[95] Federal agencies have direct or delegated authority to interpret and establish hiring criteria, but they must demonstrate excellent judgment to ensure their hiring criteria are appropriate.

The second step of the assessment process is to identify which assessment tools will be implemented. Federal agencies are required to use valid assessment methods to evaluate applicants against job-related criteria and to base referral and selection on that evaluation. For example, in a competitive examination, agencies are required to identify quality groups ("categories"), consistent with the policy requiring job-related hiring criteria. Agencies must then use valid assessments to determine whether applicants meet minimum qualifications and assign applicants who meet requirements to a quality category and limit selections to applicants in the highest quality category, consistent with the principle of basing selection on relative ability.[96] Federal agencies are also required to follow these basic policies, albeit in simplified form, for internal promotions and placements.[97] This regulation, which governs competitive service promotion and placement internal to the Federal Government, defines when competition is required (in essence, most situations in which an agency wishes to place an employee at a level for which he or she has not previously competed) and basic requirements for that competition, which include identification of a pool of best-qualified applicants and selection within only that pool.

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[94] 5 C.F.R. § 300.103(a).

[95] U.S. Office of Personnel Management, *Qualification Standards,* accessed December 17, 2015 at www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/#url=Group-Standards. Additional qualification requirements are found at 5 C.F.R. Part 338.

[96] U.S. Office of Personnel Management, *Delegated Examining Operations Handbook: A Guide for Federal Agency Examining Offices*, May 2007, accessed December 17, 2015 at www.opm.gov/policy-data-oversight/hiring-authorities/competitive-hiring/deo_handbook.pdf and 5 U.S.C. Chapter 33. Agencies must also apply and observe veterans' preference.

[97] 5 C.F.R. Part 335.

One target for improving efficiency within the Federal Government in recent years has involved the Federal hiring process. This impacted application and selection procedures in sometimes unintended ways. For example, one initiative under hiring reform discontinued knowledge, skill and ability (KSA) narratives as part of the initial application for employment. While this expedited the application and initial assessment process for both applicants and agencies, it also increased the number of applicants, with an increase in unqualified applicants who could now apply without a substantial investment of their time and effort. As a result, other parts of the process may take longer given the time required to sort through the increased volume of applications.

Selection methods differ widely in their validity.[98] Unfortunately, there is considerable evidence that Federal agencies' assessments of job applicants often fall short of what is necessary and attainable.[99] Federal agencies have frequently chosen assessment methods more for their convenience than for their predictive power.[100] Given that only 38 percent of survey respondents agreed that their organization selects the best qualified candidates for job vacancies, there is considerable room for improvement in this area. To improve their ability to fairly and effectively identify the best candidates, agencies should also focus on improving the quality of selection procedures.

The third step of the assessment process is to properly apply these selection procedures to determine which of the candidates are qualified, and subsequently, to identify which candidate should be selected. Unfortunately, otherwise valid selection instruments may be poorly implemented which dramatically undermines the validity of the assessment tool.[101]

For example, training selecting officials and others involved in the selection process is critical to the appropriate use of selection tools.[102] Providing decision makers with greater flexibilities and more options requires additional attention to making sure that they fully understand the implications of the choices that they make.

The fourth and final step is that Federal agencies are expected to evaluate their hiring processes and outcomes.[103] For example, EEOC requires Federal agencies to conduct analyses and submit reports under its Management Directive 715 (MD-715), to include hiring and representation of historically underrepresented groups—i.e., progress toward achieving a workforce representative of all segments of society, as envisioned in the first MSP.[104]

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[98] See, for example, Frank L. Schmidt and John E. Hunter, "The Validity and Utility of Selection Methods in Personnel Psychology: Practical and Theoretical Implications of 85 Years of Research Findings," *Psychological Bulletin*, the American Psychological Association, Inc., Vol. 124, No. 2, Sep. 1998, p. 265.

[99] U.S. Merit Systems Protection Board, *Reforming Federal Hiring: Beyond Faster and Cheaper*, Washington, DC, July 2006, pp. 19–21.

[100] U.S. Merit Systems Protection Board, *Assessing Federal Job Seekers in a Delegated Examining Environment*, Washington, DC, December 2001, p. viii.

[101] *Id.* at pp. 28–31 and U.S. Merit Systems Protection Board, *Reforming Federal Hiring: Beyond Faster and Cheaper*, Washington, DC, July 2006, pp. 21 and 23.

[102] U.S. Merit Systems Protection Board, *A Call to Action: Improving First-Line Supervision of Federal Employees*, Washington, DC, December 2010, pp. 34–35.

[103] U.S. Merit Systems Protection Board, *Fair and Equitable Treatment: Progress Made and Challenges Remaining*, December 2009, pp. 8–9.

[104] See EEOC guidance on MD-715, such as at www.eeoc.gov/federal/directives/md715.cfm, accessed February 25, 2016.

MSPB has published many reports on improving the selection process. These include:

- *Reforming Federal Hiring: Beyond Faster and Cheaper* (2006)
- *Fair and Equitable Treatment: Progress Made and Challenges Remaining* (2009)
- *Assessing Federal Job Seekers in a Delegated Examining Environment* (2001)
- *Federal Appointment Authorities: Cutting through the Confusion* (2008)

MSPB has also evaluated a variety of assessment and selection instruments. For more details, please see the following reports:

- *The Federal Selection Interview: Unrealized Potential* (2003)
- *Evaluating Job Applicants: The Role of Training and Experience in Hiring* (2014)
- *Identifying Talent Through Technology: Automated Hiring Systems in Federal Agencies* (2004)
- *Job Simulations: Trying Out for a Federal Job* (2009)
- *Reference Checking in Federal Hiring: Making the Call* (2005)

Another critical, though sometimes overlooked, final step of the hiring process involves the assessment of the new employee before the end of the probationary period. Given the protections that Federal employees gain upon satisfactory completion of the probationary period, supervisors should carefully consider whether the employee has truly earned these rights by demonstrating successful performance on the job. In fact, MSPB has previously recommended that this change from probationary to permanent status not be left to a default mechanism driven by time, but rather require the active approval by the supervisor to avoid overlooking this crucial decision point. This topic was explored in the following MSPB reports:

- *The Probationary Period: A Critical Assessment Opportunity* (2005)
- *Navigating the Probationary Period After Van Wersch and McCormick* (2007)

Lessons Learned from Case Examples

Fair and Open Competition – Illustration from Case Law: *Special Counsel v. Lee and Beatrez*[105]

History. The agency initially announced a GS-11 position under both delegated examining and merit promotion procedures. After candidates were screened and referred, the selecting official contacted Lee, the field HR specialist, to find out why a particular current employee was not on the referral list. Lee informed the official that the employee did not qualify and advised her to state that the vacancy announcement had not produced sufficient well-qualified candidates. That statement would enable her to re-advertise with the hopes that the intended selectee would then qualify.

[105] See *Special Counsel v. Lee*, 114 M.S.P.R. 57, ¶ 35 (2010) and U.S. Merit Systems Protection Board, *Case Report for May 21, 2010*.

Following re-advertisement, Beatrez, another HR specialist, refused to refer the intended selectee because he did not meet the requirement for time in grade. Lee then advised re-advertising the position at the GS-11 and GS-9 levels with the stated goal of expanding the pool of qualified applicants. However, contrary to that stated goal, Lee: (1) announced the position only under merit promotion procedures, restricting the pool to current and former Federal employees, (2) limited the area of consideration to the immediate geographical area; and (3) opened the announcement for only the minimum time required. The intended selectee applied and was referred and selected.

Holding and consequences. OSC filed a complaint with MSPB seeking disciplinary action against three individuals for violating 5 U.S.C. § 2302(b)(6) by subverting fair and open competition to provide an unauthorized preference to a job applicant. The Board ordered disciplinary action against Lee (a forty-five day suspension without pay) and Beatrez (a ten day suspension without pay). (The third individual, the selecting official, retired before disciplinary action could be taken.) However, the U.S. Court of Appeals for the Federal Circuit reversed the decision against Beatrez, due to insufficient evidence that her actions indicated improper intent.[106] Given that culpability hinges upon not only violating a PPP, but also doing so intentionally,[107] it is critical to ascertain the motives behind an action and in this case, the judge decided that there was insufficient evidence that she acted with intent to grant an unauthorized preference to the preferred candidate.[108]

Implications for practice. Selecting officials—and those who advise them—should be on notice that any employee who manipulates the hiring procedures to favor a candidate may face serious consequences. Although selecting officials have considerable discretion to design vacancy announcements to attract and identify a pool of well-qualified applicants, they cannot engineer procedures or outcomes that are inconsistent with "fair and open competition."

Assessment – Illustration from Case Law: *Mapstone v. Department of the Interior*[109]

History. In *Mapstone v. Department of the Interior*, the appellant challenged his nonselection for a position which required a four-year college degree. Since the appellant had extensive related work experience, as well as two associate's college degrees, he maintained that the educational requirement is not necessary to successful performance in the job. While nonselection generally does not fall under MSPB's jurisdiction, MSPB jurisdiction may apply when two criteria are met: (1) the appeal concerns an employment practice administered by OPM and (2) the appellant alleges a violation of one of the "basic requirements" of 5 C.F.R. § 300.103.

Holding and consequences. Although the initial decision dismissed the case due to lack of jurisdiction, the Board granted the petition for review and found that the appellant had demonstrated that the case fell within MSPB's jurisdiction. The case was remanded to the regional office, but during the adjudication of the appeal,

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[106] See *Beatrez v. Merit Systems Protection Board*, 413 F. App'x 298 (Fed. Cir. 2011) (nonprecedential).

[107] For more information, see the discussion at www.mspb.gov/ppp/ppp.htm regarding "What requirements apply to proving a PPP?" and the background of the CSRA at S. Rep. No. 95-969.

[108] *Beatrez v. Merit Systems Protection Board*, 413 F. App'x 298 (Fed. Cir. 2011) (nonprecedential).

[109] See *Mapstone v. Department of the Interior,* 110 M.S.P.R. 122, ¶¶ 3, 8 (2008).

the appellant and the agency reached a settlement agreement, which means that there was no final decision on the merits of the issue.[110]

Implications for practice. Agencies—and hiring officials—must be able to demonstrate that their screening and selection criteria are relevant to successful performance on the job and that they have applied those criteria properly.

MSP 2: Equity

> "All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights."

Explanation and Intent of MSP 2

MSP 2 reinforces the concept expressed in MSP 1 that Federal employees and applicants should be treated fairly and MSP 2 specifically emphasizes that they not be subjected to discrimination on legally protected bases. MSP 2 summarizes the bases on which decisions must NOT be made, which corresponds closely to PPP 1 and affirms the intent of prior laws. For example, the Pendleton Act of 1883 replaced the patronage system with a merit system. Further, Title VII of the Civil Rights Act of 1964 and related laws prohibited discrimination in employment decisions based on race, color, religion, national origin, sex, marital status, age, or disability. Additionally, the No FEAR Act of 2002 required annual employee training to raise awareness about "rights and remedies" under anti-discrimination and whistleblower protection laws.[111]

In terms of scope, while MSP 1 focuses on recruitment and selection, MSP 2 includes the broader frame of reference of "all aspects of personnel management." This choice of wording expands the coverage to include the full range of employment decisions, such as recruitment and hiring, providing training and development opportunities, conducting performance management activities, granting pay increases and cash awards, and removal, if necessary.

Beyond protection against discrimination, MSP 2 also notes that employees and applicants for employment are also entitled to the protections of the U.S. Constitution and the Privacy Act. The Constitution, including the Bill of Rights, grants everyone, including Federal employees, certain rights. However, these rights must also be balanced with the needs of the Government. For example, Federal employees maintain freedom of speech (First Amendment) rights. In fact, "whistleblower" laws, such as noted in MSP 9 and PPP 3, protect employees who make a covered disclosure.[112] However, employees must respect limitations on their rights to speech, such as Hatch Act prohibitions against lobbying for political candidates[113] (as covered in MSP 8 and PPP 3).

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[110] *Mapstone v. Department of the Interior*, MSPB Docket No. AT-3443-07-0076-B-2 (Initial Decision, Jan. 13, 2008).

[111] See www.eeoc.gov/eeoc/statistics/nofear/qanda.cfm, accessed on March 4, 2016.

[112] U.S. Merit Systems Protection Board, *Whistleblower Protections for Federal Employees*, Washington, DC, September 2010, pp. 9–10.

[113] The Hatch Act, 5 U.S.C. §§ 7321–7326, places restrictions on the political activities of Federal employees.

Under the Fifth Amendment, career employees have due process rights which require Federal agencies to follow procedural requirements before a Federal employee can be removed.[114] Therefore, Federal employees can be removed for performance or conduct—but the proper procedures must be followed to ensure their removal has a legitimate basis and is not politically motivated. These rights are discussed more fully in MSP 6 and MSP 9, as well as in related PPPs.

Regarding privacy, the Fourth Amendment specifically grants employees the right to a "reasonable expectation" of privacy, although as usual, this must be weighed against the employers' needs. Additionally, the Privacy Act[115] outlines the requirements for Federal agencies to collect and securely maintain information on their employees, balanced against the employees' rights to privacy. Further, agencies must inform employees as to why this information is being collected and provide them with an opportunity to review the records, and correct any inaccuracies.

Federal Employee Perspective

Two-thirds of Federal employees (66 percent) agreed on the 2010 MPS that their agency prevents prohibited discrimination and 60 percent felt their agency rectifies prohibited discrimination, when it does occur. In comparison, just over half (52 percent) agreed with the more general statement that their organization treats employees fairly.

Findings and Recommendations Related to MSP 2

As part of its studies function, MSPB frequently analyzes Federal workforce data to assess representation and employee perceptions as gathered through surveys, discussion groups, and interviews. Research topics include the MSPs and PPPs and related issues. Because data has been collected periodically over the past 35 years, our analyses reveal not only the current status, but also allow examination of trends over time.

Trends in Federal Workforce Composition and Employee Opinions

MSPB has conducted studies that examine the composition of the Federal workforce by demographic groups (e.g., ethnicity, race and sex).[116] These longitudinal analyses of the Federal workforce have found that progress has been made as the Federal workforce has become more diverse. However, the Federal workforce has not fully achieved representation, particularly among higher grade levels.[117] For example, ethnic and racial minorities and women remain under-represented at the higher levels of pay, such as the General Schedule grades GS-14 and GS-15, as well as in supervisory and executive roles. Hispanic employees remain under-represented in the overall Federal workforce.

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[114] U.S. Merit Systems Protection Board, *What is Due Process in Federal Civil Service Employment?*, Washington, DC, May 2015, p. 11.

[115] 5 U.S.C. § 552a.

[116] MSPB first studied these topics in the 1990s and issued the reports *Fair and Equitable Treatment: A Progress Report on Minority Employment in the Federal Government* (1996) and *A Question of Equity: Women and the Glass Ceiling in the Federal Government* (1992). MSPB re-examined these topics in the 2000s and issued *Fair and Equitable Treatment: Progress Made and Challenges Remaining* (2009) and *Women in the Federal Government: Ambitions and Achievements* (2011).

[117] U.S. Merit Systems Protection Board, *Fair and Equitable Treatment: Progress Made and Challenges Remaining*, Washington, DC, December 2009, pp. 21–22 and U.S. Merit Systems Protection Board, *Women in the Federal Government: Ambitions and Achievements*, Washington, DC, May 2011, pp. 5–6.

Another perspective on how Federal employees view their treatment over time has been obtained through MSPB's periodic Merit Principles Survey (MPS). The MPS includes core items that address employee perceptions regarding the occurrence of PPPs, such as discrimination based on race, sex, political affiliation, religion, marital status, age, or disability. Since 1996, survey responses have consistently indicated a downward trend in the prevalence of perceived discrimination based on race or national origin, sex, and age.[118] As of 2010, no more than five percent of Federal employees said they experienced discrimination based on their race or national origin, sex, and age and fewer than three percent indicated that they had experienced discrimination based on marital status, disability, religion, and political affiliation. Additionally, Federal employees have generally become less likely to think that they have been treated unfairly in terms of career advancement, awards, discipline, training, pay, assignments and appraisals.[119] These results suggest improvement in employees' perceptions regarding how well Federal agencies adhere to MSP 2, but survey results also suggest there is still some room for improvement.

MSPB has analyzed and compared the composition of the Federal workforce and shifts in Federal employee opinions, by demographic groups, over time in reports, such as:

- *Fair and Equitable Treatment: Progress Made and Challenges Remaining* (2009)
- *Women in the Federal Government: Ambitions and Achievements* (2011)
- *Fair and Equitable Treatment: A Progress Report on Minority Employment in the Federal Government* (1996)
- *A Question of Equity: Women and the Glass Ceiling in the Federal Government* (1992)
- *Achieving a Representative Federal Workforce: Addressing the Barriers to Hispanic Participation* (1997)

The Role of Supervisors and Agencies in the Fair and Equitable Management of Employees

Many of the strategies for improving representation were discussed under MSP 1. Fair and effective recruitment, assessment and selection procedures—both at the time of initial hire and during subsequent career advancement—are necessary to ensure a Federal workforce that is qualified and representative. However, fair treatment goes beyond selection decisions and requires that supervisors treat employees fairly and make decisions based on merit at every decision point regarding their careers.

Agencies rely heavily upon their supervisors to ensure that employees and applicants are treated fairly on a day-to-day basis. Therefore, first and foremost, agencies must ensure that their supervisors are willing and able to treat all employees according to the MSPs. To achieve this, agencies need to start by investing adequate time and effort into the recruitment, selection and development of supervisors, as well as holding accountable any supervisors who fail to support the MSPs through their daily actions.[120]

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[118] U.S. Merit Systems Protection Board, *Fair and Equitable Treatment: Progress Made and Challenges Remaining*, Washington, DC, December 2009, p. 54.

[119] U.S. Merit Systems Protection Board, *The Federal Government: A Model Employer or a Work In Progress? Perspectives from 25 Years of the Merit Principles Survey*, Washington, DC, September 2008, p. 35. Data was also collected from the 2005 and 2010 Merit Principles Surveys.

[120] U.S. Merit Systems Protection Board, *A Call to Action: Improving First-Level Supervision of Federal Employees*, Washington, DC, May 2010.

Supervisors should keep in mind their influence over the careers of their employees through a multitude of major and minor interactions. As a result, they should exercise caution whether making decisions such as regarding, hiring, pay and awards, and discipline or regarding the distribution of assignments or training and development opportunities.[121] In particular, the assignment of "acting supervisor" should be considered because research has shown this to be career-enhancing when seeking to advance to supervisory roles.[122] Supervisors also need to realize the importance of providing feedback to all employees regarding their performance and how to improve so all employees can understand what is critical to job success and advancement.[123]

Agencies have organizational level responsibilities for identifying and rectifying unfair treatment. These can be accomplished through:

1. Transparency—Ensuring that the criteria for personnel decisions are objective and merit-based and communicating these criteria to supervisors and employees;
2. Employee surveys and program evaluations to identify concerns that might not be raised at the individual level;
3. Procedures to identify and resolve unfairness in the workplace, such as through the EEO complaint and grievance processes, after ensuring that employees are aware of their rights; and
4. Workforce analyses, such as that required by the EEOC's Management Directive 715, to examine workforce composition compared to the Civilian Labor Force and to identify possible barriers to a fully representative workforce.

It is good news that workforce trends and survey results suggest that Federal employees have growing confidence that they will not be discriminated against based on non-merit factors such as political affiliation, race, color, religion, national origin, sex, marital status, age or disability. However, agencies must maintain vigilance and focus on merit in all decisions to avoid any discrimination on these legally protected bases within their workforces.

MSPB has provided recommendations to agency leaders regarding the fair and equitable management of employees through reports such as:

- *A Call to Action: Improving First-Level Supervision of Federal Employees* (2010)
- *Managing for Engagement—Communication, Connection, and Courage* (2009)

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[121] U.S. Merit Systems Protection Board, *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism*, Washington, DC, December 2013, pp. 10–15.

[122] U.S. Merit Systems Protection Board, *Fair and Equitable Treatment: A Progress Report on Minority Employment in the Federal Government*, Washington, DC, August 1996, p. 34 and U.S. Merit Systems Protection Board, *Fair and Equitable Treatment: Progress Made and Challenges Remaining*, Washington, DC, December 2009, p. 44.

[123] U.S. Merit Systems Protection Board, *Managing for Engagement—Communication, Connection, and Courage*, Washington, DC, July 2009, pp. 22–29.

- *Managing Public Employees in the Public Interest: Employee Perspectives on Merit Principles in the Federal Workplaces* (2013)
- *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism* (2013)
- *Fair and Equitable Treatment: Progress Made and Challenges Remaining* (2009)
- *Women in the Federal Government: Ambitions and Achievements* (2011)

Lessons Learned from Case Examples

Fair and Equitable Treatment – Illustration from Case Law: *Davis v. Department of the Interior*[124]

History. The appellant challenged the agency's proposed removal action and alleged that the agency's actions were grounded in discrimination based on race and sex and due to retaliation for her filing an EEO complaint.

Holding and consequences. Following the hearing of the initial appeal, the MSPB administrative judge decided that the agency had proven its case for removal, while the appellant had not demonstrated that this action was due to retaliation for protected EEO activity. However, upon subsequent review, the Board referred the case back to the administrative judge to consider the appellant's affirmative defenses of race and sex discrimination. The administrative judge found these arguments unpersuasive and given that this was a "mixed case,"[125] the appellant filed a petition for review with the EEOC. The EEOC reviewed the evidence and found that the agency's reasons for removing the appellant were based on discrimination. MSPB deferred to EEOC's interpretation of discrimination law and ordered the Department of the Interior to reinstate the appellant with back pay, and sent the case back to the regional office to adjudicate the appellant's claim for compensatory damages.

Implications for practice. Agencies must ensure that discrimination based upon any of the legally protected bases does not influence any actions towards employees. Agencies will also be well-served by treating all employees respectfully and equitably.[126]

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[124] *Davis v. Department of the Interior*, MSPB Docket No. AT-0752-09-0860-E-1 (Initial Decision, Aug. 15, 2014).

[125] As described in 29 C.F.R. §1614.302, mixed case appeals are those appeals that are filed with MSPB because they relate to an action under MSPB's jurisdiction, and the appellant alleges that the agency took this action due to discriminatory reasons.

[126] As outlined in EEOC's summary of this case, *Annette Davis v. Sally Jewell, Secretary, Department of the Interior*, EEOC Petition No. 0320110050 (Jul. 16, 2014), the appellant contended that disparate treatment included disrespectful and threatening communication, reduced cash awards, disapproval of leave requests, denial of access to computer programs needed to complete work, low performance appraisal ratings, disciplinary action, and ultimately, the removal action.

MSP 3: Compensation

"Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance."

Explanation and Intent of MSP 3

MSP 3 continues the emphasis on fairness, this time with regards to pay and performance recognition.[127] MSP 3 embodies the vision that maintaining equitable salaries and rewarding excellent performance will attract and retain the most effective and efficient Federal workforce.

Additional details regarding how to achieve the goals of MSP 3 are covered in the Classification Act, which guides pay setting in accordance with the duties, responsibilities, and qualification requirements of each occupation.[128] This facilitates the ability to provide equal pay for work of equal value based on these objective criteria. Further, MSP 3 reflects the stated policy of Congress that pay for Federal employees under the General Schedule and the Prevailing Rate Systems (wage grade employees) should take into account both national and local pay rates compared to private sector salaries.[129] For example, areas with significant pay disparities (over five percent) may receive locality-based pay supplements.[130]

The last clause of MSP 3 references the requirement for agencies to create performance appraisal systems in accord with 5 U.S.C. § 4302. Beyond documenting accomplishments, agencies should support incentive awards programs to acknowledge high performing employees.[131] These awards often include performance-based cash and time-off awards, although agencies may pursue alternatives, particularly during times of severe budgetary constraints.

Federal Employee Perspective

Nearly two-thirds of Federal employees (63 percent) reported on the 2010 MPS that their organization pays employees fairly. However, only about half (51 percent) agreed that their organization recognizes and rewards excellence.

Findings and Recommendations Related to MSP 3

As mentioned under MSPs 1 and 2, supervisors must make all workforce management decisions—including those impacting pay and the distribution of awards—in a fair and equitable manner. This requires

[127] 5 U.S.C. Chapter 53.

[128] 5 U.S.C. § 5101(1).

[129] 5 U.S.C. § 5304(a), 5 U.S.C. § 5341.

[130] *Id.*

[131] 5 U.S.C. Chapter 45 and 5 C.F.R. Part 451.

basing decisions about placing employees at appropriate pay levels (whether at initial hire or subsequent promotions), given their job-related qualifications, in addition to providing awards based on performance.

Setting Pay

To facilitate providing equal pay for work of equal value, OPM is required by law to "define Federal occupations, establish official position titles, and describe the various levels of work" and it accomplishes this through position classification standards that agencies use to determine the title, series, and grade of positions covered by Title 5 C.F.R.[132] However, each agency is responsible for ensuring that its positions are properly classified.[133] To achieve this, supervisors need to work with HRM staff when preparing to fill a vacancy. They should start by developing or reviewing a position description to describe the work to be performed, typically taking into account factors such as knowledge required, supervisory controls, guidelines, complexity, scope and effect, personal contacts and their purpose, physical demands and work environment, which determine the grade.[134]

Working together requires time and effort to ensure that positions are properly classified. However, MSPB research has found that selecting officials and HRM staff face challenges in terms—not only of having the time to invest in hiring, and the prerequisite classifying of positions—but also to maintain the necessary expertise to perform this essential function.[135] Providing the time and resources for supervisors and HRM staff to be able to make accurate classification decisions greatly enhances the ability to achieve the pay equity goals of MSP 3.

Approving Pay Increases/Promotions

Upon being placed in the correct series and grade at the time of hire, employees can also earn permanent pay increases based on their performance. For example, most employees within the General Schedule receive within-grade increases (WGIs) for demonstrating competent performance on the job (e.g., "fully successful" or higher).[136] Supervisors also have the discretion to acknowledge outstanding performers by approving quality step increases (QSIs) which grant a within-grade increase before the end of the standard waiting period.[137] Employees who have competed for a career ladder promotion series may be promoted to the next grade if rated "fully successful" overall and on all elements that are deemed critical to success at the higher grade level.[138] However, these actions to grant within-grade pay increases or career ladder promotions should not be automatic and the supervisor should ensure that the employees' performance warrants the advancement by effectively utilizing the performance management process to monitor and document performance.

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[132] U.S. Office of Personnel Management, *The Classifier's Handbook* (TS-107, August 1991), accessed January 21, 2016 from www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/classifierhandbook.pdf, p. 4.

[133] U.S. Office of Personnel Management, *Introduction to the Position Classification Standards* (TS-34, July 1995 and TS-107, August 1991, revised August 2009), accessed January 21, 2016 at www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/positionclassificationintro.pdf.

[134] U.S. Office of Personnel Management, *The Classifier's Handbook* (TS-107, August 1991), accessed January 21, 2016 from www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/classifierhandbook.pdf, pp. 7–8.

[135] U.S. Merit Systems Protection Board, *Reforming Federal Hiring: Beyond Faster and Cheaper*, Washington, DC, September 2006, p. 41–43.

[136] 5 C.F.R. §§ 531.401–411.

[137] 5 C.F.R. §§ 531.501–504.

[138] 5 C.F.R. § 335.104.

To further assist the matching of pay levels with their qualifications and contributions, current (or eligible former) Federal employees may also be promoted competitively through the merit promotion process, which involves the assessment of applicants against job-related criteria.[139] MSPB has conducted research into the merit promotion process and found that many employees have reservations about the fairness of the outcomes.[140] As discussed under MSP 1, only 38 percent of employees agreed that the best qualified candidates are selected. Similarly, results from OPM's 2015 Federal Employee Viewpoint Survey revealed only 33 percent of respondents agreed that promotions are based on merit.[141] Unfortunately, these concerns have persisted over time since data from MSPB's 1996 MPS also revealed concerns about whether or not employees are promoted based on their relative knowledge, skills and abilities.[142] This topic will be discussed further under MSP 8.

Providing Recognition

In accord with MSP 3, supervisors also recognize performance through periodic awards, which can include cash or time-off awards. MSPB research regarding performance-based compensation has identified a number of questions that agencies should consider to improve the effectiveness of their efforts to recognize excellent performance.[143] For example, agencies should consider how much money can and should be made available for salary increases and cash awards. Although some Federal agencies have experimented with pay for performance compensation systems that allow more discretion surrounding the amounts of annual salary and awards, most Federal agencies have only offered minimal cash awards or pay increases, particularly in light of budgetary limits imposed in recent years.[144]

The unavailability of funding for individual cash awards may help explain why so few Federal employees (35 percent) see a link between their job performance and the amount of their awards.[145] Fortunately, MSPB research has found that although significant numbers of Federal employees agree that awards are important to seeking and continuing employment with their organizations, awards ranked ninth in popularity behind other job factors such as how personally satisfying or interesting the work is, job security and "being able to serve the public."[146]

Nevertheless, effective management of employees requires effective performance management practices. Beyond ensuring that employees receive accurate performance ratings (and performance recognition), effective performance management also improves employee engagement[147] and consequently, produces

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[139] 5 C.F.R. Part 335.

[140] U.S. Merit Systems Protection Board, *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism*, Washington, DC, December 2013; U.S. Merit Systems Protection Board, *The Merit Promotion Program: Process vs. Outcome*, Washington, DC, December 2001.

[141] U.S. Office of Personnel Management, *Federal Employee Viewpoint Survey Results Governmentwide Management Report*, p. 29.

[142] U.S. Merit Systems Protection Board, *Managing Public Employees in the Public Interest: Employee Perspectives on the Merit Principles in Federal Workplaces*, Washington, DC, January 2013, p. 77.

[143] U.S. Merit Systems Protection Board, *Designing an Effective Pay for Performance Compensation System*, Washington, DC, January 2006, pp. 14–18.

[144] U.S. Office of Personnel Management and U.S. Office of Management and Budget, *Memorandum for Heads of Executive Departments and Agencies*, Subject: Guidance on Awards for Fiscal Year 2014, M-14-02, November 1, 2013.

[145] U.S. Merit Systems Protection Board, *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards*, Washington, DC, December 2012, p. 23.

[146] *Id.* at p. 21.

[147] U.S. Merit Systems Protection Board, *Managing for Engagement—Communication, Connection, and Courage,* Washington, DC, July 2009, p. ii.

desirable organizational outcomes, such as improved performance and lower turnover.[148] Therefore, agencies should ensure that they adhere to the best practices for effective performance management, such as those summarized in MSPB's 2009 report, *Managing for Engagement–Communication, Connection, and Courage*, which will be discussed in more detail under MSP 6.[149]

MSPB has explored issues related to providing appropriate pay and recognition through the following reports:

- *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism* (2013)
- *Managing Public Employees in the Public Interest: Employee Perspectives on Merit Principles in Federal Workplaces* (2013)
- *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards* (2012)
- *Managing for Engagement—Communication, Connection, and Courage* (2009)
- *Designing an Effective Pay for Performance Compensation System* (2006)

MSP 4: Conduct

"All employees should maintain high standards of integrity, conduct, and concern for the public interest."

Explanation and Intent of MSP 4

MSP 4 sets the expectation that Federal employees should demonstrate exemplary integrity and conduct to maintain the public's trust and honor their obligations to serve the public in a manner that is efficient and effective. Providing more details on standards of conduct that are applicable to all Federal employees, the Principles of Ethical Conduct can be found in Appendix F or at 5 C.F.R. Part 2635.101. For example, the first principle stipulates that "Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain." The remaining thirteen principles provide variations on this theme to offer examples of how Federal employees need to guard against unethical, self-serving behavior.

In addition to the prosocial desire to uphold the public trust, Federal employees may also seek to avoid punitive actions for lacking integrity. Specific statutory provisions govern agency practices for addressing employee misconduct.[150] Federal agencies may also develop supplemental standards of conduct tailored to their individual requirements. These standards generally reflect heightened stringency relevant to the unique nature of their work. Further, although some agencies have established a table of penalties to identify

[148] *Id.* at pp. 1–4 and U.S. Merit Systems Protection Board, *The Power of Federal Employee Engagement*, Washington, DC, September 2008, pp. ii–iv.

[149] U.S. Merit Systems Protection Board, *The Power of Federal Employee Engagement*, Washington, DC, September 2008.

[150] More information can be found at 5 U.S.C. § 7513(b)(1) and 5 C.F.R. § 752.604(d).

offenses that will likely result in discipline, agencies are not required to specify all of the possible forms of prohibited conduct. MSP 4 sets a common sense standard and expects Federal employees to exercise sound judgment regarding their actions and not be dependent upon their agencies to constantly discern right from wrong for them. The MSPs are good government principles so all of government, not just management, should adhere to them. For employees, supporting the MSPs should be part of fulfilling their obligations to their employers and the taxpaying public.

Federal Employee Perspective

Likely reflecting the high ideals upheld as a pre-condition of Federal employment, 2010 MPS respondents expressed confidence in their organizations holding employees to high standards of conduct (64 percent agreed). Similarly, 60 percent agreed that their organization puts the public interest first.

Findings and Recommendations Related to MSP 4

MSPB studies have addressed the expectation that agencies should maintain high standards of integrity, conduct, and concern for the public interest through:

1. Hiring employees who meet and maintain high standards of integrity;
2. Effectively managing employees who demonstrate conduct issues (to be discussed under MSP 6), and
3. Encouraging employees to report wrongdoing that they observe (which will be covered under MSP 9).

How to Avoid Hiring Employees with Conduct Issues

As part of a careful assessment process as outlined in MSP 1, hiring officials should conduct reference checks prior to making a selection decision.[151] Beyond improving the quality of hiring decisions, conducting reference checks can also help maintain the public's trust by asking references to answer questions about the applicant that the applicant may not be able or willing to answer accurately.[152] Although some references may be reluctant to provide negative feedback regarding an applicant, a skillful interviewer should strive to build rapport and convince the reference to provide information that would help determine whether the applicant would be an appropriate match to the position to be filled.

Reference checks are widely used in the public and private sectors[153] and are legally defensible as long as they meet certain criteria, such as:

- Focused on specific, job-related information;

[151] U.S. Merit System Protection Board, *Reference Checking in Federal Hiring: Making the Call*, Washington, DC, September 2005.

[152] *Id.* at pp. 21–23.

[153] *Id.* at pp. 5–6.

- Based on experience observing or working with the job applicant;
- Applied fairly across all applicants in conformance with professional assessment requirements; and
- Used as part of the hiring process to complement other assessments.[154]

Despite the benefits of conducting a well-designed reference check, it is important to note that the authors of the CSRA were concerned about the potential misuse of information, such as from references, that could be used to help or hinder an applicant. In fact, PPP 2 prohibits consideration of any input regarding a person under consideration for any personnel action unless it is based on "an evaluation of the work performance, ability, aptitude, or general qualifications" or "an evaluation of the character, loyalty, or suitability" of the individual.[155] Fortunately, these exceptions to the PPP define precisely the types of issues that can and should be probed through standardized questions as part of a structured reference interview.[156]

However, those conducting reference checks may occasionally encounter situations where the reference may be bound by a "clean record" agreement[157] to provide only favorable information about the employee or to provide only minimal information, such as the dates of employment.[158] This may occur for a variety of reasons, including when an employer, who wants to expedite the separation process, has agreed to a clean record settlement agreement so the employee will voluntarily resign instead of appealing a removal. However, it can create a challenge for the next potential employer who may have a difficult time getting an accurate reference. As a result, this may threaten the public interest, if Federal agencies hire employees without knowledge of problems that may repeat under similar circumstances. Therefore, agencies should use clean record agreements "judiciously, in an effort to avoid making a low-performing employee another agency's problem"[159] while hiring agencies need to be alert for any warning flags that may indicate that the former employer is not divulging relevant information.[160] Although employees in these situations may learn from their mistakes and excel in other jobs where their skills are a better match, agencies should consider not only the benefit to their organization to quickly sever ties with the employee, but also the potential cost to a subsequent Federal employer.

MSPB reports related to avoiding the hiring of employees with conduct issues include:

- *Reference Checking in Federal Hiring: Making the Call* (2005)
- *Clean Record Settlement Agreements and the Law* (2013)

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[154] *Id.* at pp. 1–3. Additional recommendations for best practices in reference checking are provided on pp. 25–36.

[155] 5 U.S.C. § 2302(b)(2).

[156] U.S. Merit System Protection Board, *Reference Checking in Federal Hiring: Making the Call*, Washington, DC, September 2005, pp. 6–7.

[157] U.S. Merit Systems Protection Board, *Clean Record Settlement Agreements and the Law*, Washington, DC, December 2013, p. 1. As explained, an agency and a current or former employee may enter into a clean record settlement agreement, under which "the agency is obligated to change, remove, or withhold potential negative information about an individual in exchange for the resolution of employment-related claims against the agency."

[158] *Id.* and U.S. Merit System Protection Board, *Reference Checking in Federal Hiring: Making the Call*, Washington, DC, September 2005, pp. 19–20.

[159] U.S. Government Accountability Office, *Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance*, GAO-15-191, Washington, DC, February 9, 2015, p. 7.

[160] U.S. Merit Systems Protection Board, *Clean Record Settlement Agreements and the Law*, Washington, DC, December 2013, p. 19.

Responding Appropriately to a Failure to Meet the Federal Government's High Standards

As another tool to ensure that recent hires meet the Federal Government's high standards of integrity, conduct, and concern for the public trust, agencies should effectively utilize the probationary period to assess new employees and decide whether or not to retain them. MSPB reports have addressed the need for supervisors to be attentive to this time frame and take appropriate action in a timely manner when the employees should not attain full career status (and the rights that accompany the successful completion of the probationary period).[161] Agencies should encourage supervisors to terminate employees who fail to demonstrate the appropriate level of performance and conduct during the initial probationary period. MSPB research indicates that significant numbers of supervisors do not terminate probationers—even though they would not choose to hire the person again.[162] Instead of missing the opportunity to easily separate a probationer who is a poor fit, supervisors should take the appropriate action when a probationer fails to meet the minimum standards during the probationary period.

In other situations, agencies cannot afford to take time to consider their options and need to act immediately to remove employees who harm (or threaten to harm) others in the workplace, as required by multiple laws and regulations.[163] MSPB research has found that current or former employees were the most common perpetrators of violence in the workplace.[164] Therefore, while agencies should remain alert to potential external threats, they also need to take proactive steps to reduce the likelihood of internal threats. Fundamental strategies to help Federal agencies create safe work environments and protect employees from attacks by current or former employees were summarized in a 2012 MSPB report, *Employee Perceptions of Federal Workplace Violence*.[165] These include:

1. Foster a respectful organizational culture that does not tolerate aggressive or violent behaviors;
2. Complete appropriate assessments of potential employees, including pre-employment background checks;
3. Train employees on how to prevent workplace violence, with particular attention to teaching supervisors conflict resolution skills;
4. Respond in a timely and consistent manner to manage serious workplace conflicts before they escalate into violence; and
5. Facilitate the fair and effective management of the workforce to avoid unnecessary stress in the workplace.

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[161] U.S. Merit Systems Protection Board, *The Probationary Period: A Critical Assessment Opportunity*, Washington, DC, August 2005 and U.S. Merit Systems Protection Board, *The Navigating the Probationary Period After Van Wersch and McCormick*, Washington, DC, September 2006.

[162] U.S. Merit Systems Protection Board, *The Probationary Period: A Critical Assessment Opportunity*, Washington, DC, August 2005, pp. 7–8.

[163] U.S. Merit Systems Protection Board, *Employee Perceptions of Federal Workplace Violence*, Washington, DC, September 2012, pp. 13–16.

[164] *Id.* at p. 18.

[165] *Id.* at pp. 43–53.

MSPB reports that address how to handle conduct issues include:

- *Clean Record Settlement Agreements and the Law* (2013)
- *The Probationary Period: A Critical Assessment Opportunity* (2005)
- *The Navigating the Probationary Period After Van Wersch and McCormick* (2006)
- *Employee Perceptions of Federal Workplace Violence* (2012)

While agencies hope to prevent problems by hiring employees who epitomize the integrity needed as a representative of the Federal Government, agencies also need to be vigilant to ensure that their employees (at all levels) are acting in accord with these high expectations. (Addressing employee conduct issues will be discussed further under MSP 6.) They also need to be cognizant of the fact that certain employees who draw attention to the failings of their agencies, often through the actions of higher level managers, should be protected and encouraged to report their concerns. (This will be discussed more under MSP 8.)

Lessons Learned from Case Examples

Hiring - Illustration from Case Law: *Merino v. Department of Justice*

History. The appellant applied for a Border Patrol Agent (Trainee) position with the Immigration and Naturalization Service (INS). On the basis of a background investigation, the agency determined that he was unsuitable for employment because of "criminal or dishonest conduct related to the duties to be assigned to the applicant or appointee" and "intentional false statement or deception or fraud in examination or appointment."[166] He filed an appeal with MSPB on the grounds that he had matured beyond the "indiscretions of his youth," which he had admitted to both OPM and the Department of Justice.[167]

Holding and consequences. The MSPB administrative judge's initial decision ordered the agency to cancel its suitability determination and consider the applicant for Federal employment because the administrative judge found the appellant to be "motivated and committed to continuing his efforts to rehabilitate himself."[168] However, in responding to the agency's petition for review, the Board reversed the initial decision upon finding that the agency had proven its case on the first charge. Further, given the role of Border Patrol Agents in keeping drugs from being illegally imported, the applicant's past conduct prevented him from being suitable for employment in this job.[169]

Implications for practice. In making a suitability determination, agencies may consider whether the applicant's past conduct would undermine the efficiency or effectiveness of the agency. Therefore, factors that may be considered include: the nature of the position, including the mission and responsibilities of the agency; the nature and seriousness of the conduct; the circumstances surrounding the conduct; the recency of the

[166] *Merino v. Department of Justice*, 94 M.S.P.R. 632, ¶ 2 (2003).

[167] *Id.* at ¶ 3.

[168] *Id.* at ¶ 4.

[169] *Id.* at ¶¶ 9–15.

conduct; the age of the person at the time of conduct; contributing societal conditions; and the absence or presence of rehabilitation.[170]

Responding Appropriately to a Failure to Meet the Federal Government's High Standards – Illustration from Case Law: *Martin v. Department of Transportation*

History. The agency demoted the appellant from a supervisory position to a nonsupervisory position based on charges that he "misused government resources, interfered with an official investigation, and made false statements during an official investigation."[171] Specifically, he frequently conducted non work-related Internet searches while on duty and accessed nude and sexually explicit images. He filed an appeal with MSPB, claiming that others could have used his computer or that the images on his computer were not the result of intentional searches.

Holding and consequences. The MSPB administrative judge ruled that the agency had proven the first charge by preponderant evidence, but not the remaining charges. Therefore, the administrative judge reduced the penalty to a thirty day suspension. The agency filed a petition for review with the Board, which found the agency's decision to demote the appellant to be reasonable, particularly given that he was a supervisor, and could therefore be held to a higher standard of conduct because supervisors occupy positions of greater trust and responsibility.

Implications for practice. Federal employees must maintain high standards of integrity and conduct in their past and present behavior to maintain the public's trust. Other factors, such as supervisory status or nature of responsibilities, may further heighten the standards to which individuals are held. Agencies have the discretion to bar applicants from further consideration, remove employees from employment, or take disciplinary or adverse actions to address misconduct.

MSP 5: Utilization

"The Federal work force should be used efficiently and effectively."

Explanation and Intent of MSP 5

Given that much of the impetus driving the CSRA related to the inappropriate hiring of those with political connections and difficulty in removing employees who were not contributing to the efficient and effective functioning of the Federal Government, this MSP is central to the CSRA. MSP 5 sought to ensure that the personnel rules of the Federal Government would be impartially administered so hiring and firing would be based on merit and enable the workforce to be flexibly managed.[172]

As usual, MSP 5 requires a balance between the needs of the organization to act efficiently and effectively and its obligations to Federal employees. For example, during a furlough, Federal agencies are typically

[170] 5 C.F.R. § 731.202(c).

[171] *Martin v. Department of Transportation*, 2006 MSPB 245, ¶ 2 (2006), *aff'd*, 224 F. App'x 974 (Fed. Cir. 2007).

[172] U.S. Rep. No. 95-969, at 4 (1978), *as reprinted in* Committee on Post Office and Civil Service House of Representatives, 96th Cong., Legislative History of the Civil Service Reform Act of 1978 (CSRA), at 1468 (1978).

required to give employees thirty days advance written notice with an opportunity to reply before being furloughed.[173] However, 5 C.F.R. Part 752.404(d)(2) authorizes immediate furloughs under emergency situations, such as when Congressional funding of Federal agencies expires.

One additional such circumstance involves seasonal employees, which are hired with the express purpose of providing agencies with more flexibility to size their workforce in accord with fluctuating workloads. Since they are appointed during periods of higher workloads as temporary workers, they may be placed in a nonduty, nonpay status without the thirty day advance written notice corresponding to the terms of their employment.[174]

Federal Employee Perspective

MSP 5 delves into the efficient and effective management of the Federal workforce and represents an area full of debate regarding how to best achieve the goals of efficiency and effectiveness. From a global perspective, opinion is clearly divided as only 42 percent agreed their organization uses the workforce efficiently and effectively.[175] Respondents seemed most dissatisfied with their organization's ability or willingness to eliminate unnecessary functions and positions as slightly less than 30 percent agreed that they did this. However, most employees were also lacking confidence in their organizations in terms of positive actions such as focusing on important priorities (48 percent) and making good use of employees' skills and talents (45 percent).

Findings and Recommendations Related to MSP 5

The goal of managing Federal employees efficiently and effectively relies upon accomplishing other MSPs well. For example, employees must be treated fairly in all aspects of their employment (MSP 2), such as during recruitment, selection and advancement (MSP 1), through pay and performance recognition (MSP 3), when employees are held accountable for conduct (MSP 4) and performance (MSP 6), during training (MSP 7), and to protect them from other biased treatment due to political affiliation or favoritism (MSP 8) or due to their whistleblowing activity (MSP 9). As a result, MSP 5 requires supervisors who are willing and able to actively uphold all of the MSPs.

Selection and Training of Supervisors

This has become a greater challenge as the nature of Federal work has evolved and growing numbers of Federal supervisors have become eligible for retirement.[176] However, agencies should take advantage of the opportunity to conduct succession planning and prepare to select and train an effective and diverse group of supervisors to replace those who are leaving.[177] For example, rather than selecting supervisors primarily based on technical expertise, agencies should recognize the criticality of supervisory competencies, such

[173] 5 U.S.C. § 7513(b).

[174] *National Treasury Employees Union v. Devine*, 10 M.S.P.R. 194, 198 (1982).

[175] U.S. Merit Systems Protection Board, 2010 Merit Principles Survey.

[176] U.S. Merit Systems Protection Board, *As Supervisors Retire: An Opportunity to Reshape Organizations*, Washington, DC, October 2009, p. 5 and pp. 11–13.

[177] *Id.* at pp. 11–14.

as interpersonal and oral communication skills, conflict management, and the ability to manage employee performance, since these facilitate the efficiency and effectiveness of the workforce.[178] The recruitment and assessment process should be designed to reinforce the necessity of the supervisory (non-technical) competencies to ensure the selectee will be capable of demonstrating these capabilities, with additional training and development opportunities to further prepare the individual to succeed in the supervisory role.[179] Importantly, if the new supervisor is not successful during the probationary period, the agency should utilize the critical last step of the assessment process and remove the person from this role.[180]

MSPB reports which provide recommendations regarding the selection and training of supervisors include:

- *As Supervisors Retire: An Opportunity to Reshape Organizations* (2009)
- *A Call to Action: Improving First-Level Supervision of Federal Employees* (2010)

Facilitating Employee Engagement to Improve Organizational Outcomes

Given the influence of supervisors on the workforce, effective supervision positively impacts organizational performance.[181] For example, MSPB research has shown that supervisors can facilitate employee engagement, which results in a "heightened connection to their work, their organization, or the people they work for or with that causes them to produce better results for the organization." In other words, as a result of greater employee satisfaction and commitment, engaged employees demonstrate greater discretionary effort and are less likely to demonstrate negative actions.[182] The 2008 MSPB report *The Power of Federal Employee Engagement* explored the role of supervisors in engaging employees and the subsequent impact on organizational outcomes. At the highest level, this report recommended that agencies do the following to facilitate employee engagement:[183]

- Recruit and hire employees who are an excellent match to the organization and the job;
- Show employees they are valued from the first day on the job;
- Inspire employee commitment;
- Communicate vision and commitment about how the agency will accomplish the mission;
- Ensure that employees know how important their work is to the mission;
- Manage employee performance by providing appropriate guidance and feedback;
- Mentor employees to help them define their role in the organization;

[178] *Id.* at pp. 18–19.

[179] *Id.* at pp. 8–27 and pp. 33–48.

[180] *Id.* at pp. 25–29.

[181] U.S. Merit Systems Protection Board, *The Power of Federal Employee Engagement*, Washington, DC, September 2008, pp. 3–4 and 27–35.

[182] *Id.* at p. 2.

[183] *Id.* at pp. iv–v.

- Evaluate employees against competencies throughout their career to facilitate their contributions and development; and
- Measure employee engagement and work to increase engagement and therefore organizational outcomes.

Other workforce management initiatives may also impact employee engagement, as well as efficiency and effectiveness. For example, telework serves as an example of a specific initiative that can be used to enhance employees' commitment to the organization by allowing them greater flexibility, while also helping to meet the organization's goals.[184] MSPB examined the benefits and concerns related to telework programs and provided guidance regarding the infrastructure needed to support telework. For example, supervisors need to identify and address any concerns about telework prior to implementation, ensure fair treatment of teleworkers and those who do not telework, and have effective performance management skills, which can be critical to the success of telework programs.[185]

MSPB has also examined the ability of management's actions to impact employee engagement and organizational outcomes through reports such as:

- *The Power of Federal Employee Engagement* (2008)
- *Managing for Engagement—Communication, Connection, and Courage* (2009)
- *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards* (2012)
- *Telework: Weighing the Information, Determining an Appropriate Approach* (2011)

Managing Staffing Levels. An agency level perspective on the effective and efficient utilization of the workforce also includes having the appropriate level of staffing and being able to manage this is in accord with funding levels. Although the MSPB's adjudicatory function received a large volume of appeals (over 32,000) related to furloughs in 2013,[186] the studies function has not recently broached this topic. Similarly, the last report related to reduction-in-force, *Reduction-in-Force in the Federal Government, 1981: What Happened and Opportunities for Improvement*, was published in 1983.

[184] U.S. Merit Systems Protection Board, *Telework: Weighing the Information, Determining an Appropriate Approach*, Washington, DC, October 2011.

[185] U.S. Merit Systems Protection Board, *The Power of Federal Employee Engagement*, Washington, DC, September 2008, p. iv.

[186] U.S. Merit Systems Protection Board, *Annual Report for FY 2014*, Washington, DC, May 29, 2015, p. 9.

Lessons Learned from Case Examples

Managing Staffing Levels – Illustration from Case Law: *Chandler v. Department of the Treasury*

History. The appellant appealed the agency's decision to furlough her for five to seven days as a result of the Sequestration Order requiring reductions in Federal spending.[187] As part of the appeal, the appellant also requested substantial information from the agency regarding how and why the furlough decisions were made.[188]

Holding and consequences. In response to the interlocutory appeal, the Board found that the agency's furlough did meet the requirement "to promote the efficiency of the service"[189] and denied most of the appellant's discovery requests as exceeding what the agency was required to do to demonstrate this fact. The Board found that the agency should provide information regarding payment of overtime and bonuses, the identity of those who were not furloughed, as well as the information regarding the processes that guided the furlough, including the Executive Order that directed the IRS to conduct the furlough.[190]

Implications for practice. The Board has found that an agency can use non-disciplinary furloughs as a means to promote the efficiency of the service when the furlough is "a reasonable management solution to the financial restrictions placed on it and the agency applied its determination to furlough employees"[191] in an equitable manner. While this means that the agency "is required to treat similar employees similarly and to justify any deviations with legitimate management reasons,"[192] these decisions remain at the discretion of the agency and are not subject to review by the Board to determine how the agency should have conducted the furlough.[193]

MSP 6: Retention

> "Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards."

Explanation and Intent of MSP 6

One of the primary problems the CSRA was intended to address was the presumed difficulty removing poor performers. Many people felt that the accumulation of regulations and judicial rulings designed to protect employee rights had resulted in managers being unable to take appropriate corrective action.

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[187] *Chandler v. Department of the Treasury*, 120 M.S.P.R. 163, ¶¶ 2–4 (2013).

[188] U.S. Merit Systems Protection Board, *Annual Report for FY 2013*, May 30, 2014, p. 22.

[189] 5 U.S.C. § 7513(a).

[190] *Chandler v. Department of the Treasury*, 120 M.S.P.R. 163, ¶¶ 19–31 (2013).

[191] *Id.* at ¶ 8. *See also Clark v. Office of Personnel Management*, 24 M.S.P.R. 224, 225 (1984).

[192] *Chandler v. Department of the Treasury*, 120 M.S.P.R. 163, ¶ 8, (2013).

[193] *Id.* at ¶¶ 8–9.

To provide supervisors with additional tools for addressing poor performers, the CSRA supplemented the existing Chapter 75 ("Adverse Actions") of Title 5, United States Code, by adding a new Chapter 43 titled "Performance Appraisal." New standards were authorized for evaluating performance with sanctions of removal or demotion for unacceptable performance.[194] While Chapter 75 required agencies to establish that the removal or demotion action was supported by "preponderant" evidence, Chapter 43 actions were given the lower standard of "substantial" evidence. However, in accordance with constitutional due process requirements, both Chapters 43 and 75 included provisions for procedural rights and the right to appeal the action to a neutral third party—the U.S. Merit Systems Protection Board.[195] Therefore, agencies should ensure that all of the mandatory steps of the disciplinary process are carefully completed and documented—after deciding whether Chapter 43 or 75 would be most appropriate, considering the level of burden, as well as the procedural requirements. While Chapter 75 provides for removal or demotion after demonstrating unacceptable performance by "preponderant" evidence, under Chapter 43, the decision of the agency to remove or demote the employee shall be sustained if supported by "substantial" evidence. However, Chapter 43 requires that the employee be provided an opportunity to demonstrate acceptable performance prior to being demoted or removed, but no mitigation of the penalty is allowed.[196]

Under Chapter 43 or 75, the removal or demotion may not be sustained if the employee demonstrates a harmful error in the application of the agency's procedures in arriving at its decision, shows that the decision was based on a PPP, or establishes that it was not in accordance with law.[197] Additionally, the Board may review the denial of a within grade increase based on an agency's finding that an employee failed to perform at an acceptable level of competence under a Chapter 43 performance appraisal system.[198]

Federal Employee Perspective

On the 2010 MPS, Federal employees expressed the most skepticism regarding their organizations' ability to manage employee performance. Of all of the MSP-related items that were included on the 2010 MPS, this item was most frequently considered to be a weakness in maintaining the merit systems as only one in four respondents (24 percent) agreed that management addresses poor performers effectively. In comparison, 41 percent agreed their agency retains its best performers.

Findings and Recommendations Related to MSP 6

Although the CSRA was intended to provide more options and support for taking performance-based actions, frustration remains among supervisors who wish to take corrective action toward poor performers, but fear they will not be supported within their agencies for doing so.[199]

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[194] 5 U.S.C. §§ 4301–4308.

[195] U.S. Merit Systems Protection Board, *What is Due Process in Federal Civil Service Employment?*, Washington, DC, May 2015.

[196] In contrast, Chapter 75 does not require a performance improvement plan prior to taking corrective action. For more information regarding the differences between Chapter 43 and Chapter 75 for performance-based actions, see U.S. Merit Systems Protection Board, *Addressing Poor Performers and the Law*, Washington, DC, September 2009.

[197] 5 U.S.C. § 7701.

[198] 5 C.F.R. §§ 531.410(d), 531.409(b).

[199] U.S. Merit Systems Protection Board, *Addressing Poor Performers and the Law*, Washington, DC, September 2009.

Options for Remedying Poor Performance

The CSRA created Chapter 43 of Title 5 with the intention of making it easier for agencies to demote and remove poor performers by providing a lower standard of proof than for actions taken under Chapter 75. For example, as established by Chapter 43, an agency can reduce in grade or remove an employee for receiving a rating of "unacceptable" with respect to even a single "critical element" if it follows these steps:[200]

1. Set up an OPM-approved performance appraisal system;
2. Communicate to the employee his/her written performance standards and "critical elements" of the position;
3. Warn the employee of inadequacies in their performance of "critical elements" during the appraisal period;
4. Counsel the employee, and
5. Provide a reasonable opportunity for improvement after proper notice.

However, the intended result of providing Chapter 43 as an easier alternative was not fully realized, as agencies continue to use Chapter 75 in a majority of cases.[201] Therefore, agencies should carefully consider the circumstances associated with a poor performer and evaluate the relative merits of using Chapter 43 or Chapter 75.[202] Although Chapter 75 may prove more appropriate in certain situations (e.g., the agency does not have to offer an opportunity to improve nor have the concurrence of an official above the deciding official), Chapter 43 offers other advantages, notably the lower standard for proof.[203]

MSPB has published reports to educate managers regarding how to remedy poor performance:

- *Addressing Poor Performers and the Law* (2009)
- *What is Due Process in Federal Civil Service Employment?* (2015)

Due Process Requirements

A 2015 MSPB report, *What is Due Process in Federal Civil Service Employment?*, provides an overview of the history and reasoning behind the current civil service laws for adverse action, as well as protections offered by due process requirements. This report also discusses the two key components of due process: (1) the opportunity prior to removal to understand the charges and offer a defense and (2) the right to appeal a removal decision before an impartial third party.

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[200] *Lovshin v. Department of the Navy*, F.2d 826 (Fed. Cir. 1985).

[201] U.S. Merit Systems Protection Board, *What is Due Process in Federal Civil Service Employment?*, Washington, DC, May 2015.

[202] The procedural requirements associated with managing and/or removing a poor performer under Chapter 43 and Chapter 75 are discussed in detail in the September 2009 MSPB report, *Addressing Poor Performers and the Law*. Chapter 43 and Chapter 75 are compared in the Appendix of that report on pp. 33–34.

[203] U.S. Merit Systems Protection Board, *Addressing Poor Performers and the Law*, Washington, DC, September 2009.

Given that affording employees due process is essential to sustaining adverse actions, Federal agencies should be careful to provide employees with due process procedures in accord with relevant statutes and regulations.[204] These include requirements such as:[205]

1. Ensure adequate notice of an intended adverse action;
2. Provide the employee with a comprehensive list of charges;
3. Give the employee an opportunity to respond orally and in writing, and
4. Issue a written decision containing a notification of appeal rights.

The Role of Performance Management

Effective management of performance—to include determining whether performance is adequate, and whether corrective action is needed—begins with adequate performance management practices. Agencies may encounter difficulties taking performance-based actions—not due to underlying problems with the law—but rather due to their failure to establish and adhere to appropriate performance management practices. To effectively and efficiently take performance-based actions, supervisors need to carefully create standards of performance and document how well employees are meeting those standards. For example, supervisors should: [206]

- Communicate performance expectations through carefully developed performance standards;
- Work with each employee to define individual performance goals with specified outcomes and timelines;
- Meet regularly with employees to review their progress toward achieving their goals;
- Regularly review employees' work;
- Provide frequent constructive feedback and coaching;
- Provide recognition and other positive consequences for good work; and
- Take prompt corrective action when employees are not performing well.

By investing the necessary time and effort into the performance management process, supervisors will be better able to help employees improve their performance. And in the cases where employees cannot or will not improve, the supervisor will have prepared the groundwork for taking action to remove the employee in accord with the requirements of due process.[207]

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[204] 5 U.S.C. § 4303.

[205] U.S. Merit Systems Protection Board, *Addressing Poor Performers and the Law*, Washington, DC, September 2009.

[206] U.S. Merit Systems Protection Board, *Managing for Engagement—Communication, Connection, and Courage*, Washington, DC, July 2009, p. 70.

[207] U.S. Merit Systems Protection Board, *What is Due Process in Federal Civil Service Employment?*, Washington, DC, May 2015, pp. 28–31.

MSPB guidance regarding effective performance management is included in the reports:

- *Managing for Engagement—Communication, Connection, and Courage* (2009)
- *What is Due Process in Federal Civil Service Employment?* (2015)

Lessons Learned from Case Examples

Options for Remedying Poor Performance - Illustration from Case Law: *Lovshin v. Navy*

History. The appellant was removed from his position for alleged unsatisfactory performance. Upon initial appeal, the MSPB found the standards and procedures met the requirements of 5 U.S.C. Chapter 75.[208] Instead of petitioning for review by the Board, the appellant appealed directly to the U.S. Court of Appeals for the Federal Circuit, asserting that his agency had not proved that his performance was unsatisfactory, among other issues of contention.[209] Given a decision they had handed down in a similar case in the interim (*Gende v. Department of Justice*, 23 M.S.P.R. 604 (1984)),[210] the Board sought for the U.S. Court of Appeals to remand the case back to the Board to decide.

Holding and consequences. The U.S. Court of Appeals for the Federal Circuit held that the removal action must be sustained because the establishment of Chapter 43 did not eliminate the option of using Chapter 75 to remove a poor performer. While Chapter 43 and Chapter 75 have different requirements, the agency met its obligations under Chapter 75 to use this procedure to remove the employee and did not have to also meet the requirements of Chapter 43. This decision disagreed with the Board's ruling in *Gende* that Chapter 43 was the only available procedure for taking performance-based actions after October 1, 1981.

Implications for practice. Agencies may choose between Chapter 43 and Chapter 75 for removals based on poor performance.[211] Since Chapter 43 covers the evaluation of an employee's work performance and subsequent remedial efforts and Chapter 75 focuses on removals and other disciplinary actions, both may be implemented to manage employee performance and take appropriate action if the employee's performance does not improve to acceptable levels.[212] Nevertheless, agencies must be mindful of meeting the requirements unique to each procedure and not commit any prohibited personnel practices.

Lessons Learned from Case Examples

The Role of Performance Management - Illustration from Case Law: *Henderson v. National Aeronautics and Space Administration*

History. The appellant was removed by his agency after his supervisor rated his performance as unacceptable in two critical elements and he failed to improve during a ninety day Performance Improvement Plan.

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[208] *Lovshin v. Department of the Navy*, 32 M.S.P.R. 393 (1987).

[209] *Lovshin v. Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985).

[210] In *Gende*, the Board held that Chapter 43 was the only procedure for removals based on performance.

[211] *Lovshin v. Department of the Navy*, 767 F.2d 826, ¶¶ 4, 141–142 (Fed. Cir. 1985).

[212] *Id.*

Holding and consequences. The appellant appealed his removal and the MSPB administrative judge found that the agency failed to prove that the appellant's performance standards were valid since the performance plan had five ratings, but only stated what was required to "meet" the standard, rather than what would be required to avoid performance-based action (the "needs improvement" level vs. the "fails to meet" level).[213] Additional information that had been provided to the employee via subsequent oral and written communication did not compensate for the inadequate performance standards. The agency appealed the reversal of the removal and the Board affirmed the initial opinion that the agency must cancel the removal action and restore the appellant's employment status.

Implications for practice. An agency must give every employee a reasonable opportunity to demonstrate acceptable performance by providing valid performance standards at the commencement of the performance appraisal period. These standards must provide enough information so the employee understands what is required to avoid a performance based action that would occur at the "fails to meet" expectations level rather than simply stating what is needed to meet the standard—unless this requirement is not applicable because the system is two level (pass/fail) or three level with only one level of unsuccessful. Additionally, it is insufficient to try to remedy performance standards by communicating additional information after informing the employee of unacceptable performance.

MSP 7: Employee Training and Development

> "Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance."

Explanation and Intent of MSP 7

By referencing training in the MSPs, Congress sought to better ensure that employees will receive adequate training in order to succeed in their jobs and therefore be retained. MSP 7 also communicates the dual goals of improving both individual and organizational performance through appropriate training and education of employees. MSP 7 was designed to ensure that employees receive the training they need to perform their jobs; that training plans are integrated into organizations' overall strategic plans; and that funds are available to accomplish necessary training. Agencies have a responsibility to invest time and money into training and development opportunities to help their employees gain the skills needed to adapt and excel as their work environments and responsibilities become increasingly complex. Agencies need to maintain this commitment to employee development even during stringent budgets because an investment in employees can provide an excellent return on investment in terms of improved individual and organizational performance. Investing in training and development can also aid employee retention when employees feel they are valued and are motivated by the opportunity to enhance their knowledge and abilities.

[213] U.S. Merit Systems Protection Board, *Case Report for February 4, 2011*, available at www.mspb.gov/netsearch/viewdocs.aspx?docnumber=574181&version=575908&application=HTML, accessed February 11, 2016. *See Henderson v. National Aeronautics and Space Administration*, 116 M.S.P.R. 96 (2011).

Federal Employee Perspective

In response to the 2010 MPS, six out of ten Federal employees agreed that their organization provides employees with necessary training. However, just over half concurred that their organization met the higher standard of providing employees with opportunities for growth.

Findings and Recommendations Related to MSP 7

MSP 7 acknowledges that agencies have a responsibility to ensure employees receive the education and training needed to perform successfully. Agency spending that supports employee training and development represents an investment in employees, as well as their ability to better accomplish the organization's mission.

Deciding Where to Invest Training Resources

In order to use their training resources most efficiently and effectively, agencies should take a strategic approach to identify which competencies are most needed now and in the future. They should also consider which training methods best suit different competencies, as well as the degree of trainability—how easily a competency can be learned. Competencies can be categorized as highly trainable, moderately trainable, and less trainable competencies, and agencies should focus their training and development resources accordingly.[214] Knowledge competencies tend to be highly trainable; Language (e.g., reading, writing, learning other languages), Social (e.g., getting along with others), and Reasoning (e.g., analysis) competencies are moderately trainable; while Motivation (e.g., willingness to perform work) and Mental Style (e.g., flexibility, conscientiousness, creativity) competencies are less trainable. For the less trainable competencies, agencies should focus more resources into the selection of applicants who already possess these competencies.

To foster the effectiveness of training and improve the efficiency of investing resources in training and development, supervisors should take the following steps:

1. Focus more time and resources on high quality career development planning to take into account current and future needs of the individual employees, the work team, as well as organizational needs.
2. Take a proactive and comprehensive view of training needs among the staff and consider the relative criticality of developing these competencies, taking into consideration how trainable they are.
3. Consider training prerequisites to ensure that employees are well-prepared to gain from the specific training being offered.
4. Review past training and evaluate how well the newly acquired knowledge and skills have transferred to the work environment. Consider testing employees before and after the training to be able to assess the return on investment.

[214] U.S. Merit Systems Protection Board, *Making the Right Connections: Targeting the Best Competencies for Training*, Washington, DC, February 2011.

5. Periodically discuss training needs with individual employees so they can provide input regarding their interests for career development and so they understand the rationale underlying the allocation of training opportunities. Include in the discussion a prioritization of competencies that need to be developed (ensuring that these competencies are amenable to training) and identify the best means to enhance these capabilities.

Given limitations on resources, supervisors should take trainability of critical competencies into account when planning for new hires or promotions of onboard staff. To use their resources most wisely, supervisors need to:

1. Assess the criticality and trainability of needed competencies.
2. Prioritize selecting for the most critical competencies that are low in trainability, followed by less critical competencies that are moderately trainable, with the least emphasis on other competencies that are less important and/or highly trainable.
3. Consult with HRM to identify the assessment tools that are most appropriate for each competency.
4. Given that candidates rarely have all of the desired competencies, use results of the assessment as input for determining how to prioritize training, focusing resources to address the most important needs that are likely to be ameliorated through training.

MSPB provided recommendations for the training and development of Federal employees in the report:

- *Evaluating Job Applicants: The Role of Training and Experience in Hiring* (2014)

Consideration of Training in the Assessment Process

Further, agencies should consider the quality and quantity of training provided to employees because this training may later be taken into account as part of the selection process if the training and experience (T & E) assessment method is used.[215] Indeed, survey results show that this is very likely as 82 percent of survey respondents reported using level of education to a great or moderate extent. Although not focused solely on training, methods that assess T & E, such as resumes, occupational questionnaires, and educational records are among the most frequently used assessment instruments in Federal hiring. T & E assessment should give more weight to training that is high quality, relevant to the job to be filled, and positively impacts performance in a measurable way. Otherwise, counting irrelevant training that fails to improve performance undermines the validity of the assessment process.

MSPB also explored the consideration of training as part of the selection process in the report:

- *Evaluating Job Applicants: The Role of Training and Experience in Hiring* (2014)

[215] U.S. Merit Systems Protection Board, *Evaluating Job Applicants: The Role of Training and Experience in Hiring*, Washington, DC, January 2014.

Training and Development for Senior Executives

Regarding specific employee populations, agencies should keep in mind that although senior executives have reached the highest levels of the organization, their training and development needs should not be overlooked. In fact, given the potential for their great influence over the organization as a result of their position, agencies should ensure that time and resources are devoted to ensuring their competence in these critical roles.[216] Unfortunately, many career senior executives (30 percent) have unmet developmental needs and only half have completed an Executive Development Plan as required.[217] Therefore, agency leaders need to encourage a culture supportive of continuous growth and development among senior executives, as well as employees.[218]

MSPB has addressed issues related to training and development of senior executives in the following report:

- *Training and Development for the Senior Executive Service: A Necessary Investment* (2015)

MSP 8: Neutrality

"Employees should be–
(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and
(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election."

Explanation and Intent of MSP 8

5 U.S.C. § 2301(b)(8)(A) notes that Federal employees cannot be treated arbitrarily. In other words, in contrast to an "at-will" employment process through which employees can be readily terminated without cause, Federal employees have rights that prevent agencies from removing them before certain conditions are met. This is to prevent actions from being taken under the pretext of removal for cause, when that action is actually motivated by a desire to replace the employee with a personal friend or political crony. This serves to reinforce the concept, established in the Pendleton Act of 1883, that Federal civil servants should be selected and retained based on merit, and not as part of the "spoils" system.

5 U.S.C. § 2301(b)(8)(B) bars Federal employees from using their authority or office to influence nominations and elections. The prohibition of Subsection (B) is enforced primarily through the 1939 Act to Prevent Pernicious Political Activity, as amended, which is more commonly known as the "Hatch Act." The Hatch Act, like MSP 8, prohibits Federal employees from using their "official authority or influence for

[216] U.S. Merit Systems Protection Board, *Training and Development for the Senior Executive Service: A Necessary Investment*, December 2015, pp. i–ii.

[217] U.S. Office of Personnel Management, *Senior Executive Service Survey 2011.*

[218] U.S. Merit Systems Protection Board, *Training and Development for the Senior Executive Service: A Necessary Investment*, December 2015, pp. i–iv.

the purpose of interfering with or affecting the result of an election."[219] Furthermore, Federal employees are prohibited from seeking nomination or running as a candidate for partisan political office.[220]

Federal Employee Perspective on MSP 8

According to Federal employees responding to the 2010 MPS, one of the biggest challenges for supervisors and managers is to refrain from demonstrating favoritism, which occurs when supervisors or managers base decisions regarding current or prospective employees on personal feelings and/or relationships and not on objective criteria, such as assessments of ability, knowledge, and skills. Only 28 percent stated that their organizations do not engage in favoritism.

In response to MSPB's 2011 Federal Merit Systems Survey, nearly half of all employees (48 percent) agreed that favoritism is a problem in their organization. Many felt this impact directly as 28 percent of employees responded that their supervisor demonstrated favoritism, while 53 percent believed other supervisors in their organization showed favoritism toward some employees. Similarly, on MSPB's 2007 Career Advancement Survey, employees were more likely to agree that promotions were driven by "who you know" (72 percent) rather than competence (39 percent) or hard work (36 percent).[221] Additionally, 84 percent of employees who had applied but not been selected for a position within the last two years said that the selectee had been preselected.[222] In other words, they believed that the competition was not "fair and open" because the selecting official had decided who to select in advance and regardless of the qualifications of the other applicants.

However, perceptions of favoritism were not limited to selections. Employees were most likely to believe that supervisors demonstrated favoritism through more informal means, such as social interactions (27 percent) and work assignments (26 percent). However, they also frequently perceived favoritism in awards (23 percent), performance appraisals (21 percent), advancement and promotion (21 percent), and acting supervisor opportunities (21 percent).

In a similar vein, employees have also expressed concern about nepotism,[223] which occurs when a public official provides an advantage (e.g., selection, advancement) to a relative as defined in 5 U.S.C. § 3110. In response to the 2011 Federal Merit Systems Survey, 5 percent of employees said their supervisor has committed nepotism, compared with 27 percent of employees who said that a supervisor elsewhere in their organization had demonstrated nepotism.

Regarding politically motivated actions, half of the MPS 2010 respondents agreed that their organization protects employees from political coercion. Further, only 1 percent of Federal employees responded that they had experienced discrimination based on political affiliation within the past two years and less than

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[219] 5 U.S.C. § 7323(a)(1).

[220] S U.S.C. § 7323(a)(3).

[221] U.S. Merit Systems Protection Board, *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism*, Washington, DC, December 2013, p. 57.

[222] *Id.* at p. 8.

[223] *Id.* at p. 9.

1 percent reported that they had experienced coercion related to political activity in the preceding two years.[224]

Therefore, while Federal employees rarely perceive biases based on political affiliation, agencies and selecting officials still have substantial room for improvement to convince employees that the best qualified applicant will be selected for promotion or that employees will be treated fairly in any other decisions that their supervisor makes. Unless supervisors base their decisions on merit rather than social, familial or political connections and convince employees that their actions are not arbitrary or motivated by non-merit bases, employees will remain skeptical about whether their agencies are operating fully in accord with the merit system principles.

Findings and Recommendations Related to MSP 8

MSP 8 draws attention to some of the most common potential threats to basing actions on merit. Instead of basing decisions on the merit system principles, a supervisor might arbitrarily act to aid friends or political allies.

Preventing Partisan Political Actions

As mentioned earlier, a 2009 report *Fair and Equitable Treatment: Progress Made and Challenges Remaining* summarized survey findings indicating that employees generally believed that discrimination based on race, sex and age have decreased and that discrimination based on marital status, disability, religion and political affiliation have remained very low.[225] Perceptions of political coercion have also remained low.[226] However, given the criticality of zero tolerance for politically motivated discrimination or coercion of political activities within the Federal civil service, agencies should continue to ensure that employees (including political appointees) are aware of the limitations on their activities.[227]

MSPB has recently summarized Federal employee opinions regarding the occurrence of prohibited personnel practices related to partisan political actions in several reports:

- *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism* (2013)
- *Fair and Equitable Treatment: Progress Made and Challenges Remaining* (2009)
- *Prohibited Personnel Practices: Employee Perceptions* (2011)

[224] U.S. Merit Systems Protection Board, *Prohibited Personnel Practices: Employee Perceptions*, Washington, DC, August 2011, pp. 28–29.

[225] U.S. Merit Systems Protection Board, *Fair and Equitable Treatment: Progress Made and Challenges Remaining*, Washington, DC, December 2009, pp. 53–54.

[226] U.S. Merit Systems Protection Board, *Prohibited Personnel Practices: Employee Perceptions*, Washington, DC, August 2011, p. 29.

[227] *Id.* at pp. 27–29.

Avoiding Favoritism

MSPB research reveals that many Federal employees harbor concerns about whether supervisors base decisions on merit or favoritism.[228] Agencies have a vested interest in reassuring employees that decisions are merit-based because actual or perceived favoritism can undermine employee satisfaction and engagement, as well as negatively impacting agency performance, such as through decreased employee effort, increased turnover, impaired teamwork, and the employment of less capable employees.[229]

To remedy employees' suspicions of favoritism, agencies must first understand what is driving these perceptions. Possible explanations include the following:[230]

1. Intentional favoritism, where a supervisor provides an advantage to an applicant or employee based on a personal connection;
2. Unintentional favoritism, where a supervisor makes a flawed decision that conveys an unfair advantage based on a lack of guidance;
3. Misinterpretation by employees, when they mistakenly view a merit-based decision to be due to favoritism, perhaps due to lack of transparency or the presence of a legitimate professional relationship.

Information to educate and guide supervisors and/or observers may prevent misunderstandings such as those that arise from unintentional favoritism and misinterpretations by employees.[231] However, intentional favoritism needs to be addressed by holding supervisors accountable for allowing favoritism to bias their decisions.[232]

To prevent favoritism (and other non-merit based factors) from impeding the Federal merit systems, agencies should take the following actions:[233]

- Select supervisors who are committed to supporting the MSPs and avoiding PPPs;
- Provide in-depth training to all supervisors at the time of hire and on a regularly recurring basis;
- Hold supervisors accountable for adhering to the MSPs and avoiding PPPs;

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[228] U.S. Merit Systems Protection Board, *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism*, Washington, DC, December 2013 and U.S. Merit Systems Protection Board, *Fair and Equitable Treatment: Progress Made and Challenges Remaining,* December 2009.

[229] U.S. Merit Systems Protection Board, *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism*, Washington, DC, December 2013, pp. 49–53.

[230] *Id.* at pp. 31–36.

[231] *Id.* at pp. 31–39.

[232] *Id.* at pp. 32–33 and pp. 36–38.

[233] *Id.* at pp. 57–58.

- Follow best practices in the assessment process, such as: (1) identify key competencies through job analysis; (2) develop and implement valid and reliable assessments for critical competencies, and (3) ensure transparency by communicating to applicants the key competencies that will be measured and the assessment methods that will be used; and
- Encourage HRM staff to provide their expert advice and support them when they express concerns.

The bottom line is that selecting officials should be vigilant against being influenced by personal relationships or feelings of affinity (or any other biases), as opposed to focusing on job-related qualifications. However, as shown earlier in the discussion of training that agencies provide on the MSPs and PPPs, supervisors do not always have a full understanding of what they should and should not do. Even worse, some are aware of prohibitions against non-merit based decisions, and yet choose to proceed since they do not believe they will be held accountable.

MSPB has specifically examined the issue of favoritism in the reports:

- *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism* (2013)
- *Fair and Equitable Treatment: Progress Made and Challenges Remaining* (2009)

Lessons Learned from Case Examples

Partisan Politics - Illustrations from Case Law: *Special Counsel, Petitioner v. Mark*[234] and *Special Counsel, Petitioner v. Briggs*[235]

History. Both of these cases were brought before the Board by OSC as Hatch Act violations. In the first case, the appellant (Mark) forwarded one email to several co-workers soliciting political campaign donations. In the second case, the appellant (Briggs) was a candidate in a partisan election when he was hired by a Federal agency. His agency and the Office of Special Counsel repeatedly warned him, but he continued his candidacy.

Holding and consequences. In the first case, the Board held that the appellant did violate the Hatch Act. However, they stated that a variety of mitigating and aggravating factors should be considered to determine whether removal is the appropriate penalty. These include: (1) the nature of the offense and the extent of the employee's participation; (2) the employee's motive and intent; (3) whether the employee knew the activity was forbidden; (4) whether the employee continued the actions; (5) the employee's past employment record, and (6) the extent of the political nature of the activity.[236] Upon analyzing these factors, the Board decided that the limited nature of the activity (one email), which was sent to colleagues (not under his authority),

[234] *Special Counsel v. Mark*, 114 M.S.P.R. 516 (2010).

[235] *Special Counsel v. Briggs*, 110 M.S.P.R. 6 (2008).

[236] *Special Counsel v. Mark*, 114 M.S.P.R. 516, ¶ 8 (2010).

and which he said he did not realize was a Hatch Act violation, did not warrant removal given his otherwise satisfactory performance record. Therefore, the Board reduced the penalty to a 120-day suspension. In contrast, in the second case, the Board found that the appellant violated the Hatch Act and failed to demonstrate that removal was not warranted.

Implications for practice. Agencies have a responsibility to ensure that all employees are aware of the Hatch Act and its restrictions on political activity by Federal employees. In the event that an employee does violate the Hatch Act, the agency should promptly notify the employee, orally and in writing, and report the violation to OSC.

MSP 9: Public Interest

"Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—
(A) a violation of any law, rule, or regulation, or
(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

Explanation and Intent of MSP 9

Federal employees who act as whistleblowers can greatly facilitate the efficiency and effectiveness of the Federal Government by reporting serious wrongdoing that involves breaking laws, wasting money or endangering the well-being of others.[237] However, if they are afraid to report it due to fear of reprisal, this has a chilling effect on their ability to surface their concerns.[238] Therefore, MSP 9 establishes that Federal employees should be protected against reprisal when they disclose wrongful conduct.[239]

What is whistleblowing?

Whistleblowing occurs when an employee has a reasonable belief of and makes a specific and detailed allegation of wrongdoing. Under the Whistleblower Protection Enhancement Act of 2012 (WPEA), employees are protected when they make allegations of wrongdoing by disclosing a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a "substantial and specific danger" to public health or safety.

[237] U.S. Merit Systems Protection Board, *Whistleblower Protections for Federal Employees*, Washington, DC, September 2010, pp 13–17 and U.S. Merit Systems Protection Board, *Blowing the Whistle: Barrier to Federal Employees Making Disclosures*, Washington, DC, November 2011, pp. 15–16.

[238] U.S. Merit Systems Protection Board, *Blowing the Whistle: Barrier to Federal Employees Making Disclosures*, Washington, DC, November 2011, pp. 15–24.

[239] For more information on filing an appeal based on retaliation for whistleblowing, please see www.mspb.gov/appeals/whistleblower.htm for MSPB Questions and Answers About Whistleblower Appeals.

As noted earlier, Federal employment originated in a system built upon hiring and removal based upon political loyalties. The Pendleton Act of 1883 shifted employment criteria to merit, but it did not address removals. Therefore, its provisions did nothing to ensure that removals were purely due to poor performance or conduct and to ensure that Federal whistleblowers would not be removed if they disclosed wrongdoing within their agencies. To address this need, in 1912, Congress enacted the Lloyd-LaFollette Act, which stated that removal actions must be for merit-based reasons and not inappropriate causes, which would include whistleblowing. In 1978, Congress enacted the CSRA, which included the establishment of the OSC. OSC has the responsibility to listen to complaints filed by alleged whistleblowers and seek redress on behalf of complainants who meet the legal definition of a whistleblower.[240]

Congress passed the Whistleblower Protection Act of 1989 (WPA) and the Whistleblower Protection Enhancement Act of 2012 (WPEA) to expand the circumstances under which a disclosure would constitute a protected activity. Additionally, Congress passed the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (the No FEAR Act) which requires agencies to provide annual notice to employees about their rights under the anti-discrimination and whistleblower laws, as well as training every two years.[241] Therefore, the provisions of the CSRA, the WPA and the WPEA enhanced whistleblower appeal rights, while the No FEAR Act helps ensure that employees are aware of these rights.

Federal Employee Perspective

According to 2010 MPS data as shown earlier in **Figure 2**, slightly under half of Federal employees agreed that their organization protects employees against reprisal for exercising a grievance, complaint or appeal right (46 percent) or against reprisal for whistleblowing (45 percent). By comparison, when asked if they actually experienced retaliation for exercising a grievance, complaint or appeal right or for conducting whistleblower activity, analysis of other longitudinal survey items reveals a downward trend since 1992 of employees reporting that they actually experienced reprisal after taking one of those actions.[242] In 2010, only 3.9 percent of survey respondents said they experienced retaliation for exercising a grievance or appeal while 3.2 percent said they experienced whistleblower retaliation.[243] Although these percentages are small, any instances of retaliation remain a cause for concern so additional steps should be taken—not only to decrease the instances of retaliation—but also to reassure employees who might consider engaging in whistleblowing or exercising grievance or appeal rights. Further, it is worth noting that survey results have revealed that significant percentages of employees harbor concerns that reporting wrongdoing would negatively influence their future careers:, such as through their ability to get a promotion (31 percent), their performance appraisal (36 percent), or that they would be suspended, demoted or fired (37 percent).[244]

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[240] OSC was initially established as an office within the MSPB, but in 1989, OSC was made an independent agency and in 1994, whistleblowers were given the right to file retaliation complaints with MSPB if they were unable to get relief through OSC.

[241] Notification and Federal Employee Antidiscrimination and Retaliation (No FEAR) Act, P.L. 107-174, Section 202.

[242] U.S. Merit Systems Protection Board, *Prohibited Personnel Practices: Employee Perceptions*, Washington, DC, August 2011, p. 33.

[243] *Id.* at p. 33.

[244] U.S. Merit Systems Protection Board, *Blowing the Whistle: Barrier to Federal Employees Making Disclosures*, Washington, DC, p. 17.

Findings and Recommendations Related to MSP 9

As mentioned above, Congress has taken incremental steps over the past thirty-five years to improve protections for whistleblowers and those who exercise grievance or appeal rights. In addition, they have implemented requirements to ensure that employees are aware of these rights. Nevertheless, there is still room for improvement to ensure that employees feel that they can safely raise concerns.

Create a Culture Supportive of Exercising Rights

MSP 9 encourages Federal employees to report "a violation of any law, rule or regulation," or gross "mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[245] As a result of Federal employees identifying these significant problems, the agency leadership can take appropriate steps to better accomplish their mission and maintain the respect of their employees and the American public. However, given concerns that employees may have about the potential dangers to their careers if they do report problems, agencies must work to create cultures that are viewed as supportive of whistleblowers.[246] To achieve this, agencies should:

- Encourage employees to speak to their supervisors and managers regarding potential wrongdoing without fear of suffering consequences, such a being punished or shunned.
- Demonstrate to employees that reports of wrongdoing will result in positive changes.
- Inform employees that they can report a reasonable suspicion of wrongdoing rather than requiring them to be certain.
- Provide training every two years to employees regarding whistleblower rights.[247]
- Provide the legally mandated annual notice of their rights.
- Ensure that potential whistleblowers know precisely what must be established in order to prevail on their claims, as any criteria found lacking will strip the MSPB of jurisdiction over an appeal of alleged retaliation.

MSPB has provided recommendations for agencies and employees regarding how to protect the rights of whistleblowers in reports such as:

- *Blowing the Whistle: Barriers to Federal Employees Making Disclosures* (2011)
- *Whistleblower Protections for Federal Employees* (2010)

[245] 5 U.S.C. § 2301(b)(9).

[246] U.S. Merit Systems Protection Board, *Blowing the Whistle: Barriers to Federal Employees Making Disclosures*, Washington, DC, November 2011.

[247] *Id.* MSPB survey data confirm that most agencies are taking the required steps to train employees regarding their whistleblower rights, although 25 percent of survey respondents indicated that they had not received this training.

Lessons Learned from Case Examples

Create a Culture Supportive of Exercising Rights - Illustration from Case Law: *Chambers v. Department of the Interior*

History. The appellant, who was the Chief of the U.S. Park Police, expressed concerns regarding her organization's need for additional resources and these statements were published in *The Washington Post.* The agency placed her on administrative leave and ultimately removed her on charges of misconduct for (1) disclosing budget information, (2) not following her supervisor's instructions, and (3) not following the chain of command. She appealed the removal, which she attributed to retaliation for her disclosures of what she regarded as public safety dangers.[248]

Holding and consequences. This case continued over several years and multiple decisions by the Board and the U.S. Court of Appeals for the Federal Circuit.[249] However, the end result was a holding that the appellant had made a protected disclosure and established by preponderant evidence that her protected disclosures were a contributing factor to her being placed on administrative leave and ultimately removed. The agency failed to prove with clear and convincing evidence that it would have taken the same actions if she had not made these protected disclosures. Therefore, the Board reversed the removal of the appellant for statements she made pertaining to safety and other issues.[250]

Implications for practice. The Whistleblower Protection Act (WPA) and the Whistleblower Protection Enhancement Act of 2012 (WPEA) prohibit any employee who has the authority to take, direct others to take, recommend, or approve any personnel action from taking, failing to take, or threatening to take or fail to take, any personnel action because of the disclosure of information by an employee or applicant for employment that the employee or applicant reasonably believes evidences, among other things, gross mismanagement or gross waste of funds.[251] Therefore, agencies and employees must exercise caution when determining whether employees' statements meet the criteria for protection under whistleblower protection laws. If they do, agencies should respond appropriately to this information and not retaliate against employees for reporting concerns. Ideally, agencies will create a supportive culture that proactively encourages employees to share their concerns with those who can address them to further the efficiency and effectiveness of the government. This will create a work environment that is more closely aligned with MSP 9.

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[248] U.S. Merit Systems Protection Board, *Case Report for January 14, 2011.* This case report summarizes the multiple decisions of the Board and the U.S. Court of Appeals for the Federal Circuit.

[249] *Id.*

[250] *Chambers v. Department of the Interior*, 116 M.S.P.R. 17, 71 (2011).

[251] 5 U.S.C. § 2302(b)(8).

Conclusions and Recommendations

Conclusions

According to MSPB surveys, most, but not all, Federal employees and supervisors respond that they are aware of the MSPs. However, the MSPs are so critical to the fair and effective management of the Federal workforce that agencies should strive for higher rates of awareness and greater depth of understanding, particularly among supervisors. No supervisor should exercise workforce management authority without full comprehension of the expectations inherent in the MSPs, as well as a commitment to uphold the MSPs and avoid committing PPPs.

Additionally, knowledge of the MSPs should go beyond basic familiarity and strive for a more thorough understanding, such as how the MSPs should influence decisions made by employees at all levels within the Federal workforce. To accomplish this, agencies should ensure that all employees receive information on the content, as well as applications of the MSPs and PPPs to the work environment. Unfortunately, results of our research indicate that many agencies have neglected to provide employees with adequate training on the MSPs and PPPs, in spite of requirements for supervisors to receive related training at a minimum of every three years, following their selection for this role. Further, given their influential roles and authority to impact large numbers of employees with their decisions, leaders (supervisors, managers and executives) should receive training on the MSPs that is tailored to their needs and agencies need to hold leaders accountable for acting in accord with the spirit and intent of the MSPs.

Results from MSPB surveys indicate that Federal employees perceive that some aspects of the MSPs have been widely achieved but others remain challenging. For example, more than half of Federal employees agreed that their organizations effectively combated discrimination, yet fewer than 30 percent felt their organizations addressed poor performers effectively or refrained from favoritism.

As long as members of the Federal workforce lack confidence that their organizations are fully implementing the MSPs, there exists a need for more attention to improving understanding of the MSPs by all employees—from the front line employees to the top level executives. We recognize that comprehensive and continuing education requires a commitment of time and resources. Nevertheless, because the MSPs were designed to improve outcomes for employees, agencies and the value to the taxpayers, we believe there is a clear business case—as well as a legal mandate—for providing this education. Ultimately, promoting the MSPs remains vital to achieving the full potential inherent within the Federal merit systems.

Recommendations

A variety of actions at various levels within agencies can improve the ability of the Federal Government to live up to the ideals of the MSPs and avoid the commission of PPPs. These recommendations address improving both the knowledge level of Federal employees regarding the MSPs and PPPs, as well as addressing the role that accountability can play for those who to disregard the responsibilities inherent in maintaining the MSPs and avoiding PPPs.

Key Recommendations for Agencies

To ensure a merit-based culture that promotes the MSPs and protects against PPPs, agencies must:

- Select supervisors who are knowledgeable of and committed to upholding the high expectations of the Federal merit systems.
- Provide in-depth training regarding the content and applications of the MSPs and PPPs (as well as the potential costs for not adhering to these expectations) to all supervisors at the time of hire and on a regularly recurring basis.
- Ensure that supervisors receive the required training at the time of selection and as needed in subsequent years (at a minimum frequency of every three years as legally mandated). Although the requirements do not specifically mention the MSPs and PPPs, to help supervisors adequately perform their duties, this training should cover not only the content of the MSPs and PPPs, but also the practical implications.
- Ensure that political appointees are well informed on the practical implications of the MSPs and PPPs and understand the criticality of demonstrating their full support of the Federal merit systems given their influential leadership role.
- Hold all supervisors, managers and executives accountable for adhering to the MSPs and avoiding PPPs.
- Ensure HRM employees have the expertise to correctly advise regarding the impact of the MSPs on all workforce management decisions.
- Educate employees regarding their rights and responsibilities according to the MSPs and PPPs and ensure that they are aware of the procedures for redress in the event they feel their rights have been violated.
- Understand the dual responsibility to employees and the public to manage the Federal workforce fairly and effectively.

Key Recommendations for Supervisors

Supervisors directly manage the Federal workforce, therefore, each supervisor must:

- Fully appreciate the implications of each MSP and PPP to understand how their actions impact their agency's embodiment of the merit systems.
- Ask for assistance from HRM staff or others with relevant expertise prior to taking an action that could be inconsistent with the MSPs or constitute a PPP.
- Work with HRM to understand the options available to achieve the desired merit-based goals and not request that HRM take actions that violate MSPs or result in PPPs.

Key Recommendations for Human Resources Management Staff

HRM employees play a critical role in helping agencies and managers promote the MSPs and avoid the commission of PPPs. To that end, they should:

- Provide expert advice on merit-based workforce management, including best practices for recruiting, hiring (including promoting), evaluating performance, determining awards, distributing work assignments and training and development opportunities, and administering discipline.
- Speak up when they observe a violation of a MSP or the commission of a PPP and for HRM supervisors, managers and executives to support HRM staff when they raise concerns regarding MSPs or PPPs.

Key Recommendations for Employees

Employees should take the following steps to manage their performance and careers:

- Learn more about the MSPs and the PPPs.
- Work with supervisors and colleagues to support the MSPs.
- When it appears that a MSP has been violated or a PPP committed, consider discussing the act with HRM or the EEO office or by filing a grievance, appeal or complaint.

Appendix A. The Merit System Principles – 5 U.S.C. § 2301(b)

Federal personnel management should be implemented consistent with the following Merit System Principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be—

> (A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and
>
> (B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—

> (A) a violation of any law, rule, or regulation, or
>
> (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Appendix B. The Prohibited Personnel Practices–5 U.S.C. § 2302(b)

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e–16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. §§ 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 206 (d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. § 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110 (a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110 (a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(11)

(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; or

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title; or

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."

Appendix C. Method for the MSP Education Agency Questionnaire

To obtain feedback regarding current agency training practices regarding the MSPs and PPPs, we distributed an agency questionnaire to the Chief Human Capital Officers (CHCOs) of the 26 departments and large independent agencies listed below. Given that practices may vary within departments by bureau, we gave the CHCOs discretion regarding the appropriate level of distribution within their organization. As a result, we received a total of 73 completed agency questionnaires.

Departments and Large Independent Agencies Completing the MSP Education Agency Questionnaire

Departments	Independent Agencies
Department of Agriculture	Environmental Protection Agency
Department of Commerce	Equal Employment Opportunity Commission
Department of Defense	Federal Deposit Insurance Corporation
Department of Education	General Services Administration
Department of Energy	National Aeronautics and Space Administration
Department of Health and Human Services	National Science Foundation
Department of Homeland Security	Nuclear Regulatory Commission
Department of Housing & Urban Development	Office of Personnel Management
Department of the Interior	Small Business Administration
Department of Justice	Social Security Administration
Department of Labor	U.S. Agency for International Development
Department of State	
Department of Transportation	
Department of the Treasury	
Department of Veterans Affairs	

A replica of the agency questionnaire, formatted for printing, appears on the following pages.

MSPB Questionnaire for Federal Agencies
Merit System Principles Education

You have been asked to complete this questionnaire to support a study being conducted by the U.S. Merit Systems Protection Board (MSPB). Under 5 U.S.C. §§ 1204(a)(3), MSPB has the authority to study issues related to the civil service and issue reports of its findings to the President and the Congress. MSPB is authorized by 5 U.S.C. § 1204(e)(3) to obtain from agencies the information, reports, and records it deems necessary to the performance of this mission.

To send us your survey responses, you have the options to—

1. Complete the survey in the fillable pdf, save your responses and return it electronically as an email attachment; or
2. Print out the survey, complete it on paper, and email a scanned copy of your responses; or
3. Print out the survey, complete it on paper, and fax it.

Thank you for your assistance with this important project. If you would like to receive a copy of the report when it is completed, please send an email to studies@mspb.gov and request to be added to our mailing list.

Please provide the name, phone number and email address for the person who completed this questionnaire. We may follow up with you to ask additional questions.

Name: _____

Title: _____

Organization: _____
What organization (e.g., Department, agency, bureau) does this cover?

Telephone: _____

Email: _____

Merit System Principles Education

1. Does your agency provide instruction on the following topics to employees, new and experienced supervisors, and political appointees? Please mark your responses in the corresponding boxes using the following numbers:

   1 = Yes, this training is provided to all in this group as part of a focused course on the topic
   2 = Yes, this training is provided to all in this group as part of a broader course (e.g., introduction to supervision)
   3 = Yes, this training is provided to some in this group
   0 = No, this training is not provided to anyone in this group
   9 = Don't know

Topic	*Employees*	*New Supervisors*	*Refresher Training for Supervisors*	*Political Appointees*
Overview of the Merit System Principles				
Overview of the Prohibited Personnel Practices				
Recruitment				
Hiring				
Preventing or Remedying Discrimination				
Setting Pay				
Awards and Recognition				
Maintaining Standards of Conduct				
Efficient and Effective Workforce Management				
Managing Poor Performers				
Protecting Employees Against Arbitrary Action, Favoritism, Political Coercion				
Protecting Employees Against Reprisal for Whistleblowing or Exercising a Grievance, Complaint or Appeal Right				

Questions 2–7 only apply to training provided for new supervisors. If your organization does not provide this training to new supervisors, then skip to Question 8.

2. When do new supervisors typically receive training on the Merit System Principles (MSPs) and Prohibited Personnel Practices (PPPs)?

   - ☐ After selection, but before assuming supervisory responsibilities
   - ☐ Within one week of becoming a supervisor
   - ☐ Within one month of becoming a supervisor
   - ☐ Within 1-3 months of becoming a supervisor
   - ☐ Within 4-6 months of becoming a supervisor
   - ☐ More than 6 months after becoming a supervisor
   - ☐ Not applicable, we don't provide new supervisor training on the MSPs and PPPs

3. What is the total length of new supervisor training on the MSPs and PPPs?

   - ☐ Less than 1 hour
   - ☐ 1-3 hours
   - ☐ 4-8 hours
   - ☐ More than 1 day but less than 3 days
   - ☐ More than 3 days

4. What percent of the training is on the MSPs? _____%

5. How is the MSP/PPP training for new supervisors provided? (Select all that apply.)

   - ☐ Via self-paced computer modules
   - ☐ Live presentation by a person through a webinar/video-based instruction
   - ☐ Live presentation by a person in a large group setting (classroom)
   - ☐ By a person on a one-to-one basis
   - ☐ Other: _____

6. Who provides the MSP/PPP training for new supervisors? (Select all that apply.)

   ☐ Human Resources Management (HRM) Staff

   ☐ Equal Employment Opportunity (EEO) Staff

   ☐ Staff from within the new supervisor's organization

   ☐ Other: _____

7. Do you conduct evaluations of the MSP/PPP training for new supervisors?

   ☐ Yes

   ☐ No

8. Is refresher training on the MSPs/PPPs provided to supervisors?

   ☐ Yes If so, how frequently? _____

   ☐ No

9. How well do you think the following groups understand the MSPs/PPPs?

(a)	Career employees (nonsupervisory)	Excellent	Good	Fair	Poor
(b)	New career supervisors	Excellent	Good	Fair	Poor
(c)	Experienced supervisors/managers	Excellent	Good	Fair	Poor
(d)	New non-career (political appointee) supervisors/executives	Excellent	Good	Fair	Poor

10. Do you have any additional comments or suggestions regarding training on the MSPs and PPs?

Appendix D. Relationship between the MSPs and the PPPs

As mentioned earlier, the MSPs are not self-executing, which means they cannot serve as the basis for a corrective action.[1] However, violations of MSPs may also involve the commission of PPPs. As a result, there exists a close correspondence between the MSPs and the PPPs as the PPPs clearly define actions that would undermine a merit system. Together, these MSPs and PPPs establish the vision for how the Federal workforce should be fairly and effectively managed and how Federal employees should view their rights and responsibilities. The general themes across the MSPs and PPPs relate to treating employees fairly in all aspects of their employment; protecting employees from harm, such as reprisal for the exercise of a legally protected right; and encouraging the efficiency of the Federal workforce.[2]

The tables below summarize the relationship between the MSPs and the PPPs. This demonstrates how the two complement each other to establish an ideal for how the workforce should be managed (generally through the MSPs), as well as to clarify what actions are clearly forbidden as PPPs. For example, while MSP 1 aims for a representative workforce that is selected based solely on merit, PPP 1 prohibits discrimination against employees or applicants and PPP 2 requires that any personnel decision be based on merit (as determined by "an evaluation of the work performance, ability, aptitude or general qualifications"). Similarly, PPP 10 prohibits discrimination against employees or applicants based on conduct not related to the job. Further, PPPs 4, 5, 6, and 7 outline common means through which officials might impede merit-based decisions.

MSP 2 notes that legally protected bases for discrimination such as "political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition" cannot be considered; neither should any factors that would compromise the employee's "privacy and constitutional rights." PPPs 1 and 10 provide comparable protections.

MSP 8 also remarks on the criticality of fairness—by protecting employees against partisan influence. In similar wording, PPP 3 prohibits the coercion of political activity or retribution against an employee for not engaging in partisan activity. MSP 8 also discourages "arbitrary action" and "personal favoritism" which corresponds to MSP 1's expectation that personnel decisions be merit-based with selections made through "fair and open competition." Also, PPP 10's general protection against discrimination based on conduct that is not related to the job also echoes MSP 8's protections.

MSP 3 notes the right to "equal pay for equal work" which frequently invokes a need to guard against paying employees differently based on their demographic characteristics (as noted in PPP 1) rather than their ability to perform the work. However, MSP 3 goes further to suggest that the Federal Government should also compensate employees fairly in reference to private sector, as well as to provide recognition and awards for excellent performance.

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[1] *Pollard v. Office of Personnel Management*, 52 M.S.P.R. 566, 569–570 (1992).

[2] A factor analysis of MPS 2010 results is discussed on p. 7 of the 2013 MSPB report, *Managing Public Employees in the Public Interest: Employee Perspectives on Merit Principles in Federal Workplaces*. The resulting factors were labeled "fairness," "protection," and "stewardship."

As previously noted in **Figure 2**, Federal employees believe that MSP 6 represents the greatest challenge for supervisors. In contrast to MSP 3, which directs agencies to reward desired performance, MSP 6 requires corrective action for poor performance, including removing those employees who "cannot or will not improve their performance to meet required standards." The corollary PPPs 1 and 2 indicate that non-merit reasons should not influence personnel decisions, such as removal.

Similarly, as described in MSP 9 and PPPs 8, 9, and 13, employees are protected from retaliation for certain covered actions. Specifically, in the event that an employee discloses information that meets the criteria for whistleblowing or exercises covered appeal, complaint or grievance rights, or assists others with exercising their rights or for refusing an order that would require them to break the law, an employer cannot take punitive actions against the employee.

In contrast to other MSPs, MSPs 4 and 5 discuss broad aspirational goals established for the Federal Government and do not uniquely relate to specific PPPs. Instead, these MSPs identify in general why PPPs should not occur since committing any of the PPPs would undermine the integrity, efficiency and effectiveness of the Federal civil service.

Likewise, MSP 7 lacks an individually corresponding PPP, given that it relates to the aim of providing employees with needed education and training to enable them to effectively perform their duties. In this manner, it clearly identifies a goal which would enable the Federal workforce to be more effectively and efficiently managed because even in times of budget crisis, judiciously providing employees with needed learning opportunities can provide a positive return on investment. Additionally, providing employees with training can have the causal effect of reducing the likelihood of these employees committing PPPs.

In summary, there is considerable interaction between the aspirational MSPs and the actionable PPPs which demonstrates extensive overlap between these guiding principles. In other words, although MSPs were intended to serve as aspirational goals and have been deemed not to be "self-actuating," violations of an MSP will likely result in a PPP that can be prosecuted. Further, PPP 12 may cover additional actions that result in a violation of a MSP. Together the MSPs and PPPs create a clear standard of expectations for not only the minimal standards, but also the ideals for fair, effective and efficient management of the Federal workforce.

Summary of the MSPs and Related PPPs[3]

Merit System Principle		Related PPP(s)
1	Recruit a diverse pool of applicants. Hold fair and open competition. Select the best-qualified applicants.	1, 2, 4, 5, 6, 7, 10
2	Treat employees and applicants fairly and equitably, and with respect for their privacy and constitutional rights.	1, 10
3	Pay employees fairly. Recognize and reward performance.	1
4	Hold employees to high standards. Put the public interest first.	All
5	Use the workforce efficiently and effectively.	All
6	Retain employees based on performance. Effectively address poor performance.	1, 2
7	Provide employees with training and development.	All
8	Protect employees against arbitrary action, favoritism, and political coercion.	3; also 1, 2, 4, 5, 6, 7, 10
9	Protect employees against reprisal for whistleblowing or exercising a right.	8, 9, 13

Prohibited Personnel Practice **An employee who may take, influence, or recommend a personnel action may not—**	
1	Discriminate on any protected basis, such as sex, ethnicity or race, disability, or religion.
2	Consider any reference or recommendation that is not directly related to the job to be performed.
3	Coerce political activity or base a personnel action on political activity or inactivity.
4	Obstruct any person's right to compete for employment.
5	Influence any person to withdraw from competition.
6	Grant any unauthorized preference to an employee or applicant.
7	Provide an advantage to a relative.
8	Take or influence a personnel action in reprisal for whistleblowing.
9	Take or influence a personnel action in reprisal for exercise of a right of complaint or appeal.
10	Discriminate on the basis of conduct that is not job-related.
11	Take or influence a personnel action that violates any veterans' preference requirement.
12	Take or influence a personnel action that violates any merit system principle.
13	Implement or enforce any improper nondisclosure policy or agreement.

[3] The MSPs and PPPs here are paraphrased for simplicity and brevity. For the full text of the MSPs and PPPs, refer to Appendix A and Appendix B or 5 U.S.C. §§ 2301(b) and 2302(b), respectively.

Appendix E. MSPB Reports by Merit System Principle

These reports (and more) are available at: www.mspb.gov/studies/viewallstudies.htm.

MSP 1: Recruitment, Selection and Advancement

> "Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity."

Recruitment

- *Managing Federal Recruitment: Issues, Insights, and Illustrations* (2004)
- *Attracting the Next Generation: A Look at Federal Entry-Level New Hires* (2008)
- *In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees from Outside the Federal Government* (2008)
- *Reforming Federal Hiring: Beyond Faster and Cheaper* (2006)

Fair and Open Competition

- *The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs* (2015)
- *In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees from Outside the Federal Government* (2008)
- *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism* (2013)
- *Fair and Equitable Treatment: Progress Made and Challenges Remaining* (2009)

Assessment

- *Reforming Federal Hiring: Beyond Faster and Cheaper* (2006)
- *Fair and Equitable Treatment: Progress Made and Challenges Remaining* (2009)
- *Assessing Federal Job Seekers in a Delegated Examining Environment* (2001)
- *Federal Appointment Authorities: Cutting through the Confusion* (2008)

Assessment and Selection Instruments

- *The Federal Selection Interview: Unrealized Potential* (2003)
- *Evaluating Job Applicants: The Role of Training and Experience in Hiring* (2014)
- *Identifying Talent Through Technology: Automated Hiring Systems in Federal Agencies* (2004)
- *Job Simulations: Trying Out for a Federal Job* (2009)
- *Reference Checking in Federal Hiring: Making the Call* (2005)

Probationary Period

- *The Probationary Period: A Critical Assessment Opportunity* (2005)
- *Navigating the Probationary Period After Van Wersch and McCormick* (2007)

MSP 2: Equity

"All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights."

Trends in Federal Workforce Composition and Employee Opinions

- *Fair and Equitable Treatment: Progress Made and Challenges Remaining Employee Opinions* (2009)
- *Women in the Federal Government: Ambitions and Achievements* (2011)
- *Fair and Equitable Treatment: A Progress Report on Minority Employment in the Federal Government* (1996)
- *A Question of Equity: Women and the Glass Ceiling in the Federal Government* (1992)
- *Achieving a Representative Federal Workforce: Addressing the Barriers to Hispanic Participation* (1997)

Fair and Equitable Management of Employees

- *A Call to Action: Improving First-Level Supervision of Federal Employees* (2010)
- *Managing for Engagement—Communication, Connection, and Courage* (2009)
- *Managing Public Employees in the Public Interest: Employee Perspectives on Merit Principles in Federal Workplaces* (2013)
- *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism* (2013)
- *Fair and Equitable Treatment: Progress Made and Challenges Remaining* (2009)
- *Women in the Federal Government: Ambitions and Achievements* (2011)

MSP 3: Compensation

"Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance."

Pay, Performance Management and Recognition

- *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism* (2013)
- *Managing Public Employees in the Public Interest: Employee Perspectives on Merit Principles in Federal Workplaces* (2013)
- *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards* (2012)
- *Managing for Engagement—Communication, Connection, and Courage* (2009)
- *Designing an Effective Pay for Performance Compensation System* (2006)

MSP 4: Conduct

"All employees should maintain high standards of integrity, conduct, and concern for the public interest."

How to Avoid Hiring of Employees with Conduct Issues

- *Reference Checking in Federal Hiring: Making the Call* (2005)
- *Clean Record Settlement Agreements and the Law* (2013)

How to Handle Conduct and/or Performance Issues

- *Clean Record Settlement Agreements and the Law* (2013)
- *The Probationary Period: A Critical Assessment Opportunity* (2005)
- *Navigating the Probationary Period After Van Wersch and McCormick* (2006)
- *Employee Perceptions of Federal Workplace Violence* (2012)

MSP 5: Utilization

"The Federal work force should be used efficiently and effectively."

Selection and Training of Supervisors

- *As Supervisors Retire: An Opportunity to Reshape Organizations* (2009)
- *A Call to Action: Improving First-Level Supervision of Federal Employees* (2010)

How to Improve Employee Engagement and Organizational Outcomes

- *The Power of Federal Employee Engagement* (2008)
- *Managing for Engagement—Communication, Connection, and Courage* (2009)
- *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards* (2012)
- *Telework: Weighing the Information, Determining an Appropriate Approach* (2011)

MSP 6: Retention

"Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards."

How to Remedy Poor Performance

- *Addressing Poor Performers and the Law* (2009)
- *What is Due Process in Federal Civil Service Employment?* (2015)

Effective Performance Management

- *Managing for Engagement—Communication, Connection, and Courage* (2009)
- *What is Due Process in Federal Civil Service Employment?* (2015)

MSP 7: Employee Training and Development

"Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance."

Training and Development

- *Evaluating Job Applicants: The Role of Training and Experience in Hiring* (2014)
- *Training and Development for the Senior Executive Service: A Necessary Investment* (2015)

MSP 8: Neutrality

"Employees should be—
(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and
(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election."

Preventing Partisan Political Actions

- *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism* (2013)
- *Fair and Equitable Treatment: Progress Made and Challenges Remaining* (2009)
- *Prohibited Personnel Practices: Employee Perceptions* (2011)

Avoiding Favoritism

- *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism* (2013)
- *Fair and Equitable Treatment: Progress Made and Challenges Remaining* (2009)

MSP 9: Public Interest

"Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—
(A) a violation of any law, rule, or regulation, or
(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

Protecting the Rights of Whistleblowers

- *Blowing the Whistle: Barriers to Federal Employees Making Disclosures* (2011)
- *Whistleblower Protections for Federal Employees* (2010)

Appendix F. Basic Obligations of Public Service

General Principles (5 C.F.R. § 2635.101(b))[4]

(1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

(2) Employees shall not hold financial interests that conflict with the conscientious performance of duty.

(3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

(4) An employee shall not, except as permitted by subpart B of this part, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

(5) Employees shall put forth honest effort in the performance of their duties.

(6) Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.

(7) Employees shall not use public office for private gain.

(8) Employees shall act impartially and not give preferential treatment to any private organization or individual.

(9) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

(10) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

(11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

(12) Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those—such as Federal, State, or local taxes—that are imposed by law.

(13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

(14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

[4] www.gpo.gov/fdsys/pkg/CFR-2005-title5-vol3/pdf/CFR-2005-title5-vol3-sec2635-101.pdf.

The Merit System Principles

Adapted from Title 5, United States Code, Section 2301(b).

1	Recruit a diverse pool of applicants. Hold fair and open competition. Select the best-qualified applicants.
2	Treat employees and applicants fairly and equitably, and with respect for their privacy and constitutional rights.
3	Pay employees fairly. Recognize and reward performance.
4	Hold employees to high standards. Put the public interest first.
5	Use the workforce efficiently and effectively.
6	Retain employees based on performance. Effectively address poor performance.
7	Provide employees with training and development.
8	Protect employees against arbitrary action, favoritism, and political coercion.
9	Protect employees against reprisal for whistleblowing or exercising a right.

The Merit System Principles (MSPs) in this summary have been paraphrased and reformatted.

The MSPB report *The Merit System Principles: Guiding the Fair and Effective Management of the Federal Workforce* (September 2016), available at www.mspb.gov, provides the full text of each MSP, accompanied by an explanation of its intent, a discussion of Federal employee perceptions of adherence to the principle, related MSPB research findings and recommendations, and a brief discussion of illustrative MSPB cases.

The Prohibited Personnel Practices

Adapted from Title 5, United States Code, Section 2302(b).

An employee who may take, influence, or recommend a personnel action may not—

1	Discriminate on any protected basis, such as race, color, religion, sex, national origin, age, disability, marital status or political affiliation.
2	Consider any reference or recommendation that is not directly related to the job to be performed.
3	Coerce political activity or base a personnel action on political activity or inactivity.
4	Obstruct any person's right to compete for employment.
5	Influence any person to withdraw from competition.
6	Grant any unauthorized preference to an employee or applicant.
7	Provide an advantage to a relative.
8	Take or influence a personnel action in reprisal for whistleblowing.
9	Take or influence a personnel action in reprisal for exercise of a right of complaint or appeal.
10	Discriminate on the basis of conduct that is not job-related.
11	Take or influence a personnel action that violates any veterans' preference requirement.
12	Take or influence a personnel action that violates any merit system principle.
13	Implement or enforce any improper nondisclosure policy or agreement.

The Prohibited Personnel Practices (PPPs) in this summary have been paraphrased and reformatted.

The MSPB report *The Merit System Principles: Guiding the Fair and Effective Management of the Federal Workforce* (September 2016), available at www.mspb.gov, provides the full text of the PPPs and a discussion of how they reinforce the Merit System Principles (MSPs).

Information on the PPPs and their enforcement is available on the website of the Office of Special Counsel, www.osc.gov.

U.S. Merit Systems Protection Board
1615 M Street, N.W.
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