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ISSUES OF MERIT

Civil Service Reform Act at 40 Edition

August 2018

a publication of the U.S. Merit Systems Protection Board, Office of Policy and Evaluation

WHAT'S INSIDE

Merit Studies *Page 2*

Merit Pay *Page 3*

Poor Performers *Page 4*

Whistleblowers *Page 5*

Top Occupations *Page 5*

Hiring *Page 6*

Senior Executive Service *Page 7*

Closing Thoughts *Page 7*

DIRECTOR'S PERSPECTIVE

The CSRA, 40 Years Later

Forty years ago, President Carter signed the Civil Service Reform Act of 1978 (CSRA) into law. This legislation was the most significant reform of the Federal personnel system since the Pendleton Act, almost 100 years earlier. The CSRA's purpose was to improve efficiency, accountability, and performance in Government during a time when the public was dissatisfied with and did not trust Government. President Carter felt it would be one of the most important laws enacted in its time.

The CSRA consisted of two parts. The first was a reorganization plan that restructured the institutions responsible for administering Federal personnel programs. Prior to 1978, the Civil Service Commission (CSC) played multiple, often conflicting, roles in administering the personnel system and protecting employees' rights in that system. The CSRA sought to divide those responsibilities among four agencies. The Office of Personnel Management (OPM) is responsible for developing and administering personnel policies and programs. The Merit Systems Protection Board (MSPB) protects merit through adjudicating individual employee appeals, conducting studies of merit systems, and reviewing OPM's significant actions. The Office of Special Counsel (OSC, originally housed in MSPB and is now a separate agency) investigates and prosecutes cases involving prohibited personnel practices. Finally, the Federal Labor Relations Authority oversees Federal labor-management relations.

The second part of the CSRA, taken from the President's Personnel Management Project, consisted of procedural reforms that sought to change personnel policies and procedures deemed at the time to be barriers to an efficient and responsive civil service. These proposals were developed on a very short timeframe, using wide input from stakeholders in the public, private, and nonprofit sectors. The CSRA set forth what was considered to be bold and comprehensive change that would free Government managers from red tape, make them more responsive and accountable to political leaders and the public, and improve Government's performance.

The CSRA included actions such as the following:

- Codifying the merit system principles and prohibited personnel practices to help leaders and employees avoid conduct that undermines merit;
- Establishing the Senior Executive Service (SES)—an elite, mobile corps of Government leaders with wide impact on public policy, greater financial incentives to motivate performance, and more opportunities for continuous development;

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

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

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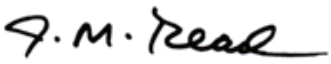
- Initiating pay for performance to reward top performers;
- Introducing a more comprehensive performance management structure, including new procedures for addressing poor performance;
- Authorizing OPM to delegate hiring to improve timeliness and quality; and
- Enhancing protections of whistleblowers against reprisal.

As the articles in this issue highlight, MSPB's research demonstrates mixed results in how well the CSRA achieved its goals. Today, we hear many of the same complaints heard then: it is too hard to fire Federal employees; it takes too long to hire; Government cannot attract the best people; employees are paid for longevity rather than performance; managers do not effectively manage the workforce; whistleblowers are punished for reporting waste, fraud, and abuse; and so forth.

In President Carter's written statement about the CSRA signing, he stated, "By itself, the law will not ensure improvement in the system. It provides the tools; the will and determination must come from those who manage the Government." As we reflect on the CSRA's accomplishments and failures 40 years later, and as we look toward future reform efforts, we should keep that quote in mind. Rules can be changed. Laws can be passed. Policies can be written. But the key to true reform is the resolve of the people who administer the change. ❖



Director, Policy and Evaluation

Merit System Studies

The CSRA established MSPB not only to adjudicate employee appeals, but also to conduct merit system studies and review OPM's significant actions. MSPB's reports to the President and Congress have influenced Federal law, regulation, and policy and have drawn attention to the importance of merit in the civil service. Below are a few publications that address particularly topical issues. All of our reports can be found at www.mspb.gov/studies.

Update on Sexual Harassment in the Federal Workplace

Addressing Poor Performers and the Law

The Power of Federal Employee Engagement

Designing an Effective Pay for Performance Compensation System

Reforming Federal Hiring: Beyond Faster and Cheaper

Blowing the Whistle: Barriers to Federal Employees Making Disclosures

A Call to Action: Improving First-Level Supervision of Federal Employees

Fair & Equitable Treatment: Progress Made and Challenges Remaining

Women in the Federal Government: Ambitions and Achievements

What is Due Process in Federal Civil Service Employment?

Merit Pay—Lessons for the Future

The merit pay experience shows the importance of time, guidance, equity, and dollars to pay reform.

The CSRA established a pay for performance system for some Federal employees that was a significant departure from the previous system. Prior to the CSRA, the three-level rating system had become essentially a single rating system of "satisfactory." Employees were not adequately informed about the quality of their performance, and management did not have sufficient information on which to base personnel decisions. Further, the Government's pay system was criticized for lacking meaningful links between pay and performance.

To remedy these problems, the CSRA established new performance appraisal systems for nearly all Federal employees, as well as a merit pay system for all GS 13–15 managers and supervisors. Merit pay was intended to improve employee productivity while the new performance appraisal systems were expected to help supervisors evaluate job performance objectively and accurately. So what went wrong with the merit pay system? A review of MSPB and Government Accountability Office (GAO) evaluations of the merit pay system from that era identified several factors.

Time. Good performance appraisal systems take time to develop, test, and refine to ensure that clear standards are established and used to measure employee performance. However, the merit pay system became operational before many agencies could pretest their appraisal systems, train employees on the merit process, or train supervisors on how to properly assess employee performance.

Guidance. OPM used a decentralized, non-prescriptive approach to enable agencies to design their own programs. GAO noted that this approach may not have provided the needed policy leadership, and OPM's oversight efforts focused on compliance with the law rather than assessing the quality of the systems or that they operated properly.

Equity. Under merit pay, lower-rated employees in one pay pool often received larger—sometimes much larger—increases than a higher-rated employee of the same grade in a different pay pool in the same agency. This situation was mostly due to the differing composition of the various pay pools and contributed to employee perceptions of unfairness.

Dollars. Funds for annual merit pay increases were limited. In some instances, employee performance ratings were altered, apparently to meet a pre-established distribution of ratings or allocate more of the limited funds to a smaller number of high performers. One review noted that the merit pay system failed to reward deserving people fairly with significant raises. These constraints on dollars or ratings resulted in large effects on employee pay, contributing greatly to employees' negative perceptions of the system. GAO's 1984 report *A 2-Year Appraisal of Merit Pay in Three Agencies* found that, in agencies studied, two-thirds to three-quarters of top performers did not believe the merit pay system increased their motivation or performance.

In 1984, Congress replaced the merit pay system with the Performance Management and Recognition System (PMRS). PMRS was intended to correct the difficulties experienced with the merit pay system but suffered from many of the same implementation problems and was terminated by Congress in 1993. GAO's 1987 report *Implementation of the Performance Management and Recognition System* noted that as long as agencies must limit the funds available for merit pay programs, it is not apparent how they can completely overcome negative effects of those limits and associated practices on the system.

MSPB's 1981 *Status Report on Performance Appraisal and Merit Pay Among Mid-Level Employees* listed 36 critical assumptions implicit in implementing the CSRA's merit pay provisions. One assumption was that employee performance could be assessed primarily on measurable and objective dimensions. As the percentage of knowledge workers has increased, that has become more difficult to achieve. Another assumption was that money is an effective motivator. Subsequent MSPB research has shown that Federal employees may be more highly motivated to do a good job by emotional outcomes (e.g., personal pride or satisfaction) as opposed to monetary rewards.

We note that some smaller-scale pay for performance systems have been successfully introduced, suggesting that failure is not inevitable. The message to architects of future pay for performance programs seems to be that they should take care to validate any assumptions underlying those systems and to anticipate and address the implementation issues that plagued the CSRA's merit pay approach. ❖

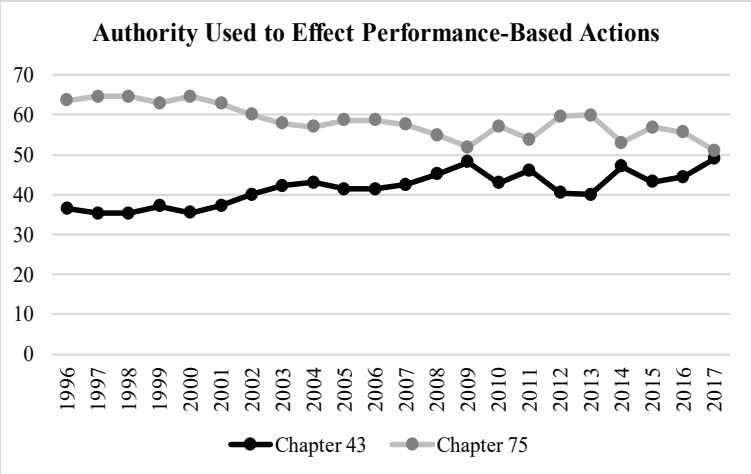
Why is the CSRA's Provision for Removing Poor Performers Not Used More Often?

The problem may be implementation rather than content.

Complaints about how difficult it is to remove poor performers are not new. In fact, one of the CSRA's goals was to make it easier for agencies to remove poor performers. Prior to the legislation, agencies dismissed employees primarily using Chapter 75 of Title 5. CSRA added Chapter 43 as an alternative option.

There are two significant differences between Chapters 43 and 75. First, the agency can meet a lower standard of proof using Chapter 43. Second, Chapter 43 sets up procedures for the overall management of employee performance, whereas Chapter 75 is dedicated entirely to taking adverse actions. The CSRA's Senate Report indicates that Congress expected Chapter 43 to "simplify and expedite procedures" to remove unacceptable performers as part of "a comprehensive framework for performance evaluation."

Given that Chapter 43 provisions were supposed to be easier to use than Chapter 75, one would expect them to be used far more frequently to take performance-based actions. Yet, that has not been the result. For fiscal years 1996–2017, only 42 percent of performance-based actions occurred under the Chapter 43 authority.



MSPB explored this trend in the 2009 report *Addressing Poor Performance and the Law*. Agency representatives told us that some of the major drawbacks of Chapter 43 procedures included the amount of documentation involved, supervisors' unwillingness to follow through because of these documentation requirements, and the possibility of the action being reversed because of technicalities not properly addressed in the process.

More importantly, though, the study found that many of the challenges in taking performance-based actions were related to implementation rather than law or regulation. For instance, OPM's regulation, 5 CFR § 432.104, states that before using Chapter 43 to remove an employee, the agency must first inform the employee that he or she is failing in a critical element and provide the following: (1) appropriate assistance; (2) an opportunity to improve; and (3) a warning that demotion or removal may occur if performance does not improve. The Board has held that such communication may occur in a formal performance improvement plan or in less formal counseling sessions, written instructions, or any manner that explains the requirements against which the employee is to be measured.

However, not only do many agencies have policies requiring formal improvement plans, but many require additional steps, such as a minimum duration for the improvement period or offering an informal improvement opportunity before the official improvement period. Our 2016 Merit Principles Survey (MPS) asked supervisors who had used a formal plan in the past 3 years if they often try an informal opportunity to improve first—84 percent agreed that they did.

In contrast, Chapter 75 does not require that the agency prove it provided an improvement period, although the reasonableness of the penalty will be determined, in part, by the extent to which the employee was put on notice of his or her deficiencies.

By establishing Chapter 43, the CSRA attempted not only to make it easier to fire poor performers, but also to improve the Government's ability to manage employee performance. MSPB's research indicates that the key to addressing poor performance lies not in the language of the laws and regulations, but in effective implementation and having supervisors who are willing, prepared, and permitted to address poor performance. ❖

Whistleblowers and the CSRA

The CSRA was the first legislative attempt to encourage Federal employees to disclose wrongdoing and protect those whistleblowers from retaliation. As with many of the initiatives under the CSRA, the laws relating to whistleblower protections have been an evolving process. Here is a brief overview of key whistleblower protection legislation and some of the main points addressed.

1978	**CSRA:** The CSRA was the first Federal statute to create a legal mandate to protect whistleblowers from reprisal. It created the OSC within MSPB to investigate allegations of retaliation against whistleblowers. OSC had the authority to file a complaint with MSPB asking for either corrective action, disciplinary action, or both.
1989	**Whistleblower Protection Act (WPA) of 1989:** The law made three particularly important changes: (1) established OSC as a separate agency, (2) gave employees a right to bring corrective action claims to MSPB when OSC did not, and (3) lowered the standard for an individual to prove his or her case, allowing the Board to assume from circumstantial evidence that retaliation occurred.
1994	**WPA of 1994:** The WPA of 1994 resulted in several new amendments, including ordering courts to use a knowledge/timing test to determine if there was circumstantial evidence of retaliation and taking steps to improve employee education regarding their rights through 5 U.S.C. § 2302(c).
2012	**Whistleblower Protection Enhancement Act (WPEA) of 2012**: Among other things, the WPEA expanded the definition of protected disclosure, provided employees with the right to bring individual right of action (IRA) appeals for previously ineligible activities, and gave employees the option to file appellate court review petitions with a circuit court other than the Federal Circuit for a 5-year test period.
2017	**Dr. Chris Kirkpatrick Whistleblower Protection Act:** Wanting more consequences for those who retaliate, the Act requires agencies to propose an adverse action against an official after OSC, MSPB, a court, or an Inspector General determines that official has engaged in whistleblower retaliation.
2018	**All Circuit Review Act:** The Act made permanent the right of an employee to file a whistleblowing appellate court review petition with a circuit court other than the Federal Circuit.

Top Federal Occupations: Then and Now

The Federal workforce that existed at the time of the CSRA's enactment bears little resemblance to the workforce of today, which is worth considering as we look at future reform efforts. Knowledge work and technology have all but eliminated several occupations that were once common. The technology workforce has more than tripled in size. Also, law and law enforcement occupations have become more prominent, accounting for three of the most populous occupations in 2016. It is a different workforce today and will require different efforts to improve the management of it.

Top 10 Federal Occupations

	1977		2016	
Rank	**Occupation**	**Employees**	**Occupation**	**Employees**
1	General Clerk	90,202	Program Specialist	84,870
2	Secretary	56,518	IT Specialist	82,248
3	Clerk-Typist	52,615	Nurse	75,867
4	Nursing Assistant	37,110	Management Analyst	72,609
5	Supply Clerk	27,397	Investigation/Compliance Technician	42,949
6	Air Traffic Controller	27,232	General Clerk	42,529
7	Clerk-Stenographer	25,157	Investigator	42,133
8	Computer Specialist	24,826	Contract Specialist	37,329
9	Engineering Technician	22,268	Investigation/Compliance Specialist	35,795
10	Electronics Technician	21,941	Attorney	34,381

The Rise of Decentralized Hiring

The CSRA took the first step to decentralize hiring—did it achieve what it intended?

> "It takes a long time and much paperwork to complete all the steps necessary…to hire a person for a permanent job in the career service."

That is a quote taken from the 1977 Personnel Management Project Final Report. At the time, the hiring process was administered solely by the CSC, and the law did not allow for delegation. The report pointed out that this structure made the hiring process slow, rigid, and unresponsive to agency needs. Furthermore, qualification reviews were being carried out by CSC staff who had limited knowledge of agency-specific programs and occupations.

To address these issues, the CSRA sought to bring hiring decisions closer to agency officials. It gave OPM's Director the authority to delegate competitive examinations to the heads of agencies for agency-specific occupations, and OPM's first Director, Scotty Campbell, encouraged agencies to take advantage of this flexibility. The CSRA can be seen as the beginning of the end of centralized hiring. In the 1990s, the National Performance Review recommended giving agencies the authority to recruit and examine for all of their positions, and Congress amended 5 U.S.C. § 1104 to let OPM do just that. So what impact did delegating hiring authorities to agencies have on the hiring process?

Most hiring managers and human resources (HR) staff today probably do not remember what it was like to have centralized hiring. However, MSPB conducted a survey in the late 1990s to capture perceptions regarding the change. The 1999 report *The Role of Delegated Examining Units: Hiring New Employees in a Decentralized Civil Service* showed that both hiring managers and HR specialists believed the delegation resulted in faster hiring and better candidates. They were able to tailor recruitment and hiring decisions to meet agency needs and they could adapt to changing labor market trends more quickly, and HR specialists in individual agencies did not have to prioritize requests from other agencies (as the CSC had to do), had a better understanding of the agency's needs and mission, and could more readily bring subject matter experts (SMEs) into the process.

While those observations are still valid today, decentralized hiring did not solve all of the issues related to the timely hiring of highly qualified candidates. For instance, timeliness is still a problem. In 2017, OPM reported that the average time to hire was 106 days, measuring from when the need to hire is validated by the manager to the time the employee enters on duty. This is still a lengthy time, despite the many efforts to reduce the time to hire, including abolishing the standard Federal application (SF-171), automating recruitment and assessment, eliminating essays as part of the original application process, and trying to hold agencies to an 80-day hiring model.

By its nature, merit-based hiring takes more time than hiring in a typical private sector company. Competitive hiring requires that jobs be advertised to the general public, all applications be rated against the job requirements, and applicant qualifications be evaluated to determine which individuals are best qualified for the job. These measures help promote a fair and open process as well as equitable treatment of applicants. However, they may not be the only way to preserve merit. Some hiring experts say that more advanced technology, online assessments, and even automated interviews could be the wave of the future as they can be used to measure abilities while also limiting biases.

The quality of applicants remains an issue as well. In MSPB's 2016 MPS, supervisors told us that getting a pool of quality candidates was one of their most difficult tasks. Recent interviews with agency HR staffs indicate that they face an increased number of applicants (and therefore workload) because it is easier to apply for jobs. In addition, many agencies do not have access to high-quality, automated assessments that make clear distinctions among large groups of applicants. This exemplifies how decentralization has divided agencies into the "haves" and "have-nots," causing an imbalance in their ability to assess candidates.

Other issues that affect the quality of candidates include the increasing complexity of the hiring system because of new hiring flexibilities granted to individual agencies, HR staffs' limited knowledge of the specialized experience needed for knowledge workers, lack of SME involvement in the process, and lack of training for HR staffs and hiring managers. Decentralization did provide some benefits, but it did not solve all of the problems related to Federal hiring. ❖

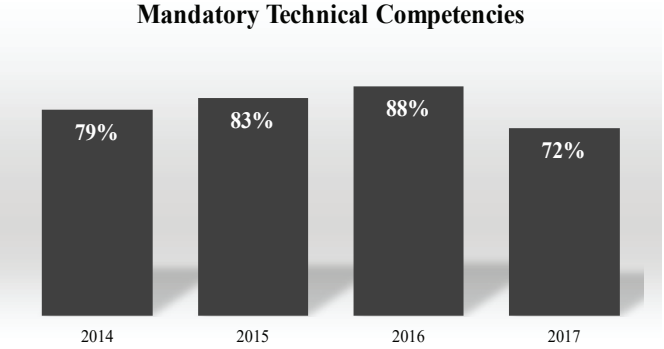
Technical Competencies Remain Important in the Senior Executive Service

A cornerstone of the CSRA was establishing the SES—a corps of strong leaders who possess a broad governance perspective and are capable of serving in multiple leadership positions across the Federal Government. OPM reinforced this vision by creating the Executive Core Qualifications (ECQs), which are the framework for preparing, selecting, and developing members of the SES. These five core competencies—leading change, leading people, results driven, business acumen, and building coalitions—are meant to take the focus off of technical competence in a specific job and emphasize overall leadership abilities that drive performance and accountability. As such, successful SES performance requires proficiency in each of the five ECQs.

MSPB has found, however, that agencies still strongly emphasize technical competence. MSPB's 2015 *Training and Development for the Senior Executive Service: A Necessary Investment* examined, among other things, the relative importance of technical competencies to achieving success in SES leadership roles. While technical credibility is a component of one of the ECQs, the study found that only 21 percent of the SES agreed that their positions could be filled using just the ECQs, without requiring additional technical qualifications.

This survey result was consistent with MSPB's analysis of USAJOBS SES vacancy announcements from 2014–2017. Approximately 80 percent of these announcements required applicants to demonstrate at least one "mandatory technical competency"—in addition to the ECQs—to qualify for the position. Clearly, agencies continue to value technical expertise in SES hires beyond the general "technical credibility" in OPM's leadership competency model. ❖

Percent of USAJOBS SES Vacancies Requiring Mandatory Technical Competencies



Closing Thoughts for Civil Service Reform

This edition of *Issues of Merit* marks the 40th anniversary of the CSRA and discusses some of the changes introduced by that legislation. We close with some thoughts for current and future reformers.

Positive change is possible. Even if the CSRA did not achieve all that its framers hoped, much has been accomplished. For example, the merit system principles have provided useful, values-based guidance to policymakers and practitioners for 40 years. Leadership competencies, as embodied in the ECQs, are now central to the SES selection and development.

Values matter. Public service requires more than competence; it also requires, as noted in the fourth merit system principle, "high standards of conduct and concern for the public interest." Values are similarly important to civil service policy and practice. Reform is more than copying a set of HR "best practices" culled from a management textbook. The public interest is best served when policies for the Federal workforce are governed by broader values and administered by leaders who respect those values.

Implementation is key. If a recurring theme in this issue is that outcomes fell short of visions for the CSRA, a recurring cause is that practice fell short of policy. Pay for performance initiatives were discontinued, in part, because agencies failed to create clear standards and measures for employee performance. Decentralized hiring disappointed because Federal agencies could not make the necessary investments in hiring processes or applicant assessments. Future reformers should strive to make good policy—but they also should give thought to how individual agencies and managers can translate that policy into practice. ❖

The Foundations of Merit

The nine merit system principles can be found in 5 U.S.C. § 2301(b).

The 14 prohibited personnel practices can be found in 5 U.S.C. § 2302(b).

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August 2018

ISSUES OF MERIT

Volume 23 Issue 3

IN THIS ISSUE * IN THIS ISSUE * IN THIS ISSUE

Director's Column. *What is the CSRA, and what can we learn from it today? (Page 1)*

Merit System Studies. *Review past studies that are still important today. (Page 2)*

Merit Pay. *What can we learn from the merit pay experiment under the CSRA? (Page 3)*

Poor Performers. *CSRA sought to make it easier to fire poor performers. Did it? (Page 4)*

Whistleblowers. *A chronology of whistleblower protection laws since the CSRA. (Page 5)*

Then and Now. *What were the top Federal occupations at the time of the CSRA as compared to now? (Page 5)*

Hiring. *Was decentralization enough to improve the hiring process? (Page 6)*

Senior Executive Service. *Have we gotten beyond hiring for technical competencies? (Page 7)*

Civil Service Reform. *Where do we go from here? (Page 7)*