United States

Merit Systems Protection Board

Strategic Plan for FY 2020-2024

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U.S. Merit Systems Protection Board
Strategic Plan for Fiscal Year 2020 - 2024

Introduction

A highly qualified, diverse Federal workforce managed in accordance with the merit system principles (MSPs) and in a manner free from prohibited personnel practices (PPPs) is critical to ensuring agency performance and service to the public. The MSPs are essential management practices that help ensure that the Federal Government is able to recruit, select, develop, and maintain a high-quality workforce and thereby reduce staffing costs and improve organizational results for the American people. The PPPs are specific, proscribed behaviors that undermine the MSPs and adversely affect the effectiveness and efficiency of the workforce and the Government. This U.S. Merit Systems Protection Board (MSPB) Strategic Plan (SP) provides the foundation for MSPB's work for fiscal years (FY) 2020-2024. It defines the agency's purpose and lays out the long-term outcomes it hopes to achieve, and describes how MSPB will fulfill its functions to protect merit, promote adherence to MSPs, and prevent PPPs.

MSPB: An Overview

Historical significance. Understanding the origin of MSPB and the role it plays in ensuring effective human capital management in the Federal Government requires a brief review of the history of our Nation's Federal civil service. From the earliest days of our Government through the early 1880s, the Federal civil service operated under a patronage or "spoils system."[1] Federal employees were appointed based on their support of a President's election campaign and political beliefs. There were no requirements that such appointees be suitable for Federal service or have the qualifications to perform particular Federal jobs. As administrations changed, large numbers of Federal employees were replaced with new employees appointed by the new administrations. At various times, the Capital was besieged with thousands of office seekers who believed they were owed a Federal job based on their political support of the President. Over time, this practice contributed to an unstable workforce lacking the necessary qualifications to perform its work, which in turn adversely affected the efficiency and effectiveness of the Government and its ability to serve the American people.

The inherent weaknesses of the patronage system and its impact on Government effectiveness were recognized by concerned individuals and groups resulting in various reform movements. However, there was little momentum for change until President James A. Garfield was assassinated in 1881 by a disgruntled Federal job seeker. A large public outcry for civil service reform ensued, which led to the enactment of the Pendleton Act in 1883. The Pendleton Act created the Civil Service Commission (CSC) and tasked it with monitoring a merit-based civil service which used competitive examinations to support the appointment of qualified individuals to Federal positions. This contributed to improvements in Government efficiency and effectiveness by helping to ensure that a stable, highly qualified Federal workforce, free from partisan political pressure, was available to serve the American people.

Following passage of the Pendleton Act, laws were enacted and actions undertaken that established the principle of "promoting the efficiency of the civil service" as the standard for removing a Federal employee. These laws and actions also granted preference for hiring military veterans,

[1] Bogdanow, M., and Lanphear, T., History of the Merit Systems Protection Board, *Journal of the Federal Circuit Historical Society*, Vol. 4, 2010, pp. 109-110.

established a more transparent process for removing veterans from Federal jobs, and extended the veterans' job protections to other civil servants.[2] The CSC was given additional authority to oversee the removal of Federal employees and to adjudicate employees' appeals of their removal.[3] Although the CSC made several internal changes to better manage the appeals process, it became clear over time that the CSC could not properly, adequately, and simultaneously set managerial policy, protect the merit systems, and adjudicate appeals of actions Federal agencies took against employees. Concern over the inherent or perceived conflicts of interest in the CSC's role as both rule-maker and adjudicator of appeals was a principal motivating factor behind the enactment of the Civil Service Reform Act of 1978 (CSRA).[4] The CSRA replaced the CSC with three new agencies: MSPB as the successor to the Commission, with an Office of Special Counsel (OSC) situated within MSPB to investigate and prosecute alleged PPPs;[5] the Office of Personnel Management (OPM) to serve as the President's agent for Federal workforce management policy and procedure; and the Federal Labor Relations Authority (FLRA) to oversee Federal labor-management relations.[6]

MSPB's role and functions. During congressional hearings on the CSRA before its passage in 1978, the role and functions of MSPB were described during testimony by various members of Congress: "[MSPB] will assume principal responsibility for safeguarding merit principles and employee rights" and be "charged with ensuring adherence to merit principles and laws" and with "safeguarding the effective operation of the merit principles in practice."[7] MSPB inherited the CSC's adjudication functions and provides due process to employees as an independent, third-party adjudicatory authority for employee appeals of adverse actions (e.g., removals, suspensions for more than 14 days, and furloughs) and retirement decisions. For matters within its jurisdiction, the CSRA gave MSPB the statutory authority to develop its adjudicatory processes and procedures, issue subpoenas, call witnesses, and enforce compliance with MSPB decisions.

The CSRA also gave MSPB broad authority to conduct independent, objective studies of the Federal merit systems and Federal human capital management issues, to ensure that Federal employees are managed in accordance with MSPs and in a manner free from PPPs. In addition, MSPB was given the authority and responsibility to review the rules, regulations, and significant actions of OPM. MSPB may, on its own motion or at the request of other parties, review and potentially overturn OPM regulations if such regulations, or the implementation of such regulations, would require an employee to commit a PPP. MSPB also is responsible for annually reviewing and reporting on OPM's significant actions and the degree to which the actions may affect adherence to MSPs and avoidance of PPPs.[8] In summary, the CSRA granted MSPB the statutory authority and responsibility to adjudicate employee appeals, enforce compliance with MSPB decisions, conduct objective studies of Federal merit systems and human capital management issues, and review and take appropriate action on OPM's rules, regulations, and significant actions. Appendix A contains additional information about MSPB's jurisdiction, scope and impact, and customers and stakeholders.

Current Organization. MSPB is an independent Federal agency within the executive branch. MSPB's Board members, consisting of a Chairman, Vice Chairman, and Member, are appointed by the President and confirmed by the Senate. Board members serve overlapping, non-renewable

[2] The Lloyd LaFollette Act of 1912; the Veterans Preference Act of 1944, as amended; and Executive Order 10,988.

[3] Bogdanow, M., and Lanphear, T., History of the Merit Systems Protection Board, *Journal of the Federal Circuit Historical Society*, Vol. 4, 2010, pp, 111-112.

[4] Ibid. p. 113.

[5] Ibid. p. 114.

[6] The Whistleblower Protection Act of 1989 established OSC as a separate agency.

[7] Legislative History of the Civil Service Reform Act of 1978. Committee on Post Office and Civil Service, House of Representatives, March 27, 1979, Vol. 2 (pp. 1469-1470).

[8] Title 5 United States Code (U.S.C.) §§ 1204(f) and 1206.

7-year terms and can be removed only for cause. No more than two of the three Board members may be from the same political party. MSPB also has independent budgetary and hiring authority for its General Schedule employees. The Board members' primary role is to adjudicate the cases brought before them. The Chairman, by statute, is the chief executive and administrative officer.

MSPB headquarters (HQ), located in Washington, DC, has eight offices that are responsible for conducting its statutory and support functions. These are the offices of Appeals Counsel, Clerk of the Board, Equal Employment Opportunity (EEO), Financial and Administrative Management, General Counsel, Information Resources Management, Policy and Evaluation (OPE), and Regional Operations (ORO). The EEO Director reports directly to the Chairman, and the Directors of the other offices report to the Chairman through the Executive Director. MSPB also has six regional offices (ROs) and two field offices (FOs) located throughout the United States. These offices process initial appeals and report to the ORO Director. The agency is currently authorized to employ approximately 235 full-time equivalents to conduct and support its statutory duties. Many support functions are performed by other Federal agencies through interagency agreements.

MSPB has been without a quorum of Board members since January 8, 2017, and without any Presidentially-appointed Senate-confirmed Board members since March 1, 2019. Since that time, MSPB has continued to operate in accordance with its continuity of operations plan (COOP). Under the COOP, the MSPB's General Counsel serves as the agency's acting chief executive and administrative officer. The lack of quorum has created a backlog in petitions for review (PFRs) and other cases at MSPB HQ. As of the end of September 2019, there were 2,378 PFRs pending at HQ, and the number grows larger every day. The lack of quorum also prevents MSPB from releasing official reports of merit systems studies to the President and Congress, and from promulgating regulations to accompany congressional changes in our jurisdiction or processes. Nonetheless, administrative judges (AJs) in the ROs/FOs continue to receive initial appeals, conduct hearings, and issue initial decisions. MSPB HQ continues to receive PFRs and to draft proposed PFR decisions for consideration by Board members upon their arrival. It also continues to conduct research and has drafted a new research agenda that will be reviewed for approval once a quorum is restored. While work on these functions will continue, we anticipate that it will take three years or longer to process the inventory of cases at HQ once new Board members begin their work.

In the spring of 2018, the President nominated Dennis D. Kirk as Board Chairman and Julia A. Clark as Board Member. The Senate Committee on Homeland Security and Governmental Affairs held a nomination hearing on July 19, 2018. However, the nominees were not confirmed prior to the adjournment of the 115th Congress. On January 16, 2019, the President resubmitted the nominations for consideration by the 116th Congress. On February 13, 2019, the Committee advanced the two nominees to the Senate floor for consideration. On April 30, 2019, the President nominated B. Chad Bungard to serve as a Board Member. The Senate Homeland Security and Governmental Affairs Committee held a nomination hearing for Mr. Bungard on June 12, 2019, and voted unanimously on June 19, 2019 to advance his nomination. The nominations of Mr. Kirk, Ms. Clark, and Mr. Bungard now await action on the Senate floor.

Revising the Strategic Plan. MSPB made very few changes to this SP since publication of the last SP in 2018. Updates were based on input from senior agency leaders and managers, and the SP was developed in accordance with the Government Performance and Results Act Modernization Act (GPRAMA) and guidance from the Office of Management and Budget (OMB). MSPB considered current external factors and internal challenges and how they may impact MSPB's work. This SP also includes updated means and strategies to make clear our intent to update our objectives, performance goals (PGs), measures, and targets when new Board members arrive. This plan reflects streamlined goals and measures for information technology (IT) operations and an updated program evaluation

section. Consultation with our congressional committees was conducted in the fall of 2019. We received no comments from Congress on the draft SP. Additional information about changes in this SP and how it links to other agency planning and reporting documents is contained in Appendix B.

How MSPB Serves the Merit Systems, the Federal Workforce, and the Public

Considering MSPB's relatively small size and budget, it provides enormous value to the Federal workforce, Federal agencies, and American taxpayers. MSPB's effective and efficient adjudication of appeals, enforcement of its decisions, objective merit systems studies, and review of OPM regulations and significant actions adds value and saves money by improving the quality of the workforce providing service to the public, strengthening adherence to MSPs, and preventing PPPs.

Value added through efficient and effective adjudication and enforcement. MSPB adds value by providing superior adjudication of employee appeals, including alternative dispute resolution (ADR), which ensures due process and decisions that are based in law, regulation, and legal precedent and not on non-merit factors. MSPB's adjudication process is guided by reason and legal analysis, which are hallmarks of both our Nation's legal system and our merit systems. The quality of MSPB's decisions is evidenced by the high affirmance rate of its decisions by the U.S. Court of Appeals for the Federal Circuit (CAFC). As a neutral, independent third party, MSPB's adjudication of employee appeals improves the fairness and consistency of the appeals process and resulting decisions, and it is more efficient and less cumbersome than having each agency adjudicate its own employees' appeals. The body of legal precedent generated through adjudication, and the transparency and openness of the adjudication process, collectively support better adherence to MSPs and prevent PPPs by guiding agencies and employees on proper behavior and the ramifications of improper behavior. This adjudication information (shared through outreach and extensive materials on MSPB's website) also improves the effectiveness and efficiency of the adjudication process by helping parties understand the law and how to prepare and present thorough, well-reasoned cases. Strong enforcement of MSPB decisions ensures timely, effective resolution of current disputes and encourages more timely compliance with future MSPB decisions. Together, MSPB's decisions concerning the merits of disputes and their enforcement comprise a body of knowledge used to provide educational information to all stakeholders about the merit systems and their function in the workplace.

Value added through merit systems studies and review of OPM regulations and significant actions. MSPB's high-quality, objective merit systems studies provide value by assessing current management policies and practices, identifying innovative, efficient, and effective merit-based management policies and practices, and making recommendations for improvements. For example, MSPB research has shown that effective and efficient hiring and selection, improved merit-based management, and greater employee engagement contribute to a highly qualified Federal workforce, improved organizational performance, and better service to the public. These factors also help reduce the occurrence and costs of PPPs that negatively affect agency and employee performance. Results, findings, and recommendations from MSPB's merit systems studies are published in reports, newsletters, other articles and research briefs posted to our website, and through outreach. A recent MSPB report provides information on and dispels misconceptions about due process in the civil service, which is useful to policy makers, managers, legal practitioners, and other stakeholders. MSPB's review of OPM rules, regulations, and significant actions protects the integrity and viability of the merit systems and civil service, and improves adherence to MSPs and provides benefits similar to those related to merit systems studies. These reviews also help to reduce costs in terms of fewer PPPs, less employee misconduct, fewer adverse actions, and fewer unsubstantiated appeals. This benefits American taxpayers by decreasing Governmentwide costs and increasing confidence that the Government is doing its job and appropriately managing the workforce.

The Merit Systems, the Merit System Principles, and the Prohibited Personnel Practices

The Federal merit systems are based on widely accepted organizational management practices and values that have been developed and reinforced over time. Naturally, there are benefits and costs associated with merit-based management of the Federal workforce. Ensuring values such as fairness in all personnel matters; hiring and advancement based on qualifications and performance; protection from arbitrary personnel decisions, undue partisan political influence, and reprisal; and assurance of due process help ensure a strong merit-based workforce but incur costs that are not directly comparable to the private sector. For example, the Government hiring process typically takes longer than that of the private sector in part because of requirements to ensure selection of highly qualified employees based on assessing applicant qualifications after fair and open competition. Effective assessment of candidates through the probationary or trial period takes time, but it improves the overall quality of the workforce and helps ensure that Federal job protections are provided to the most highly qualified employees. This, in turn, helps save money by reducing the likelihood that the Government will need to undertake the lengthy process to remove an employee. These management costs are offset by the benefits associated with ensuring a more stable, highly qualified workforce that serves in the public's interest over the long term.

The CSRA codified for the first time the values of the merit systems as the MSPs, and delineated specific actions and practices as the PPPs that were prohibited because they were contrary to merit system values.[9] The Whistleblower Protection Enhancement Act of 2012 (WPEA) added a 13th PPP which involves appropriate enforcement of non-disclosure agreements. The Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 added a 14th PPP prohibiting access of medical records in the furtherance of a PPP. The MSPs and PPPs are summarized below and their full text is contained in Appendix C.

MSPs include:

- Fair and open competition for positions with equal opportunity to achieve a workforce from all segments of society;
- Merit-based selection for jobs;
- Advancement and retention based on qualifications and job performance;
- Fair and equitable treatment in all aspects of management;
- Equal pay for work of equal value;
- Training that improves organizational and individual performance;
- Protection from arbitrary action, favoritism, or coercion for political purposes;
- Protection against reprisal for lawful disclosure of violations of law and waste, fraud, and abuse;
- Effective and efficient use of the workforce; and
- That all employees should maintain high standards of integrity, conduct, and concern for the public interest.

PPPs state that employees shall NOT take, or influence others to take, personnel actions that:

1. Discriminate for or against an employee or applicant on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;
2. Consider information beyond the applicant's qualifications, performance, or suitability for public service;
3. Coerce political activity or take action in reprisal for refusal to engage in political activity;

[9] Title 5 United States Code (U.S.C.) §§ 2301 and 2302, respectively.

4. Deceive or willfully obstruct rights to compete for employment;
5. Influence a person to withdraw from competition to affect the employment prospects of another;
6. Grant preference beyond that provided by law to affect a person's employment prospects;
7. Are based on nepotism;
8. Are in retaliation or reprisal for whistleblowing—the lawful disclosure of violation of law, rule, regulation, gross mismanagement or waste of funds, abuse of authority, or danger to public health or safety;
9. Are in retaliation or reprisal for an employee's exercise of certain of his or her rights and legal protections;
10. Are based on past conduct that does not adversely affect the job;
11. Knowingly violate veterans' preference;
12. Violate the MSPs;
13. Implement or enforce a nondisclosure policy, form, or agreement, which does not include a specific statement that its provisions are consistent with and do not supersede applicable statutory whistleblower protections; or
14. Access a medical record as a part of, or otherwise in furtherance of, any conduct described in PPPs 1 through 13.

MSPB Strategic Framework

Mission

Protect the merit system principles and promote an effective Federal workforce free of prohibited personnel practices.

Vision

A highly qualified, diverse Federal workforce that is fairly and effectively managed, providing excellent service to the American people.

Organizational Values

Excellence: We will base our decisions on statutes, regulations, and legal precedents; use appropriate scientific research methods to conduct our studies and make practical recommendations for improvement; and develop and use appropriate processes to oversee the regulations and significant actions of the Office of Personnel Management. We will interact with our customers and stakeholders in a professional, respectful, and courteous manner. We will strive to be a model merit-based organization by applying the lessons we learn in our work to the internal management of MSPB.

Fairness: We will conduct our work in a fair, unbiased, and objective manner. We will be inclusive in considering the various perspectives and interests of stakeholders in our work, and in our external and internal interactions with individuals and organizations.

Timeliness: We will issue timely decisions in accordance with our performance goals and targets. We will issue timely reports on the findings and recommendations of our merit systems studies. We will respond promptly to inquiries from customers and stakeholders.

Transparency: We will make our regulations and procedures easy to understand and follow. We will communicate with our customers and stakeholders using clear language. We will make our decisions, merit systems studies, and other materials easy to understand, and widely available and accessible on our website. We will enhance the understanding of our processes and the impact of our products through outreach efforts.

Strategic Goals and Objectives

Strategic Goal 1: Serve the public interest by *protecting* merit system principles and *safeguarding* the civil service from prohibited personnel practices.

Strategic Objectives:

1A: Provide understandable, high-quality resolution of appeals, supported by fair and efficient adjudication and ADR processes.

1B: Enforce timely compliance with MSPB decisions.

1C: Conduct objective, timely studies of the Federal merit systems and Federal human capital management issues.

1D: Review and act upon the rules, regulations, and significant actions of the Office of Personnel Management, as appropriate.

Strategic Goal 2: Advance the public interest through *education* and *promotion* of stronger merit systems, *adherence* to merit system principles, and *prevention* of prohibited personnel practices.

Strategic Objectives:

2A: Inform, promote, and/or encourage actions by policymakers, as appropriate, that strengthen Federal merit systems laws and regulations.

2B: Support and improve the practice of merit, adherence to MSPs, and prevention of PPPs in the workplace through successful outreach.

2C: Advance the understanding of the concept of merit, the MSPs, and the PPPs through the use of educational standards, materials, and guidance established by MSPB.

Management Objectives

Management Objectives: Effectively and Efficiently . . .

M1: Lead, manage, and develop employees to ensure a diverse, inclusive, and engaged workforce with the competencies to perform MSPB's mission and support functions successfully.

M2: Develop budgets and manage financial resources to ensure necessary resources now and in the future.

M3: Improve and maintain IT and information services programs to support agency mission and administrative functions.

M4: Modernize core business applications to achieve electronic adjudication and provide a web-based survey capability.

Means and Strategies Needed to Accomplish MSPB's Objectives

Over the next four to five years, MSPB will use the following means and strategies to accomplish its objectives. Selected means and strategies may be adjusted and may be emphasized in specific years, or may be used over the entire period. Strategies may be carried out by one or more MSPB offices.

Strategic Goal 1

Strategic Objective 1A: Provide understandable, high-quality resolution of appeals supported by fair and efficient adjudication and alternative dispute resolution processes.

1. Provide effective, efficient, and appropriately transparent adjudication of appeals in our ROs/FOs and at HQ.
2. Work with new Board members to consider approaches to reducing the backlog of PFR and other cases at HQ, determine how to track and measure success in reducing this backlog, and implement appropriate changes to the PGs, measures, and targets in MSPB's Annual Performance Plans (APPs) to ensure transparency in accomplishing this important goal. (Similar to strategies for objectives1B and 1D.)
3. Effectively and efficiently implement changes in adjudicating cases in accordance with changes in statute, regulation, or policy (e.g., the Department of Veterans Affairs (VA) Accountability and Whistleblower Protection Act of 2017).
4. Improve and maintain adjudication case processing data, data systems, practices, and policies to ensure valid and reliable data for management and reporting purposes that comply with standard data practices and statutes (e.g., GPRAMA, WPEA, the Foundations for Evidence-Based Policymaking Act of 2018, etc.).
5. Examine and assess current adjudication processes, agency records management processes, IT infrastructure, applications, resources, and expertise, and in consideration of changes in Governmentwide IT procurement and security requirements, develop requirements, plan for, and then implement new core adjudication business applications to support implementing e-Adjudication as a permanent shift from paper-based to automated electronic adjudication and records management. (Also a strategy for objective M4.)
6. Ensure adequate adjudication expertise and capacity through strategic workforce planning. (Also a strategy for objectives 1B and M1.)
7. Ensure continuity of expertise in legal and procedural issues through effective and efficient knowledge sharing and appropriate training of adjudication staff.
8. Review Board and court decisions, share significant changes with stakeholders, and determine and implement necessary changes to adjudication processes and procedures.
9. Monitor adjudication performance and ensure accountability for the adjudication process, the quality of adjudication data, the quality of adjudication decisions, timeliness of case processing, and customer satisfaction with the appeals process, within available resources.
10. Provide effective and impartial ADR services (including settlement and mediation) to meet the needs of the involved parties.
11. Ensure effective representation of MSPB in cases brought before other adjudicatory bodies, such as the CAFC, any circuit court for certain whistleblower appeals, U.S. district courts for mixed cases, and the U.S. Supreme Court.
12. Continue the automated survey process to sample and invite feedback from adjudication and ADR customers and make changes based on feedback, as appropriate.

13. Consider the future structure of ROs/FOs, and adjudication offices at HQ, including location, cost, schedule of lease renewals, availability of technology, and other factors to improve effectiveness and efficiency.
14. Explore the sharing of services/contracts between MSPB and its sister agencies (OSC, FLRA, Office of Government Ethics, etc.) for court reporting and videoconferencing facilities.

Strategic Objective 1B: Enforce timely compliance with MSPB decisions.

1. Provide effective and efficient processing of requests for enforcing MSPB decisions and improve the transparency of the enforcement process.
2. Work with new Board members to consider approaches to reducing the backlog of enforcement cases at HQ, determine how to track and measure success in reducing this backlog, and implement appropriate changes to the PGs, measures, and targets in MSPB's APPs to ensure transparency in accomplishing this important goal. (Similar to strategies for objectives 1A and 1D.)
3. Ensure adequate adjudication expertise and capacity through strategic workforce planning. (Also a strategy for objectives 1A and M1.)
4. Ensure continuity of expertise in legal and procedural issues through effective and efficient knowledge sharing and appropriate training of adjudication staff.
5. Review Board and court decisions, share significant changes with stakeholders, and determine and implement necessary changes to adjudication processes and procedures.
6. Monitor adjudication performance and ensure accountability for the adjudication process, the quality of adjudication data, the quality of adjudication decisions, timeliness of case processing, and customer satisfaction with the appeals process, within available resources.
7. Ensure effective representation of MSPB in cases brought before other adjudicatory bodies, such as the CAFC, any circuit court for certain whistleblower appeals, U.S. district courts for mixed cases, and the U.S. Supreme Court.

Strategic Objective 1C: Conduct objective, timely studies of the Federal merit systems and Federal human capital management issues.

1. Conduct independent, objective, and timely studies of the Federal merit systems and Federal management issues and practices in accordance with accepted research practices.
2. Periodically conduct a transparent process to develop and update the merit systems studies research agenda that includes feedback from studies stakeholders and customers. (See the merit systems studies research agenda for FY 2015-2018.)
3. Expeditiously and appropriately report findings and recommendations from merit systems studies that provide value to the President, Congress, Federal human resources (HR) policymakers, practitioners, Federal managers, supervisors, employees, and other stakeholders and that positively impact the merit systems and Federal human capital management.
4. Work with new Board members to ensure timely drafting and publication of merit system study reports following the almost three-year lack of quorum. Determine and implement appropriate changes to the PGs, measures, and targets in MSPB's APPs to ensure transparency in accomplishing this important goal.
5. Publish *Issues of Merit* (*IoM)* newsletters, research highlights, and other products that address timely, focused information about Federal merit systems and workforce management issues.

6. Provide relevant survey subject matter expertise and survey technical and operational requirements to support agency efforts under PG M4-2 to maintain a FedRAMP certified IT survey capability that has flexible survey design and administration, and Governmentwide compatibility in a secure, cloud-based environment, to conduct research surveys and collect other similar data to support MSPB's merit systems studies mission and internal program evaluation. (Related to objective M4.)
7. Administer periodic merit principles surveys, and other specialized surveys, to assess and report on the overall health of the Federal merit systems, practice, and understanding of merit in the workplace, and occurrence of PPPs.
8. Ensure MSPB has the analytic workforce needed to conduct high-quality objective studies, ensure the value and impact of study findings and recommendations, and perform essential program evaluation responsibilities through strategic workforce management. (Also a strategy for objective M1.)

Strategic Objective 1D: Review and act upon the rules, regulations, and significant actions of OPM, as appropriate.

1. Maintain review of OPM rules, regulations, and significant actions and take action, as appropriate, to ensure adherence to MSPs and avoidance of PPPs.
2. Work with new Board members to consider approaches to reducing the backlog of requests for review of OPM regulations, determine how to track and measure success in reducing this backlog, and implement appropriate changes to the PGs, measures, and targets in MSPB's APPs to ensure transparency in accomplishing this important goal. (Similar to strategies for objectives 1A and 1B.)
3. Monitor scope of OPM significant action review; include a review of the significant actions of OPM in the MSPB Annual Report.

Strategic Goal 2

Strategic Objective 2A: Inform, promote, and/or encourage actions by policymakers, as appropriate, that strengthen Federal merit systems laws and regulations.

1. Translate and deliver information from adjudication, merit systems studies, and OPM review into products designed to inform and influence actions by policymakers that will support merit, improve adherence to MSPs, and prevent PPPs.
2. Track citations of and references to MSPB's work in sources such as professional, academic, trade, and media publications (print and electronic) to ensure information about MSPB's work in protecting merit systems is disseminated appropriately.

Strategic Objective 2B: Support and improve the practice of merit, adherence to MSPs, and prevention of PPPs in the workplace through successful outreach.

1. Translate information from adjudication, merit systems studies, and OPM review into outreach presentations and other products designed to inform and influence actions by practitioners and other stakeholders that will improve adherence to MSPs, prevent PPPs, and/or improve the understanding of a merit-based civil service or understanding of MSPB, its functions, and processes.

2. Conduct outreach activities within available resources (e.g., conference presentations, practitioner forums, mock hearings, briefings, etc.) designed to improve the practice and understanding of merit, MSPs and PPPs, and that provide value to participants.
3. Consider a centralized catalog of presentations and the electronic, web-based delivery of outreach presentations to improve efficiency of outreach and reduce travel costs.
4. Continue tracking outreach events, and note when MSPB presents material that results in continuing legal education and continuing education unit credits to audience members, which may promote cost-effective methods to meet these requirements.
5. Consider and develop effective and efficient methods to improve the ability to obtain and use feedback from outreach participants and audience members to assess outreach success, improve quality of outreach, gather suggestions for improvement, and better address stakeholder needs, within resource constraints.

Strategic Objective 2C: Advance the understanding of the concept of merit, the MSPs, and the PPPs, through the use of educational standards, materials, and guidance established by MSPB.

1. Develop educational standards, materials, and guidelines on merit, MSPs, PPPs, and the merit-based civil service to ensure excellent Government service to the public.
2. Develop and make available information and materials about MSPB's adjudication processes, outcomes, and legal precedents to support the parties' ability to prepare and file thorough and well-reasoned arguments in appeals filed with MSPB.
3. Encourage agencies to use MSPB's educational materials and guidance to implement educational programs for Federal employees and the public by recognizing agencies' merit systems educational efforts on MSPB's website or in MSPB reports.
4. Develop and make MSPB products and educational information widely available through the website, social media outlets, and other appropriate avenues.

Management Objectives

Management Objective M1: Lead, manage, and develop employees to ensure a diverse, inclusive, and engaged workforce with the competencies to perform MSPB's mission and support functions successfully.

1. Hire and retain a diverse and highly qualified legal, analytic/research, and administrative workforce that can effectively accomplish and support MSPB's knowledge-based work.
2. Provide developmental experiences and access to training and educational resources (e.g., employee orientation, on-the-job training, developmental assignments, formal training experiences, education and training resources, and drills when appropriate, etc.) to ensure employees have the competencies necessary to perform MSPB's work, and have appropriate information on topics such as (but not limited to) ensuring safety and security of personnel and the workplace, effective and efficient use of telework, retirement planning and financial literacy, and other relevant topics. Consider collaborating with other agencies to obtain cost-effective training.
3. Use results from the Federal Employee Viewpoint Surveys (FEVS) and MSPB internal survey (IS), and apply leadership and management skills to strengthen and maintain a culture that supports a diverse, inclusive, and fully engaged workforce.

4. Considering the external factors and internal challenges that may affect MSPB's mission and operations, initiate and maintain a continual strategic human capital planning (SHCP) process to consider the most critical human capital requirements needed to achieve MSPB's mission and support functions and to achieve its human capital management objectives.
5. Over the long-term, use the SHCP process to evaluate MSPB office and grade structures, assess the need for Senior Executive Service (SES) positions, consider Senior Leader positions, streamline hiring authorities, use personnel flexibilities (e.g., not-to-exceed temporary positions, Intergovernmental Personnel Act assignments, etc.), and ensure adequate training and development.

Management Objective M2: Develop budgets and manage financial resources to ensure necessary resources now and in the future.

1. Establish and communicate mission, support, and operational priorities to ensure achievement of agency objectives and goals.
2. Use people and budgetary resources effectively and efficiently to ensure adequate staff are available and have the competencies to accomplish our goals.
3. Communicate justification of resources (funds, people, operational requirements, and contingencies) necessary to accomplish MSPB's objectives (mission and support) including how resource levels and external factors (such as Governmentwide reform efforts) may impact MSPB performance.
4. Periodically consider the structure of HQ offices (including possible consolidation and/or outsourcing of support functions) and the structure and location of ROs/FOs, including statutory requirements, costs, availability of technology, best practices in operations, and other factors to improve effectiveness and efficiency.
5. Periodically assess long-term contracts and interagency agreements (e.g., legal citation software, leases, HR services, financial management, payroll, etc.) to ensure effective and efficient service and value to MSPB.

Management Objective M3: Improve and maintain IT and information services programs to support agency mission and administrative functions.

1. Develop, implement, and maintain stable and secure IT infrastructure (hardware, software, applications, processes, and systems) and information services programs, with sufficient resources and expertise (e.g., privacy, IT security, network administration, records and information management, data integrity, Freedom of Information Act, etc.), to meet customer business needs and provide effective and efficient MSPB adjudication, enforcement, studies, OPM review, and administrative support programs.
2. Gather customer feedback from e-Adjudication customers, and other internal and external users as needed, and make changes to relevant applications and functionality, as appropriate.
3. Ensure availability and reliability of MSPB's IT infrastructure (i.e., hardware, systems, servers, internet, applications, and file storage and retrieval).
4. Ensure disaster recovery capability for MSPB's existing data center.
5. Ensure effective and efficient support of internal and external IT customers.
6. Improve compliance with Section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794(d)).

7. Comply with OMB Memorandum M-17-25, "*Reporting Guidance for Executive Order on Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure*," and related OMB and Department of Homeland Security (DHS) requirements.
8. Provide ongoing computer and professional development training for MSPB staff and IT personnel, respectively.

Management Objective M4: Modernize core business applications to achieve electronic adjudication and provide a web-based survey capability.

1. Examine and assess current adjudication processes, agency records management processes, IT infrastructure, applications, resources, and expertise, and in consideration of changes in Governmentwide IT procurement and security requirements, develop requirements, plan for, and then implement new core adjudication business applications to support implementing e-Adjudication as a permanent shift from paper-based to automated electronic adjudication and records management. (Also a strategy for objective A1.)
2. Ensure access to and encourage increased use of e-Appeal Online; and continue to improve efficiency by shifting from paper-based adjudication work processes and products to automated electronic work processes and products.
3. Ensure secure storage and effective use of workforce data (from OPM and other sources) in a web-based environment.
4. Comply with OMB Memorandum M-17-25, "*Reporting Guidance for Executive Order on Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure*," and related OMB and DHS requirements.
5. Provide ongoing computer and professional development training for MSPB staff and IT personnel.
6. Consider consolidating, outsourcing, or reallocating resources and personnel to other mission-critical areas as a result of modernizing our core business applications in the cloud.
7. Use information about technical and operational survey requirements provided by agency subject-matter experts to obtain and maintain a FedRAMP certified IT survey capability that has flexible survey design and administration, and Governmentwide compatibility in a secure, cloud-based environment, to conduct research surveys and collect other similar data to support MSPB's merit systems studies mission and internal program evaluation. (Related to objective 1C.)

Assessing Achievement of MSPB Strategic and Management Objectives

The following PGs are used to assess achievement of MSPB's objectives. They include outcome, output, process, customer service, and customer satisfaction PGs and strategic indicators.[10] Detailed information about PGs, including measures and yearly targets for each goal, are contained in the APPs. MSPB is committed to the annual tracking and reporting of achievement in relation to strategic and management objectives and PGs. Strategic indicators may be measured periodically as resources allow.

Strategic Goal 1

1A. Provide understandable, high-quality resolution of appeals supported by fair and efficient adjudication and alternative dispute resolution processes.

Performance Goals:

1A-1 Maintain quality of initial decisions.
Consider, determine, and implement changes to this goal, measure, or target in light of the possible impact of the approach chosen by the new Board to address the PFR backlog and begin issuing PFR decisions.

1A-2 Maintain quality of decisions reviewed by in the courts.

1A-3 Maintain participants' positive perceptions of the adjudication ***process.***

1A-4 Maintain processing timeliness for initial appeals.

1A-5 Maintain processing timeliness for PFRs.
Consider, determine, and implement appropriate goals, measures and targets to track and ensure transparency in reducing the PFR case backlog at HQ.

1A-6 Maintain participants' positive perceptions of the ADR ***process.***

Strategic Indicator:

S1A-1 Percent of adjudication participants and legal stakeholders over time who agree that MSPB decisions are thorough, understandable, thoughtful, and legally sound.

1B. Enforce timely compliance with MSPB decisions.

Performance Goal:

1B-1 Maintain timeliness of processing compliance/enforcement cases.
Consider, determine, and implement appropriate goals, measures and targets to track and ensure transparency in reducing the enforcement case backlog at HQ.

1C. Conduct objective, timely studies of the Federal merit systems and Federal human capital management issues.

Performance Goals:

1C-1 Maintain the number and scope of *IoM* newsletters or other articles.

1C-2 Maintain the number and scope of MSPB study reports, briefs, or other documents.
Consider, determine, and implement appropriate changes to goals, measures, and targets to ensure timely publication of official merit systems study reports by the new Board following an almost three-year lack of quorum.

1C-3 Conduct surveys of Federal employees to assess and report on the health of the merit systems.

[10] Strategic indicators may exceed what MSPB can do or control on its own, but reflect areas in which MSPB can make a contribution to strengthening merit, improving adherence to MSPs, and prevention of PPPs.

Strategic Indicator:

S1C-1 Percent of studies stakeholders over time who agree that study reports are objective, timely, well written, and include appropriate recommendations.

1D. Review and act upon the rules, regulations, and significant actions of the Office of Personnel Management, as appropriate.

Performance Goals:

1D-1 Maintain program for review of OPM regulations.
Consider, determine, and implement appropriate goals, measures and targets to track and ensure transparency in reducing the backlog of cases requesting review of OPM regulations at HQ.

1D-2 Maintain program for reviewing and reporting on OPM significant actions.

Strategic Goal 2

2A. Inform, promote, and/or encourage actions by policymakers, as appropriate, that strengthen Federal merit systems laws and regulations.

Performance Goals:

2A-1 Maintain scope of references to MSPB work and products.

2A-2 Maintain the number and scope of MSPB products focused on policymakers or changing Governmentwide policy.

2B. Support and improve the practice of merit, adherence to MSPs, and prevention of PPPs in the workplace through successful outreach.

Performance Goal:

2B-1 Maintain the number and scope of outreach contacts and events.
Consider, determine, and implement any changes to this performance goal, measure, or target in lieu of the agency priorities and resource availability while simultaneously addressing the HQ case backlog.

Strategic Indicator:

S2B-1 Increase in the proportion of Federal employees who perceive adherence to the MSPs, or decrease in the proportion who perceive occurrence of PPPs, over time. (Also relevant to Objective 2C.)

2C. Advance the understanding of the concept of merit, the MSPs, and the PPPs through the use of educational standards, materials, and guidance established by MSPB.

Performance Goals:

2C-1 Maintain the number and scope of materials viewed or accessed from MSPB's website that are designed to improve the practice and understanding of merit.

2C-2 Maintain number and scope of available educational materials and guidance.

Strategic Indicator:

S2C-1 Increase in the proportion of agencies that provide training and/or educational materials about the merit systems, MSPs, and PPPs to their employees over time.

Management Objectives

M1. Lead, manage, and develop employees to ensure a diverse, inclusive, and engaged workforce with the competencies to perform MSPB's mission and support functions successfully.

Performance Goals:

M1-1 Ensure MSPB's workforce has the competencies needed to perform its mission.
M1-2 Maintain positive perceptions of diversity and inclusion by MSPB employees.
M1-3 Strengthen and maintain employee engagement and address engagement issues identified in the FEVS.

M2. Develop budgets and manage financial resources to ensure necessary resources now and in the future.

Performance Goal:

M2-1 Develop fully justified budgets and ensure resource accountability.

M3. Improve and maintain IT and information services programs to support agency mission and administrative functions.

Performance Goals:

M3-1 Ensure availability and reliability of MSPB IT systems, hardware, and applications.
M3-2 Ensure satisfaction with internal IT support and services.

M4. Modernize core business applications to achieve electronic adjudication, and provide a web-based survey capability.

Performance Goal:

M4-1 Improve efficiency of adjudication case processing.
M4-2 Improve agency survey capability.

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Trends and Challenges that May Affect Agency Performance

A number of significant external trends and internal challenges are likely to affect MSPB's mission through FY 2024. This section lists these trends and challenges and their potential effect on the agency. MSPB studies, newsletters, decisions, and other information and products may help inform Congress and other stakeholders on the potential impacts on merit and the Federal workforce of various actions and external trends. Otherwise, the external trends described here are beyond MSPB's influence. Additional narrative information about these trends and challenges can be found in MSPB's annual performance report (APR) and APP documents.

External Trends

- Changes in law, jurisdiction, policy, authorities and flexibilities (e.g., the All Circuit Review Act, the National Defense Authorization Act (NDAA) for FY 2018, the Dr. Chris Kirkpatrick Whistleblower Protection Act, Executive Orders (EOs) 13836, 13837, and 13839, and continuing impacts from other laws and issues described in the last SP, such as the Follow the Rules Act and the VA Accountability and Whistleblower Protection Act).
  - Increased adjudication workload, expanded jurisdiction, increased numbers of employees who can file appeals with MSPB, implementation of statutory time constraints on appeals processing, increased case complexity, fewer cases resolved through ADR leading to an increased proportion of cases requiring full hearings, and expanded case tracking, coding, and reporting requirements.
  - Increased need for and complexity in studying the Federal merit systems, Federal management, and reviewing OPM rules, regulations, and significant actions to ensure the workforce is managed under the MSPs and free from PPPs.
  - Increased need to promote merit and educate Federal policymakers, managers and employees, other stakeholders, and the public about Federal merit systems, MSPs, and PPPs.

- Governmentwide reform (e.g., EO 13781 and related OMB Memorandum M-17-22), the *President's Management Agenda*, *Delivering Government Solutions for the 21st Century: Reform Plan and Reorganization Recommendations*, *Celebrating One Year of Progress: The President's Management Agenda Anniversary Report*, and *One Year Update: Reform Plan and Reorganization Recommendations*, and potential fiscal constraints with related workforce adjustments.
  - Increases in the number of reductions in force (RIFs), furlough, Voluntary Early Retirement Authority (VERA), and Voluntary Separation Incentive Payments (VSIP) appeals as a result of Governmentwide reform and related budget and workforce reductions.
  - Increase in appeals workload due to the potential use of VERA and VSIP, RIFs, furloughs, and actions taken in lieu of or in preparation for RIFs.
  - Continued need to conduct merit systems studies and make recommendations on how to ensure merit and avoid PPPs during these workforce changes.

Internal Management Issues and Challenges

- Lack of Board quorum.
  - The lack of quorum since January 2017, followed by lack of any Presidentially-appointed, Senate-confirmed Board members since March 2019, prevents MSPB from completing statutory functions including issuing decisions on PFRs and other cases at HQ, issuing merit systems study reports, and promulgating substantive regulations and interpretive precedential decisions in response to legislative changes.

  - MSPB also was unable to set agency targets or measure progress in FY 2018, FY 2019 and FY 2020 for PGs related to quality of initial decisions, average PFR processing time, enforcement case processing time, publication of merit systems study reports, and review of OPM regulations.
  - Indirect effects include results for cases left unchanged by the court and outreach. There were 30 percent fewer cases processed by the court in FY 2019 compared to FY 2016 (the last full year with a quorum), or 87 versus 125 cases, respectively. The lack of new MSPB Board precedents and no publication of merit systems studies reports limit the new content available to share with stakeholders, and may lead to a possible decrease in the number of outreach events.

- IT stability, security, and modernization.
  - In order to effectively and efficiently modernize our legacy case processing systems, MSPB required contractor support to develop requirements and begin design and configuration of a new e-Adjudication system, including electronic filings, automated workflows, electronic case files, and other enhancements to minimize our reliance on paper and the need to print case files as our official records.
  - The new core business application is highly configurable and should allow us to create workflows for a new ticketing system. Customer feedback for the new e-Appeal system was already obtained through the requirements development process. Thus, the PGs for the help desk ticketing system and for obtaining customer feedback on e-Appeal were terminated in FY 2019. We will review the PGs for IT help desk operations and e-Appeal customer satisfaction when the new applications are fully implemented. All IT functions will continue during the transition.
  - Obtaining and ensuring the resources and expertise needed to improve MSPB's survey capability required for MSPB's studies mission and customer satisfaction survey program. This includes supporting MSPB's new FedRAMP certified, web-based survey application and ensuring the application can be used securely for Governmentwide surveys.

- Human capital issues.
  - High proportion of retirement-eligible MSPB employees in key positions including AJs and their managers, and challenges retaining expertise when employees in critical, one-deep positions depart the agency (through retirement, resignation, or transfer).
  - A need for resources to sustain staff expertise through transfer of tacit knowledge of experienced staff (see above), overlapping new hires, and using re-employed annuitants to ensure transfer of critical knowledge and competencies.
  - Require resources for training and employee development needed to ensure employee competencies to perform MSPB's work.
  - Return to long hiring lags even for critical positions.
  - Require continual SHCP process to assess and develop an agency and workforce structure to ensure a successful MSPB in the future.
  - Possible effect of *Lucia, et al. v. Securities and Exchange Commission (SEC),* 585 U.S. __ (2018).

Program Evaluation and Performance Measurement

Program Evaluation

MSPB programs broadly affect Federal merit systems and Federal management, and they generate significant value for Federal agencies and the public. Effective program evaluation is critical to ensuring that MSPB can continue to achieve its mission effectively and efficiently and to provide value now and in the future. Emphasis on program evaluations has increased in recent years and was listed in the Administration's Reform Plan released June 21, 2018 as an area that needs to be strengthened.[11] Program evaluation, as well as performance measurement, also is related to the Foundations for Evidence-Based Policymaking Act of 2018.[12] MSPB is committed to high-quality program evaluation. However, ensuring our ability to perform our statutory mission, as well as ensuring compliance with requirements of the GPRAMA and recent program evaluation guidance from OMB, could require increased resources and program evaluation staff.

A relatively small increase in MSPB's program evaluation resources and staff could likely yield a large return in efficiency and cost savings for MSPB. In turn, this would improve the value MSPB brings to agencies, Federal employees, individual parties to cases filed with MSPB, and to the public. If internal program evaluation resources are not available, contractor support is a viable, but potentially more expensive, option for conducting tasks associated with program evaluations. This option is most useful when the evaluation topic is technical in nature, beyond the knowledge of existing program staff, or when the evaluation is focused on program evaluation itself or on the office within which program evaluation activities are conducted.

Performance Measurement: Verifying and Validating Performance Information

Most quantitative measures of MSPB's adjudication performance come from its automated case management system (Law Manager), which tracks location, timeliness, outcomes, and other information about cases filed with MSPB. Other quantitative and qualitative performance measures are reported by MSPB's program offices. MSPB also collects external customer satisfaction data from adjudication, ADR and (more rarely) merit systems studies customers and stakeholders. Several of MSPB's management PGs use data from OPM's FEVS. MSPB also has an active internal survey program, which measures various management PGs contained in MSPB GPRAMA reports, and provides customer feedback and customer service information on internal administrative programs such as IT, information services, HR, facilities, travel, procurement, and EEO programs.

MSPB has made many recent improvements in performance measurement. Even so, recent data integrity issues, coupled with the emphasis on 100 percent e-Adjudication and new core business applications, continue to highlight the importance of continuous improvement in performance measurement. MSPB needs to consider the status of its performance measurement functions, and seek to develop an agency-wide performance measurement policy that will improve oversight, accountability, and coordination of performance measurement processes. Such a policy will help ensure the consistency, validity, and verifiability of the performance data used to manage MSPB programs and included in agency reports. MSPB will develop an agency policy for performance measurement utilizing findings from its data integrity and regional case processing evaluations and the results of the requirements gathering process for new core business applications. The recent

[11] Executive Office of the President of the United States, June 21, 2018, *Delivering Government Solutions for the 21st Century: Reform Plan and Reorganization Recommendations*, p. 118.

[12] Pub. L. 115-435, signed by the President on January 14, 2019.

work on developing a Federal Data Strategy is also relevant to agency program evaluation and performance measurement.[13]

Results and Status of Program Evaluation Activity

Government Accountability Office (GAO) assessment of processing WPEA cases at MSPB. GAO's 2017 report on the WPEA recommended updating the user guide for entering WPEA data at MSPB and improvements to MSPB's data quality checks to help identify discrepancies in WPEA data. In addition, MSPB has conducted an initial internal assessment of the data entry and data checking processes used for adjudication case management, including, but not limited to, whistleblower data. Finally, MSPB's considerable efforts in FY 2018 to define the requirements necessary for modernizing its core business applications also included information about our current case management system, Law Manager, which will serve as a foundation for updating the data entry user guide and defining appropriate quality checks in the reporting process. Developing the requirements necessary to update our core business applications, including a next-generation electronic case management system, also served as a surrogate evaluation of Law Manager. No additional evaluation of Law Manager will be performed since it is likely that it will be replaced with a new core business application in the next two years. In addition, the process used to identify the requirements for new core business applications provided essential background information as the initial steps in evaluating the functions of ORO.

Define adjudication process/develop requirements for new core business applications. This activity involves validating the business and technical requirements for these applications, i.e., our case management, document management, and document assembly systems, to support e-Adjudication, and developing a prioritized path for upgrades necessary to support our business processes. In FY 2017, we began by developing a performance work statement (PWS) to create our requirements documentation. The contract was awarded in FY 2018 and work was completed in the 3rd quarter of 2018. The contract to design and implement the new core business applications was awarded in FY 2019.

Program Evaluation Status

MSPB Program Evaluation Status		
Program/ System to Evaluate	**Evaluation Start Year**	**Status**
Case processing and data integrity in the ROs/FOs	**2017**	Initial information was provided by the GAO WPEA report. Additional information was provided in the internal assessment of data entry processes for case management data. In FY 2018, further information was provided in conjunction with our efforts to define the adjudication process as part of the initiative to develop requirements for new core business applications. Results of these efforts will help ensure compliance with GAO's recommendations from the WPEA report and the development of an agency-wide performance measurement policy. In addition, the automated process for surveying initial appeals and ADR participants provides ongoing data to inform next steps in this program evaluation. MSPB's adjudication process may also be affected by legislative changes in the appeals process including specific timeliness and procedural requirements. A preliminary draft report was prepared by OPE describing how key appeals data are collected and reported in Law Manager and providing recommendations for improving data quality. Next steps in this program evaluation, including changes in scope, will await results from ongoing activities, changes in legislation, and direction from a new Chairman.

[13] See https://strategy.data.gov/.

Functions of ORO	**2018**	In FY 2018, we developed requirements for modernizing our core business applications, including business process narratives, breakdowns of internal and external users groups, and data flow diagrams. This baseline information provides a starting point to help structure and inform any evaluation of our adjudicatory processes. While program evaluation of ORO functions was not the focus of the requirements development effort, it was helpful in better understanding our processes and systems. Further steps in conducting an evaluation of ORO functions will await guidance from a new Chairman.

Proposed Program Evaluation and Performance Measurement System Review Schedule

Efforts to develop an agency policy for performance measurement, verification, and validation resulted in realization that such a policy has implications for and is related to Governmentwide policy efforts involving data quality and integrity, data governance, and related issues. This work continued in FY 2019 as resources allowed. Based on the availability of resources, a projected schedule for program evaluation activities through FY 2022 is provided below. Additional specifications for these evaluations and changes in the evaluation focus or schedule may occur when the quorum is restored and we have a new Chairman.

Program/Performance Measurement System	Evaluation Start Year (FY)
Data integrity and case processing in the ROs/FOs	2017
Functions of ORO (rescheduled from FY 2020)	2018
Implementation of SHCP process	2020
Assess agency telework usage and reporting	2020
Administrative functions of the Office of the Clerk of the Board	2021
Merit Systems Studies	2022
HR management & EEO functions	2022

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Governmentwide Contextual Indicators of a Strong Merit-based Civil Service

MSPB cannot achieve its mission to protect and promote a strong merit-based civil service on its own. Federal policymakers and other stakeholders must do their part to establish and implement merit-based policies, and must apply these policies to the everyday practice of merit in the workplace. A strong merit-based civil service also requires the cooperation and commitment of every agency leader, manager, supervisor, and employee. If everyone does their part, we will have a stable, highly qualified, diverse workforce managed under MSPs and free from PPPs, able to provide superior services to the American people.

MSPB cannot control the ultimate strength of the Federal merit systems or the degree to which other stakeholders do their part to support strong merit systems. However, we suggest that the following long-term, Governmentwide contextual indicators illustrate important aspects of creating and maintaining a strong merit-based civil service in the Federal Government. It is important to note that these are long-term indicators with changes becoming evident over a period of several years, beyond the period of time covered in this SP. Objective, verifiable, and valid information related to these indicators may be available from a variety of Federal agencies, as well as Government oversight organizations, public management groups, and other sources.

- ✓ Higher Governmentwide employee engagement and improved organizational management leading to higher organizational performance.
- ✓ A stable (with constructive turnover), competent, diverse, and inclusive workforce.
- ✓ Decrease in the actual or perceived occurrence of PPPs, or in the perception of the adverse impact of PPPs, as reported by Federal employees.
- ✓ Increase in the perception that agencies monitor the performance and conduct of their employees and take effective and efficient actions for improvement or discipline, when appropriate.
- ✓ Increase in the percent of Federal employees, supervisors, managers, and leaders who understand the basis of the Federal merit systems, the MSPs, and the PPPs.
- ✓ Increase in the percent of employees who agree they have confidence in the Federal merit systems appeals process.
- ✓ Increase in reported level of public trust in Federal civil servants.

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Appendix A: More about MSPB

MSPB's Jurisdiction under Other Federal Laws

Performance and retirement cases: The CSRA gave MSPB jurisdiction to adjudicate adverse actions (under 5 U.S.C. chapter 75), performance-based cases (under 5 U.S.C. chapter 43), and retirement cases under the Civil Service Retirement System, in addition to several other less-used authorities. Since then, Congress has given MSPB jurisdiction to hear cases and complaints filed under a variety of other laws.[14] The Federal Employee Retirement System (FERS) Act authorized MSPB to hear FERS appeals and interpret FERS and issues arising from it.[15]

Cases involving veterans: Under the Uniformed Services Employment and Reemployment Rights Act, a person entitled to the rights and benefits provided by chapter 43 of title 38 U.S.C. may file an appeal with the Board alleging that a Federal agency employer or OPM failed or refused, or is about to fail or refuse, to comply with a provision of that chapter, such as a denial of reemployment rights following a period of uniformed (military) service or discrimination based on a person's uniformed service.[16] This prohibition applies to initial employment, reemployment, retention in employment, promotion, or any benefit of employment. The Veterans Employment Opportunity Act (VEOA) provides preference eligible veterans with a means to seek redress before MSPB for alleged veterans' preference violations, such as those concerning non-selections for vacant Federal positions. VEOA also provides certain veterans a means of redress before MSPB when they have been denied the right to compete under certain vacancy announcements.[17]

Employees in other merit systems: Additionally, MSPB hears appeals from employees covered by merit systems established under other statutes. For example, MSPB has jurisdiction over certain Veterans Health Administration employees pursuant to 38 U.S.C. § 7403(f)(3), RIF actions affecting a career or career candidate appointee in the Foreign Service pursuant to 22 U.S.C. § 4010a, and cases involving preference eligible veterans in the United Stated Postal Service (USPS) and Postal Regulatory Commission under 5 U.S.C. § 7511(a)(1)(B)(ii).

Whistleblowers and new PPPs: Under the Whistleblower Protection Act (WPA), MSPB exercises jurisdiction over claims made by whistleblowers in two types of appeals. An individual right of action (IRA) appeal is authorized by 5 U.S.C. § 1221(a) with respect to personnel actions that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities.[18] If the action is not otherwise appealable directly to MSPB, the appellant first must seek corrective action from OSC. An otherwise appealable action is a direct appeal to MSPB under laws, rules, or regulations other than 5 U.S.C. § 1221(a), providing MSPB with jurisdiction over the case, which also includes an allegation that the agency action was based on the employee's whistleblowing activities. The appellant may choose either to seek corrective action from OSC before appealing to MSPB or appeal directly to MSPB.[19] That choice determines the scope of review applicable to the appeal.

Congress enacted significant changes to whistleblower protections in the WPEA.[20] This legislation amended the WPA to: (1) expand the scope of protected disclosures and activities; (2) eliminate or

[14] Also including 5 U.S.C. chapter 43, and all those set out at 5 C.F.R. part 1201.3.

[15] 5 U.S.C. § 8461(e), enacted by Pub. L. 99-335, title I, § 101, 100 Stat. 571 (1986).

[16] Pub. L. 103-353, codified at 38 U.S.C. §§ 4301-4335.

[17] 5 U.S.C. § 3330a-c.

[18] IRA appeals involve personnel actions listed in 5 C.F.R. § 1209.4(a).

[19] Examples of such otherwise appealable actions are listed in 5 C.F.R. §§ 1201.3 (a)(1) through (a)(19).

[20] Pub. L. 112-199.

narrow some exclusions from coverage; (3) add to the covered actions over which MSPB has appellate jurisdiction; (4) extend protections to all Transportation Security Administration employees; (5) authorize MSPB to impose disciplinary action in some retaliation cases; (6) expand MSPB's authority to award compensatory and other damages; and (7) require MSPB to include whistleblowing case processing data in its APRs. The WPEA, as amended, also suspended, for five years, the exclusive jurisdiction of the CAFC over MSPB whistleblower cases. On July 7, 2018, the President signed the All Circuit Review Act.[21] The All Circuit Review Act reinstated (retroactive to November 26, 2017) and made permanent the authority for appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with any circuit court of appeals of competent jurisdiction (instead of only the CAFC). The WPEA also added a 13th PPP, which involves appropriate enforcement of nondisclosure agreements. The WPEA enhanced whistleblower protections and gave MSPB more responsibility and authority in whistleblowing cases, which has added to MSPB's case workload and case complexity.[22] GAO issued a report on the WPEA in November 2016.[23] As discussed above, MSPB has made and is continuing to make changes to its processes for recording and reporting WPEA data in response to issues found and recommendations made in that report.[24]

The Follow the Rules Act, which was signed into law on June 14, 2017, amended the right-to-disobey provision of the WPEA.[25] This provision originally protected covered employees from retaliation for refusing to obey an order that would require the individual to violate a law.[26] The Follow the Rules Act permits an employee to refuse to obey an order that would require him or her to violate a law, rule, or regulation. This includes agency-specific rules and regulations, and is likely to be the subject of appeals brought to MSPB when agencies attempt to discipline employees for failing to obey an order.

On October 26, 2017, the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 was signed into law.[27] This law creates a 14th PPP prohibiting access to medical records of another employee or an applicant for employment as a part of, or otherwise in furtherance of, any conduct described in PPPs 1 through 13. In addition, this law: (1) requires agency heads to propose disciplinary action against supervisors who are found to have committed a PPP; (2) provides certain whistleblower protections to probationary Federal employees; (3) provides guidelines to enhance Federal employee awareness of Federal whistleblower protections; and (4) enhances access to information by OSC.

On December 12, 2017, the FY 2018 NDAA was signed into law.[28] Section 1097 of this law reauthorized OSC. The most significant provision of this law relevant to whistleblower protection is section 1097(d), which amends 5 U.S.C. §§ 4302 and 4313 to require that agencies establish criteria for adding the protection of whistleblowers as a critical element for supervisors' performance appraisals (including SES performance appraisals). The provision also requires agencies to report annually to Congress the number of performance appraisals that determine agency supervisors fail to meet these standards. Another provision of this law, section 1097(c), amends 5 U.S.C. § 2302(b)(9)(C) to provide whistleblower protections for employees who cooperate with or disclose information not only to an Inspector General or the Special Counsel, but also to any other component responsible for internal investigation or review of an agency. The FY 2018 NDAA also contains a provision (similar to the Dr.

[21] Pub. L. 115-195.

[22] The updated text for the eight sections of the U.S.C. changed by the WPEA is available on the MSPB website at http://www.mspb.gov/appeals/uscode.htm.

[23] Government Accountability Office, Whistleblower Protection: Additional Actions Would Improve Recording and Reporting of Appeals Data (GAO-17-110), November 2016.

[24] Improvements to FY 2016 WPEA data have been made and are contained in the APR-APP for FY 2016-2018.

[25] Pub. L. 115-40.

[26] 5 U.S.C. § 2302(b)(9)(D).

[27] Pub. L. 115-73.

[28] Pub. L. 115-91.

Chris Kirkpatrick Whistleblower Protection Act) that requires the head of the agency to propose discipline of a supervisor determined by the agency head, an administrative law judge, the MSPB, OSC, a judge of the United States, or the agency's Inspector General to have committed a PPP.[29] If a suspension of more than 14 days, a demotion, or a removal is taken against a supervisor under this statute, the supervisor has the right to appeal the matter to the MSPB. Finally, section 1097(c)(4) amends 5 U.S.C. § 1214 to permit OSC to petition the MSPB to order corrective action against an agency if the agency's investigation of an employee was begun, expanded, or extended in retaliation for a protected disclosure or activity, regardless of whether a personnel action was taken.

On December 20, 2019, section 5721 of the NDAA for FY 2020 amended the PPP in 5 U.S.C. §2302(b)(8) to specifically protect disclosures to Congress.[30] Expending the definition of disclosures to those made to Congress could increase the number of appeals involving whistleblowing.

Hatch Act cases: MSPB also processes cases brought by OSC related to the behavior of public employees alleged to be in violation of political conduct prohibited by the Hatch Act. The Hatch Act Modernization Act of 2012, which was signed into law on December 28, 2012, broadens the scope of permissible political activities for state, local, and Federal employees, and affects MSPB's jurisdiction and processing of such cases. The Act expands the range of penalties MSPB may apply for Federal employees who violate the prohibitions in the Act, and, in some cases, permits retroactive application of these penalty provisions for Federal employees. In another area related to OSC, Congress authorized any remaining MSPB Board member, who was appointed by the President and with the advice and consent of the Senate, in circumstances in which the Board lacks a quorum, to extend the period of any OSC stay granted under 5 U.S.C. § 1214(b)(1)(A).[31]

Title 5 employees who work in specific agencies: The FY 2016 NDAA made several changes to the HR resources authorities used to manage Department of Defense (DOD) civilian employees. The changes include lengthening the probationary period for new DOD employees, making employee performance the most important factor in determining retention standing of DOD employees in a RIF, delaying a within-grade-increase (WIGI) for the period of time the employee is not performing at an acceptable level of competence, and clarifying removals related to suitability determinations.[32] Processing appeals from DOD employees related to these issues might be a bit more complicated until changes in precedent, if any, are made.

The FY 2017 NDAA made additional changes in the management of DOD employees.[33] This law also added MSPB appeal rights for up to 11,500 National Guard military technicians for various actions taken against them when they are not in a military pay status, or when the issue does not involve fitness for duty in the reserve component.[34] The law also repeals the waiver of the 180-day period after retirement before retired members of the armed forces may be appointed to DOD civilian positions. The Senate Report for the repeal of the 180-day waiver cites MSPB's report on hiring veterans entitled, "*Veteran Hiring in the Civil Service: Practices and Perceptions*."[35]

[29] 5 U.S.C. § 7515(b).

[30] Pub. L. 116-92, the NDAA for FY 2020.

[31] Pub. L. 115-42, enacted June 27, 2017.

[32] The NDAA for FY 2016, Pub. L. 114-92, § 1101 (RIF), § 1105 (probationary period), § 1106 (delay of WIGI), § 1086 (suitability adverse actions).

[33] The NDAA for FY 2017, Pub. L. 114-328 § 512 (gives appeal rights to military technicians), § 1111 (repeals 180-day waiver).

[34] Based on information provided to MSPB by the National Guard.

[35] S. Rep. 114-255, https://www.congress.gov/congressional-report/114th-congress/senate-report/255/1.

On June 23, 2017, the VA Accountability and Whistleblower Protection Act of 2017 was signed into law.[36] This law essentially replaced the Veterans Access, Choice, and Accountability Act of 2014[37] for purposes of SES appeals, and changes the requirements for appeals of adverse action taken against VA employees, including how MSPB processes those appeals. The new law: (1) requires that performance-based actions be taken under chapter 75 rather than chapter 43; (2) lowers the standard of proof for all VA adverse actions from preponderance of the evidence to substantial evidence; (3) disallows mitigation of the agency's selected penalty by MSPB; (4) imposes a 180-day time limit for issuance of an MSPB initial decision; and (5) requires that actions against SES members be grieved in an internal process so that they are no longer appealable to MSPB.

Administrative leave: The Administrative Leave Act of 2016 (§ 1137 of the FY 2017 NDAA) limits the length of time an agency can place an employee on paid administrative leave to 10 work days in a calendar year, and it defines three new categories of paid leave: "notice leave," "investigative leave," and "weather and safety leave."[38] For purposes of title 5 U.S.C. subchapter II of chapter 12 and § 1221 (IRA appeal in reprisal cases), placing an employee on investigative leave for a period of not less than 70 work days shall comprise a personnel action under paragraph (8) or (9) of § 2302(b), thus essentially adding to the possible grounds on which an employee might file an appeal based on the PPPs related to whistleblowing.[39]

Investigations of former employees: The FY 2017 NDAA also expands MSPB's jurisdiction to include a new type of appeal. When an employee who is the subject of an investigation resigns before the investigation is completed, and the investigation results in an adverse finding as to the former employee, the head of an agency is required to make a permanent notation of the adverse finding in the former employee's official personnel file (OPF). The former employee is entitled to notice, and an opportunity to challenge, the adverse finding. If the agency upholds the adverse finding, the former employee is entitled to appeal to MSPB the agency's decision to place a notation of the adverse finding in his or her OPF. The OPF provisions became effective upon enactment of the NDAA.[40] The notation in the OPF, and the right to appeal it, assumed added significance throughout the Government because Congress also created a requirement for agencies to check the OPF of any former employee before making hiring decisions.[41]

MSPB's Scope of Impact

Through its adjudication and studies functions, MSPB affects almost every Federal employee, and through those employees, affects the quality of the services provided to the American people. Under various statutes, MSPB provides an independent, third-party review authority for over 2 million Federal civilian employees, applicants for Federal civilian jobs, and selected categories of the almost 575,000 employees of the USPS and 1.4 million uniformed military service members. MSPB's adjudication function covers individuals in almost every Federal cabinet level department, small and independent agencies, Government boards, and other executive branch organizations.

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[36] Pub. L. 115-41.

[37] The Veterans Access, Choice, and Accountability Act of 2014, Pub. L. 113-146. On May 9, 2017, the U.S. Court of Appeals for the Federal Circuit found portions of the law relating to SES appeals to be unconstitutional. *See Helman v. Department of Veterans Affairs,* 856 F.3d 920 (Fed. Cir. 2017).

[38] NDAA for FY 2017, § 1138.

[39] 5 U.S.C. § 2302(b)(8) provides protections for whistleblowing, and (b)(9) provides protections for the exercise of or participation in an appeal, complaint, or grievance procedure or refusing to obey an order that would require violation of law.

[40] NDAA for 2017 § 1140.

[41] 5 U.S.C. § 3330(e).

MSPB's merit systems studies function provides findings and recommendations that are applicable to and can improve Federal merit systems policies and practices in all Federal executive branch organizations. Because these study findings and recommendations focus in part on improving public management in support of fundamental public service values, they also may provide useful information and guidance for the management of Federal legislative branch and judicial branch employees and public employees at the state and local levels. Through MSPB's authority to review and act on OPM rules, regulations and significant actions, MSPB protects the Federal merit systems and helps ensure that Federal employees are managed in adherence with MSPs and free from PPPs. This broad authority includes all employees in all the agencies for which OPM sets policy, beyond the specific individual employees who may file appeals to MSPB challenging actions their agencies have taken against them.

MSPB Customers, Partners, and Stakeholders

MSPB has a range of customers, partners, and stakeholders beyond the President and Congress who receive our reports on Federal merit systems studies and on OPM significant actions, and who look to MSPB as a key component of a healthy civil service. Adjudication customers include those who appear before us, such as appellants, appellant representatives, and agency representatives. Legal stakeholder groups include bar associations, attorney associations focused on Federal employment law, employee unions, management associations, veterans and military organizations, and other people or groups interested in our decisions and legal precedents. Customers and stakeholders primarily interested in our merit systems studies and OPM review functions include agency leaders, chief human capital officers, HR directors, EEO directors, HR and EEO specialists, academicians, good Government groups (e.g., the National Academy for Public Administration, etc.), and affinity groups (e.g., Federally Employed Women, Blacks in Government, etc.). This also includes other Government and non-profit organizations that do work similar to MSPB's studies function, such as GAO and the Partnership for Public Service.

MSPB partners include those organizations with which it has formal statutory or functional relationships, such as OPM, OSC, the Equal Employment Opportunity Commission (EEOC), and the CAFC. MSPB's authority to review OPM rules, regulations, and significant actions is described above. In addition, an MSPB Board member may request an advisory opinion from the Director of OPM concerning the interpretation of any rule, regulation, or other policy directive promulgated by OPM. The OPM Director may request reconsideration of an MSPB decision when the Director determines that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management, and the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

OSC prosecutes cases before MSPB that involve PPPs and violations of the Hatch Act and can seek corrective action. Further, if MSPB determines there is reason to believe that a current employee may have committed a PPP, it must refer the matter to OSC to investigate and take appropriate action. MSPB and EEOC both review mixed cases that involve issues concerning both Federal MSPs and anti-discrimination principles as applied to Federal employees. Usually, MSPB and EEOC agree on the outcome of such cases. However, when the two agencies do not agree, the case is decided by a Special Panel as established by the CSRA.

The CAFC hears cases resulting from an appeal of a final Board decision in which no issue of discrimination was raised to or decided by the Board or when a discrimination issue was abandoned on judicial review. As mentioned earlier, whistleblower appeals may be filed with any U.S. Circuit

Court of Appeals, and mixed cases may be appealed to district courts or to EEOC.[42] MSPB applies precedents established by the court(s) in adjudicating initial appeals and PFRs, although it has not yet addressed whether or how it will apply the whistleblower law of the other numbered circuits to the extent it may differ from CAFC holdings.

MSPB employees and the MSPB Professional Association, which represents MSPB's non-supervisory attorneys, are also key stakeholders because they carry out MSPB's work. Federal civilian employees, applicants for Federal civilian jobs, and selected categories of USPS employees and military service members, are also stakeholders. This is because the precedents MSPB sets through adjudication, the findings and recommendations of our studies, and our review of OPM rules, regulations, and significant actions, affect how well these employees are managed and how any potential appeals they may file are processed and decided. Several foreign governments also have an interest in MSPB and have used MSPB and the U.S. merit systems as models for establishing similar agencies and systems in their own countries. Finally, the public is a stakeholder because a successful MSPB helps ensure a healthy merit systems and a high-quality workforce able to provide effective and efficient services to the American people.

[42] See *Perry v. Merit Systems Protection Board*, 137 S. Ct. 1975 (2017).

Appendix B: More about the New Strategic Plan

Updates to and Consultation on the Strategic Plan for FY 2020-2024

As noted earlier, this SP updates changes in law including the All Circuit Review Act, FY 2018 NDAA, and EOs 13836, 13837, and 13839 (published in May 2018). It also references Governmentwide reform efforts, and how changes in law and reform may impact MSPB's work. The SP reflects streamlined measures of IT operations, and an updated program evaluation plan. In the fall of 2019, we consulted with, but received no comments from Congress on this SP.

Links to Other MSPB Plans and Reports

This SP provides the foundation for MSPB's work for the next several years. It defines our purpose and lays out the long-term outcomes we hope to achieve. In accordance with the GPRAMA, MSPB's APPs include one or more program PGs for each strategic objective in the SP. Each performance goal has a performance measure, and annual performance targets designed to move the agency incrementally toward achievement of its strategic goals, strategic objectives, and management objectives. MSPB reports program performance results as compared to the APP goals, measures, and targets in the APR. The APR and APP are combined in the APR-APP, which is published in February each year. The APR-APP presents information about MSPB's performance results and performance plans in a coherent, cogent, and straightforward manner, and minimizes the duplication and redundancy that would occur by publishing the APR and APP separately. In accordance with MSPB's statute (Title 5 U.S.C. § 1206), MSPB also publishes an Annual Report (AR) each year containing information about MSPB's significant actions for that year. The AR contains case processing statistics, summaries of significant Board decisions, court opinions relevant to MSPB's work, merit systems studies activities, a review of the significant actions of OPM and the degree to which those actions uphold merit and prevent PPPs, and other information of interest to MSPB's stakeholders. MSPB's SPs and APR-APPs are posted on its website at www.mspb.gov in accordance with GPRAMA and OMB guidance. The website also contains MSPB ARs, and other agency-wide information.

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Appendix C: The Merit System Principles and the Prohibited Personnel Practices

The Merit System Principles: Title 5, United States Code, § 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.

The Prohibited Personnel Practices: Title 5, United States Code, § 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 except as provided under section 3303(f);

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee of 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;

(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; or

(C) any disclosure to Congress (including any committee of Congress) by any employee of an agency or applicant for employment at an agency of information described in subparagraph (B) that is--

(i) not classified; or

(ii) if classified--

(I) has been classified by the head of an agency that is not an element of the intelligence community (as defined by section 3 of the National Security Act of 1947 (50 U.S.C. 3003)); and

(II) does not reveal intelligence sources and methods.

(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;

(i) with regard to remedying a violation of paragraph (8); or

(ii) other than with regard to remedying a violation of paragraph (8).

(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;

(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. This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress; 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.

(14) access the medical record of another employee or an applicant for employment as a part of, or otherwise in furtherance of, any conduct described in paragraphs (1) through (13).

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