insights & analyses for Federal human capital management

ISSUES OF MERIT

January 2014

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

WHAT'S INSIDE

The First Merit Principle: Fair and Open Competition

Since the Pendleton Act in 1883, it has been a basic rule that entry into the Federal civil service should be grounded in fair and open competition. The intent is to promote efficient and effective Government by assuring that Federal employees are hired on the basis of their competence rather than their connections. This precept is now codified as the first merit system principle and supported by other statutory provisions that prescribe certain measures to promote fair and open competition (such as public notice of competitive examinations) and proscribe certain practices that are harmful to it.

Nevertheless, the law does not precisely define what constitutes fair and open competition, nor does it specify in detail how Federal agencies should use the many appointing authorities that are available to assure fair and open competition. Furthermore, fair and open competition is not the only consideration that drives recruitment and hiring decisions. Agencies must also comply with public policies that can impose requirements—and produce outcomes—that might appear inconsistent with fair and open competition. Agencies must also be attentive to the merit system principle calling for efficient and effective use of the workforce. Much discretion and judgment is left to agencies, HR staff, and hiring managers.

This discretion brings with it the responsibility to make informed and principled decisions when recruiting and hiring. Federal agencies and managers cannot assume that merely complying with the letter of the law will result in fair and open competition. Below, we outline three stages in hiring ("decision points") at which Federal agencies and Federal managers can make a job competition more fair and open—or intentionally or inadvertently "close" the competition.

1. The area of consideration. This decision point concerns who the agency will allow to compete for the position. Important choices at this decision point include the extent of the applicant search (for example, will the agency recruit solely from internal employees, or look for external candidates), the appointing authorities to be used, and how the position will be advertised (for example, will the agency conduct active outreach and recruitment, or rely solely on a USAJOBS vacancy announcement).

2. The application period ("open window"). This decision point concerns how much time agencies will give applicants to submit an application. As discussed in an upcoming report, there is no point that clearly distinguishes an open window that is "too short" from one that

continued, page 3

insights & analyses for Federal human capital management

ISSUES OF
MERIT

U.S. Merit Systems Protection Board

CHAIRMAN
Susan Tsui Grundmann

VICE CHAIRMAN
Anne M. Wagner

BOARD MEMBER
Mark A. Robbins

Office of Policy and Evaluation

DIRECTOR
James M. Read

DEPUTY DIRECTOR
James J. Tsugawa

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

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

Reprint Permission
We invite you to reprint any of our articles. If you do, please include the following attribution: *Reprinted from Issues of Merit, a publication of the Office of Policy and Evaluation, U.S. Merit Systems Protection Board*.

For More Information
Contact us at:
www.mspb.gov/studies
STUDIES@mspb.gov
202-254-4802 x4802
1-800-209-8960
V/TDD: 202-653-8896
(TTY users may use the Federal Relay Service, 800-877-8339)

U.S. Merit Systems Protection Board
Office of Policy and Evaluation
1615 M Street, NW
Washington, DC 20419

DIRECTOR'S PERSPECTIVE

Moving to the Other Side of the House

James M. Read joins the Office of Policy and Evaluation as its new Director and offers perspective on two of MSPB's missions.

After 20 years working as an attorney in support of the Board's adjudication activities, I have moved to the studies side of the house. In this, my debut column as Director of Policy and Evaluation, I want to reflect on the relationship between these two functions.

The Civil Service Reform Act of 1978 empowers the Board to "adjudicate" matters within its jurisdiction and to "conduct . . . special studies relating to the civil service."[1] In performing the first function, the Board resolves employment-related legal disputes under its jurisdiction between individuals and agencies via decisions that are binding on the parties; when the Board's decision is precedential, any interpretation of the law contained therein represents the law of the workplace throughout the executive branch.[2] In performing the second function, the Board typically sets out policy prescriptions or options for improving how existing policy is implemented for consideration by Congress and the President. When adjudicating a dispute, the Board limits its deliberations to the evidence that the litigants submit. By contrast, when conducting a study, the Board makes "such inquiries as may be necessary" and, unless otherwise prohibited by law, "shall have access to personnel records or information collected by the Office of Personnel Management and may require additional reports from other agencies as needed."[3] In other words, the findings and conclusions in a study are derived from Board-initiated empirical research.

It is tempting to view adjudication as a hard-edged and precise undertaking and to view studies as a pliable and expansive project. On a practical level, this perception is accurate. The Board must decide each specific, live controversy that is within its adjudicatory jurisdiction and either grant or deny relief under the applicable law, whereas the Board has great discretion in determining the timing and content of studies.

Conceptually, however, the distinction between the subject matter of adjudication and of studies—law and policy, respectively—is not so sharp. Indeed, laws are nothing more than operational expressions of policy. For example, the Pendleton Act of 1883 reordered the civil service system by introducing the policy that positions in the Executive Branch should be filled on the basis of merit rather than political affiliation. The Act carried out this policy by dictating procedures to be followed before an individual may be appointed in the civil service.[4] While the legislative process often involves translating broad ideas into concrete rules, this does not mean that a policy goal is by its nature ambiguous if it

[1] Pub. L. No. 95454, 92 Stat. 1111; *see* 5 U.S.C. § 1204(a)(1), (3). The studies function includes the responsibility to report on the adequacy of protections against prohibited personnel practices.
[2] *See Cornelius v. Nutt*, 472 U.S. 648 (1985); 5 C.F.R. § 1201.117(c).
[3] 5 U.S.C. § 1204(e)(3).
[4] Ch. 27, 22 Stat. 403; *see generally* 5 U.S.C. ch. 33.

continued, page 3

Director's Perspective

(continued from page 2)

has not been enacted into law. For example, leaving aside the particular means adopted for achieving the policy goal underlying the Pendleton Act, there was nothing fuzzy about the goal itself, namely, replacing a patronage-based hiring system with a merit-based one. The Board, for its part, has issued studies containing specific recommendations or options for changes in policy or how a policy is carried out.[5]

Through adjudication, the Board interprets and applies rules found in the Constitution, statute, and regulation. Through studies, the Board analyzes facets of the Federal personnel system and identifies possible improvements. Perhaps the key difference between adjudication and studies activities is in their effect. A decision creates immediate, enforceable legal obligations,[6] while a study may or may not result in a change in policy—or a change in the way an existing policy is implemented—depending on its persuasiveness, prevailing political considerations, and other factors. In the end, though, the Board's adjudication and studies activities are complementary; both are aimed at fostering an optimally-functioning civil service system under which employment decisions are based on merit and free from prohibited personnel practices. ❖

James M. Read

Director, Policy and Evaluation

[5] *See, e.g.*, U.S. Merit Systems Protection Board, *Restoring Merit to Federal Hiring: Why Two Special Hiring Programs Should be Ended*, January 2000; U.S. Merit Systems Protection Board, *The Rule of Three in Federal Hiring: Boon or Bane*, December 1995.

[6] *See* 5 U.S.C. § 1204(a)(2).

Fair and Open…

(continued from page 1)

is "sufficient." The question is whether a qualified citizen without an "inside track" has a reasonable opportunity to learn of the job and submit a viable application—and the answer depends on factors such as the availability of qualified applicants, the extent of recruitment efforts, and the application requirements.

3. Assessment methods. This decision point involves both *what* an agency is seeking (the job-related attributes on which applicants will compete) and *how* an agency will evaluate job applicants (the assessment tools to be used, such as evaluations of training and experience, educational requirements, and structured interviews). Previous MSPB reports have emphasized how assessment tools differ in their ability to predict job performance; our upcoming report on fair and open competition will focus on how assessment methods can affect the fairness and openness of a job competition.

The report on fair and open competition will examine these decision points in depth and discuss the balancing act that agencies and managers must perform when recruiting. Additionally, the report will make recommendations to help agencies and managers better understand their obligations and options in recruitment and hiring, navigate often-complex Federal hiring processes, and honor the Federal Government's commitment to fair and open competition. ❖

! Three New MSPB Reports !

MSPB invites *Issues of Merit* readers to look at our three new reports:

***Clean Record Settlement Agreements and the Law* discusses the prevalence of clean record settlement agreements and the importance of parties making careful decisions about what an agreement will cover and choosing words that accurately express their intentions.**

***Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism* presents results from the Federal Merit Systems Survey and recommendations regarding how to encourage merit-based decisions and avoid favoritism.**

***Evaluating Job Applicants: The Role of Training and Experience in Hiring* examines the relative advantages of occupational questionnaires, resumes, accomplishment records, and other training and experience assessments used by Federal agencies.**

These reports are available on MSPB's web site at www.mspb.gov/studies.

Federal Employees: What Makes You Engaged?

The New Year and the early months of the Federal performance cycle bring opportunities for new goals, projects, and initiatives directed towards agency mission accomplishment. In a complementary fashion, the New Year also brings fresh opportunities for fueling employee engagement. An article in the previous issue[1] and past MSPB research[2] emphasize the importance of quality employee-supervisor relationships for building and sustaining engagement. Internal agency policies and practices can also affect employee engagement as can external events such as sequestration, pay freezes, and furloughs. While employees cannot control these forces, nor always insulate themselves from any adverse effects that they may bring, employees can still take action to help shape their own engagement.

Specifically, employees can identify and discuss with their supervisors what engages them at work; how these factors compare with agency needs; and strategies for addressing any misalignment.[3] For example, employees could determine and discuss:

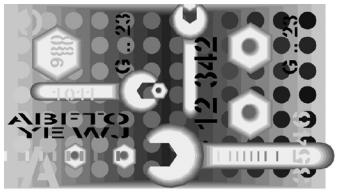
- The goals they have for their work and the impact that they desire to have;
- The talents and contributions they desire to bring to the table;
- What excites and energizes them about their jobs;
- What drives them to take the initiative and go the extra mile;
- What keeps them focused on their work amidst the many distractions, obstacles, and even derailments that characterize the work day; and
- What fuels their perseverance in the face of adversities such as pay freezes, training cuts, furloughs, and attacks on the "essentiality" of their work.

Such a process of identifying and discussing engagement factors could occur several times throughout the performance cycle, or even on an on-going basis. Yet, regardless of frequency, it is critical that employees take the lead in determining what is important for their engagement. This is because there is unlikely to be a "one-size-fits-all" recipe for fueling engagement as each employee has different capabilities, interests, and goals with respect to work, as well as different perceptions about what they want to contribute to and receive from their jobs.[4] Sure, supervisors (and Federal agencies at large) can establish job conditions and work environments that are more or less conducive for encouraging employee engagement, such as ensuring fairness, a positive workplace culture, opportunities for growth and development, and appropriate recognition.[5] Further, supervisors can take the initiative in building quality working relationships with their employees. But only employees can identify what factors are most important for them *as individuals* to be fully absorbed and invested in—and passionate about—their work. And only employees can determine what stirs them emotionally, cognitively, and behaviorally[6] to apply their talents and give their all at their jobs or in service of their coworkers, bosses, or agencies.

Overall, while employees have little (or no) control over the internal agency and external forces that can impact engagement, employees can still help to shape their own engagement. Step 1 is for employees to identify their personal engagement factors; step 2 is to discuss such factors with their supervisors—on an as-needed basis—paying particular attention to any misalignment with job, work unit, or agency characteristics. Such conversations provide ongoing opportunities for employees and supervisors to jointly understand what is necessary for employees to give their all in their current jobs, and to best support mission accomplishment. But the process begins with employees; only they can identify their personal "engagement fuel." ❖

[1] U.S. MSPB. Employee-Supervisor relationships: A key to capitalizing on employees' talents. *Issues of Merit*, pp. 4 & 7, September 2013.
[2] U.S. MSPB. *Managing for Engagement—Communication, Connection, Courage*, July 2009.
[3] *See* Rice, Marlow, and Masarech. *The Engagement Equation*, John Wiley & Sons, Inc., 2012.
[4] *See* Rice, Marlow, and Masarech. *The Engagement Equation*, John Wiley & Sons, Inc., 2012.
[5] U.S. MSPB, *The Power of Federal Employee Engagement*, September 2008.
[6] *See* Kahn (1990). Psychological conditions of personal engagement and disengagement at work. *Academy of Management Journal*, 33, 692-724.

TOOLS OF THE TRADE



Action Learning

In 1982, Reginald Revans coined the term "action learning" (AL) to refer to an educational approach that combines the application of formal knowledge with insightful questioning to solve real world problems. Formal knowledge is gained through traditional instructional methods such as classroom lectures and reading of text books or case studies. Insightful questioning consists of asking thought-provoking questions that encourage viewing an issue from multiple perspectives. In an agency setting, AL can be used to achieve a solution to a real-world issue while providing an opportunity for participant hands-on learning.

For many years, private sector organizations have successfully used AL techniques to develop their leaders. However, the Federal sector has been considerably slower to adopt AL. Only 21 percent of career senior executives have participated in an AL project even though a majority of those participants characterized the experience as being either very effective or mostly effective for continuing their development.[1] Given the range and complexity of Federal missions and work—and the ongoing need for effective leaders and good training—it seems prudent for Federal agencies to consider the developmental opportunities that AL approaches can offer.

Although AL approaches can vary based on agency or participant needs and goals, key elements include:

Problem: Select a problem that is important to the agency, does not have a readily apparent solution, and could benefit from input from multiple work units.

Team or set: Assign individuals who have a stake in the outcome. This group typically consists of four to eight people who possess diverse knowledge and skills. There may also be a senior leader connected to the team. The senior leader does not participate in the problem solving process but supports the team by providing organizational resources.

Process: For each problem, encourage participants to carefully and consistently ask questions, use reflective listening, identify possible solutions, and weigh alternatives before selecting a course of action.

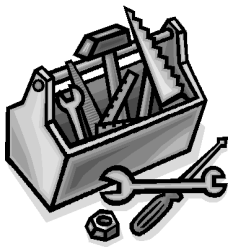
Coach: Have a coach present during team meetings and discussions to provide ongoing guidance and feedback. The coach's role is to help the team understand strengths and weaknesses in how they individually and collectively approached the problem. The coach can reinforce key learning strategies and help the team apply the lessons learned to other situations.

Action: At the end of the process some action must be taken. The team may present their findings and recommendations to senior leaders for implementation. Alternatively, members of the team may have authority within the scope of their own responsibilities to implement the recommendations.

Feedback: The team may receive feedback from the senior leader or observe first-hand the challenges of implementation and how well the recommendations or action resolved the problem. The team can use this information to reflect on the outcome and continue the learning process.

Action learning can create a win-win situation for agencies and employees. However, agencies must exercise discretion in selecting the AL process that works best for them. Factors to consider include the nature of the problem, available resources, and the previous experience of team members with AL.

Regardless of the AL approach, the overall goal is to achieve participant learning and agency action on a pressing problem. Agencies can also use AL projects to foster a learning environment capable of addressing future challenges or initiatives. Participants can leverage their AL experiences to expand their professional networks, develop or strengthen their leadership competencies, and refine their problem solving skills. Thus, AL is a tool that can provide short- and long-term benefits to both agencies and employees. ❖



[1] U.S. Office of Personnel Management (2012). Senior Executive Service Survey Results for Fiscal Year 2011.

Supervisors' Decisions: Merit or Favoritism?

The merit system principles (MSPs) and the prohibited personnel practices (PPPs) create clear expectations for the fair and effective management of the Federal workforce. For example, the MSPs advocate selection and advancement on the basis of merit, as well as protection against personal favoritism. Favoritism occurs when a supervisor provides an unfair advantage to an employee or applicant based on non-merit factors such as personal feelings or relationships.

As discussed in the recently published MSPB report, *Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism*, some Federal employees suspect that favoritism exerts an undue influence on many supervisory decisions. Specifically, 28 percent of employees believe their own supervisor practices favoritism, while just over half agree that other supervisors in their organization practice favoritism. Employees may be more likely to see favoritism among other supervisors in their organization simply from looking at a larger number of people so that one "bad apple" can ruin perceptions of the entire group. An alternative explanation could be that employees, who don't know other supervisors (or their employees) as well, have less information on which to base their opinions regarding favoritism. As a result, they are more likely to perceive favoritism outside their work unit compared to their closer experience with their own supervisor.

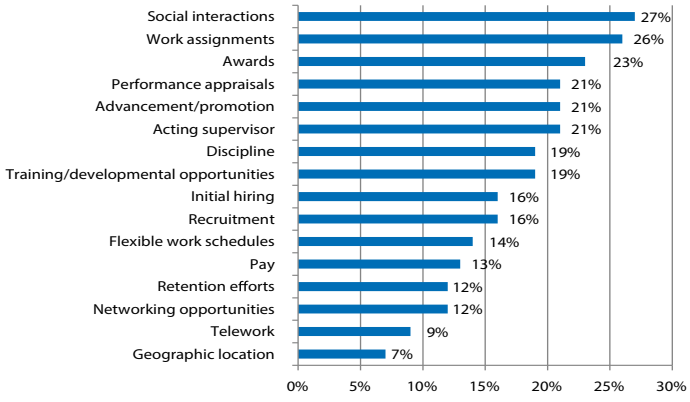
As shown in the chart below, Federal employees report that favoritism can influence a wide variety of supervisory actions from formal actions that should be made in a structured manner and carefully documented, such as selection decisions (for example, initial hiring and advancement/promotion), performance recognition, and discipline, to activities that are less structured, such as social interactions, and providing work assignments and training opportunities. Given that social interactions and work assignments are often made informally, it is not surprising that these topped the list in terms of perceptions of favoritism. Yet even formal, high-stakes actions were sometimes viewed skeptically. For example, about 1 in 5 employees saw awards, performance appraisal ratings, and promotions as areas where their supervisors had unfairly allocated resources.

Given these results, supervisors should be aware that employees pay attention to the entire range of actions that they take during the day, from formal decisions to informal interactions, and may attribute even slight differences in treatment to favoritism. Such scrutiny should not lead supervisors to avoid casual interactions and substantive discussions with employees nor to shirk their responsibilities to make decisions based on merit and to exercise transparency so employees understand the rationale behind these decisions. Nevertheless, supervisors must be mindful that employees are attentive to their actions, including those that may seem insignificant to the supervisor, and that employees make inferences—which may be correct or incorrect—about the supervisor's motivations and integrity.

These employee perceptions of unfairness can influence their feelings about their agency, their coworkers, and negatively impact their performance.[1] Fortunately, agency leaders, supervisors and employees can take actions to avoid perceptions of favoritism and ensure merit-based decisions. More about such actions can be found in the report. ❖

[1] U.S. Merit Systems Protection Board, *Beware of the Unintended Consequences of Favoritism*, *Issues of Merit*, June 2013, p. 5.

Perceptions of Favoritism in Supervisory Actions



Clean Record Settlements: Words Matter

The fate of a petition for enforcement of a settlement agreement often depends on the precise words the parties use in their agreement and the extent to which the parties understand the meaning of those words.

A comparison of the Board's recent decision in *Shirley v. Department of the Interior* and an older case, *Sena v. Department of Defense*, helps to illustrate this point. In *Shirley*, the appellant was employed by the National Park Service (NPS) in Tennessee prior to his removal. After the appellant filed an appeal with MSPB, the parties entered into a clean record agreement in which they agreed that the appellant's removal action would be replaced with a resignation action and that "the terms and conditions of this Agreement, including the identity of the Parties, and the facts surrounding the Agreement are to be deemed confidential and not to be disclosed to anyone[.]"

The appellant later applied for and was offered a position with the NPS in Alaska. The appellant's petition for enforcement alleged that someone within the NPS then informed the Alaska office of facts surrounding the agreement and thereby breached the agreement. However, the Board determined that the precise words of the agreement stated that it was entered into by the appellant and the "National Park Service." Relying upon prior Board case law, the Board held that information cannot be deemed a disclosure if a party shares the information with itself, and thus the purported communication within the NPS could not be a breach of the agreement.

The Board noted that this was a different outcome than had been reached in *Sena v. Department of Defense*, in which the settlement agreement specifically said that the information could not be shared, except among the positions and individuals explicitly named in the agreement. In *Sena*, a breach occurred when the agency shared information with its equal employment opportunity office, which was not named in the agreement as an authorized party. The Board held that because the *Shirley* agreement lacked the limits of the *Sena* agreement, the *Shirley* agreement was not breached when one part of the NPS told a different part of the NPS about information covered by the agreement.

As explained in our recent report, *Clean Record Settlement Agreements and the Law*, distinctions in the precise wording of settlement agreements can result in very different outcomes in a petition for enforcement. Parties need to be careful about the words they use and understand the implications of those words, recognizing that the Board will apply the established meaning of those words. Every word matters. ❖

MSPB Welcomes *James M. Read* as the New Director of the Office of Policy and Evaluation

Chairman Susan Tsui Grundmann of the Merit Systems Protection Board (MSPB) announces the appointment of James M. Read as the Director of the Office of Policy and Evaluation (OPE) at MSPB headquarters.

Mr. Read is an attorney and career Senior Executive at MSPB, where he has held a variety of positions including Chief Counsel to Chairman Neil McPhie, Director of the Office of Appeals Counsel, and, most recently, Senior Counsel to Board Member Mark Robbins. In recent years, Mr. Read has served on inter-agency assignments as Special Counsel for Personnel with the Executive Office for U.S. Attorneys and Special Assistant to the Director of the Federal Bureau of Investigation's whistleblower protection program. Mr. Read received his B.A. from Hamilton College and his J.D. from George Washington University and began his legal career clerking for the Chief Judge of the Court of Federal Claims. He is licensed to practice law in New York, Connecticut, and the District of Columbia, and previously served as co-chair of the American Bar Association's Federal Service Labor & Employment Law Committee.

In making this appointment, Chairman Grundmann, stated, " I am delighted that Jim will continue his service to MSPB and the public in this critical leadership position. I look forward to his significant contribution to our adjudicatory and studies missions in the years ahead."

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

FIRST CLASS MAIL
POSTAGE & FEES PAID
MSPB 20419
PERMIT NO. G-113

January 2014

ISSUES OF MERIT

Volume 19 Issue 1

IN THIS ISSUE * IN THIS ISSUE * IN THIS ISSUE