

# AN INTRODUCTION TO THE U.S. MERIT SYSTEMS PROTECTION BOARD



# HISTORY

Why does an agency that began doing business in 1979 have the date 1883 on its logo?

- Spoils system!
- Assassination!
- Pendleton Act
- Civil Service Reform Act of 1978
- Reorganization Plans 1 and 2 of 1978



# EEO: FROM CIVIL SERVICE COMMISSION TO MSPB

Pre-1979, 18 agencies had authority over EEO  
5 C.F.R. Part 713 - Federal employee EEO  
appeals were decided by the CSC; under the  
CSRA, EEOC gained a role

MSPB appellate jurisdiction - 5 U.S.C. § 7701

Mixed Cases – 5 U.S.C. § 7702

- MSPB vs. EEOC

- Special Panel

Merit Systems Principles & Prohibited  
Personnel Practices - 5 U.S.C. §§ 2301, 2302

# MISSION & VISION

- MSPB Mission: Protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices.



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

# MSPB & OSC

- 1979 – OSC was part of MSPB
- 1989 – Whistleblower Protection Act - OSC became an independent agency.
- Responsibilities – 5 USC § 1212:
  - Investigates alleged PPPs
  - Petitions for stays and corrective action
  - Brings complaints seeking disciplinary actions
  - Investigates and brings actions re violations under § 1216
  - May bring corrective action under USERRA & disciplinary action under VEOA

# MSPB ORIGINAL JURISDICTION

- OSC Disciplinary Actions
  - OSC Corrective Actions
  - OSC Stay Requests
  - OSC and others' requests for protective orders
  - Hatch Act Appeals
  - Actions against ALJs
  - Removal from the SES
- 

# MSPB APPELLATE JURISDICTION – 5 C.F.R.

- Adverse action –Part 752
- Unacceptable performance –Part 432
- Reduction in force – Part 351
- Denial of within-grade increase – Part 531
- Suitability – Part 731
- Restoration to duty – Part 353
- Retirement – Parts 831, 837, 838, 839, 841 to 847
- IRA – Part 1209
- VEOA, USERRA – Part 1208
- Others - See § 1201.3

# GENERAL RULES OF PROCEDURE

- Right to “due process”
- Right to a hearing and “transcript”
- Right to call and cross-examine witnesses
- Right to representation or self-representation
- Right to discovery, subpoena
- If prevailing, perhaps right to interim relief, attorney fees & costs, enforcement of compliance

# STATISTICS

- FY2006 – FY2010: 34,115 appeals were decided in MSPB regional and field offices, an average of more than 6,800 per year, in an average of fewer than 88 days each. During that period, MSPB had between 56 and 60 Administrative Judges.



- Approximately 60% of the cases that were not dismissed were settled.
- Approximately 5,751 PfRs and other cases were decided by the Board members during these years, an average of 1,150 cases per year.
- Mixed Cases: During the same 5 years, 9,276 appeals raised a discrimination allegation; 1,481 were decided on the merits. Most commonly raised was disability discrimination, followed by race.

# DISCIPLINE – ADVERSE ACTIONS



- Agency's burden of proof:
  - Charges
  - Nexus
  - Penalty
- Appellant's burden:
  - Jurisdiction and Timeliness
  - Affirmative defenses
    - - Harmful error, Prohibited personnel practices, Not in accordance with law

# CHARGES REQUIRING PROOF OF INTENT

- **Theft** - intent to deprive the owner permanently of possession and use of the property. *King v. Nazelrod*, 43 F.3d 663, 665-67 (Fed. Cir. 1994).
- **Threat** – reasonable person test applied to: listener’s reactions and apprehension of harm; speaker’s intent; the circumstances; and if conditional. *Metz v. Treasury*, 780 F.2d 1001, 1004 (Fed. Cir. 1986).
- **Insubordination** - willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed. *Phillips v. GSA*, 878 F.2d 370 (Fed. Cir. 1989).
- **Falsification** – knowingly providing wrong information with the intention of defrauding, deceiving, or misleading the agency. *Naekel v. DOT*, 782 F.2d 975, 978 (Fed. Cir. 1986).

# CHARGES WITH ELEMENTS, NOT REQUIRING INTENT

- Failure to Follow Instructions - *Hamilton v. USPS*, 71 M.S.P.R. 547 (1996)
- Lack of Candor - *Ludlum v. Justice*, 278 F.3d 1280, 1284 (Fed. Cir. 2002)
- Misuse of Government Property – 5 C.F.R. § 2635.704
- AWOL – *Johnson v. DLA*, 54 M.S.P.R. 370 (1992)
- Failure to Follow Leave Requesting Procedures – *Wilkinson v. Air Force*, 68 M.S.P.R. 4 (1995).
- An alternative = the Narrative Charge.  
But proceed with caution!!



# NEXUS

An agency may take an adverse action only for such cause as will promote the efficiency of the service. 5 U.S.C. 7513(a), 5 C.F.R. 752.403(a). It may show a nexus between off-duty misconduct and the efficiency of the service by:

- (1) rebuttable presumption in egregious circumstances
- (2) misconduct adversely affects the appellant's or coworkers' job performance or the agency's trust in the appellant's performance; or
- (3) misconduct adversely affects the agency's mission or employee's off-duty misconduct is directly opposed to the agency's mission. *Kruger v. Department of Justice*, 31 MSPR 71 (1987).

# EXAMPLES OF NEXUS

- *Graham v. USPS*, 49 MSPR 364 (1991) – sexual abuse of a minor = egregious.
- *Doe v. Justice*, 113 MSPR 128 (2010) - unprofessional conduct of videotaping sexual encounters with co-workers = affected performance of co-workers and others in office.
- *Wild v. HUD*, 692 F.2d 1129 (7<sup>th</sup> Cir. 1982) - HUD appraiser was a slumlord = contrary to the agency's mission.

# PENALTY

Douglas,  
Douglas,  
Douglas,  
And more  
Douglas

*Douglas v. VA,*  
5 MSPR 280 (1981)



# IS THE PENALTY WITHIN THE BOUNDS OF REASONABLENESS?

**The Rule:** Board reviews whether the agency weighed the relevant factors or was unreasonable. Twelve factors include:

- nature and seriousness of the offense
- nature of the job
- past work and disciplinary records
- consistency with others' penalties
- table of penalties
- rehabilitation potential
- mitigating circumstances
- alternative sanctions



# ALLEGED INVOLUNTARY ACTIONS

- A voluntary action is not appealable. Where the appellant claims that an apparently voluntary action is involuntary, the Board may have jurisdiction over a constructive adverse action.

May include:

- Retirement
- Resignation
- Suspension
- Demotion
- Disability Retirement

# RETIREMENT/RESIGNATION

- Misinformation, deception, or coercion. *Terban v. Energy*, 216 F.3d 1021 (Fed. Cir. 2000). Was the employee deprived of freedom of choice? *Coufal v. Justice*, 98 MSPR 31 (2004).
- Agency made working conditions so difficult or unpleasant that a reasonable person would have felt compelled to resign or retire. Evidence of discrimination or retaliation goes to the question of coercion and may not be examined under Title VII unless jurisdiction is proven. *Markon v. State*, 71 MSPR 574 (1996).
- Threatened removal could not be substantiated, so is purely coercive. *Schultz v. Navy*, 810 F.2d 1133 (Fed. Cir 1987).



# CONSTRUCTIVE SUSPENSION

1. Enforced leave in order to inquire into ability to perform. *Brehmer v. USPS*, 106 MSPR 463 (2007).
  2. Employee, absent from work for medical reasons, requests to return with altered duties and the agency denies the request. If the agency is obligated by policy, regulation, or contract to offer available light-duty work but fails to do so, continued absence may constitute a constructive suspension. *Baker v. USPS*, 71 MSPR 680 (1996).
  3. Employee relies on agency's misleading statements to request LWOP or other non-pay or non-work status.
  4. Intolerable working conditions compelled absence on sick leave, annual leave, or leave without pay.
- Must be more than 14 days to be appealable. 5 USC § 7512(2).



# CONSTRUCTIVE DEMOTION

- **Misinformation, deception, or coercion.**
  - **Agency made working conditions so difficult or unpleasant that a reasonable person would have felt compelled to request assignment that resulted in a lower grade job.**
  - **Position newly classified as worth a higher grade; employee met the requirements for promotion; and employee was reassigned rather than promoted.**
- 

# INVOLUNTARY DISABILITY RETIREMENT

- Accommodation was available between the time a medical condition arose and the date of separation that would have allowed the appellant to continue employment; s/he communicated desire to continue working but that medical limitations required modifications; and agency failed to provide that accommodation. See *Okleson v. USPS*, 90 MSPR 415 (2001).
- Why? Because an appellant who meets the statutory requirements for disability retirement has no true choice between working (with or without accommodation) and not working. If accommodation was impossible, the appellant's disability retirement was not a constructive removal.



# BUT ...

- In very unusual circumstances, the regular tests for involuntariness apply:
- *Hosford v. OPM*, 107 MSPR 418 (2007) - disability retirement involuntary because of misinformation as to eligibility for an immediate optional retirement.
- *Vaughan v. USDA*, 2011 MSPB 61 (6/13/11) - where the appellant alleged he was coerced into retirement because the agency's discriminatory conduct caused him to become disabled, he is entitled to try to prove that his retirement was involuntary under the general principles for constructive discharge.

# HEAR IT FROM AN AJ



- What happens when an appeal is filed?
- How is a record made?
- What is discovery?
- Is a hearing always held?
- Can both parties call witnesses?
- What happens at a hearing?

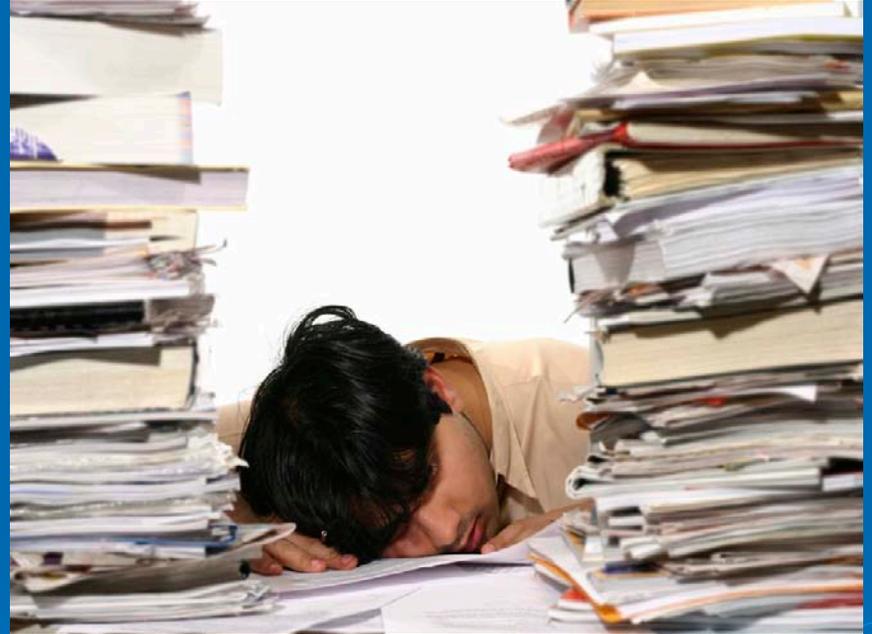
# THE AJ's VIEW

- Does the employee need an attorney?
- Can the agency be required to pay attorney fees and damages?
- How long does the process take?
- What are the parties' options if they disagree with the AJ's decision?
- What is the PFR process?
- What if the employee wins but the agency does not comply with the decision?
- Are there alternatives to adjudication?

# WHISTLEBLOWING

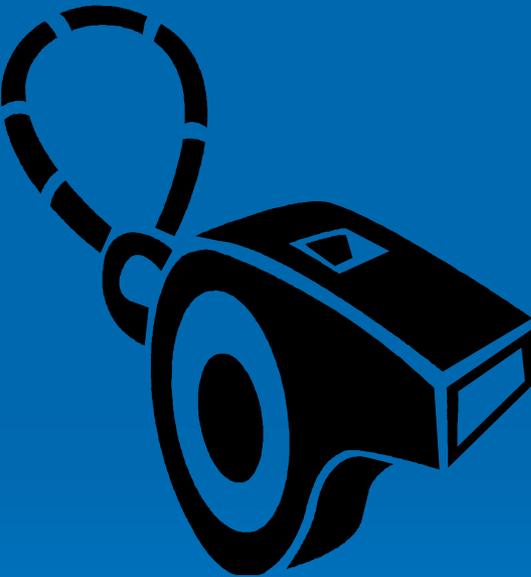
An Individual Right of Action (IRA) appeal is a way for an employee or applicant to seek corrective action for personnel actions that are not otherwise appealable to MSPB.

For Board jurisdiction, appellant must: (1) prove exhaustion of OSC remedy; and (2) make non-frivolous allegations of (i) protected disclosure; & (ii) contributing factor to a personnel action.



On merits, appellant must prove (i) and (ii) by preponderant evidence. Agency must prove by clear and convincing evidence that it would have taken personnel action absent the protected disclosures.

# WHISTLEBLOWING



- What is a **Protected Disclosure**? A disclosure of information that the individual reasonably believes evidences a violation of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; or substantial and specific danger to public health or safety.
- What is a **Contributing Factor**? Any disclosure that affects an agency's decision to threaten, propose, take or not take a personnel action with respect to the individual making the disclosure. 5 CFR § 1209.4(c). The appellant need demonstrate only that the fact of, not necessarily the content of, the protected disclosure was one factor that tended to affect the personnel action in any way.

# VEOA

Two types of claims:

- Violation of a preference eligible's rights under any statute or regulation relating to veterans' preference in employment. 5 USC § 3330a(a)(1)(A).
- Violation of the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures. 5 U.S.C. § 3304(f)(1).

# USERRA

- “A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied ... any benefit of employment on the basis of that membership ....”
- Discrimination or retaliation because a person:
  - (1) took action to enforce a protection under ...
  - (2) testified or made a statement in any proceeding under ...
  - (3) participated in an investigation under ...
  - (4) exercised a right provided for in ... 38 U.S.C. Chapter 43.
- Denial of re-employment after absence from civilian employment to perform uniformed service.

# MIXED CASE COMPLAINTS & APPEALS

The EEOC defines a mixed case complaint as a complaint of employment discrimination related to or stemming from an action that can be appealed to the MSPB. 29 C.F.R. § 1614.302(a).

A mixed case appeal is an appeal filed directly with the MSPB that alleges that an appealable action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability, age or reprisal for prior protected EEO activity. 29 C.F.R. § 1614.302(a)(2).

# MIXED CASE PROCESS

If the EEOC finds that it has jurisdiction to consider a petition to review an MSPB decision, it can either **concur** with the MSPB's decision, or issue a decision that **differs** from that of the MSPB with regard to the issue of discrimination. 29 C.F.R. § 1614.305(c).

When the Commission differs with the decision of the MSPB, the Commission refers the matter back to the Board. If the MSPB reaffirms its decision, with or without modification, the matter is certified to the Special Panel for consideration. The Special Panel must then issue a decision in the matter within 45 days. 29 C.F.R. §§ 1614.306; 1614.308(c).

# SPECIAL PANEL

The Special Panel consists of a Chairman appointed by the President, one member of the MSPB, and one member of the EEOC. MSPB and EEOC each designate a member to serve each time the Special Panel is convened.



The Special Panel will not disturb a Commission decision in which the MSPB does not concur unless the decision depends upon civil service law for its support, or is so unreasonable that it amounts to a violation of civil service law. *Ignacio v. USPS*, 30 M.S.P.R. 471, 486 (Spec. Pan. 1986)

# MERIT SYSTEM PRINCIPLES

- 5 USC § 2301(b) lists “merit system principles” with which Federal personnel management “should be” consistent. The principles are “expressly stated to furnish guidance to Federal agencies in carrying out their responsibilities in administering the public business.” *Wells v. Harris*, 1 MSPR 208 (1979).
- The CSRA’s legislative history states: “Unless a law, rule or regulation implementing or directly concerning the principles is violated (as under § 2302(b)(11)), the principles themselves may not be made the basis of a legal action by an employee or agency.” However, OPM must maintain oversight to “ensure” that activities under any personnel management authority it delegates to agencies are “in accordance with the merit system principles.”

# WHAT ARE THE MSPs?

- (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.

# THE MSPs, cont'd

- (5) The Federal work force should be used efficiently and effectively.
- (6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.
- (7) Employees should be provided effective education and training [where it] 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 [they] 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.

# PROHIBITED PERSONNEL PRACTICES

- A *prohibited personnel practice* is a *personnel action* that is taken for a *prohibited purpose* by someone who has *authority* to take the *personnel action*.
- If the conduct the employee is challenging falls within the scope of the prohibited personnel practices, then the CSRA's administrative procedures provide the *only remedies* and the federal court cannot resolve the claims under another statute, e.g., FTCA, Privacy Act, etc.

# WAYS THAT PPPs MAY BE HEARD BY MSPB

1. OSC files complaint with Board.
2. Employee brings otherwise appealable action to MSPB and raises PPP as affirmative defense. See 5 USC § 7701(c)(2)(B) (“the agency’s decision may not be sustained ... if the employee or applicant for employment ... shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title.”)
3. The Board may review an OPM rule or regulation on its own motion, or on the petition of OSC or “any interested person” and may declare the provision invalid if it either: (1) *requires* an agency to commit a PPP, or (2) as implemented, *requires* an employee to commit a PPP. See 5 USC § 1204(f)(1).

# PERSONNEL ACTIONS

- an appointment;
- a promotion;
- an adverse action or other disciplinary or corrective action;
- a detail, transfer, or reassignment;
- a reinstatement;
- a restoration;
- a reemployment;
- a performance evaluation;
- a decision concerning pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
- a decision to order psychiatric testing or examination; and
- any other significant change in duties, responsibilities, or working conditions.

# FREQUENTLY RAISED PPPs

**5 USC 2301(b)(1)** Prohibits discrimination for or against an applicant or employee on the basis of race, color, religion, sex or national origin (Title VII), age (ADEA), sex (FLSA, pay parity), disabling condition (Rehabilitation Act and ADAAA), and marital status or political affiliation as prohibited under any law, rule, or regulation.

**5 USC 2301(b)(8)** Prohibits agency officials from taking, failing to take, threatening to take, or threatening to fail to take a personnel action, with respect to any employee or applicant for employment, because of a protected disclosure.

**5 U.S.C. § 2302(b)(9)** Prohibits retaliation for protected activities: filing complaint, appeal, grievance; testifying for or lawfully assisting any individual in filing; cooperating with or disclosing information to the Inspector General or OSC; refusing to obey an order that would require an individual to violate a law.

# FREQUENTLY RAISED PPPS, cont'd

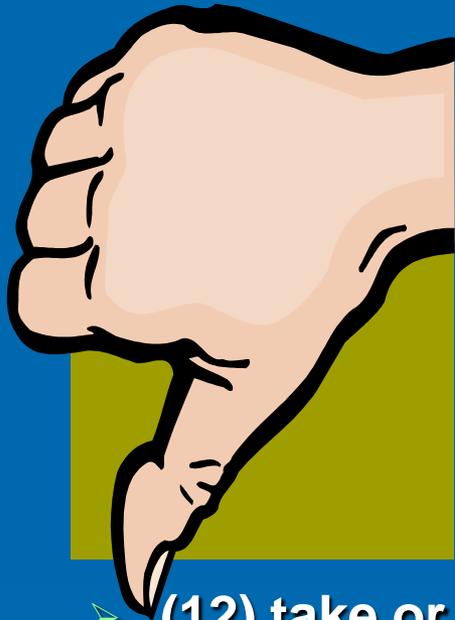
**5 USC 2302(b)(10)** Prohibits discrimination for or against any employee or applicant on the basis of conduct which does not adversely affect his or her performance or the performance of others; conviction of any crime under the laws of any State, DC, or the US may be considered re fitness or suitability.

**5 USC 2302(b)(11)** Prohibits knowingly taking, recommending, or approving – or failing to take, recommend, or approve - any personnel action if the taking of or failure to take such action would violate a veterans' preference requirement

# OTHER PPPs – § 2302(b) ...

- (2) solicit or consider any recommendation as to any person under consideration for any personnel action unless based on personal knowledge or records and consists of an evaluation of the work performance, ability, aptitude, or general qualifications of the individual; or an evaluation of his/her character, loyalty, or suitability;
- (3) coerce the political activity of any person or take any reprisal for a person's refusal to engage in political activity;
- (4) deceive or willfully obstruct any person with respect to his/her 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 unauthorized preference or advantage to any employee or applicant for the purpose of improving or injuring the prospects of any particular person for employment;

# PPPs cont'd



**(7) appoint, employ, promote, advance, or advocate for those actions, in a civilian position any individual who is a relative (as defined in 5 USC 3110(a)(3)) if the position is in the agency in which the relative works or exercises jurisdiction or control as an official;**

- **(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 in § 2301.**

# MERIT SYSTEMS STUDIES

- MSPB's other main statutory function is noted in 5 USC § 1204(a):
  - The MSPB “shall (3) conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected; and
  - (4) review, as provided in subsection (f), rules and regulations of the Office of Personnel Management.”

# STUDIES PRODUCTS

## ➤ Issues of Merit newsletter

## ➤ Reports

- All reports are thoroughly researched and analyzed.
- Based on an approved research agenda or are at the request of Members of Congress.
- To the President and Congress but are distributed to wide audiences of agency leaders, including human capital officers; unions and employee groups; academicians and libraries, and those who have joined our Studies ListServ.
- Available on our website to the public.

# http://www.mspb.gov/studies/

The screenshot shows a Windows Internet Explorer browser window displaying the MSPB Studies website. The address bar shows the URL <http://www.mspb.gov/studies/index.htm>. The website header features the U.S. Merit Systems Protection Board logo and a navigation menu with links: Home, About MSPB, The Appeal Process, MSPB Decisions, MSPB Studies, Public Affairs, FOIA, and Contact. Below the header, there are two main sections: 'Quick Links' on the left and 'MSPB Studies' on the right. The 'Quick Links' section includes a list of links: MSPB Studies, Browse Studies, Search Studies, Browse Newsletters, Browse Surveys, and Contact Studies. The 'MSPB Studies' section displays a search bar with '1 of 9' results and a featured article titled 'Director's Perspective' by John Crum, Director. The article text states: 'The Office of Policy and Evaluation of the Merit Systems Protection Board is responsible for conducting studies of the civil service and other Federal merit systems and for reviewing the significant actions of the Office of Personnel Management.' Below the article, there is a link for 'Lessons Learned: Making Strategic Hiring Decisions'. The browser's taskbar at the bottom shows several open applications, including 'Studies overview.doc...', 'Inbox - Microsoft Out...', 'Pepub on 'Hqf1' (1)', and 'MSPB Studies - Windo...'. The system clock in the bottom right corner indicates the time is 11:53 AM.

MSPB Studies - Windows Internet Explorer

http://www.mspb.gov/studies/index.htm

File Edit View Favorites Tools Help

MSPB Studies

U.S. MERIT SYSTEMS PROTECTION BOARD

Home About MSPB The Appeal Process MSPB Decisions MSPB Studies Public Affairs FOIA Contact

Quick Links

- MSPB Studies
- Browse Studies
- Search Studies
- Browse Newsletters
- Browse Surveys
- Contact Studies

MSPB Studies

1 of 9

**John Crum, Director**

The Office of Policy and Evaluation of the Merit Systems Protection Board is responsible for conducting studies of the civil service and other Federal merit systems and for reviewing the significant actions of the Office of Personnel Management.

Director's Perspective

Lessons Learned: Making Strategic Hiring Decisions

Done Internet 100%

start Studies overview.doc... Inbox - Microsoft Out... Pepub on 'Hqf1' (1) MSPB Studies - Windo... Search Desktop 11:53 AM

# SOME RECENT STUDIES

- Prohibited Personnel Practices: Employee Perceptions
- Women in the Federal Government: Ambitions and Achievements
- Making the Right Connections: Targeting the Best Competencies for Training
- Whistleblower Protections for Federal Employees
- A Call to Action: Improving First-Level Supervision of Federal Employees
- Prohibited Personnel Practices: A Study Retrospective
- Fair and Equitable Treatment: Progress Made and Challenges Remaining
- and many more

For topics to look for in future reports, see “MSPB Finalized 2011-2013 Research Agenda.”

# TO LEARN MORE ...

- The MSPB's website has more information on all of the subjects you've just heard about: [www.mspb.gov](http://www.mspb.gov)



# QUESTIONS???



THANKS FOR YOUR ATTENTION!

