Addressing Misconduct in the Federal Civil Service: Management Perspectives

Supervisors Report the Greatest Barriers to Addressing Employee Misconduct Come from Within Agencies

In 2016, the U.S. Merit Systems Protection Board (MSPB) conducted a survey of supervisors, managers, and senior executives and asked them, "If a subordinate employee engaged in serious misconduct are you confident that you would be able to remove that employee?" Approximately half said yes, they were confident they could remove such a person, but half said no. As shown in the table on the next page, the factors that most influenced the view that a removal could not occur were issues within the control of the agency.

Each item on the table has been assigned a "score." The score is based on the strengths of the expressed views, so that if everyone agreed to a "great extent" the score would be 3, and if everyone agreed to "no extent" the score would be 0.

As the table shows, the greatest perceived barriers to removal were the agency's culture toward taking such actions and the level of support given by managers and leaders. The next greatest barrier was the quality of service provided by the human resources (HR) office. (MSPB is currently working on a study of HR services, including the knowledge, reliability, and helpfulness of the staff in multiple different HR disciplines.)

The perceived level of proof required by law ranked fourth. This item is particularly interesting because, as we have reported before, officials who actually propose and decide to implement removal actions overwhelmingly use a much higher level of proof than the law requires.

The legal standard to remove an employee is preponderance of the evidence, which means it must be more likely than not that the charges against the employee are true. Yet, a few years ago, when we surveyed proposing and deciding officials for removal actions that occurred, 90 percent of proposing officials and 84 percent of deciding officials reported that the standard they used was "beyond a reasonable doubt" – the level of proof our legal system requires in order to send a person to prison or even give them the death penalty. Another 7 percent of proposing officials and 10 percent of deciding officials used the standard of "highly likely" – again a higher standard of proof than is required by law or regulation. Overall, approximately 95 percent of officials used a higher standard of proof than is required by law or regulation.

Thus, it is quite possible that a lack of understanding about the true requirements of the law is a greater barrier than the law itself. (For more on our survey of proposing and deciding officials, see *Adverse Actions: The Rules and the Reality* available at www.mspb.gov/studies/noteworthyarchive.)

Respondents to our 2016 survey of supervisors did recognize there are gaps in their knowledge. Approximately 60 percent stated that, to some or a great extent, one barrier was the degree to which they

Barriers Come from Within Agencies (Continued)

understand the process to remove an employee. However, as shown by the standard of proof used by officials who actually implemented removal actions, officials may not realize just how much they do not know or they may be choosing to make the process more difficult than Congress intended.

The barrier supervisors felt posed the least challenge is their own discomfort with taking a person's job away, with only 45 percent stating it would be a barrier to some or a great extent. The responses to this factor provide only part of the story about the supervisors themselves, because 88 percent of supervisors agreed with the statement, "I think that some supervisors do not manage their employees' conduct because the supervisors want to avoid conflict." In other words, supervisors do not see their own discomfort with firing people as a major factor, but they believe other supervisors are hindered by a discomfort with conflict.

IF AGENCIES ARE THE SOURCE OF THE PROBLEM, THEN THEY CAN BE THE SOURCE OF THE SOLUTION.

Overall, the perceptions reported by supervisors indicate that there is not just one barrier that poses a challenge to removing employees. But, it also shows that many of the strongest barriers that potential proposing and deciding officials face come from within their own agencies. The good news for agencies is that if agencies are the source of the problem, then they can be the source of the solution.

Barriers Identified by Respondents Who Were Not Confident that They Could Remove an Employee for Serious Misconduct *

Rank	Some or Great Extent	Score	Issue
1	80.0%	2.21	My agency's culture regarding removing people for misconduct.
2	77.3%	2.16	The degree of support given by managers and leaders above me.
3	75.6%	2.08	The quality of service provided by my human resources office.
4	74.3%	2.01	The level of proof required by law.
5	64.2%	1.75	How well I understand the process to accomplish this.
6	45.3%	1.33	The degree to which I am comfortable taking a person's job away from him/her.

* The caption of this table has been revised from the original for clarity. The original caption was "To what extent would the following pose a challenge in your attempts to remove an employee for serious misconduct?"

## *Supervisors Want the Process of Taking Adverse Actions to Be Easier While Keeping Employee Protections*

While survey respondents indicated that addressing serious misconduct is less difficult than many of their other tasks, they also reported that it was more difficult than they thought it ought to be. Respondents agreed that it is harder than it should be to suspend (71%), demote (77%), and remove (78%) employees for misconduct.

However, as shown in the chart below, 92 percent of survey respondents agreed with the statement, "Employees should be protected from **erroneous** discipline (*i.e.,* not punished when innocent of charges)." Ninety-three percent of respondents agreed with the statement, "Employees should be protected from **improper** discipline (*i.e.,* not punished for an improper reason such as discrimination or retaliation for reporting wrongdoing).

While supervisors feel that protecting employees' rights is important, they are relatively evenly split on whether the rights employees currently have are at an appropriate level. Approximately one-third of respondents agreed that Federal employees have too many rights; one-third disagreed; and one-third neither agreed nor disagreed. At the same time, 44 percent agreed with the statement, "Knowing that the employee can grieve or appeal a serious adverse action makes me feel more comfortable about taking such actions." About a quarter of respondents disagreed with this statement while the rest neither agreed nor disagreed.

Ultimately, what the survey data indicate is that there is some disagreement among supervisors about how many rights the system should provide to employees, including the desired extent of appeal and grievance rights. But, there is little disagreement on one crucial point – supervisors overwhelmingly want a merit-based system where employees are protected from managers who either make mistakes or act in bad faith.

SUPERVISORS OVERWHELMINGLY WANT A MERIT-BASED SYSTEM WHERE EMPLOYEES ARE PROTECTED FROM MANAGERS WHO EITHER MAKE MISTAKES OR ACT IN BAD FAITH.
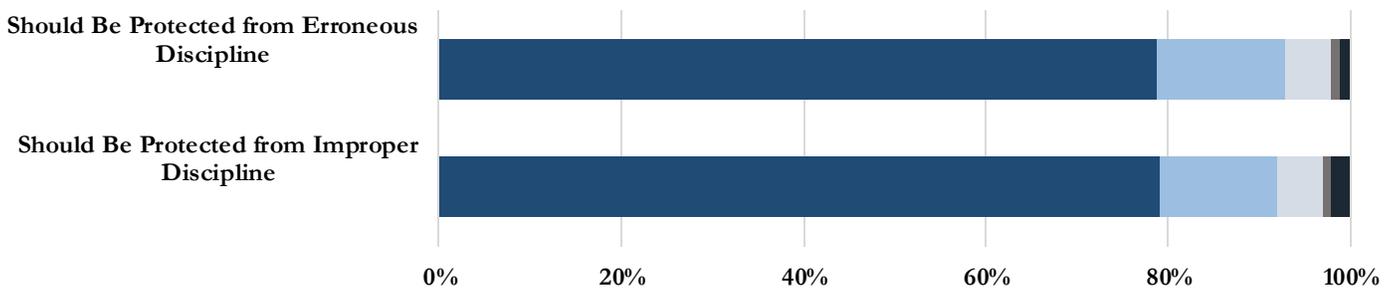
	Should Be Protected from Improper Discipline	Should Be Protected from Erroneous Discipline
■ Strongly Agree	80%	78%
■ Somewhat Agree	13%	14%
■ Neither Agree nor Disagree	5%	5%
■ Somewhat Disagree	1%	1%
■ Strongly Disagree	2%	1%

Supervisors Say Preventing and Addressing Misconduct Are Among the Easier Tasks They Perform

SUPERVISORS REPORTED THAT PREVENTING SERIOUS MISCONDUCT AND ADDRESSING SUCH MISCONDUCT WHEN IT DOES OCCUR WERE AMONG THE EASIER TASKS, RANKING 14TH AND 15TH IN DIFFICULTY OUT OF 19 TASKS.

While there has been much talk recently about the Government's inability to deal with misconduct and fire bad employees, supervisors tell a different story. In our 2016 survey of supervisors (including managers and executives) we asked respondents to tell us, on a scale from 1 to 7, how easy they found each of 19 enumerated tasks. The higher the number assigned, the more difficult the task. Respondents also had the option to select "Not Applicable/Can't Judge" for tasks where they did not have adequate experience to assign a rating. Responses were then averaged, so that the "mean" could serve as a score to allow comparisons between items.

As shown in the table on the next page, supervisors reported that preventing serious misconduct and addressing such misconduct when it does occur were among the easier tasks, ranking 14th and 15th in difficulty out of 19 tasks.

To say that a task is "easier" than others is not the same thing as saying that the task is easy – that would be a score of 1 out of 7, a rating that no task was consistently assigned. Additionally, a task that is relatively easy for one supervisor might be a much more difficult task for a different supervisor (who has different competencies or training) or when it is a different workforce (with much different needs) being supervised.

Challenges that supervisors face when addressing poor performers have also been the subject of much discussion. Yet, supervisors reported that addressing performance issues

Differences in Difficulty Level for Selected Tasks
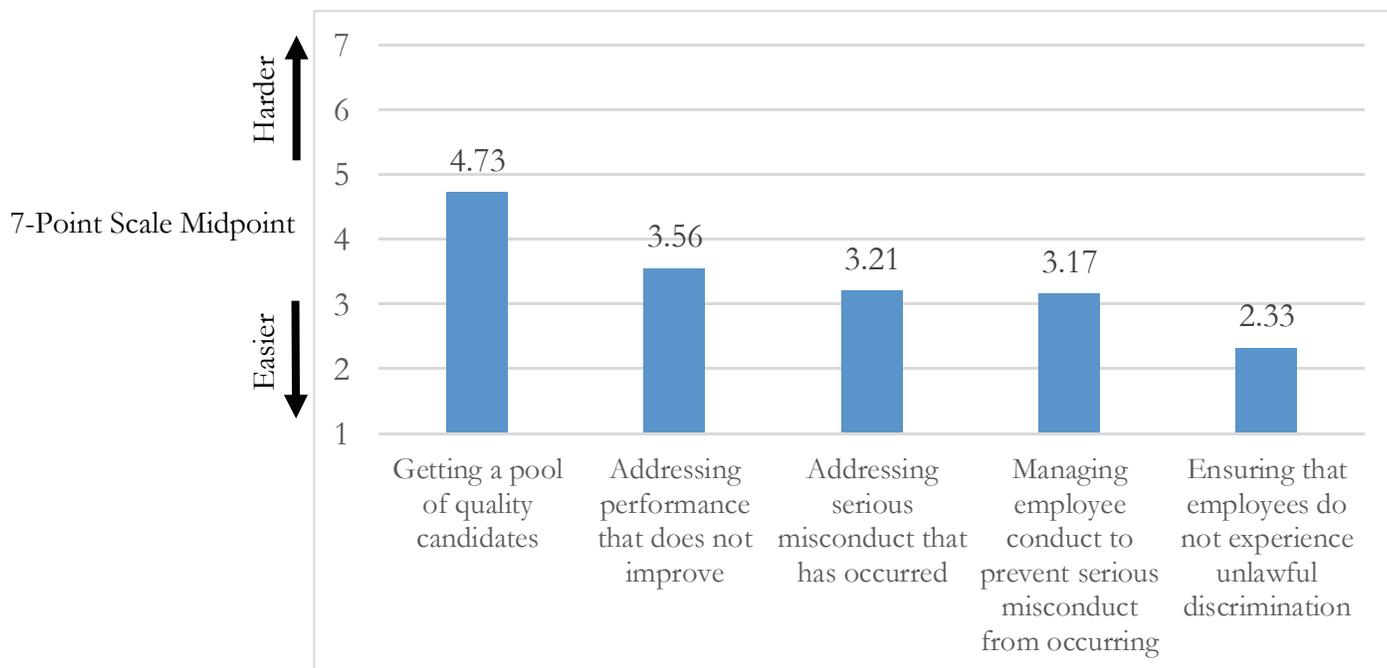
Easier Management Tasks (Continued)

was moderately difficult (10th place, scoring 3.56 out of 7), while communicating with employees about their performance was considered one of the easiest tasks to perform (18th place). Overall, it appears that hiring qualified people in the first place is considered much harder than addressing problems with employees after they are on board.

Please rate on a scale of 1-7 how challenging you find each of the following (1 is very easy, 7 is very difficult).

HIRING QUALIFIED PEOPLE IN THE FIRST PLACE IS CONSIDERED MUCH HARDER THAN ADDRESSING PROBLEMS WITH EMPLOYEES AFTER THEY ARE ON BOARD.

Rank	Score	Item
1	4.73	Getting a pool of quality candidates.
2	4.16	Paying employees an amount that is appropriate for the work they do.
3	4.14	Getting enough employees to accomplish the work.
4	4.12	Creating recruitment plans to identify the best candidates for particular jobs.
5	3.99	Getting enough resources to give my subordinates the tools to accomplish their work effectively.
6	3.98	Establishing in subordinates' performance standards clear measurements for success in each element.
7	3.74	Establishing performance standards for subordinates that cover all critical elements of the jobs.
8	3.66	Managing office interpersonal relationships.
9	3.62	Managing employee morale.
10	3.56	Addressing performance that does not improve.
11	3.47	Ensuring that higher-level supervisors appreciate what my subordinates have accomplished.
12	3.43	Ensuring that subordinates have accurate position descriptions.
13	3.41	Finding ways to increase employee engagement.
14	3.21	Addressing serious misconduct that has occurred.
15	3.17	Managing employee conduct to prevent serious misconduct from occurring.
16	3.16	Managing employee training.
17	2.86	Providing meaningful recognition for good performance.
18	2.72	Communicating with employees about how they can improve their performance.
19	2.33	Ensuring that employees do not experience unlawful discrimination.

Proposing Removals Leads to Actual Departures

Data from our 2016 survey show that when an agency official proposes a removal for misconduct, 70 percent of the time, the outcome is that the employee departs. But, what many people may not realize is how many of those departures are recorded as an action other than a removal.

According to surveyed supervisors, for the most recent removal they proposed, only 54 percent of the departures were removals, while 28 percent were resignations, 8 percent were retirements, 3 percent of employees found another Federal job, and in 6 percent of cases, the proposing official did not know the nature of the departure.

LOOKING ONLY AT THE NUMBER OF EMPLOYEES WHO WERE REMOVED CANNOT TELL THE WHOLE STORY OF WHAT HAPPENS TO EMPLOYEES WITH CONDUCT ISSUES.

Not surprisingly, 90 percent or more of respondents with an employee who resigned, retired, or was removed agreed that the outcome was in the best interest of the Government and the public. However, less than 40 percent agreed that it was in the best interest of the Government or the public when the employee obtained a different Federal job. This is one reason why reference checks are so important, as noted in our report, *Reference Checking in Federal Hiring: Making the Call.* Of course, if the employee engages in serious misconduct at the new agency, the new agency is free to propose an action on that basis. Diligence before hiring is preferable, but diligence after hiring should occur as well.

If a hiring official is aware of the employee's weaknesses and then makes an informed assessment that the person will still fit the unique requirements of the new job, it may help explain some of the nearly 40 percent of respondents who proposed a removal and then said that the transfer elsewhere in the Government was in the interest of the Government and public.

What about the almost 30 percent of employees who received a notice of proposed removal but later remained employed by that same agency? Understandably, when an official proposes a removal, he or she tends to think that retaining the employee was not the best choice. In those cases where the employee with alleged misconduct was demoted, suspended, or reassigned, approximately one out of every five proposing officials agreed that the outcome was in the best interest of the Government and public. In contrast, when the employee remained in the same position without such an action, less than 1 out of every 20 proposing officials thought that outcome was best.

This data about retained employees is one reason why it is important to understand that just because a removal was proposed, it does not mean the removal was warranted. In some cases, even the official who proposed a removal said that it was a good outcome when the agency kept the employee. Whether the proposing official endorsed the outcome or opposed it, the data come from a survey of perceptions, not a review of agency evidence. We are not in a position to say what decision was "correct" or "best" for the agency or the public – only to note that sometimes even the proposing officials for removal actions support a different outcome in the end.

The survey data show that looking only at the number of employees who were removed cannot tell the whole story of what happens to employees with conduct issues. The rest of the tale is harder to see, but the data indicate that other outcomes can also serve the best interest of the Government and the American people. In other words, not every departure needs to be a removal action.

A Different View at the Top

The views of first-line supervisors, managers, and executives differ on many issues, including how they perceive the adverse action process. This is important because in many agencies, the decision to act begins with first-line supervisors who collect information and then decide whether to propose an adverse action. Managers often complete the process by rendering a decision on those proposed actions. Managers also set the tone for the future through how they deal with decisions by supervisors to not propose actions. (This can include commending the supervisor for proper restraint or expressing concern that serious misconduct has not been addressed.) Yet, while the greatest number of agency employees are at the bottom of the organizational chart, changes to agency policies or requests to Congress for new laws often come from the top, several levels away from the bulk of the workforce.

As noted in an earlier article, we asked respondents if they were confident that they would be able to remove an employee who engaged in serious misconduct. While 48 percent of non-managerial supervisors and 50 percent of managers said they were confident that they could do this, 69 percent of executives reported that they could remove such employees.

The view at the top may differ, in part, because of differences in experience. For the most recent removal the respondent proposed, 65 percent of supervisors, 74 percent of managers, and 84 percent of executives reported that the individual was no longer employed by the agency. In other words, executives may be more likely to feel they can successfully remove a person because they are more likely to have succeeded when trying. Also, given that the two greatest reported barriers to removal actions were the agency's culture and support from leadership, it makes sense that those who set the tone for those two things did not perceive heavy obstacles to the same degree as first-line supervisors or managers.

There were also notable differences in the respondents' perceptions of support after a removal occurs, which could affect supervisors' level of commitment to proposing the removal of employees with conduct issues. Less than half of first-line supervisors said they were confident they would be allowed to replace an employee fired for misconduct, while 61 percent of managers and 72 percent of executives were confident they would be allowed to hire a replacement. A perceived inability to hire a new employee may affect how an official calculates the damage to efficiency of the organization if the individual remains versus the damage if the person is removed, as a lack of employees to perform assigned duties can also hinder the mission.

These are just a few of the ways in which the view at the bottom differs from the view at the top. Whenever Congress, the President, and agency leaders consider how to improve the civil service, and in particular how to improve the adverse action process, it is important to recognize that not every official has the same experiences when using the adverse action system or the same perceptions about how it operates. In the end, how agency officials – at all levels – interact with the system will ultimately determine the effectiveness of that system.

LESS THAN HALF OF FIRST-LINE SUPERVISORS SAID THEY WERE CONFIDENT THEY WOULD BE ALLOWED TO REPLACE A PERSON FIRED FOR MISCONDUCT.

MSPB has been issuing reports related to the health of the civil service since 1981. We have also published shorter articles since 1996. Our website's studies page, www.mspb.gov/studies, contains copies of these publications under the sections titled *Studies*, *Noteworthy*, and *Newsletters*. Below is a list of a few available materials that readers may find relevant to the subjects covered in the preceding articles. The list is not all-encompassing, and we encourage people and organizations with an interest in a merit-based civil service to search the MSPB studies website for items that correspond to their interests.

Study Reports:

What is Due Process in Federal Civil Service Employment (2015).

Clean Record Settlement Agreements and the Law (2013).

Addressing Poor Performers and the Law (2009).

Alternative Discipline: Creative Solutions for Agencies to Effectively Address Employee Misconduct (2008).

Navigating the Probationary Period After *Van Wersch* and *McCormick* (2007).

The Probationary Period: A Critical Assessment Opportunity (2005).

"Noteworthy" Publications:

Indefinite Suspensions and Potentially Criminal Behavior: Using Reasonable Cause to Act, May 2016.

Performance Management is More than an Appraisal (article collection), December 2015.

Adverse Actions: The Rules and the Reality (article collection), August 2015.

Identifying a Probationer: It is not Always Easy, but is Always Important, June 2014.

Supervisory Probationary Period: A Missed Opportunity, May 2011.

Issues of Merit Articles:

Ensuring Accountability Through Supervisory and Managerial Probation, Spring 2016, p. 5.

Probationary Periods: A Missed Opportunity to Address Poor Performance, Spring 2015, p. 5.

Alternative Discipline: What You Need to Know, February 2009, p. 3.

What Agencies Should Know in a Post-*Van Wersch* and *McCormick* World, July 2006, p. 6.

Due Process: What You Need to Know, May 2006, p. 5.

The Trial Period: A Missing Link, January 2006, p. 1.

Replace Warm Bodies With Working Bodies, April 2005, p. 5.

Using the Probationary Period to Weed Out Selection Errors, June 2004, p. 5.