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PECP-SCR-H

2 January 2007

SUBJECT: Fort Benning CPAC Staffing Update 1-2007

1. This publication is issued to ensure the Fort Benning Commanders, managers, supervisors, and employees are kept informed of employment and staffing issues. Future updates will contain updated information on specific employment topics (i.e., compensation, recruiting procedures, travel entitlements, classification issues, NSPS implementation information, etc.) and will be issued on a monthly basis.

2. **January 2007 GS Pay Adjustments**. The Office of Personnel Management (OPM), CPM 2006-19, dated 21 December 2006, advised that the President has signed an Executive Order to implement the January 2007 pay adjustments. The Executive Order authorizes a 1.7 percent across-the-board increase for the statutory pay systems under the provisions of 5 U.S.C. 5303 and locality pay increases costing approximately 0.5 of pay roll under 5 U.S.C. 5304a, for an overall average pay increase of 2.2 percent. The 2007 pay rates will become effective on the first day of the first applicable pay period beginning on or after 1 January 2007 (7 January 2007). OPM has posted the 2007 salary tables on it's web site at: <http://www.opm.gov/oca/07tables/index.asp>.

The administration also revised the way locality pay amounts are divided up, in a way that shifts more of the money to metropolitan areas with the largest pay gaps between federal and private sector pay. The Federal Salary Council, an advisory body, earlier had considered such a change but took no position after union members argued that changing the formula would come at the cost of employees in the "rest of the U.S." locality; those outside of metropolitan locality zones. The new method produces raises ranging 1.81 percent in RUS to 3.03 percent in New York, on a 2.2 percent average increase, compared with what would have been 2.03 to 2.71 percent under the traditional method.

As required by the pay law, President Bush cited a national emergency as a justification for not paying the raise that would have been paid otherwise, which would have averaged 8.6 percent. The order said that a national emergency has existed since 11 September 2001, and that the "growth in federal requirements is straining the federal budget." Paying the default raise, at a cost of \$8.8 billion, "would interfere with our nation's ability to pursue the war on terrorism," the order said.

Bush's order also, as required by law, contains an assessment of the potential impact of limiting the raise on recruiting and retention. It says: "I do not believe this decision will

materially affect our ability to continue to attract and retain a quality federal workforce. To the contrary, since any pay raise above what I have proposed would likely be unfunded, agencies would have to absorb the additional cost and could have to freeze hiring in order to pay the higher rates. Moreover, GS 'quit' rates continue to be very low (2.0 percent on an annual basis), well below the overall average 'quit' rate in private enterprise. Should the need arise, the government has many compensation tools, such as recruitment bonuses, retention allowances, and special salary rates, to maintain the high quality workforce that serves our nation so very well."

One other effect of the presidential order involves pay for certain high-level systems. By law, the annual raise for Congress, federal judges and senior political appointees paid under the executive schedule is capped at no more than the across-the-board component of the GS raise 1.7 percent, in this case. The executive schedule rates in turn act as pay caps for career employees in several high-level pay systems. The largest category affected by those pay caps is the senior executive service. However, under the SES pay system, raises are not automatic in any event, but are performance-based. Thus, while the pay caps are in line to increase by 1.7 percent, that does not necessarily mean that all of those who are up against the caps will get raises of that size.

3. **S Funds Leads TSP.** The small and mid-sized U.S. company stock (S) fund led TSP funds in returns in November, posting a 3.54 percent gain, followed by the international stock (I) fund, 2.96 percent, large U.S. company stock (C) fund, 1.91 percent, bond (F) fund, 1.08 percent, and government securities (G) fund, 0.43 percent. Over the last 12 months, those funds have returned 15.61, 28.2, 14.25, 5.96 and 5.04 percent, respectively. Among the lifecycle funds, the 2040 fund posted the largest gain in November, 2.32 percent, followed by the 2030 fund, 15.04, 2020 fund, 1.78, 2010 fund, 1.34, and income fund, 0.79. The 12-month returns for those funds are, respectively, 16.54, 15.04, 13.65, 11.11 and 7.55 percent.

4. **EEOC Requires In-Person Hearing.** On 16 November 2006, in *Sandra Herges v. Department of Justice, Bureau of Prisons*, EEOC Appeal No. 0120051636, the Equal Employment Opportunity Commission vacated an administrative judge's (AJ) decision after determining that the AJ abused her discretion by conducting the hearing via telephone rather than in person.

Ms. Herges filed a formal complaint of discrimination after she was not selected for promotion. On 4 June 2003, Ms. Herges, who worked at the Bureau of Prisons' central office in Washington, D.C., requested a hearing before an AJ in the Washington D.C. field office. On 8 June 2004, the case, along with several others, was transferred to the San Antonio district office due to the heavy case load of the Washington D.C. field office. On 23 August 2004, the AJ held a hearing via telephone from San Antonio while the

witnesses and parties' representatives were all in a conference room in Washington, D.C. The AJ then issued a decision finding of no discrimination, which was adopted by the agency.

On appeal, Ms. Herges asserted that the AJ's credibility findings were not supported by substantial evidence because the AJ conducted the hearing by telephone and, therefore, as unable to observe witness demeanor. The Commission held, pursuant to its recent decision in *Louthen v. United States Postal Service*, EEOC Appeal No. 01A44521 (May 17, 2006), that absent exigent circumstances, e.g., if the complainant is disabled and unable to get to a hearing location or if a witness has been deployed on military duty, the conduct of a hearing by telephone should not occur and is inappropriate. The Commission found that no exigent circumstances were present in this case and that the AJ could have traveled to Washington, D.C. for the hearing.

Further, the Commission was concerned because the AJ's decision in this case rested on her credibility determinations, including the credibility of the management officials involved in the selection. As examples, the Commission pointed out that the AJ "implicitly credited" the selecting official's testimony when he testified that he failed to keep his notes from the reference checks because this was his first selection and he had not read the policy requiring him to retain the notes. The AJ also found that the selecting official's explanation about his visit to the selectee prior to the selection was credible despite that, as the Commission stated, his "hearing testimony on his issue appeared evasive." Finally, the Commission found it troubling that the AJ determined the testimony of the selecting official was "believable" although she never indicated or explained what about the testimony made it credible.

As relief, the Commission remanded Ms. Herges' complaint back to the Washington D.C. field office for an in-person hearing before a newly assigned AJ. The Commission's ruling in this case underscores the importance of credibility determinations in EEO cases, where there are often conflicting versions of the same event, and the duty of AJ's to make credibility determinations by personally observing the demeanor and conduct of the witnesses. This information is provided by the attorneys at Passman & Kaplan, P.C.

5. **Spiral 1.3 Announcement Upcoming**. The Pentagon intends to soon announce the next groups of employees to be phased into the National Security Personnel System (NSPS), the so-called spiral 1.3 groups that are to come under the program starting in the spring. So far about 77,000 DoD employees are under the system, all of them in positions not eligible for union membership. The reason is litigation brought by a group of unions that has resulted in a court injunction against carrying out the union rights, disciplinary and appeals rights provisions of NSPS. Although the suit does not affect other aspects of the program, such as the pay banding and pay for performance elements, DoD recently said it "has elected to implement NSPS to non-bargaining unit

employees until the litigation is resolved." An appeals court is to hear arguments December 11, and a decision could come early in 2007, with a possible Supreme Court appeal to follow.

6. **New Year Brings New Finances.** The arrival of the new year brings several changes in the financial area for federal employees and retirees, some due to legislative action and some due to normal adjustments in benefit levels tied to inflation. For general schedule employees the most important change is the January 2007 federal pay raise.

Retirees are getting their annual cost-of-living adjustments with their January checks (or direct deposits, for those who get their payments that way). The COLA for those retired under the CSRS annuity system will be 3.3 percent. FERS retirees get the 3.3 percent adjustment on their Social Security benefits, as well (some CSRS retirees also get Social Security benefits through employment outside the government) while they will get 2.3 percent on the civil service portion of their annuities, assuming they are eligible for COLAs (generally FERS does not pay COLAs under age 62). Those who retired in calendar year 2004 should note that COLAs are pro-rated according to the month in which their annuities started.

The 3.3 percent COLA also applies to children's survivor benefits and to the lump-sum amount payable under certain circumstances upon a FERS employee's death, which is rising to \$27,461.

Also beginning this month are the new premium rates paid by both employees and retirees under the Federal Employees Health Benefits program (FEHB), effective 1 January for retirees and with the first full pay period of the year for most active employees. Premiums on average are increasing by around 2 percent in 2007, although within that average is a wide variation of actual changes, with some plans exceeding that figure substantially while others had smaller increases or even lowered premiums. Also note that coverage changes also take effect at the same effective dates as the premium changes. Further, any changes in plans or levels of coverage elected in the recently concluded FEHB open season also begin.

Coverage that was elected for Federal Dental and Vision Insurance Program (FEDVIP) benefits also is taking effect, as are elections made under the flexible spending account program during the open season. In both programs, deductions are made from payroll on a pre-tax basis; the same is true for the large majority of actively employed FEHB enrollees. Retirees may not participate in the FSA program and must pay FEHB and FEDVIP premiums with after-tax money.

For FERS employees, the Social Security maximum wage base is rising to \$97,500 from \$94,200. That is the portion of their salaries on which they pay the 6.2 percent "FICA" tax; there is no limit on the 1.45 percent Medicare tax paid by both FERS and CSRS employees. Also, for those retired under FERS, the earnings test applying to

Social Security beneficiaries aged 62-through "full retirement age," for 2007 is 65 and ten months, is increasing to \$12,960 from \$12,480. Those beneficiaries lose \$1 in Social Security benefits for every \$2 in earnings through employment or self-employment above the limit. A separate earnings test applies only to earnings for months in the year an individual reaches full retirement age prior to the individual attaining that age. One dollar in benefits will be withheld for every \$3 in earnings above \$34,440. There is no limit on earnings beginning the month an individual attains full retirement age. And for purposes of determining the benefit offset under the windfall elimination provision, which can reduce Social Security benefits of CSRS retirees who worked long enough in each system to qualify for a benefit from each, the annual "substantial earnings" minimum will be \$18,150 in 2007.

The monthly premium paid by those receiving Medicare Part B (primarily physicians' services) benefits are rising to \$93.50 for most enrollees, although those with incomes over \$80,000 will see premiums rise on a phased-in scale up to \$162.10 monthly. The Part B annual deductible will rise to \$131, the Part A (hospital insurance) deductible is rising to \$992 for the first 50 days per benefit period and the coinsurance requirements is increasing to \$248 a day for the 61st-90th day per benefit period and to \$496 a day above 90 days. Those new figures represent increases of several dollars each.

The interest paid in the voluntary contribution retirement savings program available to CSRS (but not FERS) employees will be 4.875 percent in 2007, up from 4.125 percent in 2006. That rate also applies to required deposits and redeposits into the retirement fund to capture service for which no contributions were taken or for which refunds were received.

The IRS-imposed dollar limit on allowable individual contributions the TSP rises to \$15,500 in 2007. Those under the FERS system should make sure to structure their investments so that they can keep contributing throughout the calendar year; when they hit the limit, government matching contributions on their behalf will cut off. That isn't a concern for CSRS investors, who get no employer contributions. Also, investors age 50 and older during 2007 can make special "catch-up" investments over and above the dollar limit of \$5,000 in 2007, the same figure as in 2006.

7. **Effect of Refusal of Accommodation.** A federal judge in Pennsylvania has ruled that a Department of Veterans Affairs employee was not a "qualified individual with a disability," under the Rehabilitation Act because the employee refused the agency's offer of (what the judge found to be) a "reasonable" accommodation. *Mastronicola v. Principi*, WL 3098763, W.D.Pa. (October 30, 2006). Because the employee rejected a reasonable accommodation that would enable him to perform the essential functions of the position, and could not, because of that rejection, perform the essential functions of the position, the individual is not qualified, said the judge, quoting the EEOC regulations at 29 CFR §1630.9(d). Thus, the employee's claim against the agency failed.

The VA employee lost his left eye and injured his right eye. He worked a 15-hour week as a VA food service worker. The VA transferred him from the day shift to the evening

shift, necessitating the employee's request for accommodation. The employee asked to be returned to the day shift, because public transportation was not available at night, and this disability prevented him from walking home in the dark. The VA refused, stating that there was no 15-hour day shift position available, but offered him either a 12-hour a week position as a housekeeping aid, or a 30-hour a week position as a food service worker. Mastronicola rejected both offers, explaining that he could not take the 30-hour a week position because it would result in the reduction of his Social Security benefits.

On summary judgment, the judge found that Mastronicola was an individual with a disability under the Rehabilitation Act because he was substantially limited in the major life activity of seeing. However, the judge went on to say that Mastronicola was not a "qualified individual with a disability," because he refused the agency's offer of a "reasonable" accommodation.

In finding that the offers of accommodation by the agency were "reasonable," the judge held that that 15-hour a week day shift positions no longer existed, but even if they did, the agency had no obligation to offer the employee such a position as an accommodation as long as the agency offered him another reasonable accommodation. The 30-hour a week position was reasonable, said the judge, because it eliminated the problem with transportation posed by the evening shift, and there was no evidence that the employee was physically incapable of working a 30 hours a week. Finally, the court noted that the agency had no obligation to make sure the employee remained "disabled" for purposes of the Social Security Act. Social Security benefits, noted the judge, do not constitute the kind of job-related payments and benefits whose material decrease would render an accommodation unreasonable.

The lessons to learn from this case are many. First, even as to the issue of disability, the VA challenged that loss of one eye and damage to the other did not make the employee disabled. And, as the court noted, the Supreme Court has said that the Americans with Disabilities Act requires monocular individuals, like others claiming the act's protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial. Accordingly, it is important to remember that it always the burden of the employee to prove that s/he meets the definition of "disabled" under the Rehabilitation Act and/or the ADA.

Second, it is important to remember when seeking reasonable accommodation, that the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide. The Supreme Court has held that an employee cannot make his employer provide a specific accommodation if another reasonable accommodation is provided instead. The key to this analysis would be whether the accommodation offered by the employer is first reasonable, and then second "effective." If the answer to both questions is yes, the employee may lose all protection under the ADA if he or she refuses such accommodation and therefore

becomes unable to perform his or her job duties. This information is provided by the attorneys at Passman & Kaplan, P.C.

8. **Human Resources (HR) for Supervisors**. The HR for Supervisors Course is mandatory for all Department of Army civilian (DAC) and military supervisors of appropriated fund (APF) civilian employees who supervise at least 3 appropriated fund DAC employees. The course is 40 hours long and is intended to help the supervisor in performing his/her HR management duties. In addition to teaching the participants about HR regulations and processes, the course introduces them to the automated HR tools. Completion of this course can enhance the supervisor's confidence and performance. The course includes the following modules:

- Overview of army CHR (includes coverage of Merit System Principles and Prohibited Personnel Practices)
 - Staffing
 - Position Classification (includes an introduction to CHR automated tools such as CPOL, ART, Gatekeeper and FASCLASS)
 - Human Resource Development
 - Management Employee Relations
 - Labor Relations
 - Equal Employment Opportunity

The course includes lectures, class discussion and exercises. There is a pre and post test administered at the beginning and end of the course. The course does not address supervision of Nonappropriated Fund (NAF) or contractor employees. The next course, scheduled for **19-23 March 2007, will be conducted from 0800 to 1630** at the Fort Benning CPAC, classroom #225, building #6. Please see the schedule below for other course start dates. The point of contact for this course is Ms. Stephanie Carpenter, Fort Benning CPAC, 545-2681.

DATE

11-15 June 2007

17-21 September 2007

9. **RPA and ART Workshop**. The Fort Benning CPAC HR specialists are available to conduct RPA and ART desk-side walkthroughs and/or workshops to assist managers/supervisors and new DCPDS account holders with accessing and using DCPDS, ART, initiating RPAs, creating Gatekeeper Checklists, forwarding and tracking RPAs, generating reports and printing SF 50s. Training can be accomplished via individualized sessions or activity specific workshops upon request. If you desire training of this nature, please contact your servicing HR specialist to arrange for scheduling.

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10. **Job Aids Available on the Web.** Lotus ScreenCams (how-to-movies) are available to assist DCPDS users with DCPDS, Army Regional Tools (ART), Oracle 11i and other automation tools. ScreenCam movies ART Logon, Ghostview, Gatekeeper, Inbox Default, Initiating an RPA, Logging On, Navigator, RPA Overview and RPA Routing are available on the web at: <http://www.chra.army.mil/>. Click on HR Toolkit and then click on the name of the movie to download or play it. Managers/supervisors and administrative personnel responsible for initiating RPAs are encouraged to review this site and check out these new tools. ART Users Guide has been updated and provides descriptions of and instructions for using tools available in ART, including such tools as Employee Data, Inbox Statistics (timeliness and status information about personnel actions), Organization Structure (information about positions in various organizational elements), and many more tools. It is intended for use by managers, resource management officials, administrative officers, and commanders as well as CPAC and CPOC staff members. There is both an on-line and downloadable Word version (suitable for printing).

in addition, to the ART Users Guide, there is a Defense Civilian Personnel Data System (DCPDS) Desk Guide which provides how-to information about tasks and functions that end users might need to perform in DCPDS, such as initiating a Request for Personnel Action (RPA) and creating a Gatekeeper Checklist. The ART Users Guide and the Desk Guide can be accessed from the CHRA web page at: <http://www.chra.army.mil/>, by clicking on HR Toolkit. In addition to these tools the Fort Benning CPAC staff is available to assist you in accessing DCPDS, ART, initiating RPAs, creating a Gatekeeper Checklist, forwarding and tracking RPAs, generating reports and printing an SF 50. If you have any questions or need assistance, please contact your servicing HR specialist to arrange a time so we can come to your office to help you

11. **Emergency Contact (Next of Kin) Database.** Information on the Emergency Contact Database is located on the Civilian Personnel on Line (CPOL) website <http://www.cpol.army.mil/>. It can be accessed from the CPOL homepage by clicking on the link for "Emergency Guidance and Resources," and then clicking on "Emergency Contact Database" Managers need to keep reminding their civilian employees of the need to have their current emergency contact information on file in the Emergency Contact Data Base. In addition, supervisors and managers are required to conduct periodic validations, with employees, to ensure the accuracy of their data. If assistance is needed, please contact project e-mail account at echelp@asamra.hoffman.army.mil.

12. Fort Benning **CPAC Homepage.** Please log on to our website at <https://www.benning.army.mil/Cpac/Index.htm>. If you have any suggestions on ways to improve or recommendations for information to add, please contact the undersigned.

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