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FORT BENNING, GEORGIA 31905



3 October 2006

PECP-SCR-H

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Fort Benning CPAC Staffing Update 10-2006

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

2. **Even If You're Not Harmed, It Could Hurt**. In *Gilmore v. U.S. Postal Service*, Docket No. AT-0752-05-0325-I-1 (September 5, 2006), the Merit Systems Protection Board overruled an administrative judge and found that there was no harmful procedural error in the agency's execution of an adverse action against an employee, even though the agency failed to follow established procedures for such an adverse action.

The concept of procedural due process prohibits a person from being stripped of such things as their freedom and their land without a fair opportunity to know of the potential deprivation and fair opportunity to respond to such potential deprivation. Procedural due process used to also mean that a person could not be subjected to adverse action without the employer adhering to certain procedural steps.

Through the Civil Service Reform Act of 1978, as amended, Congress has implemented the concept of "harmful procedural error," which requires any employee to show that he or she was harmed by the agency's failure to follow established procedures in taking an adverse action. The effect of the Reform Act has been that the Board is loath to overturn an agency decision to take adverse action on the basis of the agency failing to following established procedural processes. In short, it is easier for an agency to do such things as fire or suspend an employee without providing that employee any meaningful opportunity to know or respond to the charges.

In *Gilmore*, the Board reaffirmed its commitment to deferring to the agency. The appellant was a USPS employee who received notice of a proposed demotion for unsatisfactory performance. The agency erred in providing a fair and adequate process, but the Board still sided with the agency on appeal.

First, the proposal notice contained charges that were not particularly detailed. The employee did not respond to the lack of specificity prior to the hearing. The Board found that the employee was provided adequate notice of the specific reasons for the proposed demotion.

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Second, the agency failed to provide the employee the minimum number of days required to respond. Prior to the employee submitting a response to the notice of proposed demotion and prior to the deadline for the employee to do so, the agency issued a notice of actual demotion. The Board determined that the agency's failure to follow established procedure was not likely "to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error."

Third, the agency failed to provide the employee with copies of the documents on which it relied on in deciding to propose demotion and failed to inform the employee that she had a right to such copies. A supervisor informed employee that the documents would be made available to the employee, but the employee did not receive them and did not follow up. The Board relied on the employee's failure to follow up in finding that the agency's procedural error was not harmful.

Finally, the agency's notices to the employee informed her that she could reply either orally or in writing, instead of informing her of her right to reply by both methods. The Board decided that the agency's procedural error was not harmful because the employee did not indicate that she would have submitted both oral and written responses if she knew that was permitted.

There is at least one powerful recommendation that federal employees can follow: Be the first line of defense in protecting your rights. Do not give tacit approval to the agency's failures to follow the rules. Failing to be vigilant about your workplace rights may result in someone choosing to believe that you have not been harmed by the agency – and that could hurt. This information is provided by the attorneys at Passman & Kaplan, P.C.

3. **No 'Alternative' Raise Recommendation Made**. The White House did not use its authority to recommend an "alternative" federal pay raise by the August 31 deadline, a decision that most likely will have little practical effect. By not proposing a figure, the administration allowed a provision of federal pay law to take effect that sets a default raise of 1.7 percent for January 2007. Under the law, that number is set by taking a half percentage point off the employment cost index number for the pertinent measuring period. The default raise figure is important only if Congress and the White House fail to agree on a raise through the appropriations process by December 31. Twice in recent years that has happened and the default raise has kicked in, only to be overridden by higher raises that were enacted soon after.

In another setback for prospects for setting the January 2007 federal pay raise at 2.7 percent, the Senate has joined the House in passing a DoD appropriations bill (HR-5631) providing only 2.2 percent for uniformed military personnel. A 2.7 percent raise for federal employees is in both versions of a separate appropriations bill, the Transportation-Treasury bill (HR-5576), that has passed the House and is pending in the Senate, but officials consider it unlikely that Congress would approve a higher raise for civilian employees than for uniformed personnel.

The last chance for boosting the military raise to 2.7 percent; and thus setting the higher figure as the target for civilian employees in the name of "pay parity," could come in a House-Senate conference on a separate DoD bill, the authorization measure (HR-5122).

The House version of that bill backed 2.7 percent for the military although the Senate version backed only 2.2 percent. Congressional leaders hope to have at least one, and possibly both, of the DoD bills finalized before the end of the month, after which Congress will recess until after the November elections. However, it's uncertain whether a 2.7 figure in the DoD authorization bill could trump a 2.2 percent figure in the DoD appropriations bill, since military raises must be fully funded. The Transportation-Treasury bill carrying the federal raise likely won't be finalized until a November lame duck session.

4. **Contracting Restriction Added.** The Senate in floor voting adopted an amendment to expand restrictions on contracting out at DoD, the department that does by far the lion's share of competitions among federal agencies. The amendment would prohibit contractors from gaining a competitive advantage by offering inferior or no retirement benefits; specifically, bidders could not devote less as a percentage of salary toward retirement benefits for their employees than federal agencies pay toward retirement benefits for FERS employees. The House bill doesn't have similar language, which is a follow up to language that has been in the measure for several years, and appears again this year in both the House and Senate versions, to would bar bidders from gaining an advantage by offering health insurance to their employees that is inferior to what federal employees get through the FEHB program. Both bills also continue to require that the in-house bid be based on a "most efficient organization" and that bidders must show a saving of at least 10 percent or \$10 million to win a bid involving more than 10 employees.

5. **Restrictions on NSPS at Issue.** One provision in the House version but not the Senate bill would bar DoD from making changes in certain personnel policies under the national security personnel system. The House version bars DoD from spending money in the fiscal year starting October 1 to carry out changes in the parts of law affecting employee appeals of discipline for performance or misconduct reasons, as well as changes in labor-management law. Sponsors of that amendment argued in House debate that the provisions would merely bar spending on parts of the NSPS system that have been blocked by a court injunction. However, DoD argues that the language is unnecessary because it is complying with the court injunction and not spending money on the enjoined parts of the rules.

The Pentagon also argues that the restrictive language on NSPS would bar work on parts of the NSPS even if a federal appeals court rules in the department's favor; the case is pending on appeal. It further contends that the language goes beyond the scope of the court injunction by barring changes in areas not barred by the court, including some performance management issues, preparations for applying the system beyond the general schedule in the future, and alternative personnel systems and policies already in place, including demonstration projects. Nor could DoD modify existing non-NSPS policies in the areas of performance management, discipline or labor relations for any reason, including changes driven by new laws or court decisions, the department argues in a position paper.

6. **More Surveys Coming**. OPM has issued final rules carrying out a 2004 law requiring agencies to conduct an annual survey of employees. The rules in the August 24 Federal Register describe how the surveys can be done and specify certain questions that must be asked, in the areas of personal work experience, recruitment, development and retention, performance culture, leadership, and job satisfaction. Meanwhile, the TSP has awarded a contract to conduct a survey of its participants, to be finished by the end of this calendar year, part of what is planned as an ongoing project to identify participant concerns and trends.

7. **Court Reads Whistleblower Protections Broadly**. Whistleblower anti-retaliation law applies to situations in which an agency refuses to hire someone for a posted vacancy, even if the agency ultimately decides not to fill that position, the U.S. Court of Appeals for the Federal Circuit has held (case No. 05-3311). The court overturned MSPB, which it said took too narrow a reading of whistleblower rights in denying the appeal of a job applicant who asserted that he was not hired because of his whistleblowing during prior federal employment. The court said the law contains a broad definition what "personnel actions" that agencies may not take or fail to take as retaliation and does not state that the failure to select an applicant is covered only if someone else is selected; instead, an agency must only "take some identifiable step that constitutes a decision not to hire the complainant," including, as in this case, canceling the vacancy announcement.

8. **MSPB Finds Postal Worker Entitled to Disability Retirement**. In *Dussault v. Office of Personal Management*, 2006 MSPB 241 (2006), the Merit Systems Protection Board ("Board") reversed the administrative judge's decision to deny a postal worker's disability retirement and ordered OPM to grant her application for disability retirement benefits under the Federal Employees Retirement System ("FERS").

The appellant was a city carrier with the U.S. Postal Service ("USPS") in Springfield, Massachusetts. In 2003, she stopped reporting to work and thereafter filed an application for disability retirement under FERS, citing the following conditions: stress, anxiety, depression, Chronic Obstructive Pulmonary Disease (COPD), asthma, emphysema, and diverticulosis.

The Office of Personnel Management concluded that the appellant failed to show that her physical condition were causing a disability and further held that it was unclear whether her psychological conditions were disabling. On May 27, 2005, the appellant was removed from service because "she was physically unable to perform the duties of her position."

Thereafter, she appealed OPM's decision to an administrative judge. The AJ affirmed OPM's decision, stating that the medical evidence the appellant provided was conclusory and did not reasonably explain how her conditions rendered her unable to perform her job. Still dissatisfied, the appellant filed a petition for review to the Board for review of the AJ's initial decision.

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The Board reversed the AJ's decision, concluding that the appellant was entitled to disability retirement under FERS. Specifically, the Board addressed the AJ's determination that the appellant's evidence was conclusory.

Generally, when applying for FERS disability retirement, an employee must present specific medical evidence which explains how certain aspects of the employee's condition affects her job requirements. Here, the appellant's medical evidence failed to do so.

However, the Board applied a narrow exception to this rule, which allows the Board to link the medical evidence to the job duties and requirements to find whether the applicant is entitled to disability retirement. Examining the medical evidence, the Board concluded the appellant's COPD, which is a chronic and incurable condition affecting the lungs, sufficiently limited the appellant from performing the duties of her position. Therefore, given that the USPS previously found that accommodation and reassignment were not possible, the Board concluded that the appellant was entitled to disability retirement.

This case is an example of the complexities of disability retirement. Eligibility for FERS disability retirement is conditioned upon several requirements: (1) at least 18 months of creditable civilian service; (2) disability because of a medical condition, resulting in a service deficiency in performance, conduct, or attendance, or if there is no such actual service deficiency, the disabling medical condition is incompatible with either useful and efficient service or retention in her position; (3) the disabling medical condition must be expected to continue for at least one year from the date the disability application is filed; (4) accommodation of the disabling medical condition in the position held must be unreasonable; and (5) the employee must not have declined a reasonable offer of reassignment to a vacant position. In this case, the appellant, who proceeded without representation, failed to submit sufficient medical evidence to OPM in the first place. If she had done so, OPM may have granted her application, saving her time and money spent on appeals. In the end, however, the Board bridged the evidence gap and awarded disability retirement. This information is provided by the attorneys at Passman & Kaplan, P.C.

9. **TSP Stock Funds Have Good Month**. All three stock-oriented TSP funds posted gains above 2 percent in August, with the international stock (I) fund up 2.76 percent, the large company U.S. stock (C) fund up 2.36 percent and the small company U.S. stock (S) fund up 2.15 percent. Those funds have posted 12-month gains of 23.44, 8.89 and 8.72 percent, respectively. The bond (F) fund gained 1.58 percent and the government securities (G) fund 0.44 percent in August, for 12-month returns of 1.77 and 4.91 percent. The lifecycle fund returns were: Income, 0.9; 2010, 1.39; 2020, 1.81; 2030, 1.96 and 2040, 2.22, for 12-month gains, respectively, of 6.28, 8.65, 9.95, 10.55 and 11.47 percent.

10. **Automatic Enrollment in TSP Considered**. An idea that has been pending before the TSP governing board for some time and that may be nearing a decision point would require that newly hired employees be enrolled in the program automatically. Officials have expressed concern for some time that new employees, who by definition are put under the FERS system, are missing out on the government contributions available to them. Currently, about one in six FERS employees don't invest any of their own money in the TSP and thus get only the automatic 1 percent of salary government contribution. Recently enacted legislation (PL 109-280) encourages employers offering such tax-favored plans to enroll employees automatically; according to the Congressional Research Service, about a third of such plans with more than 50 participants already have automatic enrollment. Also under consideration at the TSP for some time is setting the L fund most closely matching the person's retirement eligibility date as the default fund for investors who do not choose investment allocations; currently the G fund is the default fund.

11. **COLA Count Comes Down to Wire**. With one month left in the counting period for the January 2007 federal retiree COLA, the figure stands at 3.6 percent, following an increase of 0.2 percentage points in August in the inflation index used to set the COLA. Those retired under the CSRS system would get the full adjustment while those retired under FERS and who are eligible for COLAs would get one percentage point less.

12. **Court Reverses Whistleblower's Reprimand**. In *Greenspan v. Department of Veterans Affairs*, Fed. Cir. No. 05-3302 (Sept. 8, 2006), the Federal Circuit reversed the Merit System Protection Board's (Board) ruling that the agency proved, by clear and convincing evidence, that it would have reprimanded an appellant in the absence of his protected disclosures.

The appellant, a VA physician, received discipline after he made remarks suggesting an agency executive acted inappropriately. The appellant invoked the Whistleblower Protection Act, 5 U.S.C. §2302(b)(8) (WPA), but the Board upheld the agency's position that the letter of reprimand and reduced proficiency rating would have been given because of the manner in which the protected disclosure was made, independent of the content of the disclosure. The WPA prohibits the taking of any adverse personnel action because of "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences --(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. . . ."

In this case, the appellant was elected by the medical staff to serve as representative at a hospital management meeting.

Earlier, the medical staff had taken a vote of "no confidence" in the leadership of the Chief Executive Officer (CEO), who was attending the meeting. When the appellant spoke at the meeting he accused the CEO of engaging in prohibited personnel practices, deals where there was a conflict of interest and nepotism, and reprisal. After the meeting, the agency issued a Notice of

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Proposed Suspension to the appellant for making "unfounded statements which were defamatory about a senior VA official." After the appellant's reply, the agency mitigated the penalty to a formal letter of reprimand, stating that appellant's presentation was done in "a derogatory, inflammatory and inappropriate manner." The appellant's supervisor also lowered his proficiency rating for "Personal Qualities" from "High Satisfactory" to "Satisfactory." The appellant then filed a request for corrective action with the Board, claiming the reprimand and reduced rating were retaliation for his "whistleblowing."

The Board presumed that appellant's disclosures were protected, that the agency's actions were adverse personnel actions within the meaning of §2302, and that his disclosures were a contributing factor to the agency's actions. To prevail, the agency had to establish that it would have taken the same actions in the absence of the protected disclosures. *Horton v. Dept of the Navy*, 66 F.3d 279, 284 (Fed.Cir.1995).

The Board, in *Geyer v. Department of Justice*, 70 M.S.P.R. 682, 688 (1996), *aff'd*, 116 F.3d 1497 (Fed.Cir.1997), identified several factors that may be considered when determining whether an agency action would have been taken in the absence of the employee's whistleblowing disclosures, including the strength of the agency's reason for the personnel action when the whistleblowing is excluded; the existence and strength of any motive to retaliate for the whistleblowing, and any evidence of similar actions against similarly situated employees for the non- whistleblowing aspect alone. The agency did not dispute that the actions against the appellant were taken in retaliation for his statements at the staff meeting, but argued that appellant was disciplined for derogatory, inappropriate, and disrespectful conduct, not for the content of his words. After a hearing, the administrative judge found that the agency would have taken the same disciplinary actions because appellant's conduct was rude and disrespectful.

While the Board affirmed this ruling, the Federal Circuit, noting that the WPA shields employees who speak out and criticize government management to "freely encourage employees to disclose that which is wrong with our government," concluded that although wrongful or disruptive conduct is not shielded by the presence of a protected disclosure in this case, the conduct charges are anchored in the protected disclosures themselves. Thus, had the appellant not made the disclosures, he would not have been reprimanded, and there was not clear and convincing evidence that he was not disciplined for his conduct alone. This information was provided by the attorneys at Passman & Kaplan, P.C.

13. **NSPS Schedule Sketched.** DoD says it has begun to work on how to apply its National Security Personnel System (NSPS) to employees under the wage system while it continues to phase in the program for its general schedule employees. The next phase will put about 66,000 GS employees into the NSPS over a four-month period starting in January; those employees will join

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about 12,000 converted earlier this year. The Air Force for example will convert another 11,000 employees effective 15 October and its remaining 26,000 in the current phase in January. The Army has said it will split its 14,000 in the upcoming phase into November and January groups. Officials have set no timetable for bringing wage grade employees in the system, but at a Senate hearing they indicated that conversion of employees in DoD laboratories, who already are under an alternative personnel system, won't even be considered until at least 2008. A federal court has blocked the labor relations, adverse action and appeal rights provisions of the system, so those in the first two phases of NSPS are not subject to those provisions. The case is on appeal but the appeals court is not expected to rule until next year.

At the hearing, Deputy Secretary Gordon England, the Pentagon's point man on NSPS, said that if DoD loses again in court, the "department may come back to Congress next year to seek clarification, to allow full implementation of NSPS." Presumably that would involve a request for specific authority to carry out the planned changes at issue in the case. Such a request could face tough going in Congress, since the provisions in dispute involve fundamental issues such as due process and union rights. He also noted that under the current law, the labor relations provisions expire in 2009 unless renewed before then, and indicated that due to the numerous delays in getting NSPS operating, DoD may ask for that deadline to be pushed back.

14. **Federal Employee Health Benefit (FEHB) Program.** There will be a FEHB Open Season for eligible Civil Service Federal employees beginning 13 November 2006, and running through 11 December 2006. During this Open Season, employees may enroll and an enrolled employee may change the enrollment from self only to self and family, from one plan or option to another, or make any combination of these changes. Your election will become effective 7 January 2007.

Employees may review FEHB brochures for coverage's and costs on the OPM website at: <http://opm.gov/insure/health/index.asp>. Department of the Army Federal employees who wish to participate in the FEHB Open Season must process their actions on the Army Benefits Center-Civilian (ABC-C) Website at: <https://www.abc.army.mil>. Non-Army Federal employees should contact their local Human Resources Office for guidance on how to participate in the Open Season.

15. **Dental/Vision Program Detailed.** OPM has released further information regarding the benefits and premium structure of the upcoming Federal Dental and Vision Insurance Program (FDVIP). For vision coverage, all three plans will be national, each with high and standard options. Premiums also will vary according to the type of coverage elected; self only, self plus one (the "one" must be someone who would be eligible for FEHB coverage as a family member) and self and family. Biweekly premiums for self-only family range from \$2.63 to \$5.40, those for self plus one from \$5.13 to \$10.81 and those for self and family from \$7.64 to \$16.21.

For dental coverage, there are four national carriers, two of which have high and standard options, and three regional carriers. Premiums will vary according to the type of coverage elected and according to "rating areas" established by the plans. Biweekly premiums range from \$7.29 to \$18.92 for self-only coverage, from \$18.73 to \$37.85 for self plus one, and from \$28.09 to \$56.77 for self plus family. Employees and retirees will be eligible to sign up for either, both or neither during the health open season running November 13-December 11.

Benefits vary by plan, dental benefits include:

(1) Preventive and diagnostic services are covered in full, or with a \$10 copay, such as: prophylaxis; oral evaluations; diagnostic evaluations; sealants; and X-rays.

(2) Intermediate services and periodontal and endodontic services with enrollee cost obligations ranging from 20 to 45 percent, such as: restorative procedures such as fillings; prefabricated stainless steel crowns; periodontal scaling; routine extractions; and denture adjustments.

(3) Major services including restorative dentistry and prosthetics, with enrollee cost obligations ranging from 50 to 65 percent, such as: root canals; periodontal services such as gingivectomy; major restorative services such as crowns, oral surgery, bridges; and prosthodontic services such as complete dentures.

(4) Orthodontia, with enrollee cost obligations ranging from 50 to 70 percent, subject to up to a 24-month waiting period. Per-person deductibles range from \$0 to \$75.

Vision benefits include: comprehensive vision services; discounts on laser vision correction; repair and replacement of frames or lenses for one year from date of delivery; coverage for elective and medically necessary contact lenses; prosthetic eye replacement; and eye health management programs.

16. **Are You Ready to Retire?** From an article by benefit's expert Reg Jones. Unless you've been hiding under your desk, you've read of the recent study released by OPM that points out how woefully unready federal employees are to retire. Mostly that's because they don't understand how the system works and what their benefits will be.

We should have never come to this pass. In the early 1980s, the Congress, which was fed up with the number of complaints it was getting from constituents, passed a law requiring each agency head to designate a retirement counselor who would be responsible for furnishing both information on benefits and counseling services relating to such benefits to agency employees. It was understood that there were to be counterparts to the agency retirement counselor at the local level. And OPM was required to establish training programs for these counselors.

Everything got off to a good start. I know because I was there and in charge. However, even the best efforts of agencies and OPM have been undermined since then by the need each administration has to reduce the size of government. It never works. It's like pressing down on a plate of Jell-O. What's under your palm shrinks, only to come up through your fingers. But even in growth areas, non-mission related services – such as personnel – have continued to get smaller

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and smaller. Renaming them human resource or human capital offices hasn't stopped the decline in staffing. Based on the aforementioned study, efforts are underway to turn things around and provide employees with the kinds of information they need to make intelligent retirement decisions. Let us all fervently hope for success, or at least progress. In the meantime, I'd like to refer you to FEDweek's publication, "The 14 Worst Retirement Planning Mistakes," available for free at <http://www.fedweek.com/content/hfi/index.php>.

17. **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 CPAC staff members are 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 CPAC personnel specialist to arrange a time so we can come to your office to help you

18. **Navy, Army Collaborate on Assessment Program**. The Army and Navy have produced in collaboration the Civilian Leader Improvement Battery (CLIMB), which is now ready for use by DoD civilian personnel. CLIMB is a web-based competency- oriented self-assessment tool that will allow participants to identify leadership strengths and weaknesses. It includes both a personal characteristics assessment and a 180-degree self- supervisor assessment.

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Prior to initiating the CLIMB, employees are encouraged to coordinate with their supervisor or mentor since his or her input is required for the system to generate a feedback score report. It takes approximately 90 minutes for the employee and 60 minutes for the supervisor or mentor to complete the assessment. Upon completion of the assessment, employees will receive narrative feedback and recommendations on competencies needed for improvement in obtaining the leadership skills in which they may need to develop. Anyone with a ".mil" email address is eligible to take the assessment. CLIMB is available at: <http://www.123assess.com/climb/home.do>.

19. **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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