

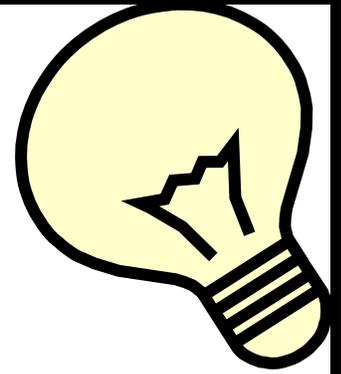
The

# Illuminator

Shedding Light on the HR World

5-2011

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This publication is issued to ensure the Fort Benning commanders, managers, supervisors, and employees are kept informed of employment and staffing issues. Monthly issuances will contain updated information on specific employment topics (i.e., compensation, recruiting procedures, travel entitlements, classification issues, the Maneuver Center of Excellence (MCOE) civilian transition, etc.).

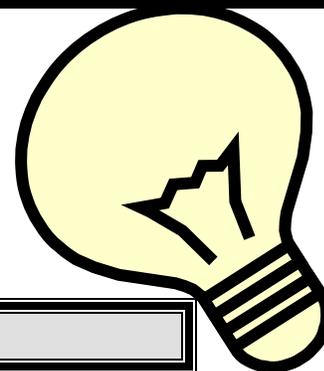
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*Retirement, Life/Health Insurance, TSP, Social Security and Such*

**When the Highest Rate of Return Isn't the Best.** This article was written by Micah Shilanski, CFP. Any references to "I" pertain to him as an author. Whenever we talk about the TSP in the federal retirement classes I teach, people always ask, "What's the best way to allocate my TSP?"

My answer usually surprises some and frustrates others. My answer is... "In a way that helps you achieve your goals."

I think this answer frustrates some people in class, because they want 'the answer'. They're expecting a magic recipe of 20% in this fund, 10% in that fund, etc., etc. They want me to be able to tell them the magic formula that gets the highest rate of return all the time and will work for everyone. Some people are so caught up in looking for the 'perfect' allocation strategy and getting the highest rate of return that they lose sight of something very important.

But others in class have an 'Ah-ha' moment.

There is not one perfect allocation mix that is appropriate for everyone. Why?

What Are \*Your\* Goals?

The reason there isn't one perfect TSP allocation is because we're all different. Your investments, including your TSP, need to be aligned in a way that makes sense for you.

The way you allocate your TSP needs to reflect \*your\* goals. Not Bob's goals, and not the 'average' goals of someone your age. \*Your\* goals.

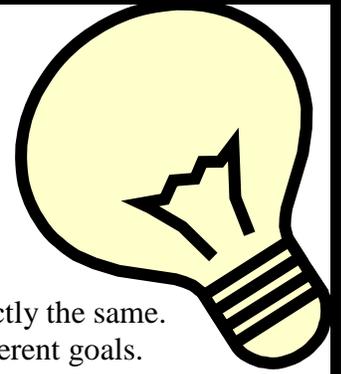
Your goals are your destination. Money is a tool to help you get there.

When I first meet with clients, we talk about their goals. Before we ever talk about investments, we get clear on their goals. We talk about retirement goals, lifestyle goals, personal goals. We discuss questions like, "When do you want to retire? What sort of lifestyle do you want to live?" and more.

Once we know what their goals are, then we look at how we can use money to achieve those goals. Not the other way around.

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And after hundreds of these conversations, I've never had two that were exactly the same. Every client is unique. Everyone has different dreams, different desires, different goals. The client's individual goals drive their asset allocation.

But when you don't have clear financial goals in mind, you can end up chasing rates of return.

Shouldn't I Just Go For the Highest Return?

Some people think the 'best' allocation is the one that yields the highest rate of return.

High returns are certainly wonderful - once you've received them. But let's step back and remember why investments pay high rates of return.

In the big picture, investments pay a return to compensate you for the amount of risk that you take. Investments pay a higher rate of return because you're taking more risk. Investments that are less risky pay less of a return.

When you're investing in something that's offering a high rate of return, it's because you're offering to take a high amount of risk.

You've probably taken a risk tolerance test before - you answer a series of questions and the test tells you how much risk you're 'willing' to take. But just because you're 'willing' to take a lot of risk - does that mean you *\*need\** to?

Chasing Rates of Return

I want to share a real story about someone who forgot to focus on his goals, and ended up chasing rates of return. (We've changed his name for this story and aren't revealing any identifying personal details.)

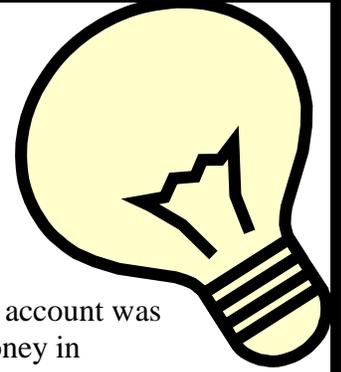
He Had Enough Money When He Retired, But...

Bob was thinking about hiring a financial planner, and he contacted us right before he was retiring. He had a good pension, and about \$600,000 saved up in other personal investments (accounts like TSP, employer-sponsored plans, etc.).

We talked, but he decided he didn't want to hire us to help. Bob decided he would rather just manage his own investments. That was at the end of 2007.

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A little more than a year later, in early 2009, Bob called again. His \$600,000 account was now worth only \$50,000. Based on past rates of return, had put all of that money in international investments.

He asked if he hired us now, could we help him stay retired. We're good, but there are some things we just can't fix overnight. Bob's fixed pension wouldn't be enough maintain the lifestyle he wanted in retirement. I had to tell Bob he needed to get another job.

That's certainly not the answer Bob was hoping to hear. But I don't like to sugar coat things, and I think it would have been a disservice to tell him anything else.

I still remember that phone call. I haven't heard from Bob again, but he's got to start saving for retirement all over again at age 58. At least Bob is still young and in good health, but I'm sure he didn't dream of having to go back to work again after he retired.

The real shame of the situation was that Bob \*had\* enough money when he retired. Between his pension and the \$600,000 of personal investments...he had enough to live the lifestyle he wanted comfortably.

If he had focused on choosing investments based on his goals, rather than just chasing the highest rates of return, Bob would probably still be retired today.

But Bob lost sight of his goals. Instead of thinking about how much risk he \*needed\* to take, Bob got caught up in chasing rates of return. He forgot that high rates of return come with high risk, and it cost him his retirement.

Some people chase rates of return because they want 'more'. More, more, more - but what is more? How much 'more' will be enough?

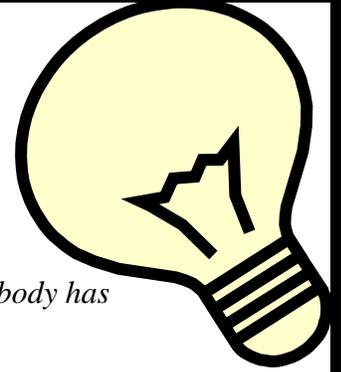
Learn from Bob's mistake, if you have enough money to retire, don't get caught up in chasing rates of return.

Whether you're working with a planner, or doing-it-yourself, remember your goals. Before you choose your investment allocation, step back and take a look at your larger financial picture.

**Seven Little Known Facts About Social Security.** This article is written by Sherri Goss, Senior VP at Rosenberg Financial Group, Inc., and is specifically for people who do not have the pension offset issue. Any references to "I" pertain to her as an author.

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**John is sitting in my office with the most perplexed look on his face. "Nobody has ever told me that," he exclaims. "Why didn't I know about this?"**

Unfortunately, this is a common experience when I tell people what they don't know about Social Security. I find it amazing that a benefit we depend on so heavily, is so widely misunderstood. Hopefully, this column will grant you a better understanding of Social Security, and *how to maximize your benefits*.

**Fact #1:** The amount of benefit you are scheduled to receive upon reaching your Full Retirement Age, is called your *Primary Insurance Amount*. All calculations for benefits, whether taken early or later, come from this dollar figure. You need to know your PIA, and can find it by visiting [www.ssa.gov](http://www.ssa.gov) or looking on your annual SS mailing.

**Fact #2:** Your benefit is based on your *highest 35 years* of earnings. If you do not have 35 years of earnings, the years you did not work count as 0, and are averaged in with the other years. So, how many years you work matters, and the more years you work and the more you earn, the greater your benefit.

**Fact #3:** If you are married, and your spouse begins taking SS benefits, and you are age 62 or more, you can apply for your *own benefit*, and, if your Primary Insurance Amount is less than half of your spouse's PIA, you can apply for a portion of your own benefit and a portion of your *spouse's benefit*.

**Fact #4:** If you *WERE* married to someone for at least 10 years, and your *X-spouse* begins taking SS benefits, and you are age 62 or more and single, you can apply for your *own benefit*. And, if your Primary Insurance Amount is less than half of your spouse's PIA, you can apply for a portion of your own benefit and a portion of your *x-spouse's benefit*. *Multiple divorced spouses can receive this benefit at the same time without decreasing each other's benefits, or the benefit of the X-spouse.*

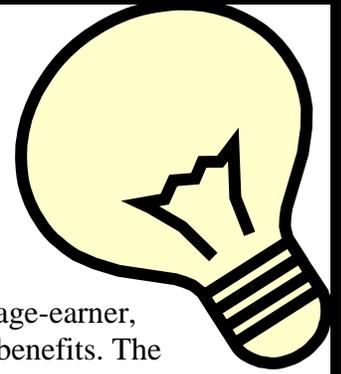
**Fact #5:** If your spouse is deceased, and you are *age 60* (50 if you are permanently disabled) you qualify for survivor benefits equal to an age-reduced portion of your spouse's benefit. And, *if your X-spouse (person you were married to for at least 10 years) is deceased, you can obtain the same benefit.*

**Fact #6:** If you work, and apply for benefits at age 62, you will lose \$1 in benefits for every \$2 you earn over \$14,160. If you wait until full retirement age to apply, you can *earn any amount you want* to without losing benefits.

**Fact #7:** If you retire at 62 and begin receiving SS benefits, then later decide to go back to work, *you can suspend your benefits*. And, working these additional years can increase the benefit you receive once you re-apply at a later date.

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**Bonus Fact:** If a couple is a combination of a high wage-earner and a low wage-earner, the high wage-earner should at least *consider waiting to age 70* to apply for benefits. The reason is that (depending on health and age) if this person dies first, the spouse will receive 100% of this benefit as a survivor benefit, which is *much greater* than their own benefit.

**New Rule Protects Exempted Funds from Garnishment Orders.** Debtors no longer have to worry about frozen exempted funds. The latest in a series of new federal regulations intended to protect credit card holders and other indebted Americans is poised to kick in, and this measure covers brand new ground: It offers aid and comfort to some of the nation's most desperate debtors -- those who face frozen bank accounts and, ultimately, seizure of the funds in those accounts.

Beginning May 1, banks and other financial institutions no longer can automatically freeze accounts that are subject to [garnishment orders](#) won by credit card companies, their representatives or any other creditor. Instead, banks, credit unions and similar institutions must examine those accounts -- and ensure that electronically deposited federal benefit payments are exempted from the garnishment order and remain available to account holders.

Among the federal payments that cannot be slapped into the deep freezer and later thawed and ladled out to creditors: [Social Security benefits](#), Supplemental Security Income benefits, veterans benefits, federal employee and civil service retirement benefits, and benefits administered by the Railroad Retirement Board.

### **Protecting exempt funds**

The move is seen as a significant reform that will pre-empt inconsistent state rules and clarify procedures for banking institutions. Most importantly, it will end a practice that often left many of the nation's most debt-ridden and impoverished people -- including retirees, veterans and the disabled -- without even the minimal financial resources they needed for food, shelter, health care and other matters of basic subsistence.



Consumer advocates estimate that more than 1 million low income people each year, including hundreds of thousands of credit card customers, received Social Security and

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other federal payments that were improperly frozen as a result of garnishment orders. These actions often rendered such people temporarily destitute.

"We applaud the work of the Treasury Department and the other agencies to safeguard these essential benefits ...," said Margot Saunders, an attorney with the National Consumer Law Center, which represented Consumers Union, Public Citizen and 19 other consumer groups before the U.S. Department of the Treasury, which took the lead in crafting the [new regulation](#).

"All too often, elders, veterans and disability benefit recipients who rely on these benefits for their basic needs have been unable to access them for extended periods because of creditor-imposed garnishment freezes," she said.

**We recognize that the procedures that banks had to follow before the rule could result in very real hardships for some individuals ...**

On the other side of the equation, the American Bankers Association, the trade group representing virtually all of the nation's banks, also expressed approval.

*-- Mark Tenhundfeld  
American Bankers Association*

"The ABA supports adoption of the proposal," said Mark Tenhundfeld, a senior vice president of the association. "We recognize that the procedures that banks had to follow before the rule could result in very real hardships for some individuals, and so we support a rule that avoids those hardships by protecting the customer's access to funds."

## **Banks caught in the middle**

Put simply, garnishment is a last-ditch effort by a creditor to collect legitimate debts owed by consumers. If you become and remain delinquent in your payments, and if you fail to respond to a series of efforts by the creditor or its representatives to collect the amount due, the creditor can obtain a court order allowing it to "garnish" your account and seize your money.

Such garnishment orders generally come in two flavors: If you are earning a paycheck, the court can order your employer to divert a portion of your wages to the creditor. If you are not employed, the court can order your bank to turn over to the creditor some of the proceeds of your account.

**When the account is frozen, no money is available to cover any expenses for food, rent or medical care.**

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-- National Cons



Social Security and other federal payments that end up in your bank account have been exempt from court-issued garnishment orders for years, but those orders often produced inconsistent or overly broad responses by banks that found themselves between a rock (court orders won by creditors) and a hard place (account holders needing access to their money).

"On the one hand, a creditor, having received a court order entitling it to payment, expects the bank to comply with that order or risk incurring liability for the full amount of the judgment," Tenhundfeld of the bankers association said last year in a letter to the U.S. Treasury. "On the other hand, a debtor that receives benefits payments that are exempt from garnishment expects the bank to refuse to pay to the creditor funds that are presumably protected."

In the end, many banks and other financial institutions simply froze the entire account and then required consumers to prove that the funds -- or a particular portion of the funds -- in that account came from exempted federal sources and should not be and could not be frozen or seized.

The process of unfreezing an account could take weeks or even months, consumer advocates said, and usually required the assistance of an attorney. As a consequence, it often took a heavy toll on credit card holders and others who already were nearly at their wit's end.

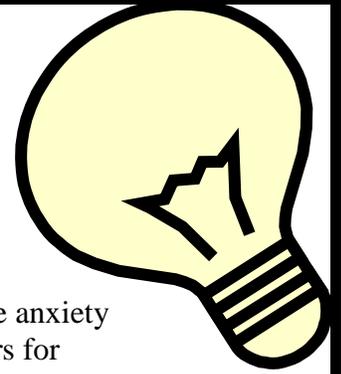
"When the account is frozen, no money is available to cover any expenses for food, rent or medical care," the National Consumer Law Center noted. "Checks and debits previously drawn on the account, before the recipient learned that the account was frozen, are returned unpaid. Subsequent monthly deposits into the account will also be subject to the freeze and inaccessible to the recipient."

## **Vulnerable most impacted**

The NCLC offered several examples, including the case of Ethel Silmon of Montgomery, Ala. A disabled, 59-year-old widow, she fell behind on her credit card payments. Her bank account ended up getting hit with a garnishment order for \$15,895.44. The only money in her account -- less than \$1,000 -- came from her \$889 monthly Social Security disability payments, funds that should have been exempted from the order but were frozen by the bank. It took her -- and a volunteer attorney -- about four weeks to sort it out.

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"During the month without access to her money, Mrs. Silmon suffered severe anxiety attacks. She had to go to the food bank for food and had to rely on her doctors for samples of medicine," the Center reported. "She is still fearful that they will try it again and states that she cannot handle it if they do."

Attorneys and consumer advocates say the regulation that takes effect May 1 should go a long way toward preventing similar cases in the future. The new garnishment rules come in the wake of other recent federal efforts to protect consumers, including the staged phase-in of landmark [credit card reforms](#) and creation of the [Consumer Financial Protection Bureau](#).

## **Applies only to direct deposits**

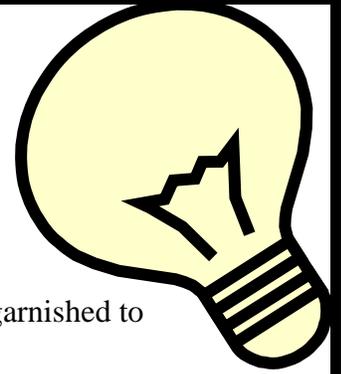
Importantly, the garnishment regulation applies only to electronic direct deposits. It does not apply to old-fashioned paper deposits of federal payments. Those deposits also are exempt from garnishment, but banks are not required under this regulation to identify or protect them. This should not pose much of a problem, given that 87 percent of Social Security recipients received their payments electronically last year, and the federal government is making electronic delivery mandatory for virtually everyone who receives federal payments.

Under the regulation:

- The federal government must insert an electronic "tag" in all direct deposits of exempted payments.
- When a bank receives a garnishment order from a court, it must review the debtor's account within two business days and determine what -- if any -- federal payments are exempt under the new regulation. Those payments cannot be frozen or garnished.
- Banks are required to exempt all tagged deposits made during the two months prior to the receipt of any garnishment order and protect those deposits from garnishment. No longer will consumers be required to identify or help segregate payments that are exempt from garnishment.
- Within three business days of receiving the garnishment order, the bank must provide the debtor with the name of the creditor, the date of the garnishment and the amount of both protected and nonprotected assets in the account.
- As in the past, amounts owed for federal taxes and in response to state child support agencies *cannot* be protected from garnishment -- even if they come from otherwise exempted federal sources. In other words, even under this new

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regulation, your Social Security or federal pension payments can be garnished to pay for overdue federal taxes or for child support.

Though both sides of the issue -- the banks and consumer representatives or attorneys -- had urged federal officials to tweak an early version of the regulation in various (and mostly minor) ways, everyone seemed pleased with the result.

"This rule is truly an amazing and wonderful thing ...," the National Consumer Law Center said in a written statement. "The Treasury Department has led a remarkable effort."

"The agencies have tried hard to strike the right balance," said ABA's Tenhundfeld. "While the rule will result in additional burdens for the banking industry, we believe the balance struck by the agencies is reasonable."

**Federal Long Term Care: What You Need to Know.** Active federal employees have the opportunity to sign up for the Federal Long Term Care Insurance Program (FLTCIP) during Open Season through June 24, and the good news is you can take advantage of abbreviated underwriting. This is possibly the best part of Open Season because it makes obtaining coverage so much easier, especially for a person who might otherwise be uninsurable or have rate-ups. [Click here](#) to see the questions asked on the abbreviated underwriting application.

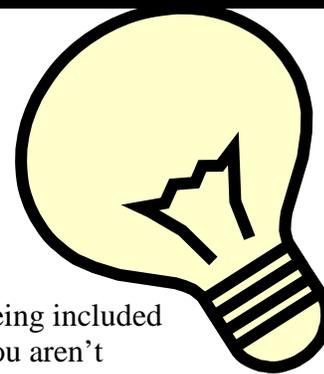
There are many parts of the program you should know about prior to buying into it. For example, FLTCIP only offers a daily benefit, which lacks flexibility because you can only access a certain amount of dollars per day. If you have a monthly benefit amount, you can utilize the dollars as you wish anytime throughout the month; a much more flexible benefit.

Additionally, there is no benefit sharing in the federal program. If you and your spouse both obtain coverage, you are limited individually by the amount of your personal policy. Many private carriers allow for sharing of benefits. For example, if you each have a policy with 3 years of benefit and your spouse needs 5 years of care, he or she can access 2 of your years to ensure he/she continues to receive proper care.

Furthermore, there is a lack of flexibility in the elimination period, which is another way of saying the waiting period for care to be received. The FLTCIP elimination period is 90 calendar days. Under a private plan, you can select a longer or shorter elimination period depending on your finances. Additionally, some private policies have 0-day home health care elimination periods, meaning you can immediately access the benefits in your home should you meet the conditions in the contract.

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Finally, because the FLTCIP allows the abbreviated underwriting, you are being included with a group of people who may not be as healthy as you. This means that you aren't eligible for good health discounts, married discounts, annual payment discounts, etc. If you are a healthy individual and qualify for certain discounts, you may be able to beat the FLTCIP premiums with a private policy.

Hopefully this has helped you evaluate whether the FLTCIP 2.0 is right for you. Whether you are considering the federal program or a private plan, it makes good sense to compare plans in order to make the right choice.

## ***Employment-Related News***

**Senior Executive Service's Quality Threatened by Budget Crunch, Complex Hiring Process, Senators Told.** During a period when all federal employees have been asked to do more with less, including less pay than they expected, the government's elite leadership corps is facing additional problems that could diminish its quality, number and effectiveness.

That's the upshot of testimony at a recent Senate hearing on the Senior Executive Service.

"At a time when we truly need the best and the brightest in our executive corps — and when senior managers are expected to achieve even greater results with limited resources — the funds available for executive pay, awards, training and professional development are severely limited," Nancy Kichak, the chief human capital officer and an associate director of the Office of Personnel Management, told the Senate federal workforce subcommittee.

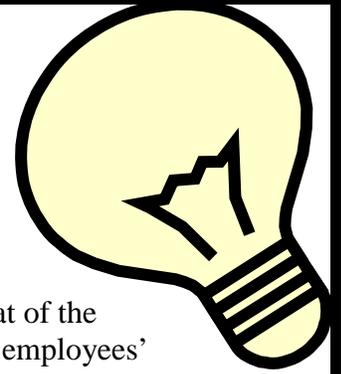
"At the same time, career SES members are being asked to lead and motivate a workforce whose own compensation and career opportunities are under attack," she said.

Senior executives can earn more than \$170,000, big money for government work. When fed bashers hit federal pay, executive compensation can be an easy target. Yet some executives oversee billion-dollar programs. Similar positions in the private sector pay many times more.

That was never more true than now, when their pay, like others' in the government, is frozen for two years. Because of the freeze, the Obama administration will take no action to fix a long-standing quirk in the system that allows some executives to be paid less than subordinates they supervise.

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Kichak acknowledged that “senior executives’ pay has not kept pace with that of the workforce they manage.” Then she added: “Nevertheless, since most federal employees’ pay is frozen at this time, we did not believe it was appropriate to exclude the workforce’s senior leaders from the freeze applied to the employees they manage.”

Although their pay is frozen, federal employees may continue to get bonuses based on performance. And SES members as a group are almost unbelievably good workers, according to their performance ratings.

For fiscal 2009, the percentage of executives rated as “exceeds expectations” or “outstanding” was 90.1 percent. And 9.6 percent were rated as “fully successful.” This covers those rated on a five-level scale, which is the vast majority of executives. Just 0.2 percent were considered “minimally successful,” and only one person was rated “unacceptable,” with a score rounded to zero percent. No one in the last two categories received a performance award. Almost 80 percent of senior executives government-wide received bonuses.

Carol A. Bonosaro, president of the Senior Executives Association, said more than 99 percent are considered at least fully successful because some of those who aren’t good get dumped. “People are encouraged to retire or are reassigned to Detroit,” she said during an interview, apparently unaware that she was speaking to a proud Detroit native. “There are lots of ways to push people out the door.”

Before senior executives can be evaluated, they have to be hired. Yet while the hiring process for government positions generally is being simplified, the system for executives remains complex and discouraging.

“Many top-notch candidates do not want to apply to the SES,” said Sen. Daniel K. Akaka (D-Hawaii), chairman of the subcommittee. “It is time to focus on fixing the SES hiring process.”

That’s particularly important because more than half of the SES will be eligible to retire within the next two years, Kichak said.

Most senior executives make a career of government service. Others are political appointees who come and go. Using political appointees in certain critical positions can defeat the purpose of the SES, Bonosaro said.

“The failure to provide career leadership at certain top positions — as was once the practice in government — has resulted in a loss of continuity and expertise,” she said. Bonosaro said the position of assistant secretary of administration in agencies should be

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held by career executives, as it is in the Justice, Transportation, and Health and Human Services departments.

Max Stier, president and chief executive of the nonprofit Partnership for Public Service, urged Congress to cap the percentage of political executives at each agency, rather than the current 10 percent government-wide limit. (PPS has a content-sharing relationship with The Washington Post).

“While the government-wide average is 9 percent, the picture varies dramatically within individual agencies,” Stier said, adding that 20 percent of the Education Department’s SES corps are political appointees.

“Political and career leadership at the very top need to make investment in government’s senior executive corps a priority,” Stier said. “Simply put, a stronger SES is the single most important thing we can do to improve government performance, but it will not happen without the commitment of agency leaders and the White House.”

**Military Spouse Employment Opportunity Briefing.** Staff members of the Fort Benning Civilian Personnel Advisory Center (CPAC) will host the first informational briefing for military spouses who are interested in Federal employment. The briefing will take place Wednesday, 20 Apr from 1000 to 1130 in building 35, Doughboy Conference Room (#219).

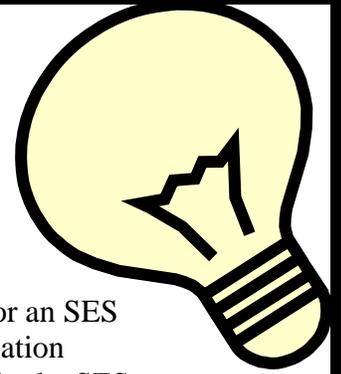
The briefing will provide information on Executive Order 13473 [which became effective September 11, 2009 and is intended to provide military spouses an opportunity to obtain employment with the Federal government]; address spouse preference; how to apply; and, highlight which documents should be submitted along with the resume.

The location of future briefings will be publicized.

**Reality Check: Are you SES Material?** Are you a civil servant who has been highly successful at the GS-14 or GS-15 level for a while and your SES colleagues are nudging you to apply for the Senior Executives Service? Or, are you a corporate executive poised to make the transition and apply your business acumen to the federal government? On the other hand, are you a senior military officer at the O-5 level or above holding multiple command positions, but are now ready to leave the military and would like to continue to serve by working within the federal government? If you fall into any of these scenarios, the SES could be a good fit.

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Having the drive, ambition, passion and vision is important when applying for an SES position, but it may not be enough unless you can demonstrate in your application materials that you possess the experience, training and background to thrive in the SES. To give you an idea of the level of performance needed, consider these real-world accomplishments people have recently cited in their SES application materials:

One seasoned GS-15 serving as principal deputy director of a major division in Department of the Army led numerous high-visibility initiatives, developed policy, provided expert guidance and oversight, and managed program budgets in excess of \$6 billion. Recognizing shifting priorities and the need to realign them with strategic goals, she convinced senior officials to discontinue one of the highest visible incubation programs and make major funding shifts. She ultimately gained approval for obligation of more than \$48 million while streamlining and prioritizing the organization's efforts.

In another case, a corporate executive and consultant was hired as the director of global EEO initiatives for a major Fortune 500 company. In response to growing federal non-compliance issues with \$500 million in government contracts, he directed a robust gap analysis to better identify any employment liability related to non-compliance with federal regulations. He developed a strategic compliance vision and plan and then led the execution of the operating plan. Ultimately, he brought all operating divisions into compliance within 12 months.

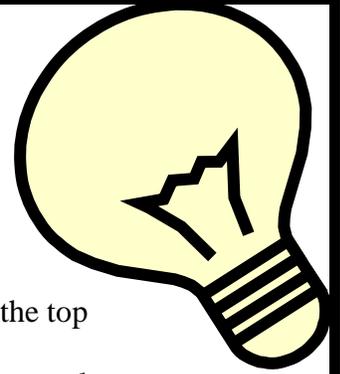
An Air Force Colonel (O-6) had experience leading large multi-functional Department of Defense organizations of up to 800 personnel. As the commanding officer of one of these, he led seven subordinate organizations in a massive human capital and workforce realignment that included increasing one division from 120 to 400 personnel and relocating several hundred employees. He overcame conflict, competition for resources, and both internal and external pressure to drive positive change and meet all major milestones.

As you can see, members of the SES represent a broad range of professional and personal backgrounds, and they come in all shapes and sizes. To help determine if you are SES material, ask yourself these seven questions:

1. Do you share a broad perspective of government and a public service commitment that is grounded in the Constitution?
2. Are you interested in serving in the key positions within federal government just below the top Presidential appointees?
3. Would you like to serve as one of the major links between Presidential appointees and the rest of the federal workforce?
4. Are you qualified to lead and oversee nearly every government activity in one of approximately 75 federal agencies?

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5. Do you have the personal and professional passion to serve as one of the top executives in federal government?
6. Are you a visionary leader and able to build alliances, overcome change and challenge, and communicate effectively with a broad range of customers?
7. Do you possess solid management and leadership skills necessary to produce optimum results with limited resources

If you answered YES to these questions, and you have the senior-level experience to substantiate it, then the SES is for you!

**Bill Would Extend Probationary Period for Feds.** The House Oversight and Government Reform Committee has passed legislation in a 17 – 14 vote along party lines that would extend the probationary period for federal employees to two years, up from one year.

The bill, HR-1470, was introduced by Rep. Dennis Ross, R-Fla., who later amended it to specify that only new hires would have the probationary period and that the bill would not apply to preference eligible veterans.

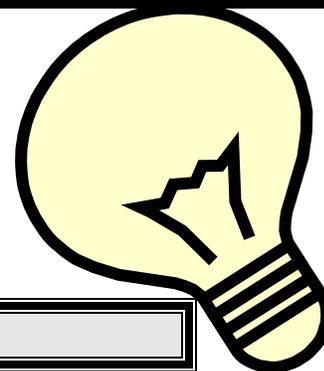
According to the committee the legislation has received support from several management organizations including the Federal Managers Association and the Senior Executives Association.

The National Treasury Employees Union issued a statement in response to the bill, noting that earlier versions would have established a two-year probationary period every time a federal employee received a transfer, is reassigned, promoted or demoted.

**Early Warning Sent on Hatch Act.** The Office of Special Counsel has sent an early warning about potential Hatch Act violations related to displays of campaign posters now that President Obama is officially a candidate for reelection. The guidance says that official portraits of the Obama may continue to be displayed in federal buildings both in public and non-public places as well as photographs of the President conducting official business, but the photographs must be displayed in traditional size and manner and should not be altered either in a positive or negative way. However, pictures from sources including the Internet and partisan or campaign organizations are not official and may not be displayed, even if they show the President conducting official business. Employees may have photographs of any candidate in their office under limited circumstances, but not if there is a political purpose for displaying them.

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## *Merit System Principle of the Month*



## THE MERIT SYSTEM PRINCIPLE OF THE MONTH

This month: Equal Pay

### **MERIT SYSTEM PRINCIPLE OF THE MONTH**

#### **NUMBER 3 Equal Pay**

“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.”

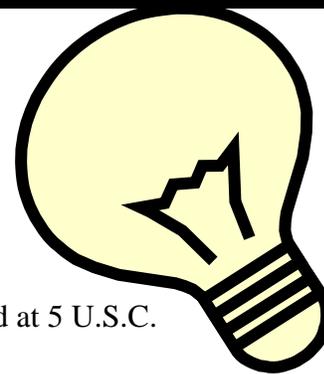
#### **What is the intent behind the third Merit System Principle?**

The third Merit System Principle embodies the vision that maintaining equitable salaries and rewarding excellent performance will attract and retain the most effective and efficient federal workforce through positive employee engagement.

The Classification Act requires the classification of federal civil service positions in accordance with their duties, responsibilities, and qualification requirements, and mandates that in determining the rate of basic pay which an employee will receive, “the principle of equal pay for substantially equal work will be followed.” 5 U.S.C.

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5101 (1)(A). The various pay rates and systems in effect today may be found at 5 U.S.C. Chapter 53 and here.

It is the express policy of Congress that “Federal pay fixing” for employees under the General Schedule and the Prevailing Rate Systems (wage grade employees) be based on the principle that there “be equal pay for substantially equal work within each local pay area.” 5 U.S.C. §§ 5301(1), 5341(1).

## **What does it mean to give “appropriate consideration [to] both national and local rates paid by employers in the private sector”?**

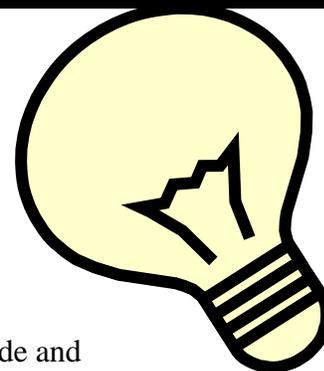
Congress has codified its policy that federal pay rates be comparable with non-federal pay rates for the same levels of work within the same local pay area, except when the President provides for an alternative level of payment due to a national emergency or other serious economic condition. 5 U.S.C. §§ 5301(3-4), 5304(a), 5341. The President establishes rates of pay within localities with the advice of his Pay Agent, designated under 5 U.S.C. § 5304(d)(1). The Pay Agent, in turn, receives salary recommendations from the President’s Federal Salary Council, established under 5 U.S.C. § 5304(e)(1), and the Federal Prevailing Rate Advisory Committee, established under 5 U.S.C. § 5347(a). The Federal Salary Council evaluates surveys conducted by the U.S. Bureau of Labor Statistics of salary data for non-federal jobs throughout the country. The Federal Prevailing Rate Advisory Committee surveys private employers, at least every two years, to determine the prevailing wage in designated regions throughout the country.

What is the MSPB’s adjudicatory role in ensuring equal pay is provided for equal work?

Although classification determinations are the purview of the Office of Personnel Management, the MSPB may review pay issues in certain circumstances. For example, the Equal Pay Act of 1963 amended the Fair Labor Standards Act to forbid employers from engaging in pay discrimination and require that employees of both sexes be paid equitably for work requiring equal skill, effort, and responsibility performed under similar working conditions. 29 U.S.C. § 206(d). An Equal Pay Act claim may be alleged as an affirmative defense in an MSPB mixed case in which the MSPB has jurisdiction over an adverse action. 5 U.S.C. §§ 2302(b)(1)(C), 7702(a)(1)(B)(ii). Issues involving pay setting may also come before the MSPB in a whistleblower reprisal case, because “a decision concerning pay” is a covered “personnel action” under 5 U.S.C. § 2302(a)(2)(A)(ix). Pay issues may also come before the MSPB in situations where the MSPB has ordered status quo ante (make whole) relief, when it has reversed or mitigated an agency action or ordered corrective action. *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984).

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## **Has the MSPB ever studied pay equity issues?**

Yes. In its recent study entitled “Fair and Equitable Treatment: Progress Made and Challenges Remaining,” the MSPB analyzed pay and status issues at pages 21-28. The MSPB concluded that while trends are improving, there remain disparities in salary levels for minority groups, principally due to their under-representation in certain higher paying occupations and managerial positions.

## **Why is it important to recognize excellent performance?**

During debate on the Civil Service Reform Act of 1978, then-Senator Joe Biden stated that “the most important part of civil service reform must be to motivate good employee performance.” S. Rep. No. 969, at 1718 (1978). Indeed, in the MSPB’s recent study entitled “Managing for Engagement– Communication, Connection, and Courage,” the MSPB concluded at pages 43-58 that recognition of employees’ performance contributions is one of the key “drivers” of positive employee engagement and retention.

## **In what ways do federal agencies reward excellent performance?**

Agencies must construct performance appraisal systems for their employees through which performance may be recognized by granting within-grade salary increases, career ladder promotions, or other awards. *See* 5 U.S.C. § 4302. Agencies must maintain an incentive awards program which recognizes and provides various types of awards to individual civil service employees whose significant contributions improve government performance. 5 U.S.C. Chapter 45; 5 C.F.R. Part 451. These types of awards include performance-based cash and time-off awards, special act awards, awards for beneficial suggestions, and recommendations for Presidential awards.

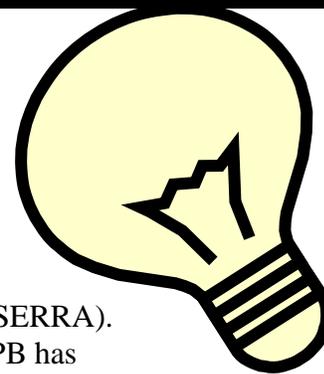
## **What is the MSPB’s adjudicatory role in the performance recognition process?**

The MSPB does not generally have jurisdiction over performance recognition questions. However, the failure of an agency to grant a within-grade salary increase or its decision to demote or remove an employee for poor performance may be appealed to the MSPB. 5 U.S.C. § 4303(e); 5 C.F.R. §§ 432.106(a); 531.410(d); 752.405(a).

Additionally, issues involving awards and promotions may come before the MSPB in a whistleblower reprisal case, because “a promotion” and “a decision concerning awards” are covered “personnel actions” under 5 U.S.C. § 2302(a)(2)(A)(ii),(ix). These issues could also come before the MSPB as “conditions of employment” in a military status discrimination case brought under the Uniformed Services Employment and

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Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA). Finally, such issues may come before the MSPB in situations where the MSPB has ordered status quo ante (make whole) relief, when it has reversed an agency action or ordered corrective action. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984).

## ***Management-Employee Relations***

**Management Matters: Cracking the Whip.** This article is written by Elizabeth Newell.

*Managers often lack the training to discipline bad actors on their staffs.*

Dealing with a difficult employee is perhaps the greatest challenge for any boss. Federal managers, especially, tend to think their hands are tied when it comes to meting out corrective or disciplinary action. But the real barrier to addressing personnel problems often is a lack of managerial training. Robbie Kunreuther, a labor and employee relations specialist and founder of Government Personnel Services, a Seattle-based company that offers seminars on supervising difficult employees, says managers are "stunningly ignorant" about their options for handling poor performers and even insubordinate employees. And without knowing their options and the most effective techniques, they are woefully ill-equipped to respond to the myriad human resources issues that can arise.

There are as many problems as there are employees," Kunreuther says.

"Abstenteeism is very different from belligerence, for example. But all of them have one thing in common, that there are basic rules of the workplace and these people are testing or violating them."

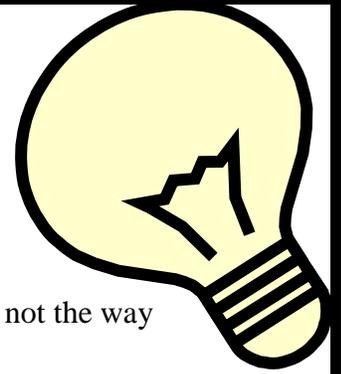
The challenge with this wide range of problems is it requires an equally varied arsenal of potential responses. While Kunreuther advises managers to tailor their responses to the individual employee, he says there are four basic principles they should keep in mind regardless of the situation.

**Respond to the problem.** Kunreuther sees two common approaches among managers in this situation. "They either overreact, or they put their head in sand," he says. "My sense is the more common response is nonconfrontation."

**Be direct.** Make clear how the employee's behavior is hampering the team's productivity. "We tend to forget that 'problem employee' is a broad brush," Kunreuther says. "Most good employees who present problems, when they're told, will stop. A casual remark or

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reminder is actually the most common form of discipline, just saying, 'That's not the way we do things here.' And most people are responsive to that."

**Be honest without throwing punches.** This is somewhat of a balancing act, requiring candor and level-headedness, and can be particularly challenging when dealing with an insubordinate employee.

**Document the discussion.** For many, the instinct is not to document an informal conversation about a behavioral or performance issue. Supervisors should follow their gut in determining whether putting it on record is appropriate, Kunreuther says. "If it caused any kind of butterflies in your stomach, the recommendation is to document," he adds. "Anxiety is the sign to document."

So when should managers go beyond these early steps and consider disciplinary actions such as formal reprimands, or even suspensions? If an employee becomes defiant the manager should consider making that call, Kunreuther says. "When it feels as if the employee is making it a contest - either you'll win or they will - then formal discipline is appropriate," he explains.

"When your mom or dad thought you were being insubordinate . . . they'd ground you, take away your cell phone - a formal response," he says. "And when somebody calls in sick and goes to a bowling tournament . . . we're talking about rather childish behavior." Managers' responses are only as effective as the disciplinary process that guides them. Agency leaders and officials at the [Office of Personnel Management](#) and the Merit System Protection Board could help managers by updating "antiquated" procedures, Kunreuther observes. He suggests a "three strikes, you're out" system, in which employees who received three formal reprimands would be dismissed.

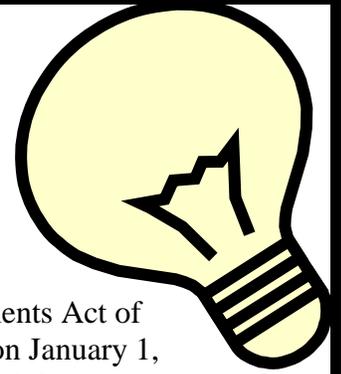
Kunreuther also encourages more mediation to resolve misconduct or poor performance before it reaches the boiling point. "It's very difficult to participate in a discussion that you have to both manage and participate," Kunreuther says. "Bringing the discussion to a third party in mediation frees up the supervisor to be a participant."

Alternative forms of discipline offer another path to resolution, including community service hours in lieu of suspensions, or a public apology to individuals affected by an employee's misconduct. But a 2008 MSPB survey of 22 agencies showed that most were providing managers little or no guidance on these options.

When supervisors don't know what tools they have at their disposal to address conduct issues, it can make a tough situation even tougher.

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**EEOC Issues New Guidelines for Disabled Workers.** The ADA Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009. The law made a number of significant changes to the definition of “disability” under the Americans with Disabilities Act (ADA). It also directed the U.S. Equal Employment Opportunity Commission (EEOC) to amend its ADA regulations to reflect the changes made by the ADAAA. The EEOC issued a Notice of Proposed Rulemaking (NPRM) on September 23, 2009. The final regulations were approved by a bipartisan vote and were published in the Federal Register on March 25, 2011.

In enacting the ADAAA, Congress made it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute. Congress overturned several Supreme Court decisions that Congress believed had interpreted the definition of “disability” too narrowly, resulting in a denial of protection for many individuals with impairments such as cancer, diabetes, and epilepsy. The ADAAA states that the definition of disability should be interpreted in favor of broad coverage of individuals.

The EEOC regulations implement the ADAAA -- in particular, Congress's mandate that the definition of disability be construed broadly. Following the ADAAA, the regulations keep the ADA's definition of the term “disability” as a physical or mental impairment that substantially limits one or more major life activities; a record (or past history) of such an impairment; or being regarded as having a disability. But the regulations implement the significant changes that Congress made regarding how those terms should be interpreted.

The regulations implement Congress's intent to set forth predictable, consistent, and workable standards by adopting “rules of construction” to use when determining if an individual is substantially limited in performing a major life activity. These rules of construction are derived directly from the statute and legislative history and include the following:

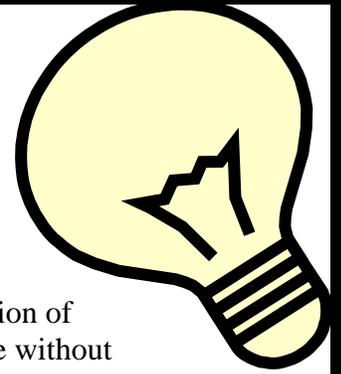
The term “substantially limits” requires a lower degree of functional limitation than the standard previously applied by the courts . An impairment does not need to prevent or severely or significantly restrict a major life activity to be considered “substantially limiting.” Nonetheless, not every impairment will constitute a disability.

The term “substantially limits” is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.

The determination of whether an impairment substantially limits a major life activity requires an individualized assessment, as was true prior to the ADAAA.

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With one exception (“ordinary eyeglasses or contact lenses”), the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, such as medication or hearing aids.

An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

In keeping with Congress’s direction that the primary focus of the ADA is on whether discrimination occurred, the determination of disability should not require extensive analysis.

As required by the ADAAA, the regulations also make it easier for individuals to establish coverage under the “regarded as” part of the definition of “disability.” As a result of court interpretations, it had become difficult for individuals to establish coverage under the “regarded as” prong. Under the ADAAA, the focus for establishing coverage is on how a person has been treated because of a physical or mental impairment (that is not transitory and minor), rather than on what an employer may have believed about the nature of the person's impairment.

The regulations clarify, however, that an individual must be covered under the first prong (“actual disability”) or second prong (“record of disability”) in order to qualify for a reasonable accommodation . The regulations clarify that it is generally not necessary to proceed under the first or second prong if an individual is not challenging an employer’s failure to provide a reasonable accommodation.

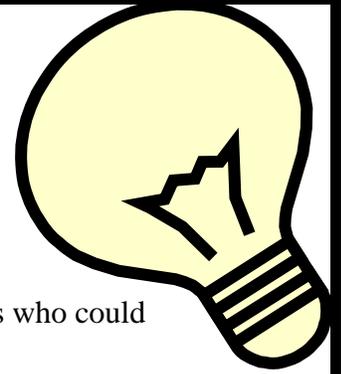
The final regulations differ from the NPRM in a number of ways. The final regulations modify or remove language that groups representing employer or disability interests had found confusing or had interpreted in a manner not intended by the EEOC. For example:

Instead of providing a list of impairments that would “consistently,” “sometimes,” or “usually not” be disabilities (as had been done in the NPRM), the final regulations provide the nine rules of construction to guide the analysis and explain that by applying those principles, there will be some impairments that virtually always constitute a disability. The regulations also provide examples of impairments that should easily be concluded to be disabilities, including epilepsy, diabetes, cancer, HIV infection, and bipolar disorder.

Language in the NPRM describing how to demonstrate that an individual is substantially limited in “working” has been deleted from the final regulations and moved to the appendix (consistent with how other major life activities are addressed). The final regulations also retain the existing familiar language of “class or broad range of jobs”

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rather than introducing a new term, and they provide examples of individuals who could be considered substantially limited in working.

The final regulations retain the concepts of “condition, manner, or duration” that the NPRM had proposed to delete and explain that while consideration of these factors may be unnecessary to determine whether an impairment substantially limits a major life activity, they may be relevant in certain cases.

The Commission has released two Question-and-Answer documents about the regulations to aid the public and employers – including small business – in understanding the law and new regulations. The ADA regulations and accompanying Question and Answer documents are available on the EEOC website at [www.eeoc.gov](http://www.eeoc.gov).

**Supreme Court Rejects Challenge to "Cat's Paw" Theory.** On March 1, 2011, the Supreme Court issued its decision in *Staub v. Proctor Hospital*, 562 U.S. ----, No. 09-400.

In *Staub*, the court had to decide whether an employee can prove discrimination through use of the "cat's paw" theory. Unlike many other discrimination claims, "cat's paw" cases do not involve discriminatory intent on the part of the ultimate decisionmaker. Instead, in "cat's paw" cases, the ultimate decisionmaker for the personnel decision in question is not biased, but is alleged to have relied upon information or input from other biased individuals in making his decision, thus tainting the decision and the overall personnel action as discriminatory.

Writing for the majority, Justice Scalia rejected a challenge to the use of the "cat's paw" theory to find Proctor Hospital liable when the evidence showed that Staub's firing was caused by a biased employee, even though that biased employee was not the ultimate decisionmaker who fired Staub.

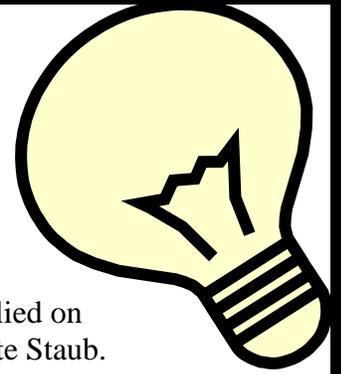
Staub was an angiography technician working at Proctor Hospital. Staub was also a member of the U.S. Army Reserve, which required Staub to attend military drill one weekend each month and full-time training 2-3 weeks per year.

Staub's 1st-line and 2nd-line supervisors allegedly were hostile to Staub's military duties in the Reserves, making negative comments regarding Staub's reserve duties and regarding the scheduling difficulties in accommodating Staub's military duty. Staub's supervisors further scheduled Staub for additional shifts without notice as payback for the difficulties in scheduling around Staub's military obligations, according to the court.

In 2004, Proctor Hospital fired Staub after first issuing him a disciplinary warning, citing as its reason Staub's violation of an alleged hospital rule requiring Staub to stay in his work area when not working on a patient. The decisionmaker who fired Staub was not

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Staub's 1st-line or 2nd-line supervisor, but instead another individual who relied on information provided by those supervisors in making the decision to terminate Staub. Staub first challenged his termination through Proctor Hospital's internal grievance process, alleging that the rule cited in the disciplinary warning did not actually exist and that he had not engaged in any such violation in any event.

Staub then sued Proctor Hospital in U.S. District Court for violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA), charging that Proctor Hospital had fired him out of hostility to his military obligations in the Reserves. Staub's claims utilized a "cat's paw" theory, asserting not that the decisionmaker was biased but that his decision to fire Staub was influenced by his 1st and 2nd-line supervisors. The jury found in favor of Staub, and awarded him over \$57,000 in damages. The verdict was appealed to the U.S. Circuit Court for the Seventh Circuit. The Seventh Circuit reversed the jury's verdict and found Proctor Hospital entitled to judgment as a matter of law. The Circuit Court cited its own precedent, which limited application of the "cat's paw" theory to situations of blind reliance on the biased employees and barred employer liability where the ultimate decisionmaker had conducted his own investigation into the facts before making a decision. The Supreme Court granted certiorari.

Writing for six justices, Justice Scalia reversed the Seventh Circuit. Justice Scalia rejected an automatic rule against using the "cat's paw" theory where the ultimate decisionmaker conducts some independent investigation.

Instead, Justice Scalia noted that in tort law prior acts of an employer's agent can also constitute proximate cause for a harm against an employee, and that Staub's 1st-line and 2nd-line supervisors were agents of Proctor Hospital under the common law of agency. Justice Scalia noted that, under USERRA, an employer can still prevail by proving that it would have taken adverse action against the employee for reasons unrelated to the employee's protected military activity, but that the employer bears the burden of proving this defense. The Supreme Court remanded to the Seventh Circuit for determination whether the differences between its holding and the phrasing of the jury instructions used at trial required a new trial on Staub's claim.

Justice Alito, joined by Justice Thomas, concurred in the result. However, Justice Alito rejected a "cat's paw" analysis that the decisionmaker relied upon the input of Staub's biased supervisors, and instead held that on these facts that the termination decision had been essentially delegated to Staub's biased 2nd-line supervisor.

Justice Alito's analysis favored limiting liability to employers where the ultimate decisionmaker has conducted an independent investigation prior to taking adverse action against an employee. The cat's paw analysis is also applicable to finding liability in employment discrimination cases.

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This information is provided by the attorneys at Passman & Kaplan, P.C., a law firm dedicated to the representation of federal employees worldwide.

## ***Training, Self-Development, and Personal Improvement***

**Federal Supervisor Training Act Introduced in Senate.** On April 12, Senator Daniel Akaka (D-Hawaii) introduced the Federal Supervisor Training Act (S. 790) in the Senate and Reps. Jim Moran (D-Va.), Frank Wolf (R-Va.) and Gerry Connolly (D-Va.) introduced companion legislation (H.R. 1492) in the House in an effort to improve supervisor training in the federal government.

"Properly trained supervisors are critical to the federal government's ability to efficiently and effectively provide essential services to the American people," said Akaka. "By investing in supervisor training now, we will save money later."

"Providing supervisors with the best possible training will improve work quality, professional development and job satisfaction throughout all levels of our federal workforce," said Moran.

If passed, the legislation will require each agency to set up a training program for supervisors. Supervisors will be required to complete the training program within their first year of appointment as a supervisor and once every three years following the first training. Training topics include: developing and discussing goals and objectives with employees; mentoring and motivating employees; fostering a fair work environment; managing poor performers; understanding collective bargaining rights; and addressing reports of harassment or a hostile work environment.

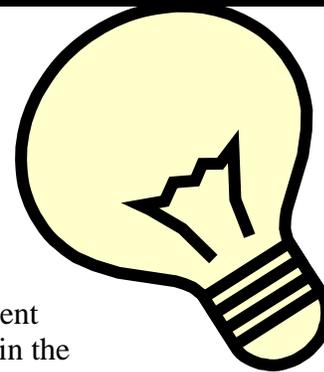
Each agency will be directed to establish a mentoring program that will partner experienced supervisors to new supervisors. Additionally, the Office of Personnel Management (OPM) will be required to develop competencies that new supervisors are required to meet. Agencies will then assess supervisor performance based on guidance from OPM.

The legislation enhances the supervisor training requirements under the Federal Workforce Flexibility Act of 2004, which directs agencies to create training programs for supervisors. This measure is supported by labor organizations, outside good government groups and management associations.

"Private sector businesses prioritize supervisor training because they understand that it has a large return on investment," said Professional Managers Association Executive Director Tom Burger. "In this climate of budget cuts, it's imperative that agencies

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implement and continue training programs because they lead to a more efficient workforce, cut down on personnel adverse actions and save agencies money in the long-run."

**Human Resources (HR) for Supervisors Course.** The HR for Supervisors Course encompasses instruction applicable to the Legacy (i.e. GS) System. The course is 4.5 days long, includes lecture, class discussion, exercises; and, is designed to teach new civilian and military supervisors of appropriated fund civilian employees about their responsibilities for Civilian Human Resource Management. This instruction does *not* cover supervision of non-appropriated fund (NAF) or contract employees.

Instruction includes the following modules:

- Introduction of Army CHR which includes coverage of Merit System Principles and Prohibited Personnel Practices, CHRM Life Cycle Functions, Operation Center and CPAC Responsibilities
- Planning
- Structuring – Position Classification
- Acquiring – Staffing and Pay Administration
- Developing – Human Resources Development
- Sustaining – Performance Management, Management Employee Relations, Labor Relations

Training dates for the next iterations of this course are below. Registration information will be disseminated electronically three weeks before each class start date.

Next course offerings:

13-17 Jun 11

19-22 Sep 11

5-9 Dec 11

**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 HR liaisons, managers/supervisors, and new DCPDS account holders with accessing and using DCPDS, ART, initiating RPAs, 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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**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 a Notification of Personnel Action (i.e. 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.

*BLANCHE D. ROBINSON*  
*Human Resources Officer*  
*Fort Benning CPAC*  
*Phone: 545-1203 (ComL); 835-1203 (DSN)*  
*E-Mail:*  
*[blanche.d.robinson@us.army.mil](mailto:blanche.d.robinson@us.army.mil)*