

In this issue ▶▶

• Insight By Mike Causey	1
• Bill Proposes New Food Safety Agency	1
• OPM Releases 2008 Employee Survey Data	3
• Postal Career Execs Serving Shorter Tenure	4
• Informed Investor	5
• Rulings Roundup	6
• You Be The Judge	7

INSIGHT

BY MIKE CAUSEY

Job Insecurity

What do federal employees who collect taxes, protect the nation's borders, run Social Security and catch crooks have in common with the folks in show biz who write, produce, publicize, film and act in television soap operas?



More than you might think.

Both groups are high-profile. And while the stars get all the attention—and most of the money—all high-profile folks depend on a large group of people to make them stars.

But there is a major difference. While federal workers continue to enjoy job security, pay raises and the like, some of the soap people are in increasingly unsettled waters.

The reason why it may be better to be a GS 11 living in Dayton than a soap opera star in Hollywood can be summed up in two words:

Susan (“All My Children”) Lucci.

If the name doesn't ring a bell, there is something—something big—missing from your life. Consult a colleague who keeps up with the TV soaps. And resolve to be a more well-rounded person in future. Back to her in a moment ...

Many of us—whether we are federal or private-sector wage slaves—envy the glamour, the glitz and the

continued on page 2

Bill Proposes New Food Safety Agency

After years of effort, advocates of splitting off and strengthening the food safety elements of the Food and Drug Administration (FDA) hope to find traction at the dawn of the Obama administration. Whether such a change will come—and what it would mean for agency employees—remains unclear.

The latest impetus to reinvent the agency comes over apparent lapses in food safety monitoring resulting in a salmonella outbreak that, to date, has infected at least 425 people in 43 states.

In the wake of the outbreak, Rep. Rosa L. DeLauro, D-Conn., announced this month that she will propose a bill to split up the Food and Drug Administration (FDA).

In a Jan. 8 statement, DeLauro said she will reintroduce the Food Safety Modernization Act, which would divide the FDA into two distinct agencies—one for food safety, and the other to oversee pharmaceuticals and medical devices.

DeLauro made her call for the bill by emphasizing that a new “food only” oversight agency would end what she and other critics see as dangerous federal jurisdictional turf battles—such as those between FDA and the Department of Agriculture (USDA)—which have slowed the investigation of the current salmonella outbreak. In this case, for example, because the source of the salmonella was unknown, it was unclear whether the investigation fell under the jurisdiction of FDA or USDA.

“This jurisdictional limbo is potentially dangerous because it delays the investigation into an outbreak that began over four months ago and any

delays in these critical investigations can sicken more people,” DeLauro said. “The scope of this recent salmonella outbreak is a reminder that reforming and modernizing our food safety laws should be a top priority in the new Congress.”

The National Treasury Employees Union (NTEU), one of the two largest federal employee unions—and one which includes in its membership some 5,000 FDA employees—is studying the issue, and what the bill would mean for workers.

“NTEU is currently examining the proposal to split the FDA,” the union's president, Colleen M. Kelley, told *FEND* in an e-mail last week. “NTEU will continue its focus on securing additional staffing and resources for the FDA, as well as working to ensure the professional integrity of the work of our FDA members.”

“We very much look forward to working with [former] Sen. Tom Daschle, HHS [Health and Human Services] secretary nominee, to strengthen the FDA once his appointment is confirmed,” Kelley added.

“The prospects of doing something new with FDA are good,” Tony Corbo, a senior lobbyist with Food & Water Watch, a food safety non-profit, told *FEND*. “Over the last two years, I count

continued on page 3

INSIGHT by Mike Causey

continued from page 1

excitement of the entertainment industry. And especially the money. When the Academy Awards or the Golden Globe Awards are given out, the audience probably represents the biggest gathering of millionaires in the world.

So if it is all so good, why are some stars wishing they had taken the federal service entrance exam instead of getting their teeth capped?

Answer: Job security.

While show biz and government biz have much in common, some of the differences are becoming more apparent.

SAG—the Screen Actors Guild—is threatening to strike. Entertainment types say this could be as damaging as the writers strike a couple of years back that left beautiful (but empty-headed) stars speechless. Literally.

The sour economy is already hurting show business. To the point where feds should count their blessings.

Jobs and pension plans (and health insurance) are disappearing at an alarming rate. Big companies are either going belly up, or warning that they will unless they get a handout ... er ... bailout from the Treasury. They must be right—after all, some of them pay their CEOs \$20 million or \$30 million a year!

Some of the companies even gave top bosses seven-figure bonuses, and lavish parties and retreats, AFTER they got bailout money. Makes sense because they couldn't have afforded it otherwise.

And where would we be without companies like that?

The security, stability and perks that accompany a federal job look better—at least to outsiders—every day. Consider these signs of trouble:

Susan Lucci, the Emmy-winning star of AMC. (For you intellectuals who work days, AMC is what we fans call “All My Children.” It's the afternoon soap that many believe provides the distraction, and the glue, that holds the Republic together). Susan (I feel like I know her) had been making \$10,000 per weekly episode. That'll buy a lot of soap.

But because her network is only making millions, instead of jillions, of dollars via advertising, Susan has agreed to a 40 percent pay cut. She's gonna have to get

by on only \$6,000 per week. And that's before federal, state and local taxes. And FICA.

Others in the cast have all agreed to take pay cuts to keep their jobs. I guess I would too. But you must admire handsome Cameron Mathison, who plays Ryan Lavery on AMC. (Or maybe it's Ryan Lavery who plays Cameron Mathison, whatever!)

Anyhow, Cameron (or Ryan) says: No soap! No pun intended.

He's not going to take a pay cut. Instead, according to one of the super-market tabloids I found on the street (I do NOT read those things), he is prepared to walk. That sort of courage is rare these days.

Instead of settling for 60 cents on the dollar, Ryan (or Cameron, whatever!) thinks that since he was so hot on “Dancing With the Stars” (I think that's a reality show where astronomers dress up as their favorite planet and do the electric slide), he is, according to a *National Enquirer* article, “confident that he has earning power elsewhere.”

Similar tales of hardship and bravery are being repeated in other TV shows where people who make more than even a GS 15, step 10, are either taking pay cuts, or making a stand on principle.

It makes you proud to be an American!

While federal workers aren't being asked to take pay cuts, many are concerned with outside economic conditions.

There is anecdotal evidence that the brain drain—if it was ever really happening or about to happen—may be over.

Dozens of feds who had planned to be retirees by now tell *FEND* they are still on the job. Some—thanks to the shrinking private-sector job market and their downsized TSP accounts—say they may have to work another couple of years.

One disgruntled fed, C.W., from Cincinnati, says that thanks to government rules and economic policies, all of us are under—or soon to be under—a WUYD pension plan. WUYD, he says, stands for “Work Until Your Drop.” And that it will, in his view, replace

continued on page 3



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continued from page 1

over 12 hearings conducted by both the Senate and House committees on the problems that plague the FDA.

"It's become very apparent that the food side of FDA is the stepchild of that agency," he continued. "The drug side has its problems, but the food side is really in bad shape."

"We think that the bill congresswoman DeLauro is advancing is a good one," Corbo said. "We favor the concept of splitting out the food part of FDA and creating its own independent agency inside the Department of Health and Human Services—because from both a policy standpoint and resources standpoint, the food side of FDA has been mistreated."

Corbo said DeLauro's bill has a "good chance of being the main vehicle being considered for change at FDA."

Corbo mentioned a misgiving or two about the bill, however. He said that the last draft he saw "still had the concept of contracting out some inspections of a limited range of lower-risk imported products."

INSIGHT by Mike Causey

continued from page 2

CSRS, FERS and Social Security. And all other pension plans.

The idea, he contends, is to make things so bad that people will NEVER retire because there won't be any money to pay any sort of benefit or pension.

Federal officials we contacted said there is no such plan, and that they have never heard of WUYD. One, perhaps in an attempt to distract us in our quest for the truth, suggested that C.W. from Cincinnati might want to seek professional help. She said federal health programs offer good benefits for such counseling.

I suspect this is a red herring, and I will continue to look for solid evidence of the cruel, but clever, WUYD plan.

Meantime, we salarymen (and women) of the world should consider ourselves lucky. I don't know about you, but a \$4,000-a-week pay cut would mean big changes in my life style!



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"We still have a problem with this concept," he said, though other leading bills, notably one being advocated by Sen. Dick Durbin, D-Ill., are more flawed in Corbo's opinion, as they "would allow private third-party certification of a whole host of food items."

In fact, neither food safety advocates nor employee organizations support contracting out inspections—what many see as a basic function of the agency—to outside workers at all.

"At least DeLauro has minimized this aspect of her bill," Corbo said.

"DeLauro's bill does clearly call for a huge increase in the level of inspection," Corbo told *FEND*. "So what happens if the bill passes? Is the FDA going to have to hire a brand new crew of people just to focus on food safety? Or are some of the existing staff over there at the FDA willing to specialize in food? These are questions that are yet to be worked out."

Chris Waldrop, the director of the Food Policy Institute at the nonprofit Consumer Federation of America, said his group supports DeLauro's proposal.

"Food safety needs a higher priority, and this bill does that—for that reason we think it's a good idea," Waldrop told *FEND*. "In addition, the bill modernizes the law that would govern the new agency."

Indeed, the DeLauro bill not only would create a new agency, but also would provide additional legal authorities to the new entity, set specific inspection frequencies, require companies to develop preventative process controls, and address currently thorny food import issues.

"The bill would give the new agency the legal strength that it needs to address food safety issues in the 21st Century," Waldrop said.

Waldrop said the bill aims to avoid some of the pitfalls of agency-inventing by first reforming the food elements of FDA, and later moving them out of HHS's FDA—along with the food safety portions of the Department of Agriculture—to combine them in a separate agency.

"You're not creating a whole new agency like DHS. Instead, you are taking all of the food safety functions of one agency and sort of putting them whole into a separate agency—I think it's an easier lift," he said.

As for the bill's near-term prospects, Waldrop said, "It's a little early to tell at this point."

To see more, go to: <http://delauro.house.gov/release.cfm?id=1446>. 

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OPM Releases 2008 Employee Survey Data

The latest Office of Personnel Management (OPM) employee survey indicates that federal employees are committed to their jobs, but only about a quarter of those surveyed said they see a link between job performance and pay raises.

The OPM Federal Human Capital Survey focuses on employee workplace perceptions and is the fourth such survey conducted since 2002. More than 210,000 federal employees responded to the 2008 survey, for a government-wide response rate of 51 percent, OPM said.

The survey, released Jan. 8, offered a range of good news. For example, 91 percent of respondents believe their work is important. This question on the survey continues to elicit the highest positive rating on the entire survey, OPM said. Also, 84 percent of respondents said they know how their work relates to the agency's goals and priorities; about 75 percent the workforce say they have the knowledge and skills to get the job done and 68 percent are satisfied with their jobs.

The agencies with the most satisfied workforces as rated by the respondents were: the Nuclear Regulatory Commission (1), the Office of Management and Budget (2), the National Science Foundation (3), the National Aeronautics and Space Administration (4) and the Department of State (5). Those ranked

continued on page 4

continued from page 3

ings were based mostly on the answer to Question No. 61: "Considering everything, how satisfied are you with your job?"

Agencies that ranked the worst on the survey for employee satisfaction included the Broadcasting Board of Governors (15.6 percent answered they were 'Very Satisfied' on Question 61), the National Credit Union Administration (16.5 percent), the Department of Homeland Security (18.2 percent), the Treasury Department (18.2 percent), the Department of Transportation (18.5 percent), the Department of Housing and Urban Development (18.5 percent) and the National Labor Relations Board (18.6 percent).

Beyond the agency ratings, the survey highlighted government-wide issues. Results included:

- Only 40 percent say creativity and innovation are rewarded.
- About 30 percent believe performance differences are recognized in a meaningful way or see steps taken to address poor performance.
- Only 26 percent see a link between performance and pay raises. This item received the highest negative rating on the survey (Question No. 27) but improved 4 percentage points since 2006, OPM said.

Overall, the findings underscore employees' lack of confidence in senior management, said Colleen Kelley, president of the National Treasury Employees Union (NTEU). However, the union said, the report also presents an oppor-

Thrift Savings Plan Share Prices (As of FEND's deadline)

FUNDS	JAN. 13	MONTH AGO	YEAR AGO
G Fund	12.7507	12.7222	12.2900
F Fund	12.6490	12.3550	12.0800
C Fund	10.0831	10.1433	15.8100
S Fund	11.8936	11.5206	18.3400
I Fund	13.5116	13.6238	23.6700
Lifecycle Funds			
L Income	12.7029	12.6575	13.3600
L 2010	13.6963	13.6388	15.2100
L 2020	12.5807	12.5318	16.1600
L 2030	12.2972	12.2422	16.7900
L 2040	12.1193	12.0630	17.4900

tunity for the incoming administration to make improvements.

Kelley said OPM's survey of federal employees highlights employees' frustration with inadequate resources and lack of training for frontline managers, and noted that more than half the respondents—52 percent—said they believe that arbitrary action, personal favoritism and coercion for partisan political purposes continue to be tolerated in federal agencies.

Fewer than half of the respondents—48 percent—said they have a high level of respect for their organization's senior leaders.

"There continue to be serious unaddressed problems throughout the federal workplace," said Kelley. "The survey reveals that, with a few exceptions, the

largest departmental agencies were conspicuously absent from the top 10 in any of the four survey categories."

To see more, go to: www.nteu.org/PressKits/PressRelease/PressRelease.aspx?ID=1362.

...

Postal Career Execs Serving Shorter Tenure, GAO Says

The U.S. Postal Service (USPS) pool of senior managers in its Postal Career Executive Service (PCES) is getting older upon appointment, serving shorter tenures and retiring at an older age, according to a Government Accountability Office (GAO) report released Jan. 12.

The report is a follow-up to a 2008 study in which GAO analyzed the demographic representation of employees in the PCES and certain levels of the Service's Executive and Administrative Schedule. GAO looked at age, the level of employment of those with disabilities and tenure differences in the PCES from Fiscal Year (FY) 2000 and FY 2007. Specifically, auditors reviewed the number of PCES employees who reported having one of nine targeted disabilities that the government has identified for special affirmative action emphasis.

"Equal opportunity in the federal

continued on page 8

Top 10 Agencies by Job Satisfaction

AGENCY	2008 RANKING
Regulatory Commission	1
Office of Management and Budget	2
National Science Foundation	3
National Aeronautics and Space Administration	4
Department of State	5
U.S. Agency for International Development	6
Social Security Administration	7
Court Services & Offender Supervision Agency	8
Federal Energy Regulatory Commission	9
Department of Justice	10

The Job Satisfaction Rankings are a composite of results from Questions: 5, 6, 20, 55, 59, 61 and 62.
Source: OPM

Financial Boost for Military Members and Their Families

As a result of tax legislation passed during 2008, federal employees who also serve in the military or whose relatives died while in military combat received a financial boost for their retirement. The Heroes Earnings Assistance and Relief Tax (HEART) Act of 2008 contains several provisions for military service personnel and their relatives that could increase their retirement savings. This column discusses some of the HEART Act's provisions.

Under the Pension Protection Act (PPA) of 2006, active reservists requesting premature (pre-age 59.5) withdrawals from their retirement plans—including the Thrift Savings Plan (TSP) and IRAs—are exempt from the 10 percent early distribution penalty. This exception was to expire on Dec. 31, 2007, but a HEART provision makes this exemption permanent.

The 10 percent penalty exception applies to any reservist called to active duty for 180 days or more and who requests a *distribution*—not a loan—from a retirement plan during that time. The repayment option is effective for distributions taken after Aug. 16, 2006, but there is a retroactive repayment option for withdrawals taken between Sept. 11, 2001, and Aug. 16, 2006. The amount withdrawn is included as income in the year it is withdrawn and income taxes will have to be paid on the amount distributed in any year—but without a 10 percent early withdrawal tax penalty. In addition, a reservist has the option of reimbursing the retirement plan or IRA within two years following the period of active duty. Here is an example:

Joseph, a federal employee, is called to active duty on Nov. 15, 2008. On Dec. 1, 2008, he requests a withdrawal of \$30,000 from his TSP account. Joseph will have to include the \$30,000 in income for 2008, but he is not subject to the 10 percent early withdrawal penalty. His active duty will end on Feb. 15, 2010. Joseph will have until Feb. 14, 2012, to repay the \$30,000.

Since an employee who is a reservist is paying back the IRA or TSP with after-tax dollars, the repayment should instead go into a Roth IRA in which everything withdrawn—contributions and earnings—will be tax-free. The repayment to the Roth IRA is not subject to the annual contribution limits or to the income limits that normally apply to Roth IRA contributions. In the example above, Joseph could therefore repay the \$30,000 withdrawn from his TSP and contribute the \$30,000 to his Roth IRA.

Another provision of the HEART Act involves mili-



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tary death benefits. A beneficiary of benefits from an individual who died while serving in the military can contribute these benefits to a Roth IRA or to a Coverdell Education Savings Account (ESA) (formerly called an educational IRA). This provision applies to beneficiaries of all military personnel, not just active reservists. Military death benefits include military death gratuities and Service Members Group Life Insurance.

Military beneficiaries can contribute death benefits to a Roth IRA without regard to annual contribution or income limits that normally apply. The contribution must be completed within one year of receiving the death benefits.

Here is an example:

Carol is the widow of a reservist who died in 2008 while in combat in Afghanistan. Carol's adjusted gross income during 2008 was \$87,000. On Dec. 15, 2008, Carol received SGLI benefits of \$150,000. She is eligible to contribute up to \$150,000 to her Roth IRA no later than Dec. 15, 2009. This is true even though the \$150,000 far exceeds the 2009 maximum contribution amount of \$5,000. Since Carol's adjusted gross income (AGI) was less than the maximum AGI allowed for making a Roth IRA contribution during 2009, she can also contribute to her Roth IRA up to \$5,000 (\$6,000 if she is 50 or older during 2009).

This provision is retroactive for deaths incurred in combat on or after Oct. 7, 2001, and before June 17, 2008.

The beneficiaries of military death benefits are often young parents with children who will need the death benefits to pay for immediate expenses such as food, housing and education. A Roth IRA owner cannot take a tax- and penalty-free qualified distribution of Roth IRA earnings until he or she is age 59.5 or older or has owned the account for at least five years if later, becomes disabled, or uses up to \$10,000 of the account, for a first-time home purchase. But a Roth IRA owner can always withdraw—with no penalty—monies contributed to a Roth IRA. It is only the *earnings* that must remain in the Roth IRA for the later of five years or age 59.5.

Another option for these beneficiaries is to contribute some of their death benefits to a Roth IRA, and some benefits to a Coverdell ESA. The total amount contributed to a Roth IRA and to a Coverdell ESA cannot exceed the total amount of the death benefits received. Funds are considered contributed to the Coverdell ESA first and to the Roth IRA second. Any excess amounts contributed would have to be withdrawn from the Roth IRA first.

Army Guard Loses Improper Termination Claim

Kathy Webb, a Security Guard with the Department of the Army, lost a recent appeal claiming she was improperly terminated after three years on the job. She further alleged that the improper termination occurred due to a medical condition she had.

Webb, according to official documents in the case, in August 2003 won an initial one-year appointment. The same documents show that almost two years later, in August 2005, the agency officially opted to lengthen the appointment yet another year, ending no later than Aug. 3, 2006.

The Army subsequently notified Webb, on July 12, 2006, that “her term appointment would not be extended and would therefore expire on Aug. 3, 2006.”

Indeed, the Army informed Webb explicitly, according to the documents, “that it could not continue to employ her because she failed to meet a condition of employment, related to a medical condition.”

The Army subsequently did not extend Webb’s job term. Webb appealed her termination, on Dec. 28, 2007, to the Merit Systems Protection Board (MSPB). In her complaint, she alleged that she had in fact been “hired for a four-year term”—but then improperly terminated after only three years on the job, due to “a medical condition.”

An administrative judge (AJ) with the board examined the evidence in the case. The AJ wrote that, in this case as in all others before the MSPB, the appellant is responsible for presenting evidence and establishing the board’s jurisdiction, according to 5 C.F.R. § 1201.56(a)(2)(i) and the precedent case *Garcia v. DHS* (2006). According to documents in the case, the AJ concluded that “all of the submitted documents supported the agency’s assertions that Webb’s term employment was not for a four-year term and had expired Aug. 3, 2006.” In February 2008, the AJ dismissed her appeal.

The AJ noted that Webb retained the right to appeal the decision again—but not to MSPB. That’s because, the judge pointed out, jurisdiction over “the end of a term appointment” did not fall under board jurisdiction, as detailed in 5 C.F.R. § 752.401(b)(11).

In this case, the AJ concluded, Webb’s loss of employment was a “release at the predetermined end of the term”—not an adverse personnel action. Accordingly, Webb appealed again, but to the U.S. Court of Appeals for the Federal Circuit.

Webb reiterated in documents submitted to the court that the evidence against her was “fake.”

But the court found her counter-claim to be unsupported, and concluded that she had not submitted a non-frivolous claim that demanded jurisdiction. “The evidence presented to the Board to support jurisdiction uniformly showed that Webb’s term appointment ended Aug. 3, 2006,” the court wrote.

“Thus there is no basis for Webb’s appeal,” the court con-

cluded—and denied the appellant’s complaint.

(*Webb v. MSPB*, *United States Court of Appeals for the Federal Circuit*, Docket No. 2008-3317, 1/13/09)

DHS Mechanic Fails at Appeal

Alex M. Grijalva, a maintenance mechanic with the Department of Homeland Security (DHS), U.S. Coast Guard Integrated Support Command, San Pedro, Calif., lost a recent appeal he filed after losing his job.

Grijalva worked as part of a team supervising prisoners housed at the Federal Correctional Institution on Terminal Island, Calif., who were tasked to do “maintenance and repair duties” at the San Pedro facility. In the course of this work, Grijalva was administratively charged with “smuggling of prohibited items” to the inmates in exchange for money.

On June 19, 2007, the agency informed Grijalva that the charges had been found to be substantiated and he would be removed from his position. The agency also stated that he could appeal the decision to the Merit Systems Protection Board (MSPB)—and he was informed of strict deadlines governing his appeal, with the latest permissible appeal date of July 24, 2007. According to official documents, Grijalva filed an appeal with the board—but waited until Sept. 21, 2007, to do so. His appeal did not include an explanation or argument as to why it came more than nearly three months after the deadline had passed.

Grijalva later filed a second appeal to MSPB. In it, he offered an explanation for late filing: “[He] had waited to appeal until after he received notice from the U.S. Attorney’s office regarding the completion of its criminal investigation relating to his actions,” according to official documents in the case. Regarding the criminal investigation, Grijalva explained, he had been charged with a misdemeanor after accepting a plea agreement on Sept. 13, 2007. Grijalva stated that he believed he could not appeal to the board until the criminal charges had been addressed by the U.S. Attorney’s Office.

On Nov. 26, 2007, an administrative judge (AJ) with MSPB rejected his appeal, and his explanation for the untimeliness. The appellant took his appeal to the full board, but was rejected. Finally, Grijalva appealed to the U.S. Court of Appeals for the Federal Circuit.

The court reexamined Grijalva’s explanation for late filing his appeal to the MSPB. But the court noted that the appellant had been “48 days late” in filing his first appeal—and “failed to show good cause” for this failure.

The court found that the board did “not abuse its discretion” in the case—and rejected Grijalva’s appeal.

(*Grijalva v. MSPB*, *U.S. Court of Appeals for the Federal Circuit*, Docket No. 2008-3249, 1/12/09)

Did IRS Agent Suffer Unfair Demotion?

“I worked for the IRS for years,” said Erica Burger,* a longtime supervisory agent with the agency. “I put in a lot of long days—and I got pretty good feedback on my work. Yet, one day in 2007, out of the blue, my managers demote me.”

“I was shifted from one job to the next, and before I knew it, I had no way to move up anymore,” she continued. “Then came the worst days of all—when I confronted my supervisor and appealed these unjust moves by my agency. All officials above my rank do is deny everything—they refuse to admit they have even done anything wrong, let alone something I can appeal.”

“Now I am appealing in the courts—if there’s any justice, I’m sure to win,” she said.

“Ms. Burger has only one fact right—she did change jobs a few years ago,” began Leslie Bogan, a lawyer for the IRS. “But the job change did not represent a demotion—and the appellant cannot legally prevail.”

FACTS: Erica Burger worked for many years as a Supervisory Revenue Agent, IR-05, at the IRS. But, on May 13, 2007, when—according to official documents in the case—she was “reassigned” to a different job slot—Internal Revenue Agent, GS-13. The new job paid a similar salary, but was substantially different in its duties.

Burger later complained, “alleging that her reassignment was an involuntary demotion,” according to documents. She took her complaint to the Merit Systems Protection Board (MSPB).

The agency rebutted Burger’s allegations, moving that the board should dismiss the appeal for lack of jurisdiction because Burger’s “reassignment was voluntary and did not result in a reduction in either pay or grade,” according to the IRS.

MSPB studied the filings, and then, in a “show-cause” order, asked Burger to file additional evidence in her case. The board later judged that Burger had failed to substantiate her claim. On Feb. 7, 2008, the board rejected her appeal on this basis.

Burger appealed yet again, this time to the U.S. Court of Appeals for the Federal Circuit. The court wrote that it accepted jurisdiction over the appeal under 28 U.S.C. § 1295(a)(9), and began considering the case.

The court wrote that it would examine Burger’s appeal *de novo* (anew), citing the example of a recent precedent (*Parrott v. MSPB*, 2008). The court added that since MSPB dismissed Burger’s appeal without holding a hearing, it needed to consider the entirety of her case *de novo* in order to establish whether or not she had raised “non-frivolous allegations of fact” that were pertinent to her case.

To establish whether Burger, in fact, had been demoted, first the court examined the issue of pay, and whether she suffered a pay cut.

“The term ‘pay’ is defined as ‘the rate of basic pay fixed by law or administrative action for the position held by an employee,’ 5 U.S.C. § 7511(a)(4),” the court wrote. The court added that, under a precedent case (*Chaney v. VA*, 1990), “A ‘reduction in pay’ is ‘an ascertainable lowering, at the time of the personnel action, of an employee’s present or future pay.’”

Following these basic tenets, the court compared Burger’s pay rate under her previous job to that of her reassigned post. Her old job paid \$79,481 per year. Her new job paid \$80,343 per year. Furthermore, both job slots had the same pay ceiling: \$87,039.

“No such reduction [in pay] occurred in this case,” the court ruled upon examining the evidence. “The Board concluded that [Burger’s] reassignment from the IR-05 position to the GS-13 position did not result in a reduction of either grade or pay. We agree.”

In a further attempt to ascertain whether Burger had suffered a demotion of some kind, the court looked to the two pay grades involved. The term “grade” means, according to the court, “a level of classification under a position classification system.” Burger’s old job was IR-05, and her new one, GS-13. The court held that neither outranked the other.

The court agreed, at this point, with MSPB, which ruled Burger had not suffered a reduction in grade, either.

But Burger countered to the court that indeed she had suffered a demotion.

Specifically, Burger asserted, according to official documents, “that her prior IR-05 position allowed for future promotions to senior management positions, whereas her new GS-13 position does not.”

Did Burger suffer an involuntary demotion?

DECISION: The court considered Burger’s allegations that her new position did not permit promotions. However, after probing the issue, the court found for the agency, stating that under current federal law the opportunity for promotion was not a pertinent matter in the case. Only pay and job grade matter with respect to the issue of demotion.

“Even assuming that her new position involves less responsibility and less potential for future advancement,” the court wrote, citing a 1986 precedent (*Wilson v. MSPB*), “[a] reduction in responsibility without a concurrent reduction in grade or pay ... is not appealable to the Board.”

The court therefore affirmed MSPB’s findings in the case, and denied Burger’s appeal.

(U.S. Court of Appeals for the Federal Circuit, Docket No. 2008-3251, 1/14/09)

* Names and dialogue are fictitious, but details are based on a real case.

continued from page 4

workplace is intended to result in a diverse and highly qualified workforce,” the report said. “Diversity within an agency’s senior executive ranks is particularly important.”

Overall, the PCES has shrunk, from 959 employees during 2000 to just 867 in 2007, a 9.6 percent decrease. PCES employees during 2000 were, on average, nearly 44 years old when they first entered the PCES, while those who were on board during 2007 were, on average, about one year older at their original appointment.

The average tenure in the PCES dropped from about 8.2 years in 2000 to about 6.4 years in 2007. Those leaving the PCES also were older—54.5 years old in 2000 to about 55.6 years old in 2007, the report said. Retirement made up about 74.5 percent of the 47 PCES separations tracked by GAO. The average age, at retirement, increased from about 55.9

years in 2000 to about 56.6 years in 2007—an increase of about 0.7 years.

The PCES in 2007 had no employees who reported a condition that constituted a targeted disability, compared to two employees who reported such conditions in 2000. An individual with a targeted disability has at least one of nine specific physical and mental conditions, including deafness, blindness, and mental illness. Another seven PCES employees reported having a disability in 2000, while eight reported a disability in 2007. However none of the conditions they reported constituted a targeted disability, the report noted. Twenty PCES employees chose not to provide information on their disability status in 2000, followed by 22 who chose not to disclose this information in 2007, the report said.

To see more, go to: www.gao.gov/new.items/d09255r.pdf.



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