



The Library of Congress
Office of the Inspector General



Human Resources Services

*The Library's Human Resources Policies:
Better Communication and
Improved Access Needed*

Attestation Report No. 2005-AT-902
March 2007



UNITED STATES GOVERNMENT

LIBRARY OF CONGRESS

Memorandum

Office of the Inspector General

TO: James H. Billington
Librarian of Congress

March 31, 2007

FROM: Karl W. Schornagel
Inspector General

A handwritten signature in black ink, appearing to read "Karl W. Schornagel".

SUBJECT: The Library's Human Resources Policies:
Better Communication and Improved Access Needed

Audit Report No. 2005-AT-902

This transmits our final audit report on the Library's Human Resources policies. The Executive Summary begins on page *i*, and complete findings and recommendations appear on pages 5 to 22.

In its response, the Office of Human Resources Services (HRS) agreed with eight of our recommendations and disagreed with six. In its response, the Office of General Counsel (OGC) agreed with all of our recommendations.

In accordance with Section 11.A. of Library of Congress Regulation 211-6, *Functions, Authority, and Responsibility of the Inspector General*, we request that the Director, Office of Human Resources Services, provide within 30 calendar days, an action plan addressing implementation of all recommendations in the report.

We appreciate the cooperation and courtesies extended by HRS and OGC during the audit.

cc: Chief Operating Officer
Director, Office of Human Resources Services
General Counsel

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▶▶ EXECUTIVE SUMMARY

The Library of Congress employs almost four thousand people in many different types of positions, from librarian to space planner. Its workforce is diverse both in type of occupation and demographic characteristics. The majority of Library staff is represented by one of four unions. Somewhat different rules apply to each of these populations, and yet another to the portion of the workforce that is non-unionized.

The Library has recently had significant problems in relations with its workforce, particularly since the 1980s when a class action suit – the “Cook Case” – was filed. The plaintiffs in that case accused the Library of discriminating against minority employees. In a settlement action, the Library agreed to reform many of its personnel practices and, in 2003, the Court released the Library from its supervision, opining that the Library had complied with the terms of the settlement agreement. Despite the resolution of the Cook case, the Library became the target of another lawsuit in 2004 alleging discrimination.¹

We undertook this project when it became apparent the Library’s personnel policies might contribute to employee dissatisfaction. Notwithstanding the 2003 Court opinion, we received numerous hotline complaints that some Library practices were unfair. We also became aware that employees were making complaints directly to Congress and that a congressional request was placed for a U.S. Government Accountability Office audit and investigation of Library personnel operations.

We confirmed that the Library handled each of these complaints appropriately. However, we were not able to clearly identify the source of employee discontent through a preliminary assessment of the situation. Each complainant alleged somewhat different facts and circumstances and, in our view, the complaints did not collectively represent a cohesive global set of problems.

¹ On December 20, 2004, approximately 700 Library employees filed an employment discrimination complaint in U.S. District Court. See Mills v. Billington, Docket 1:04-CV-0225-HHK.

Accordingly, without a clear indication of specific personnel policies and practices that might result in the perception of unfairness, we developed two general objectives for our review. We sought to determine whether (1) a communications breakdown exists between management and staff; and (2) the Library is following best federal government practices for personnel management.

We found that management is not communicating effectively with staff and that the Library's personnel policies are not easy to find or understand. For example, many personnel policies have review dates that have lapsed and are decades old. Similarly, no announcements are made as to which policies are being negotiated. Moreover, the Library has five discrete sets of personnel policies, but there is no employee or supervisor's manual or any other means to clearly guide users when referring to those policies. See page 6.

Our report cites omissions along these lines as factors that limit the transparency of Library personnel policies and practices. A good first step the Library could take to address this situation would be to upgrade the staff intranet so that it becomes as user-friendly and informative as the Library's public web site.

We also found that the Library has not adopted some best practices in federal personnel management. For example, the Library regulation for resolving staff disputes with management calls for the Librarian to make the final decision on whether one of his managers has acted inappropriately. Other federal agencies use an outside agency to be the decision-maker. See page 12.

Our report points to an organizational culture that is resistant to change as one factor that perpetuates the status quo. Although there are valid reasons that explain why the Library operates differently than the rest of the government, change is possible and is needed.

Both the Office of General Counsel (OGC) and the Office of Human Resources Services (HRS) responded to this report. HRS responded that it agreed with most of our recommendations but disagreed that the Library needs a table of penalties. It also disagreed with our recommendation that

decisions of the Personnel Appeals Board should be binding on the Library. OGC's response discussed why it believes policies to adopt a table of penalties and to make decisions of the PAB binding are exactly what the Library needs. As we closed this project, HRS and OGC were discussing the practices of other federal agencies and the views of industry experts. We will follow these discussions and report on the outcome as part of our audit follow-up process.

►► INTRODUCTION

Personnel policies for the Library of Congress fall into three main categories: federal personnel laws that apply to all government employees, regulations issued by the Librarian of Congress, and collective bargaining agreements.

Under 2 U.S.C. § 136, the Librarian is required to make rules and regulations for the government of the Library of Congress.² As of January 1, 2007, 152 Library of Congress Regulations (LCRs) contain personnel policies.

HRS writes and keeps the personnel-related LCRs up-to-date with oversight and legal support from the Office of General Counsel (OGC). HRS is responsible for the first draft of new or revised LCRs and checks each one for compliance with recently enacted laws or regulations that apply to federal employees. HRS may request legal support from the OGC in determining whether it must draft or revise an LCR to comply with a new authority. The OGC is responsible for maintaining a web page on the staff intranet where all LCRs are posted.

This type of OGC-HRS collaboration is not necessary in executive branch agencies. The Office of Personnel Management (OPM) drafts Combined Federal Regulations to guide those agencies that implement federal personnel law and is effectively a “one-stop-shop.”

The responsibility of HRS and OGC to clearly communicate Library of Congress personnel policies is outlined in the U.S. Government Accountability Office’s (GAO’s) Standards for Internal Control in the Federal Government that the Library is required to follow. These standards state that “[i]nformation should be recorded and communicated to others within the entity who need it and in a form or within a time frame that enables them to carry out their internal control and other responsibilities.”

² The Office of General Counsel (OGC) supports the Librarian in this responsibility by serving as “final legal advisor.” LCR 211-10, *Functions and Organization of the Office of the General Counsel, Office of the Librarian*, assigns this responsibility to the OGC.

Since many Library employees are represented by labor unions, the Librarian is also legally obligated to comply with labor laws contained in 5 USC Chapter 71. The Library has entered into a master collective bargaining agreement with each of its four unions as well as an agreement with the Congressional Research Employees Association (CREA) governing pay for senior level staff. In addition, the Library has entered into more than 100 midterm agreements with the unions over the years that have some continuing effect on conditions of employment.

As of October 1, 2006, the Library of Congress employed approximately four thousand employees. These included 872 librarians, 650 library technicians, 366 information technology specialists, 75 attorneys, and many others with highly specialized skills. The Library also has its own police force. Approximately seventy-five percent of Library staff members hold positions covered by collective bargaining agreements. The Library has signed agreements with the American Federation of State, County, and Municipal Employees (AFSCME) Local 2910, the AFSCME Local 2477, CREA, and the Fraternal Order of Police (FOP).

GAO designated human capital management as a high-risk area for the entire government in 2001. In 2007, this issue is still on the list. GAO emphasizes that “federal employees are not the problem.” The issue is that federal agencies don’t have the modern, effective, and credible human capital strategies that are essential to maximize employee performance and thereby provide accountability to the American people. As part of the federal community, the Library faces these same challenges. We believe the recommendations in this report are a good first step towards modernizing the way the Library communicates with and manages its workforce. It is axiomatic that improved job satisfaction results in increased productivity. Accordingly, as an entity, the Library should profit by improving its personnel policies.

►► OBJECTIVES, SCOPE, AND METHODOLOGY

We undertook this project based on information we received from two sources – our hotline files and complaints to Congress brought by Library personnel. We also noted an increase in the number of audits and investigations by the GAO and in the number of congressional inquiries related to personnel matters.

Based on this information, we began an attestation engagement to look into complaints about the fairness of the Library's personnel policies and practices. Attestations are similar to audits, but may be more limited in scope.

At the beginning of this project we met with representatives from all of the Library's unions, including the AFSCME Locals 2910 and 2477; CREA; and FOP, D.C. Lodge #1/ Library of Congress Labor Committee. We also met with several recognized employee organizations, including the Library's Chapter of Blacks in Government, the Library's Asian American Council, and the Library's Gay, Lesbian, or Bisexual Employees Association.

After a consideration of their views, we developed two general objectives³ for this attestation: to determine whether

- there is a communications breakdown between management and staff; and
- the Library is following best practices in federal personnel management.

We designed procedures intended to assess the quality of the Library's internal communications mechanisms. Specifically, we tested the Library's intranet information sources and other sources by asking routine questions that a newly hired employee would likely ask. We evaluated the ease of obtaining answers to these routine questions. Our inquisitive new hire was computer savvy and well educated. Our report explains the challenges this new employee encountered in his search for answers.

³ We did not pursue Objective 3, "Is the Library perceived as a fair employer?" because it would not have been possible to make a fair assessment of this issue given the staffing and other resources available to us for this project.

The OGC provided subject matter expertise on federal personnel policy for this review. Its support included written legal opinions on specific issues discussed in this report, but did not include a blanket legal opinion that identified federal personnel authorities that are or are not applicable to the Library. Accordingly, we also compared certain Library personnel practices to best practices in other agencies; however, we did not examine the legality of Library personnel policies.

HRS provided subject matter expertise on federal labor law. Its support included well-researched information on labor relations and advice on whether the recommendations in this report pertain to issues that require negotiation with the Library's labor unions.

At our invitation, OGC and HRS representatives accompanied us to meetings with human resources officials at the GAO. An HRS representative also accompanied us when we met with HRS representatives at GPO.

This attestation review was conducted in accordance with: (1) *The Library of Congress Office of the Inspector General Policy and Procedures for Conducting Audits and Attestations*, (2) Attestation Standards issued by the American Institute of Certified Public Accountants, and (3) Standards for Attestation Engagements issued by the Comptroller General of the United States in the *Government Auditing Standards, 2003 Revision*. Due to conflicting priorities, our fieldwork took from November of 2004 to March of 2007.

►► FINDINGS AND RECOMMENDATIONS

Issues faced by the Library related to its personnel policies and practices fall into two broad areas. We categorized our findings and recommendations accordingly.

The first issue category relates to communications. In the information age, the goal of any progressive employer should be to communicate with staff in an open and transparent manner. However, despite strong attempts at communicating with its staff, the Library still falls short of succeeding, primarily because it is focused on publishing great volumes of content in the form of web pages, Gazette articles, PAO announcements, and other materials. Where the Library could improve is in making all this content intelligible and accessible to the average employee. As George Bernard Shaw wrote – “[t]he greatest mistake in communication is the illusion that it has been accomplished.”

We discuss communication in section I of our findings.

The second issue category relates to best practices. Our objective in exploring this topic was to put a spotlight on personnel policies that are different than the best practices employed by other federal organizations. We regarded the GAO as a best practices model for human capital management. As a legislative branch agency, the GAO has effectively dealt with many of the challenges that are unresolved at the Library. For example, the GAO has been successful in obtaining the authority to establish an independent process for hearing disputes its employees have with management. The GAO also affords its entire staff the opportunity to comment on proposed regulations affecting personnel policies. In this project, we used the GAO as a benchmark.

We discuss best federal government practices for personnel management in section II of our findings.

I. Communication with Staff

The Library has a responsibility to provide staff with up-to-date guidance that provides answers to common questions about its personnel policies and practices.

At first glance, it appears that the Library meets this responsibility. The staff intranet includes a staff newsletter, union contracts, and directives and regulations on personnel policy. However, the sheer volume of all this guidance is daunting. Moreover, finding what is needed to answer a personnel policy question is not easy because of what's missing. Specifically, the Library doesn't have a subject index to the many topics covered by personnel policies. Although the Library's award-winning public web site is outstanding in this regard, the staff intranet site is not.

The condition of the staff intranet may be one factor that contributes to the lack of apparent openness and transparency. As management expert Peter Drucker wrote: "...the most important thing in communication is to hear what isn't being said."⁴

This report section identifies steps the Library could take to make the guidance more user-friendly.

*a. The Library Should Make Its
Personnel Policies More Accessible*

All Library policies are posted on the staff intranet, but staff must download and read entire documents to find answers to their questions. Bargaining unit staff must also research their union agreements. In the information age, it should not be necessary for staff to manually search through entire documents to find an answer to a question. Staff should be able to quickly point-and-click their way to find answers by using a personnel policies subject index that contains frequently used terms like "sick leave." However, the Library does not have such an index.

⁴ Peter Drucker is respected throughout the world as a seminal thinker, writer, and lecturer on organizations. *Business Week* has referred to him as the "most enduring management thinker of our time." His book, "Managing for Results," has been translated into 20 languages.

We note, however, that the staff intranet currently includes automated search features which are helpful to staff who know what they are looking for. For example, if an employee knows that the answer to his sick leave question is contained in LCR 2015-7 titled *Charges for Annual and Sick Leave*, he can use a search engine maintained by OGC to access that regulation on the staff intranet. Once he downloads the regulation, the employee can then search again within the regulation to confirm, for example, that sick leave is charged in 15-minute increments.

Nevertheless, the intranet's automated search features come up short for those staff who do not know in advance which document includes the information they are seeking. For example, an employee who does not know where to look for the answer to the sick leave question would first have to know that he should look in the LCRs for this guidance (a fact that may not be apparent to everyone), then would have to navigate through four screens, and finally would have to choose the correct result out of 176 possibilities.

Guidance on regulation-writing in the *Federal Register* emphasizes that "few readers want to study a regulation from beginning to end. Like drivers on unfamiliar roads, they need lots of signs."⁵

The bargaining unit employees of the Library are represented by four unions. In addition, approximately 25 percent of the Library's employees hold non-bargaining unit jobs. As a result, the Library maintains five sets of personnel policies for five different employee groups. In our view, the Library needs a subject index for each of the five groups to make its complex set of personnel policies more user-friendly. "Signs" on the staff intranet should lead members of each group to their own set of policies (i.e. policies for the FOP, the non-bargaining unit, etc.).

OPM's subject index is a model that the Library could adopt for categorizing the personnel policies for non-bargaining unit staff. Modifications to the non-bargaining unit categories

⁵ The *Federal Register* is published by the National Archives and Records Administration which is the official repository of all federal laws and regulations. Its web site includes guidance on making regulations easier to understand.

could then be made for the different policies of each of the four labor unions.

The OPM web site is an excellent source for guidance. For example, OPM’s subject index includes a topic called “family leave policies.” Clicking on the web site’s hyperlink for family leave policies takes users to a comprehensive set of hyperlinked family-friendly leave policies. These include easy-to-understand fact sheets on topics like time off for the birth or adoption of a child. The site also includes standard forms such as the form for requesting leave. For those who want to read laws and federal regulations on these topics, OPM includes hyper-links to them. The OPM web page also presents the same information in a question-and-answer format.

HRS advised us that the Library must first negotiate with its unions before it changes the way it communicates with its bargaining unit employees.

Recommendation

We recommend that the Director, HRS, study OPM’s Quick Index (or other sources of his choosing) and consider it as a model that the Library could use to provide portals to personnel policies for its five employee groups. If the HRS Director concludes that the OPM model is the one that the Library should consider, we recommend that he discuss the proposed changes to the way the Library communicates with its employees with the representatives of the Library’s labor unions.

HRS Response

HRS agreed with our recommendation and has recently taken steps to leverage Library resources by piggybacking onto the comprehensive pay administration guidance posted on the OPM web site. HRS is working with the Library’s Internet Operations Committee to develop additional strategies for making the staff intranet more user-friendly.

OPM.gov Home | Subject Index | Important Links | Contact Us | Help

U.S. OFFICE OF PERSONNEL MANAGEMENT
Ensuring the Federal Government has an effective civilian workforce

Advanced Search

Family and Medical Leave

Entitlement

Under the Family and Medical Leave Act of 1993 (FMLA), most Federal employees are entitled to a total of up to 12 workweeks of unpaid leave during any 12-month period for the following purposes:

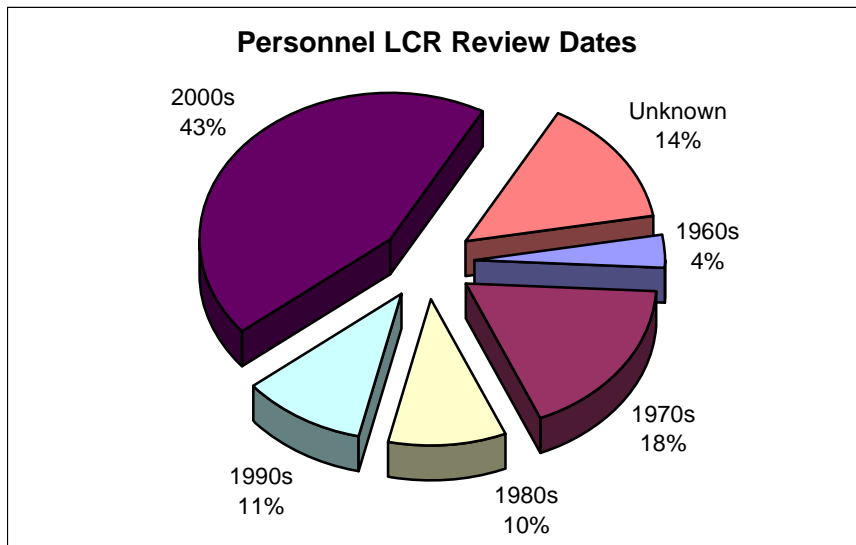
- the birth of a son or daughter of the employee and the care of such son or daughter;
- the placement of a son or daughter with the employee for adoption or foster care;
- the care of spouse, son, daughter, or parent of the employee who has a serious health condition; or
- a serious health condition of the employee that makes the employee unable to perform the essential functions of his or her positions.

Under certain conditions, an employee may use the 12 weeks of FMLA leave intermittently. An employee may elect to substitute annual leave and/or sick leave, consistent with current laws and OPM’s regulations for using annual and sick leave, for any unpaid leave under the FMLA. (The amount of sick leave that may be used to care for a family member is limited. See “Sick Leave to Care for a Family Member with a Serious Health Condition”) FMLA leave is in addition to other paid time off available to an employee.

b. The Library Should Update its Personnel Policies

The Library’s personnel LCRs each contain a “review date” and a “responsible office.” The review date is often five years after the issue date. HRS is responsible for accomplishing this review for policies relating to human resources.

We found that 43 percent of the policies had review dates that had lapsed prior to the year 2000. Another 14 percent did not have review dates, so we were unable to determine when the Library intended to review them.⁶



HRS has attempted to address this situation. Since June 2001, it has retained two contractors to update the policies. Neither contractor performed a comprehensive review or revamping of the policies. As a result, HRS changed its approach. In 2006, OGC and HRS began working together without contractor assistance to review, revise, and reissue policies with lapsed review dates. For example, in August of 2006, OGC and HRS collaborated to draft a pay

regulation that would replace and cancel 30 out-of-date pay administration regulations.

The joint effort, however, has not been publicized. As far as Library staff know, many old policies such as the leave regulations (which have been revised and are almost ready for comment) continue to lay dormant with management making no effort to update them.

One of GAO’s Standards for Internal Control in the Federal Government stipulates that communication in federal organizations should “occur in a broad sense with information flowing down, across, and up the organization.”

By not letting staff know that work is underway to update and reissue the Library’s aging personnel policies, the Library is not meeting GAO’s standard. HRS has advised us that

⁶ Data as of March 21, 2007.

announcements as to which policies are being revised, reviewed by the Executive Committee, or negotiated are management decisions that do not have to be negotiated with the unions.

Recommendation

We recommend that the Director, HRS, annotate policies that are in the process of revision (e.g., those on pay administration) then insert a hyperlink to an announcement that lists which policies are under revision, under review by the Executive Committee, or are being negotiated with Library labor organizations.

HRS Response

HRS agreed with our recommendation and is coordinating with OGC to effect this change.

*c. The Library Should Better
Communicate Issues Affecting Staff*

The Library has not adequately communicated to staff certain important developments in its personnel policies. For example, the Library has not informed staff about a pilot program it initiated after entering into a Memorandum of Understanding (MOU) with GAO's Personnel Appeals Board (PAB) in October 2005. As called for by GAO's Standards for Internal Control in the Federal Government, the Library's progress on such an initiative should be clearly communicated to staff. The purpose of the MOU was to provide some Library staff with an independent, external hearing process. Hearing procedures take place pursuant to the MOU for non-bargaining unit staff and for those covered by AFSCME 2477.

In our view, moving employee dispute hearings to the PAB is a significant milestone that the Library should loudly and clearly communicate to its staff. The internal hearing process at the Library clearly lacks independence. Although using outside contractors is an important element of the Library's hearing procedures, an appearance of unfairness clouds the entire process conducted within the four walls of the Library.

The only communication on the hearing process is in revised LCR 2020-4, *Hearing Procedures*. The regulation includes a

provision for GAO to provide hearing services, but does not provide any background on the issue. Moreover, there is no announcement that explains what the Library is doing and why. HRS advised us that management can make announcements about the pilot program without negotiating them with the unions.

Recommendation

We recommend that the Director, HRS, post an announcement about the pilot program on the staff intranet.

The announcement should include: (1) a discussion of the reasons the Library entered into the pilot, (2) an overview of the Personnel Appeals Board's authority, (3) a hyperlink to the Personnel Appeals Board website, (4) a copy of the Memorandum of Understanding between the Library and the Personnel Appeals Board, and (5) information that representatives from CREA, FOP, and AFSCME 2910 declined to participate in the pilot.

HRS Response and OIG Comments

HRS partially agreed with our recommendation. It stated that it will work with OGC to develop language that "focus(es) attention on the union (AFSCME 2477) that chose to participate rather than those that declined." We reaffirm our recommendation that the Library should announce the decision of all four unions. We do not regard an announcement that omits the decision of three of the Library's unions as complete or transparent.

II. Best Practices in the Federal Community

At first glance, Library personnel policies appear very similar to those of the rest of the government. Library staff are paid on the General Schedule (GS) (and other government-wide schedules), participate in the same federal retirement plans, and accrue the same amount of leave.

Personnel policies at the Library of Congress are different, however, because staff do not have the same rights to challenge management as those established for the rest of the federal community.

For example, employees working at GAO are invited to comment on proposed personnel policies. GAO management considers comments submitted by employees before finalizing the policy. If the comments are substantive, GAO summarizes and posts them on the staff intranet. GAO employees also have the right to challenge a management decision to terminate their employment. Although Library employees can also challenge termination decisions, it is the Librarian rather than an administrative law judge that is the final decision-maker.

In this section, we discuss this concept in more detail and make recommendations for change.

a. The Library Should Follow Best Practices With Respect to External Hearings

The cornerstone of a fair process is an independent arbiter of disputes. Our legal system works this way: parties involved in a dispute seek resolution from an independent third party – a judge, whose decision is not only binding, but also outside the control and influence of either party. The federal government has tried to model its ultimate personnel dispute resolution mechanisms on this premise.

In 1978, Congress passed important legislation that established an independent executive branch agency, the Merit Systems Protection Board (MSPB). The MSPB provides executive branch staff with a separate federal agency for appealing serious management decisions such as those that resulted in employee removals or reductions in grades.

At the MSPB, administrative law judges hear the facts and circumstances of executive branch staff cases, and then issue binding decisions that are posted on the MSPB web page. Either the executive branch staff member or his agency may appeal the MSPB decision to the U.S. Court of Appeals for the Federal Circuit. By law, MSPB administrative law judges cannot hear cases pertaining to Library staff.

The principal element Congress incorporated in the MSPB model is independence. This quality is built into the model because the agency whose action the employee is appealing is not permitted to make or recommend final decisions on the matter. Unless appealed to the Court of Appeals for the federal circuit, MSPB decisions are binding. We believe there is an inherent conflict of interest in placing the final decisions for personnel actions in the hands of the management team that initiated those actions. But in the case of non-bargaining unit staff – a substantial population – this is exactly what the Library does.

The Library now has several methods for resolving disputes over adverse actions, as shown in table 1.

	Non-bargaining unit	FOP	AFSCME 2477		AFSCME 2910		CREA
First Step	LCR 2020-4	Grievance	LCR 2020-4	Grievance	LCR 2020-4	Grievance	Negotiated Process
Next Step(s)		Arbitration		Arbitration	Grievance Arbitration	Arbitration	
Binding on the Library?	No	Yes	No	Yes	Yes	Yes	

Table 1: Dispute Resolution process at the Library.

Non-bargaining unit staff must follow the procedures outlined in LCR 2020-4. FOP members must file a grievance and proceed to arbitration. AFSCME 2477 and 2910 members can choose to file a grievance and proceed to arbitration, or follow the LCR 2020-4 procedures. Finally, CREA has negotiated a hearing process.

With the exception of non-bargaining unit members and AFSCME 2477 members who have chosen the LCR 2020-4 route, Library staff have the option of taking their dispute to an external third party, whose decision is binding on the Library.

LCR 2020-4 calls for a hearing at the Personnel Appeals Board.⁷ Congress passed a law in 1980 that created the PAB. The purpose of the PAB was to provide GAO employees with a means to appeal management decisions such as removals. The make-up and operation of the PAB mirrors the MSPB. A board independent of GAO management oversees the PAB. For GAO employees, PAB decisions are final and binding. Both employees and GAO management have appeal rights at the U.S. Appellate Court.

The independent hearing process provided by PAB is permitted by LCR 2020-4. However, in contrast with those made through MSPB proceedings, decisions of the PAB for non-union staff and AFSCME 2477 members who have chosen LCR 2020-4, the PAB's decision is not binding, but merely advisory. The Librarian can reject all or part of PAB decisions. Employees cannot appeal the Librarian's decisions to the courts; however, they can appeal decisions that may be violations of the Equal Employment Opportunity Act. As a result, we believe the process appears unfair.

We believe that the Library should amend LCR 2020-4 to make decisions of the PAB binding instead of advisory. OGC advised us that the Librarian has the authority to delegate final decisions to the PAB. However, the collective bargaining agreements in place with CREA, AFSCME 2910, and the FOP do not permit the Librarian to delegate his authority to an external third party. Because of this, employees whose jobs are covered by these unions do not have access to best practices that would be available to them if they worked at a different federal agency. HRS advised us that the Librarian cannot delegate authority for final agency decisions that affect union members without negotiating the possibility with the union's representatives in advance.

⁷ Except in cases involving AFSCME 2910 members. Hearings for these employees are not conducted by the PAB.

Recommendations

We recommend that:

- (1) the Director, HRS, send a memorandum to the president of each union which represents Library employees that explains:
 - (a) the reasoning behind Congress' approval for the PAB's establishment,
 - (b) the operation of the pilot program, and
 - (c) the reasoning behind permitting an external agency to make decisions that are binding. A copy of this memorandum should be posted on the staff intranet.
- (2) the OGC initiate an amendment to LCR 2020-4 that designates the PAB as the final decision-maker for Library cases that it hears.
- (3) the Director, HRS, post an announcement on the staff intranet that explains the role of the PAB in Library personnel policies and practices.

HRS and OGC Responses and OIG Comments

Both HRS and OGC responded to these recommendations.

HRS disagrees with making the PAB decisions binding. It believes that "the pilot should continue in its current format and that no determination be made on the binding character of PAB decisions until a substantial number have been rendered." We reaffirm our recommendation. Important to note is that the PAB has been hearing cases for over 25 years. Its decisions on these cases are available for download and analysis.

OGC agrees with making the PAB decisions binding. It believes that when "decisions from administrative judges or hearing examiners are not binding, and can be overturned by the Librarian, employees may perceive that the system is arbitrary." It believes that the current system leads to employee speculation about the reasons why the Library supports a system that is different than the rest of the federal government.

We reaffirm our recommendation.

b. The Library Should Adopt a Table of Penalties

Most staff at the Library of Congress have excellent work habits. They come in on time, work hard, and have never been in any trouble. But, there is another group of staff which does not always practice good work habits. Those staff members may not arrive at work on time or may not show up at all; may not perform their jobs properly; or may become involved in fights. Predictably, things can and do go wrong for those group members.

This section of the report is about what happens when things go wrong. How does the supervisor know whether he is expected to fire the staff member? How does the staff member know if he will soon be out of a job? They each find out by asking questions:

- The supervisor can ask HRS.
- The staff member can ask a union representative.

Each party must ask questions of the other because this is the only alternative at the Library. However, if the Library followed best practices, there would be written policies available to which the parties could refer.

For example, when staff don't show up for work, supervisors should not have to call HRS to find out how seriously this should be taken. There should be some way for the supervisor to research the Library's policy on unapproved work absence before he meets with HRS.

Similarly, there should be policy that staff who are absent without official leave (AWOL) can research to see if he will soon be unemployed. To expect the AWOL staff to assume a wait-and-see attitude is unreasonable.

A situation where the supervisor has to check with HRS weakens his authority. Similarly, a situation where the staff has no information to determine if he should retain a lawyer to help save his job is too heavy-handed. If the Library has never fired a staff member for an AWOL incident, this should be disclosed in a written document available to the staff.

Most federal agencies are set up to provide more autonomy for supervisors. For example, at GAO, supervisors and staff can quickly point-and-click their way to written policies on punishments for AWOL. GAO's policy clearly states that supervisors can fire staff who have been AWOL three times. GAO adheres to a policy and practice that is easy-to-understand and readily available. Such understandable and accessible policies are a goal of progressive employers.

We believe that fear and uncertainty are fostered by the perception that the Library is secretive about its policy and practices. Any policy or practice that has the ability to foster fear and prompt employees to go outside of the Library to complain is a candidate for change. HRS advised us that establishing a table of penalties for Library employees is an issue that must be negotiated with the unions.

Recommendations

We recommend that the Director, HRS:

- (1) evaluate the usefulness of GAO's table of penalties as a model for the Library of Congress, and
- (2) request a written legal opinion from the OGC that presents options on implementing a table of penalties in an organization where the majority of staff are covered by collective bargaining agreements.

HRS and OGC Responses and OIG Comments

HRS and OGC were discussing their own views and those of experts as we closed this project.

HRS disagrees with adopting a table of penalties. Its view is based on a consideration of the opinions of two industry experts. One expert believes that tables of penalties are "...more trouble than they are worth..." The second expert pointed out that when an agency has to rely on its managers to choose from a range of penalties, misjudgments could cause the agency to have an adverse action reversed upon appeal.

OGC agrees with adopting a table of penalties. Its view is based on a determination that seventy-five percent of federal agencies use a table of penalties to illuminate an agency's

policy and past practices regarding sanctions for specific offenses. OGC believes that a table of penalties is an important resource for employees and an educational tool for managers.

c. The Library Should Establish a Supervisor's Manual

In a few offices around the Library, there are old red three-ring binders labeled "Supervisor's Manual." These manuals are relics of a bygone era. As near as anyone can remember, the last update to the manual came out around 1990. The Library no longer has a supervisor's manual with any official standing.

Does this make any difference? After all, Library regulations and personnel policy directives can be easily downloaded from the staff intranet and HRS staff are available for questions. Is there any reason to breathe some life into the old red supervisor's manual? In the current set-up, do supervisors have what they need to do their jobs?

To answer these questions, we took a close look at staff intranet postings for AWOL, tardiness, and sick leave abuse. We reviewed the postings for these areas from a supervisor's point of view and tried to find guidance on the following common issues:

- An employee who is AWOL on Monday and Thursday of one week.
- An employee who arrives at work at 11:00 a.m. every day for a two-week period.
- An employee who abuses his sick leave.

We found some written guidance in the regulations, directives, and union contracts; however, these documents did not adequately explain Library policy on these issues. In most cases, the material posted stated that questions on staff discipline should be directed to HRS.

GAO does not use a supervisor's manual, but it does have an internal program for instructing newly promoted or hired supervisors about personnel policies. GAO told us that many

of these sessions are recorded so that supervisors can review personnel policies on their own.

In 2003, we made an audit recommendation that all supervisors be required to complete 80 hours of training. Although some online management training is available for Library supervisors, a formal management training program has not yet been implemented. The Office of Management and Training (OMT) had hoped to begin offering classroom training in January 2007; however, budget constraints prevented this from happening. OMT told us that the Library's Operations Committee agrees that supervisory development training should be mandated and provided through an instructor. It is currently drafting a plan for such training that must be approved by the Operations Committee. An evaluation of this new training program was not within the scope of our review.

We believe that the best management training programs are built on the premise that one size does not fit all. For example, at GAO, their management training targets three different audiences. Courses there are geared towards the new supervisor, the experienced manager, and the executive. Like GAO, the Library's needs include training for new supervisors as well as seasoned managers.

We provided GAO's curriculum guide to OMT personnel in response to their interest. HRS advised us that the Library could establish a supervisor's manual and training without negotiating such initiatives with its labor unions.

Recommendation

We recommend that the Director, HRS coordinate with OMT and the Operations Committee to develop a plan for a supervisor's manual that compliments Library management training.

HRS Response

HRS agreed with our recommendation and indicated it will study this issue to determine the optimum approach.

d. The Library Should Establish an Employee Manual

The Library does not maintain a paper manual for staff that provides a simple summary of Library personnel policies.

Guidance that is available for staff includes:

- An “Orientation Guide for New Staff” published by OMT that focuses on how to use Library voicemail, timekeeping systems, etc.
- Portals on the HRS web page for “Directives and Guidance” that provide a limited amount of information on benefits, pay, time, retirement, and “general employment resources.”

An HRS representative advised us that a staff guide to the Library had been in development but, due to budget restraints, work on the guide was discontinued about two years ago. The discontinued guide contained information on points-of-contact at the Library; however, it was not a staff handbook.

The Library needs a staff manual. Although the available guidance documents provide useful information, they do not provide a summary of the Library’s personnel policies. A well-written staff manual takes the mystery out of an organization’s personnel policies, as complicated rules and regulations are combined and presented as simple summaries. It is not good business practice to expect staff to visit HRS’ customer service center to obtain information on common personnel policies, such as the Library’s probation policy for new staff.

An example of an informative staff manual is the one being used at the U.S. Government Printing Office (GPO). For instance, GPO’s employee manual explains that all new staff are on probation for their first year.

The Library’s personnel policies would be better communicated if staff were not forced to learn about personnel policies, such as the Library’s probation policy for new staff, by reading LCRs. HRS advised us that establishing a staff manual does not require negotiation with the labor unions.

Recommendation

We recommend that the Director, HRS, develop a staff manual that consolidates and simplifies common Library personnel policies and post the manual on the staff intranet when its development is complete.

HRS Response

HRS agreed with our recommendation. It indicated that it would review employee manuals at selected agencies, then identify a proposal for management's consideration.

» CONCLUSION

While it may be frustrating and time-consuming for the uninitiated to find written answers to all of their questions, persistence will provide them the guidance they are seeking. For those needing personal assistance in navigating the staff intranet, HRS' newly refurbished customer service center is always an alternative. This may not be the most efficient and cost-effective approach to acquire an understanding of a particular personnel policy, but it is a viable option. Customer service center personnel are friendly, helpful, and informed and are an excellent resource for Library staff with questions on personnel matters. Nevertheless, improvements should be made.

We put a spotlight on the external hearings process to illustrate a Library policy that is not in line with best practices followed by other federal organizations. Serious disputes between management and staff are taken to an outside agency for resolution in other federal organizations. The reasoning is that disputes like that need an outsider's perspective. There are five possible ways in which the five employee groups can attempt to resolve the same dispute; this is but one indicator of the internal debate on this issue.

It is in the best interests of the Library to improve communications with staff and to revise hearing policies so that they mirror best practices in the federal community. We believe the recommendations in this report can serve as an agenda for further analysis and discussion between HRS, OGC, and the labor unions.

Major Contributors to This Report:

Nicholas G. Christopher, Assistant Inspector General
Judy M. Fischer, Senior Auditor

▶▶ APPENDIX A: HRS RESPONSE


United States Government

*Human Resources Services
Director for Human Resources*

Memorandum

Library of Congress

TO : Karl W. Schornagel
Inspector General

FROM : Dennis M. Hanratty 
Director for Human Resources

SUBJECT : Human Resources Services (HRS) Comments on Draft Attestation Report

Date: March 28, 2007

Thank you for the opportunity to comment on Draft Attestation Report No. 2005-AT-902, *The Library's Human Resources Policies: Better Communication and Improved Access Needed*. The report notes that your office reviewed various hotline complaints concerning the Library's personnel practices and determined that in each instance, the Library handled the complaint appropriately. We are pleased by this determination, as well your observation that the personnel of HRS' newly-refurbished customer service center are friendly, helpful, and informed and are an excellent resource for Library staff with questions on personnel matters. We are committed to providing outstanding customer service and welcome the attestation report as a means to strengthen our operations. In general, we support your findings and recommendations. However, we do not concur with two specific findings/recommendations: 1)the Library should accept decisions of the Government Accountability Office's Personnel Appeals Board (PAB) as binding rather than advisory and 2)the Library should establish a Table of Penalties.

Our comments to each of the report's specific findings and recommendations are as follows:

I. A. **(Finding)** *The Library Should Make its Personnel Policies More Accessible.*

HRS Response - Concur. You recommend that the staff intranet be redesigned to make it easier for users to find personnel information. We agree. In fact, we have been working with other members of the Intranet Task Group, a subordinate entity of the Internet Operations Committee, to develop a prototype for a more user-friendly staff intranet. These efforts will continue in fiscal 2007. In addition, HRS' offices of Worklife Services and Strategic Planning and Automation will review the HRS intranet and determine if information can be presented in a more customer-centric manner.

I. A. **(Recommendation)** *We recommend that the Director, HRS, study OPM's Quick Index (or other sources of his choosing) and consider it as a model that the Library could use to provide portals to personnel policies for its five employee groups. If the HRS Director concludes that the OPM model is the one that the Library should consider, we recommend that he discuss the proposed changes to the way the Library communicates with its employees with the representatives of the Library's labor unions.*

HRS Response - Concur. We agree that OPM's subject index aids federal employees in navigating personnel policies. For that reason, our consolidated payroll administration regulation (issued March 19, 2007) contains direct links to relevant OPM topics. For example, a reader of our regulation may link to OPM's gateway page on pay administration, containing fact sheets, questions and answers, pay tables, and various other information applicable to Library employees. We will use this approach wherever possible in redesigning the HRS intranet.

I. B. **(Finding)** *The Library Should Update its Personnel Policies.*

HRS Response - Concur. We agree that personnel regulations should be current and are actively engaged in ensuring that this is accomplished. The recently-issued payroll administration regulation noted above incorporated or eliminated 29 payroll regulations. Wherever pertinent, we directed users of this regulation to specific OPM regulations (the Library is covered by most federal payroll provisions), thereby eliminating the need for continual updating. We took a similar approach in a new time and leave administration regulation, which incorporates 24 time and leave regulations. This consolidated draft regulation has been transmitted to the Office of the General Counsel (OGC) for service units' review and comments. Nineteen additional regulations have also been updated and are currently under final review in HRS. These regulations will be transmitted to OGC for service units' review and comments by April 30, 2007. **Thus, by May 2007, over 70 updated personnel regulations will have either been issued or submitted to the service units for their review and comments.**

I. B. **(Recommendation)** *We recommend that the Director, HRS annotate policies that are in the process of revision (e.g. those on pay administration), then insert a hyperlink to an announcement that lists which policies are under revision, under review by the Executive Committee, or are being negotiated with Library labor organizations.*

HRS Response - Concur. We agree and will work with OGC, the custodian of the regulations website, to effect this change.

I. C. **(Finding)** *The Library Should Better Communicate Issues Affecting Staff.*

HRS Response - Concur. You recommend that the Library should inform staff about the Library's pilot program with the PAB (discussed in our response to II. A., below). We agree and will work with OGC on the language of the announcement.

I. C. (Recommendation) *We recommend that the Director, HRS, post an announcement about the pilot program on the staff intranet.*

The announcement should include: (1) a discussion of the reasons the library entered into the pilot, (2) an overview of the Personnel Appeals Board's authority, (3) a hyperlink to the Personnel Appeals Board website, (4) a copy of the Memorandum of Understanding between the Library and the Personnel Appeals Board, and (5) information that representatives from CREA, FOP, and AFSCME 2910 declined to participate in the pilot.

HRS - Concur in part. As stated above, we will work with OGC on the language of the announcement. We believe, however, that the language should be recast to focus attention on the union (AFSCME 2477) that chose to participate rather than those that declined.

II. A. (Finding) *The Library Should Follow Best Practices with Respect to External Hearings.*

HRS Response - Do Not Concur. In October 2005, the Library entered into a Memorandum of Understanding with the PAB under which evidentiary hearings for adverse action appeals, Equal Employment Opportunity complaints, and appeals of denial of leave under the Family and Medical Act may be adjudicated on a pilot basis by the PAB. The pilot currently covers non-bargaining unit and AFSCME 2477 employees.

LCR 2020-4, *Hearing Procedures*, was modified to reflect this pilot and contains the following statement, "All decisions rendered by the PAB will be recommended decisions and the Librarian retains the right to accept, reject, or modify any recommended decision (except in cases where the governing collective bargaining agreement dictates the decision be final and binding)." You have recommended that LCR 2020-4 be amended to make decisions of the PAB binding instead of advisory. We do not agree. It is our understanding that the PAB has issued only two decisions in Library cases. We believe that it is premature for the Librarian to make such a significant decision on the basis of so few cases. Instead, we believe that the pilot should continue in its current format and that no determination be made on the binding character of PAB decisions until a substantial number have been rendered.

II. A. (Recommendation) *We recommend that:*

(1) the Director, HRS, send a memorandum to the president of each union which represents Library employees that explains: (a) the reasoning behind Congress' approval for the PAB's establishment; (b) the operation of the pilot program, and (c) the reasoning behind permitting an external agency to make decisions that are binding. A copy of this memorandum should be posted on the staff intranet.

(2) the OGC initiate an amendment to LCR 2020-4 that designates the PAB as the final decision-maker for Library cases that it hears.

(3) the Director, HRS, posts an announcement on the staff intranet that explains the role of the PAB in Library personnel policies and practices and the reasons why there is a lack of uniformity in Library appeal processes.

HRS Response - Do Not Concur. As noted above, we do not support amending LCR 2020-4 at this time to designate the PAB as the final decision-maker for Library cases it hears. Therefore, we do not believe it to be in the Library's interests to send a memorandum to each union discussing the reasoning behind permitting an external agency to make binding decisions.

II. B. **(Finding)** *The Library Should Adopt a Table of Penalties.*

HRS Response - Do Not Concur. You contend that neither supervisors nor staff are well-served by the Library's absence of a Table of Penalties. You indicate supervisors should not have to contact HRS to find out how seriously an offense (e.g. absence without leave) should be taken and that the current practice weakens supervisory authority. Similarly, staff should not have to contact a union representative to determine the likely disciplinary course that management will adopt. You recommend that the Library adopt a Table of Penalties, identified in the report as a federal best practice, whereby supervisors and staff can quickly point-and-click their way to written policies on punishments.

We do not agree that the current practice weakens supervisory authority. No Library supervisor or manager has requested a Table of Penalties. Nor has any Library supervisor or manager complained to us about the need to consult with HRS' Office of Workforce Management Employee Relations and Performance Management Team (WFM/ERPM) to determine appropriate penalties in conduct or performance cases. To the contrary, the service and infrastructure unit heads, managers and supervisors frequently have commented favorably on the advice and support that they receive from WFM/ERPM, including guidance on appropriate penalties which requires a review of past practices and evaluation of applicable "Douglas" factors. In the past five years, no adverse action in the Library has been reversed on appeal on the grounds that the penalty was too high, or on the grounds that the Library lacked a Table of Penalties.

We also do not agree that a Table of Penalties is a best practice. We consulted with two experts in the field--one a former Chief Counsel to the Chairman of the U.S. Merit Systems Protection Board (MSBP), Chief of Staff to the General Counsel of the Federal Labor Relations, and author on employee relations law and practice and the other an attorney in private practice working exclusively on federal sector personnel and labor law and a noted author and lecturer. The first expert responded in part as follows, "In my opinion, penalty guides cause more trouble than they are worth relative to any benefit. MSPB over and over stresses the overriding importance of a full Douglas factor analysis, with particular heavy weight given to Factor One: The nature and seriousness of the misconduct. If a penalty guide is in place and the Agency follows it, that adds little if any weight to the ultimate penalty decision. However, if the penalty selection exceeds a penalty guide, then the agency has to explain the variance. And any time you have to explain yourself to a judge, you run the risk (however small) that your explanation will not be accepted." In this expert's opinion, penalty guides offered very little value, if any, and significant potential harm.

The second expert stated that some agencies find it useful to have a penalty guide while others rely on past practices to make such determinations. This expert identified both advantages and disadvantages of penalty guides. On the positive side, he stated that penalty guides are “nice to have” because they provide managers an indication of what penalty can be imposed in an adverse action. He emphasized that a properly-structured penalty guide is useful if an agency has managers who are able to exercise sound judgment in determining the best penalty from a range of penalties for a specific infraction. On the negative side, the expert stated that the problem with penalty guides is that an agency has to rely on managers exercising good judgment in using the penalty guides which usually range from a series of penalties (for example, warning to suspension for first offense and suspension to removal for subsequent offenses). If managers are not able to exercise sound judgment, the agency runs the risk of having an adverse action reversed on appeal based upon inconsistent application of the penalty guide.

We do not believe that there is a compelling reason for the Library to adopt a Table of Penalties. Therefore, we do not support this recommendation.

II. B. (Recommendation) *We recommend that the Director, HRS:*

- (1) evaluate the usefulness of GAO’s table of penalties as a model for the Library of Congress, and*
- (2) request a written legal opinion from the OGC that presents options on implementing a table of penalties in an organization where the majority of staff are covered by collective bargaining agreement.*

HRS Response - Do Not Concur. For the reasons just stated, we do not support the Library’s adoption of a Table of Penalties.

II. C. (Finding) *The Library Should Establish a Supervisor’s Manual*

HRS Response - Concur. We agree that a supervisor’s manual would be helpful. We will study this issue further to determine the optimum approach.

II. C. (Recommendation) *We recommend that the Director, HRS, coordinate with OMT and the Operations Committee to develop a plan for a supervisor’s manual that complements Library management training.*

HRS Response - Concur. We will study this recommendation and then identify a proposal for management’s consideration.

II. D. (Finding) *The Library Should Establish an Employee Manual*

HRS Response - Concur. We will review employee manuals at selected agencies and then identify a proposal for management’s consideration.

II. D. **(Recommendation)** *We recommend that the Director, HRS, develop a staff manual that consolidates and simplifies common Library personnel policies and post the manual on the staff intranet when its development is complete.*

HRS Response - Concur. As noted, we will review employee manuals at selected agencies and then identify a proposal for management's consideration.

cc: Jo Ann Jenkins

►► APPENDIX B: OGC RESPONSE

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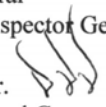
INSPECTOR
GENERAL

UNITED STATES GOVERNMENT
MEMORANDUM

LIBRARY OF CONGRESS
OFFICE OF THE GENERAL COUNSEL

TO: Karl W. Schornagel
Inspector General
Office of the Inspector General

DATE: April 3, 2007

FROM: Jessie James, Jr. 
Associate General Counsel
Office of General Counsel

RE: Comments on Draft Attestation Report, No. 2005-AT-902

This is to respond to your Draft Attestation Report, No. 2005-AT-902, "The Library's Human Resources Policies: Better Communication and Improved Access Needed." First and foremost, the Office of General Counsel ("OGC") commends you on the report's findings and recommendations. OGC supports all of the recommendations contained therein. The following comments highlight two specific recommendations made in your report, and adds additional information to support your recommendations. Specifically, the OGC strongly agrees with your recommendations that the Library follow the best practices with respect to external hearings, and that the Library adopt a "table of penalties."

Over the course of the past several years, as courts, administrative judges, and arbitrators have been increasingly surprised, concerned, and view the Library's practices and procedures with a jaundiced eye when they learn that Library employees are not equal in the eyes of federal law, OGC has recommended that the Library adopt many of the practices you propose in your Attestation. Hopefully, by adopting your recommendations, the Library will be one step closer to conforming with the rest of the federal government.

I. The Library Should Follow Best Practices with Respect to External Hearings

The OGC agrees with your recommendation that LCR 2020-4, Hearing Procedures, be amended to make decisions rendered by the Personnel Appeals Board final and binding instead of advisory.¹ Under the Library's current system if an employee files an adverse action appeal,

¹ While under our present system the PAB has contractual jurisdiction over claims brought by non-bargaining unit employees and members of AFSCME 2477, the PAB is afforded jurisdiction by contract which the Library could terminate at any time. Thus, if the Library cancels the contract, employees will no longer have a two-tiered system of review of its adverse action and discrimination claims and the Library will revert back to the old decision-making

the decision issued by the administrative judge is a recommended decision which the Librarian may accept, reject or modify. Thus, if the Librarian is dissatisfied with the findings or decision of an administrative judge of the PAB, or a hearing examiner for any reason, or no reason at all, he may reject or modify the decision. On the other hand, if an employee is unhappy with the Librarian's final decision the employee has no appeal except in cases involving Title VII claims of discrimination.² Thus, the structure of the Library's current system gives the impression to employees that the system is "fixed" or "rigged" particularly given the fact that after the Librarian issues his final agency decision, there are no additional appeal rights to a neutral body. Furthermore, because the decisions from administrative judges or hearing examiners are not binding, and can be overturned by the Librarian, employees may perceive that the system is arbitrary. This perception can give rise to claims of discrimination, or even worse, claims of class discrimination if employees believe that the Librarian is favoring one group over another in regards to his final agency decisions. Most important, because there is no standard of review imposed upon the Librarian when he accepts, rejects or modifies a decision, the Librarian is not required to explain the reasoning that underpins his decision to reject or modify a decision. Even if the Librarian were to disclose the underpinnings of his reasoning, his decisions are not harvested and published for public and employee consumption. Thus, there are no controls imposed on what the Librarian can and cannot do when he reviews (and potentially) overturns an Administrative Judge's decision.³ This leads to employee speculation about the reasoning behind the Final Agency Decision that other agencies are not subject to because other agencies' decisions are reviewed by the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Office of Special Counsel and the courts. The system also results in unnecessary complaints and letters to Congress about the Library's practices and procedures.

Furthermore, by not having binding decisions the quality of Library management suffers and will continue to suffer. Specifically, the opinions rendered by external administrative judges are a form of feedback about workings and non-workings Library management. However, if the Library permits the administrative judge's decisions to be rejected by the Librarian, there is no motivation on the part of Library management to make decisions in accordance with established laws, rules, regulations, practices and procedures.

Moreover, the Library's system has already been challenged by at least two Library employees in Federal Court (see Ferrarese v. Billington, 02-1614 (AK), USDDC; Wood v. Billington, 2006 WL 3431688, C.A.D.C.), and the District Court for the District of Columbia recently struck down a system used by the Department of Defense that is very similar to the

system which is more or less paternalistic, subjective and subject to the whim of individual Library managers.

² Federal court has jurisdiction over final agency decisions rendered by the Library on claims of discrimination.

³ The Library's present system could also lead to an abuse of the Librarian's authority.

Library's current process. American Federation of Government Employees, AFL-CIO v. Rumsfeld, 422 F. Supp. 2d 16., D.D.C. (2006).

II. The Library Should Adopt a Table of Penalties

The OGC agrees with your recommendation that the Library should adopt a table of penalties. A table of penalties has become a commonly utilized tool and a clear and concise means for providing a basis for agency action in employment decision-making. In general, a table of penalties provides a public list of the potential ramifications or discipline for an employee's engaging in unacceptable conduct. The OGC has determined that seventy-five percent of federal agencies use a table of penalties to illuminate the agency's policy and past practices regarding sanctions for specific offenses. See <http://www.govexec.com/features/0603/0603view2.htm> (explaining the processes utilized by agencies in taking adverse actions); see e.g., DOI's Table at <http://www.doi.gov/hrm/guidance/tbpfm3c.htm>; Dept. of Agriculture's Table at <http://www.afm.ars.usda.gov/ppweb/461-05.HTM#H38>; Dept. of the Army's Table at <http://cpol.army.mil/library/permis/5a111.html>.

Widespread use of a table of penalties may be in response to the Federal Circuit's finding that "good administrative practice strongly suggests the wisdom of adopting a table of penalties as many agencies have done." Hunt v. Dept. of Health and Human Services, 758 F.2d 608, 610 (Fed.Cir. 1985). Even if widespread use, efficiency, and clarity of agency policies were not sufficient reasons, the Library has been directly instructed by the Personnel Appeals Board ("PAB") on the benefits of having a table of penalties. The PAB even went so far as informing the Library that use of such a table simplifies the review process by providing an objective list of comparative offenses and sanctions. See PAB Decision, Proctor v. LOC at p.25 ("If the Library had a table of penalties, it would have facilitated the determination as to the appropriateness of the penalty under the circumstances here presented.")

Contrary to arguments against implementing a table of penalties, should the Library adopt a table of penalties, it would in no way be restricting itself to those penalties listed. See Farrell v. Dep't of Interior, 314 F.3d 584, 590-94 (Fed.Cir. 2002) ("[A]n agency is not required to follow the penalty table in aggravated cases."). Rather, a table of penalties is an invaluable tool that provides guidance to Managers on how to deal with employee misconduct. A table of penalties also assists proposing officials and deciding officials compare diverse misconduct issues. In addition, a table of penalties provides an important resource for employees that publishes the effects of employee misconduct. Furthermore, it is also an educational tool for Managers, and if Managers use a table of penalties over time they will become more familiar with the appropriate penalties and how to deal with employee misconduct. Lastly, a table of penalties would aid our defense of employment decisions made by Library managers.

Although the table of penalties must be negotiated with the Library's unions, the OGC sees no legal impediment to implementing a table of penalties.

The OGC appreciates the opportunity to respond to the Draft Attestation Report, No. 2005-AT-902. Should you have any questions, or seek further clarification on OGC's comments, please do not hesitate to contact me at 7-7464.

cc: Jo Ann Jenkins
Dennis Hanratty
Elizabeth Pugh