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May 19, 2010

The Honorable John Berry  
Office of Personnel Management  
Theodore Roosevelt Building  
1900 E Street NW  
Washington, DC 20415

Dear Director Berry:

This letter is in response to a discussion we had during our March 17th meeting with you regarding OPM regulations and the scope of Executive Resources Boards (ERB) as they apply to the Senior Executive Service. Per our discussion, and at your suggestion, we would like to propose areas for consideration in expanding the regulations governing ERBs.

As we have addressed with you, both in a letter dated January 5, 2010 and during our meeting, SEA has received disturbing accounts of reorganization actions affecting Senior Executives being taken by agencies without input or oversight by an ERB. In examining existing OPM regulations and the statute governing ERBs, it appears that OPM regulations have addressed only the scope of an ERB's role in merit staffing as it relates to initial appointments to the SES. (5 C.F.R. §317.501)

Below is a framework for proposed OPM regulations that addresses several areas that SEA believes fall within the scope of an ERB. Specifically, SEA recommends that OPM encourage ERBs to be run in a business-like manner, including using an agenda, keeping minutes and making bylaws publicly available. Further, ERBs should have oversight responsibilities to review all SES positions to ensure they are SES level, to exercise oversight over reassignments to ensure they have a business-purpose, and to utilize their authority to make recommendations concerning major reorganizations of the SES. Finally, any new regulations should clarify that "merit staffing," as that term is used in the applicable statute, includes all aspects of staffing, not just initial appointments to the SES.

By statute (5 U.S.C. 3393(b)), each agency is directed to establish:

One or more executive resources boards, as appropriate, the members of which shall be appointed by the head of the agency from among employees of the agency or commissioned officers of the uniformed services serving on active duty in such agency.

The boards shall, in accordance with merit staffing requirements established by the

Office, conduct the merit staffing process for career appointees, including (1) reviewing the executive qualifications of each candidate for a position to be filled by a career appointee; and (2) making written recommendations to the appropriate appointing authority concerning such candidates.

OPM regulations (5 C.F.R. §317.501) govern the merit staffing process only as it applies to *initial* career SES appointment. However, the statute appears to give ERBs oversight responsibility of the entire merit staffing process, which we believe includes reassignments and determining which positions are designated as SES. It is reasonable to infer that Congress used the term “staffing” as it is generally accepted for all areas in Human Resources functions that fall under hiring, transfers, or reassignments as they relate to either competitive or non-competitive processes. Essentially, “staffing” is that process that determines which person should go to a particular job. Merit staffing is, in our view, the process by which a particular executive is placed into an executive position by application of merit system principles. Our information is that some ERBs operate under this broader charter.

Given the complex nature of the SES system, and the ability of agencies to make staffing decisions with minimal oversight, we encourage you to provide firmer guidance through OPM regulations on the scope of ERBs to ensure that staffing decisions are made in a manner that is transparent and fair and helps an agency more effectively meet its goals.

SEA proposes the following areas for inclusion in the regulations for Executive Resources Boards.

*Areas of ERB Oversight:*

- The designation of those positions in an agency that are in the Senior Executive Service.
- Reassignments (especially geographic relocations), with particular attention to ensuring that any Senior Executives reassigned are being moved to positions appropriately designated as being in the SES.
- Any restructuring of jobs as they relate to the SES within an agency, and in particular, final review and recommendations concerning major restructuring.

*Oversight Actions:*

- The role of an ERB in oversight of merit staffing issues should be specifically defined to include the items discussed below.
- Specific ERB responsibilities of oversight should allow ERBs to oversee all areas of management of the SES corps in that agency or in the part of the agency that is within the purview of the ERB; should allow the ERB to delegate oversight on certain areas and then conduct a final review; and, should provide for final recommending authority over merit staffing.
- “Merit staffing,” as used in the statute, should be interpreted to provide for ERB input into the decision concerning which jobs are in the SES and who gets placed in them.

*Specific ERB Practices:*

- OPM should craft a consistent government-wide policy governing the practices of ERBs.

- Such practices include maintaining minutes and following an agenda.
- Regulations should ensure that at least one career appointee serves on each ERB.
- OPM regulations should provide guidance concerning when a department should have sub-units that have their own ERB, particularly for departments that are large or have numerous components.

SEA appreciates your consideration of this issue, and we believe that an expanded role for ERBs would serve to ensure that Senior Executives are treated fairly throughout the merit staffing process. We encourage you to pursue revised regulations and look forward to working with you on this critical issue, including suggesting specific language for such regulations.

Sincerely,



CAROL A. BONOSARO  
President



WILLIAM L. BRANSFORD  
General Counsel