United States

Merit Systems Protection Board

Annual Report for FY 2013

May 30, 2014

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Foreword

In accordance with section 1206 of Title 5, United States Code (U.S.C.), the U.S. Merit Systems Protection Board (MSPB) submits this annual report on its significant actions during fiscal year (FY) 2013. This report includes summaries of the most significant Board decisions, relevant opinions issued by our reviewing courts during the year, case processing statistics, summaries of MSPB's merit systems study reports and *Issues of Merit* newsletter topics, and a summary of MSPB's financial results. The report also contains a review of the significant actions of the Office of Personnel Management (OPM) and examines whether those actions are in accord with merit system principles and free from prohibited personnel practices. The review of OPM significant actions conducted under 5 U.S.C § 1206 is not, and should not be construed as, an advisory opinion (which is prohibited under 5 U.S.C. § 1204(h)). In addition, when there have been significant MSPB activities since the end of the FY, the report includes updated information as a service to the reader.

Additional information about FY 2013 program performance results is available in the Annual Performance Report and Annual Performance Plan (APR-APP) published at the same time as the FY 2015 Congressional Budget Justification. Financial accountability and audit information is included in MSPB's Annual Financial Report (AFR), published in November each year. MSPB Annual Reports, AFRs, PR-APPs, and Strategic Plans are posted on MSPB's website, www.mspb.gov, when they are released.

Go to www.mspb.gov to learn more about MSPB's work, sign up for our adjudication or studies listservs, follow us on twitter (@USMSPB), or download the MSPB app (for android or iphone).

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U.S. Merit Systems Protection Board
Fiscal Year 2013 Annual Report

Introduction

In accordance with section 1206 of Title 5, United States Code (U.S.C.), the U.S. Merit Systems Protection Board (MSPB) submits this annual report on its significant actions during fiscal year (FY) 2013. The report includes summaries of the most significant Board decisions, relevant Court opinions, case processing statistics, summaries of MSPB's merit systems study reports and *Issues of Merit* (*IoM*) newsletter topics, and summaries of the significant actions of the Office of Personnel Management (OPM). The report also contains summaries of the Board's financial status, outreach and merit systems education activities, legislative and congressional relations activities, international activities, internal management issues, and the external factors that affect MSPB's work. When there have been significant activities or events since the end of the FY 2013, the report includes updated information as a service to MSPB's stakeholders.

About MSPB

MSPB has its origin in the Pendleton Act of 1883, which was passed following the assassination of President Garfield in 1881 by a frustrated Federal job seeker. The Pendleton Act created the Civil Service Commission (CSC) and provided the foundation for improvements in Government efficiency and effectiveness by helping to ensure that a stable, highly qualified Federal workforce, free from partisan political pressure, was available to provide effective service to the American people.

Over time, it became clear that the CSC could not properly, adequately, and simultaneously set managerial policy, protect the merit systems, and adjudicate employee appeals. Concern over the inherent conflict of interest in the CSC's role as both rule-maker and judge was a principal motivating factor behind the passage of the Civil Service Reform Act of 1978 (CSRA). The CSRA replaced the CSC with three new agencies: MSPB as the successor to the CSC; OPM to serve as the President's agent for Federal workforce management policy and procedure; and the Federal Labor Relations Authority (FLRA) to oversee Federal labor-management relations.[1]

MSPB inherited the adjudication functions of the CSC by providing due process to employees and agencies as an independent, third-party adjudicatory authority for employee appeals of adverse actions and retirement decisions. Under the CSRA, MSPB was authorized to develop its adjudicatory processes and procedures, issue subpoenas, call witnesses, and enforce compliance with final MSPB decisions. MSPB was also granted broad new authority to conduct independent, objective studies of the Federal merit systems and Federal human capital management issues. In addition, MSPB was given the authority and responsibility to review and act on OPM's regulations and review and report on OPM's significant actions.[2] The CSRA also codified for the first time the values of the merit systems as the merit system principles (MSPs) and delineated specific actions and practices as the

[1] Bogdanow, M., and Lanphear, T., History of the Merit Systems Protection Board, Journal of the Federal Circuit Historical Society, Volume 4, 2010.

[2] Pursuant to 5 U.S.C. § 1204(f), MSPB may on its own motion, or at the request of other parties, review and declare invalid OPM regulations if such regulations, or the implementation of such regulations, would require an employee to commit a prohibited personnel practice (PPP). Pursuant to 5 U.S.C. § 1206, MSPB also is responsible for annually reviewing and reporting on OPM's significant actions.

prohibited personnel practices (PPPs) that were proscribed because they were contrary to merit system values.[3] Since the CSRA, Congress has given MSPB jurisdiction to hear cases and complaints filed under a variety of other laws.[4]

Board Members

The bipartisan Board consists of the Chairman, Vice Chairman, and Board Member, with no more than two of its three members from the same political party. Board members are appointed by the President, confirmed by the Senate, and serve overlapping, non-renewable 7-year terms.

SUSAN TSUI GRUNDMANN
Chairman
November 2009 to Present

Susan Tsui Grundmann was nominated by President Barack Obama to serve as a Member and Chairman of the U.S. Merit Systems Protection Board on July 31, 2009. She was confirmed by the U.S. Senate on November 5, 2009, and sworn in on November 12, 2009. Chairman Grundmann's term expires on March 1, 2016.

Previously, Ms. Grundmann served as General Counsel to the National Federation of Federal Employees (NFFE), which represents 100,000 Federal workers nationwide and is affiliated with the International Association of Machinist and Aerospace Workers. At NFFE, she successfully litigated cases in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia. In 2004, Ms. Grundmann represented NFFE and other labor unions in the statutory "meet and confer" process with officials from the Department of Homeland Security (DHS) and OPM, which sought agreement on how to proceed with new DHS personnel regulations. She represented NFFE and the United Department of Defense Workers Coalition, consisting of 36 labor unions, and served on the Coalition's litigation team in a coordinated response to proposed personnel changes at the Department of Defense (DoD). In addition to DoD employees, Ms. Grundmann represented employees in the Forest Service, Department of Agriculture, Passport Service, Veterans Administration, General Services Administration, and some 25 additional Federal agencies. From 2003 to 2009, she was a regular instructor on Federal sector labor and employment law at the William W. Winpisinger Education Center in Placid Harbor, Maryland. Prior to joining NFFE, Ms. Grundmann served as General Counsel to the National Air Traffic Controllers Association. She began her legal career as a law clerk to the judges of the Nineteenth Judicial Circuit of Virginia, and later worked in both private practice and at the Sheet Metal Workers National Pension Fund. Chairman Grundmann earned her undergraduate degree at American University and her law degree at Georgetown University Law Center.

[3] Title 5 U.S.C. § 2301 and § 2302, respectively.
[4] Including the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 *et seq.*; the Veterans Employment Opportunity Act (VEOA), 5 U.S.C. § 3309 *et seq.*; the Whistleblower Protection Act (WPA), Pub. L. No. 101-12, 103 Stat. 16; 5 U.S.C. § 4304; 5 U.S.C. § 7513; and those set out at 5 C.F.R. § 5 Code of Federal Regulations (C.F.R.) § 1201.3.

ANNE M. WAGNER
Vice Chairman
November 2009 to Present

Anne M. Wagner was nominated by President Barack Obama to serve as a Member of the U.S. Merit Systems Protection Board with the designation of Vice Chairman on July 31, 2009. Her nomination was confirmed by the U.S. Senate on November 5, 2009, and she was sworn in November 12, 2009. Although Ms. Wagner's term expired on March 1, 2014, she continues to serve in her position in accordance with MSPB's governing statute, which specifies that a member may remain on the Board for a period of one year past the end of her term, or until a successor is confirmed, whichever occurs first.

Ms. Wagner came to the Merit Systems Protection Board after serving as General Counsel of the Personnel Appeals Board of the U.S. Government Accountability Office (GAO). Prior to that, Ms. Wagner was appointed by the U.S. Comptroller General to serve a five-year statutory term as a Member of the GAO Personnel Appeals Board. Ms. Wagner began her career as a staff attorney in the Office of the General Counsel of the General Services Administration, where she primarily handled labor and employment issues. From there, she went on to become an Assistant General Counsel for the American Federation of Government Employees (AFGE), AFL-CIO, the largest Federal sector labor organization representing more than 600,000 Federal and District of Columbia government employees. In her nearly 20years with AFGE, she led precedent-setting litigation and handled cases arising under the full array of laws governing Federal employment. Ms. Wagner graduated from the University of Notre Dame and received her J.D. from the George Washington University, National Law Center. She is admitted to practice law in the District of Columbia, Maryland, and Illinois as well as before various Federal Courts, including the U.S. Supreme Court.

MARK A. ROBBINS
Member
May 2012 to Present

Mark A. Robbins was nominated by President Barack Obama on December 5, 2011 to serve as a Member of the Merit Systems Protection Board. He was confirmed by the U.S. Senate on April 26, 2012. Mr. Robbins' term expires on March 1, 2018.

At the time of his nomination, Mr. Robbins was the General Counsel of the U.S. Election Assistance Commission. In that capacity, Mr. Robbins worked to certify elections systems and maintain information on the best practices of conducting elections. He previously served as a Senior Rule of Law Advisor for the State Department in Babil Province, Iraq. Mr. Robbins also served as Executive Director of the White House Privacy and Civil Liberties Oversight Board between 2006 and 2008 and as General Counsel of the Office of Personnel Management from 2001 to 2006. He worked in private practice as a litigation attorney in Los Angeles, California between 1988 and 2000, and in the White House Office of Presidential Personnel from 1984 to 1988. He began his career as a legislative assistant to two members of the U.S. House of Representatives, where, among other issues, he covered the Federal civil service and human resources management.

Mr. Robbins earned both his undergraduate and law degrees from George Washington University. He is a member of the California and District of Columbia bars. In 2013, in recognition of his extensive professional involvement and continued leadership in public administration, Mr. Robbins was elected as a Fellow of the National Academy of Public Administration.

MSPB Offices and Their Functions

MSPB is headquartered in Washington, DC and has eight regional and field offices located throughout the United States. The agency is currently authorized to employ 226 Full-time Equivalents (FTEs) to conduct and support its statutory duties.

The **Board Members** adjudicate the cases brought to the Board. The Chairman, by statute, is the chief executive and administrative officer. The Office Directors report to the Chairman through the **Executive Director**.

The **Office of the Administrative Law Judge** (ALJ) adjudicates and issues initial decisions in corrective and disciplinary action complaints (including Hatch Act complaints) brought by the Special Counsel, proposed agency actions against ALJs, MSPB employee appeals, and other cases assigned by MSPB. The functions of this office are currently performed under interagency agreements by ALJs at the Federal Trade Commission (FTC), the Coast Guard, and the Environmental Protection Agency (EPA).

The **Office of Appeals Counsel** conducts legal research and prepares proposed decisions for the Board to consider for cases in which a party files a Petition for Review (PFR) of an initial decision issued by an Administrative Judge (AJ) and in most other cases to be decided by the Board. The office prepares proposed decisions on interlocutory appeals of AJs' rulings, makes recommendations on reopening cases on the Board's own motion, and provides research, policy memoranda, and advice on legal issues to the Board.

The **Office of the Clerk of the Board** receives and processes cases filed at MSPB headquarters (HQ), rules on certain procedural matters, and issues Board decisions and orders. It serves as MSPB's public information center, coordinates media relations, operates MSPB's library and on-line information services, and administers the Freedom of Information Act (FOIA) and Privacy Act programs. It also certifies official records to the Courts and Federal administrative agencies, and manages MSPB's records systems, website content, and the Government in the Sunshine Act program.

The **Office of Equal Employment Opportunity** plans, implements, and evaluates MSPB's equal employment opportunity programs. It processes complaints of alleged discrimination brought by agency employees and provides advice and assistance on affirmative employment initiatives to MSPB's managers and supervisors.

The **Office of Financial and Administrative Management** administers the budget, accounting, travel, time and attendance, human resources, procurement, property management, physical security, and general services functions of MSPB. It develops and coordinates internal management programs, including review of agency internal controls. It also administers the agency's cross-agency servicing agreements with the U.S. Department of Agriculture (USDA), National Finance Center for payroll services, U.S. Department of the Treasury, Bureau of the Public Debt for accounting services, and USDA's Animal and Plant Health Inspection Service for human resources services.

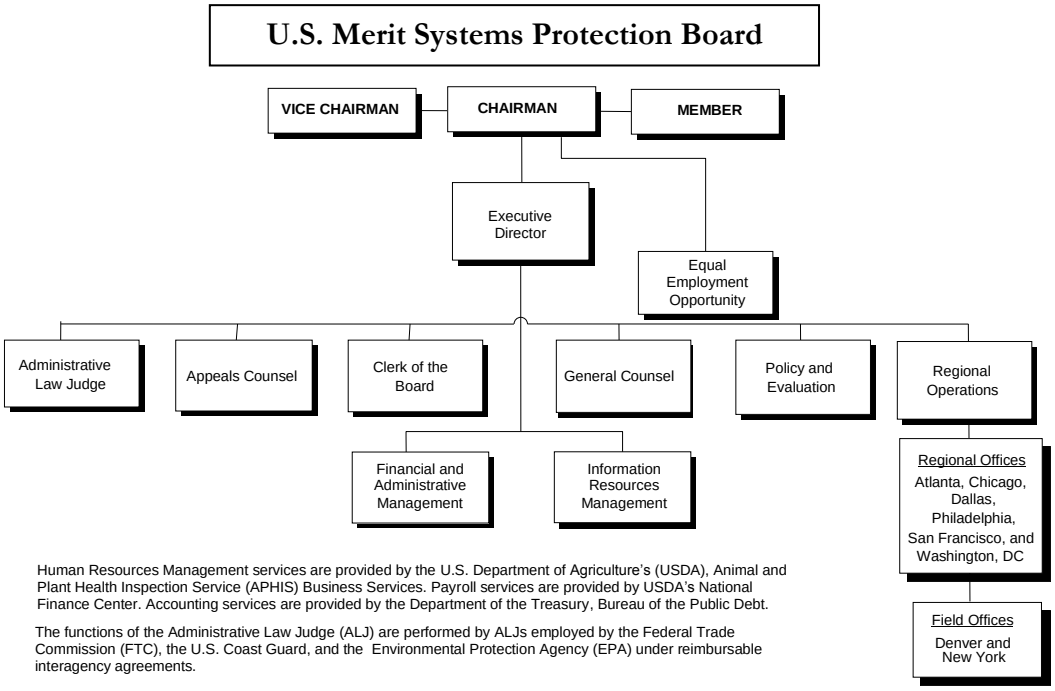
The **Office of the General Counsel**, as legal counsel to MSPB, advises the Board and MSPB offices on a wide range of legal matters arising from day-to-day operations. The office represents MSPB in litigation; coordinates the review of OPM rules and regulations; prepares proposed decisions for the Board to enforce a final MSPB decision or order, in response to requests to review OPM regulations, and for other assigned cases; conducts the agency's PFR settlement program; and coordinates the agency's legislative policy and congressional relations functions. The office also drafts regulations, conducts MSPB's ethics program, performs the Inspector General function, and plans and directs audits and investigations.

The **Office of Information Resources Management** develops, implements, and maintains MSPB's automated information systems to help the agency manage its caseload efficiently and carry out its administrative and research responsibilities.

The **Office of Policy and Evaluation** carries out MSPB's statutory responsibility to conduct special studies of the civil service and other Federal merit systems. Reports of these studies are sent to the President and the Congress and are distributed to a national audience. The office provides information and advice to Federal agencies on issues that have been the subject of MSPB studies. The office also carries out MSPB's statutory responsibility to review and report on the significant actions of OPM. The office conducts special projects and program evaluations for the agency and has responsibility for coordinating MSPB's performance planning and reporting functions required by the Government Performance and Results Act Modernization Act of 2010 (GPRAMA).

The **Office of Regional Operations** oversees the agency's six regional and two field offices, which receive and process appeals and related cases. It also manages MSPB's Mediation Appeals Program (MAP). AJs in the regional and field offices are responsible for adjudicating assigned cases and for issuing fair, well-reasoned, and timely initial decisions.

MSPB Organizational Chart



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Fiscal Year 2013 in Review

Adjudication and Enforcement

MSPB issued 7,459 decisions in FY 2013 including 6,340 initial decisions issued by the regional and field offices and 952 decisions issued by the Board at HQ. (ALJs issued 167 decisions.) HQ and the regional and field offices continued to issue high quality decisions and the average processing times were within targets for initial appeals. The average processing time continued to increase for PFRs at HQ. However, PFR processing stabilized in FY 2013 during which MSPB processed PFRs (and addendum cases) at approximately the same rate at which they were received. Therefore, the existing inventory of PFRs did not increase as had occurred in recent years. MSPB provides alternative dispute resolution options to its customers including the Mediation Appeals Program. MSPB conducted dozens of outreach events for its adjudication stakeholders. To improve the availability of *pro bono* representation for *pro se* appellants, MSPB continued its partnerships with local law school clinics in San Francisco and Denver, began a partnership with law firm in Boston, and began negotiations with local law school clinics in Philadelphia and Dallas. The average processing time for enforcement cases closed at HQ increased in FY 2013. Because the new adjudication regulations change the way enforcement cases are processed in the regional and field offices, MSPB will calculate the overall processing time for all enforcement cases closed in the regional and field offices and at HQ rather than just at HQ.

The most significant issue related to adjudication was the arrival of almost 32,400 appeals from employees who were furloughed in FY 2013 due to budget sequestration. More information about how furlough appeals are impacting MSPB and how MSPB is processing them is provided below. In addition, the Whistleblower Protection Enhancement Act of 2012 (WPEA), which became effective in December 2012, resulted in substantive changes in MSPB's adjudication and reporting of whistleblower cases. More detail about these changes is included in the MSPB FY 2012 Annual Report. In accordance with the WPEA, information about FY 2013 whistleblower appeals is contained in MSPB's Annual Performance Report (APR-APP) for FY 2013.

In addition to sequestration and the WPEA, other external events had an effect on MSPB. In late October and early November 2012, MSPB's regional office in Philadelphia and field office in New York were closed or operating at limited capacity, and individual MSPB employees were effected as a result of Hurricane Sandy. As a result of the Government Shutdown in October 2013, MSPB was closed for business, and the majority of MSPB employees were furloughed, with the exception of the three Board Members and very limited emergency staff. This Government shutdown, on the heels of receiving tens of thousands of furlough appeals, will further delay the final resolution of cases filed with MSPB. It is worthwhile to note that during the Government shutdown, MSPB Board Members continued to work and processed 55 cases. MSPB also successfully relocated the Washington Regional Office from Alexandria, Virginia to Crystal City, Virginia effective July 29, 2013.

MSPB continued its efforts to improve the transparency of its adjudication processes and decisions at HQ. The Board requested amicus briefs in *Day v. Department of Homeland Security* and in *King v. Department of the Air Force* on retroactive application of specific provisions of the WPEA.[5] The Board expects to continue to request amicus briefs and to hear oral arguments in cases that have Governmentwide effect on the Federal civil service workforce and the merit systems. The Board continued to issue nonprecedential decisions (NPOs) with expanded explanations of its reasoning, which improve the parties' understanding of the Board's decisions and PFR process. NPOs are available on MSPB's website.

[5] Summaries of and links to these decisions are provided later in this report.

MSPB's new adjudication regulations related to 5 C.F.R. Parts 1200, 1201, 1203, 1208, and 1209 (summarized in more detail in the FY 2012 Annual Report) became effective on November 13, 2012. In May 2013, following a development period which included public comment, MSPB implemented a new streamlined version of its appeal form (MSPB Form 185) and updated MSPB's e-Appeal Online system to reflect the content of the new form. Further information about the new form is posted on MSPB's website. In November 2013, MSPB gave public notice that began the formal rule-making process to revise its regulations related to how jurisdiction is established over Board appeals. On April 3, 2014, after notice and comment, MSPB published a proposed rule to amend its jurisdiction regulations. Information about MSPB's previous and current regulations review processes can be found on our website.

This Annual Report contains brief summaries of the most significant Board decisions issued in FY 2013, which addressed a number of issues including whistleblower protection, national security determinations, and furloughs. Summaries of selected significant decisions issued by the Board in early FY 2014 are included for the convenience of MSPB's stakeholders. Moreover, the report includes summaries of significant opinions relevant to MSPB's work issued during FY 2013 by the U.S. Court of Appeals for the Federal Circuit. This report also contains case processing statistics for initial appeals decided by MSPB's regional and field offices and for PFRs and other cases decided by the Board at HQ. Case processing statistics include the type of case and overall disposition of cases, such as the number dismissed (e.g., for lack of jurisdiction or untimeliness), the number settled and the number adjudicated on the merits. Disposition of cases is also listed by agency.

Furlough Cases Resulting from Federal Sequestration

The most significant external factor currently affecting MSPB's ability to carry out its mission is the tens of thousands of furlough appeals filed with MSPB regional and field offices as a result of budget sequestration. Soon after Governmentwide sequestration took effect in March 2013 several agencies (e.g., EPA, Federal Aviation Administration, Internal Revenue Service, Social Security Administration, and others) began implementing furloughs of their employees. In July 2013, DoD began implementing furloughs for most of its 650,000 employees. Under Federal law, employees have the right to appeal furloughs to MSPB. In FY 2013, almost 32,400 furloughed employees filed appeals in MSPB's regional and field offices, approximately five times the 6,200 initial appeals MSPB receives on average each year (2007-2012, not counting addendum appeals). In addition, in accordance with statute, seven agencies requested permission from MSPB to furlough 158 ALJs.[6]

Almost 32,000 DoD employees filed furlough appeals over a 5-6 week period in July and August 2013. This volume of initial appeals had and continues to have an extraordinary impact on MSPB's regional and field offices. Accurate docketing requires reviewing the appeal and entering additional information into our case management system (even when appeals are filed electronically through e-Appeal Online). MSPB's paralegals and legal assistants in the regional and field offices worked overtime to manage this massive workload and MPSB hired temporary employees to assist in docketing cases. In addition, a furlough appeal docketing "strike team" was established at HQ to assist the regional and field offices in docketing these appeals.

The overall volume of furlough appeals, number of furlough appeals filed per day, and subsequent processing spikes created during the normal receipt and distribution of case documents (orders,

[6] MSPB incurred direct costs (e.g., salary, travel, and transcript costs) in the adjudication of these cases by ALJs under an interagency reimbursable agreement with the United States Coast Guard. Adjudication of the ALJ furlough cases also required substantial administrative and ministerial support from MSPB legal staff.

responses, pleadings, etc.) to and from the parties during the adjudication process, are also straining MSPB's processes and IT infrastructure. On the busiest day, 1,656 appeals were filed electronically via e-Appeal Online, 80 times the average daily number of appeals filed online. This one-day total was over half the 2,872 appeals filed online through the first nine months of FY 2013. The volume of electronic filing and subsequent processing caused IT resources such as processors, memory, disk space, and internet bandwidth to exceed maximum operational capacity at various points; this required constant monitoring during filing and processing peaks and frequent rebooting of the system to recover system resources. MSPB developed and implemented new *ad hoc* processes such as docketing short cuts and batch processing of legal notices to help manage the workload. MSPB also reached agreement with several agencies to use a common agency file containing the agency's documentation regarding its furloughs. MSPB's programmers also updated multiple case processing systems to accommodate case docket numbers that could exceed 9,999 cases per office in a FY. In addition, the number of external help-desk tickets increased proportionally to the number of first time users of e-Appeal Online, overwhelming MSPB's help-desk services.

As a result of furlough appeals, MSPB responded to a larger than normal number of press inquiries and interview requests and managed a large increase in telephone calls, voicemails, and emails from individuals, attorneys, and agencies requesting information on the appeal process, identifying problems with e-Appeal Online, and requesting status of their appeals. MSPB had additional contacts with Members of Congress and Congressional staff to provide information about furlough appeals and their impact on MSPB. MSPB posted and continues to post notices on our website and through social media to share important information on furlough appeals.

By the end of the FY 2013, nearly all of the DoD furlough appeals were docketed—entered into MSPB's system—so our AJs could begin the adjudication process. MSPB is using a variety of adjudication strategies to effectively and efficiently process furlough appeals. One strategy is to consolidate cases with common elements such as agency, duty location, or deciding official. Consolidating cases and processing consolidated cases takes more time and is a more complex undertaking than processing a single adverse action case. Nonetheless, this is one of the most useful methods available to ensure due process and efficient adjudication of this enormous number of cases. By the end of FY 2013, a small number of furlough appeals had been processed, including one important Board decision issued on an interlocutory appeal. On September 18, 2013, the Board issued a decision in *Chandler v. Department of Treasury* regarding the issues the Board will consider in furlough appeals.

The sheer number of furlough appeals resulting from Federal sequestration was unprecedented—32,400 initial furlough appeals compared to an average of 6,200 initial appeals received per year.[7] By the end of March 2014, approximately 64 percent of individual furlough appeals had been consolidated into 724 consolidated cases. Additionally, approximately 2,000 individual furlough appeals have been processed (dismissed, settled, or adjudicated on the merits) as individual appeals or as part of consolidated cases. Of those processed, about 40% were dismissed for a variety of reasons including for lack of jurisdiction or timeliness, withdrawn, cancelled, or dismissed without prejudice. Of those dismissed, about 63% were withdrawn by appellants or cancelled due to failure to prosecute. Of the appeals not dismissed, 99% were adjudicated on the merits—meaning that only about 1% of furlough appeals were settled—a far smaller portion than is normally resolved through settlement. Of the appeals adjudicated on the merits, 100% of the initial decisions affirmed the

[7] As a comparison, MSPB AJs issued 11,555 decisions in FY 1981-1983 in cases resulting from the firing of striking Air Traffic Controllers. *U.S. Merit Systems Protection Board: 10 Years After the CSRA. A Ten Year Retrospective of the MSPB 1978-1988*, U.S. Government Printing Officer, 1989, 250-215 – 814/00828.

furlough action taken by the agency. We generally anticipate a proportional increase in the number of furlough PFRs filed at HQ. As of the end of March 2014, 4 furlough PFRs had been filed at HQ (all in the second quarter). These PFRs are currently being processed.

MSPB will continue to use a variety of strategies to process furlough appeals in conjunction with other adverse action cases and cases filed on other matters for which MSPB jurisdiction (e.g., appeals related to whistleblowing, retirements, various veterans' hiring authorities, etc.). MSPB is committed to issuing initial decisions in all furlough initial appeals by the end of FY 2015, while maintaining the processing of non-furlough appeals as effectively as possible. In addition, MSPB is investing in long-term improvements in electronic adjudication and electronic case-processing. Although sequestration is suspended for FY 2014 or FY 2015, future budget reductions for individual agencies may lead to additional furloughs or more permanent workforce reduction actions such as reductions in force (RIFs). At this time, we cannot anticipate how these budget actions will affect the number of initial appeals (and subsequently PFRs) in FY 2014 or 2015.

Merit Systems Studies

In FY 2013, MSPB approved one study report involving clean record agreements and the law, the FY 2012 MSPB Annual Report, and three editions of the *Issues of Merit (IoM)* newsletter.[8] Summaries of FY 2013 MSPB merit systems study reports and of *IoM* newsletter topics are included in this annual report. This annual Report also includes summaries of two merit systems study reports approved and issued in early FY 2014. In addition, eight "Research Highlights"—one-page summaries of recent merit system study—reports were posted on the MSPB website.

MSPB studies continued to be referenced by policy makers and in professional literature, legislation, and the media. For example, in December 2012, OPM cited MSPB research to reinforce the importance of supervisory training in guidance issued to Federal agencies.[9] In February 2013, OPM cited MSPB's study on employee perceptions of workplace violence in its guidance for agency-specific policies on domestic violence, sexual assault, and stalking.[10] In addition, MSPB reports on employee engagement were cited in a book on public employee engagement published by the American Management Association. MSPB staff conducted dozens of outreach presentations and media interviews about a variety of MSPB studies. It is also important to note that MSPB has begun the process of updating its merit systems studies research agenda. This process will include opportunities for stakeholder and public input. More information about the research agenda development process can be found on the website at www.mspb.gov.

The Significant Actions of the Office of Personnel Management

In accordance with 5 U.S.C. § 1206, MSPB is responsible for reviewing the significant actions of OPM to ensure that these actions conform with MSPs and do not result in PPPs. MSPB reviewed OPM's new significant actions, ranging from those related to guidance on agency policies to prevent workplace violence, the senior executive service exit survey, supervisory training, USA Hire, extension of benefits to same-sex spouses, proposed rules of designation of national security clearances, and USERRA guidance. MSPB updated OPM's progress on significant actions

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[8] In FY 2013 published two study reports that were approved in FY 2012. These reports, one on motivation potential and employee engagement and one on managing employees in the public interest, were summarized in MSPB's FY 2012 Annual Report.

[9] U.S. Office of Personnel Management, Supervisory Training Fact Sheet, December 2012.

[10] U.S. Office of Personnel Management, Guidance for Agency-Specific Domestic Violence, Sexual Assault, and Stalking Policies, February 2013. More information is provided in the OPM Significant Actions section of this report.

summarized in previous annual reports. More information about MSPB's review of OPM significant actions is included in a later section of this report.

Outreach and Merit Systems Education

In FY 2013, MSPB staff conducted 94 outreach events with customers, stakeholders, and sister agencies on the merit systems, MSPs, PPPs, MSPB's adjudication processes and decisions, and its studies' findings and recommendations. MSPB continued to increase its efforts to educate people about the concept of merit, MSPs, and PPPs through online activities, such as the MSP of the Month and PPP of the Month, which continue to be among the most visited webpages and the most accessed documents on MSPB's website. In FY 2013, MSPB had nearly 400,000 visits to the MSPs, PPPs, *IoM* newsletter, case report, and training webpages, and nearly 11.5 million hits (one or more documents accessed per hit) to documents on these pages. MSPB's education and outreach efforts help enhance the understanding of merit, ensure that MSPs are consistently applied throughout the Government, reduce the likelihood of PPPs, promote better management practices, and strengthen employee engagement. This in turn helps to improve employee and organizational performance, improves service to the American people, and provides value to the taxpayer.

International Activities

During FY 2013, MSPB hosted international representatives for the purpose of educating participants on the Federal merit systems, MSPB's organization, and its responsibilities to protect the Federal merit systems. MSPB's Chairman Grundmann hosted India's Chairman for the Union Public Service Commission to discuss MSPB's review of OPM significant actions, MSPB's role in protecting the Federal merit systems, its use of technology, and the assessment of managers. The Atlanta Regional Office hosted an executive delegation from China's State-Owned Assets Supervision and Administration Commission of State Council, which had interests in performance management of civil servants, internal working procedures, and internal codes of conduct.

Legislative and Congressional Relations

MSPB senior and legislative staff conducted two briefings for House and Senate legislative oversight staff on the Board's revisions to its adjudication regulations. Senior MSPB officials communicated with Members of Congress to ensure that they were aware of the unique impact sequestration and Governmentwide furloughs could and did have on MSPB. In March 2013, after meeting with MSPB Chairman Grundmann, Senator Carper, Chairman of the Senate Homeland Security and Governmental Affairs Committee, sent a letter to the majority and minority leaders of the Senate committees and subcommittees on appropriations asking that that they "consider providing the Board with additional funding in the [then pending] Continuing Resolution to ensure it is able to process the wave of claims that could result from the expected [governmentwide] furloughs."

On November 20, 2013, the Senate Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce held a hearing entitled: "Safeguarding our Nation's Secrets: Examining the National Security Workforce." The hearing examined issues related to an MSPB case (*Kaplan v. Conyers)* that was appealed to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit's *en banc* decision—which reversed the Board's decision—held that the Board cannot review a Federal agency's determinations concerning the eligibility of an employee to occupy a "sensitive" position, regardless of whether that sensitive position requires the employee to access classified information.

On December 12, 2013, Senator Tester introduced S. 1809 to amend chapter 77 of title 5 to clarify that MSPB would have the authority to review on the merits an appeal by an employee or applicant regarding a determination of ineligibility for a sensitive position if the sensitive position does not require a security clearance or access to classified information, and such action is otherwise appealable to the MSPB. A similar bill (H.R. 3278) was introduced in the House by Delegate Norton on October 8, 2013. This legislation would reverse the Federal Circuit's decision in *Kaplan v. Conyers*.

Internal Management Activities and Challenges

Due to sequestration, MSPB's FY 2013 resources were down significantly from FY 2012. MSPB was able to avoid furloughing its own employees, however it continues to operate below the resource level needed to execute its mission as effectively and efficiently as possible. Even ignoring the recent arrival of approximately 32,400 furlough appeals (more information on furloughs available earlier in this report), MSPB will continue to struggle with internal challenges primarily related to the retirement eligibility of its workforce, persistent number of vacancies, limited resources, and competing priorities for existing resources.

Approximately one-third of MSPB employees including nearly half of MSPB AJs are eligible to retire in the next two years. MSPB was able to replace the OAC staff attorneys at HQ who conduct legal research and draft PFR decisions for the Board Members review who resigned or retired in FY 2013. However, the number of OAC staff attorneys is still significantly lower than in the past. In addition, key existing vacancies among our adjudication staff (in the regional and field offices and at HQ), and new vacancies that occurred in FY 2013, were not filled, which compromised, MSPB's ability to transfer critical knowledge of the adjudication process. Once hired, it generally takes 2–3 years for an AJ or an OAC staff attorney to reach journey-level status. Replacing experienced AJs and OAC staff attorneys with relatively less experienced attorneys affects overall adjudication processing and typically increases average processing time, at least temporarily. The average processing times for initial decisions and PFRs are increasing and will increase further as a result of furlough cases. In addition, MSPB is pursuing changes to its regulations covering jurisdiction. It is unclear how such changes may affect the adjudication process.

MSPB made appointments in several key agency leadership positions in FY 2013, filling some leadership positions that had been held by people in acting positions for several months. In January 2013, Chairman Grundmann appointed a new Executive Director (previously the General Counsel), new General Counsel, and new Director of the Office of Appeals Counsel (OAC). In November 2013, the Chairman appointed a new Director of the Office of Policy and Evaluation, and new Regional Director/Chief AJ of the Dallas Regional Office. In December 2014, the Chairman appointed a new Director of Financial and Administrative Management (FAM), and a new Chief Counsel to the Board Member. The Regional Director/Chief AJ of the San Francisco Regional Office departed in late summer and that office is currently being led by an Acting Regional Director. These changes, in general, have improved the stability of the agency's leadership team, which will benefit the agency as it deals with these workload and resource issues.

Although several positions were filled in FY 2013, several key vacancies remain in other Board offices and a number of employees in key positions (e.g., where the agency has only one person performing essential agency functions) are eligible to retire in the near future. Having an enacted budget earlier in FY 2014 will assist in planning and recruitment for anticipated retirements and vacancies. However, there are not sufficient resources to fill all of these vacancies or to hire in advance of all anticipated retirements in key positions. In addition, uncertain budgets for FY 2015

and beyond require a balanced approach to filling vacancies, meeting short-term resource needs, and investing for the long term.

The receipt of tens of thousands of furlough appeals has had a tremendous impact on MSPB operations, especially those involving initial appeals processed in the regional and field offices, automated case management and processing applications, and other IT services and systems. This wave of appeals will begin to affect PFRs filed at HQ in FY 2014. The volume of furlough appeals emphasizes the need to shift from mostly paper processing to mostly electronic processing of initial appeals and subsequently to PFRs. MSPB needs to be able to electronically process cases for customers who have access to electronic systems and to support the Government's focus on increasing efficiency and customer service through improved automated systems. Our enacted FY 2014 resource levels will assist us in processing furlough appeals, but, even with this budget, we will not be able to sustain previous results for adjudication timeliness. In FY 2015, MSPB is requesting resources to obtain technical and professional services to assist in developing the requirements and an implementation plan for this shift to electronic case processing. This effort, along with necessary and continued investments in professional staff, will yield significant potential improvements in efficiency in the long term but will require an initial investment of resources and time.

MSPB also is affected by competing priorities for its limited analytic and research staff. The external issues discussed below, including sequestration and furloughs, challenge the ability of Federal agencies to achieve their missions within resource constraints. Efforts to manage resources almost always directly or indirectly impact Federal employees. Such tension can adversely affect the culture of merit-based management and potentially weaken adherence to merit principles and even increase the occurrence of PPPs. It is critical for MSPB to continue to conduct merit systems studies to track such issues and to make recommendations that will support agencies' ability to both manage resources and support merit. Likewise, MSPB must maintain its review of OPM rules, regulations, and significant actions. However, the analytic and research staff skills needed for merit systems studies and OPM review are also needed to conduct internal program evaluation and support agency-wide requirements under GPRAMA including the collection of customer service and customer satisfaction data. This competition for resources will continue absent an increase in the number of analytic and research staff members. Limited and competing resources are also affecting MSPB's ability to conduct outreach (involving both adjudication and studies staff), especially if it involves travel or extensive preparation time, which competes with participants' other work.

During FY 2013, MSPB developed and consulted on its new Strategic Plan for FY 2014-2018. The new plan retains the strategic framework from the previous plan which reflects MSPB's broad role in protecting the merit systems and preventing PPPs as intended by the Civil Service Reform Act of 1978 (CSRA). The new plan adds key management objectives related to leading employees, managing budget and improving efficiency, managing IT and information services, and ensuring safety and security. MSPB's Annual Performance Plan (APP) for FY 2014-2015 is based on this new strategic plan. The new plans comprehensively and coherently convey MSPB's commitment to protect merit systems, increase adherence to MSPs, and prevent or reduce PPPs, which will ultimately result in better Federal management, improved Federal employee and agency performance, better service to the public, and increased value to American taxpayers. MSPB's new strategic plan and new performance plan are available on MSPB's website at www.mspb.gov.

MSPB employees continue to report high levels of commitment to MSPB's mission. Employee ratings on Federal Employee Viewpoint Survey (EVS) questions related to having the resources needed to accomplish the agency's mission dropped significantly in 2012 and dropped further in 2013. MSPB will focus on setting clear priorities and strong internal management, communication,

and other strategies to mitigate the impact of fewer resources. MSPB will use its FY 2014 enacted budget resources to help offset its short term resource issues and make long-term investments to ensure its ability to effectively achieve its mission. MSPB will continue to request and justify the resources it requires to conduct its mission and make clear the impact that resource constraints have on its performance.

Significant External Trends and Issues

The most significant external trends or issues affecting MSPB's ability to carry out its mission include: Budget reduction (including sequestration) and related consequences such as thousands of furlough appeals; increasing retirements of Federal employees; changes in law and jurisdiction; and changes in employee management flexibilities. This section contains information about these trends and how they may effect MSPB.

Budget reductions, sequestration, and related consequences such as furlough appeals. As MSPB receives and processes tens of thousands of furlough appeals, it must continue to process its existing caseload of approximately 7,500-8,500 initial appeals and PFRs. It must also perform its other statutory functions to conduct studies, review OPM's rules, regulations and significant actions, promote stronger merit-based policy and practice, and improve the understanding of merit. MSPB is performing this work with 196 (as of the end of FY 2013) employees (approximately 13 percent of its FTE are vacant due to resource constraints and budget uncertainty). Moreover, MSPB must continue to perform this work when it, like most other executive agencies, is uncertain of its budget for FY 2015 and beyond.

Although Governmentwide sequestration is suspended in FY 2014 and FY 2015, overall Federal budgets are still expected to decrease over the long term. Agencies have already begun to use retirement incentives to reduce their workforces. As budgets continue to be lower over the long term, agencies may begin to use RIFs and other actions to permanently decrease or restructure their workforces. Historical data indicate that RIFs would lead to potentially large increases in the number of RIF appeals filed with MSPB. In response to reduced budgets, agencies may also implement hiring delays or freezes and reductions in training and development. Governmentwide actions in response to decreasing Federal budgets have included and may continue to include pay freezes or small cost-of-living increases, severe limitations in employee awards (e.g., performance awards, special act awards, and quality step increases), and limits on within-grade increases. Pay freezes and limits on awards may increase retirements and may be related to recent survey results showing decreases in employee morale, which could in turn lead to decreases in productivity. Constraints on pay and awards may shift employees' attention to the application of performance appraisal systems and ratings, which could in turn increase performance-based appeals to MSPB.

Repetitive Federal pay freezes may encourage employees to leave Government jobs, and budget reductions may lead to reductions or long delays in hiring and reductions in workforce training. These actions have logical consequences such as the loss of workforce expertise and reduction in workforce capacity to carry out agencies' missions. In addition, it is difficult to predict how personal financial stress may affect employee conduct, performance, morale, or engagement. Depending on how these issues develop and affect the workforce, it could take years for Federal agencies to recover from these issues. Emphasis on merit systems studies is important to continue studying the effect of these workforce changes on adherence to MSPs and avoidance of PPPs. It is also important to promote merit and educate the workforce, especially managers and leaders, about how to adhere to MSPs and to avoid PPPs when making management decisions such as those related to reducing the workforce.

Increasing retirements of Federal employees. The proportion of retirement-eligible Federal employees also continues to increase. The number of Federal employees who are retiring has begun to increase and that trend will likely continue. As retirements increase, we may expect to see an increase in retirement appeals. Although OPM's efforts to reduce the retirement backlog have been affected by sequestration, it has reduced some of the backlog of retirement claims, increasing the number of retirement decisions that may be appealable to MSPB. As the Government replaces retiring employees with relatively younger, less experienced employees, the average age of the workforce is likely to decrease. As this occurs, we may see an increase in appeals as historical information indicates that less experienced employees typically have more appealable actions taken against them than do more experienced employees.

Statutory changes in Federal retirement such as the authority that phases in the opportunity for employees in the FERS to claim service credit toward retirement for their sick leave balance, and the potential to allow full-time Federal employees to phase their retirements or work in part-time status, may alter retirement rates and thus may increase retirement appeals. Changes to Federal retirement programs, such as increasing the level of employees' contributions to fund their annuities or changing the calculations for annuities (such as basing annuities on the average high five years instead of the average high three years), especially for current retirement-eligible employees, could lead to a surge in retirements, followed by a surge in retirement appeals to MSPB.

Changes in law and jurisdiction. The most recent changes in law and jurisdiction that have a direct impact on MSPB involve the WPEA and changes to the Hatch Act. The modifications and supplemental coverage contained in the WPEA both extend coverage to matters not previously within the jurisdiction of MSPB and expand MSPB's adjudicatory authority in such cases. The WPEA is likely to: increase the number of individual right of action (IRA) and otherwise appealable action (OAA) whistleblower appeals; reduce the number of dismissals through the expanded definition of a protected disclosure; and increase the complexity of whistleblower appeals in terms of content and review of MSPB decisions by multiple Circuit Courts. The WPEA is also likely to: increase the number and length of hearings on the merits in such cases; increase the information and data collected and reported for such cases; increase travel to represent MSPB at various Circuit Courts; and increase addendum appeals related to attorney's fees, compensatory damages (related to IRA appeals or if the agency conducts an investigation of an employee in retaliation for whistleblowing), monetary awards, and enforcement of MSPB decisions. The Act also requires MSPB to track and report additional information on whistleblowing cases. These changes have required MSPB to commit greater resources to implement Congress's mandates for adjudication, tracking, and reporting of whistleblower cases. MSPB established working groups to facilitate smooth implementation of the WPEA including changes in the coding of these cases, ensuring accurate data, and reporting information about these cases as required by the WPEA. FY 2013 data on whistleblower cases is available in MSPB's APR-APP.[11]

The Hatch Act Modernization Act of 2012 broadens the scope of permissible political activities for some Federal, state, and local employees. Under the new law, Federal employees who live in the District of Columbia may run for local political office and take an active role in political management and political campaigns to the same degree that residents of Maryland and Virginia who live in the immediate vicinity of the District of Columbia may engage in those activities. The amendments also expand the range of penalties that apply to violations of the Act by Federal

[11] The WPEA does not alter MSPB's responsibility to hear additional evidence and/or witnesses in select whistleblower cases that would increase case complexity and/or the length of hearings, in accordance with the Court of Appeals for the Federal Circuit's decision in *Whitmore v. Department of Labor, 680 F.3d 1353 (Fed. Cir. 2012),* (No. 2011-3084).

employees. Under certain conditions, these new penalty provisions for Federal employees apply retroactively to any violation that occurred before the effective date.

Changes in law, appeal rights, and appellate jurisdiction also increase the importance of MSPB's statutory responsibility to promote merit and educate employees, supervisors, managers, and leaders on the merit systems, MSPs, PPPs, and MSPB appellate procedures, processes, and case law. Education on these issues, promoting merit, and sharing important information about appeals procedures should improve workforce management and reduce the cost of appeals to agencies, appellants, and the Government.

Changes in employee management flexibilities. Management flexibilities might include expanded legislative authorities (such as the alternative personnel systems in DoD or DHS) or may be directed through administrative actions such as Presidential Executive Orders. For example, President Obama issued Executive Order 13562 in December 2010, establishing the Pathways Programs. The Pathways Programs create a set of excepted service appointing authorities tailored to ease and encourage recruitment, hiring, development, and retention of students and recent graduates. The Pathways Programs formally acknowledge a long-standing interest of Federal agencies and Federal managers—the ability to hire high-quality college graduates into professional and administrative occupations. It is not clear what affect the Pathways Programs will have on hiring and management or if it will succeed in its goals. MSPB plans to follow closely the evolution and implementation of these programs.

Changes in Federal management flexibilities emphasize the importance of MSPB's responsibility to conduct studies of Federal merit systems and human capital management practices in order to ensure the flexibilities are implemented and operated in accordance with MSPs and are free from PPPs. Flexibilities and other changes in human resource management policies issued through OPM regulation make it imperative that MSPB maintain its ability to exercise its statutory authority to review OPM regulations. Reviewing OPM regulations can save the Government costs such as those associated with transferring employees out of new management systems when the new systems are terminated. Finally, changes in management flexibilities also increase the importance of MSPB's role in promoting and educating employees and the public about the merit systems, MSPs, and PPPs.

Significant Board Decisions and Court Opinions Issued in FY 2013

MSPB issued a number of noteworthy decisions in FY 2013, several of which are summarized below. As a service to our stakeholders, we have also provided brief summaries of selected significant opinions issued by the U.S. Court of Appeals for the Federal Circuit. This section also includes summaries of selected significant Board decisions issued in early FY 2014.

Significant Board Decisions Issued in Fiscal Year 2013

Due Process

Hodges v. U.S. Postal Service, 2012 MSPB 116, 118 M.S.P.R. 591 (2012): The agency reduced the appellant in grade for failure to follow instructions. On appeal, the Board set aside the action on the ground that the agency violated the appellant's right to minimum due process. Although the deciding official considered statements that the appellant had made during an investigative interview, he did not consider the appellant's written response to the proposed reduction in grade or allow the appellant to present an oral reply. Due process requires that a tenured employee have the "opportunity to present reasons, either in person or in writing, why [a] proposed [adverse] action should not be taken." The investigative interview did not satisfy this requirement because it had been conducted before the agency proposed the appellant's reduction in grade.

Martinez v. of Veterans Affairs, 2012 MSPB 121, 119 M.S.P.R. 37 (2012): The agency removed the appellant after an investigation and reported findings by the agency's Office of Inspector General (OIG). Prior to undertaking the role of decisionmaker in the adverse action proceedings, the deciding official had concurred in the OIG draft investigative report. The Board found that there is no general proscription against appointing a deciding official who is familiar with the case and who has expressed a predisposition contrary to the appellant's interests. The burden is on the appellant to establish actual bias or an intolerable risk of unfairness, and at this stage of the proceedings, there had been no such showing.

Jurisdiction

Levy v. Department of Labor, 2012 MSPB 123, 118 M.S.P.R. 619 (2012): The appellant accepted a promotion to a GS-15 supervisory IT Project Manager position, and immediately following the effective date of his promotion, he went on annual leave. On his return he was informed that the promotion was being held "in abeyance" pending an investigation by the agency's Office of Inspector General. The appellant filed an appeal alleging that the agency had demoted him from a GS-15 to a GS-14 position. The Board modified its jurisdictional test to hold that in such cases the appellant must show the following: (1) the promotion actually occurred; that is, it was approved by an authorized appointing official aware that he or she was making the promotion; (2) the appellant took some action denoting acceptance of the promotion; and (3) the promotion was not revoked before it became effective. Additionally, the Board held that an employee who has received an initial appointment as a supervisor must show that he has successfully completed the required probationary period in the supervisory position. The Board remanded the case in order to determine whether the appellant could establish jurisdiction under the modified standard.

Nelson v. Department of Health & Human Services, 2013 MSPB 4, 119 M.S.P.R. 276 (2013): The appellant was appointed to a position under 5 C.F.R. § 213.3116(b)(8), a Schedule A excepted service hiring authority granting Indian hiring preference. The agency terminated her employment less than 2 years

after the effective date of her appointment, and she appealed to the Board. The jurisdictional issue to be decided was whether the appellant was an "employee" within the meaning of 5 U.S.C. § 7511(a)(1)(C)(i), i.e., a nonpreference eligible in the excepted service "who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service." Because it was undisputed that the appellant was a nonpreference eligible in the excepted service who was serving in an initial appointment pending conversion to the competitive service, the dispositive question was whether the appellant was serving a "probationary or trial period" at the time of her termination. On PFR, the Board overruled *Lopez v. Department of the Navy*, 103 M.S.P.R. 55 (2006), and *Taylor v. Dept. of the Navy*, 63 M.S.P.R. 99 (1994), finding that the holding of those cases, which relied on interim OPM guidance, was in conflict with the statute. The Board reasoned that if the entire period of an appointment pending conversion to the competitive service is a "probationary or trial period", then the statute should simply state that appeal rights should attach if an individual "is not serving under an initial appointment pending conversion to the competitive service". The statute contemplates that whether an individual had the type of employment covered by the section and whether the individual completed a probationary or trial period are separate inquiries. The appellant did not qualify as an "employee" because the agency required nonpreference eligible employees hired under 5 C.F.R. § 213.3116(b)(8) to complete a 2-year probationary period, the appellant was on notice of that requirement, and the agency terminated the appellant prior to the completion of the probationary period.

Ingram v. Department of Defense, 2013 MSPB 78, 120 M.S.P.R. 420 (2013): The issue in this case was whether the Board could review the merits of the appellant's demotion from a non-critical sensitive position based on the denial of her eligibility for access to classified information and/or occupancy of a sensitive position, regardless of whether the position requires such access. The Federal Circuit's en banc decision in *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013) (No. 2011-3207), held that the limited scope of review set forth by the Supreme Court's decision in *Dept. of the Navy v. Egan*, 484 U.S. 518 (1988) applies to Board appeals of such determinations. The Board affirmed the appellant's demotion, finding that the appellant's position required eligibility to access non-critical sensitive information, that eligibility was denied, and the agency complied with the procedural protections of 5 U.S.C. § 7513 in demoting the appellant to a vacant non-sensitive position.

Whistleblower Protection

MaGowan v. Environmental Protection Agency, 2012 MSPB 120, 119 M.S.P.R. 9 (2012): The appellant filed an IRA appeal alleging that in 2010 the agency converted approved sick leave to AWOL in retaliation for a disclosure she made to the agency's Office of Inspector General (OIG) in 2003. The Board found that the appellant had nonfrivolously alleged that she made a protected disclosure in 2003 and that her disclosure was a contributing factor in the agency's decision to classify her leave as AWOL in 2010. In so finding, the Board noted the appellant had alleged that, when she requested a promotion about six months before the personnel action in question, the agency official asked her about the 2003 OIG disclosure, demanded the details of the disclosure, and requested that the appellant provide her with a copy of the OIG report.

Mattil v. Department of State, 2012 MSPB 127, 118 M.S.P.R. 662 (2012): The appellant, who held a temporary appointment as Chief of Staff with the agency's Office of Accountability and Transparency in its Iraq offices, filed an IRA appeal alleging that the agency took numerous personnel actions in retaliation for protected whistleblowing disclosures. The appellant also alleged that the agency conducted an investigation into whether he was the source of a leak of information and "blacklisted" him from employment opportunities. The Board found that, although there are times when a judge may properly determine whether the agency met the clear and convincing

standard before proceeding to the question of whether the appellant established a prima facie case of reprisal, that approach was not appropriate where, as here, the substance of the alleged disclosure, as well as the extent to which the retaliating official was aware of the disclosure, are relevant to retaliatory motive. With regard to the alleged personnel actions, the Board further found, inter alia, that: (1) while an investigation is not generally a personnel action, it is proper to consider evidence regarding an investigation if it so closely related to a covered personnel action that it could have been a pretext for gathering information to retaliate for whistleblowing; and (2) although "blacklisting" an employee from employment opportunities is not a specifically enumerated personnel action, construed broadly it could constitute a significant change in working conditions.

Agoranos v. Dept. of Justice, 2013 MSPB 41, 119 M.S.P.R. 498 (2013): Before filing his removal appeal with the Board, the appellant filed a whistleblower complaint with the Office of Special Counsel (OSC). While his removal appeal was pending before the Board, OSC closed its file in his complaint without taking corrective action, and the appellant then filed an IRA appeal. The Board concluded that the removal appeal should proceed on the merits. The Board explained that 5 U.S.C. § 7121 contains three provisions giving employees options for avenues of relief other than the negotiated grievance procedure for certain personnel actions – § 7121(d),(e), and (g) – and in each instance, whichever remedy is sought first by an aggrieved employee is deemed an election of that procedure and precludes pursuing the matter in another forum. Under 5 U.S.C. § 7121(g), which is applicable here, an employee who has been subjected to an action that is appealable to the Board and alleges that he has been affected by a prohibited personnel practice other than a claim of discrimination under § 2302(b)(1), may elect to pursue a remedy by filing either a Board appeal, a grievance, or an OSC complaint. For matters arising under 5 U.S.C. § 7121(d) and (e), the Board has long held that an agency's failure to provide proper notice of "'potential avenues of recourse' and of the limitations of those rights precludes finding that the employee has made a knowing and informed election and thus renders it invalid." However, in *Feiertag v. Department of the Army*, 80 M.S.P.R. 264, ¶ 5 (1998), the Board held that an election of remedies made pursuant to 5 U.S.C. § 7121(g) is binding regardless of whether the "individual is aware of all of his options, and of the effect that a particular option will have on his ability to pursue other options." The Board overruled *Feiertag*, holding that for adverse actions appealable to the Board under 5 U.S.C. § 4303 and 7512, an employee's election of remedies under 5 U.S.C. § 7121(g) must be knowing and informed, and, if it is not, it will not be binding upon the employee. The Board found that the agency removed the appellant without notifying him of his right to file a request for corrective action with OSC and of the effect that such an election would have on his appeal rights before the Board. Therefore, the Board found, his filing of the OSC complaint did not constitute a valid, informed election under 5 U.S.C. § 7121(g). Consequently, he was not precluded from filing a subsequent appeal of his removal, and he was not restricted to the issues within the scope of an IRA appeal.

Day v. Department of Homeland Security, 2013 MSPB 49, 119 M.S.P.R. 589 (2013): At issue in this interlocutory appeal was whether the provisions of section 101 of the Whistleblower Protection Enhancement Act of 2012 (WPEA) providing protection to disclosures made in the course of the employee's normal duties and disclosures made to the alleged wrongdoer apply to cases that were pending before the effective date of the WPEA. In *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2011), the Federal Circuit held that such disclosures are not protected whistleblowing disclosures. Applying the analytical framework for determining whether a new statute should be given retroactive effect set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the administrative AJ found that Congress had not clearly expressed an intention that the terms of the WPEA should apply retroactively and that, therefore, the *Huffman* decision should apply to the case before him. A majority of the Board, Member Robbins concurring in part and dissenting in part, reversed the administrative judge's ruling, finding that the application of the provisions of the

WPEA at issue in this appeal does not raise retroactivity concerns because these provisions clarify, rather than effect substantive changes to, existing law. Therefore, the provisions of section 101 of the WPEA should be applied to determine whether protected disclosures had been made.

King v. Department of the Air Force, 2013 MSPB 62, 119 M.S.P.R. 663 (2013): At issue in this interlocutory appeal was whether the compensatory damages provision of the WPEA applies to cases that were pending on the effective date of the WPEA. Applying the framework set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Board concluded that the compensatory damages provision of the WPEA does not clarify the WPA. Rather, the addition of compensatory damages significantly alters the consequences of relevant past events and would undeniably attach an important new legal burden to the agency's past conduct that did not previously exist. Accordingly, the reasoning supporting the Board's conclusion in *Day v. Department of Homeland Security*, 2013 MSPB 49, 119 M.S.P.R. 589 (2013) regarding which disclosures are protected under the WPA cannot be applied in this case. Therefore, the Board held compensatory damages are not available in cases pending on the effective date of the WPEA.

Van Lancker v. Department of Justice, 2013 MSPB 42, 119 M.S.P.R. 514 (2013): A preference eligible employee of the Federal Bureau of Investigation (FBI) who has the right to appeal an adverse action to the Board may not raise an affirmative defense of retaliation for whistleblowing. The Board acknowledged that it has held that, in general, an individual who may appeal an action may raise any affirmative defense available under 5 U.S.C. § 7701(c), including whistleblower retaliation. A majority of the Board with Vice Chairman Wagner dissenting, declined to apply the general rule, however, in the case of an FBI employee who has Board appeal rights and claims whistleblower retaliation, because Congress has created a separate statutory process outside of the Board for FBI employees to seek redress for whistleblower retaliation.

O'Donnell v. Department of Agriculture, 2013 MSPB 69, 120 M.S.P.R. 94 (2013): The appellant was suspended for three days without pay for refusing to comply with "rules, regulations, written procedures, or proper supervisory instructions" after he had sent to a collaborating agency a memorandum stating his disagreement with his supervisor's position on a mutually-administered program matter. The appellant filed an IRA appeal with the Board alleging that the suspension was retaliation for whistleblowing. The Board dismissed the appeal for lack of jurisdiction, noting that in *Meuwissen v. Department of the Interior*, 234 F.3d 9, 13-14 (Fed. Cir. 2000), the Federal Circuit found that that an employee's disagreement with an agency ruling or adjudication does not constitute a protected disclosure even if that ruling was legally incorrect. The Board ruled that a subordinate's refusal to abide by his supervisor's instructions is not protected by 5 U.S.C. § 2302(b)(8).

Review Rights

The Board issued four decisions interpreting and applying the Supreme Court's decision in *Kloeckner v. Solis*, 133 S. Ct. 596 (2012).

Mills v. U.S. Postal Service, 2013 MSPB 40, 119 M.S.P.R. 482 (2013): Under *Kloeckner*, a case is mixed if the appellant was affected by an action that is appealable to the Board and claims that the action was the product of unlawful discrimination. A decision in a mixed case is reviewable before the Equal Employment Opportunity Commission or in federal district court; there is no right of review before the Federal Circuit in a mixed case. The Board thus held that an individual who receives a final Board decision that adjudicates a discrimination claim may not seek review before the Federal Circuit, even if he is willing to abandon his discrimination claim.

Vaughn v. Department of the Treasury, 2013 MSPB 50, 119 M.S.P.R. 605 (2013): An appellant has three options for seeking review of a final Board decision in cases involving both whistleblower and discrimination claims in the context of an otherwise appealable action: (1) if the appellant wishes to challenge the Board's findings on her discrimination claims alone, she may petition the Equal Employment Opportunity Commission for review; (2) if the appellant wishes to challenge the Board's findings on her discrimination claims and other matters, she may file a civil action in the appropriate federal district court under the applicable anti-discrimination statute; or (3) if the appellant wishes to challenge the Board's decision on her whistleblower claim, to the exclusion of any discrimination claim or other alleged prohibited personnel practice described in 5 U.S.C. § 2302(b), she may seek review before the Federal Circuit or any court of appeals of competent jurisdiction.

Cunningham v. Department of the Army, 2013 MSPB 7, 119 M.S.P.R. 147 (2013): The Board dismissed this appeal for lack of jurisdiction on the ground that the appellant was a probationer, and thus, had no right to appeal her termination. Although the appellant claimed that her termination was the product of unlawful discrimination, the Board concluded that the appeal was not a "mixed case" under 5 U.S.C. § 7702(a)(1) because the appellant was not affected by an action that was appealable to the Board. Accordingly the Board majority, Vice Chairman Wagner dissenting on this issue, provided notice of non-mixed review rights before the U.S. Court of Appeals for the Federal Circuit.

Johnson v. U.S. Postal Service, 2013 MSPB 68, 120 M.S.P.R. 87 (2013): Judicial review of a Board decision in which an individual withdraws all discrimination claims before the Board issues a final decision is properly before the Federal Circuit.

Adverse Action Charges

Miller v. Department of the Interior, 2013 MSPB 35, 119 M.S.P.R. 438 (2013): The Board reopened, vacated, and substituted a new decision for its April 3, 2013 decision. The Board held that, in evaluating adverse actions based on a refusal to accept a directed reassignment, it would no longer apply the three-step, burden-shifting analytical framework set forth in *Ketterer v. Department of Agriculture*, 2 M.S.P.R. 294 (1980). The Board found that the previous framework, which included a prima facie case, does not meaningfully add to the Board's adjudication of an adverse action based on a refusal to accept a directed geographic reassignment because determining whether the agency made a prima facie case is irrelevant where, as here, the record is complete. Instead, the Board will weigh all the evidence to determine whether the agency proved by a preponderance of the evidence that the misconduct occurred and that its action promotes the efficiency of the service. The Board determined that here, the record evidence did not support a finding that the agency directed the geographic reassignment for bono fide management reasons and that the removal for failing to accept a directed reassignment did not promote the efficiency of the service. As a result, the Board reversed the appellant's removal.

Shibuya v. Department of Agriculture, 2013 MSPB 44, 119 M.S.P.R. 537 (2013): The appellant filed a Board appeal challenging his demotion based on two charges of poor judgment. The first charge alleged that the appellant solicited the unauthorized destruction of Government records, and the second charge alleged that the appellant engaged a contract attorney to review case analyses drafted by agency employees so that the attorney-client or work-product privilege would attach, thereby protecting the analyses from disclosure in third-party proceedings. The Board found that the agency proved both charges. With respect to the first charge, the Board rejected the appellant's contention that the charge was impermissibly vague, finding that the information provided in the proposal notice was sufficiently specific to permit the appellant to respond to the charge. The Board further

found that the issue of whether the agency identified any law, rule, or regulation that the appellant violated pertains to whether there is a nexus between the charge and the efficiency of the service but is immaterial to whether the agency proved the charge. As for the second charge, the Board found that the fact that the appellant abandoned his scheme with the contract attorney in less than a month and that only one employee actually sent materials to the attorney is relevant to the issues of nexus and penalty but does not mean that the agency failed to prove its charge. The Board remanded the appeal for new findings on the issues of nexus and penalty.

Furloughs

Chandler v. Department of the Treasury, 2013 MSPB 74, 120 M.S.P.R 163 (2013): At issue before the Board on interlocutory appeal were several discovery-related rulings in a furlough appeal filed by an Internal Revenue Service employee. A majority of the Board denied most of the appellant's discovery requests, including requests for information concerning how or why the agency chose specific days for furloughs. In addressing the standard of review in adverse action furlough appeals, the majority opinion stated that to satisfy the efficiency of the service standard in a furlough appeal, the agency must show that it applied the furlough "uniformly and consistently." This means that the agency must treat similarly situated employees similarly and justify any deviations with legitimate management reasons. The Board's efficiency of the service determination does not encompass agency spending decisions per se, including spending on personnel matters, or an agency's decision to allocate furlough days in a certain manner among employees who are not similarly situated. Such matters belong to the judgment of agency managers, who are in the best position to decide what allocation of funding will best allow the agency to accomplish its mission. Instead, the efficiency of the service determination encompasses issues relating to the uniform and consistent application of the furlough, including whether the agency used a furlough to target employees for personal reasons or attempted to exempt certain employees from the furlough without legitimate management reasons.

Department of Labor v. Avery, 2013 MSPB 75, 120 M.S.P.R. 150 (2013): At issue in this case was whether the agency met its burden under 5 U.S.C. § 7521 of establishing "good cause" for furloughing the respondent ALJs. The Board's ALJ found that good cause required the agency to prove, among other things, that ALJs were treated like other employees of the agency, that the agency failed to satisfy this requirement in proposing to furlough ALJs for a greater number of days than other employees whose positions were funded from the same budget account and issued an initial decision authorizing the agency to furlough the respondents for fewer days than the agency had requested. In determining what constitutes good cause for purposes of 5 U.S.C. § 7521, the Board considered whether the action improperly interferes with an ALJ's ability to function as an independent and impartial decision maker. The Board found that the agency showed that it had sound business reasons to furlough ALJs, and there is no evidence that the decision was made for an improper reason or to interfere with the ALJs' qualified judicial independence. The Board, Vice Chairman Wagner concurring in part and dissenting in part, vacated the initial decision and found that the agency had shown good cause to furlough the respondent ALJs the requested number of days.

Constructive Suspension

Crutch v. U.S. Postal Service, 2013 MSPB 38, 119 M.S.P.R. 460 (2013): For a period of 10 years, the agency provided the appellant with a reasonable accommodation for his medical condition by allowing him to sit down intermittently to rest. However, after the appellant took sick leave under the Family and Medical Leave Act, the agency barred him from returning to work unless the appellant stated he no longer needed reasonable accommodation or he submitted a written request

for light duty. The majority found that the agency's failure to continue to provide reasonable accommodation for the appellant's disability may constitute a constructive suspension. In doing so, the decision overruled precedent that declined to consider an appellant's claim of denial of reasonable accommodation as the basis for establishing a constructive suspension when the record shows that the employee had initiated the absence by taking sick leave. Member Robbins concurred in the result, but disagreed with the majority's analysis, finding that the agency initiated the appellant's absence when it barred him from work upon the expiration of his sick leave and, therefore, the appellant's claim of denial of reasonable accommodation was immaterial in determining whether a constructive suspension had occurred.

Indefinite Suspension

Camaj v. Department of Homeland Security, 2012 MSPB 133, 119 M.S.P.R. 95 (2012): The agency placed the appellant on indefinite suspension on February 9, 2009, based on a reasonable cause to believe that he had committed a crime for which a sentence of imprisonment might be imposed. The criminal charges against the appellant subsequently were resolved on February 22, 2010. However, the agency continued the appellant's indefinite suspension after the criminal case was completed. It ultimately proposed his removal on May 19, 2010, and removed him on November 16, 2010. The Board found that the continuation of the indefinite suspension was improper because the agency's delay in proposing the appellant's removal was unreasonable. The Board specifically determined that the agency already had all the information it needed to commence adverse action proceedings in February 2010, and that the agency's decision to investigate additional alleged misconduct did not warrant continuation of the indefinite suspension because the mere existence of an open agency investigation into alleged misconduct does not serve as cause for taking (or continuing) an adverse action. Accordingly, the Board ordered the agency to terminate the indefinite suspension with an effective date of February 22, 2010.

National Security Determinations

Schnedar v. Department of the Air Force, 2013 MSPB 16, 119 M.S.P.R. 246 (2013): Based on the revocation of his security clearance, the agency indefinitely suspended the appellant pending his appeal of the revocation to the agency's appeals board. The appellant argued that the suspension violated the agency's internal regulations. Specifically, he cited Department of Defense Regulation 5200.2-R which provides that, with certain exceptions, "no unfavorable administrative action shall be taken under the authority of this Regulation unless the individual concerned has been … [p]rovided a final written decision by the [appeals board]." Citing *Romero v. Department of Defense*, 527 F.3d 1324 (Fed. Cir. 2008), the Board found it had authority under 5 U.S.C. § 7701(c)(2)(A) to review the issue of the agency's compliance with its regulation. The Board remanded the case to afford the agency an opportunity to interpret Regulation 5200.2-R in light of the appellant's assertions.

Retirement

Whittacre v. Office of Personnel Management, 2013 MSPB 71, 120 M.S.P.R. 114 (2013): The appellant sought civilian retirement credit for periods during which he was absent from his Criminal Investigator position on leave without pay (LWOP) to perform active military duty. OPM denied credit on the ground that the appellant had not made a deposit for the periods of LWOP. On appeal the Board agreed concluding that the relevant provisions of the retirement law and the Uniformed Services Employment and Reemployment Rights Act, read together, require an employee who performs active duty military service to make a deposit in order to gain civilian retirement credit.

Hatch Act

Special Counsel v. Jackson, 2013 MSPB 10, 119 M.S.P.R. 175 (2013): Respondent Jackson was employed by a state agency engaged in programs financed, in whole or in part, by Federal funds. Acting against advice from the Special Counsel that doing so would violate the Hatch Act, Jackson ran for election for a seat on a county council. The Special Counsel filed a complaint with the Board seeking Jackson's removal. The ALJ granted the Special Counsel's motion for summary adjudication, found there were not material facts in dispute, and ordered Jackson's removal. In granting the motion for summary adjudication, the ALJ relied on case law allowing for the procedure in Federal Hatch Act cases. The Board remanded the case, finding that it was governed by 5 U.S.C. § 1515, which provides that, in cases involving state or local government employees, the employee is "entitled to appear with counsel at the hearing[.]" The Board also found that the judge erred in failing to address Jackson's claim that the Special Counsel violated his constitutional rights to due process and equal protection. In so finding, the Board noted that while it lacks authority to adjudicate the constitutionality of statutes, it does have authority to adjudicate a constitutional challenge to an agency's application of a statute.

VEOA

Launer v. Department of the Air Force, 2013 MSPB 18, 119 M.S.P.R. 252 (2013): The agency accepted applications for a competitive service position through an automated system operated by OPM, which used a "category ranking" system under 5 U.S.C. § 3319 in lieu of a traditional examination. Based on his score the appellant was placed in the Well Qualified category instead of the Best Qualified category and was selected only after one of the selectees from the Best Qualified category declined the position. The Board denied the appellant's request for corrective action, finding that the appellant's score had included the addition of 10-point veterans' preference and explained that, under the category ranking process set forth at § 3319, an examining agency defines two or more categories; candidates are assessed and those with similar proficiency are placed in the same category; a preference eligible with a service-connected disability of 10 percent or more must be listed in the highest quality category; within a category, preference eligible veterans are listed ahead of non-preference eligible veterans; and an agency may not select a non-preference eligible ahead of a preference eligible in the same category unless it seeks and receives approval or a pass over. However, if the agency assigns numerical scores for purposes of placing applicants in categories, as it did here, veterans' preference points are not added to such scores. Here, the appellant did not claim in his application that he had a compensable service-connected disability of 10 percent or more, and the agency afforded the appellant the appropriate veterans' preference under the category ranking process.

USERRA

McMillan v. Department of Justice, 2013 MSPB 53, 120 M.S.P.R. 1 (2013): At issue in this Uniformed Services Employment and Reemployment Rights Act (USERRA) appeal was whether and to what extent USERRA prohibits an agency from taking adverse employment actions based on an employee's specific military duties and the manner in which they are performed. The appellant, an officer in the U.S. Army Reserves and a Special Agent with the agency's Drug Enforcement Administration, alleged that the agency denied his request for an extension of his tour of duty overseas based not only on his reservist status and use of military leave, but also on conflicts with management over his specific military assignments. The AJ denied the appellant's request for corrective action, finding that there was no evidence that the appellant's status or obligations as a military reservist played any part in the agency's decision. The Board vacated the initial decision,

finding that although Congress was concerned primarily with acts of discrimination and reprisal based on an employee's military service and the absences such service entails, USERRA should be read to prohibit adverse employment actions based on the content and performance of any military assignment. Therefore, the Board held, 38 U.S.C. § 4311(a) protects both military status (e.g., membership in the reserves) and military activity (e.g., performance of service).

Discrimination

Southerland v. Department of Defense, 2013 MSPB 46, 119 M.S.P.R. 566 (2013): A majority of the Board, Member Robbins concurring, overruled its prior finding in *Southerland v. Department of Defense*, 117 M.S.P.R. 56 (2011), that a mixed-motive analysis does not apply to disability discrimination claims arising under the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). After *Southerland* was issued, the EEOC applied a mixed-motive analysis in a case involving a claim of reprisal for protected activity under the Rehabilitation Act, *Feder v. Holder*, Appeal No. 0720110014 (2012). A majority of the Board found it appropriate to defer to the EEOC's analysis in *Feder* and held that a mixed-motive analysis does apply to disability discrimination claims arising under the ADAAA.

Penalties

Lange v. Department of Justice, 2013 MSPB 52, 119 M.S.P.R. 625 (2013): The deciding official in this removal appeal had been a supervisor in the agency's Office of Professional Responsibility (OPR) at the time that OPR investigated the misconduct for which the appellant was later removed. The AJ issued an initial decision reversing the appellant's removal based upon a due process violation, finding that the deciding official was not an impartial decision maker due to his prior involvement with the OPR investigation. The Board reversed the initial decision's due process finding based on two decisions which were issued after the initial decision in this case: *Norris v. Securities & Exchange Commission*, 675 F.3d 1349 (Fed. Cir. 2012), and *Martinez v. Department of Veterans Affairs*, 2012 MSPB 121, 119 M.S.P.R. 37 (2012). Under those decisions, a deciding official only violates due process when he relies upon his personal knowledge of an employee's background, without notice to the employee, as a basis for his determinations on either the merits of the underlying charge or the penalty to be imposed. The Board found that there is no evidence that the deciding official relied upon his past involvement in or knowledge of the appellant's OPR investigation when considering the appellant's proposed removal.

Boucher v. U.S. Postal Service, 2012 MSPB 126, 118 M.S.P.R. 640 (2012): The appellant was placed on indefinite suspension following her arrest for possession of cocaine and marijuana, while on lunch break in a car near the worksite. The Board found that the judge did not err in relitigating the reasonableness of the penalty. The Board found that two exceptions to the law of the case doctrine applied: (1) there was material new evidence the agency did not submit during the initial adjudication of the appellant's removal appeal; and (2) a manifest injustice would result from failure to reconsider the appropriateness of the penalty under these circumstances. The Board also found that the judge did not err in mitigating the penalty. The Board noted that, under *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657 (2010), the appellant must show that there is enough similarity between the nature of the conduct and other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, and that if the appellant makes the required showing, the agency must prove a legitimate reason for the difference in treatment by preponderant evidence before the penalty can be upheld. The Board concluded that the agency failed to explain by preponderant evidence why the comparator employee received no discipline while the appropriate penalty for the appellant was removal. In his dissent, Member Robbins expressed the view that the Board should reconsider its holding in *Lewis* and similar cases.

Settlement

Shirley v. Department of the Interior, 2013 MSPB 76, 120 M.S.P.R. 195 (2013): The parties settled the appellant's appeal from his removal from a Park Ranger position in Tennessee, in an agreement that included a confidentiality clause. The appellant later claimed that agency officials in Tennessee breached the agreement by revealing details of the appellant's removal to agency officials in Alaska who had offered him a job. The Board found no breach, holding that ordinarily, a confidentiality clause in a settlement agreement will not be interpreted to prohibit intra-agency disclosures.

Selected Significant Board Decisions Issued in Early FY 2014

Davis v. Department of the Navy, 120 M.S.P.R. 457 (2013): Disparate penalty claim not established where, among other things, the deciding official believed the comparison employee was treated too leniently.

Bean v. U.S. Postal Service, 120 M.S.P.R. 397 (2013): Clarification of the Board's constructive suspension jurisdictional standard; lowered the appellant's burden of proving involuntariness where the agency's action would force him to choose absence or working outside his medical restrictions.

Miller v. Department of the Interior, 120 M.S.P.R. 426 (2013): Denied OPM's request for reconsideration of *Miller v. Department of the Interior*, 119 M.S.P.R. 438 (2013), which reversed the agency's action removing the appellant for failing to accept a management-directed geographic reassignment, where the agency failed to provide bona fide reasons for the reassignment.

Boudrealt v. Department of Homeland Security, 120 M.S.P.R. 372 (2013): Affirmed the continued validity of the *Exum/Yeressian* line of cases; did the agency inform the appellant that he would lose appeal rights upon accepting a new position for which he applied?

Burroughs v. Department of the Army, 120 M.S.P.R. 392 (2013): Standard established for proving a USERRA reprisal claim under 38 U.S.C.A. § 4311(b); an agency violates § 4311(b) if the agency would not have taken the action but for the appellant's protected activity.

Chavez v. Department of Veterans Affairs, 120 M.S.P.R. 285 (2013): Granted corrective action in an IRA appeal, finding that the appellant was terminated in retaliation for protected whistleblowing; although disclosures made by the appellant, a licensed nurse, did not name a specific law, rule, or regulation that was allegedly violated, those disclosures were protected because a reasonable person in her position would believe they constituted a substantial and specific danger to health and safety.

Rumsey v. Department of Justice, 120 M.S.P.R. 259 (2013): Granted corrective action in an IRA appeal, finding that cancellation of the appellant's telework agreement and lowering of her 2007 performance rating constituted whistleblowing retaliation; under the WPEA, disclosures do not lose protection because they were previously known, made to a coworker, or involved matters within an appellant's job duties.

Significant Opinions Issued by the U.S. Court of Appeals for the Federal Circuit

Review Rights

Conforto v. Merit Systems Protection Board, 713 F.3d 1111 (Fed. Cir. 2013) (No. 2012-3119). In *Conforto*, the Federal Circuit ruled that when the Board dismisses a mixed case appeal for lack of jurisdiction, the proper venue for judicial review of that decision is the Federal Circuit, not a United States

District Court. The Federal Circuit declined to read the Supreme Court's decision in *Kloeckner v. Solis*, 133 S. Ct. 596 (2012), which held that judicial review of *procedural* dismissals of mixed cases by the Board is properly in a United States District Court, to cover mixed case appeals over which the Board does not have jurisdiction.

Whistleblower Protection

MacLean v. Department of Homeland Security, 714 F.3d 1301 (Fed. Cir. 2013) (No. 2011-3231). In *MacLean*, the Federal Circuit held that the Whistleblower Protection Act prohibits taking a "personnel action" against a Government employee because of any disclosure of information by the employee provided that the disclosure is not specifically prohibited by law. In this case, the court agreed with Mr. MacLean that, while an FAA regulation prohibited disclosure of the information in question, the Aviation and Transportation Security Act did not "specifically prohibit" it.

Security Clearance Determinations

Gargiulo v. Department of Homeland Security, 727 F.3d 1181 (Fed. Cir. 2013) (No. 2012-3157). In *Gargiulo*, the Federal Circuit held that employees are entitled to notice of the reasons for a suspension of their security clearance and an opportunity to make a meaningful response regarding those reasons to someone in the agency with the authority to affect that decision. Specifically, the court held that these rights are found in 5 U.S.C. § 7513(b), not in the Due Process Clause of the Fifth Amendment.

Kaplan v. Conyers, et al., 733 F.3d 1148 (Fed. Cir. 2013) (No. 2011-3207). In *Conyers, et al* the Federal Circuit held that the Board cannot review an agency's determinations concerning the eligibility of an employee to occupy a "sensitive" position, regardless of whether that sensitive position requires the employee to access classified information.

Retirement

Stephenson v. Office of Personnel Management, 705 F.3d 1323 (Fed. Cir. 2013). (No. 2012-3074). Under 5 U.S.C. § 8452(a)(2)(A), a FERS disability annuity must be reduced for each month in which the recipient is also "entitled to" social security administration disability benefits. In this case, the Federal Circuit examined the meaning of "entitled to." It held that when an employee performs substantial gainful activity, despite having earlier qualified for social security disability benefits, then he or she is not entitled to such benefits, and his or her FERS annuity need not be reduced during any such time period.

Due Process

Young v. Department of Housing & Urban Development, 706 F.3d 1372 (Fed. Cir. 2013). (No. 2012-3232). The Federal Circuit reversed a deciding official's decision to remove an appellant where, after the appellant replied to the charges, the deciding official conducted interviews of witnesses but failed to notify the appellant about the interviews or allow him the opportunity to rebut the new evidence resulting from them. The Federal Circuit found that the deciding official's gathering and consideration of "new and material" evidence denied the appellant due process. It also found that the *ex parte* communications in question were more than "confirming and clarifying information" that was already on the record.

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Case Processing Statistics for FY 2013

Summary of Cases Decided by MSPB

Table 1: FY 2013 Summary of Cases Decided by MSPB

Cases Decided in MSPB Regional and Field Offices	
Appeals	5,767
Addendum Cases[1]	492
Stay Requests[2]	81
TOTAL Cases Decided in RO/FOs	**6,340**
Cases Decided by Administrative Law Judges (ALJs) - Original Jurisdiction[3]	**167**
Cases Decided by the Board	
Appellate Jurisdiction:	
Petitions for Review (PFRs) - Appeals	736
Petitions for review (PFRs) - Addendum Cases	105
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	0
Reopenings[4]	9
Court Remands	11
Compliance Referrals	34
EEOC Non-concurrence Cases	0
Arbitration Cases	8
Subtotal - Appellate Jurisdiction	**903**
Original Jurisdiction[5]	49
Interlocutory Appeals	0
TOTAL Cases Decided by the Board	**952**
TOTAL Decisions (Board, ALJs, RO/FOs)	**7,459**

[1] Includes 111 requests for attorney fees, 148 Board remand cases, 214 petitions for enforcement, 6 court remand cases, 7requests for compensatory damages (discrimination cases only), and 6 requests for consequential damages.
[2] Includes 66 stay requests in whistleblower cases and 15 in non-whistleblower cases.
[3] Initial Decisions by ALJ. Case type breakdown: 1 Petition for Rulemaking, 3 Hatch Act cases, and 163 Actions Against ALJs.
[4] Includes 8 cases reopened by the Board on its own motion and 1 request for reconsideration by OPM.
[5] Final Board Decisions. Case Type Breakdown: 16 OSC stay requests, 1 reopening of a Hatch Act case, 2 PFRs of Hatch Act case, 22 PFRs of Actions Against ALJs, and 8 request for regulation review.

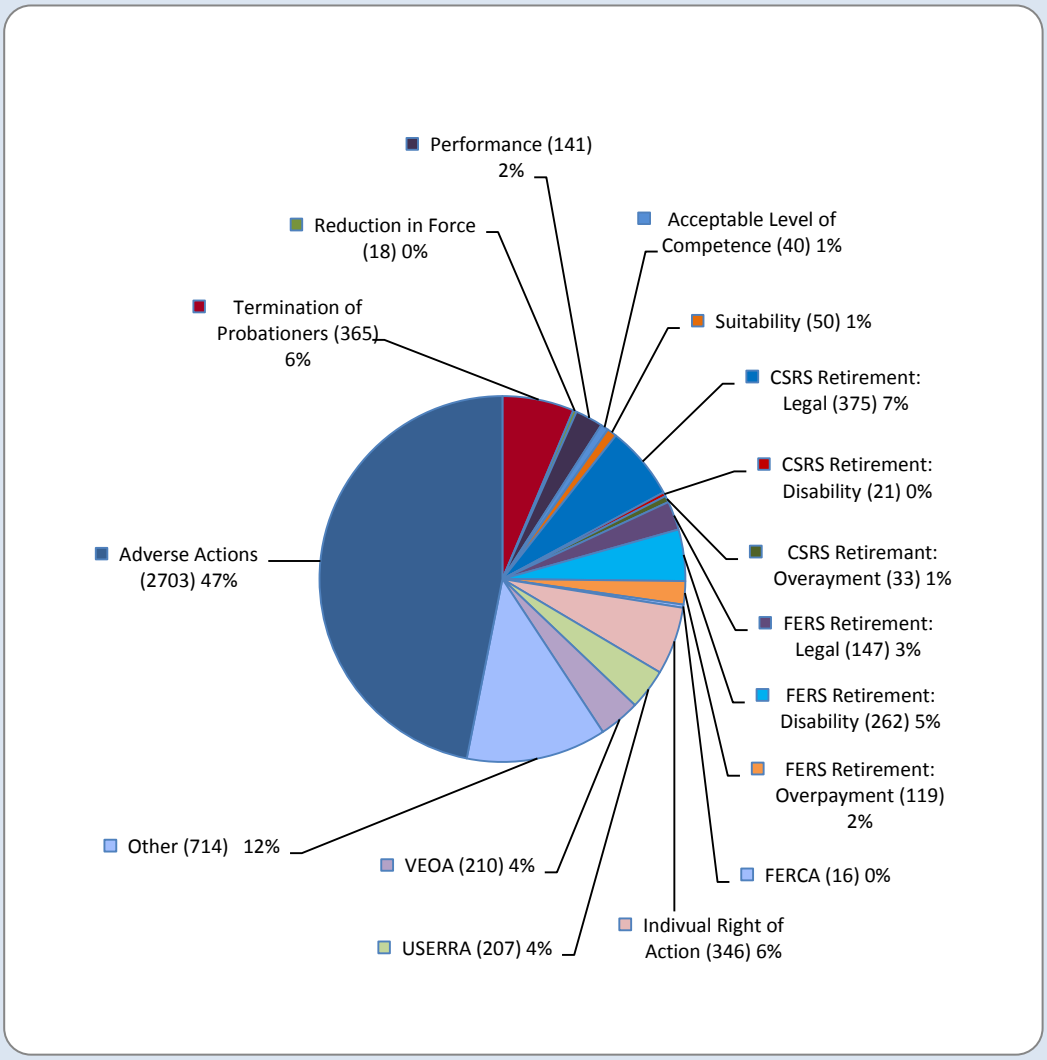
Summary of Cases Processed in the Regional and Field Offices

Table 2: Disposition of Appeals Decided in the Regional and Field Offices, by Type of Case

	Decided	Dismissed[1]		Not DIsmissed[1]		Settled[2]		Adjudicated[2]	
Type of Case	#	#	%	#	%	#	%	#	%
Adverse Action by Agency	2703	1381	51.09	1322	48.91	858	64.90	464	35.10
Termination of Probationers	365	331	90.68	34	9.32	32	94.12	2	5.88
Reduction in Force	18	15	83.33	3	16.67	2	66.67	1	33.33
Performance	141	41	29.08	100	70.92	74	74.00	26	26.00
Acceptable Level of Competence (WIGI)	40	24	60.00	16	40.00	14	87.50	2	12.50
Suitability	50	31	62.00	19	38.00	13	68.42	6	31.58
CSRS Retirement: Legal	375	219	58.40	156	41.60	1	0.64	155	99.36
CSRS Retirement: Disability	21	17	80.95	4	19.05	1	25.00	3	75.00
CSRS Retirement: Overpayment	33	17	51.52	16	48.48	11	68.75	5	31.25
FERS Retirement: Legal	147	93	63.27	54	36.73	1	1.85	53	98.15
FERS Retirement: Disability	262	203	77.48	59	22.52	1	1.69	58	98.31
FERS Retirement: Overpayment	119	51	42.86	68	57.14	40	58.82	28	41.18
FERCCA	16	15	93.75	1	6.25	0	0.00	1	100.00
Individual Right of Action	346	293	84.68	53	15.32	36	67.92	17	32.08
USERRA	207	82	39.61	125	60.39	104	83.20	21	16.80
VEOA	210	133	63.33	77	36.67	15	19.48	62	80.52
Other[3]	714	655	91.74	59	8.26	44	74.58	15	25.42
Total	**5767**	**3601**	**62.44**	**2166**	**37.56**	**1247**	**57.57**	**919**	**42.43**

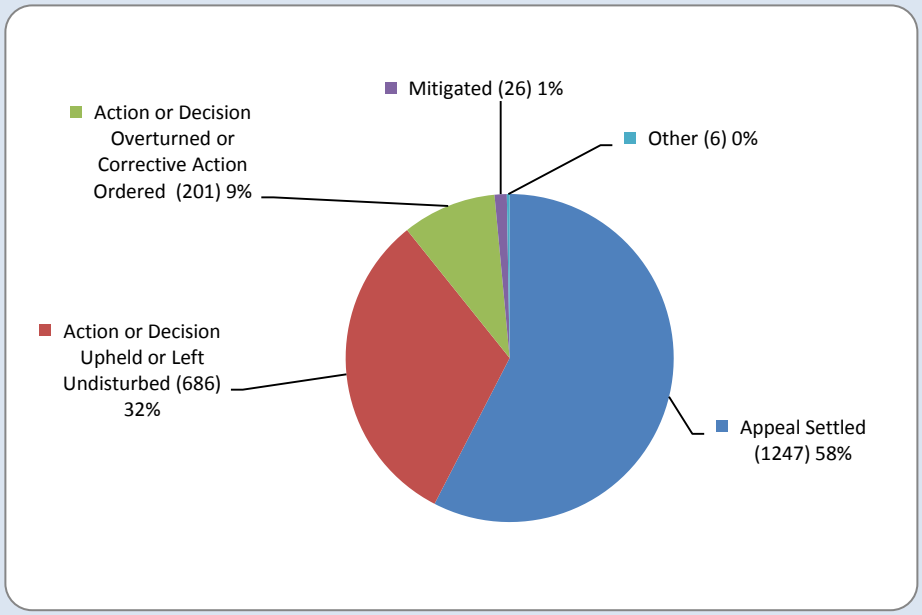
[1] Percent Dismissed and Not Dismissed are of the number Decided.
[2] Percent Settled and Adjudicated are of the number Not Dismissed
[3] "Other" appeals include Restoration to Duty (131), Miscellaneous (511), and additional types such as Reemployment Priority, Employment Practices, and others.

Figure 1: Type of Appeals Decided in the Regional and Field Offices



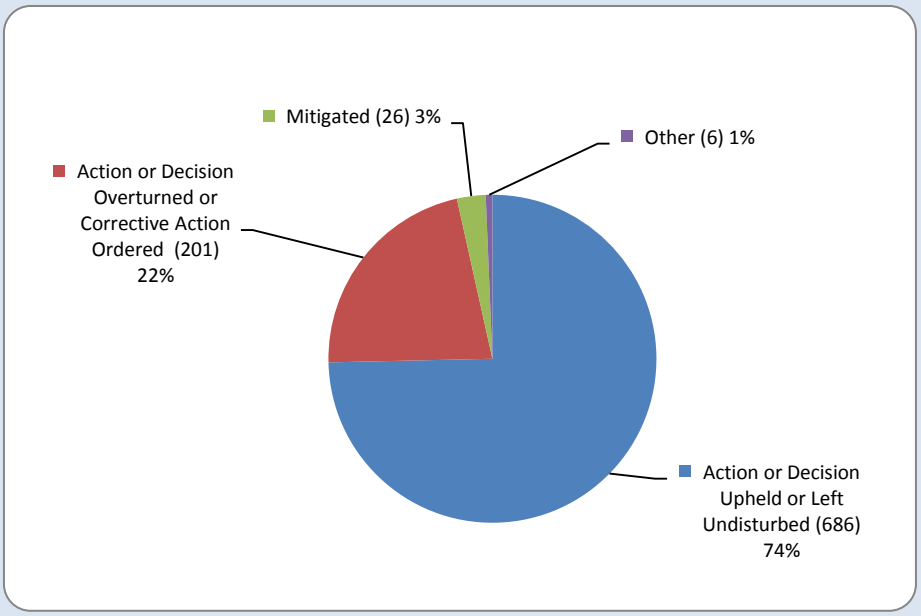
Total Number of Appeals: 5,767

Figure 2: Dispositions: Initial Appeals Not Dismissed by Regional/Field Offices



Total Number of Appeals that were Not Dismissed: 2,166

Figure 3: Dispositions: Initial Appeals Not Dismissed or Settled by Regional/Field Office



Based on 919 Appeals Adjudicated on the Merits

Table 3: Disposition of Initial Appeals by Agency

	Decided	Dismissed[1]		Not DIsmissed[1]		Settled[2]		Adjudicated[2]	
	#	#	%	#	%	#	%	#	%
Office of Personnel Management[3]	955	*599*	62.7	356	37.3	67	18.8	289	81.2
United States Postal Service	809	523	64.6	286	35.4	205	71.7	81	28.3
Department of Veterans Affairs	804	510	63.4	294	36.6	211	71.8	83	28.2
Department of the Army	546	330	60.4	216	39.6	151	69.9	65	30.1
Department of Homeland Security	373	223	59.8	150	40.2	71	47.3	79	52.7
Department of the Navy	294	166	56.5	128	43.5	82	64.1	46	35.9
Department of Defense	288	190	66.0	98	34.0	67	68.4	31	31.6
Department of the Air Force	269	127	47.2	142	52.8	107	75.4	35	24.6
Department of the Treasury	213	139	65.3	74	34.7	49	66.2	25	33.8
Department of Transportation	201	119	59.2	82	40.8	25	30.5	57	69.5
Department of Justice	152	107	70.4	45	29.6	26	57.8	19	42.2
Department of Agriculture	136	82	60.3	54	39.7	38	70.4	16	29.6
Department of the Interior	121	72	59.5	49	40.5	30	61.2	19	38.8
Department of Health and Human Services	103	68	66.0	35	34.0	26	74.3	9	25.7
Department of Housing and Urban Development	76	63	82.9	13	17.1	5	38.5	8	61.5
Social Security Administration	70	46	65.7	24	34.3	12	50.0	12	50.0
Department of Commerce	46	33	71.7	13	28.3	9	69.2	4	30.8
Department of Labor	44	31	70.5	13	29.5	5	38.5	8	61.5
Environmental Protection Agency	30	18	60.0	12	40.0	5	41.7	7	58.3
Department of State	29	19	65.5	10	34.5	8	80.0	2	20.0
General Services Administration	26	15	57.7	11	42.3	10	90.9	1	9.1
Department of Energy	25	16	64.0	9	36.0	5	55.6	4	44.4
Federal Deposit Insurance Corporation	13	10	76.9	3	23.1	1	33.3	2	66.7

Table 3: Disposition of Initial Appeals by Agency

	Decided	Dismissed[1]		Not DIsmissed[1]		Settled[2]		Adjudicated[2]	
	#	#	%	#	%	#	%	#	%
Equal Employment Opportunity Commission	12	10	83.3	2	16.7	2	100.0	0	0.0
Government Printing Office	12	8	66.7	4	33.3	3	75.0	1	25.0
Agency for International Development	10	7	70.0	3	30.0	2	66.7	1	33.3
Federal Trade Commission	9	5	55.6	4	44.4	2	50.0	2	50.0
Securities and Exchange Commission	9	7	77.8	2	22.2	2	100.0	0	0.0
Small Business Administration	9	5	55.6	4	44.4	2	50.0	2	50.0
Tennessee Valley Authority	9	4	44.4	5	55.6	3	60.0	2	40.0
Department of Education	8	7	87.5	1	12.5	1	100.0	0	0.0
National Aeronautics and Space Administration	8	4	50.0	4	50.0	2	50.0	2	50.0
Smithsonian Institution	8	6	75.0	2	25.0	1	50.0	1	50.0
Federal Emergency Management Agency	4	3	75.0	1	25.0	1	100.0	0	0.0
National Credit Union Administration	4	1	25.0	3	75.0	1	33.3	2	66.7
Armed Forces Retirement Home	3	1	33.3	2	66.7	2	100.0	0	0.0
Corporation for National and Community Service	3	1	33.3	2	66.7	1	50.0	1	50.0
Federal Reserve System	3	3	100.0	0	0.0	0	0.0	0	0.0
National Science Foundation	3	2	66.7	1	33.3	1	100.0	0	0.0
Nuclear Regulatory Commission	3	3	100.0	0	0.0	0	0.0	0	0.0
Administrative Office of the U.S. Courts	2	2	100.0	0	0.0	0	0.0	0	0.0
Architect of the Capitol	2	2	100.0	0	0.0	0	0.0	0	0.0
Broadcasting Board of Governors	2	1	50.0	1	50.0	1	100.0	0	0.0
Central Intelligence Agency	2	2	100.0	0	0.0	0	0.0	0	0.0

Table 3: Disposition of Initial Appeals by Agency

	Decided	Dismissed[1]		Not DIsmissed[1]		Settled[2]		Adjudicated[2]	
	#	#	%	#	%	#	%	#	%
Federal Communications Commission	2	1	50.0	1	50.0	0	0.0	1	100
National Archives and Records Administration	2	1	50.0	1	50.0	0	0.0	1	100
National Labor Relations Board	2	2	100.0	0	0.0	0	0.0	0	0.0
Selective Service System	2	1	50.0	1	50.0	1	100.0	0	0.0
Consumer Product Safety Commission	1	0	0.0	1	100.0	1	100.0	0	0.0
Federal Housing Finance Agency	1	0	0.0	1	100.0	1	100.0	0	0.0
Federal Mediation and Conciliation Service	1	0	0.0	1	100.0	0	0.0	1	100.0
Federal Retirement Thrift Investment Board	1	0	0.0	1	100.0	1	100.0	0	0.0
Government of the District of Columbia	1	1	100.0	0	0.0	0	0.0	0	0.0
Inter-American Foundation	1	1	100.0	0	0.0	0	0.0	0	0.0
Judicial Branch	1	1	100.0	0	0.0	0	0.0	0	0.0
Office of Management and Budget	1	1	100.0	0	0.0	0	0.0	0	0.0
Office of the Director of National Intelligence	1	1	100.0	0	0.0	0	0.0	0	0.0
Office of the U.S. Trade Representative	1	0	0.0	1	100.0	1	100.0	0	0.0
Other	1	1	100.0	0	0.0	0	0.0	0	0.0
TOTAL	**5767**	**3601**	**62.4**	**2166**	**37.6**	**1247**	**57.6**	**919**	**42.4**

[1] Percent Dismissed and Not Dismissed are of the number Decided.
[2] Percent Settled and Adjudicated are of the number Not Dismissed.
[3] Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

Table 4: Disposition of Initial Appeals Adjudicated on the Merits By Agency

	Adjudicated[1]	Affirmed		Reversed		Mitigated Modified		Other	
	#	#	%	#	%	#	%	#	%
Office of Personnel Management[2]	289	214	74.0	69	23.9	0	0.0	6	2.1
Department of Veterans Affairs	83	62	74.7	16	19.3	5	6.0	0	0.0
United States Postal Service	81	48	59.3	26	32.1	7	8.6	0	0.0
Department of Homeland Security	79	63	79.7	15	19.0	1	1.3	0	0.0
Department of the Army	65	41	63.1	19	29.2	5	7.7	0	0.0
Department of Transportation	57	56	98.2	1	1.8	0	0.0	0	0.0
Department of the Navy	46	32	69.6	13	28.3	1	2.2	0	0.0
Department of the Air Force	35	24	68.6	9	25.7	2	5.7	0	0.0
Department of Defense	31	24	77.4	5	16.1	2	6.5	0	0.0
Department of the Treasury	25	23	92.0	2	8.0	0	0.0	0	0.0
Department of Justice	19	14	73.7	4	21.1	1	5.3	0	0.0
Department of the Interior	19	11	57.9	7	36.8	1	5.3	0	0.0
Department of Agriculture	16	11	68.8	5	31.3	0	0.0	0	0.0
Social Security Administration	12	12	100.0	0	0.0	0	0.0	0	0.0
Department of Health and Human Services	9	8	88.9	1	11.1	0	0.0	0	0.0
Department of Housing and Urban Development	8	7	87.5	1	12.5	0	0.0	0	0.0
Department of Labor	8	8	100.0	0	0.0	0	0.0	0	0.0
Environmental Protection Agency	7	7	100.0	0	0.0	0	0.0	0	0.0
Department of Commerce	4	3	75.0	1	25.0	0	0.0	0	0.0
Department of Energy	4	1	25.0	2	50.0	1	25.0	0	0.0
Department of State	2	2	100.0	0	0.0	0	0.0	0	0.0
Federal Deposit Insurance Corporation	2	2	100.0	0	0.0	0	0.0	0	0.0
Federal Trade Commission	2	2	100.0	0	0.0	0	0.0	0	0.0

Table 4: Disposition of Initial Appeals Adjudicated on the Merits By Agency

	Adjudicated[1]	Affirmed		Reversed		Mitigated Modified		Other	
	#	#	%	#	%	#	%	#	%
National Aeronautics and Space Administration	2	1	50.0	1	50.0	0	0.0	0	0.0
National Credit Union Administration	2	2	100.0	0	0.0	0	0.0	0	0.0
Tennessee Valley Authority	2	2	100.0	0	0.0	0	0.0	0	0.0
Corporation for National and Community Service	1	0	0.0	1	100.0	0	0.0	0	0.0
Federal Communications Commission	1	0	0.0	1	100.0	0	0.0	0	0.0
Federal Mediation and Conciliation Service	1	1	100.0	0	0.0	0	0.0	0	0.0
General Services Administration	1	0	0.0	1	100.0	0	0.0	0	0.0
Government Printing Office	1	0	0.0	1	100.0	0	0.0	0	0.0
National Archives and Records Administration	1	1	100.0	0	0.0	0	0.0	0	0.0
Smithsonian Institution	1	1	100.0	0	0.0	0	0.0	0	0.0
Total	**919**	**686**	**74.6**	**201**	**21.9**	**26**	**2.8**	**6**	**0.7**

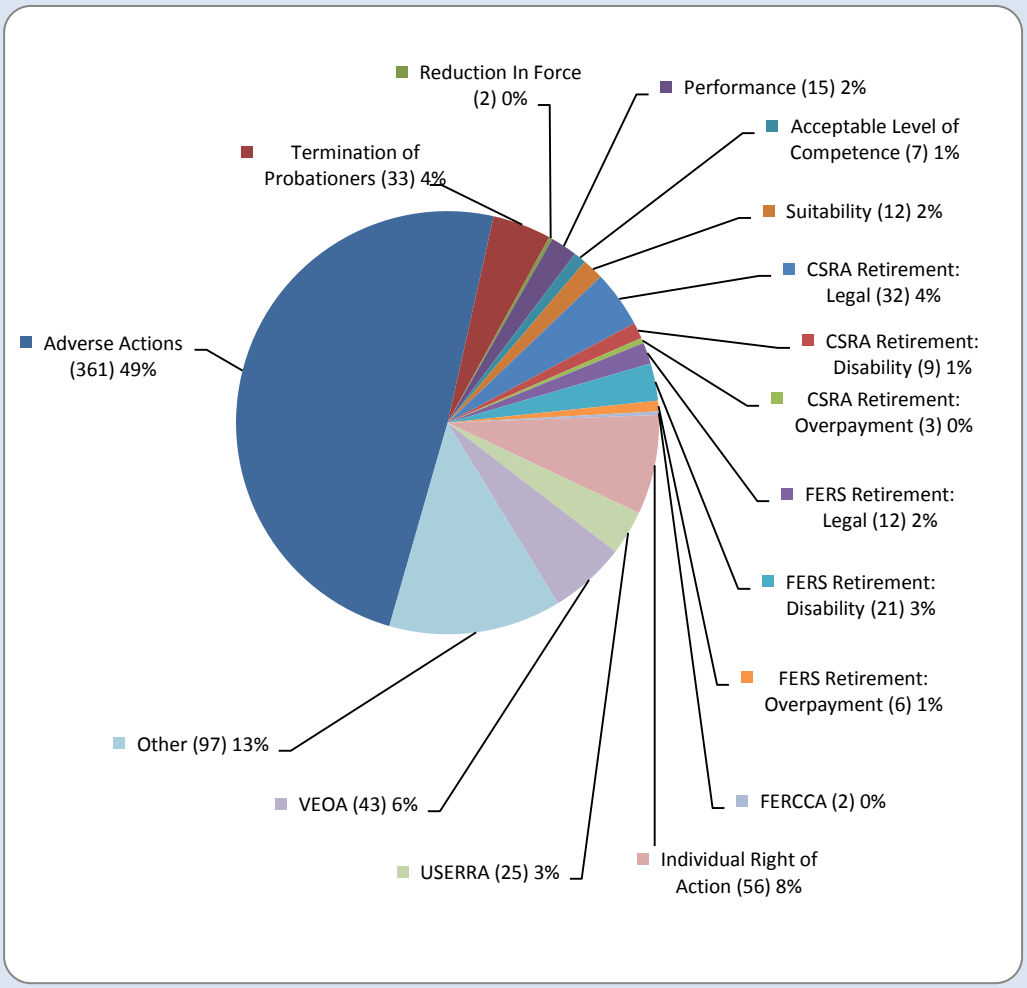
[1] Adjudicated on the Merits, i.e., not dismissed or settled.
[2] Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.
Percentages may not total 100 because of rounding.

Headquarters Case Processing

Table 5: Disposition of Petitions for Review (PFRs) of Initial Decisions by Type of Case

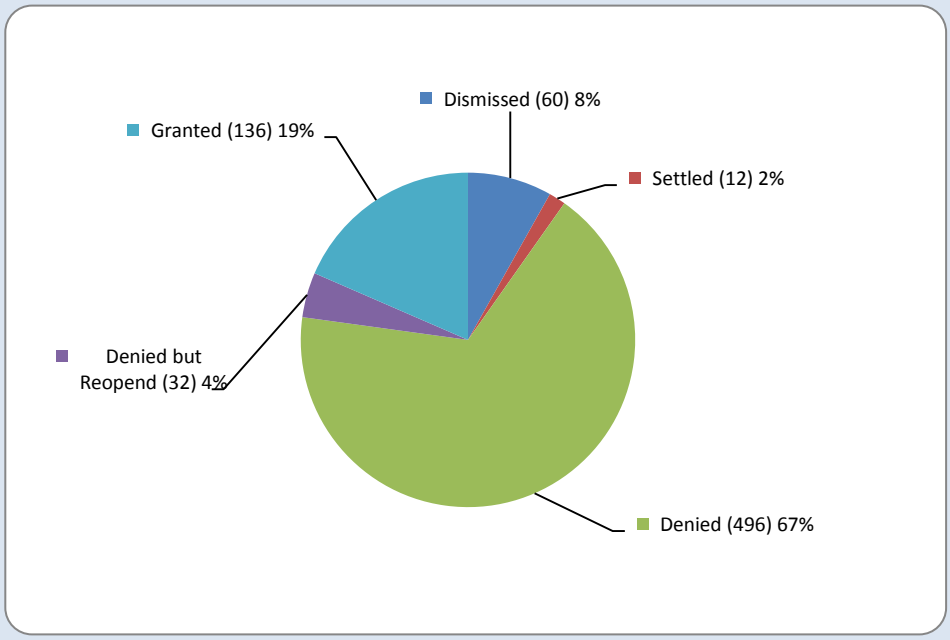
	Decided	Dismissed		Settled		Denied		Denied But Reopened		Granted	
Type of Case	#	#	%	#	%	#	%	#	%	#	%
Adverse Action by Agency	361	29	8.03	9	2.49	241	66.76	11	3.05	71	19.67
Termination of Probationers	33	4	12.12	1	3.03	25	75.76	0	0.00	3	9.09
Reduction in Force	2	0	0.00	0	0.00	1	50.00	1	50.00	0	0.00
Performance	15	1	6.67	1	6.67	12	80.00	1	6.67	0	0.00
Acceptable Level of Competence (WIGI)	7	1	14.29	0	0.00	6	85.71	0	0.00	0	0.00
Suitability	12	0	0.00	0	0.00	11	91.67	0	0.00	1	8.33
CSRS Retirement: Legal	32	4	12.50	0	0.00	24	75.00	1	3.13	3	9.38
CSRS Retirement: Disability	9	1	11.11	0	0.00	6	66.67	0	0.00	2	22.22
CSRS Retirement: Overpayment	3	1	33.33	0	0.00	0	0.00	2	66.67	0	0.00
FERS Retirement: Legal	12	1	8.33	0	0.00	9	75.00	0	0.00	2	16.67
FERS Retirement: Disability	21	3	14.29	0	0.00	13	61.90	0	0.00	5	23.81
FERS Retirement: Overpayment	6	0	0.00	0	0.00	4	66.67	1	16.67	1	16.67
FERCCA	2	0	0.00	0	0.00	0	0.00	0	0.00	2	100.0
Individual Right of Action	56	2	3.57	0	0.00	28	50.00	6	10.71	20	35.71
USERRA	25	5	20.00	0	0.00	12	48.00	2	8.00	6	24.00
VEOA	43	2	4.65	0	0.00	29	67.44	3	6.98	9	20.93
Other	97	6	6.19	1	1.03	75	77.32	4	4.12	11	11.34
Total	**736**	**60**	**8.15**	**12**	**1.63**	**496**	**67.39**	**32**	**4.35**	**136**	**18.48**

Figure 4: Types of Petitions for Review (PFRs)



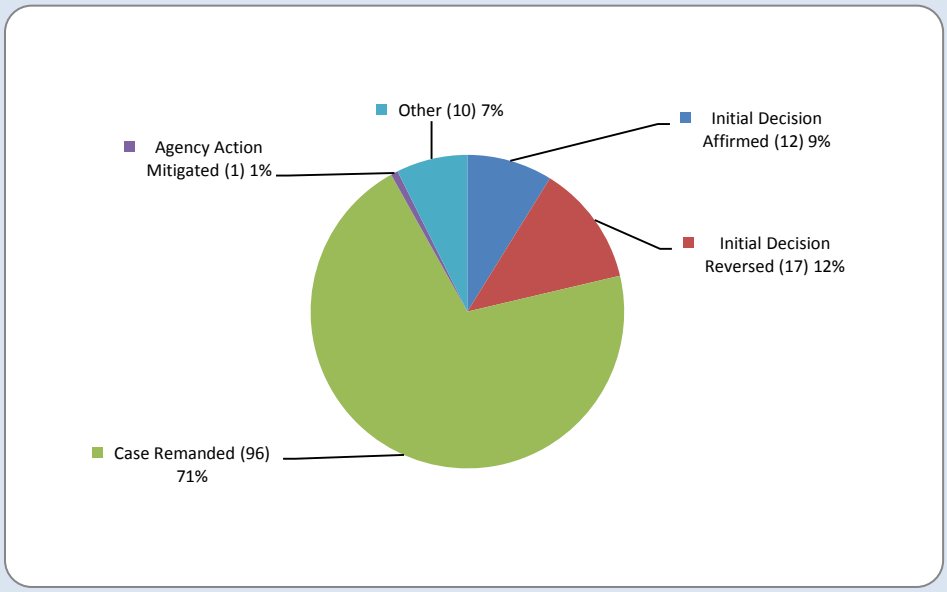
Total Number of Petitions for Review (PFR): 736

Figure 5: Disposition of Petitions for Review of Initial Decisions



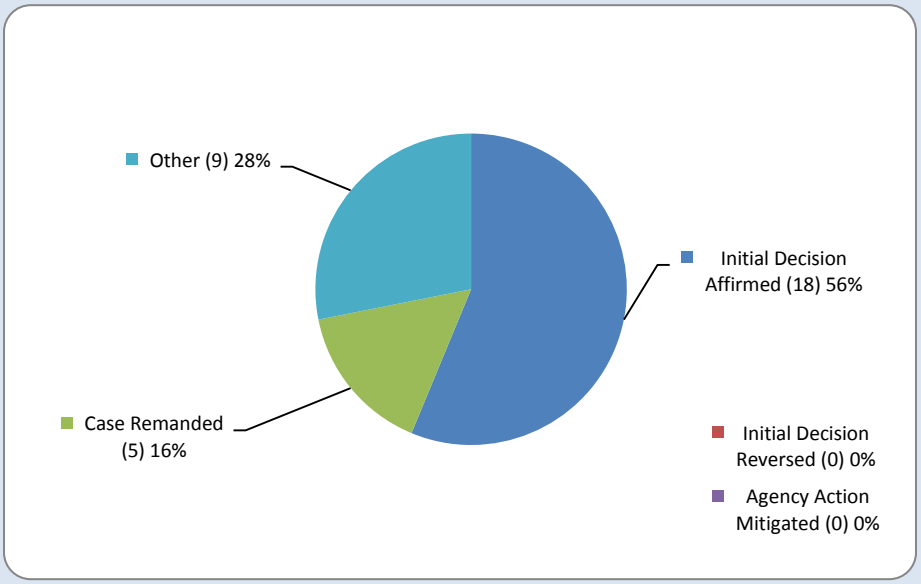
Based on 736 Total PFRs

Figure 6: Disposition of Petition for Review Granted



Based on 136 PFRs Granted

Figure 7: Disposition of Petitions for Review Denied but Reopened



Based on 32 PFRs Denied but Reopened

Table 6: Disposition of Petitions for Review of Initial Decisions, by Agency

	Decided	Dismissed		Settled		Denied		Denied But Reopened		Granted	
	#	#	%	#	%	#	%	#	%	#	%
United States Postal Service	128	13	10.16	4	3.13	88	68.75	4	3.13	19	14.84
Department of Veterans Affairs	96	7	7.29	0	0.00	69	71.88	4	4.17	16	16.67
Office of Personnel Management[1]	94	10	10.64	0	0.00	64	68.09	5	5.32	15	15.96
Department of the Army	63	4	6.35	2	3.17	43	68.25	3	4.76	11	17.46
Department of Homeland Security	55	8	14.55	3	5.45	31	56.36	0	0.00	13	23.64
Department of the Navy	42	1	2.38	1	2.38	29	69.05	3	7.14	8	19.05
Department of the Treasury	37	1	2.70	0	0.00	29	78.38	2	5.41	5	13.51
Department of Defense	34	1	2.94	1	2.94	24	70.59	2	5.88	6	17.65
Department of the Air Force	30	5	16.67	0	0.00	19	63.33	3	10.00	3	10.00
Department of Justice	27	1	3.70	0	0.00	16	59.26	0	0.00	10	37.04
Department of Agriculture	23	3	13.04	0	0.00	14	60.87	3	13.04	3	13.04
Department of Health and Human Services	17	1	5.88	0	0.00	10	58.82	0	0.00	6	35.29
Department of Labor	16	2	12.50	0	0.00	9	56.25	1	6.25	4	25.00
Department of the Interior	10	0	0.00	0	0.00	6	60.00	0	0.00	4	40.00
Social Security Administration	10	0	0.00	0	0.00	8	80.00	0	0.00	2	20.00
Department of Commerce	9	0	0.00	0	0.00	5	55.56	1	11.11	3	33.33
Department of Energy	6	0	0.00	0	0.00	6	100.0	0	0.00	0	0.00
Environmental Protection Agency	6	0	0.00	0	0.00	5	83.33	0	0.00	1	16.67
Department of Transportation	5	0	0.00	0	0.00	4	80.00	0	0.00	1	20.00
General Services Administration	5	0	0.00	1	20.00	2	40.00	0	0.00	2	40.00
Department of Housing and Urban Development	3	0	0.00	0	0.00	2	66.67	0	0.00	1	33.33

Table 6: Disposition of Petitions for Review of Initial Decisions, by Agency

	Decided	Dismissed		Settled		Denied		Denied But Reopened		Granted	
	#	#	%	#	%	#	%	#	%	#	%
Federal Deposit Insurance Corporation	3	0	0.00	0	0.00	3	100.0	0	0.00	0	0.00
Agency for International Development	2	0	0.00	0	0.00	2	100.0	0	0.00	0	0.00
Department of State	2	0	0.00	0	0.00	0	0.00	0	0.00	2	100.0
Equal Employment Opportunity Commission	2	0	0.00	0	0.00	2	100.0	0	0.00	0	0.00
Federal Trade Commission	2	1	50.00	0	0.00	1	50.00	0	0.00	0	0.00
Smithsonian Institution	2	1	50.00	0	0.00	1	50.00	0	0.00	0	0.00
Court Services and Offender Supervision Agency for DC	1	0	0.00	0	0.00	0	0.00	0	0.00	1	100.0
Government Printing Office	1	0	0.00	0	0.00	0	0.00	1	100.0	0	0.00
International Boundary and Water Commission: U.S. and Mexico	1	1	100.0	0	0.00	0	0.00	0	0.00	0	0.00
National Aeronautics and Space Administration	1	0	0.00	0	0.00	1	100.0	0	0.00	0	0.00
Office of Special Counsel	1	0	0.00	0	0.00	1	100.0	0	0.00	0	0.00
Securities and Exchange Commission	1	0	0.00	0	0.00	1	100.0	0	0.00	0	0.00
Tennessee Valley Authority	1	0	0.00	0	0.00	1	100.0	0	0.00	0	0.00
TOTAL	**736**	**60**	**8.15**	**12**	**1.63**	**496**	**67.39**	**32**	**4.35**	**136**	**18.48**

[1] Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

Percentages may not total 100 because of rounding.

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Summaries of Merit Systems Studies

In FY 2013, MSPB approved one merit system study report and three editions of the *IoM* newsletter.[12] The contents of these publications are summarized below. To provide timely information to our stakeholders, we also include summaries of two MSPB reports published in early FY 2014. All MPSB reports and newsletter editions, along with additional merit systems studies content can be found on the studies page of the MSPB website at www.mspb.gov.

Clean Record Settlement Agreements and the Law

Many settlement agreements that resolve adverse action appeals before MSPB include a clean record agreement (CRA), in which a Federal agency agrees to remove potentially negative information from an employee's record. CRAs are relevant to the parties to the agreement and MSPs related to fair treatment of employees and effective use of the workforce. In addition, because CRAs have implications for future job applications and the information that Federal agencies can provide and obtain in making employment-related decisions, CRAs are related to the MSPs involving selection based on ability and maintaining high standards of conduct and integrity.

This report uses case law to discuss why it is important for a CRA to contain clear and specific language addressing a variety of aspects of the agreement, including: what systems of records will be cleaned; what information will be cleaned from those systems; and what will be communicated to others and by whom. The report also explains how statutory and regulatory obligations placed on the parties—and the inability of the CRA to bind third parties—can complicate the ability of the parties to achieve the goals they may have for the CRA. Particular attention is paid to the issues of applying for Federal positions and security clearances.

Issues of Merit Newsletter Topics

MSPB issued three editions of *IoM* during FY 2013. Additional articles regarding Federal human capital management were posted to MSPB's studies web page. These *IoM* and website articles informed readers regarding the broad range of ongoing MSPB research studies and their linkage to supporting the MSPs and avoiding the prohibited personnel practices. Therefore, the findings and recommendations contained in the *IoM* articles are designed to foster the fair and effective management of the Federal workforce.

FY 2013 *IoM* articles were related to recruiting and retaining employees, the effects of favoritism on recruitment and quality of hires, the necessity of employee training even during times of austerity, as well as the advantage of cross-training the workforce to increase skills and improve results. Additional *IoM* articles involved employee performance including tips on how supervisors could become effective employee coaches, how to fully engage employees to improve performance, the importance of informal recognition, and how to capitalize on employee talents by developing effective supervisor-employee relationships. Additionally, FY 2013 *IoM* articles examined topics related to PPPs and provided a synopsis of MSPB's FY 2012 adjudication activities. The wide range of topics ensures publication of articles relevant to the diverse interested of our *IoM* audience.

[12] In FY 2013 published two study reports that were approved in FY 2012. These reports, one on motivation potential and employee engagement and one on managing employees in the public interest, were summarized in MSPB's FY 2012 Annual Report.

Merit Systems Studies Reports Published in Early FY 2014

Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism

The MSPs state the expectation for Federal employees to be selected and advanced based on merit and protected from personal favoritism. Avoidance of favoritism is relevant to all employees and personnel systems—and critical to fair treatment of employees, quality of hire and the integrity of the hiring process, proper and effective use of rewards, and employee engagement and retention. However, survey results indicate that some Federal employees suspect that relationships currently exert undue influence on many management decisions. For example, 28% of employees believe their own supervisor practices favoritism, while just over half agree other supervisors in their organizations practice favoritism.

This report clarifies what constitutes favoritism—a concept that is not clearly defined in statute—and summarizes Federal employees' views on the frequency of favoritism and the potential impacts on employees and organizations. The purpose of this report is to reduce the likelihood that favoritism is occurring (or believed to be occurring) by providing recommendations to strengthen supervisory and managerial practices. The report also identifies steps that employees can take to better understand the Federal merit systems and improve their ability to advance within them.

Evaluating Job Applicants: The Role of Training and Experience in Hiring

In accord with the first MSP, that "selection and advancement should be determined solely on the basis of relative ability, knowledge and skills," it is critical for agencies to use selection tools that will fairly and effectively identify highly qualified applicants. Training and experience (T&E) assessments can be used to collect information about a person's past to make inferences about that person's current proficiency in a given area and his or her likelihood of success on a job. Whenever prior T&E is considered as part of a Federal hiring or promotion decision, it must be done in a manner that best identifies true differences in ability as accurately as possible.

This report discusses the strengths and weaknesses of T&E assessments to gauge an individual's job qualifications and provides recommendations for the most effective use of such assessments. The report also recommends specific strategies to improve T&E assessment, which can result in more effective hiring decisions and a better qualified and more productive Federal workforce.

Updating the Merit Systems Studies Research Agenda

MSPB is currently in the process of updating its merit systems studies research agenda. More information about this process, and the opportunity for public input, is available here.

Significant Actions of the U.S. Office of Personnel Management

As required by statute, MSPB reviews and reports on the significant actions of OPM including an analysis of whether OPM's actions are in accord with MSPs (5 U.S.C. § 2301) and free from PPPs (5 U.S.C. § 2302). OPM's actions broadly affect the Federal workforce, multiple Federal agencies, or applicants for Federal jobs. Almost all OPM actions have the potential to impact the effectiveness and efficiency of the Federal workforce (MSP 5) and/or fair and equitable treatment in a variety of contexts (MSP 2). Depending on the nature of a particular OPM action, it has the potential to affect or involve other specific MSPs and/or PPPs. Brief information about the additional MSPs and/or PPPs that may be affected by a particular OPM action is included in the 'significance' section following each action.

Scope and Coverage of this Review

Below, we summarize OPM's most significant actions or initiatives, focusing on those policies and initiatives that have the potential to affect one or more of the MSPs or PPPs. This report is not a comprehensive digest of OPM activities, as OPM has many programs and responsibilities that do not directly affect MSPs and PPPs. For example, OPM now has the responsibility to implement certain provisions of the Patient Protection and Affordable Care Act (PPACA). OPM's actions related to the PPACA are not included in this summary because they do not affect the Federal workforce or a specific MSP or PPP.

Also, this summary does not discuss in detail every OPM significant action that was underway or completed in FY 2013. Instead, it should be read in conjunction with previous MSPB reports of OPM's significant actions. For example, our FY 2012 summary discussed several OPM proposals that were finalized during FY 2013 (such as the phased retirement program and the Goals-Engagement-Accountability-Results pilot). Those discussions are not repeated here. Also, where we have commented on operational OPM programs in the past, and no significant changes have been made to those programs, our previous comments remain applicable.

Factors Affecting the U.S. Office of Personnel Management

This review should be read in the context of issues and developments that directly affect OPM and can indirectly affect the nature and scope of the OPM policy initiatives that are the primary focus of MSPB's review. Those issues and developments include—

- Governmentwide spending cuts (the sequester) that were effected in FY 2013. In response, OPM offered limited voluntary early retirements and voluntary separation incentive payments to its workforce;[13]
- Congressional focus on OPM operations in areas such as retirement processing and background investigations;
- Continuing implementation—and heightened stakeholder scrutiny—of provisions of PPACA; and
- A leadership transition. The four-year term of OPM Director John Berry ended in April 2013. In October 2013, the Senate confirmed Katherine Archuleta[14] as the next OPM Director.

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[13] Kellie Lunney, "OPM Buyouts Could Threaten Progress on Retirement Claims Backlog," *Government Executive*, June 4, 2013. (See http://www.govexec.com/pay-benefits/2013/06/opm-buyouts-could-threaten-progress-retirement-claims-backlog/64253/).

[14] Library of Congress, Thomas, Presidential Nomination 509-113: Katherine Archuleta

New OPM Significant Actions

Guidance on Agency Policies to Prevent Domestic Violence

A Presidential memorandum of April 18, 2012, required that policies be established for addressing domestic violence in the Federal workforce.[15] The memorandum noted that as the Nation's largest employer, the Federal Government should act as a model in responding to the effects of domestic violence on its workforce. Such effects include lost productivity, increased health care costs, harassment in the workplace, and other employment-related effects. The memorandum required OPM to issue guidance on the content of agency-specific policies to prevent domestic violence and address its effects on the Federal workforce.

In February 2013, OPM issued the required guidance, *Government-wide Guidance to Address the Effects of Domestic Violence, Sexual Assault, and Stalking on the Federal Workforce,*[16] which was developed by an interagency working group. The guidance outlines agency roles and responsibilities and the steps for developing policies to address domestic violence, sexual assault, and stalking. Components of agency policies are outlined including:

- Several workplace flexibilities including different types of leave that agencies can use in collaboration with victims to help employees remain safe and maintain their work performance;
- Disciplinary actions pertaining to employees as well as contractors;
- Training, awareness, and Employee Assistance Programs;
- Building safety and security; and
- Accountability, including assigning the responsibility within agencies for monitoring, evaluating, and reporting on the progress of agency programs.

Significance

OPM's guidance, in seeking to mitigate the effects of domestic violence on the Federal workforce, directly supports two merit system principles—efficient and effective use of the Federal workforce and, as Federal employees may unfortunately be the perpetrators of such violence, maintaining high standards of integrity and conduct.

MSPB research confirms that such violence is real and consequential, reinforcing the value of measures to address it. In 2012, MSPB released the report, *Employee Perceptions of Federal Workplace Violence*, that focused on the workplace being the site of a violent event. Seven percent of the Federal employee respondents to a 2010 MSPB survey who reported witnessing a violent act at work said that the act was perpetrated by the abusive intimate partner of an employee. Almost one-third of those incidents resulted in property damage or physical injury. The effects of domestic violence in the workplace do not end there. For example, the Centers for Disease Control and Prevention, U.S. Department of Health and Human Services, has estimated that, nationally, 96 percent of victims of domestic violence experience work-related problems, and that 30 percent of victims actually lose their jobs due to attendance or performance issues.[17] OPM's policy guidance cites the MSPB study and acknowledges and seeks to mitigate the impact of violence in the workplace.

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[15] Establishing Policies for Addressing Domestic Violence in the Federal Workforce, 77 Fed. Reg. 24,339 (April 23, 2012).
[16] Available at http://www.chcoc.gov/transmittals/index.aspx.
[17] Kim M. Kerr, *Workplace Violence—Planning for Prevention and Response*, Elsevier Inc., Burlington, MA, 2010, p. 120.

Among the MSPB survey participants who witnessed workplace violence perpetrated by criminals or customers, approximately half agreed that their agencies take sufficient steps to ensure their safety from violence occurring at their workplace. However, only about one-third of employees who witnessed workplace violence perpetrated by the abusive intimate partners of employees agreed this was the case. This disparity may indicate that employees believe their agencies could do more to ensure their safety from violence perpetrated by their colleagues' abusive intimate partners. OPM's guidance may help to remedy this disparity.

Senior Executive Service Exit Survey

In March 2013, OPM announced a Governmentwide exit survey to be administered to all departing members of the Senior Executive Service (SES).[18] The SES exit survey is a web-based survey hosted by OPM that agencies can distribute electronically to departing members of the SES. The survey asks respondents about factors (outlined in the table below) that might have encouraged them to stay or contributed to their decision to leave and requests information about demographics, recent performance, and future plans for analytical purposes. OPM plans to make the survey available indefinitely and to compile data at least annually to meet agency needs.

Factors Covered in OPM SES Exit Survey	
Items that might encourage staying— • Work-life balance (e.g., geographic relocation, increased telework, or flexible scheduling) • Increased authority and support (e.g., greater engagement from senior leadership, increased autonomy, or increased support in dealing with poor performers) • Developmental opportunities (e.g., coaching, executive development training, or reassignment to a new agency job) • Compensation and benefits (e.g., increase in pay, performance or other award, or retention incentive)	Items that might contribute to leaving— • Advancement and recognition (e.g., lack of opportunities for development or advancement or a lack of recognition for accomplishments) • Work environment (e.g., senior leadership, political environment, or organizational culture) • Work-life balance (e.g., long work hours, job stress, commute) • Personal reasons (e.g., more attractive job offer, desire to pursue education, health reasons)

Significance

Exit surveys can collect important information from departing employees, and analysis of that information can help agencies identify problems and concerns affecting performance and retention and take action to address and resolve those concerns. Sharing results of exit survey data among agencies will help agencies benchmark their SES programs (including development, which is the focus of an ongoing MSPB study) against others that SES members view as the best in Government.

[18] Angela Bailey, Associate Director, Employee Services, U.S. Office of Personnel Management, Memorandum for Human Resources Directors, "Exit Survey for Senior Executive Service (SES) Members," March 22, 2013. Available at www.chcoc.gov/transmittals/index.aspx.

This effort to develop insight into the SES and improve its functioning directly supports the merit system principles requiring that employees be treated fairly and equitably in employment matters and that the Federal workforce be used efficiently and effectively. It also indirectly relates to all the MSPs and PPPs, given the responsibility of the SES for leading employees and making personnel decisions.

The exit survey is particularly timely given the role and demographics of the SES and continuing concern about its effectiveness as a Governmentwide personnel system.[19] According to a 2012 OPM report, just over two-thirds of SES members agreed that their agency is able to attract and retain high-quality executives.[20] The 2012 OPM survey showed that there was considerable variability in SES members' perceptions across Federal agencies. The importance of making the SES attractive to new entrants and improving the retention of current SES members will only increase in the coming years as retirements from the SES have been increasing since 2009, and by 2017 nearly two-thirds of the SES cadre will be eligible to retire.

Supervisory Training Guidance

OPM's Supervisory Training Guidance and Framework was released in December 2012.[21] All agencies are required to provide supervisors with appropriate training within one year of their initial appointment as well as refresher training at least every three years.[22] Such training must address, at a minimum, strategies to improve employee performance. This requirement, while helpful, does not address the full range of skills that a Federal supervisor must attain to be effective. This guidance was developed with the Federal Chief Learning Officers Council to offer a more thorough supervisory training framework to Federal agencies. This guidance is intended to assist agency instructional designers and training staff in developing agency programs, as well as aspiring, new, and current supervisors to chart the development of their leadership and technical competencies.

The framework lists a number of leadership competencies that employees should possess at successive stages of leadership (aspiring leader, new supervisor, and supervisor after the first year on the job), such as talent management, individual performance management, and organizational performance management. The framework also outlines other training required by a number of sources including ethics, equal employment opportunity, veterans' employment, and handling unacceptable performance.

In incorporating key training recommendations outlined by the National Council on Federal Labor-Management Relations ("LMR Council"), *OPM's Supervisory Training Guidance and Framework* also supports OPM's Goals-Engagement-Accountability-Results (GEAR) pilot program,[23] an initiative of the LMR Council to improve Federal organizational and individual performance.

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[19] For example, following a hearing in 2011, a bill was introduced in the Senate in 2012 (S. 2249, the Senior Executive Service Reform Act of 2012) that would have modified pay and performance management provisions for the SES and required agencies to designate certain administrative or management positions as career reserved.
[20] U.S. Office of Personnel Management, Senior Executive Service Survey Results for Fiscal Year 2011, May 2012, p. 70.
[21] Angela Bailey, Associate Director, Employee Services, U.S. Office of Personnel Management, Memorandum for Human Resources Directors, "OPM's Supervisory Training Guidance and Framework," December 3, 2012. Available at www.chcoc.gov/transmittals/index.aspx.
[22] 5 C.F.R. § 412.202.
[23] The LMR Council's effort seeks to improve management practices and behaviors and the assessment, selection, training, and development of supervisors. GEAR's purpose and focus is described in more detail in the summary of significant actions in MSPB's 2012 Annual Report.

Significance

The seventh merit system principle states that employees should be provided effective education and training in cases where better organizational and individual performance would result. MSPB research documents both the importance of effective supervisors to Federal agency performance and the need to strengthen supervisory training. Federal supervisors are the nexus between Government policy and action and the link between management and employees, ensuring that the decisions made by the President and Congress are implemented through the information and services provided by employees to the American public.[24] Unfortunately, many new supervisors have not received the training and development opportunities they need both to understand the agency's expectations for supervisors and to manage their employees effectively. In a 2007 MSPB survey of Federal employees, less than two-thirds of supervisors said that they received training prior to or during their first year as a supervisor. Of those who received training, almost half (48 percent) received one week or less. Overall, more than three-quarters of new supervisors did not receive training in each of the basic areas of performance management, including developing performance goals and standards; assigning, reviewing, and documenting employees' work; providing feedback; developing employees; evaluating employee performance; and managing poor performers.[25] OPM's supervisory training framework cites the MSPB study report and should help to rectify this situation.

As discussed above, improved training of Federal supervisors is necessary and welcome. However, Federal agencies should recognize the limitations of training. Attendance at training does not guarantee that employees have acquired the competencies that the course purported to impart. Additionally, some competencies needed to excel as a Federal supervisor may not be well-suited to development through training.[26] Accordingly, Federal agencies also need to maintain (or establish) sound programs for selecting supervisors and monitor the performance of supervisors—and take appropriate action when a supervisor is unable or unwilling to adequately carry out supervisory responsibilities.

USA Hire

OPM's USA Hire is a technology-based approach that Federal agencies may use to assess applicants for many commonly-filled Governmentwide occupations. Pilot testing of USA Hire concluded at the end of FY 2012, and its functionality was made available to all agencies on a fee-for-service basis during FY 2013. This functionality includes using existing, online OPM assessments to inform selection and promotion decisions; the ability for agencies to develop customized, online assessments for selection, promotion, and training; and automating existing agency assessments.

USA Hire now includes an assessment module that agencies may use to conduct Pathways Program Internship hiring. This internship battery targets critical general competencies needed for successful performance in any trainee position. Also available are assessment batteries covering 12 occupational series within the Pathways Recent Graduates program. OPM's Pathways Programs were finalized in 2012 to provide streamlined paths to Federal internships and opportunities for careers in Federal service for students and recent graduates.

OPM actively seeks feedback from USA Hire users (i.e., job applicants) on the overall process as well as how user-friendly the automated assessments are. In addition, better ways to track the

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[24] U.S. Merit Systems Protection Board, *As Supervisors Retire: An Opportunity to Reshape Organizations*, October 2009 and *Managing for Engagement – Communication, Connection, and Courage*, July 2009.
[25] U.S. Merit Systems Protection Board, *A Call to Action: Improving First-Level Supervision of Federal Employees*, May 2010.
[26] U.S. Merit Systems Protection Board, *Making the Right Connections: Targeting the Best Competencies for Training*, February 2011.

experiences of hiring managers with the USA Hire process are under consideration as are ways to compile performance data on new hires made through USA Hire to track the overall quality of the individuals hired.

Significance

The use of high-quality assessments that are predictive of future job performance is a cornerstone of good management practice and a standard of a strong merit system. The first merit system principle requires that selection for Federal jobs be based solely on an individual's relative ability, knowledge, and skill, while the second merit system principle states that all employees and applicants for employment receive fair and equitable treatment in all aspects of personnel management. Relying on predictive assessments to select employees as opposed to any other method of selection also promotes the effectiveness and efficiency of the Federal workforce.

Many Federal agencies have neither the expertise nor the funds to develop quality, predictive assessments as well as the platforms needed to host them in an easy-to-use online fashion. The types of assessments that are included in USA Hire have been shown to be better predictors of job performance than point-method ratings of training and experience.[27] Therefore, USA Hire has the potential to improve the quality of hires across the Government while providing economies of scale for all agencies.

Extension of Certain Benefits to Same-Sex Spouses of Federal Employees

In June 2013, the Supreme Court ruled that Section 3 of the Defense of Marriage Act was unconstitutional. Two days later, OPM issued guidance on extending certain employee benefits to gay and lesbian Federal employees and annuitants who were legally married and to their families. The affected benefits included Federal Employees Health Benefits, Federal Employees' Group Life Insurance, Federal Employees Dental and Vision Insurance Program, Federal Long Term Care Insurance Program, Federal retirement programs, and Flexible Spending Account Programs.[28] (OPM made no changes to the employee benefits previously extended to the same-sex domestic partners of Federal employees.)

Significance

Expanding the benefits available to same-sex spouses of Federal employees helps the Federal Government maintain a contemporary and competitive benefits package, which is important to recruiting a qualified and diverse workforce and creating inclusive workplaces, consistent with the merit system principles requiring the Federal Government to strive for a workforce that is representative of all segments of society and treats all employees fairly and equitably.

Proposed Rules for Designation of National Security Positions

On May 28, 2013, OPM and the Office of the Director of National Intelligence (ODNI) jointly issued through the Federal Register a proposed change to OPM's regulations regarding the

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[27] U.S. Merit Systems Protection Board, *Reforming Federal Hiring: Beyond Faster and Cheaper,* September 2006.
[28] Elaine Kaplan, Acting Director, U.S. Office of Personnel Management, Memorandum for Heads of Executive Departments and Agencies, "Guidance on the Extension of Benefits to Married Gay and Lesbian Federal Employees, Annuitants, and Their Families," June 28, 2013. Available at www.chcoc.gov/transmittals/index.aspx.

designation of national security positions.[29] The proposed rule would create a new section in the regulations, 5 C.F.R. § 1400, setting forth rules regarding the designation of positions as national security sensitive and the investigative requirements for such positions.[30] Among other things, the new section is intended to "clarify that 'critical-sensitive' positions include positions involving national security adjudicative determinations generally, not just security clearance adjudications."[31]

Significance

In 2010, the Board was confronted with two adverse action cases—*Conyers v. Department of Defense* and *Northover v. Department of Defense*—that could not be resolved without first addressing the scope of MSPB's review authority for related adverse action appeals.[32] The question was whether, pursuant to 5 C.F.R. Part 732, the rule in *Department of the Navy* v. *Egan,* 484 U.S. 518, 530–31 (1988) (limiting the scope of MSPB review of an adverse action based on the revocation of a security clearance) also applies to an adverse action involving an employee in a "non-critical sensitive" position due to the employee having been denied continued eligibility for employment in a sensitive position.[33] In August 2013, the Federal Circuit held in an *en banc* decision that *Egan* prohibits Board review of agency determinations concerning eligibility of an employee to occupy a "sensitive" position, regardless of whether the position requires access to classified information.[34] For more information, see the "Significant Board Decisions and Court Opinions Issued in FY 2013" chapter of this report.

The proposed regulations will affect the statutory protections and appellate rights afforded to many Federal employees.[35] The use of the designations in this proposed regulation, in conjunction with the holding in *Kaplan v. Conyers*, would not only potentially limit review of the merits of adverse actions, but might also preclude Board and judicial review of whistleblower retaliation and a whole host of other constitutional and statutory violations for Federal employees subjected to otherwise appealable removals and other adverse actions.[36] As the commission of a prohibited personnel practice is an affirmative defense in an adverse action, all prohibited personnel practices may be implicated by this proposed regulation.[37]

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[29] Designation of National Security Positions in the Competitive Service, and Related Matters, 78 Fed. Reg. 31,847 (May 28, 2013).
[30] *Id.*
[31] 78 Fed. Reg. 31,847.
[32] *Conyers v. Department of Defense*, 115 M.S.P.R. 572, ¶ 5 (2010), *rev'd, Berry v. Conyers*, 692 F.3d 1223 (Fed. Cir. 2012), *vacated and petition for rehearing en banc granted* (Fed. Cir. Jan. 24, 2013); *Northover v. Department of Defense*, 115 M.S.P.R. 451, ¶ 5 (2010); *rev'd*, *Berry v. Conyers*, 692 F.3d 1223 (Fed. Cir. 2012), *vacated and petition for rehearing en banc granted*, (Fed. Cir. Jan. 24, 2013); 5 C.F.R. § 732.201 (2010). *See* 75 Fed. Reg. 56146 (notice of oral argument); 75 Fed. Reg. 6728 (opportunity to file briefs).
[33] *Conyers v. Department of Defense*, 115 M.S.P.R. 572, ¶ 5; *Northover*, 115 M.S.P.R. 451, ¶ 5. *See* 75 Fed. Reg. 56146 (notice of oral argument); 75 Fed. Reg. 6728 (opportunity to file briefs).
[34] *Kaplan v. Conyers*, No. 2011-3207.
[35] *Berry v. Conyers*, 692 F.3d 1223, 1239 (2012) (Dyk, J., dissenting). The dissent to the court's *en banc* decision states that "Meanwhile, the number of employees affected is likely to increase, as a new rule proposed by OPM would allow agencies to designate as non-critical sensitive any [p]ositions not requiring eligibility for access to classified information, but having the potential to cause significant or serious damage to the national security…If positions of grocery store clerk and accounting secretary are deemed to be sensitive, it is difficult to see which positions in the DoD or other executive agencies would not be deemed sensitive."
[36] *Berry v. Conyers*, 692 F.3d 1223, 1239 (2012) (Dyk, J., dissenting); *Conyers v. Department of Defense*, 115 M.S.P.R. 572, ¶ 24; *Northover*, 115 M.S.P.R. 451, ¶ 24.
[37] 5 U.S.C. § 7701(c)(2)(B) (requiring the Board to overturn an agency action if the decision was based on any prohibited personnel practice).

Guidance on USERRA

On July 19, 2012, the President issued a memorandum to improve Federal agency compliance with the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) through outreach, education, and oversight.[38] USERRA protects individuals who have performed uniformed service in accordance with 38 U.S.C. § 4301-4335 from employment discrimination on the basis of that service, provides for the prompt restoration of civilian employment upon return to civilian life, and prohibits reprisal for exercising a right under the statute.

In September 2013, OPM published the guidance required by the Presidential memorandum.[39] This guidance addresses—

- Agency training efforts;
- New data collection procedures;
- New metrics to evaluate the implementation of the Presidential memorandum;
- Guidance and tools to assist agencies in reintegrating service members as quickly and as efficiently as possible to civilian life; and
- Strengthening relationships between service members and stakeholder groups.

Significance

Public policy has long required the Federal Government to be a model employer of veterans,[40] and full compliance with USERRA is essential to that goal. OPM's guidance should help Federal agencies better understand and meet their obligations under USERRA, consistent with the merit system principle requiring equitable treatment of employees, and also may help Federal agencies avoid the prohibited personnel practice of an action (or inaction) that would violate a veteran's preference requirement. As illustrated by the decision in *Butterbaugh v. Department of Justice*[41] and related appeals before MSPB,[42] Federal agencies have not always accurately understood their obligations under USERRA.

OPM's guidance also emphasizes the integration of service members into the civilian service, going beyond nominal compliance with legal requirements. Such integration supports the merit system principles' vision of a "workforce representative of all segments of society" and the efficient and effective use of a diverse workforce.

Proposed Nondiscrimination Rules

In September 2013, as a part of its ongoing retrospective analysis of existing regulations, OPM proposed changes to certain nondiscriminatory provisions found in Title 5 of the Code of Federal

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[38] Ensuring the Uniformed Services Employment and Reemployment Rights Act (USERRA) Protections, 77 Fed. Reg. 43,699 (July 25, 2013).
[39] Available at http://www.chcoc.gov/transmittals/index.aspx.
[40] For example, veteran's preference in Federal employment has its origins in a 1865 Congressional resolution (Res. of Mar. 3, 1865, No. 27, 13 Stat. 571).
[41] 336 F.3d 1332 (Fed. Cir. 2003). In this case, the U.S. Court of Appeals for the Federal Circuit held that Federal employees had to take military leave under 5 U.S.C. § 6323(a) *only* for days spent training with military reserves on which they were *otherwise required to work* at their Federal jobs.
[42] For several years following the decision in *Butterbaugh vs. Department of Justice*, MSPB received appeals in which individuals alleged—correctly, in many cases—that they had been improperly required to take leave to meet military training obligations.

Regulations.[43] The analysis also further responded to a Presidential memorandum of June 17, 2009, that directed OPM to issue guidance regarding compliance with certain civil service laws, rules, and regulations including 5 U.S.C. 2302(b)(10) which make it unlawful to discriminate against Federal employees on the basis of conduct that is not related to job performance. The changes aim to provide greater consistency among nondiscriminatory provisions and reflect recent legal developments including enactment of the Genetic Information Nondiscrimination Act of 2008, Pub. L. 110-233, which prohibits discrimination on the basis of genetic information.

Significance.

The proposed regulations would include sexual orientation as a nondiscriminatory factor in certain competitive Federal employment practices, including agency merit promotion programs, the selection of Federal employees for training and to receive student loan repayments, and in the operation of merit personnel systems in accordance with the Intergovernmental Personnel Act of 1970. The changes would provide uniform nondiscrimination provisions to the extent permitted by law and, as such, would provide no new avenues of redress for allegations of sexual orientation discrimination.

OPM Significant Actions Underway or Completed

This section lists selected OPM significant actions discussed in previous MSPB Annual Reports that were completed or remained underway in FY 2013. This year's report does not discuss these actions in detail because: (1) further action or results are pending; or (2) the intent and significance of the final action is essentially unchanged from the (previously reviewed) proposed action.

The table below lists the action, its current status, and the previous MSPB Annual Report(s) which discussed the action. MSPB intends to monitor actions in progress and will discuss those, as appropriate, in future Annual Reports or merit systems studies.

OPM Action	2013 Status	Year(s) Discussed
Recruitment, relocation, and retention incentives	Final regulations issued in August 2013.[44]	2010
Pathways Programs	Fifty-seven agency memoranda of understanding (which are required to make an appointment under Pathways) are in place. Hiring has been limited but continues to increase.	2011, 2012
Goals-Engagement-Accountability-Results (GEAR) pilot	Pilot programs continue. The Chief Human Capital Offices (CHCO) Council is to review workgroup recommendations in FY 2014 in anticipation of a Governmentwide roll-out.	2012
Standardized SES performance management system	Additional agencies are implementing this system.[45]	2011, 2012

[43] Nondiscrimination Provisions (Proposed rule), 78 Fed. Reg. 54,434 (September 4, 2013).
[44] Pay Under the General Schedule and Recruitment, Relocation, and Retention Incentives, 78 Fed. Reg. 49,359 (August 14, 2013).
[45] As outlined in a 2012 joint OPM/OMB memorandum to the CHCO Council, adoption of the standardized system is effectively required to receive continued certification of the agency's SES performance appraisal system. Under Public Law 108-136 (2003), that certification enabled an agency to set the pay of an SES member above the rate for Executive Level III, up to the rate for Executive Level II.

OPM Action	2013 Status	Year(s) Discussed
Phased retirement	Proposed regulations issued in June 2013.[46]	2012
Revision of appointment authority for persons with disabilities	Final regulations to simplify the authority and update terminology were issued in February 2013.[47]	2011

[46] Phased Retirement, 78 Fed. Reg. 33,912 (June 5, 2013).
[47] Excepted Service—Appointment of Persons With Intellectual Disabilities, Severe Physical Disabilities, and Psychiatric Disabilities, 78 Fed. Reg. 12,219 (February 22, 2013).

Financial Summary

Fiscal Year 2013 Financial Summary

(Dollars in thousands)

Financial Sources	
FY 2013 Appropriation	$ 38,152
Civil Service Retirement and Disability Trust Fund	2,340
Total Financial Sources	$ 40,492
Obligations Charged to FY 2013	
Personnel Compensation	$ 22,618
Personnel Benefits	6,051
Travel of Things	92
Travel of Persons	209
Rents, Communications and Utilities	4,040
Printing and Reproduction	51
Other Services	1,316
Supplies and Materials	132
Equipment	748
Reimbursable Obligations	2,340
Total Obligations Incurred	$ 37,597

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