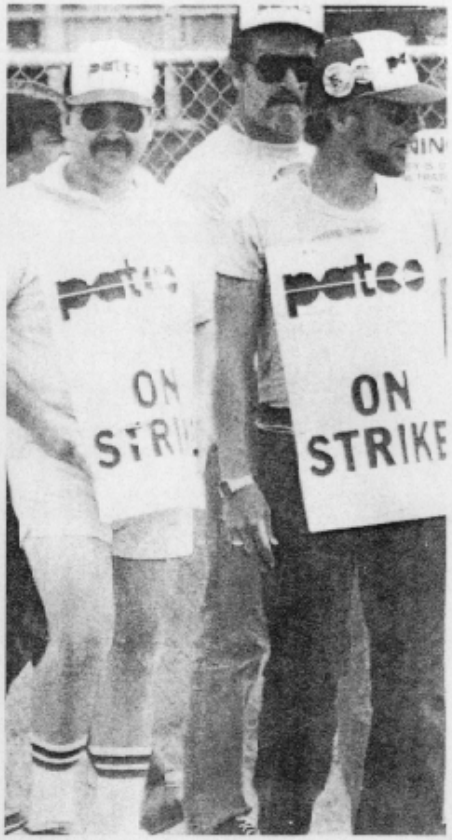


U.S. Merit Systems Protection Board Fourth Annual Report

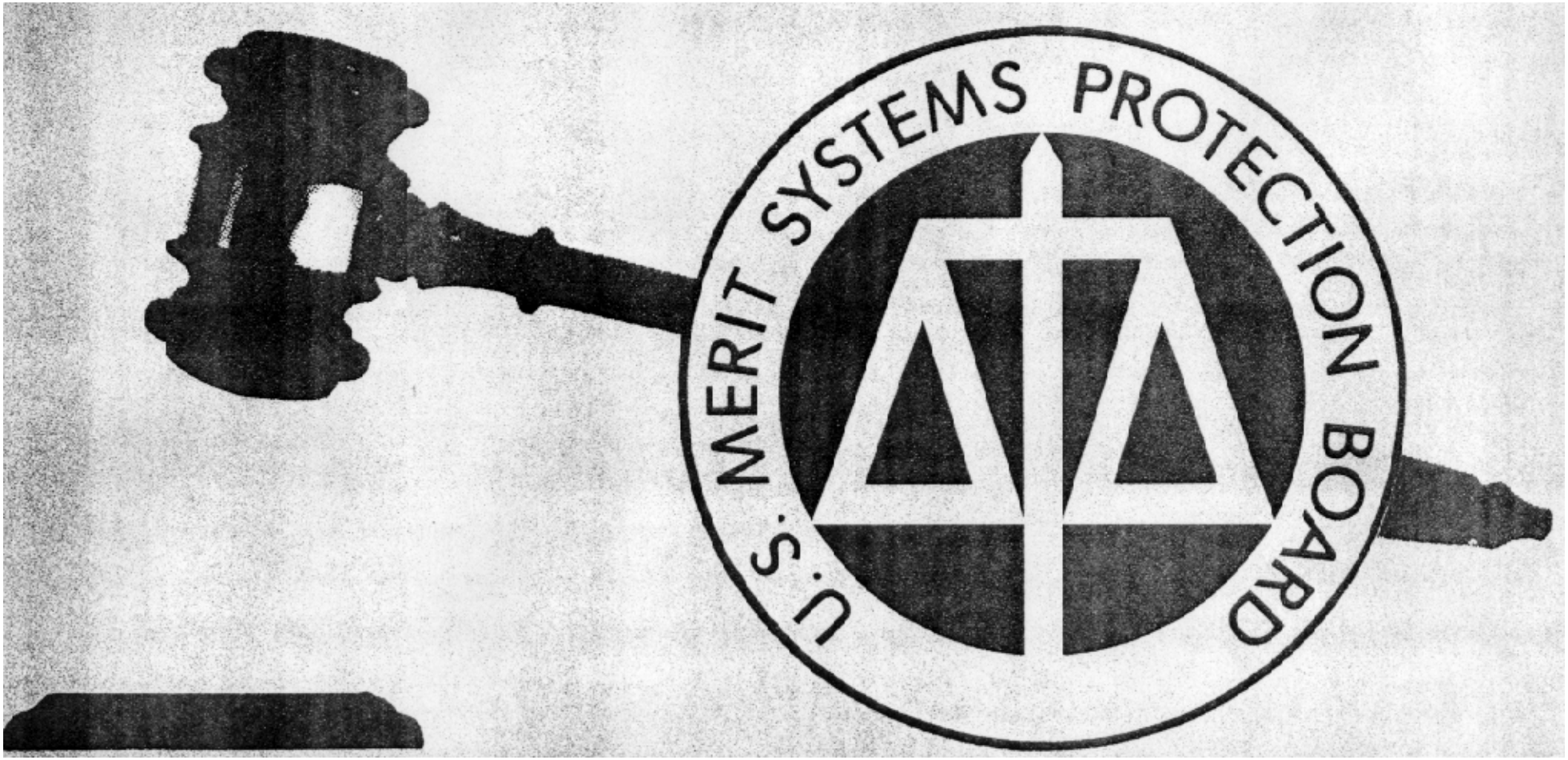
U.S. MERIT SYSTEMS PROTECTION BOARD

The U.S. Merit Systems Protection Board

Herbert E. Ellingwood, Chairman

Ersa H. Poston, Vice-Chair

Dennis M. Devaney, Member


U.S. MERIT SYSTEMS PROTECTION BOARD

Letter of Transmittal

MERIT SYSTEMS PROTECTION BOARD
Washington, D.C. 20419

The Chairman

Sirs:

In accordance with Section 202(a) of the Civil Service Reform Act of 1978 (5 U.S.C. Sec. 1209(b)), it is my honor to submit the Fourth Annual Report of the Merit Systems Protection Board. This Report covers the activities of the Board for Calendar Year 1982.

Respectfully,

Herbert E. Ellingwood

Herbert E. Ellingwood

The President of the United States
The President of the Senate
The Speaker of the House
of Representatives

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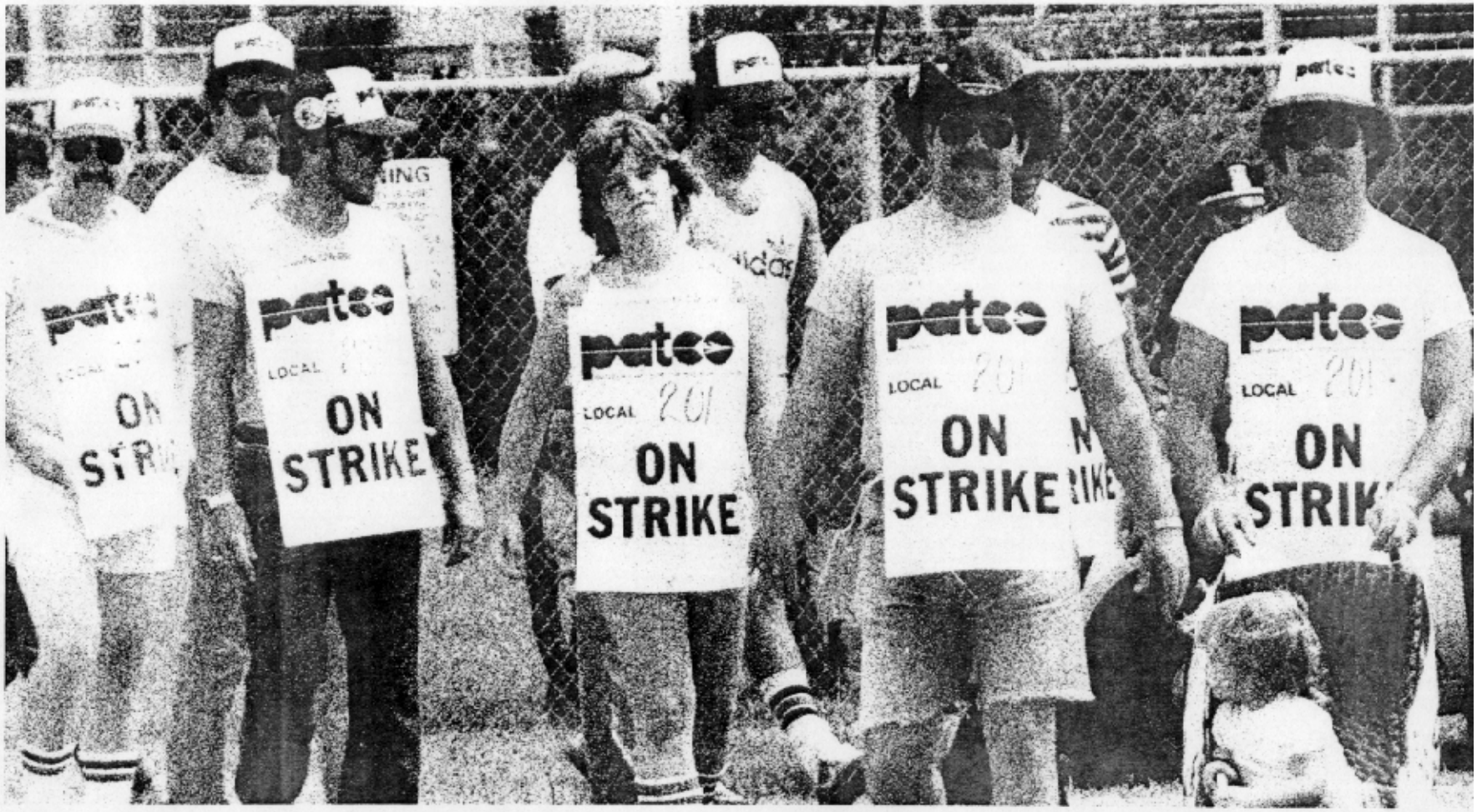
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Introduction

The Merit Systems Protection Board was created pursuant to Reorganization Plan No. 2 of 1978 and the Civil Service Reform Act of 1978 ("the Act"). A quasi-judicial agency, the Board is comprised of a bipartisan three-member panel and charged with the duty of acting as the "watchdog" of the Federal merit systems. This mandate is implemented by the Board through the fulfillment of its statutory duties under the Act including:

- Adjudicating employee appeals and actions brought by the Special Counsel in a fair and impartial manner;
- Conducting special studies of the merit systems to determine whether they are free from prohibited personnel practices;
- Analyzing and reporting on the significant activities at OPM; and
- Reviewing the regulations issued by OPM, to determine whether they require the com-mission of prohibited personnel practices, on their face or as implemented by an agency.

Because the Board has broad powers in reviewing the personnel practices of OPM and of the numerous government agencies within its jurisdiction, Congress took extra cautionary measures to assure that the Board would have that degree of independence necessary to properly exercise its authority. These protections include:

- Guaranteeing the independence of the Board members by providing for non-renewable terms and permitting removal only under extraordinary circumstances;
- Providing the Board with "bypass" authority by permitting it to make simultaneous submissions of budgets and legislative proposals to Congress and the President, thus eliminating the need for prior approval by the Office of Management and Budget (OMB);
- Permitting the Board to appoint personnel essentially free of approval by the Executive branch; and
- Representing itself in the Federal courts except before the Supreme Court.

In its fourth year of operation, the Board focused largely upon:

- Improvement of Board management;
- Streamlining both its organization and procedures;
- Coping with a 16% budget cut imposed by continuing resolutions in December of 1981;
- Obtaining supplemental funding necessary for Board operations, given the enormous increase in workload and large cut made in the Board's budget;
- Adjudicating the approximately 11,200 air traffic controller (ATC) appeals filed in the fall of 1981, and,
- Adjudicating the 10,618 appeals in all other categories received for adjudication (by far the largest workload ever).

As a result of these efforts in 1982, major changes were effected in the organization of the Board as well as in its policies and procedures: in short, the Board streamlined much of the way it performed its work. With improved efficiency and cost controls, the Board made enormous progress on the large numbers of appeals pending in the regions. Over 9,000 decisions were issued, and work on the remaining 7,899 ATC appeals was nearly complete with their issuance by the February 1, 1983 deadline nearly assured.

Summary

The fourth year of operation of the Merit Systems Protection Board was one with enormous management challenges, many of them the result of events that happened in the latter part of 1981,

The controller strike of August, 1981 resulted in 11,225 appeals being filed with the Board's 11 regional offices that fall. No discussion of Board operations in 1982 could overstate the impact that the ATC appeals were to have on the Board: every office and every employee felt the repercussions. To provide some perspective, in the entire year of 1980, the Board processed 5,544 appeals. In 1981, that figure had grown to 7,154. Thus, the ATC appeals alone represented 2 year's work when compared to 1980, and one and a half year's when compared to the 1981 adjudications.

Add to those appeals the 10,618 non-ATC appeals that were received or already on hand in the regions in 1982 and the significance of the ATC cases should be clear. In 1982 a total of 21,843 cases were in the regions for action, a load more than double that of any previous year.

In December of 1981, the Board's budget was cut 16% as a result of a continuing resolution, reducing the Board's original $15.037 million appropriation by FY'82 to $12.7 million.

As already explained, the impact of the ATC appeals alone would have been enormous, but when coupled with the budget cut, the impact on Board operations were little short of devastating.

Simply stated, much of the Board had to find new ways to conduct its business. New and less costly ways had to be found that would accomplish more: personnel had to be reallocated, resources shifted, policies revised.

The new Assistant Managing Director for Regional Operations had to devise ways for the regional offices to cope with the enormous numbers of appeals;

In the regional offices themselves, leave was canceled, work was reallocated, methods were changed; The Office of the Secretary expanded its staff and created an ATC case processing center to cope with the enormous paperwork generated by those cases;

The Office of the Administrative Law Judges coordinated the national discovery process: who should the controllers be able to question, and how could it be done so that each appellant would have the opportunity for input should he/she so desire? The Judges were also responsible for issuing subpoenas, ordering the taking of depositions and ordering responses to written interrogatories for all of the regional offices:

The Board itself, while providing the leadership for all of the activity, had to address new areas of civil service law in a series of precedent setting decisions on issues central to the adjudication of the ATC cases;

The Office of General Counsel, while providing expertise to the Board and the regions concerning legal policy issues, had to defend the Board in many Federal circuits as controllers filed a variety of suits against the Board. This fact was reflected in the enormous increase in litigation cases from 87 in 1981 to 183 in 1982.

The Office of Legislative Counsel, while trying to focus its efforts on approval of the all-important emergency supplemental funding bill, found the Board thrust into the national spotlight by its role in the ATC events and, in its public information role, had to respond to a battery of national press inquiries. The Board found itself in the national spotlight again in July, when it became the first Federal agency forced to furlough, again requiring a major public information effort.

No Board office escaped the impact: virtually all contributed in very significant ways too numerous to enumerate here.

As a result, 1982 was a year of management reform for the Board, with many of the changes implemented during the crisis made permanent later. Among the innovations implemented or prepared for implementation were:

- Development of a sound internal auditing program;
- Improvement of its automated case tracking system;
- Development of an expedited appeals procedure expected to be in use by early 1983;
- Establishment of fixed, neutral hearing sites;
- Elimination of a dual file for appeals and the creation of a single file appeals system;
- Transfer of Board payroll and personnel systems to a more efficient and controlled operation at the Department of Interior;
- Simplified and cost-saving document service procedures;
- Conducting a financial audit survey for identification of financial control areas needing improvement.

- Elimination of the use of certified mail for transmission of documents and notices related to the processing of appeals.
- Introduction of new voluntary discovery procedures, and requiring the parties to exchange their filings directly, eliminating Board service of documents and supervision of the discovery process by Board presiding officials.

The sum of these changes was a streamlining of Board operations, with real savings realized not only budgetarily, but through increased efficiency in dealing with the large workload.

Thus began 1982, the Board’s fourth, and most trying year, with a tripling of its previous workload, and loss of one-sixth of its budget.

December 1981 was also very significant to the shaping of the Board itself for 1982. Herbert E. Ellingwood was appointed Chairman that month, and one of the Board's early members, Ronald Wertheim, resigned to accept a judgeship. His resignation left the Board with one vacancy, which was not filled until August with the appointment of Member Dennis M. Devaney.

Spring was marked by intense negotiations with Congress over approval of a $4 million emergency supplemental appropriation. This money, however, was just one small part of a much larger emergency appropriation for several agencies which was caught in the middle of a number of controversial issues involving both Congress and the White House. Subsequent difficulties resulted in two Presidential vetoes before the version the President signed on July 18 was sent to the White House by the Congress.

By early July, however, the Board had already been forced to furlough its entire staff, placing virtually everyone on half-time status upon return from the July 4 weekend. This condition continued for approximately two weeks until the emergency appropriation was signed into law.

Ironically, during this same period, the Board was forced to defend itself from fired air traffic controllers, who, anxious to have their cases heard by the Board, were arguing in Federal court, even while the Board's staff was on furlough for lack of funds, that the delay in holding their hearings constituted irreparable damage and a deprivation of their right to due process.

The difficult budget situation had other impacts on Board operations as well. In December of 1981, all hearings in the regions were temporarily suspended, travel by presiding officials was suspended, and when hearings were resumed in February 1982, they were held only in the regional offices. The travel ban stayed in effect through late July. Additionally, the Board's policy of providing appellants were free transcripts of each hearing was abandoned. All of these cost saving measures, however, were not sufficient to avert July's furloughs. A strict hiring freeze had reduced staff through attrition from approximately 340, to just over 300.

However, by fall a larger staff was focusing its efforts on the efficient processing of the ATC cases, as operations escalated rapidly following the July crisis.

So, despite the problems and frustrations, 1982 was a year of real achievement in which the staff, drawn together by adversity, rose to the challenge, and by year's end had completed all of the air traffic controller hearings, had issued 3,273 ATC decisions and was preparing to issue the remainder prior to the February 1, 1983 deadline set by the Board. A total of 9,039 decisions were issued in 1981 by the Regional Offices alone.

The Board

The three Board members are appointed by the President with the advice and consent of the Senate. In order to assure the independence of the Board, the designation of any member as Chairman must be approved by the Senate; members serve a seven-year term and may not be reappointed; and members may be removed only under the higher than ordinary standard of inefficiency, neglect of duty, or malfeasance in office.

Herbert E Ellingwood **was** appointed by President Reagan to be the Board's second Chairman on December 14, 1981. At the time of his appointment, Ellingwood was serving as Deputy Counsel to the President. Prior to his White House work, he was in private law practice with the firm of Caldwell & Toms in Sacramento, California.

From 1975 to 1979 Ellingwood was Special Assistant Attorney General for California; Legal Affairs Secretary to Governor Reagan from 1969 to 1974; Legislative Representative for the State Bar of California from 1966 to 1969; Legislative Advocate for the Law and Legislative Commit tees of the District Attorneys' and Peace Officers' Associations; and Deputy District Attorney for Alameda County, California from 1960 to 1966. His military service began in the Army Counter Intelligence Corps in 1953. He completed his, military service in 1956 as a First Lieutenant.

Ersa H. Poston was sworn in as Vice-Chair of the Board on January 2, 1979. Poston had been a Commissioner of the United States Civil Service Commission since 1977 and became a member of the Board pursuant to the provisions of Reorganization Plan No. 2 which designated the Board as the successor organization to the Civil Service Commission.

Prior to becoming a member of the Civil Service Commission, Poston served as a member of Governor Nelson A. Rockefeller's Cabinet, as President and Member of the New York State, Civil Service Commission. During this time she. was also Chairperson of the President's Advisory Council on Intergovernmental Personnel Policy established under the Intergovernmental Personnel Act. Prior to accepting this position, she was Director of the New York State Office of Economic Opportunity and Confidential Assistant to Governor Rockefeller.

In addition to serving as the Vice-Chair of the Board, Poston, a former U.S. Delegate, 31st Session of the United Nations General Assembly, is the current U.S. Member of the International Civil Service Commission. She has also been the Vice-Presiding Officer of the National Commission on the Observance of International Women's Year and was a Member of the - Panama Canal Zone Company Board of Trustees.

Dennis M. Devaney was appointed by President Reagan to be Member of the Board on August 20, 1982. At the time of his appointment. Devaney was in private law practice in Washington, D.C.

From 1977 to 1979, Devaney had been Counsel to the Food Marketing Institute and from 1975 to 1977, Assistant General Counsel of U.S. Brewers Association. During 1973 to 1974, Devaney served as Legislative Assistant to the Vice Chairman of the Senate Judiciary Committee of the Maryland General Assembly.

While in college and law school, he held part-- time positions with NASA's Goddard Space Flight Center from 1972 to 1975 and with the Office of Congressional Relations, Department of State from 1965 to 1969 Devaney served on active duty in the U.S Navy from 1970 to 1972.

Herbert E. Ellingwood
Chairman

Ersa H. Poston
Vice Chair

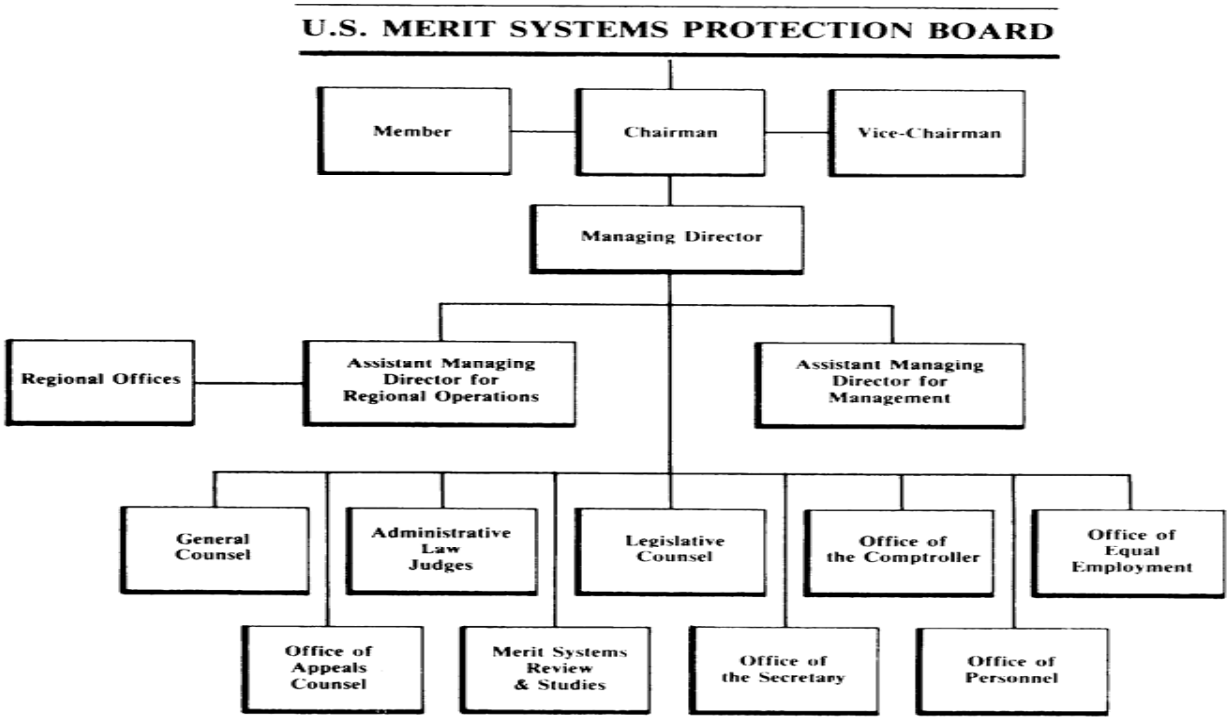
Dennis M. Devaney
Member

Organization of the Board

The Board is comprised of a number of operating offices which carry out the duties of the organization. While the three-member Board has responsibility for implementing its statutory functions, the Chairman, as Chief Executive Officer, is vested with responsibility for its overall operations.

Authority for the day-to-day management of the Board, both in headquarters and its eleven regional offices, is delegated to the *Managing Director* by the Chairman.

The Assistant Managing Director for Regional Operations has responsibility for the operation of the regional offices, for reviewing the initial decisions of those offices, and recommending that the Board reopen cases or take other appropriate actions. *The Assistant Managing Director for Management is* a newly created position responsible for formulating, planning, and coordinating improvements to the policies, procedures, administration and management of the agency.



The *Office of General Counsel* provides legal counsel to the Board and offices of the Board, and represents it in all court actions except those before the Supreme Court. It also participates in the review of Office of Personnel Management regulations.

The Office *of Appeals Counsel* prepares draft opinions and orders for the Board based upon its analyses of both petitions for review of initial decisions rendered in the regions, and the records of cases reopened by the Board on its own motion.

The Office *of Legislative Counsel* has dual responsibility for the agency's Congressional affairs and public information functions. In its Congressional affairs role, the Office advises the Board on legislative matters, responds to Congressional inquiries, prepares Board testimony and comments on other legislative matters, and has general responsibility for Congressional relations. In its public information role, the office provides information to the press and public, advises the Board on press matters, prepares for the Board press releases, pamphlets, and the annual report, as well as speeches, the internal newsletter *News of Merit,* and provides audiovisual and graphic arts services.

The *Office of Administrative Law Judges* adjudicates cases under the Hatch Political Activities Act, hears disciplinary cases and proposed removals of administrative law judges and, upon assignment from the Board, conducts hearings in sensitive and complex appeals as well as proceedings initiated by the Special Counsel. This office also has jurisdiction over, and issues orders in response to, motions for subpoenas and discovery filed in the Board's regional off ices.

The Office *of Merit Systems Review and Studies* carries out the Board's reviews of Government-wide personnel policies and practices to ensure they are free from prohibited personnel practices and achieve results consistent with the statutory merit system principles. The Office also conducts annual oversight reviews of the Office of Personnel Management (OPM) and participates in the review of OPM-issued rules and regulations. The Off ice's findings are reported to Congress and the President and made available to the public.

The Office *of the Secretary* performs the Board's ministerial functions which include: ruling on certain procedural matters for the Board relating to case adjudication; issuing Board opinions and orders; making initial determinations on requests submitted under the Freedom of Information and Privacy Acts; and publishing Board decisions and orders. Additionally, the Secretary is responsible for controlling dockets on pending cases; authenticating official records and certifying those records to the courts, Equal Employment Opportunity Commission and others; recording and keeping minutes of Board meetings; and making information available to the public through a public documents room.

The Office *of Administration* is responsible for coordinating the administrative services for the Board and includes the Library, and the divisions of Personnel Management, Budget and Finance, and Administrative Services which handles facilities, transportation, and procurement for the Board.

The *Office of Internal Audit and Control* was established in 1982 and functions like an inspector general for the Board, reviewing accounting, procurement and management practices to ensure their integrity and efficiency.

The Office *of Special Counsel* has independent investigatory and prosecutorial authority and is responsible for bringing certain actions before the Board. The Special Counsel is required by 5 U.S.C. 1206(m) to submit an annual report to the Congress; therefore, this report will not address Special Counsel activities except as they pertain to Board orders and decisions.

Adjudication of Cases: The Administrative Framework

Adjudication of appeals is by far the most time consuming activity of the Board and consequently utilizes the greatest proportion of its resources. In 1982, because of the large number of ATC cases, the Board's workload was even more concentrated in this area.

Adjudication of cases generally begins with the filing of an appeal in one of the Board's 11 regional offices. Therefore, a brief examination of the work of those offices is appropriate.

Regional Operations

Even apart from the 1 1,000-plus ATC appeals received in the last quarter of 1981, the Regional Offices received 8,499 appeals in 1982, 14% over the 7,300 received the previous year.

Several events affected the operations of the regional offices and their adjudication of appeals effort in 1982. In January, the new Chairman announced his first major change in the Board's organizational structure. To better accommodate the demands on management caused by the growth in both the organization and its workload, the duties of the Deputy Managing Director were divided and two Assistant Managing Director positions were created, one to concentrate upon revising and streamlining Board management, the other, to oversee regional operations.

The Assistant Managing Director for Regional Operations was immediately confronted with several challenges. Even as the position was created, a moratorium on hearings was in effect because of the funding shortages that were to plague the Board for much of the year. While the hearing moratorium in the regions was lifted - in early February, a travel ban on presiding officials remained in effect. This meant that presiding officials could not travel to hearing sites convenient to the parties; the parties had to come to the regional offices. Since the parties were not always in a position to travel when the distances were long, the travel moratorium resulted in hearing delays for over 500 appellants.

But even while these restrictions were in place, the regional offices were moving forward with the local discovery and the processing of the 11,000 ATC cases before them.

The fiscal crisis in early July resulted in all Regional employees being furloughed to half time for two weeks, bringing work there to a virtual standstill. With approval of the emergency supplemental funds on July 18, a major began to build the staffs of the regional offices. Approximately 80 persons (permanent and temporary) were added to assist in the appeals processing and adjudication, and eight permanent regional directors were appointed, In September, a legal training seminar was con ducted for 32 of the new attorneys and paralegals.

Office of Appeals Counsel

Decisions issued in the region do not become final for 35 days. During that time either party,

Office of Personnel Management or Special Counsel, can petition the Board to review the "initial" decision, or the Board can review it on its own initiative. The petitions for review (PFR's), as they are known, are received by the Secretary of the Board, who after taking appropriate measures to ensure a complete record, forwards the case to the Off ice of Appeals Counsel (OAC), which reviews it, recommends action, and drafts appropriate wording for the Board's Consideration.

The OAC's workload also reflected the higher work levels seen throughout the Board. In 1982, the Office of Appeals Counsel prepared decisions covering 1,784 appellants, a 65% increase over the 1,161 completed in 1981.

Major Appeals Decisions of the Board

The Board has a major responsibility to its public to thoroughly examine issues that come before it in appeals and to provide agencies, employees and its own presiding officials with precedent-setting opinions applying and interpreting the Provisions of the Civil Service Reform Act.

This year, as in previous years, the Board issued a number of decisions addressing and interpreting subjects of significance that become a guide for future appeals. Among the significant decisions issued by the Board in 1982 were:

Jones v. Tennessee Valley Authority AT07528010300 (2-19-82). The Regional Office sustained appellant's removal based on his alleged participation in a work stoppage in violation of the Agency's General Agreement. The Board found that appellant did not participate in an unauthorized work stoppage and concluded that the appellant reasonably feared injury if he crossed the picket line. The appellant's explanation for his appearance among the picketers was found to be reasonable and therefore the Board reversed the action .

Burrows et a/ v. *Government of the District Of Columbia* DC03518010087 (3-4-82). The Board held that it has the authority to award attorney fees to successful employees of the D.C. Government under provisions of the Back Pay Act, and that it would do so in accordance with requirements of 5 USC 7701 (g) that fees be reasonable and in the interest of justice.

Webb v. U.S. Postal Service SE07528010037 (3-18-82). The Board held that an adverse action based on charges concerning periods of approved leave would not promote the efficiency of the service and therefore could not be sustained.

Ketchem v. Department of Transportation, FAA DA075281F0713 (5-28-82). The Board held that the occurrence of a strike by air traffic controllers(which began on August 3, 1981) was a fact which may be officially noticed under the Board's regulations; that the strike was still in progress on August 6 and that official notice of it could extend through that date but not beyond it; and that such a strike was unlawful under 5 USC 7311 and 18 USC 1918.

Hellman v. Office of Personnel Management AT300A7990002 (5-28-82). The time in grade restrictions applied as a result of 5 CFR 300.602 were found, in this case, not to be appealable employment practices within the purview of 5 CFR 300.104. Rather, as OPM contended, they are essentially fiscal in nature.

Martin et a/ v. *Department of Treasury* AT075209044 (6-1-82). The Board determined that an indefinite suspension pending the out come of a criminal trial or investigation, is a permissible action. The Board required that such an action be imposed only if it has an "ascertainable end in sight"; that it be based on a finding of reasonable cause, which is virtually synonymous the with the probable cause which is necessary to support a grand jury indictment; and that it meet both the tests of promoting the efficiency of the service and constituting a reasonable penalty.

Pope *v. Department of Transportation* SE07528210074 (6-10-82). The Board deter mined that a presiding official must reasonably exercise discretion in each individual case where an appellant requests transfer of his case from the appropriate regional office. The Board set forth 11 specific factors which should be included in the presiding official's consideration before making that decision. As to the facts of the specific case, the Board determined that both parties had set forth persuasive reasons for their choices as to hearing site and that it would not overrule the presiding official's decision to transfer the case.

Simms et a/ v. *Government of the District of Columbia* DC03518010131 (7-16-82). In this case, issued pursuant to the Board's contract with the District of Columbia rather than under statutory jurisdiction, the Board found that under its new Comprehensive Merit Personnel Act the agency was under an obligation to establish a single career service and abolish the previous dual classification system of excepted and competitive service employees. Thus it held that the agency's action in establishing separate retention registers for employees formerly in the excepted and competitive service was improper, and that the RIF, therefore, had not been conducted pursuant to law.

Vergagni v. Office of Personnel Management DC831L8010270ADD (7-19-82). The Board found that it is authorized under 5 USC 7701 (g) to award attorney fees in disability retirement cases, but that it would only be in the interest of justice to do so in cases in which the agency, rather than the employee, initiated the application. In such a case, the Board noted that fees would be payable by the initiating agency rather than OPM.

McClaskey v. Energy SE07528110094 (8-16-82). The Board held that while it has authority to judge whether a penalty is reasonable, it will give due weight to the agency's primary discretion in exercising the managerial function of maintaining employee discipline and efficiency. The Board found that the appellant's offense jeopardized the agency's basic requirement of honesty and therefore removal was reasonable.

Paniagua v. Air Force DA03538110015 (9-16-82). Notwithstanding the fact that the appellant was subjected to a reduction-in-force separation two days after he enlisted in the Army Reserve, the Board held that the appellant was entitled to restoration rights under 38 USC 2024(b)(1), since the appellant entered active duty in response to orders and served no more than four years of active duty. The Board noted that it was the intent of Congress to ensure that individuals returning to civilian life after military service would be able to resume their previous employment without any loss.

Curry v. Navy SF0752811627 (9-21-82). The Board held that taking action against an employee to "promote the efficiency of the service" includes dismissal for speech as well as for other conduct when the comments made are subversive to order and discipline in the workplace.

Wright v. USPS DC03538110009 (9-24-82). The Board held that it was contrary to the purpose of 5 USC 81 51 (b)(2) for an agency to refuse to rehire an employee who had recovered from an on-the-job injury. The agency's refusal was based on previous misconduct for which the employee had not been dismissed.

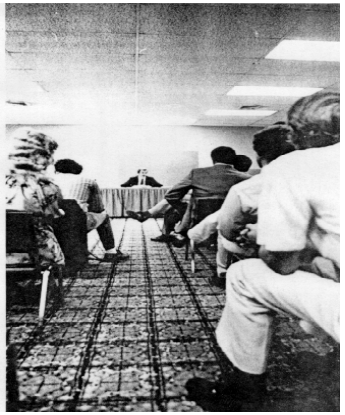
Allen v. Navy PH0752090081 ADD (10-25-82). The Board reaffirmed its authority to order an agency to cancel a personnel action under 5 USC 1205(a). It also held that an appellant is not entitled, upon restoration, to shift differential since base pay does not include any differential for working night shifts. The Board further held that the agency had discretion to restore the appellant to the day rather than the night shift.

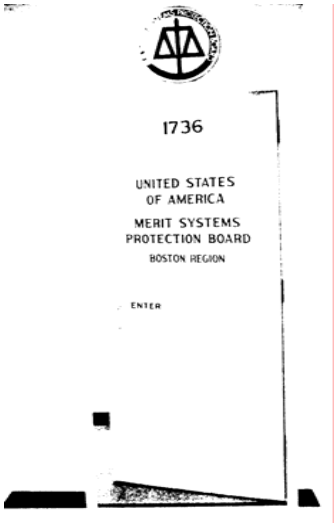
Schapansky v. DOT DA075281F1130 (1 0-28-82). The Board held that evidence of an employee's unauthorized absence from duty and his presence among picketers established a "prima facie" indication that the employee participated in a strike. The Board found that the appellant failed to rebut the agency's evidence and concluded that the appellant did participate in a strike. The Board further determined that the penalty of removal was reasonable since participation in a strike against the government constitutes extreme misconduct and hampers the government's attempt to complete its mission.

Johnson v. DOT DC075281F0998 (11-10-82). Appellant denied his participation in the air traffic controller strike and contended that he failed to work his scheduled tour of duty out of fear for his life. The Board set forth the proposition that in order to establish a defense of coercion, the appellant must demonstrate that his failure to report for work was the result of a threat of physical danger which a person of ordinary firmness would not be expected to resist. Under this prescribed standard, the Board found that the appellant had not established coercion and therefore failed to rebut the prima facie showing that he participated in the strike.

Wallace v. Treasury NY351D8190018ADD (1 1-22-82). The Board affirmed a finding that 18 USC 205 precludes an award of attorney fees to a federally employed attorney representing an appellant before the Board. The Board further determined that costs are a part of attorney fees and that an award of costs alone is not authorized by 5 USC 7701(g)(1).

Kufel v. U.S. Postal Service CH07528110245. The Board elaborated on its policy requiring that correct charges be made and that removal cannot be based on approved leave. Kufel was charged with being absent without leave. The agency's evidence appeared to support a charge of inability to meet time and attendance requirements. However, the appellant presented evidence rebutting the specific AWOL charge. The Board concluded that since the agency failed to prove its specific charge, it was precluded from supporting the removal action by other evidence concerning the appellant's overall attendance record which was not relied on by the agency in proposing the adverse action.





Actions Involving the Office of General Counsel

Original Jurisdiction Cases

In addition to those appellate cases just discussed, there is another significant body of Board orders and opinions: The Board's original jurisdiction case, in which the Office of General Counsel provided the primary staff work

The majority of cases heard by the Board under its original jurisdiction authority are action brought by the Special Counsel. These cases constitute only a small fraction of the Board adjudications, but they frequently result in important interpretations of the Civil Service Reform Act.

Cases filed by Special Counsel this year generally have been of four types: (1) requests for stays of agency personnel actions believed to be based on prohibited personnel practices; (2) requests for corrective action; (3) requests for disciplinary actions against federal employees; and (4) Hatch Act cases.

Stay Requests

Under the provisions of 5 U.S.C. §1208(a), the Special Counsel may request a stay of any personnel action for 15 calendar days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken as a result of a prohibited personnel practice. Any Board member may order such a stay unless he or she determines that, under the facts and circumstances involved, the stay would not be appropriate. If no action is taken on the request within three working days after it is filed by the Special Counsel, the stay becomes effective under operation of law. Under 5 U.S.C. 1208(b), upon further request of the Special Counsel, a Board member may extend the original 15-day stay for up to 30 additional days.

Under 5 U.S.C. 1208(c), the Board may, by majority vote, extend the original 15-day stay for any period of time which the Board deems appropriate. However, this extension may be granted only if a majority of the Board concurs in the determination of the Special Counsel and only after an opportunity is provided for comment by the Special Counsel and agency involved.

The Board considered requests for stays of personnel actions in the following cases in calendar year 1982:

Special Counsel v. National Aeronautics and Space *Administration* (Sharer), HQ12088110065. The Special Counsel requested stays of the proposed removal of an auditor in the Office of the Inspector General, National Aeronautics and Space Administration (NASA), Special Counsel alleged that removal was to be taken in retaliation for the employee's disclosures of mismanagement and violations of law by NASA officials (5 U.S.C. 2302(b)(8) (reprisal for "whistleblowing")). The Board granted stays pursuant to 5 U.S.C. λ 208(a) and (b).

Special Counsel v. Department of Housing and Urban Development (Tuesburg), HQ12088210001. The Special Counsel requested stays of the proposed removal of a supervisory construction analyst in the Department of Housing and Urban Development (HUD), charging the action appeared to be in retaliation for the employee's allegations of mismanagement by officials in HUD's St. Louis area office (5 U.S.C. 2302(b)(8) (reprisal for ..whistleblowing")). The Board granted stays pursuant to 5 U.S.C. 1208(a), (b) and (c).

Special Counsel v. Department of Housing and Urban Development (Mullin and Orejuela) HQ120888210004. The Special Counsel requested stays of the geographical reassignment of two employees in the Indianapolis Area Office of HUD. The Special Counsel argued that the reassignments were in reprisal for disclosures of mismanagement on the part of a Black property manager and in order to give preferential treatment to Black property managers in the Indianapolis area office in violation of 5 U.S.C. 2302(b)(8) (reprisal for 'whistleblowing"), §2302(b)(10) (discrimination for conduct not

affecting performance), and 2302(b)(11) (personnel actions violating any law, rule, or regulation implementing or directly concerning merit system principles). The Board granted stays pursuant to 5 U.S.C. λ 208(a), (b) and two stays pursuant to 1208(c).

Special Counsel v. Department of Defense (De Carlo) HQ12088210049. The Special Counsel requested stays of the proposed geographical reassignment and demotion of an assistant principal in the Department of Defense Dependent Schools. The Special Counsel alleged the action was in retaliation for the employee's exercise of appeal rights in a discrimination complaint in reassignment violation of 5 U.S.C. 2302(b)(1) and (9). The Board granted stays pursuant to 5 U.S.C. 1208(a), and two stays pursuant to 1208(c).

Special Counsel v. 'Department of Energy(Savitz), HQ12088210053. A Deputy Assistant Secretary for Conservation, Department of - Energy, who was a career appointee in the Senior Executive Service (SES), was geographically reassigned and was to be re moved for refusing a directed reassignment. The Special Counsel alleged that the was ordered to induce Dr. Savitz's resignation or permit her removal for failure to accept a directed reassignment, thus constituting a constructive discharge in violation of law, rule or regulation that directly concerns the merit system principles in violation of 5 U.S.C. §2302(b)(11). The Board denied the first "a" stay without prejudice. A second "a" stay petition, was granted as was a subsequent stay, pursuant to §1208(b).

Special Counsel v. Department of Energy HQ12088210056. The Special Counsel asked for stays of any personnel actions involving career SES employees of the Department of Energy (DOE), alleging that a pattern of prohibited personnel practices involving the performance appraisals of career SES appointees had occurred at DOE in violation of 5 U.S.C. §2303(b)(11). The Board granted an "a" stay and later denied a "b" stay without prejudice since it appeared that the relief sought by the Special Counsel had already been secured by Office of Personnel Management actions and thus the stay request was not ripe for review.

Requests For Corrective Action

Under 5 U.S.C. §1206(c)(1)(A), if after investigation the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, which requires corrective action, the Special Counsel may recommend to the agency that such corrective action be taken. If the agency has not taken the recommended corrective action pursuant to 5 U.S.C. §1206(c)(1)(B) after a reasonable period, the Special Counsel may ask the Board to consider the matter, The Board may then order such corrective action as it deems appropriate after opportunity for comment by the agency concerned and OPM. The Board took final action in three cases in 1982 in which the Special

Counsel had requested corrective action pursuant to 5 U.S.C. λ 206(c)(1)(B).

Special Counsel v. Department of State (Rohrmann). The Special Counsel alleged that the reassignment of an employee of the New York Passport Office was proposed in retaliation for his disclosures of mismanagement in violation of 5 U.S.C. 2302(b)(8) ("whistleblowing"). The Board held that, although the Special Counsel had shown that the whistleblowing was a significant factor in the agency's action, the agency had shown that it would have taken the same action regardless of the protected conduct because of the employee's insubordination. The Board accordingly denied the request for corrective action.

Special Counsel v. Department of Labor (Coffield) HQ12068010001. The Special Counsel argued that an employee of the Mine Safety and Health Administration was removed in violation of 5 U.S.C. §2302(b)(8),(9),(l0) and (11), but after further investigation recommended the complaint be dismissed. The Board granted the Special Counsel's motion to dismiss the request.

Special Counsel v. Small Business Administration H012068110006. The Special Counsel alleged that the Small Business Administration's implementation of a district director rotation policy resulted in the involuntary geographic reassignment of SBA district directors in violation of 5 U.S.C. §§2302(b)(1)(E), (b)(6),(b)(10) and (b)(11). The Board granted the joint motion of the Special Counsel and the SBA to dismiss the request for corrective action.

Disciplinary Action (Non-Hatch Act)

Under 5 U.S.C. §1206(g), following an investigation, if the Special Counsel determines that a disciplinary action should be taken against any employee who is not a Presidential appointee, a written complaint is prepared, containing that determination along with a statement of supporting facts, and presented to the Board for action. Any employee against whom such a complaint has been presented is entitled to certain protections as provided under 5 U.S.C. §1207, including the right to a hearing on the record. A final order of the Board in such an action may impose a disciplinary penalty against the employee including removal, reduction in grade, debarment from Federal employment for a period not to exceed five years, suspension, reprimand or the assessment of a civil penalty not to exceed $1,000. The Board acted on three consolidated cases in 1982,

Special Counsel v. Owens, Smith and Farrow H0120600033, 120600034, and 120600035. These actions arose from the successful appeal of David Dennis, an employee of the Navy, from his removal to the Board. The Special Counsel alleged that the performance rating and subsequent removal of Dennis violated 5 U.S.C. §2302(b)(8),(9) and (11) because the actions were taken in retaliation for his union activities and his disclosures of health and safety hazards.

The Special Counsel filed complaints pursuant to 5 U.S.C. §1206(g) asking the Board to order disciplinary action against Smith, who proposed Dennis's removal; Owens, who advised Smith on the removal; and Farrow, who issued Dennis's performance rating.

The Board dismissed the complaint against Smith on the grounds that it did not have jurisdiction under 5 U.S.C. §1206(g) or 1207 over Smith, who had left the Federal service before the complaint was filed and served.

The complaint against Farrow was dismissed on the ground that the 1979 performance rating in question was not a "personnel action" within the meaning of 5 U.S.C. §2302.

And, finally, the Board found that Owens had not taken, recommended, or approved any personnel action with respect to Dennis as a reprisal for activities of Dennis which were protected by 5 U.S.C. 2302(b)(8), (9) and (11), and accordingly concluded that disciplinary action against Owens was not warranted.

Hatch Act Cases

Under 5 U.S.C. Chapters 15 and 73, the Special Counsel is authorized to investigate political activities by certain state and local officers and employees, and political activities of federal employees, and employees of the District of Columbia government. Following such investigations, if the Special Counsel determines there is a basis for doing so, he may file a complaint with the Board to order certain disciplinary actions against the employee.

In 1982, the Board issued final orders in six cases in which the Special Counsel charged federal employees with violations of 5 U.S.C. 7324 for engaging in prohibited political activity.

One case was dismissed without prejudice on the Special Counsel's motion, *Special Counsel v. Alfred W. Halx* H012060028. Four cases resulted in imposition of suspensions from duty without pay in accordance with 5 U.S.C. §7325 after the Board had unanimously decided that the violations did not warrant removal.

Special Counsel v. Sullivan D. Harris HQ12068110060; *Special Counsel v. Rogelio* Chapa HQ12068210032; *Special Counsel v. Johnny A. Tacker* HQ120600027; Special *Counsel v. Marshel Watson* HQ12068110059; and *Special Counsel v. Anna Maria Fujimoto,* HQ12068110058. Harris and Tacker received the minimum statutory penalty of a 30-day suspension; Watson and Chapa received a 45-day suspension; and Fujimoto received a 60-day suspension.

In *Special Counsel v. Paul J. Comito* HQ12068110057, the Board ordered the employee removed. The record showed that Comito was repeatedly warned that he risked violation of the Hatch Act by his candidacy in the Democratic primary for the office of Alderman while employed as a firefighter by the Department of the Army at the Rock Island Arsenal, Rock Island, Illinois. When he persisted after being warned, the Arsenal advised the Special Counsel, who, in a letter to Comito, explained the prohibitions of the Hatch Act as they applied to him, advised him that his candidacy was a violation of the Hatch Act, and provided him an opportunity to withdraw. In a written response, Comito acknowledged receipt of the letter and stated his determination to remain a candidate. He won the Democratic primary, and then ran in the general election. The Board found no reason to exercise its mitigation authority and ordered Comito removed.

Litigation

The Office of the General Counsel, by designation from the Chairman, has the authority to appear for the Board and represent the Board in any civil action in which the Board is a party. Accordingly, litigation constitutes an important and increasingly substantial portion of the activities of the office and includes participation in appeals pending before both the federal circuit and district courts.

Employee Appeals

In 1982, most employee petitions for review of Board decisions were filed in the Court of Claims or a United States court of appeals. However, effective October 1, 1982, the United States Court of Appeals for the Federal Circuit, located in Washington, D.C., became the court of exclusive jurisdiction over these appeals. Board action in many of these cases was limited to an advisory role since the employing agency that took the action, the sole statutory respondent in most cases, was represented by the United States Attorney or the Department of Justice. During the year the Board participated actively in the defense of selected cases that presented a broad image of issues of first impression under the Civil Service Reform Act, notably:

Off-duty misconduct *(Stalans v. National Security Agency* 678 F.2d 482 (4th Cir. 1982); *Cosey v. Department of Navy,* (4th Cir. No. 81-2078); *Bonet v. USPS,* (5th Cir. No. 82-4250); *Borsari v. FAA,* (2d Cir. No. 82-4140)); The burden of proof in denials of within-grade salary increases *(Schramm v. Department of Health and Human Services* 682 F. 2d 85 (3d Cir. 1982); *Stankis v. Environmental Protection Agency* (5th Cir. No. 82-4240)); Whether attorney fees may be awarded in disability retirement cases. (Cases are currently pending on this issue in the First, Fourth, Fifth, Seventh, Eleventh and Federal Circuits); Certain procedural issues, including the standard of review of petitions for review *(Williams* v. *VA and MSPB* (8th Cir. No. 82-1372); *Deal v. Justice* (10th Cir. No. 82-1733) and the application of sanctions *(Devine v. MSPB and Fuller* (D.C. Cir. No. 82-1239)).

Because of the drastic budget reduction and the six-fold increase in its caseload, the Board was forced to implement cost-saving measures in early 1982 to conserve its limited resources to enable the agency to continue performing its mission. As a result of these temporary measures, fifteen actions were filed in the courts of appeals and district courts seeking to compel the Board to process pending cases expeditiously *(Conaway, et* a/. v. *MSPB* (6th Cir. No. 82-3230); *Wheeler, et* a/. v. *United States, et* a/. (W.D. Wash. No. C 82-187); *Adams v. Poston* (E.D. N.Y. No. CV 82-0331); *Casella* v. *MSPB* (E.D. Mo. No. 82-91C(3), among others), to eliminate travel restrictions *(Sanchez Mariani v. Ellingwood, et a/.* (1st Cir. No. 82-1383)) and to declare unlawful the Board's emergency regulations providing that it would no longer provide free hearing transcripts (*NTEU v. MSPB* (D.C. No. 82-0588)). A majority of these cases were resolved successfully, although a limited number were still pending before the courts at the close of 1982.

Miscellaneous Cases

One of the functions of the Board under Chapter 12 of Title 5 is to review laws, rules and regulations promulgated by OPM. In June, National Treasury Employees Union appealed a Board determination that a particular regulation was valid to the United States Court of Appeals for the District of Columbia Circuit (NTEU *v. OPM* the *and MSPB* (D.C. Cir. No. 82-1206)). At issue in this appeal of first impression challenging a Board determination under its regulation review authority is the jurisdiction of the circuit court to hear the appeal and the standards of review Board denied a request for review the which the court should apply in regulation review proceedings.

Regulation Review

The Board has the responsibility for reviewing regulations issued by the Office of Personnel Management that may cause the commission of prohibited personnel practices either on their face or through implementation. Support for this review is also provided by the Office of Merit Systems Review and Studies.

In Senior Executive Service v. Office of Personnel Management HQ12058210021, the Board denied a request for regulation review on the ground that the issues raised in the requests could more appropriately come before the Board on the basis of a complete record in a case or an appeal.

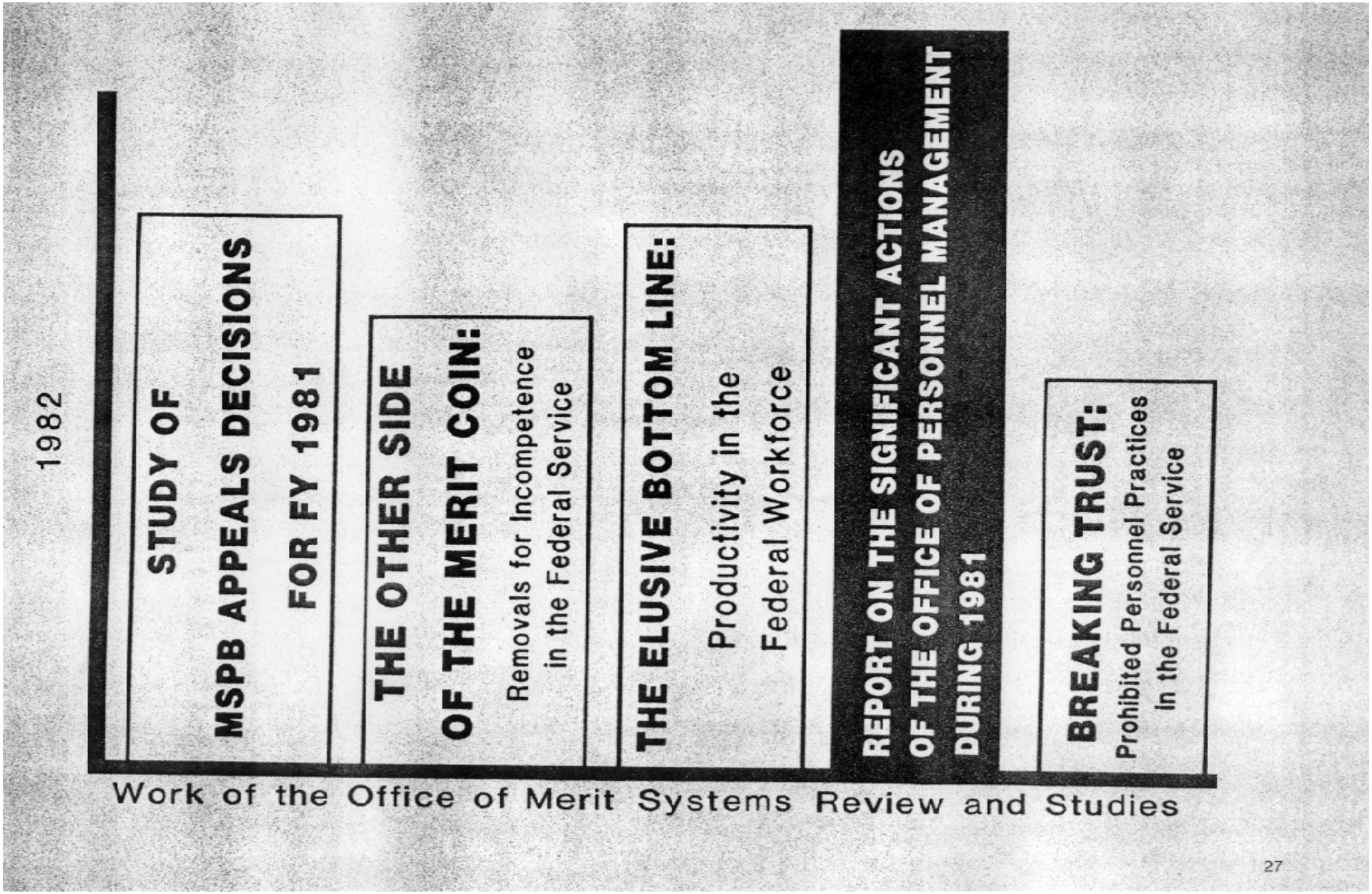
The Board granted a request for review in *Joseph v. Devine* HQ12058110067, and that matter is pending. It questions the legality of an OPM regulation limiting the scope of grievable actions.

In addition, the Board upheld the regulations involved in *National Treasury Employees Union* v. Office *of Personnel Management* HQl2050006, which concerned the scope of the adverse action provisions. That matter is currently on appeal to the Circuit Court for District of Columbia, (No. 82-1206). See LITIGATION.

In *In re Implementation of 5 CFR Part 430 by the Federal Prison System* HQl2058110013, the because identical matter was pending in another and more appropriate forum.

In *In re Invalidation of 5 CFR 752.404(d) (3)* HQ12058210005, the petitioner requested that the Board review the legality of the emergency suspension regulations. The Board, having in validated this same regulation in *Cuellar v. U.S. Postal Service* SF075299045, denied the petitioner's request. Finally, OPM voluntarily amended the regulation involved in *In re Disclosure of Information* H012058110010, which questioned the appropriate interplay between OPM's code of conduct provisions and the protection afforded to whistleblowers by the Civil Service Reform Act.

Special Studies.



This report has already detailed some of the major challenges faced by the Board during 1982 caused, in large part, by the combined impact of the budget cut and receipt of the ATC appeals. The Office of Merit Systems Review and Studies (MSRS) was not isolated from these events. In addition, along with a change in Board leadership during 1982, the three top managers of MSRS left during the last half of the year to pursue opportunities in the private sector. New management had to be recruited and hired and new priorities set.

For all of these reasons, 1982 found MSRS in a state of flux, with fewer resources, fewer staff, and a total turnover in leadership. Despite these difficulties, late in 1982 the Office was able to begin development of a forward looking research agenda in conjunction with an active outreach program which solicited the views and knowledgeable individuals and organizations such as the American Society of Public Administration, Internal Personnel Management Association, National Academy of Public Administration, Common Cause, and the Urban Institute

Incorporated in the Office's agenda development was an expanded approach to the conduct of its studies to supplement the Office's traditional reliance on survey research and to provide developmental opportunities for the professional staff. (The agenda was finalized in Spring of 1983 and will cover a variety of topics through such methods as on-site reviews, roundtable discussions with selected experts, survey research, and analysis of information drawn from various automated data bases.)

Special Studies: Despite the problems confronted by MSRS, the Board was able to send several major reports on the health of the merit system to the Congress and the President during 1982. These reports were prepared by MSRS under the mandate of 5 U.S.C. Section 1205(a) (3) and 1209(b). These studies are described below.

Report on the Significant Actions of the Office of Personnel Management 1981

This report, required by statute, examined programs and policies initiated by OPM to see if they resulted in promoting the merit principles and preventing prohibited personnel practices. Information gathered for this report was derived from several sources: public comments received from a notice published in the Federal Register; extensive OPM briefings and material provided by them; on-site interviews conducted with directors of personnel and senior executives; and writ ten comments from directors of personnel and director of equal employment opportunity.

The 1981 report included a discussion of the following topics:

- OPM's establishment of an ambitious agenda for change both-in OPM as an organization and in the policies and programs for which it is responsible.
- Problems in recruiting and retaining needed talent particularly in the Senior Executive Service and in some engineering and technical occupations.
- The implementation of the merit pay system, with attention given to GAO's and OPM's failure to resolve differences regarding the level of funding for the system,
- A potential long-term pattern of decline in employee morale.
- It also reported on SES safeguards following changes in political leadership, and equal opportunity questions including OPM's actions in EEO during 1981.

Study on MSPB Appeals Decisions for FY 1981

This report provides the Board with a comprehensive statistical update on its appeals processing, the largest of the Board's functions. The study contains in-depth information delineating such things as the types and numbers of appeals processed and their outcomes, average processing time, numbers of hearings held, agency reversal rates, appellant reversal rates, number of petitions for review, and outcomes of petitions for review.

Monographs

The Office had built a base of objective data about the operations of the merit system through its surveys of key groups of Federal employees. Initial questionnaire surveys of mid-level employees, senior executives and senior personnel officials were designed to provide the Board .with broad indicators regarding the merit system. Because of the amount of information collected, and the diversity of topics, MSRS released several "Directors' monographs" in 1982 drawing from the results of those surveys.

Breaking Trust: Prohibited Personnel Practices in the Federal Service.

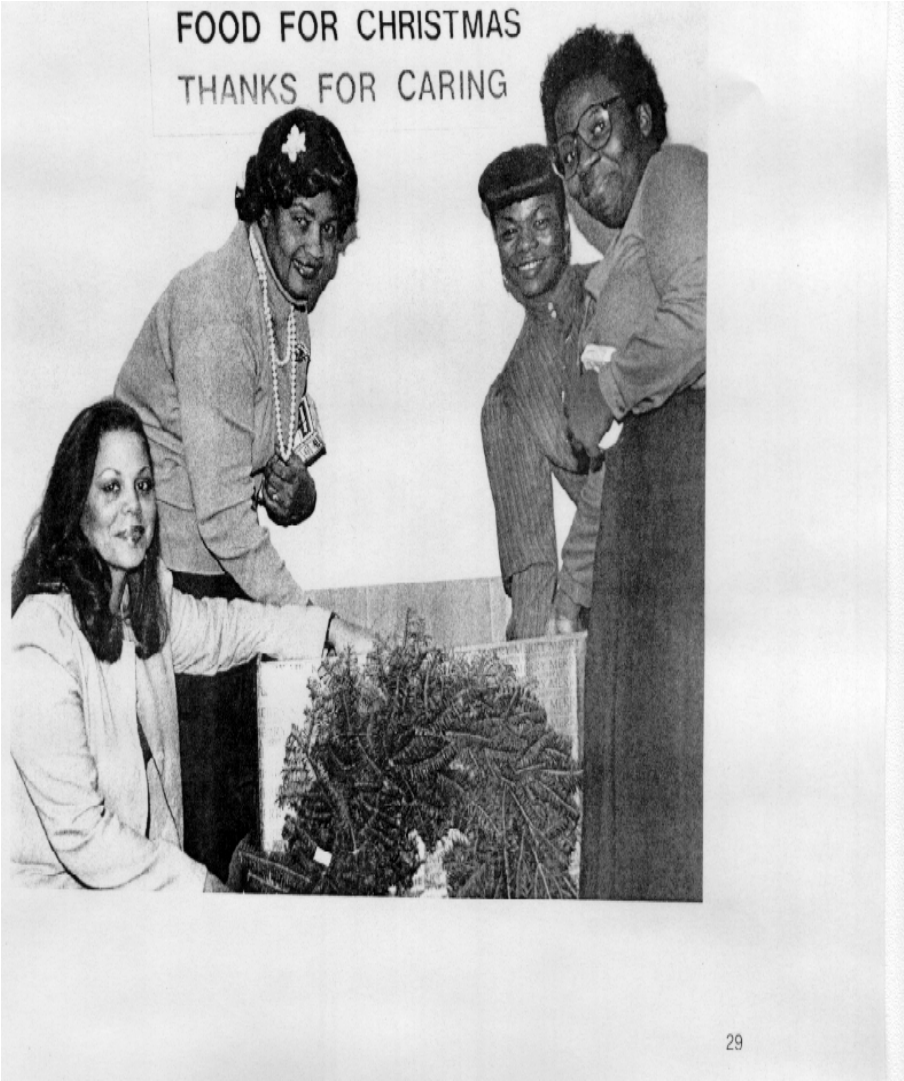
The first of the series, this Monograph was released in 1982, and examined prohibited personnel practices-which of them occur with what frequency, and how well the mechanisms intended to prevent their occurrences are working. The most frequent prohibited personnel practices were found to be those involving some form of discrimination. The three most frequently cited abuses related to the denial of equal access to the merit system. The report did not indicate abuses were widespread. The report was presented to agency heads, however, so that they could build on the data presented in order to improve the system.

The Other Side of the Merit Coin: Removals for Incompetence in the Federal Sector.

This monograph reported that Federal employees have a fairly low expectation of removal from their jobs should their performance be inadequate. Employee attitudes varied, however, among the groups surveyed. Senior executives saw themselves as more vulnerable to removal for poor performance. Employee attitudes varied greatly among the agencies. This report suggested that different employee perceptions, by agency, probably reflect differences among the agencies in organizational climate, mission, agency history and the demographics of employment.

The Elusive Bottom Line: Productivity in the Federal Workforce.

This monograph explores whether the merit principle to use the Federal work force "efficiently and effectively," is being realized. The report cautioned that since the data was drawn, significant changes have occurred in the direction and funding of Federal programs and agencies and that those changes could



impact on the findings. Federal executives and mid-level managers on a Government-wide basis have a generally positive view of their productivity and that of their work groups. However, approximately 20% of all Federal executives and 24% of all mid-level managers saw high potential for increasing productivity within their groups, with no increase in staff. A slightly greater percentage saw high potential for improving work quality. Substantial differences emerged when responses were examined on an agency-by-agency basis. The study concluded that as of late 1980 and early 1981, there was room at many agencies for major improvements in several aspects of productivity.

Some Projected Studies for 1983

Government-wide Study on the Implementation of Reductions-in-Force in 1981.

In 1981, 12,594 Federal employees were affected by reductions-in-force (RIF's). This study will focus on: the extent of the 1981 RIF; whether the 1981 RIF process complied with RIF laws and regulations; whether the 1981 RIF process was fair and equitable; the effect of the 1981 RIF on employee morale and productivity; preparations for the 1981 RIF; potential improvements to the RIF process; and alternatives to the RIF process. Data for this study was gathered chiefly through MSRS developed questionnaires and on-site interviews. MSRS administered two questionnaires, one for senior personnel officials and the other to a Government-wide sample of Federal employees. Extensive interviews were conducted with, among others, managers, employees, personnel officials, representatives of agency management, employee-oriented groups (including unions), oversight groups (including OPM, EEOC, FLRA) and professional public administration organizations.

Study of MSPB Appeals Decisions for 1982. As in previous years, the appeals study will analyze the Board's processing of appeal decisions and chart major trends, and may also incorporate recommended improvements suggested by interested readers of the 1981 report.

Study of OPM's Significant Actions During 1982.

This report, issued annually by the Board, will look at how specific OPM policies and programs during the previous year supported or detracted from the merit principles and prohibited personnel practices. The 1982 study will contain a review of merit pay to determine if the funding and implementation problems identified in 1981 were eliminated in 1982.

The Merit Principles Survey.

This year, MSRS will survey a cross section of the Federal work force on various aspects of the merit principles. It will deal with such topics as work force effectiveness, reprisal for whistleblowing, methods used to deal with employee performance problems and merit pay. This survey will be a base point for the required 1983 report on the significant actions of the Office of Personnel Management and for other potential reports.

Interaction with Other Agencies

Under Reorganization Plan No. 1 of 1978, the Equal Employment Opportunity Commission assumed the adjudicatory function over most discrimination cases brought by Federal employees. However, employees who are en-titled to appeal to the Board may also allege unlawful discrimination on the basis of handicap-ping condition, age, race, sex, religion, color and national origin. In these cases, commonly referred to as "mixed cases", there is a further statutory right to petition the EEOC to review the Board's decision.

In order to ensure the expeditious and orderly processing of these "mixed cases", the Board and EEOC have maintained an ongoing liaison to solve problems arising from their concurrent jurisdiction over discrimination cases. As a result, EEOC and the Board have been able to identify and resolve many unexpected procedural and substantive issues relating to their joint jurisdiction. Further, continuous discussions regarding procedures and substantive discrimination issues have prevented the issuance of conflicting decisions on the same legal issues. To date, the EEOC has disagreed with the Board in only four new system discrimination cases.

Other interactions with EEOC during the past year included coordination on the "mixed cases" regulations, and the establishment of procedures for the timely forwarding of case files to EEOC for review under its statutory authority.

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